

2014

Bank of America, n.a. v. Samuel D. Adamson and Courtney D. Adamson and John Doe/Jane Doe/Occupant : Appellant's Replacement Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

Recommended Citation

Brief of Appellant, *Bank of America v Adamson*, No. 20140861 (Utah Supreme Court, 2014).
https://digitalcommons.law.byu.edu/byu_sc2/3200

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (2000–) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH SUPREME COURT

BANK OF AMERICA, N.A.,

Appellant,

v.

SAMUEL D. ADAMSON AND
COURTNEY D. ADAMSON and JOHN
DOE/JANE DOE/OCCUPANT,

Appellees and Defendants.

Appellate Case No. 20140861

Trial Court Case No. 140500067

APPELLANT'S REPLACEMENT BRIEF

Appeal from a Final Order of Dismissal
of the Fifth Judicial District Court, Saint George Department
Washington County State of Utah by
The Honorable Jeffrey C. Wilcox

John Christian Barlow
LAW OFFICE OF
JOHN CHRISTIAN BARLOW PC.
321 North Mall Drive
Building R, Suite 290
Saint George, UT 84790
Tel: (435) 634-1200
jcb@johnchristianbarlow.com
Counsel for Appellees

Robert H. Scott (USB No. 10981)
AKERMAN LLP
170 South Main Street, Suite 950
Salt Lake City, Utah 84101-1648
Tel: (801) 907-6900
robert.scott@akerman.com

Amy Miller (admitted pro hac vice)
MCGUIREWOODS LLP
2001 K Street, N.W., Suite 400
Washington, DC 20006
Tel: (202) 857-1732
amiller@mcguirewoods.com

Brian E. Pumphrey (admitted pro hac
vice)
MCGUIREWOODS LLP
Gateway Plaza
901 E. Cary St.
Richmond, VA 23219
Tel: (804) 775-7745
bpumphrey@mcguirewoods.com
Counsel for Appellant

IN THE UTAH SUPREME COURT

BANK OF AMERICA, N.A.,

Appellant,

v.

SAMUEL D. ADAMSON AND
COURTNEY D. ADAMSON and JOHN
DOE/JANE DOE/OCCUPANT,

Appellees and Defendants.

Appellate Case No. 20140861

Trial Court Case No. 140500067

APPELLANT'S REPLACEMENT BRIEF

Appeal from a Final Order of Dismissal
of the Fifth Judicial District Court, Saint George Department
Washington County, Judge Wilcox

John Christian Barlow
LAW OFFICE OF
JOHN CHRISTIAN BARLOW PC
321 North Mall Drive
Building R, Suite 290
Saint George, UT 84790
Tel: (435) 634-1200
jcb@johnchristianbarlow.com
Counsel for Appellees

Robert H. Scott (USB No. 10981)
AKERMAN LLP
170 South Main Street, Suite 950
Salt Lake City, Utah 84101-1648
Tel: (801) 907-6900
robert.scott@akerman.com

Amy Miller (admitted pro hac vice)
MCGUIREWOODS LLP
2001 K Street, N.W., Suite 400
Washington, DC 20006
Tel: (202) 857-1732
amiller@mcguirewoods.com

Brian E. Pumphrey (admitted pro hac
vice)
MCGUIREWOODS LLP
Gateway Plaza
800 E. Canal Street
Richmond, VA 23219
Tel: (804) 775-7745
bpumphrey@mcguirewoods.com
Counsel for Appellant

LIST OF PARTIES

Bank of America, N.A. (Appellant)

Distressed Asset Solutions Fund, LLC (Plaintiff)

Samuel D. Adamson (Appellee/Defendant)

Courtney D. Adamson (Appellee/Defendant)

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
JURISDICTION.....	1
ISSUES PRESENTED	1
DETERMINATIVE FEDERAL AND UTAH STATUTES AND REGULATIONS.....	2
STATEMENT OF THE CASE.....	7
STATEMENT OF FACTS	8
SUMMARY OF THE ARGUMENT	10
ARGUMENT	11
I. <i>Sundquist</i> Was Wrongly Decided And Should Be Overruled.	11
II. The Trial Court Applied The Wrong Test When It Declared The Trustee’s Deed Void.	13
A. The Trial Court Relied On Case Law And A Secondary Source That Do Not Apply In This Case.	14
1. <i>Singer</i> Is Inapplicable.	14
2. <i>McQueen</i> Is Also Inapplicable.....	17
3. The Real Estate Finance Treatise Conflicts With Utah Law, And The Trial Court Misapplied It.	21
B. <i>Concepts</i> And Its Progeny Provide The Rule For This Case.....	22
1. This State Has Long Required A Debtor To Meet A High Bar.....	23
2. This High Bar Serves Important Purposes.....	25
3. This High Bar Is Appropriate For Sales Conducted By An Appointed, Qualified Trustee Without The Power Of Sale.....	27

III.	The Adamsons Failed To Meet This High Burden Of Proof To Set Aside The Sale.....	29
IV.	The Trial Court’s Ruling Has Severe Consequences.....	29
V.	The Adamsons Are Barred From Challenging The Validity Of The Foreclosure Sale By The Doctrines Of Waiver And Estoppel.	32
VI.	At Most, The Trustee’s Deed Issued By ReconTrust Is Voidable.....	34
	CONCLUSION	35
	CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)	37
	CERTIFICATE OF SERVICE	38
	ADDENDUM	39

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>American Estate Management Corp. v. International Investment & Development Corp.</i> , 1999 UT App 232, 986 P.2d 765	26, 31
<i>American Falls Canal Securities Co. v. American Savings & Loan Ass'n</i> , 775 P.2d 412 (Utah 1989).....	33
<i>Baker v. BAC Home Loans Servicing LP</i> , No. 2:11-cv-00720 CW, 2012 WL 464024 (D. Utah Feb. 13, 2012).....	28
<i>Baldwin v. Burton</i> , 850 P.2d 1188 (Utah 1993)	34
<i>Bennion Insurance Co. v. 1st OK Corp.</i> , 571 P.2d 1339 (Utah 1977)	29
<i>Blodgett v. Martsch</i> , 590 P.2d 298 (Utah 1978).....	15, 26
<i>Bradshaw v. McBride</i> , 649 P.2d 74 (Utah 1982).....	34
<i>Broadbent v. Powers</i> , No. CIV 2:05 CV 375, 2006 WL 2527429 (D. Utah Aug. 29, 2006)	35
<i>Coleman v. ReconTrust Co., N.A.</i> , No. 2:10-cv-1099 (D. Utah Jan. 9, 2015)	10
<i>Concepts, Inc. v. First Sec. Realty Servs., Inc.</i> , 743 P.2d 1158 (Utah 1987)	<i>passim</i>
<i>Dutcher v. Matheson</i> , No. 2:11-CV-666 TS, 2012 WL 423379 (D. Utah Feb. 8, 2012), <i>vacated and remanded on other grounds</i> , 733 F.3d 980 (10th Cir. 2013)	28
<i>Exxon Corp. v. Utah States Tax Comm'n</i> , 2010 UT 16, 228 P.3d 1246.....	20
<i>Federal National Mortgage Ass'n v. Sundquist</i> , 2013 UT 45, 311 P.3d 1004.....	<i>passim</i>

<i>First National Bank v. Haymond</i> , 57 P.2d 1401 (Utah 1936).....	23
<i>Fox v. Brigham Young University, Inc.</i> , 2007 UT App 406, 176 P.3d 446.....	1
<i>Garrett v. ReconTrust Co.</i> , 546 F. App'x 736 (10th Cir. 2013).....	11, 12, 28
<i>General Glass Corp. v. Mast Construction Co.</i> , 766 P.2d 429 (Utah Ct. App. 1988).....	15
<i>Gildea v. Wells Fargo Bank, N.A.</i> , 2015 UT 11, 347 P.3d 385.....	22
<i>Glatt v. Feist</i> , 156 N.W.2d 819 (N.D. 1968).....	14
<i>J.M.W. v. T.I.Z.</i> , 2011 UT 38, 266 P.3d 702.....	31
<i>J.W. v. State</i> , 2005 UT App 382, 122 P.3d 679.....	19
<i>Jones v. Johnson</i> , 761 P.2d 37 (Utah Ct. App. 1988).....	23, 28
<i>Kleinsmith v. Shurtleff</i> , 571 F.3d 1033 (10th Cir. 2009).....	28
<i>Loyal Order of Moose, # 259 v. County Board of Equalization</i> , 657 P.2d 257 (Utah 1982).....	20
<i>McGarry v. Thompson</i> , 201 P.2d 288 (Utah 1948).....	9
<i>McQueen v. Jordan Pines Townhomes Owners Ass'n</i> , 2013 UT App 53, 298 P.3d 666.....	17, 18, 19, 20, 21
<i>Millard County School District v. State Bank of Millard County</i> , 14 P.2d 967 (Utah 1932).....	15, 35
<i>National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers</i> , 414 U.S. 453 (1974)	32

<i>Occidental/Nebraska Federal Savings Bank v. Mehr</i> , 791 P.2d 217 (Utah Ct. App. 1990).....	25
<i>Ockey v. Lehmer</i> , 2008 UT 37, 189 P.3d 51.....	22, 23, 29, 34, 35
<i>Orton v. Carter</i> , 970 P.2d 1254 (Utah 1998)	1
<i>Pierucci v. U.S. Bank, NA</i> , 2015 UT App 80, 347 P.3d 837.....	25
<i>Reynolds v. Woodall</i> , 2012 UT App 206, 285 P.3d 7.....	<i>passim</i>
<i>RM Lifestyles, LLC v. Ellison</i> , 2011 UT App 290, 263 P.3d 1152.....	21, 25, 26
<i>Singer Manufacturing Co. v. Chalmers</i> , 2 Utah 542 (1880).....	14, 16, 17, 21, 25
<i>State ex rel. Bishop v. McNally</i> , 43 P. 920 (Utah 1896).....	14
<i>Timm v. Dewsnap</i> , 2003 UT 47, 86 P.3d 699.....	13, 23, 25
<i>Zion's Service Corp. v. Danielson</i> , 366 P.2d 982 (1961)	35

STATUTES

12 U.S.C. § 92a	<i>passim</i>
12 U.S.C. § 92a(a).....	2, 3, 12
12 U.S.C. § 92a(b).....	2, 3
UTAH CODE ANN. § 7-1-103	5
UTAH CODE ANN. Title 31A, Insurance Code	5
UTAH CODE ANN. § 57-1-19(3)	19
UTAH CODE ANN. § 57-1-19(4)	19

UTAH CODE ANN. § 57-1-21	4, 11, 28
UTAH CODE ANN. § 57-1-21(1)(a)	4, 5, 6, 15, 21
UTAH CODE ANN. § 57-1-21(3)	4, 5
UTAH CODE ANN. § 57-1-22	24
UTAH CODE ANN. § 57-1-23	5, 6, 11, 21, 31
UTAH CODE ANN. §§ 57-1-23 to -34 (1986)	28
UTAH CODE ANN. § 57-1-23.5	6, 27, 32
UTAH CODE ANN. § 57-1-23.5(2)(a)	27
UTAH CODE ANN. § 57-1-24	6
UTAH CODE ANN. § 57-1-27	6
UTAH CODE ANN. § 57-1-28(2)(c)(ii)	26
UTAH CODE ANN. § 78A-3-102(3)(j)	1
UTAH CODE ANN. § 78B-6-802.5	4, 7

RULES AND REGULATIONS

UTAH R. APP. P. 3(a)	1
12 C.F.R. § 9.7	2, 10, 11, 12

OTHER AUTHORITIES

Grant S. Nelson, Dale A. Whitman, et al., REAL ESTATE FINANCE LAW § 7:21 (6th ed. 2014)	21
Roger A. Cunningham et al., THE LAW OF PROPERTY 720 (West 1984)	35

JURISDICTION

This is an appeal from a final order of dismissal entered by Utah's Fifth Judicial District Court, St. George Department, Washington County. This Court has appellate jurisdiction under Utah Rule of Appellate Procedure 3(a) and Utah Code § 78A-3-102(3)(j). This Court transferred this case to the Court of Appeals but recalled the case on November 20, 2015.

ISSUES PRESENTED

- I. Whether ReconTrust Company, N.A., a national bank, had authority to exercise the power of sale in a non-judicial foreclosure sale for a property located in Utah where it was appointed as successor trustee under the deed of trust.
- II. Whether, if ReconTrust lacked authority to exercise the power of sale for properties located in Utah, such a foreclosure sale is void if the defaulted borrower suffered no harm or prejudice in having a national bank exercise the power of sale instead of a Utah attorney or title insurance company, and the defaulted borrower failed to object until months after the sale.

In reviewing whether dismissal of the unlawful-detainer claim was appropriate, the trial court's legal conclusions are reviewed for "correctness, according the trial court no particular deference." *Fox v. Brigham Young Univ., Inc.*, 2007 UT App 406, ¶ 14, 176 P.3d 446 (quoting *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998)). The trial court's findings of fact are reviewed for clear error. *See id.*

The issue of ReconTrust's authority to exercise the power of sale was preserved in the Opposition to Samuel Adamson's Motion to Dismiss filed by Distressed Asset Solutions Fund, LLC ("Distressed Asset"). *See* R. 106–07. That issue also was the basis for the trial court's dismissal order. *See* R. 403. The issue of the validity of the sale

conducted by ReconTrust was preserved in Distressed Asset's Opposition to Adamson's Motion for a Declaratory Judgment. *See* R. 301–09; *see also* R. 402–19.

DETERMINATIVE FEDERAL AND UTAH STATUTES AND REGULATIONS

12 U.S.C. § 92a – Trust powers

[Section 92a(a) and (b) provide:]

(a) Authority of Comptroller of the Currency.

The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

(b) Grant and exercise of powers deemed not in contravention of State or local law.

Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this section.

12 C.F.R. § 9.7 – Multi-state fiduciary operations.

(a) *Acting in a fiduciary capacity in more than one state.* Pursuant to 12 U.S.C. § 92a and this section, a national bank may act in a fiduciary capacity in any state. If a

national bank acts, or proposes to act, in a fiduciary capacity in a particular state, the bank may act in the following specific capacities:

(1) Any of the eight fiduciary capacities expressly listed in 12 U.S.C. § 92a(a), unless the state prohibits its own state banks, trust companies, and other corporations that compete with national banks in that state from acting in that capacity; and

(2) Any other fiduciary capacity the state permits for its own state banks, trust companies, or other corporations that compete with national banks in that state.

(b) *Serving customers in other states.* While acting in a fiduciary capacity in one state, a national bank may market its fiduciary services to, and act as fiduciary for, customers located in any state, and it may act as fiduciary for relationships that include property located in other states. The bank may use a trust representative office for this purpose.

(c) *Offices in more than one state.* A national bank with fiduciary powers may establish trust offices or trust representative offices in any state.

(d) *Determination of the state referred to in 12 U.S.C. § 92a.* For each fiduciary relationship, the state referred to in section 92a is the state in which the bank acts in a fiduciary capacity for that relationship. A national bank acts in a fiduciary capacity in the state in which it accepts the fiduciary appointment, executes the documents that create the fiduciary relationship, and makes discretionary decisions regarding the investment or distribution of fiduciary assets. If these activities take place in more than one state, then the state in which the bank acts in a fiduciary capacity for section 92a purposes is the state that the bank designates from among those states.

(e) *Application of state law—(1) State laws used in section 92a.* The state laws that apply to a national bank's fiduciary activities by virtue of 12 U.S.C. § 92a are the laws of the state in which the bank acts in a fiduciary capacity.

(2) Other state laws. Except for the state laws made applicable to national banks by virtue of 12 U.S.C. § 92a, state laws limiting or establishing preconditions on the exercise of fiduciary powers are not applicable to national banks.

UTAH CODE ANN. § 78B-6-802.5 – Unlawful detainer after foreclosure or forced sale.

A previous owner, trustor, or mortgagor of a property is guilty of unlawful detainer if the person:

- (1) defaulted on his or her obligations resulting in disposition of the property by a trustee's sale or sheriff's sale; and
- (2) continues to occupy the property after the trustee's sale or sheriff's sale after being served with a notice to quit by the purchaser.

UTAH CODE ANN. § 57-1-21 – Trustees of trust deeds – Qualifications.

[Sections (1)(a) and (3) provide:]

(1)

(a) The trustee of a trust deed shall be:

(i) any active member of the Utah State Bar who maintains a place within the state where the trustor or other interested parties may meet with the trustee to:

(A) request information about what is required to reinstate or payoff the obligation secured by the trust deed;

- (B) deliver written communications to the lender as required by both the trust deed and by law;
- (C) deliver funds to reinstate or payoff the loan secured by the trust deed; or
- (D) deliver funds by a bidder at a foreclosure sale to pay for the purchase of the property secured by the trust deed;
- (ii) any depository institution as defined in Section 7-1-103, or insurance company authorized to do business and actually doing business in Utah under the laws of Utah or the United States;
- (iii) any corporation authorized to conduct a trust business and actually conducting a trust business in Utah under the laws of Utah or the United States;
- (iv) any title insurance company or agency that:
 - (A) holds a certificate of authority or license under Title 31A, Insurance Code, to conduct insurance business in the state;
 - (B) is actually doing business in the state; and
 - (C) maintains a bona fide office in the state.
- (v) any agency of the United States government; or
- (vi) any association or corporation that is licensed, chartered, or regulated by the Farm Credit Administration or its successor.

* * * *

- (3) The power of sale conferred by Section 57-1-23 may only be exercised by the trustee of a trust deed if the trustee is qualified under Subsection (1)(a)(i) or (iv).

UTAH CODE ANN. § 57-1-23 – Sale of trust property - Power of trustee - Foreclosure of trust deed.

The trustee who is qualified under Subsections 57-1-21(1)(a)(i) or (iv) is given the power of sale by which the trustee may exercise and cause the trust property to be sold in the manner provided in Sections 57-1-24 and 57-1-27, after a breach of an obligation for which the trust property is conveyed as security; or, at the option of the beneficiary, a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property. The power of sale may be exercised by the trustee without express provision for it in the trust deed.

UTAH CODE ANN. § 57-1-23.5 – Civil liability for unauthorized person who exercises power of sale

(1) As used in this section:

(a) “Unauthorized person” means a person who does not qualify as a trustee under Subsection 57-1-21(1)(a)(i) or (iv).

(b) “Unauthorized sale” means the exercise of a power of sale by an unauthorized person.

(2)

(a) An unauthorized person who conducts an unauthorized sale is liable to the trustor for the actual damages suffered by the trustor as a result of the unauthorized sale or \$2,000, whichever is greater.

(b) In an action under Subsection (2)(a), the court shall award a prevailing plaintiff the plaintiff’s costs and attorney fees.

STATEMENT OF THE CASE

This appeal involves ReconTrust's authority, as appointed successor trustee under a deed of trust, to exercise the power of sale in a non-judicial foreclosure sale for properties located in Utah—and, if it lacks that power, the validity of a non-judicial foreclosure sale of Utah property that it conducts, as well as the resulting trustee's deed.

On February 7, 2014, a bona fide purchaser of the property, Distressed Asset, filed an unlawful-detainer action against the occupants, Samuel and Courtney Adamson, in Utah's Fifth Judicial District Court, St. George Department, Washington County. *See* R. 1–6. At a bench trial on August 7, 2014, Distressed Asset presented evidence that it obtained the property through a quitclaim deed executed by Bank of America, N.A. (“BANA”), and that BANA acquired the property through a trustee's sale conducted by ReconTrust, a national bank. *See* Trial Exs. 1–3; Trial Tr. 20:1–17. Distressed Asset also presented a stipulated order wherein the parties agreed that the Adamsons remained in possession of the property since the sale, and that they continued to remain in possession of the property after receiving notices to quit. *See* R. 371–72 (stipulated order); Trial Tr. 20:24–21:7. After Distressed Asset rested its case, the trial judge concluded that the documents admitted into evidence “make out a prima facie case for unlawful detainer.” Trial Tr. 21:23–25; *see* UTAH CODE ANN. § 78B-6-802.5.

During the Adamsons' case-in-chief, Samuel Adamson testified that before the sale date, he received a copy of the notice of default and election to sell executed by ReconTrust, but he did not call or otherwise contact ReconTrust before the sale regarding the notice. *See* Trial Tr. 27:10–17, 29:1–5, 32:25–33:13. Specifically, they did not

attempt to contact ReconTrust before the sale, did not seek an injunction to stop the sale, and did not attend the sale, all despite being aware that the sale was scheduled. *See* Trial Tr. 29:1–33:13. The Adamsons presented no evidence that they were prejudiced by having ReconTrust exercise the power of sale instead of a Utah attorney or title insurance company.

On September 2, 2014, the trial court dismissed the case, holding that Distressed Asset was unable to “overcome Defendants’ defense that there has been no ‘disposition of the property by the trustee’s sale’” conducted by ReconTrust. *See* R. 419. The court concluded that because *Federal National Mortgage Ass’n v. Sundquist*, 2013 UT 45, 311 P.3d 1004, held that ReconTrust lacked authority to exercise the power of sale, the sale conducted by ReconTrust was void. *See* R. 404, 410–12. The court entered a final appealable order on September 2, 2014, *see* R. 434–35, and Distressed Asset noted its appeal, *see* R. 421–22.

BANA purchased the property from Distressed Asset on January 6, 2015, and filed a motion to substitute BANA for Distressed Asset as appellant in this case. The Court of Appeals granted that motion.

This Court recalled the case from the Court of Appeals after that court held oral argument, but before it issued an opinion.

STATEMENT OF FACTS

In 2007, Samuel Adamson financed the purchase of property located at 70 West Orchard Lane, Washington, Utah 84780 (“the property”). *See* R. 2; Trial Tr. 24:11–12.

He executed a deed of trust granting Guild Mortgage Company a secured interest in the property that same day. *See* R. 2; Trial Tr. 25:16–21; Trial Ex. 4.

The trial court record reflects that Adamson subsequently defaulted on the note and has not made any loan payments since 2008. *See* R. 415 n.7; Trial Tr. 39:3–9. ReconTrust was appointed substitute trustee under the deed of trust. *See* R. 8–9; Add. at A-38.¹ As a result of the default, ReconTrust executed and properly recorded a notice of default and election to sell. *See* R. 2; Trial Ex. 1. In January 2010, the property was sold at a non-judicial foreclosure sale to BAC Home Loans Servicing, LP (“BAC-HLS”), FKA Countrywide Home Loans Servicing LP for the sum of \$278,530.03. *See* Trial Ex. 2.

Although Adamson had received prior notice of the sale date, *see* Trial Tr. 32:21–33:13, he never tried to contact ReconTrust before the scheduled sale date, *see* Trial Tr. 29:1–15. He also did not attend the scheduled sale. *See* Trial Tr. 30:14–17.

ReconTrust executed and properly recorded a trustee’s deed after the trustee’s sale. *See* Trial Ex. 2. Since the sale, the Adamsons have continued to occupy the

¹ This Court may take judicial notice of the recorded substitution of trustee. *See McGarry v. Thompson*, 201 P.2d 288, 291 (Utah 1948).

property, have failed to pay taxes on the property, and have not recorded a lis pendens against the property. *See* R. 5, 371–72; Trial Tr. 37:20–24.²

BANA, as successor by merger to BAC-HLS, transferred title to Distressed Asset via a quitclaim deed. *See* Trial Ex. 3. Distressed Asset provided consideration for the property without notice of any claims to the property. *See* R. 3; Trial Ex. 3. In 2014, Distressed Asset served a notice to quit on the Adamsons, notifying them that it had elected to terminate their tenancy at will and that failure to vacate within five days would result in the filing of an unlawful detainer action. *See* R. 15–21, 371–72. The Adamsons failed to vacate the property. *See* R. 5, 371–72.

SUMMARY OF THE ARGUMENT

ReconTrust has the authority to exercise the power of sale for properties in Utah, based on 12 U.S.C. § 92a and 12 C.F.R. § 9.7. This Court’s decision to the contrary in *Sundquist* was wrongly decided and should be overruled.

Even if *Sundquist* is not overruled, the trial court erred in concluding that the non-judicial foreclosure sale and resulting trustee’s deed executed by ReconTrust are void. The court’s decision is premised on case law that is inapplicable to these facts and a treatise that conflicts with Utah law. Prior decisions from this Court make clear that the

² Ten months after the foreclosure sale, Samuel Adamson filed a putative class action against ReconTrust in federal court to challenge ReconTrust’s authority to exercise the power of sale. *See* R. 107; Trial Tr. 36:9–25; *Coleman v. ReconTrust Co., N.A.*, No. 2:10-cv-1099 (D. Utah). That lawsuit was dismissed with prejudice because the plaintiffs failed to comply with a show-cause order requiring the plaintiffs to provide the court with a status of the case after months of delay, and with their intentions to proceed. *See* Order, *Coleman v. ReconTrust Co., N.A.*, No. 2:10-cv-1099 (D. Utah Jan. 9, 2015), ECF No. 142.

Adamsons cannot have the foreclosure sale set aside without proof that their interests in the property were sacrificed or there were unjust extremes from any violation of the Trust Deed Act. The Adamsons offered no such evidence. Moreover, they are precluded from even challenging the validity of the sale because they failed to object to ReconTrust's authority until months after the sale occurred. Accordingly, this Court should reverse the dismissal of Distressed Asset's unlawful detainer action.

ARGUMENT

I. *Sundquist* Was Wrongly Decided And Should Be Overruled.

The trial court relied on this Court's decision in *Federal National Mortgage Ass'n v. Sundquist* that ReconTrust lacked authority to exercise the power of sale for properties in Utah because federal law does not preempt Utah Code §§ 57-1-21 and 57-1-23. But *Sundquist* conflicts with the conclusions of the United States Court of Appeals for the Tenth Circuit, the federal Office of Comptroller of the Currency ("the OCC"), and the U.S. Solicitor General, all of which have stated that 12 U.S.C. § 92a and its implementing regulation, 12 C.F.R. § 9.7, preempt Utah Code §§ 57-1-21 and 57-1-23 and authorize ReconTrust to exercise the power of sale for properties located in Utah. *See Garrett v. ReconTrust Co.*, 546 F. App'x 736 (10th Cir. 2013) (unpublished opinion); OCC's Amicus Brief, *Dutcher v. Matheson*, No. 12-4150 (10th Cir. July 15, 2013) (Add. at A-39 to -63); U.S. Solicitor General's Amicus Brief, *Fed. Nat'l Mortg. Ass'n v. Sundquist*, No. 13-852 (U.S. Oct. 7, 2014) (Add. at A-64 to -92).

As these authorities explained, Section 92a states that, "when not in contravention of state or local law," a national bank may exercise fiduciary powers that are granted to

state banks, trust companies, or other corporations that compete with national banks “under the laws of the State in which the national bank is located.” 12 U.S.C. § 92a(a). Section 9.7(d) of Title 12 of the Code of Federal Regulations clarifies that “the state referred to in section 92a,” i.e., the state where the national bank is “located,” is the state where a bank “acts in a fiduciary capacity.” The regulation further defines the state in which the bank “acts in a fiduciary capacity” as the state in which the bank conducts three activities with respect to the specific fiduciary relationship at issue.

The OCC and Solicitor General both noted that Section 9.7 is a reasonable interpretation of 12 U.S.C. § 92a. *See* Add. at A-57; Add. at A-82 to -83. Applying Section 9.7, the Tenth Circuit, the OCC, and the Solicitor General interpreted that provision as allowing ReconTrust to exercise the power of sale on properties located in Utah because ReconTrust is located in Texas, and Texas law allows ReconTrust to exercise that power. *See Garrett*, 546 F. App’x at 740–42; Add. at A-52 to -58; Add. at A-81 to -85. Indeed, the Solicitor General specifically noted that *Sundquist* was incorrect. *See* Add. at A-81 (“The Utah Supreme Court held that, at least in cases involving the sale of real property, the national bank’s authority to perform trust functions must instead be determined under the law of the State where the property is located. That holding is incorrect.”).

Given these significant legal developments, this Court should overrule *Sundquist*, recognize that federal law preempts Utah law regarding a national bank’s authority to exercise the power of sale, and affirm ReconTrust’s authority to exercise the power of sale for the foreclosed property in this case.

II. The Trial Court Applied The Wrong Test When It Declared The Trustee's Deed Void.

Even if this Court does not overrule *Sundquist*, it should still hold that the trial court erred in dismissing the unlawful-detainer action because the trustee's deed issued by ReconTrust is valid. As further explained in Part II.B below, Utah's jurisprudence has long held that a debtor must meet a high threshold to set aside a foreclosure sale based on a violation of the Trust Deed Act. See *Concepts, Inc. v. First Sec. Realty Servs., Inc.*, 743 P.2d 1158, 1159 (Utah 1987). Beginning with *Concepts*, this Court has held that "[a] sale once made will not be set aside unless the *interests of the debtor* were sacrificed or there was some attendant fraud or unfair dealing" and the process "reach[ed] unjust extremes." *Id.* at 1159–60. This high bar for setting aside a foreclosure sale was reaffirmed by this Court in *Timm v. Dewsnup*, 2003 UT 47, ¶ 36, 86 P.3d 699, and has been consistently applied in Utah appellate court cases, including a case involving a non-judicial foreclosure sale conducted by a person who had not even been appointed trustee, see *Reynolds v. Woodall*, 2012 UT App 206, ¶¶ 14–15, 285 P.3d 7. Rather than applying this line of cases, which squarely address the impact of violations of the Trust Deed Act, the trial court relied on (1) a case that predates the Utah Trust Deed Act and another that focused primarily on the Condominium Ownership Act, and (2) a real estate treatise that conflicts with Utah law.

A. The Trial Court Relied On Case Law And A Secondary Source That Do Not Apply In This Case.

1. *Singer* Is Inapplicable.

This Court has decided no cases that support the Adamsons' position that the trustee's deed is void, whereas this Court's decision in *Concepts* directly answers the question in this case. See *infra* Part II.B. The trial court mistakenly relied on *Singer Manufacturing Co. v. Chalmers*, 2 Utah 542 (1880), a 135-year-old case that pre-dates the Utah Trust Deed Act and Utah statehood itself. As an initial matter, the trial court erred in treating *Singer* as binding precedent. *Singer* was decided by the Utah Territorial Supreme Court—not, as the trial court stated, by the Utah Supreme Court. See R. 405, 411–12. And the Utah Territory derived its authority from Congress, whereas the State of Utah derives its authority from the people of Utah. See *State ex rel. Bishop v. McNally*, 43 P. 920, 920 (Utah 1896). Decisions of a court instituted by one sovereign are not binding on courts of a different sovereign. Cf. *Glatt v. Feist*, 156 N.W.2d 819, 825 (N.D. 1968) (noting that an issue was “a matter of first impression in this state since statehood” and treating a decision from the territorial court as only persuasive authority).

Even if *Singer* were binding, it still would not apply here because of important factual differences between that case and this one. In *Singer*, a sheriff's sale was declared invalid because the auctioneer who cried the sale was not the appointed trustee and was not authorized to act as trustee under the deed of trust. See 2 Utah at 547. In other words, the auctioneer of the sale had no legal relationship and owed no duties to the trustee, trustor, or beneficiary of the deed of trust and had no reason to believe he could

sell the property. In contrast, ReconTrust was duly appointed by the beneficiary under the deed of trust to act as successor trustee. *See* Add. at A-38. It was qualified under Utah statutes to serve as a trustee because it is authorized by federal law to conduct trust business and conducted trust business in Utah. *See* UTAH CODE ANN. § 57-1-21(1)(a)(iii) (explaining that a qualified trustee includes “any corporation authorized to conduct a trust business and actually conducting a trust business in Utah under the laws of Utah or the United States”).³ As trustee, ReconTrust owed legal duties to both the Adamsons and the beneficiary of the trust deed, MERS. *See, e.g., Blodgett v. Martsch*, 590 P.2d 298, 302 (Utah 1978). It also held legal title to the property by virtue of its status as trustee. *See General Glass Corp. v. Mast Constr. Co.*, 766 P.2d 429, 432 (Utah Ct. App. 1988) (citing UTAH CODE ANN. § 57-1-19(4)). Even if ReconTrust exceeded its statutory authority by conveying that title, such an ultra vires act would not be void unless it violated public policy. *See Millard Cty. Sch. Dist. v. State Bank of Millard Cty.*, 14 P.2d 967, 971–72

³ Although this Court held in *Sundquist* that ReconTrust lacked the power of sale, ReconTrust is still a qualified trustee under Utah Code § 57-1-21(1)(a)(iii) because it is a corporation authorized to conduct trust business and actually conducting such business under the laws of the United States. The Adamsons’ counsel conceded below that ReconTrust was authorized by Utah law to conduct certain trustee activities such as executing the notice of default, without exercising the power of sale. *See* Trial Tr. 73:5–11.

(Utah 1932) (holding that a bank's ultra vires act did not render securities void).⁴ Given this critical factual distinction, *Singer* does not apply here.

Further, because *Singer* did not involve a violation of the Trust Deed Act (which was adopted approximately eighty years after *Singer*), the debtors there did not need to establish the heightened level of proof that applied in *Concepts*. The Adamsons, however, rely exclusively on ReconTrust's alleged violation of the Trust Deed Act to have the sale here set aside. They thus must prove that their interests were "***sacrificed or there was some attendant fraud or unfair dealing.***" *Concepts*, 743 P.2d at 1160 (emphasis added); *see also infra* Part II.B. There was no such showing in this case. *See infra* Part III.

In *Singer*, moreover, there are no facts suggesting that the debtors had prior notice of the auctioneer's identity because the appointed trustee was someone other than the auctioneer. Without such prior notice, the debtors did not have the opportunity to object to the auctioneer's authority to conduct the sale. *See Singer*, 2 Utah at 547. Therefore, there was no remedy available to the debtors other than seeking to have the sale set aside after it occurred. The Adamsons, in contrast, were afforded prior written notice, through the notice of default and election to sell, that ReconTrust would conduct the sale. *See* Trial Tr. 27:10–17; 32:25–33:13 (Samuel Adamson testifying that the notice of default

⁴ The public policy of requiring a trustee who exercises the power of sale to be physically present in Utah seeks to make it easier for borrowers to meet with the trustee before a foreclosure sale occurs. That policy could not have been violated in this case when the borrower did not even attempt to contact the trustee. *See infra* Part II.B.3 (discussing this purpose); *supra* Statement of Facts (noting that the Adamsons never attempted to contact ReconTrust).

was taped to his door before the sale date); Trial Ex. 1; *see also Reynolds*, 2012 UT App 206, ¶ 15 (explaining that the notice of default “inform[s] persons with an interest in the property of the pending sale of that property, so that they may act to protect those interests” (quoting *Concepts*, 743 P.2d at 1159)). Therefore, unlike the debtors in *Singer*, there is evidence that the Adamsons had an opportunity to object to the sale before it occurred.

2. *McQueen* Is Also Inapplicable.

The trial court also erred in relying on *McQueen v. Jordan Pines Townhomes Owners Ass’n*, 2013 UT App 53, 298 P.3d 666, because that case is also factually distinguishable.

First, *McQueen* was about the Condominium Ownership Act’s requirements for non-judicial foreclosures of assessment liens. In fact, the court twice defined the issue on appeal to be the extent to which portions of the Trust Deed Act were incorporated into the Condominium Ownership Act given the latter Act’s requirement that “a lien for nonpayment of a condominium unit assessment may be enforced through foreclosure or sale according to the law of deeds of trust or mortgages.” *McQueen*, 2013 UT App 53, ¶ 9. The court specifically considered whether the Trust Deed Act’s requirement that a trustee be appointed should also apply to a condominium unit assessment-lien foreclosure. *See id.* ¶¶ 11, 15. And in the context of such a foreclosure, the court determined that the sale was invalid without an appointed trustee. *See id.* ¶ 21. The court improperly went beyond the limited issue presented regarding the applicability of portions of the Trust Deed Act and instead decided the validity of the sale. *Compare id.*

¶ 21, *with id.* ¶¶ 9, 10. Further, the court did not address the impact of violating the Trust Deed Act in a trust-deed foreclosure and therefore did not even mention, analyze, or distinguish *Concepts* or its progeny. It did not address specifically whether the lack of an appointed trustee of a trust deed would invalidate a trust-deed foreclosure, and no subsequent appellate court case has applied *McQueen* in such a manner.

Second, *McQueen* involved a sale that was declared invalid because, unlike the sale in this case, it was conducted by a person who was never appointed trustee and who served as the attorney for the entity conducting the sale. *See id.* ¶¶ 20–21.⁵ Indeed, the *McQueen* court’s brief discussion of why the sale in that case was void turned entirely on the fact that no trustee at all had been appointed. *See id.* The *McQueen* court emphasized the importance of having an “independent third party who c[ould] objectively execute [the] foreclosure” and fulfill the duties owed to the debtor/trustor, given that non-judicial foreclosures are conducted “in the absence of judicial oversight” and “without judicial intervention.” *Id.* ¶ 21. Lack of an independent trustee could, for example, lead to an inadequate sale price at the trustee’s sale, as happened in *McQueen*, when the condo sold for a mere \$3,312.76. *See id.* ¶ 3. Here, by contrast, ReconTrust was properly appointed by the beneficiary to serve as the substitute trustee. *See Add.* at A-38. And there is no evidence in the record that ReconTrust was not independent or that it failed to fulfill its duties owed to the Adamsons when it conducted the sale. Unlike

⁵ In fact, the attorney who conducted the sale was the attorney who argued the case in the Court of Appeals—meaning that that person was far from an “independent third party.” *McQueen v. Jordan Pines Townhomes Owners Ass’n*, 2013 UT App 53, ¶ 21, 298 P.3d 666.

the attorney in *McQueen*, ReconTrust's role as trustee did not result in an inadequate sale price, as the property sold for \$278,530.03—almost \$23,000 more than the amount borrowed to purchase the property. *See* Trial Ex. 2; Add. at A-20.

Third, the *McQueen* opinion did not cite or appear to take into consideration this Court's ruling in *Concepts*, nor any other cases that followed *Concepts*. And as the trial court recognized, *see* R. 406, *McQueen* is in tension with *Reynolds* (which relied on *Concepts*), an earlier decision that the *McQueen* panel had no authority to overrule. *See, e.g., J.W. v. State*, 2005 UT App 382, ¶ 10, 122 P.3d 679 (discussing stare decisis).

Fourth, in *McQueen* the appointment of a trustee was a “necessary pre-requisite” to be able to convey the property in trust, as required by the Condominium Ownership Act. *See McQueen*, 2013 UT App 53, ¶¶ 30–31 (Voros, J., concurring). A trust deed like the one in this case, however, conveys title to the property to a trustee as soon as the trust deed is executed. *See* UTAH CODE ANN. § 57-1-19(3) (providing that a trust deed “convey[s] real property to a trustee in trust”); *id.* § 57-1-19(4) (defining a trustee as a “person to whom title to real property is conveyed by trust deed”). In other words, the “necessary prerequisite” to “convey[ing] . . . the property in trust” in the trust-deed context occurs as soon as the trust deed is executed and not when a trustee is appointed. *See McQueen*, 2013 UT App 53, ¶ 31. Therefore, *McQueen*'s holding as to the importance of appointing a trustee in the assessment-lien context should not be applied to the appointment of a substitute trustee in the trust-deed context.

Finally, *McQueen*'s holding should not apply here because it would represent a significant change in the common law regarding voiding non-judicial foreclosure sales

and the resulting trustee's deeds. Such changes are not automatically retroactive, and this Court has held that they will not be applied retroactively when the "overruled law has been justifiably relied upon or where retroactive operation creates a burden." *Exxon Corp. v. Utah State Tax Comm'n*, 2010 UT 16, ¶ 7, 228 P.3d 1246 (quoting *Loyal Order of Moose, # 259 v. Cty. Bd. of Equalization*, 657 P.2d 257, 265 (Utah 1982)). Given the federal authority on which ReconTrust relied in good faith to exercise the power of sale, *see infra* Part II.B.3 (citing cases and other authorities), applying *McQueen* retroactively to undo the sale and hold any subsequent deed invalid would be not only burdensome to original owners, subsequent purchasers (including bona fide purchasers), and Utah county recorders, but also unfair and detrimental to a well-ordered system of land ownership, *see infra* Part II.B.2 (explaining the importance of requiring a debtor to meet a high bar to set aside a sale).

In the Court of Appeals, the Adamsons argued that *McQueen* created a three-part test for determining the validity of a trustee's deed: "1) creation of a trust relationship; 2) a qualified trustee; and 3) the adherence to correct procedural requirements." Appellees' COA Br. 11. Utah courts have never adopted such a test. The three-part test that the Adamsons posit for determining whether a deed is void evidently rests on the following language from *McQueen*: "The Trust Deed Act, in addition to other procedural requirements like proper notice, requires the creation of a trust relationship and the appointment of a qualified trustee." 2013 UT App 53, ¶ 11. But nothing in this sentence refers to the validity of the foreclosure sale, *i.e.*, *McQueen* does not address the consequences for failing to comply with the requirements that the sentence lays out.

Even if *McQueen* did provide a three-part test, ReconTrust meets all three parts. The Adamsons do not contest that a trust relationship was created. *See* Appellees' COA Br. 11. And ReconTrust was a qualified trustee under § 57-1-21(1)(a)(iii), even if it lacked the power of sale under § 57-1-23. *See supra* note 3. As to the third prong, the Adamsons claimed that a deed is voidable if a debtor proves that his interests were sacrificed by a trustee's violation of a procedural requirement in the Utah Trust Deed Act. *See* Appellees' COA Br. 16. They stated in conclusory fashion that ReconTrust "ignored [their] rights and interests as trustors, and that [they] were not treated fairly." Appellees' COA Br. 12. As explained further below, however, no evidence in the record supports this assertion. *See infra* Part III.

3. The Real Estate Finance Treatise Conflicts With Utah Law, And The Trial Court Misapplied It.

The trial court also relied improperly on a real estate finance treatise that conflicts with Utah law concerning void and voidable deeds. Specifically, the court relied on language in the treatise that a void defect occurs when "someone other than the named trustee conducts the sale, including a successor who has not been validly appointed," whereas a voidable error is "an irregularity in the execution of a foreclosure sale and must be substantial or result in a probable unfairness." R. 408 (quoting Grant S. Nelson, Dale A. Whitman, et al., REAL ESTATE FINANCE LAW § 7:21 at 953–57 (6th ed. 2014)). The trial court posited that "*Singer* clearly takes its place in the first category [of void deeds], and the prerequisites to setting aside a sale identified in *RM Lifestyles* and

Reynolds are seen to be applicable only to those defects properly categorized as rendering a sale voidable rather than void.” R. 409. This analysis is incorrect.

As an initial matter, the treatise’s definition of a void deed conflicts with Utah law. It fails to include Utah law’s requirement that a deed must offend public policy or harm the public to be deemed void. *See Ockey v. Lehmer*, 2008 UT 37, ¶ 19, 189 P.3d 51. Indeed, there are no known Utah appellate cases that have adopted the treatise’s definition of void and voidable. Put simply, the treatise should not have played any role in the trial court’s ruling. *See Gildea v. Wells Fargo Bank, N.A.*, 2015 UT 11, ¶¶ 22–23, 347 P.3d 385 (refusing to adopt a property treatise that conflicted with Utah law).

Moreover, even if the treatise were consistent with Utah law, the trial court erred in concluding that the sale conducted by ReconTrust fit within the treatise’s definition of a void sale. Again, the treatise states that a sale is void “when someone other than the named trustee conducts the sale, including a successor who has not been validly appointed.” R. 408 (citation omitted). ReconTrust, however, conducted the sale after it was validly appointed as trustee—facts that the Adamsons did not dispute at trial. Therefore, the sale conducted by ReconTrust does not fit within the treatise’s definition of a void sale.

B. *Concepts* And Its Progeny Provide The Rule For This Case.

The proper test for determining whether a foreclosure sale should be set aside was established by this Court in *Concepts* and later applied in Utah appellate court cases. That rule is not only well established, but also well reasoned.

1. This State Has Long Required A Debtor To Meet A High Bar.

This Court has established a high standard for setting aside a foreclosure sale, explaining that “[t]he remedy of setting aside the sale will be applied only in cases which reach unjust extremes.” *Timm v. Dewsnup*, 2003 UT 47, ¶ 36 (citing *Concepts*, 743 P.2d at 1159). A foreclosure sale is presumed valid and will not be set aside unless the debtor proves that “the interests of the debtor were sacrificed or there was some attendant fraud or unfair dealing.” *Concepts*, 743 P.2d at 1160 (emphasis omitted). Explaining this rule further, the Court of Appeals noted that “substantial inadequacy of price, coupled with fraud, mistake, or other unfair dealing can be the basis for setting aside a foreclosure sale.” *Jones v. Johnson*, 761 P.2d 37, 41 n.2 (Utah Ct. App. 1988) (quoting *First Nat’l Bank v. Haymond*, 57 P.2d 1401, 1405 (Utah 1936)). Indeed, this Court has recognized that a contract, such as a deed, is void ab initio only when it “offend[s] public policy or harm[s] the public.” *Ockey*, 2008 UT 37, ¶ 19.

The Court of Appeals’ decision in *Reynolds v. Woodall* illustrates this rule; that case involved facts similar to this case, in that the person who conducted the sale had “questionable authority” to do so, as the trial court acknowledged. R. 405. Based on this Court’s decisions in *Concepts* and *Timm*, *Reynolds* affirmed a trial court’s decision that a trustee’s sale was valid even though the sale was conducted without a properly appointed trustee. See 2012 UT App 206, ¶ 18. Of particular importance here, the Court of Appeals recognized the importance of a debtor acting to protect his interests in the property *before* the non-judicial foreclosure sale occurs. The individual who recorded the notice of default and election to sell, and who exercised the power of sale, did so before

the beneficiary executed and recorded the substitution of trustee. *See id.* ¶ 13. Despite the trustee's violation of Utah Code § 57-1-22 and the lack of a validly appointed trustee at the time of the sale, the court held that the borrower had failed to meet her burden of proving that the sale should be declared void. *See id.* ¶ 18.⁶ The court focused on the borrower's failure to allege in her complaint how the late substitution of trustee sacrificed her rights or resulted in any unfair dealing. *See id.* The court explained that the borrower failed to allege that she was denied any right to cure the default, that she ever planned to cure the default or was capable of doing so, or that the trustee's actions affected the bidding or sale price. *See id.* These factors are also present in this case.⁷ Because this Court had made clear that a non-judicial foreclosure sale will be set aside only in cases involving unjust extremes, the Court of Appeals explained that "the proper remedy is to seek an injunction prior to a sale, which allows a debtor to challenge irregularities and

⁶ Although the person who was acting as trustee in *Reynolds* could have exercised the power of sale had he been appointed, he lacked the authority to do so at the time of the sale because he had not been appointed trustee. Given this lack of appointment, that person was in weaker position legally to transfer title of the property than ReconTrust at the time of the sale in this case.

⁷ For example, the Adamsons never attempted to contact ReconTrust before the sale, *see* Trial Tr. 29:4–5, and did not attend the sale, *see* Trial Tr. 30:1–3. And there was no evidence that they could have cured the default or that the sale price was lower because ReconTrust exercised the power of sale.

protect her rights before the sale is completed and a trustee's deed is executed and delivered to the purchaser." *Id.* ¶ 15.⁸

Reynolds is the latest in a long line of cases upholding a trustee's sale despite violations of the Utah Trust Deed Act, because there was no evidence of fraud, unfair dealing, or harm to the person seeking to set aside the sale. *See, e.g., Timm*, 2003 UT 47, ¶¶ 36–37 (notice of sale not sent via certified or registered mail); *Concepts*, 743 P.2d at 1159–60 (typographical error in the notice of trustee's sale as to the year the sale would occur); *RM Lifestyles, LLC v. Ellison*, 2011 UT App 290, ¶¶ 16–18, 263 P.3d 1152 (notice of default filed by substitute trustee before notice of substitution of trustee was filed); *Occidental/Neb. Fed. Sav. Bank v. Mehr*, 791 P.2d 217, 219–20 (Utah Ct. App. 1990) (notice of default and election to sell erroneously described property and notice of sale was mailed before three-month waiting period lapsed); *cf. Pierucci v. U.S. Bank, NA*, 2015 UT App 80, ¶ 14, 347 P.3d 837 (applying *Concepts* to a case that involved challenges to a foreclosure sale based on the trustee's alleged failure to accept modification payments).

2. This High Bar Serves Important Purposes.

Requiring “heightened proof” that a debtor was prejudiced by some noncompliance with the Trust Deed Act to set aside a foreclosure sale promotes important ends. First, it serves to protect the interests of bona fide purchasers—both

⁸ The trial court did not apply the rule from *Reynolds*, however, because the trial court believed it was bound by *Singer Manufacturing Co. v. Chalmers*, 2 Utah 542 (1880). As explained in Part II.A.1, *Singer* is readily distinguishable from this case and was not even binding precedent, given that it was decided by the Utah Territorial Supreme Court.

initial purchasers and subsequent ones. As this Court has explained, “[o]ur statutes protect a bona fide purchaser at a public sale under a trust deed, by permitting him to rely on the recitals in the deed he receives from the trustee after the sale.” *Blodgett*, 590 P.2d at 303. Hence, there is a “presumption that a trustee’s deed, which states that it complies with the statutory requirements, is ‘conclusive evidence in favor of bona fide purchasers’ of the trustee’s deed’s validity.” *RM Lifestyles*, 2011 UT App 290, ¶ 17 n.5 (quoting UTAH CODE ANN. § 57-1-28(2)(c)(ii)).

Second, it ensures that non-judicial foreclosure sales are more likely to have fair bids. As the Court of Appeals has recognized, “[t]he requirement that the trustor raise any issues prior to sale is consistent with the importance of protecting the validity of trustee’s deeds, thus promoting bidding at trustee’s sales and improving the chances that a sale will be for fair market value.” *Reynolds*, 2012 UT App 206, ¶ 16. This rule promotes bidding at fair market value because bidders know that if any problem existed with the sale, the trustor will have been required to have raised the issue *before* the bidder could purchase the property.

Third, this rule avoids disrupting ownership of land. As the Court of Appeals has acknowledged, “[w]hen . . . title to real property is at issue, the need for finality is at its apex.” *Am. Estate Mgmt. Corp. v. Int’l Inv. & Dev. Corp.*, 1999 UT App 232, ¶ 10, 986 P.2d 765. This need is protected by ensuring that the debtor cannot use a violation of the Trust Deed Act—that ultimately made no difference on the outcome of the sale—to set aside the sale and disrupt titles to land.

Fourth, this rule complements the “statutory right to cure the default, which also must be exercised during the three-month grace period before a trustee’s sale is held.” *Reynolds*, 2012 UT App 206, ¶ 16 (emphasis omitted). Given that the Trust Deed Act provides specific procedures for challenging a foreclosure sale, any remedies for violating that Act should not excuse a borrower’s failure to comply with the Act.

3. This High Bar Is Appropriate For Sales Conducted By An Appointed, Qualified Trustee Without The Power Of Sale.

This high bar of setting aside a non-judicial foreclosure sale should apply to sales conducted by an appointed, qualified trustee who lacked the power of sale. Notably, nowhere in the Trust Deed Act did the State Legislature declare that any type of violation of the Act invalidates a sale. Indeed, such a harsh result—particularly after a trustee’s sale has taken place and the property has been purchased by a bona fide purchaser—would undermine the confidence of Utah citizens to purchase property in a foreclosure sale. Moreover, it is incompatible with the State Legislature’s view of this issue, which is reflected in its 2011 adoption of Utah Code § 57-1-23.5. This statute allows a debtor/trustor to recover monetary damages for a sale conducted by an unauthorized person equal to the greater of actual damages or \$2,000, in addition to costs and attorney’s fees. *See* UTAH CODE ANN. § 57-1-23.5(2)(a).⁹

Allowing a sale to be voided absent fraud or other extreme circumstances is particularly unwarranted when a violation of the Trust Deed Act resulted from an act

⁹ This statute was enacted after the sale in this case, and does not apply retroactively. It does, however, provide constructive insight into the Legislature’s view of how this precise issue should be addressed.

undertaken in good faith. When ReconTrust exercised the power of sale in this case, this Court had not decided *Sundquist*. Indeed, at the time ReconTrust was exercising the power of sale in this case, no case had held that ReconTrust lacked the authority to do so—and ReconTrust’s view of its authority was later ratified by multiple decisions from federal courts. See, e.g., *Garrett*, 546 F. App’x at 737; *Baker v. BAC Home Loans Servicing LP*, No. 2:11-cv-00720 CW, 2012 WL 464024, at *4 (D. Utah Feb. 13, 2012) (not reported); *Dutcher v. Matheson*, No. 2:11-CV-666 TS, 2012 WL 423379, at *4–8 (D. Utah Feb. 8, 2012), *vacated and remanded on other grounds*, 733 F.3d 980 (10th Cir. 2013).

Further, the purpose of limiting who can serve as a qualified trustee with the power of sale is not undermined by this rule. As the Tenth Circuit made clear, the purpose of Utah Code § 57-1-21 is to “[m]ak[e] it easier for Utahns to meet with trustees.” *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1048 (10th Cir. 2009); see also *Jones*, 761 P.2d at 41 n.2 (“The detailed procedural requirements for a trustee’s sale of real property under Utah Code Ann. §§ 57-1-23 to -34 (1986) are intended to protect the debtor/trustor.” (citing *Concepts*, 743 P.2d at 1160)). In other words, the Trust Deed Act is intended simply to provide a shield to a debtor’s rights in the property; it was not intended to be “use[d] as a sword” to carve out extreme remedies that may result from its breach. See *Concepts*, 743 P.2d at 1160. Requiring a debtor to show how he was prejudiced by any alleged noncompliance with the Act ensures that the Act serves this purpose for which it was enacted.

III. The Adamsons Failed To Meet This High Burden Of Proof To Set Aside The Sale.

When the correct test is applied, the Adamsons' failure to prove that the sale should be set aside is indisputable. *See* Trial Tr. 22:1–39:19 (evidence presented by the Adamsons); Trial Tr. 60:8–25 (Distressed Asset arguing that the heightened standard applied). Specifically, they failed to present evidence that an “unjust extreme” would result if ReconTrust were allowed to exercise the power of sale in lieu of a Utah attorney or title insurance company. Nor did they present evidence that: (1) any interest was sacrificed or that some attendant fraud or unfair dealing arose from having ReconTrust serve as trustee; (2) they were denied the ability to cure the default or that they were capable of curing the default, or (3) that ReconTrust's involvement affected the bidding or the sale price of the property. Indeed, they have never even *alleged* that they could meet this heightened standard of proof.

IV. The Trial Court's Ruling Has Severe Consequences.

The trial court's holding that the foreclosure sale and resulting trustee's deed are void is a drastic and extraordinary ruling that will have severe negative consequences for citizens of Utah.

A void deed “cannot be ratified or accepted, and anyone can attack its validity in court.” *Ockey*, 2008 UT 37, ¶ 18 (footnote omitted). It also “carries no title on which a bona fide purchaser may rely.” *Bennion Ins. Co. v. 1st OK Corp.*, 571 P.2d 1339, 1341 (Utah 1977). Under the trial court's ruling, therefore, bona fide purchasers—whether an entity like Distressed Asset or an individual owner who purchased a property—will lose

their interest in properties sold by a national bank even though the purchasers have owned the property, made improvements on it, and have been paying property taxes and insurance, in some cases for years.

Even more troubling than the impact on the initial bona fide purchaser's interest in the property, subsequent bona fide purchasers will lose their interests as well. Consider this scenario: A debtor defaults and voluntarily vacates the property after the trustee's sale conducted by ReconTrust seven years ago, and a bona fide purchaser, the Smith family, buys the property. The Smith family, having paid taxes on the property and renovated the house, later sold the property to the Jones family, who also paid taxes on the property. They then sold the property to the Williams family. If this hypothetical property were subjected to a void ruling by this Court, a long line of bona fide purchasers could have their interests undone. This involuntary voiding of conveyances would potentially lead to claims involving all three families concerning the warranties in the deeds through which they transferred the property.

Declaring deeds void could raise other issues. For instance, liens that were extinguished by foreclosure sales would no longer be extinguished. In other words, thousands of property sales will be affected either directly or indirectly. Sorting through the land records and determining who should have what interests in each property and what monetary compensation may be owed from one person to another would require a herculean effort—and an unnecessary one if the debtor who defaulted suffered no harm from having a national bank rather than a Utah attorney or title insurance company exercise the power of sale.

At the same time, defaulted borrowers like Samuel Adamson will receive a windfall merely by showing that a national bank executed certain foreclosure documents instead of a Utah title insurance company or Utah attorney. They will be able to challenge the validity of sales, for the first time, months or even years after the sales occurred and the property has been sold multiple times. They will be able to remain in possession of the property even if they have failed to pay any taxes or insurance or other value for the property since the foreclosure sale. And some defaulted borrowers may not even want the sales undone—they may not want to live in the property, pay taxes on the property, or insure the property. Though these borrowers may have desired to move on, a ruling that ReconTrust's foreclosures are all void will not give these borrowers that choice.

These consequences are not theoretical. Borrowers have already relied on the trial court's ruling to seek eviction of Utah homeowners who purchased a foreclosed property at a sale in which ReconTrust exercised the power of sale. *See* Add. at A-35 (Notice, *Zamacona v. Blake*, Lis Pendens: WG-545-B-1 (Utah Dist. Ct. Feb. 3, 2015)).¹⁰ This assault on the property rights of Utah citizens is inconsistent with the importance of requiring finality in title to real property, *see Am. Estate Mgmt. Corp.*, 1999 UT App 232, ¶ 10 (quoted *supra* p. 26), and is wholly inconsistent with the purpose of Utah Code § 57-1-23—to provide debtors an opportunity to meet with trustees prior to foreclosure, *see*

¹⁰ This Court may take judicial notice of a filed lis pendens. *See J.M.W. v. T.I.Z.*, 2011 UT 38, ¶ 6 n.1, 266 P.3d 702.

supra Part II.B.3. None of these consequences were specifically addressed in the trial court's opinion, but they are real and merit this Court's consideration.

The trial court's decision holding that the sale is void is extraordinary because there are no Utah appellate cases or statutes requiring or even supporting this drastic remedy. That is undoubtedly because the sole statutory remedy for these sales allows only limited monetary relief when a sale is conducted by a trustee who lacks authority to exercise the power of sale. *See supra* Part II.B.3; *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (explaining that when a statute sets forth certain remedies, courts presume that no other remedy is available). Although Utah Code § 57-1-23.5 does not have retroactive effect on the properties in this case, its express remedies certainly provide a reasonable framework for a court-ordered remedy in an analogous situation. The trial court's holding that a sale conducted before enactment of this statute should be considered void is inconsistent with the limited monetary remedy authorized by the current statute.

V. The Adamsons Are Barred From Challenging The Validity Of The Foreclosure Sale By The Doctrines Of Waiver And Estoppel.

Even if the Adamsons had attempted to meet the heightened burden set forth in *Concepts*, which they did not, those defenses are waived. The Adamsons failed to raise timely arguments relating to ReconTrust's authority to exercise the power of sale. Under Utah law, a debtor's interests are "protected . . . up to the moment that the property [is] sold and a trustee's deed issue[s]." *Concepts*, 743 P.2d at 1161. During that time, if a debtor seeks to challenge whether a sale complies with the Utah Trust Deed Act's

requirements, “the proper remedy is to seek an injunction prior to a sale, which allows a debtor to challenge irregularities and protect her rights before the sale is completed and a trustee’s deed is executed and delivered to the purchaser.” *Reynolds*, 2012 UT App 206, ¶ 15.

Debtors who fail to exercise their remedies before a foreclosure sale occurs are barred from later doing so under the doctrines of waiver and estoppel, except where an irregularity or defect renders the sale “a complete legal nullity”:

[A] mortgagor may by acquiescence and failure to assert his rights at the proper time be estopped to set up irregularities in the foreclosure proceedings to defeat rights of the purchaser. Furthermore, the cardinal principle of estoppel, that one who knowingly and silently permits another to expend money on land, under a belief that he has title, will not be permitted to set up his own right to the exclusion of the rights of the one who made the improvements, finds application in a variety of ways where land has been sold under invalid foreclosure proceedings.

Am. Falls Canal Sec. Co. v. Am. Sav. & Loan Ass’n, 775 P.2d 412, 414 (Utah 1989) (alteration in original) (citation omitted).

In this case, ReconTrust executed and recorded a notice of default and election to sell that states that ReconTrust, as trustee, had elected to sell the property. *See* Trial Tr. 19:12–15; Trial Ex. 1. The notice provided a phone number if the Adamsons had any questions. *See* Trial Ex. 1. The Adamsons neither attempted to contact ReconTrust before the sale regarding the validity of the sale, nor did they seek an injunction or file a lawsuit prior to the sale to prevent it from occurring. *See* Trial Tr. 71:12–18 (court stating that the Adamsons “knew the sale, and they did nothing to stop it” and that the

Adamsons “didn’t file a lawsuit before the sale to try and stop the sale”); R. 412 (court finding that “Defendants did not challenge the Foreclosure Sale before it occurred.”). They offered no explanation for failing to challenge the sale before it occurred. *See* Trial Tr. 29:1–5 (Samuel Adamson testifying that he “never would have thought to call or contact ReconTrust” regarding the notice of default and election to sell). Indeed, they waited until almost a year after the sale was concluded to challenge its validity by filing a putative class action, and they never filed a lis pendens against the property. *See* R. 415 n.9 (referring to the federal class action lawsuit that Samuel Adamson filed in November 2010); Trial Tr. 36:9–25. In other words, they knowingly failed to assert their rights until several months after the sale occurred, without any reason, and therefore should have been prohibited from challenging the sale at trial.

VI. At Most, The Trustee’s Deed Issued By ReconTrust Is Voidable.

If the Court determines that the trustee’s deed in this case is invalid, the Court need not go so far as declaring it void ab initio. Instead, the Court should treat the trustee’s deed as merely voidable. *Cf. Baldwin v. Burton*, 850 P.2d 1188, 1193 (Utah 1993) (“Under well-established law a number of cases have held ‘void’ to mean ‘voidable’ only.”). A voidable deed is one that “offend[s] an individual, such as those arising from fraud, misrepresentation, or mistake.” *Ockey*, 2008 UT 37, ¶ 19. A voidable deed “may be ratified at the election of the injured party” and “[o]nce ratified, the voidable . . . deed is deemed valid.” *Id.* ¶ 18. “[S]ilence with full knowledge of the facts may . . . operate as a ratification.” *Bradshaw v. McBride*, 649 P.2d 74, 78 (Utah 1982) (citation omitted).

The sale and resulting deed were ratified by the Adamsons when they failed to timely object to the validity of the sale; therefore, the sale and deed should be deemed valid. *See supra* Part III. Even if the Adamsons did not ratify the sale, the deed is enforceable by Distressed Asset, a bona fide purchaser, because a voidable deed is “unassailable in the hands of a [bona fide purchaser].” *Broadbent v. Powers*, No. CIV 2:05 CV 375, 2006 WL 2527429, at *3 (D. Utah Aug. 29, 2006) (unpublished) (quoting Roger A. Cunningham et al., *THE LAW OF PROPERTY* 720 (West 1984)).

The trial court refused to rely on *Ockey* and its definitions of void and voidable deeds, claiming that it involved a conveyance by a trustee after the termination of a trust and “did not involve a trustee’s foreclosure sale.” R. 414 n.6. *Ockey*, however, is not limited to the context of express trusts. *Ockey*’s discussion of void and voidable acts relied on cases from other contexts, including *Millard County School District*, 14 P.2d at 971–72 (finding securities issued by a bank in excess of its statutory authority were not void) and *Zion’s Service Corp. v. Danielson*, 366 P.2d 982, 985–86 (1961) (finding void a contract intended to control prices and limit competition between the bids given by masonry contractors). *See Ockey*, 2008 UT 37, ¶¶ 22–24. This rule applies to deeds like the one in this case, and applying that rule makes clear that, at most, the sale here was voidable.

CONCLUSION

This Court should reverse the trial court’s judgment dismissing Distressed Asset’s unlawful-detainer action.

Date: January 4, 2016

Respectfully submitted,

BANK OF AMERICA, N.A.

By Counsel



Robert H. Scott
AKERMAN LLP
170 South Main Street
Suite 950
Salt Lake City, UT 84101
Tel: (801) 907-6900
Fax: (801) 355-0294
robert.scott@akerman.com

Amy Miller (admitted pro hac vice)
MCGUIREWOODS LLP
2001 K Street, N.W., Suite 400
Washington, DC 20006
Tel: (202) 857-1732
amiller@mcguirewoods.com

Brian E. Pumphrey (admitted pro hac vice)
MCGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219-3916
Tel: (804) 775-7745
bpumphrey@mcguirewoods.com

CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

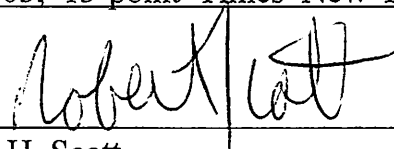
1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because:

[x] This brief contains 9,980 words, excluding the parts of the brief exempted by Utah R. App. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003, 13-point Times New Roman font.

Date: January 4, 2016



Robert H. Scott
AKERMAN LLP
170 South Main Street
Suite 950
Salt Lake City, UT 84101
Tel: (801) 907-6900
Fax: (801) 355-0294
robert.scott@akerman.com

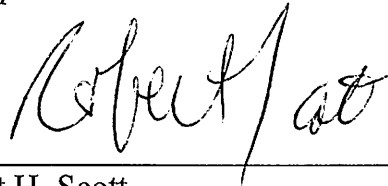
Amy Miller (admitted pro hac vice)
MCGUIREWOODS LLP
2001 K Street, N.W., Suite 400
Washington, DC 20006
Tel: (202) 857-1732
amiller@mcguirewoods.com

Brian E. Pumphrey (admitted pro hac vice)
MCGUIREWOODS LLP
Gateway Plaza
901 E. Cary St.
Richmond, VA 23219
Tel: (804) 775-7745
bpumphrey@mcguirewoods.com

CERTIFICATE OF SERVICE

I, Robert Scott, certify that on January 4, 2016, I served a copy of the **APPELLANT'S REPLACEMENT BRIEF** by first class mail, postage prepaid, to the following:

John Christian Barlow
LAW OFFICE OF JOHN CHRISTIAN BARLOW PC
321 North Mall Drive
Building R, Suite 290
Saint George, UT 84790
jcb@johnchristianbarlow.com
Counsel for Defendants/Appellees



Robert H. Scott
AKERMAN LLP
170 South Main Street
Suite 950
Salt Lake City, UT 84101
Tel: (801) 907-6900
Fax: (801) 355-0294
robert.scott@akerman.com
Attorney for Appellants

ADDENDUM

Decision and Order Dismissing Action for Unlawful Detainer	A-1
Deed of Trust.....	A-20
Notice of Default and Election to Sell	A-31
Trustee's Deed	A-33
<i>Zamacona v. Blake</i> , Lis Pendens: WG-545-B-1 (Utah Dist. Ct. Feb. 3, 2015)	A-35
Substitution of Trustee	A-38
OCC's Amicus Brief, <i>Dutcher v. Matheson</i> , No. 12-4150 (10th Cir. July 15, 2013) ..	A-39
Solicitor General's Amicus Brief, <i>Fed. Nat'l Mortg. Ass'n v. Sundquist</i> , No. 13-852 (U.S. Oct. 7, 2014)	A-64

FILED
2014 SEP -2 PM 1:21
5TH DISTRICT COURT
ST. GEORGE

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

DISTRESSED ASSET SOLUTIONS FUND
I, LLC,

Plaintiff,

vs.

SAMUEL D. ADAMSON; COURTNEY D.
ADAMSON; et al.,

Defendants.

DECISION AND ORDER DISMISSING
ACTION FOR UNLAWFUL DETAINER

Case No. 140500067

Judge Jeffrey C. Wilcox

This is an action for unlawful detainer, which came on for trial on August 7, 2014, after which the court took the matter under advisement. The court now dismisses this action for the reasons given below.

Pursuant to Utah Code section 78B-6-802.5,

A previous owner, trustor, or mortgagor of a property is guilty of unlawful detainer if the person:

- (1) defaulted on his or her obligations resulting in disposition of the property by a trustee's sale or sheriff's sale; and
- (2) continues to occupy the property after the trustee's sale or sheriff's sale after being served with a notice to quit by the purchaser.

At trial, Plaintiff presented as exhibits certified copies of the notice of default, the trust

000402

deed, and its own quitclaim deed, thus making out a prima facie case under the statute.¹

In defense, however, Defendants raised the issue of whether subdivision (1)'s requirement of "disposition of the property by a trustee's sale" has been satisfied.² There appears to be no question that Defendants defaulted on their obligations under a note secured by a trust deed, and that ReconTrust, acting as trustee, gave notice of default and intention to sell the property, and ultimately conducted a trustee's sale in January 2010, purporting to sell the property to Plaintiff's predecessor in interest.

Defendants argue that because the 2010 trustee's sale was conducted by ReconTrust, who was not a qualified trustee with the power of sale under Utah Code sections 57-1-21 and 57-1-23, see Fed. Nat. Mortgage Ass'n v. Sundquist, 2013 UT 45, ¶ 13, 311 P.3d 1004 ("ReconTrust is neither a member of the Utah State Bar nor a title insurance company or agency with an office in the State of Utah. ReconTrust was therefore not a qualified trustee with the power of sale under Utah Code sections 57-1-21 and 57-1-23."); id., ¶ 49 ("As a national bank operating in Utah

¹ Plaintiff also agreed to file, after trial, a certified copy of the 2007 trust deed, but thus far has not done so.

² In addressing this defense, the court considers, in addition to the evidence and arguments presented at trial, the briefing submitted on Defendants' Motion for Declaratory Judgment. At trial, the court indicated that it would not grant such motion at that time because there was nothing in Defendants' pleadings suggesting that they were seeking declaratory relief. However, also as indicated at trial, the motion addresses the substance of Defendants' defense, so the court references such briefing as a matter of convenience. Plaintiff's opposition memorandum filed May 23, 2014, is referenced herein as "Mem. Opp."

under the [National Banking Act], ReconTrust is precluded from exercising the power of a trustee under Utah statute for purposes of conducting a nonjudicial foreclosure.”), the sale and resulting trust deed are null and void ab initio.

As Plaintiff correctly notes, the Sundquist court expressly declined to decide what effect, if any, its determination that ReconTrust did not qualify as a trustee with the power of sale would have on the validity of the sale and resulting trust deed. See id., ¶ 50 (“Our opinion in this matter is limited to the narrow issue of whether Utah law regarding the qualification of trustees is preempted by the [National Banking Act]. In briefing and oral argument, the parties have attempted to raise a variety of other issues relating to the validity of the nonjudicial foreclosure sale, the validity of the trustee's deed, and the propriety of the order of restitution. Because these issues were not fully litigated below, we decline to reach them on interlocutory appeal.”).

However, as Plaintiff also points out, the Court of Appeals has been presented with arguments similar to those of Defendants, and has not even considered it necessary to reach them where the party attacking the validity of a trustee's sale failed to allege or prove how its rights were affected by the defect complained of. For example, in RM Lifestyles, LLC v. Ellison, 2011 UT App 290, 263 P.3d 1152, the defendants in an unlawful detainer action “argued that the trust deed sale was void because [the trustee] recorded the notice of default before it had been substituted as trustee, that the statute did not allow [the beneficiary] to ratify [the trustee's] action, and that the execution of the substitution of trustee violated the statute of frauds.” Id., ¶

15. On review, the Court of Appeals declined to “reach the merits of these issues because the [defendants], in attacking the trust deed sale’s validity after the sale, ha[d] not met their burden of proving that the alleged irregularity affected their rights,” id. (footnote omitted), and “[did] not claim that they were denied the right to cure the default or ever planned on or were capable of curing the default.” Id., ¶ 18 (citation omitted).

Similarly, in Reynolds v. Woodall, 2012 UT App 206, 285 P.3d 7, the plaintiff argued “that the trustee’s sale [was] void” because the individual who “recorded the notice of default and held the trustee’s sale” did so “before [the beneficiary] executed and recorded a written substitution of trustee.” Id., ¶ 13. The plaintiff also challenged the beneficiary’s later “attempt to ratify [this individual’s] actions after the trustee sale.” Id. In other words, like Defendants here, the plaintiff attacked the validity of the sale based on the questionable authority of the one who conducted it. Again, the Court of Appeals declined to decide these issues on their merits based on the fact that, “in attacking the validity of the trustee’s sale, [the plaintiff] ha[d] not alleged that the challenged substitution of trustee impacted her rights.” Id.

In contrast to RM Lifestyles and Reynolds are two cases cited by Defendants. First, in an early Utah Supreme Court case, the court held a trust sale void where it was not performed by the person authorized under the deed of trust:

The deed of trust authorized the sale to be made by the United States Marshal. This was not done. One of his deputies made the sale as auctioneer. It is not claimed that he acted as deputy, but simply that a person who was a deputy acted

as the auctioneer. Nor do we think that the marshal could have acted by deputy, unless the deed of trust had shown express authority to that effect, which it did not do. The fact that no injury or fraud in the sale has been shown, does not affect the question. Nor is it affected by the fact, that the purchaser was an innocent party. The sale was made by one not authorized to make it, and cannot be upheld. It is simply void, and no one gains any rights under it. A purchaser must know that the sale is made by the proper person. The deed of trust shows who could make the sale. A trustee can no doubt employ an auctioneer to act for him in crying off the property; but the trustee must be present and superintend the sale. The trustee in the present instance says that he does not think he was present at the sale.

Singer Mfg. Co. v. Chalmers, 2 Utah 542, 546-47 (Utah Terr. 1880) (emphasis added).

More recently, the Court of Appeals affirmed a trial court ruling that a nonjudicial foreclosure sale for delinquent assessments owed to a condominium association was void where the sale was conducted by the association's attorney because "[t]he record reveal[ed] that, though its attorney may have qualified as a trustee under the Trust Deed Act, the Association failed to appoint its attorney as such." McQueen v. Jordan Pines Townhomes Owners Ass'n, Inc., 2013 UT App 53, ¶¶ 19-21 & 28, 298 P.3d 666.

Notably, the McQueen court does not discuss the obstacles to setting aside a trustee sale that were mentioned, and indeed dispositive, in the RM Lifestyles and Reynolds cases, as summarized above. Rather, the court simply addressed the claimed defect – the absence of the statutorily required qualified appointed trustee – on its merits, and agreed that it rendered the sale void. Reconciliation of these cases is difficult.

Reconciliation of Singer with RM Lifestyles and Reynolds is also difficult. To say, as do

these later cases, that a party attacking the validity of a trustee sale must allege that the claimed defect resulted in an injury to “the interests of the debtor,” or “some attendant fraud or unfair dealing,” RM Lifestyles, 2011 UT App 290, ¶ 16, or a circumstance “reach[ing] unjust extremes,” id.; Reynolds, 2012 UT App 206, ¶ 15, is plainly at odds with Singer’s statement that, where an unauthorized person conducts the sale, “[t]he fact that no injury or fraud in the sale has been shown, does not affect the question.” 2 Utah at 547.

Plaintiff attempts to distinguish Singer on the ground that the deed of trust in that case specified who could conduct the sale, and that there is no such provision in the trust deed here. Plaintiff also notes that Singer was decided well before the current governing statutes, and criticizes Defendants for not providing any additional authority to support their argument that the sale here is void.

Plaintiff’s arguments are unpersuasive. First, the provisions in Utah Code sections 57-1-21 and 57-1-23 restricting who is authorized to conduct a trustee’s sale are clearly comparable to the trust deed provision identifying who was authorized to conduct the sale in Singer, particularly since “a contract,” such as the trust deed here, “implicitly contains the laws existing at the time it was entered.”³ Washington Nat. Ins. Co. v. Sherwood Associates, 795 P.2d 665, 669 (Utah Ct.

³ It is unnecessary to decide which law to apply here (i.e., the law in effect in August 2007, when the trust deed was executed, or the law in effect in January 2010, when the trust sale occurred) since the statutory provisions defining a qualified trustee did not change between these periods.

App. 1990) (citing, among other cases, Beehive Med. Elecs., Inc. v. Iridus. Comm'n, 583 P.2d 53, 60 (Utah 1978) (citing Edwards v. Kearzey, 96 U.S. 595, 601, 24 L.Ed. 793 (1878) (holding that contracts embrace laws which affect their validity, construction, discharge, and enforcement))); 59 C.J.S. Mortgages § 739 (WestlawNext database updated June 2014) ("The power to sell under deed of trust is [a] matter of contract between [the] mortgagor and mortgagee under the terms and conditions expressed in [the] deed of trust instrument. It cannot be enlarged beyond the terms of the contract and the incorporated relevant statutes.") (emphasis added and footnotes omitted).

Thus, this attempted distinction fails.

Second, while Singer is an older case, it is consistent with prevailing law on the subject today, as well as with current Utah statutory law. As a leading treatise on real estate financing explains:

Generally, defects in the exercise of a power of sale can be categorized in at least three ways – void, voidable, or inconsequential.

Some defects are so substantial that they render the sale *void*. In this situation, neither legal nor equitable title transfers to the sale purchaser or subsequent grantees, except perhaps by adverse possession. . . . A sale . . . is void when someone other than the named trustee conducts the sale, including a successor who has not been validly appointed, or, conversely, if the original trustee conducts the sale after a successor-trustee has been appointed.

Most defects render the foreclosure *voidable* and not void. When a voidable error occurs, bare legal title passes to the sale purchaser, subject to the redemption rights of those injured by the defective foreclosure. Typically, a voidable error is "an irregularity in the execution of a foreclosure sale" and must be "substantial or result in a probable unfairness." . . . If the defect only renders the sale voidable,

the redemption rights can be cut off if a bona fide purchaser for value acquires the land. When this occurs, an action for damages against the foreclosing mortgagee or trustee may be the only remaining remedy.

Finally, some defects are so *inconsequential* that they render the sale neither void nor voidable. These defects commonly involve minor discrepancies in the notice of sale. . . .

Grant S. Nelson, Dale A. Whitman et al, Real Estate Finance Law § 7:21 at 953-957 (6th ed. 2014) (hereinafter Nelson & Whitman) (underscoring added and footnotes omitted; italics in original).

Viewed within this framework, Singer clearly takes its place in the first category, and the prerequisites to setting aside a sale identified in RM Lifestyles and Reynolds are seen to be applicable only to those defects properly categorized as rendering a sale voidable rather than void. This is consistent with Singer, which expressly disavows any such prerequisites as to a sale conducted by one not authorized to do so. It is also consistent with McQueen, which affirmed that a sale was void based only on the fact that the person who conducted it had not been appointed as a trustee as statutorily required.

The limited applicability of the prerequisites stated in RM Lifestyles and Reynolds is also shown by examination of the cases cited therein. For instance, both cases quote the statement made in Concepts, Inc. v. First Sec. Realty Servs., Inc., 743 P.2d 1158, 1160 (Utah 1987) (per curiam), that “[a] sale once made will not be set aside unless the interests of the debtor were sacrificed or there was some attendant fraud or unfair dealing.” 2011 UT App 290, ¶ 16; 2012

UT App 206, ¶ 14. Concepts involved the attempted invalidation of a sale based on the fact that the notice of sale, which was printed in 1983, incorrectly stated that the sale was to be conducted on a given date in 1982, see 743 P.2d at 1159 – a defect that the court ultimately characterized as a “minor typographical error.” Id. at 1161. Thus, the statement quoted is clearly taken from a case falling into the third category described above (one involving “minor discrepancies in the notice of sale”), not one involving what Singer held to be a fundamental error.⁴

Similarly, RM Lifestyles and Reynolds each state that a trustee’s sale should be set aside “only in cases which reach unjust extremes.” 2011 UT App 290, ¶ 16; 2012 UT App 206, ¶ 15. For this proposition, RM Lifestyles cites Thomas v. Johnson, 801 P.2d 186, 188 (Utah Ct. App. 1990), which in turn cited Concepts, see id., and which involved only a challenge to the manner in which the sale was conducted – namely, the trustee’s acceptance of a bid offering to pay “fair market value” (rather than a specific dollar amount) for the property. The court rejected this challenge, holding that the statute was satisfied by the bid and “find[ing] no evidence that [the

⁴ Significantly, Concepts actually reiterates the underlying principle from Singer (although with a different focus in mind—namely, the party intended to benefit from statutory notice requirements), that “[t]he maker of the deed of trust with power of sale may condition the exercise of the power upon such conditions as he may describe.” 743 P.2d at 1160 (citing Houston First American Savings v. Musick, 650 S.W.2d 764, 768 (Tex. 1983)) (emphasis omitted). The cited case elaborates, as noted in Concepts, saying that “[t]he grantor of the power [of sale] is entitled to have his directions obeyed; to have the proper notice of sale given; to have it to take place at the time and place, and by the person appointed by him.” 650 S.W.2d at 768 (emphasis added and citation omitted).

debtor's] interests were sacrificed by the trustee's action" Id. at 189.⁵ RM Lifestyles and Reynolds also cite Timm v. Dewsnup, 2003 UT 47, ¶¶ 36-37, 86 P.3d 699, which again merely reiterated the holding of Concepts, and which, like Concepts, involved – as pertinent here – only a challenge to the sufficiency of the notice of the sale given to the debtor. Id.

Thus, none of the cases cited to support the prerequisites identified in RM Lifestyles and Reynolds involved "a purported sale by an unauthorized person," which is to be distinguished from cases in which there is merely "a question of procedural irregularities in a trustee's sale." Citizens Bank of Edina v. W. Quincy Auto Auction, Inc., 742 S.W.2d 161, 165 (Mo. 1987) (en banc). Where, as here (and as in Singer), there is "a completely unauthorized sale conducted by an individual who was powerless to sell the property," it is irrelevant "[w]hether in point of fact, the sale of the property was conducted in all respects judiciously or not, or in a manner most conducive to the interests of those concerned," although "[t]his would be a legitimate inquiry in a proceeding to set aside a sale made under the power conferred by the instrument. . . ." Id. (citation omitted). This conclusion is inconsistent with Reynolds, but that case must yield to Singer based on the principle that "[t]he Court of Appeals simply cannot overrule the law as

⁵ Thomas also included a footnote summarily rejecting the debtor's additional challenge in that case to the trustee's acceptance of a credit bid rather than "requir[ing] the bid to be 'payable in lawful money of the United States at the time of sale,' as allegedly instructed in the trust deed"—a provision that, if it existed, the court held to be satisfied by the credit bid. See 801 P.2d at 188 n.1.

announced by the highest court in the state, even if the announcement was made decades ago.”

Sentry Investigations, Inc. v. Davis, 841 P.2d 732, 735 (Utah Ct. App. 1992).

Plaintiff also relies on the holding in Reynolds that, “[a]bsent such exceptional circumstances [i.e., harm to the interests of the debtor, fraud, unfair dealing, or unjust extremes], the proper remedy is to seek an injunction prior to a sale, which allows a debtor to challenge irregularities and protect her rights before the sale is completed and a trustee's deed is executed and delivered to the purchaser.” 2012 UT App 206, ¶ 15 (citing RM Lifestyles, 2011 UT App 290, ¶ 15 n.4 (internal citation omitted)) (emphasis added). Because, as just discussed, Reynolds’s requirement of harm, etc. as a prerequisite to setting aside a trustee’s sale must be limited (under Singer) to those cases involving defects rendering a sale voidable rather than void, the companion requirement that challenges to irregularities be raised via a pre-sale injunction proceeding, except where harm, etc., is shown, must likewise be so limited. To hold otherwise would be to say that a debtor need not attempt to obtain a pre-sale injunction in a case in which the sale is only voidable (because it may be set aside thereafter by a showing of harm, etc.), but that such an attempt must be made where the sale is utterly void.

Additionally, Plaintiff argues that “the doctrines of waiver and estoppel bar Defendants’ claim that the Foreclosure Sale is void and should be set aside.” Mem. Opp. at 9. To support this argument, Plaintiff observes that

Defendants did not challenge the Foreclosure Sale before it occurred. It is

undisputed that the Foreclosure Sale took place in January 2010. It is also undisputed that although the Defendants in this case filed a class-action suit in federal court in November 2010, they have not prosecuted their claims in the Federal Action since the ruling in *Garrett* in September 2013, which ruled that a foreclosure sale done in Utah by ReconTrust was valid. It is undisputed that Defendants filed a Motion to Set Aside the Foreclosure Sale in the Prior State Case in July 2010, but failed to prosecute this claim, and allowed the case to be dismissed on June 21, 2012. Importantly, although the Defendants in this case were, or are, parties in the Prior State Action and Federal Action respectively, they failed to ever record a lis pendens on the Property. It is also undisputed that Defendants have failed to pay any value, and have failed to pay property taxes, for the Property since June 2009. Like the mortgagor in *American Falls Canal Securities Co.*, the Defendants in this case have failed to properly and timely assert their rights to defeat the rights of Plaintiff, an innocent bona fide purchaser. Defendants have knowingly and silently sat on any alleged rights they have to the Property, and most importantly, have allowed Plaintiff to expend money purchasing the Property. Defendants do not claim they had the ability to cure the default and stop the Foreclosure Sale. Defendants did not challenge the sale before it occurred, and therefore, the Trustee's Deed from ReconTrust must remain valid.[FN]1

[FN]1 Even if the court considered a trustee's deed voidable, "[a] voidable deed . . . 'is unassailable in the hands of a [bona fide purchaser].'" See *SEC v. Madison Real Estate Group, LLC*, 647 F. Supp. 2d 1271, 1279 (D. Utah 2009) (citation omitted).

Mem. Opp. at 9-10.

In the American Falls case cited, the Supreme Court recognized that "a party otherwise in position to object to a mortgage foreclosure sale may well be precluded from doing so based upon conduct sufficient to bring into operation the doctrines of waiver and estoppel." Am. Falls Canal Sec. Co. v. Am. Sav. & Loan Ass'n, 775 P.2d 412, 414 (Utah 1989) (footnotes omitted). The court indicated, however, that a party may not waive the right to challenge, or be estopped

from challenging, a sale wholly void, see id. (“[E]xcept where non-compliance results in a complete legal nullity, one otherwise entitled to object to a judicial sale in mortgage foreclosure proceedings as involving a defect or irregularity based upon a lack of or insufficient process, notice, advertisement or other designation with respect to the sale, designed for his benefit and protection, may waive, or be estopped from asserting, such defect or irregularity.”) (emphasis added and citation omitted); see also Ockey v. Lehmer, 2008 UT 37, ¶ 22, 189 P.3d 51, 57 (distinguishing “. . . between an illegal or void contract and one merely ultra vires,” which could become enforceable by ratification or estoppel”) (quoting Millard Cnty. Sch. Dist. v. State Bank of Millard Cnty., 80 Utah 170, 14 P.2d 967, 971-72 (1932)), which, under Singer, is what results from a trustee’s sale conducted by one not having authority.⁶

Moreover, even where it has been said that “[a] want of authority in the trustee making the sale may be waived by the parties in interest, or they may estop themselves by their conduct to object to such want of authority, at least as against the purchaser at the sale,” 59 C.J.S. Mortgages § 764 (WestlawNext database updated June 2014) (citing Reynolds v. Kroff, 144 Mo. 433, 46 S.W. 424 (1898); Spencer v. Hawkins, 39 N.C. 288, 4 Ired. Eq. 288, 1846 WL 1113

⁶ Plaintiff relies on Ockey, which held that a conveyance effected by trustees after the termination of the trust “was merely voidable” rather than void, see 2008 UT 37, ¶ 24, and on Millard County, which held that securities issued by a bank in excess of its statutory authority were likewise only voidable, see id., ¶ 22, but these cases did not involve a trustee’s foreclosure sale, in which context the clear rule is shown by Singer and the other authorities discussed above.

(1846); Schwarz v. Kellogg, 243 S.W. 179 (Mo. 1922)), the conduct giving rise to the waiver or estoppel in the cited cases was considerably more affirmative than anything Defendants are alleged to have done here.

Certainly, Defendants' failure to pay taxes or any other value for the property since June 2009,⁷ while remaining in possession, is understandably frustrating for the foreclosure sale purchaser (or its successor in interest), but it is not inconsistent with their claim that the sale is void,⁸ nor can their failure to affirmatively pursue judicial vindication of their position during this period properly be so characterized.⁹ Cf. Hammon v. Hatfield, 192 Minn. 259, 261, 256

⁷ At trial, Mr. Adamson actually acknowledged not having made payments since December 2008, explaining that, since April 2010, their lender refused to accept any payments.

⁸ Indeed, under the circumstances, it would be the making of payments to the purchaser at the sale, or to its successor in interest, that would be inconsistent with Defendants' claim.

⁹ Defendants' federal class-action lawsuit (initiated in November 2010), was stayed pending the outcome of Garrett v. ReconTrust Co., N.A., 546 F. App'x 736 (10th Cir. 2013) (which, contrary to Plaintiff's suggestion, did not unqualifiedly hold "that ReconTrust had the authority to act as a trustee in Utah, and therefore, the foreclosure sale that took place in the Garrett case was valid," Mem. Opp. at 3), and appears to remain pending. Resolution of the "Prior State Case" (case number 100501437 in this court) is difficult to follow. This was an unlawful detainer action filed against Defendants by Plaintiff's predecessor in interest, and appears to have been dismissed due to the failure of both sides to appear at a hearing on or about June 19, 2012. (The Order of Dismissal is a minute entry for a hearing that appears to have been held on June 19, 2012 (the date of the caption), but the signature line on the order is dated June 20, 2012, which is also the file stamp date, and the order was filed in CORIS on June 21, 2012.) However, the parties in the case had previously stipulated to continue the scheduled trial "without date," an order to that effect was entered on November 17, 2011, and no prior notice of any hearing scheduled thereafter appears in CORIS.

and Whitman went as far as to assert that “the conclusive impact” of such statutes should be limited “to procedural defects in the foreclosure process,” consistent with the likely legislative intent. See Grant S. Nelson & Dale A. Whitman, Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act, 53 Duke L.J. 1399, 1506-1507 (2004).

Although this suggested bright-line limitation did not find its way into the most recent version of Nelson and Whitman’s treatise, it appears to accurately reflect how these “conclusive” statutory presumptions should be understood. See Main I Ltd. P’ship v. Venture Capital Const. & Dev. Corp., 154 Ariz. 256, 260, 741 P.2d 1234, 1238 (Ariz. Ct. App. 1987) (observing, with reference to an Arizona conclusive presumption statute similar to that of Utah, and without apparent disagreement, that “[w]hen the California cases hold that recitals in a deed of trust are conclusive, they qualify that they are conclusive ‘in the absence of grounds for equitable relief,’” but finding equitable relief inappropriate in a case where there was no “fraud, misrepresentation, . . . concealment,” bad faith, or breach of fiduciary duty) (emphasis added and citation omitted). Among the traditional grounds for equitable relief not specifically mentioned in Main I is, as previously indicated, the absence of a power of sale in the party conducting such sale. See 5 Tiffany Real Prop. § 1550 (3d ed.) (WestlawNext database updated September 2013) (“It appears that the sale will ordinarily be set aside in equity on grounds on which it would have been previously enjoined, as for instance where the debt never existed, or has been extinguished, or was conducted by a party without authority to do so, or where the notice of sale was substantially

Plaintiff also argues that the statutory remedy set forth in Utah Code section 57-1-23.5 is exclusive, but this section was not added until 2011, the year after the sale at issue here, and Plaintiff has made no argument to show its retroactive applicability.

Finally, Plaintiff stresses that it is a bona fide purchaser for value. Assuming that to be true,¹⁰ however, Singer clearly holds that such status cannot validate a void sale. This determination is not altered by Utah Code section 57-1-28's provision stating that trust deed "recitals of compliance with the requirements of Sections 57-1-19 through 57-1-36 relating to the exercise of the power of sale and sale of the property described in the trustee's deed" "are conclusive evidence in favor of bona fide purchasers and encumbrancers for value and without notice." Utah Code Ann. § 57-1-28(2)(c)(ii).

For obvious reasons, such provisions cannot be taken completely at face value. See Nelson & Whitman § 7.22 at 982 (describing "[t]he literal language of this . . . type of statute" as "breathhtakingly broad in its impact on BFPs" as it "arguably applies even when the mortgagee had no substantive right to foreclose," such as where "a lender forecloses though the secured obligation is not in default or if the mortgage is forged" – a result that would be "fundamentally unfair and is probably legislatively unintended"). In an earlier treatment of the subject, Nelson

¹⁰ Such an assumption may be unduly generous, given that Defendants have remained in possession of the property challenging the validity of the sale at all times since the sale, thereby giving notice to Plaintiff, prior to Plaintiff's purchase, of the claimed defect in the exercise of the power of sale.

and Whitman went as far as to assert that “the conclusive impact” of such statutes should be limited “to procedural defects in the foreclosure process,” consistent with the likely legislative intent. See Grant S. Nelson & Dale A. Whitman, Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act, 53 Duke L.J. 1399, 1506-1507 (2004).

Although this suggested bright-line limitation did not find its way into the most recent version of Nelson and Whitman’s treatise, it appears to accurately reflect how these “conclusive” statutory presumptions should be understood. See Main I Ltd. P’ship v. Venture Capital Const. & Dev. Corp., 154 Ariz. 256, 260, 741 P.2d 1234, 1238 (Ariz. Ct. App. 1987) (observing, with reference to an Arizona conclusive presumption statute similar to that of Utah, and without apparent disagreement, that “[w]hen the California cases hold that recitals in a deed of trust are conclusive, they qualify that they are conclusive ‘in the absence of grounds for equitable relief,’” but finding equitable relief inappropriate in a case where there was no “fraud, misrepresentation, . . . concealment,” bad faith, or breach of fiduciary duty) (emphasis added and citation omitted). Among the traditional grounds for equitable relief not specifically mentioned in Main I is, as previously indicated, the absence of a power of sale in the party conducting such sale. See 5 Tiffany Real Prop. § 1550 (3d ed.) (WestlawNext database updated September 2013) (“It appears that the sale will ordinarily be set aside in equity on grounds on which it would have been previously enjoined, as for instance where the debt never existed, or has been extinguished, or was conducted by a party without authority to do so, or where the notice of sale was substantially

defective.”) (emphasis added and footnotes omitted). Thus, the court concludes that the protection afforded to BFPs by Utah Code section 57-1-28 is not intended to extend, and does not extend, to protect against defects traditionally viewed as fundamental, such as the one at issue here.

For these reasons, the court holds that Plaintiff has not overcome Defendants’ defense that there has been no “disposition of the property by a trustee’s sale,” as required under Utah Code section 78B-6-802.5, and accordingly dismisses this unlawful detainer action.

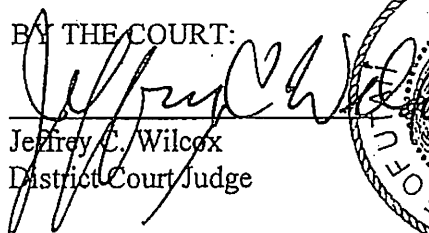
ORDER

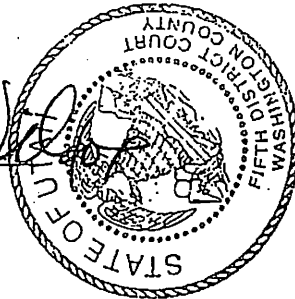
For the foregoing reasons, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Plaintiffs’ unlawful detainer action is dismissed.

Dated this 2nd day of September, 2014.

BY THE COURT:


Jeffrey C. Wilcox
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 140500067 by the method and on the date specified.

EMAIL: JOHN C BARLOW

EMAIL: BRAD G DEHAAN

Date: 09/02/2014

/s/ TIPPY LASTOWSKI

Deputy Court Clerk



LUNDBERG
associates
established 1991

FILED
FIFTH DISTRICT COURT
2014-AUG 14 AM 11:30

WASHINGTON COUNTY

BY _____

August 12, 2014

Honorable Jeffrey C. Wilcox
St. George Courthouse
206 West Tabernacle
St. George, UT 84770

Re: Case No. 140500067
Property Address: 70 West Orchard Lane, Washington, UT 84780
L&A Case No. 14-40881/VV

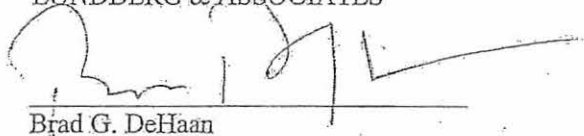
Dear Honorable Jeffrey C. Wilcox:

Per your request, please find enclosed a certified copy of the Trust Deed in the above-matter. It is my understanding that the Trust Deed will be entered as Plaintiff's exhibit #4.

Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

LUNDBERG & ASSOCIATES



Brad G. DeHaan

cc: John Christian Barlow
encl.

After recording please return to:
GUILD MORTGAGE COMPANY - ATTN: DMD

[Company Name]

[Name of Natural Person]

9160 GRAMERCY DRIVE

[Street Address]

SAN DIEGO, CA 92123

[City, State, Zip Code]

[Space Above This Line For Recording Date]

FILED
FBI DISTRICT COURT
2014 AUG 14 AM 11:30

DOC # 20070044838

Trust Deed Page 1 of 10
Russell Shirts Washington County Recorder
09/06/2007 03:35:39 PM Fee \$ 28.00
By SOUTHERN UTAH TITLE CO



DEED OF TRUST

FHA Case No.
521-6439636-703-203(b)
MIN: 100019980210000253

THIS DEED OF TRUST ("Security Instrument") is given on August 31, 2007
The trustor is SAMUEL D. ADAMSON, A MARRIED MAN, AS HIS SOLE AND SEPARATE
PROPERTY ("Borrower").
The trustee is SCOTT LUNDBERG, A MEMBER OF THE UTAH STATE BAR ("Trustee").
The lender is GUILD MORTGAGE COMPANY, A CALIFORNIA CORPORATION
which is organized and existing under the laws of California, and whose address is
9160 GRAMERCY DRIVE, SAN DIEGO, CA 92123 ("Lender").

The beneficiary under this Security Instrument is Mortgage Electronic Registration Systems, Inc. ("MERS").
MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns.
MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box
2026, Flint, MI 48501-2026, tel. (888) 679-MERS. Borrower owes Lender the principal sum of
two hundred fifty five thousand seven hundred eighty and NO/100ths
Dollars (U.S. \$ 255,780.00). This debt is evidenced by Borrower's note dated the same date
as this Security Instrument ("Note"), which provides for monthly payments, with the full debt, if not paid earlier,
due and payable on September 1, 2037. This Security Instrument secures to Lender: (a) the
repayment of the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the
Note; (b) the payment of all other sums, with interest, advanced under Paragraph 7 to protect the security of this
Security Instrument; and (c) the performance of Borrower's covenants and agreements under this Security
Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power
of sale, the following described property located in WASHINGTON County, Utah:

Loan No: 802-1000025

FHA Utah Security Instrument (MERS Modified)
—THE COMPLIANCE SOURCE, INC.—
www.compliance-source.com

Page 1 of 8



54301UT 02/01
©2002, The Compliance Source, Inc.



A-21

ALL OF LOT THIRTY ONE (31), THE FIELDS - PHASE 1, ACCORDING TO THE OFFICIAL
PLAT THEREOF, ON FILE IN THE OFFICE OF THE RECORDER OF WASHINGTON COUNTY,
STATE OF UTAH

which currently has the address of 70 W. ORCHARD LANE

WASHINGTON
[City]

[Street]
Utah 84780-
[Zip Code]

("Property Address"):

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property". Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. **Payment of Principal, Interest and Late Charge.** Borrower shall pay when due the principal of and interest on, the debt evidenced by the Note and late charges due under the Note.

2. **Monthly Payment of Taxes, Insurance and Other Charges.** Borrower shall include in each monthly payment, together with the principal and interest as set forth in the Note and any late charges, a sum for (a) taxes and special assessments levied or to be levied against the Property, (b) leasehold payments or ground rents on the Property, and (c) premiums for insurance required under Paragraph 4. In any year in which the Lender must pay a mortgage insurance premium to the Secretary of Housing and Urban Development ("Secretary"), or in any year in which such premium would have been required if Lender still held the Security Instrument, each monthly payment shall also include either: (i) a sum for the annual mortgage insurance premium to be paid by Lender to the Secretary, or (ii) a monthly charge instead of a mortgage insurance premium if this Security Instrument is held by the Secretary, in a reasonable amount to be determined by the Secretary. Except for the monthly charge by the Secretary, these items are called "Escrow Items" and the sums paid to Lender are called "Escrow Funds."

Lender may, at any time, collect and hold amounts for Escrow Items in an aggregate amount not to exceed the maximum amount that may be required for Borrower's escrow account under the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.* and implementing regulations, 24 CFR Part 3500, as they may be amended from time to time ("RESPA"), except that the cushion or reserve permitted by RESPA for unanticipated disbursements or disbursements before Borrower's payments are available in the account may not be based on amounts due for the mortgage insurance premium.

If the amounts held by Lender for Escrow Items exceed the amounts permitted to be held by RESPA, Lender shall account to Borrower for the excess funds as required by RESPA. If the amounts of funds held by Lender at any time are not sufficient to pay the Escrow Items when due, Lender may notify the Borrower and require Borrower to make up the shortage as permitted by RESPA.

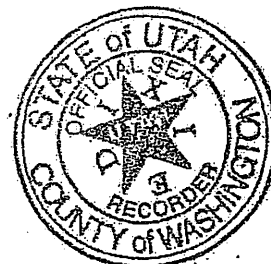
Loan No: 802-1000025

FHA Utah Security Instrument (MERS Modified).
— THE COMPLIANCE SOURCE, INC. —
www.compliance-source.com

Page 2 of 8



54301 UT 02/01
©2002, The Compliance Source, Inc.



The Escrow Funds are pledged as additional security for all sums secured by this Security Instrument. If Borrower tenders to Lender the full payment of all such sums, Borrower's account shall be credited with the balance remaining for all installment items (a), (b), and (c) and any mortgage insurance premium installment that Lender has not become obligated to pay to the Secretary, and Lender shall promptly refund any excess funds to Borrower. Immediately prior to a foreclosure sale of the Property or its acquisition by Lender, Borrower's account shall be credited with any balance remaining for all installments for items (a), (b), and (c).

3. Application of Payments. All payments under Paragraphs 1 and 2 shall be applied by Lender as follows:

First, to the mortgage insurance premium to be paid by Lender to the Secretary or to the monthly charge by the Secretary instead of the monthly mortgage insurance premium;

Second, to any taxes, special assessments, leasehold payments or ground rents, and fire, flood and other hazard insurance premiums, as required;

Third, to interest due under the Note;

Fourth, to amortization of the principal of the Note; and

Fifth, to late charges due under the Note.

4. Fire, Flood and Other Hazard Insurance. Borrower shall insure all improvements on the Property, whether now in existence or subsequently erected, against any hazards, casualties, and contingencies, including fire, for which Lender requires insurance. This insurance shall be maintained in the amounts and for the periods that Lender requires. Borrower shall also insure all improvements on the Property, whether now in existence or subsequently erected, against loss by floods to the extent required by the Secretary. All insurance shall be carried with companies approved by Lender. The insurance policies and any renewals shall be held by Lender and shall include loss payable clauses in favor of, and in a form acceptable to, Lender.

In the event of loss, Borrower shall give Lender immediate notice by mail. Lender may make proof of loss if not made promptly by Borrower. Each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Lender, instead of to Borrower and to Lender jointly. All or any part of the insurance proceeds may be applied by Lender, at its option, either (a) to the reduction of the indebtedness under the Note and this Security Instrument, first to any delinquent amounts applied in the order of Paragraph 3, and then to prepayment of principal, or (b) to the restoration or repair of the damaged property. Any application of the proceeds to the principal shall not extend or postpone the due date of the monthly payments which are referred to in Paragraph 2, or change the amount of such payments. Any excess insurance proceeds over an amount required to pay all outstanding indebtedness under the Note and this Security Instrument shall be paid to the entity legally entitled thereto.

In the event of foreclosure of this Security Instrument or other transfer of title to the Property that extinguishes the indebtedness, all right, title and interest of Borrower in and to insurance policies in force shall pass to the purchaser.

5. Occupancy, Preservation, Maintenance and Protection of the Property; Borrower's Loan Application; Leaseholds. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within sixty days after the execution of this Security Instrument (or within sixty days of a later sale or transfer of the Property) and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender determines that requirement will cause undue hardship for Borrower, or unless extenuating circumstances exist which are beyond Borrower's control. Borrower shall notify Lender of any extenuating circumstances. Borrower shall not commit waste or destroy damage or substantially change the Property or allow the Property to deteriorate, reasonable wear and tear excepted. Lender may inspect the Property if the Property is vacant or abandoned or the loan is in default. Lender may take reasonable action to protect and preserve such vacant or abandoned Property. Borrower shall also be in default if Borrower, during the loan application process, gave materially false or inaccurate information or statements to Lender (or failed to provide Lender with any material information) in connection with the loan evidenced by the Note, including, but not limited to, representations concerning Borrower's occupancy of the Property as a principal residence. If this Security Instrument is on leasehold, Borrower shall comply with the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and fee title shall not be merged unless Lender agrees to the merger in writing.

6. Condemnation. The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of any part of the Property, or for conveyance in place of condemnation, are hereby assigned and shall be paid to Lender to the extent of the full amount of the indebtedness that remains unpaid under the Note and this Security Instrument. Lender shall apply such proceeds to the reduction of the indebtedness

Loan No: 802-1000025

FHA Utah Security Instrument (MERS Modified)

—THE COMPLIANCE SOURCE, INC.—

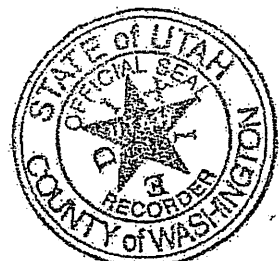
www.compliance-source.com

Page 3 of 8



54501 UT 02/02
©2002, The Compliance Source, Inc.

58



A-23

under the Note and this Security Instrument, first to any delinquent amounts applied in the order provided in Paragraph 3, and then to prepayment of principal. Any application of the proceeds to the principal shall not extend or postpone the due date of the monthly payments, which are referred to in Paragraph 2, or change the amount of such payments. Any excess proceeds over an amount required to pay all outstanding indebtedness under the Note and this Security Instrument shall be paid to the entity legally entitled thereto.

7. Charges to Borrower and Protection of Lender's Rights in the Property. Borrower shall pay all governmental or municipal charges, fines and impositions that are not included in Paragraph 2. Borrower shall pay these obligations on time directly to the entity which is owed the payment. If failure to pay would adversely affect Lender's interest in the Property, upon Lender's request Borrower shall promptly furnish to Lender receipts evidencing these payments.

If Borrower fails to make these payments or the payments required by Paragraph 2, or fails to perform any other covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, for condemnation or to enforce laws or regulations), then Lender may do and pay whatever is necessary to protect the value of the Property and Lender's rights in the Property, including payment of taxes, hazard insurance and other items mentioned in Paragraph 2.

Any amounts disbursed by Lender under this Paragraph shall become an additional debt of Borrower and be secured by this Security Instrument. These amounts shall bear interest from the date of disbursement, at the Note rate, and at the option of Lender, shall be immediately due and payable.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender; (b) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings which in the Lender's opinion operate to prevent the enforcement of the lien; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which may attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Borrower shall satisfy the lien or take one or more of the actions set forth above within 10 days of the giving of notice.

8. Fees. Lender may collect fees and charges authorized by the Secretary.

9. Grounds for Acceleration of Debt.

(a) **Default.** Lender may, except as limited by regulations issued by the Secretary in the case of payment defaults, require immediate payment in full of all sums secured by this Security Instrument if:

(i) Borrower defaults by failing to pay in full any monthly payment required by this Security Instrument prior to or on the due date of the next monthly payment, or

(ii) Borrower defaults by failing, for a period of thirty days, to perform any other obligations contained in this Security Instrument.

(b) **Sale Without Credit Approval.** Lender shall, if permitted by applicable law (including section 341(d) of the Garn-St Germain Depository Institutions Act of 1982, 12 U.S.C. § 1701j-3(d)) and with the prior approval of the Secretary, require immediate payment in full of all the sums secured by this Security Instrument if:

(i) All or part of the Property, or a beneficial interest in a trust owning all or part of the Property, is sold or otherwise transferred (other than by devise or descent), and

(ii) The Property is not occupied by the purchaser or grantee as his or her principal residence, or the purchaser or grantee does so occupy the Property, but his or her credit has not been approved in accordance with the requirements of the Secretary.

(c) **No Waiver.** If circumstances occur that would permit Lender to require immediate payment in full, but Lender does not require such payments, Lender does not waive its rights with respect to subsequent events.

(d) **Regulations of HUD Secretary.** In many circumstances regulations issued by the Secretary will limit Lender's rights, in the case of payment defaults, to require immediate payment in full and foreclose if not paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary.

(e) **Mortgage Not Insured.** Borrower agrees that if this Security Instrument and the Note are not determined to be eligible for insurance under the National Housing Act within 60 days from the date hereof, Lender may, at its option require immediate payment in full of all sums secured by this Security Instrument. A written statement of any authorized agent of the Secretary dated subsequent to 60 days from the date hereof, declining to insure this Security

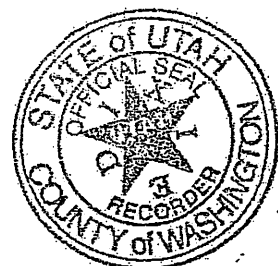
Loan No: 802-1000025

FHA Utah Security Instrument (MERS Modified)
—THE COMPLIANCE SOURCE, INC.—
www.compliance-source.com

Page 4 of 8



54301UT 02/02
©2002, The Compliance Source, Inc.



Instrument and the Note, shall be deemed conclusive proof of such ineligibility. Notwithstanding the foregoing, this option may not be exercised by Lender when the unavailability of insurance is solely due to Lender's failure to remit a mortgage insurance premium to the Secretary.

10. Reinstatement. Borrower has a right to be reinstated if Lender has required immediate payment in full because of Borrower's failure to pay an amount due under the Note or this Security Instrument. This right applies even after foreclosure proceedings are instituted. To reinstate the Security Instrument, Borrower shall tender, in a lump sum all amounts required to bring Borrower's account current including, to the extent they are obligations of Borrower under this Security Instrument, foreclosure costs and reasonable and customary attorneys' fees and expenses properly associated with the foreclosure proceeding. Upon reinstatement by Borrower, this Security Instrument and the obligations that it secures shall remain in effect as if Lender had not required immediate payment in full. However, Lender is not required to permit reinstatement if: (i) Lender has accepted reinstatement after the commencement of foreclosure proceedings within two years immediately preceding the commencement of a current foreclosure proceeding, (ii) reinstatement will preclude foreclosure on different grounds in the future, or (iii) reinstatement will adversely affect the priority of the lien created by this Security Instrument.

11. Borrower Not Released; Forbearance by Lender Not a Waiver. Extension of the time of payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to any successor in interest of Borrower shall not operate to release the liability of the original Borrower or Borrower's successor in interest. Lender shall not be required to commence proceedings against any successor in interest or refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or Borrower's successors in interest. Any forbearance by Lender in exercising any right or remedy shall not be a waiver of or preclude the exercise of any right or remedy.

12. Successors and Assigns Bound; Joint and Several Liability; Co-Signers. The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower, subject to the provisions of Paragraph 9(b). Borrower's covenants and agreements shall be joint and several. Any Borrower who co-signs this Security Instrument but does not execute the Note: (a) is co-signing this Security Instrument only to mortgage, grant and convey that Borrower's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower may agree to extend, modify, forbear or make any accommodations with regard to the term of this Security Instrument or the Note without that Borrower's consent.

13. Notices. Any notice to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Borrower designates by notice to Lender. Any notice to Lender shall be given by first class mail to Lender's address stated herein or any address Lender designates by notice to Borrower. Any notice provided for in this Security Instrument shall be deemed to have been given to Borrower or Lender when given as provided in this paragraph.

14. Governing Law; Severability. This Security Instrument shall be governed by Federal law and the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Security Instrument or the Note conflicts with applicable law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision. To this end the provisions of this Security Instrument and the Note are declared to be severable.

15. Borrower's Copy. Borrower shall be given one conformed copy of the Note and of this Security Instrument.

16. Hazardous Substances. Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property that is in violation of any Environmental Law. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property.

Borrower shall promptly give Lender written notice of any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge. If Borrower learns, or is notified by any governmental or regulatory authority, that any removal or other remediation of any Hazardous Substances affecting the

Loan No: 802-1000025

FHA Utah Security Instrument (MERS Modified)

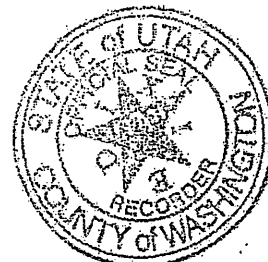
THE COMPLIANCE SOURCE, INC.
www.compliance-source.com

Page 5 of 8

58



5001UT 02/02
©2002, The Compliance Source, Inc.



Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law.

As used in this Paragraph 16, "Hazardous Substances" are those substances defined as toxic or hazardous substances by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials. As used in the Paragraph 16, "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

17. **Assignment of Rents.** Borrower unconditionally assigns and transfers to Lender all the rents and revenues of the Property. Borrower authorizes Lender or Lender's agents to collect the rents and revenues and hereby directs each tenant of the Property to pay the rents to Lender or Lender's agents. However, prior to Lender's notice to Borrower of Borrower's breach of any covenant or agreement in the Security Instrument, Borrower shall collect and receive all rents and revenues of the Property as trustee for the benefit of Lender and Borrower. This assignment of rents constitutes an absolute assignment and not an assignment for additional security only.

If Lender gives notice of breach to Borrower: (a) all rents received by Borrower shall be held by Borrower as trustee for benefit of Lender only, to be applied to the sums secured by the Security Instrument; (b) Lender shall be entitled to collect and receive all of the rents of the Property; and (c) each tenant of the Property shall pay all rents due and unpaid to Lender or Lender's agent on Lender's written demand to the tenant.

Borrower has not executed any prior assignment of the rents and has not and will not perform any act that would prevent Lender from exercising its rights under this Paragraph 17.

Lender shall not be required to enter upon, take control of or maintain the Property before or after giving notice of breach to Borrower. However, Lender or a judicially appointed receiver may do so at any time there is a breach. Any application of rents shall not cure or waive any default or invalidate any other right or remedy of Lender. This assignment of rents of the Property shall terminate when the debt secured by the Security Instrument is paid in full.

18. **Foreclosure Procedure.** If Lender requires immediate payment in full under Paragraph 9, Lender may invoke the power of sale and any other remedies permitted by applicable law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Paragraph 18, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If the power of sale is invoked, Trustee shall execute a written notice of the occurrence of an event of default and of the election to cause the Property to be sold and shall record such notice in each county in which any part of the Property is located. Lender or Trustee shall mail copies of such notice in the manner prescribed by applicable law to Borrower and to the other persons prescribed by applicable law. In the event Borrower does not cure the default within the period then prescribed by applicable law, Trustee shall give public notice of the sale to the persons and in the manner prescribed by applicable law. After the time required by applicable law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines (but subject to any statutory right of Borrower to direct the order in which the Property, if consisting of several known lots or parcels, shall be sold). Trustee may, in accordance with applicable law, postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it or to the county clerk of the county in which the sale took place.

If the Lender's interest in this Security Instrument is held by the Secretary and the Secretary requires immediate payment in full under Paragraph 9, the Secretary may invoke the nonjudicial power of

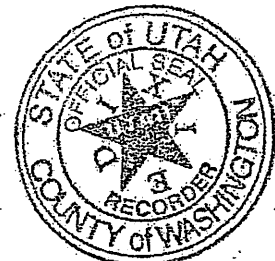
Loan No: 802-1000025

FHA Utah Security Instrument (MERS Modified)
—THE COMPLIANCE SOURCE, INC.—
www.compliance-source.com

Page 6 of 8



54301 UT 02/02
©2002, The Compliance Source, Inc.



sale provided in the Single Family Mortgage Foreclosure Act of 1994 ("Act") (12 U.S.C. § 3751 et seq.) by requesting a foreclosure commissioner designated under the Act to commence foreclosure and to sell the Property as provided in the Act. Nothing in the preceding sentence shall deprive the Secretary of any rights otherwise available to a Lender under this Paragraph 18 or applicable law.

19. **Reconveyance.** Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs. Lender may charge such person or persons a fee for reconveying the Property, but only if the fee is paid to a third party (such as the Trustee) for services rendered and the charging of the fee is permitted under applicable law.

20. **Substitute Trustee.** Lender, at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by applicable law.

21. **Request for Notices.** Borrower requests that copies of the notices of default and sale be sent to Borrower's address which is the Property Address.

22. **Riders to this Security Instrument.** If one or more riders are executed by Borrower and recorded together with this Security Instrument, the covenants of each such rider shall be incorporated into and shall amend and supplement the covenants and agreements of this Security Instrument as if the rider(s) were a part of this Security Instrument. [Check applicable box(es)].

- | | |
|--|--|
| <input type="checkbox"/> Condominium Rider | <input type="checkbox"/> Graduated Payment Rider |
| <input checked="" type="checkbox"/> Planned Unit Development Rider | <input type="checkbox"/> Growing Equity Rider |
| <input type="checkbox"/> Other [specify] | |

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any rider(s) executed by Borrower and recorded with it.

Witnesses:

SDC (Seal)
SAMUEL D. ADAMSON -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

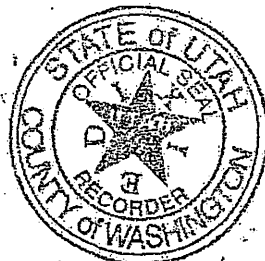
Loan No: 802-1000025

FHA Utah Security Instrument (MERS Modified)
—THE COMPLIANCE SOURCE, INC.—
www.compliance-source.com

Page 7 of 8



54301 UT 02/02
©2002, The Compliance Source, Inc.



A-27

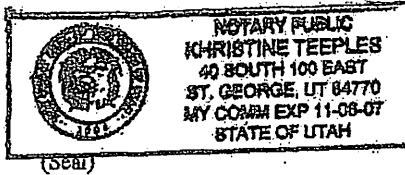
State of Utah
County of WASHINGTON

§
§
§

The foregoing instrument was acknowledged before me this
(date) by SAMUEL D. ADAMSON

8/31/2007

(name(s) of person(s) acknowledged.)



Christine Teeple
Notary Public
Christine Teeple
Printed Names

My Commission Expires: *n/e/ot*

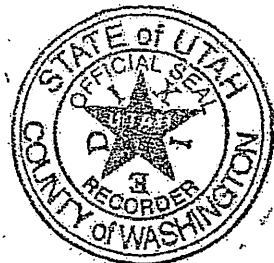
Loan No: 802-1000025

FHA Utah Security Instrument (MERS Modified)
—THE COMPLIANCE SOURCE, INC.—
www.compliance-source.com

Page 8 of 8



5401UT 02/02
©2002, The Compliance Source, Inc.



FHA Case No. 521-6439630-703

FHA PLANNED UNIT DEVELOPMENT RIDER

THIS PLANNED UNIT DEVELOPMENT RIDER is made this 31st day of August, 2007, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust or Security Deed ("Security Instrument") of the same date given by the undersigned ("Borrower") to secure Borrower's Note to GUILD MORTGAGE COMPANY, A CALIFORNIA CORPORATION

("Lender") of the same date and covering the Property described in the Security Instrument and located at:
70 W. ORCHARD LANE, WASHINGTON, UT 84780
[Property Address]

The Property Address is a part of a planned unit development ("PUD") known as
THE FIELDS

[Name of Planned Unit Development]

PUD COVENANTS: In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

- A. So long as the Owners Association (or equivalent entity holding title to common areas and facilities), acting as trustee for the homeowners, maintains, with a generally accepted insurance carrier, a "master" or "blanket" policy insuring the property located in the PUD, including all improvements now existing or hereafter erected on the mortgaged premises, and such policy is satisfactory to Lender and provides insurance coverage in the amounts, for the periods, and against the hazards Lender requires, including fire and other hazards included within the term "extended coverage" and loss by flood, to the extent required by the Secretary, then: (i) Lender waives the provision in Paragraph 2 of this Security Instrument for the monthly payment to Lender of one-twelfth of the yearly premium installments for hazard insurance on the Property, and (ii) Borrower's obligation under Paragraph 4 of this Security Instrument to maintain hazard insurance coverage on the Property is deemed satisfied to the extent that the required coverage is provided by the Owners Association policy. Borrower shall give Lender prompt notice of any lapse in required hazard insurance coverage and of any loss occurring from a hazard. In the event of a distribution of hazard insurance proceeds in lieu of restoration or repair following a loss to the property or to common areas and facilities of the PUD, any proceeds payable to Borrower are hereby assigned and shall be paid to Lender for application to the sums secured by this Security Instrument, with any excess paid to the entity legally entitled thereto.
- B. Borrower promises to pay all dues and assessments imposed pursuant to the legal instruments creating and governing the PUD.
- C. If Borrower does not pay PUD dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this paragraph C shall become additional debt of Borrower secured by the Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

[Signatures on Following Page]

Loan No: 802-1000025
FHA Planned Unit Development Rider (Multistate)
—THE COMPLIANCE SOURCE, INC.—
www.compliance-source.com

MIN: 100019980210000253

Page 1 of 2



5450eMAU 01/99 Rev. 05/04
©2004, The Compliance Source, Inc.



A-29

BY SIGNING BELOW, Borrower accepts and agrees to the terms and provisions contained in this PUD
Rider.

SDA
SAMUEL D. ADAMSON

(Seal)
Borrower

(Seal)
Borrower

(Seal)
Borrower

(Seal)
Borrower

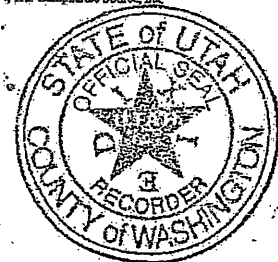
[Space Below This Line For Acknowledgment]

Loan No: 802-1000025
EHA Planned Unit Development Rider (Multistate)
—THE COMPLIANCE SOURCE, INC.—
www.compliance-source.com

Page 2 of 2



54504MD 02/99 Rev. 05/04
©2004, The Compliance Source, Inc.



A-30

Notice of Default Page 1 of 2
 Russell Shirts Washington County Recorder
 06/25/2009 02:34:34 PM Fee \$12.00 By
 Backman FPTP

After Recording Return to:
 RECONTRUST COMPANY, N.A.
 2380 Performance Dr, TX2-985-07-03
 Richardson, TX 75082

TS#: 09-0081584
 TSG#: 5-051603

SPACE ABOVE THIS LINE FOR RECORDER'S USE

NOTICE OF DEFAULT AND ELECTION TO SELL

On or about August 31, 2007, SAMUEL D. ADAMSON, A MARRIED MAN, AS HIS SOLE AND SEPARATE PROPERTY, as Trustor, executed and delivered to SCOTT LUNDBERG, A MEMBER OF THE UTAH STATE BAR, as Trustee, for the benefit of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as Beneficiary, a certain Trust Deed to secure the performance by the Trustor of the obligations under a Promissory Note. The Trust Deed was recorded in the office of the Washington County Recorder, as Instrument No. 20070044838 on September 6, 2007 and covers the following real property:

ALL OF LOT THIRTY ONE (31), THE FIELDS - PHASE 1, ACCORDING TO THE OFFICIAL PLAT THEREOF, ON FILE IN THE OFFICE OF THE RECORDER OF WASHINGTON COUNTY, STATE OF UTAH

Together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property.

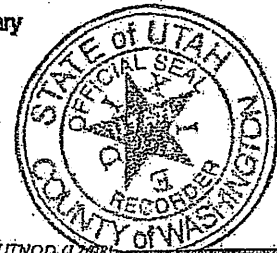
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. is presently the holder of the beneficial interest under the Trust Deed, and RECONTRUST COMPANY, N.A., is the trustee. A breach of an obligation for which the trust property was conveyed as security has occurred. Payments are due for the months of January 2009 through June 2009 in the amount of \$1,680.29 per month, together with any unpaid taxes, insurance and other obligations under the Promissory Note and Trust Deed. Under the provisions of the Promissory Note and Trust Deed, the principal balance of \$252,306.96 is accelerated and now due, together with accruing interest, late charges, costs and trustees' and attorneys' fees. Accordingly, the trustee has elected to sell the property described in the Trust Deed, as provided in Title 57, Chapter 1, Utah Code Annotated (1953), as amended and supplemented.

This is an attempt to collect a debt and any information obtained will be used for that purpose.
 FOR QUESTIONS, CALL (800) 281-8219, Regular Business Hours: Monday - Friday, 8:00a.m. to 5:00p.m., Central Time
 Dated: June 23, 2009

By: RECONTRUST COMPANY, N.A.

Helen Hendriksen, Team Member

Assistant Secretary



UTNOD (12/08)



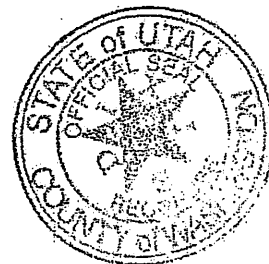
STATE OF Texas
COUNTY OF Dallas

On 6/24/09, before me Christopher A. Williams, personally appeared Helen Hendriksen, known to me (or proved to me on the oath of _____ or through _____) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed.
WITNESS MY HAND AND OFFICIAL SEAL

Notary

Public's

Signature



Trustee's Deed Page 1 of 2
 Russell Shirts Washington County Recorder
 04/05/2010 11:42:32 AM Fee \$12.00 By
 Backman FPTP

RECORDING REQUESTED BY:
 BAC HOME LOANS SERVICING, LP FKA
 COUNTRYWIDE HOME LOANS SERVICING LP

RECORDING REQUESTED BY:
 BAC HOME LOANS SERVICING, LP FKA
 COUNTRYWIDE HOME LOANS SERVICING LP

WHEN RECORDED MAIL DOCUMENT
 TAX STATEMENT TO:
 BAC HOME LOANS SERVICING, LP FKA
 COUNTRYWIDE HOME LOANS SERVICING LP,
 400 COUNTRYWIDE WAY, SV-35, SIMI VALLEY,
 CA 93065

TS#: 09-0081584

TSG# 5-051603

SPACE ABOVE THIS LINE FOR RECORDER'S USE

TRUSTEE'S DEED

This Deed is made by RECONTRUST COMPANY, N.A., as successor Trustee under the hereinafter described Trust Deed, in favor of BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING LP, 400 COUNTRYWIDE WAY SV-35, SIMI VALLEY, CA 93065, as Grantee.

WHEREAS, on August 31, 2007, SAMUEL D. ADAMSON, A MARRIED MAN, AS HIS SOLE AND SEPARATE PROPERTY, as Trustor, executed and delivered to SCOTT LUNDBERG, A MEMBER OF THE UTAH STATE BAR, as Trustee, for the benefit of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as Beneficiary, a certain Trust Deed to secure the performance by said Trustor of his obligations under a Promissory Note. The Trust Deed was recorded in the office of the Recorder of Washington County, State of Utah, on September 6, 2007, as Instrument No. 20070044838, and covered the property described below; and

WHEREAS, breach and default was made under the terms of the Trust Deed in the particulars set forth in the Notice of Default referred to below; and

WHEREAS, RECONTRUST COMPANY, N.A., executed and filed for record in the Office of the County Recorder of Washington County, a written Notice of Default containing an election to sell the trust property, which Notice of Default was recorded on June 25, 2009, as Instrument No. 20090024680; and

WHEREAS RECONTRUST COMPANY, N.A., the successor Trustee in consequence of the declaration of default, election and demand for sale, and in accordance with said Trust Deed, executed the Notice of Trustee's Sale stating that it would sell at public auction to the highest bidder the property therein and hereafter described, and fixing the time and place of said sale as January 14, 2010, at 1:00 PM, of said day, and did cause copies of said notice to be posted for not less than 20 days before the date of sale therein fixed, at the office of the county recorder in the county wherein said property is located, and also in a conspicuous place on the property to be sold; and said successor Trustee did cause a copy of the notice to be published once a week for three consecutive weeks before the date of sale in the ST. GEORGE SPECTRUM; and

WHEREAS, all applicable statutory provisions of the State of Utah and all of the provisions of said Trust Deed have been complied with as to the acts to be performed and the notices to be given; and

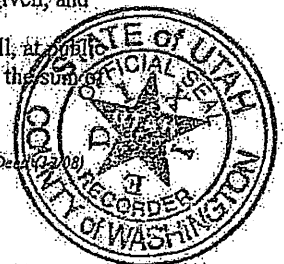
WHEREAS, the successor Trustee did, at the time and place of sale, then and there sell, at public auction, to Grantee above named, being the highest bidder therefor, the property described for the sum of

Tax ID: W-FDS-1-31

Page 1 of 2



UT Trust Deed (12/2/08)



A-33

\$278,530.03.

NOW, THEREFORE, RECONTRUST COMPANY, N.A., successor Trustee, in consideration of the premises recited and of the sum above mentioned, bid and paid by Grantee, the receipt whereof is hereby acknowledged, and by virtue of the authority in it by said Trust Deed, grants and conveys unto Grantee above named, but without any covenant or warranty, express or implied, all of that certain property situated in Washington County, State of Utah, described as follows:

ALL OF LOT THIRTY ONE (31), THE FIELDS - PHASE I, ACCORDING TO THE OFFICIAL PLAT THEREOF, ON FILE IN THE OFFICE OF THE RECORDER OF WASHINGTON COUNTY, STATE OF UTAH

Dated: March 22, 2010

By: RECONTRUST COMPANY, N.A.

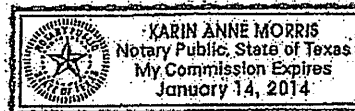
K Newland

Kathy Newland Team Member
Asst Sec

STATE OF Texas
COUNTY OF Tarrant

On 3/22/10, before me Karin Morris, personally appeared Kathy Newland, known to me (or proved to me on the oath of — or through —) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed.
WITNESS MY HAND AND OFFICIAL SEAL

Karin Morris
Notary Public's Signature



John Christian Barlow 12438
321 N Mall Drive R290
Saint George UT 84790
435-634-1200
jcb@johnchristianbarlow.com
for Plaintiffs

IN THE FIFTH DISTRICT COURT IN AND FOR THE STATE OF UTAH,
WASHINGTON COUNTY, SAINT GEORGE DIVISION

ENRIQUE ZAMAONA
Plaintiff

LIS PENDENS: SG-545-B-1

Case No:

RHONDA KAYE BLAKE, TRUSTEE, an
individual, John and Janie Does 1-5, and Roes 1-5.
Defendant

Judge:

Please take notice that Plaintiff Enrique Zamaona, in the foregoing action, claims an interest in the following real property in Washington County, State of Utah, which may affect the title to, or the right of possession of, the following real property, and notice of the pendency of the foregoing action is hereby given, the object of said action being to determine the rights and liabilities of the Parties concerning the property located at 455 W. 300 N. Saint George UT 84770; Parcel # SG-545-B-1, and legally identified as:

ALL OF THE NORTHERLY 90.6 FEET OF THE EAST 1/4 OF LOT 6, BLOCK 36, PLAT "A", ST
GEORGE CITY SURVEY, ACCORDING TO THE OFFICIAL PLAT THEREOF ON FILE AND OF
RECORD IN THE WASHINGTON COUNTY RECORDERS OFFICE


John Christian Barlow

STATE OF UTAH)
)
County of Washington)

I hereby certify that on Tuesday, February 3, 2015, JOHN CHRISTIAN BARLOW did appear before me and acknowledged that he signed the foregoing, as attorney for Plaintiff in the above-captioned action.


Notary Public



Notary Public
NANCY BENNETT
COMMISSION # 665571
My Commission Expires
April 16, 2017
STATE OF UTAH

NOTICE OF EVICTION
FIVE DAY NOTICE TO A TENANT AT WILL

This Notice is Given to Tenant(s): Mrs. Rhonda Kaye Blake, Trustee John/Jane Does, and Roes 455 W. 300 N. St. George, UT 84770	This Notice is Given by Landlord(s): ENRIQUE ZAMACONA c/o Attorney John Christian Barlow 321 N Mall Drive R290 Saint George UT 84790 435-634-1200
---	---

You are given notice that you are a tenant at will and that you are required to vacate the premises no later than five (5) calendar days of this notice (including weekends and holidays). If you do not comply with this notice, you will be served with a Summons and Complaint for unlawful detainer. Unlawful detainer is when you remain in possession of real property after the owner serves you with a lawful notice to leave, such as this eviction notice. If you are found by the court to be in unlawful detainer, you will be evicted by the court and you will be liable for: (1) any rent due and unpaid through the end of your rental agreement, less any amounts the landlord receives from the next tenant; (2) damages caused by your unlawful detainer of the rental property; (3) damages for any waste of the rental property caused by you, if and only if the landlord alleges them in a court complaint and proves them at trial, or submits them to the court by affidavit in the event of your default (Waste is damage you cause beyond normal wear and tear.); (4) damages as provided in Utah Code Ann. § 78B Chapter 6 Part 8, 10, 11; and (5) attorney fees and court costs. Be advised that your landlord intends to proceed with legal or equitable relief. You will also be liable for three times those damages allowed to be trebled under Utah Code Ann. § 78B-6-811 which may include trebling damages mentioned above. Rent due and unpaid shall be trebled each day you remain in the premises after this notice expires. Damages under (2) are the reasonable rental value or reasonable value of the use and occupation of the premises for each day you remain after the expiration of this notice. In most cases, trebling damages under (2) means that the court will times the amount you have been paying for rent by three for every day you remain in the property after the last day you were given to leave under this eviction notice.

RETURN OF SERVICE AND SELF AUTHENTICATION DECLARATION This Notice was served on the above-listed tenant(s) on this day of, 20 , in one (or more) of the following manners:

- ☐ Personal Service. A copy was delivered to the tenant personally.
- ☐ Posted Service. A copy was posted in a conspicuous place on the premises, as no one was home.
- ☐ Suitable Age & Discretion - Residence. A copy was left with a person of suitable age and discretion at tenant's residence and a second copy was mailed to tenant's residence.
- ☐ Certified Mail. A copy was sent through certified or registered mail to tenant's address.

Pursuant to Utah Code Ann. §46-5-01, I declare under criminal penalty that the foregoing is true and correct. Signature of Notice Giver: _____

DATE SERVED _____

TIME SERVED _____

John Christian Barlow—Attorney at Law

321 N. Mall Drive R290
Saint George, UT 84790
435.634.1200
Fax: 435.215.2420

DEMAND IS MADE UPON YOU

Tuesday, February 03, 2015

Mrs. Rhonda Kaye Blake, Trustee
455 W. 300 N.
St. George, UT 84770

Dear Ms. Blake:

I represent Enrique Zamacona. Mr. Zamacona is the legal and equitable owner of the property located at 455 W. 300 N. Saint George, UT 84770; Parcel # SG-545-B-1; and legally identified as: ALL OF THE NORTHERLY 90.6 FEET OF THE EAST 1/2 OF LOT 6 BLOCK 36 PLAT "A", ST. GEORGE CITY SURVEY, ACCORDING TO THE OFFICIAL PLAT THEREOF ON FILE AND OF RECORD IN THE WASHINGTON COUNTY RECORDERS OFFICE.

On June 2, 2010 a foreclosure sale Trustee's Deed was filed in the Washington County Recorder's Office as doc. id 20100017897 by ReconTrust Company N.A. On February 19, 2013 a Warranty Deed, doc. id 20130006036, was recorded in your name. Good and marketable title was insured by Mountain View Title.

ReconTrust Company N.A. has been judicially determined as lacking the power of sale necessary to foreclose real property in the State of Utah. The Trustee's Deed issued by ReconTrust Company N.A. has been judicially determined as void.

Since the Trustee's Deed is void you do not have title to the property in which you now claim ownership and which your title insurance company has contracted with you to insure good and marketable title.

Therefore, the legal and equitable owner of the property stated above is Enrique Zamacona and you are illegally in possession of his real property, and an unlawful detainer action will proceed against you to evict you from the real property.

Mr. Enrique Zamacona demands that you either vacate the real property or in the alternative consult with your title insurance company to issue a monetary settlement. You may contact me to negotiate the terms of your settlement offer.

Sincerely,


John Christian Barlow

JCB/

Substitution of Trustee Page 1 of 1
 Russell Shirts Washington County Recorder
 06/25/2009 02:34:34 PM Fee \$10.00
 Backman, ERIC

RECORDING REQUESTED BY:
 RECONTRUST COMPANY, N.A.

WHEN RECORDED MAIL DOCUMENT
 TAX STATEMENT TO:
 RECONTRUST COMPANY, N.A.
 2380 Performance Dr, TX2-985-07-03
 Richardson, TX 75082

TS#: 09 -0081584
 TSG# 5-051603

SPACE ABOVE THIS LINE FOR RECORDER'S USE

SUBSTITUTION OF TRUSTEE

RECONTRUST COMPANY, N.A., 2380 Performance Dr, TX2-985-07-03, Richardson, TX 75082, PHONE: (800) 281-8219, is hereby appointed successor Trustee under that certain Trust Deed dated August 31, 2007, executed by SAMUEL D. ADAMSON, A MARRIED MAN, AS HIS SOLE AND SEPARATE PROPERTY, as Trustor, in which MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., is named as Beneficiary and SCOTT LUNDBERG, A MEMBER OF THE UTAH STATE BAR, is named as Trustee, and recorded in the office of the Recorder of Washington County, Utah, on September 06, 2007, as Instrument No. 20070044838.

Said Trust Deed covers the following described real property situated in Washington County, Utah:

ALL OF LOT THIRTY ONE (31), THE FIELDS - PHASE 1, ACCORDING TO THE OFFICIAL PLAT THEREOF ON FILE IN THE OFFICE OF THE RECORDER OF WASHINGTON COUNTY, STATE OF UTAH

The undersigned, the current Beneficiary, hereby ratifies, approves, and confirms all action taken by the successor Trustee, RECONTRUST COMPANY, N.A., on the Beneficiary's behalf, in connection with the Trust Deed referenced above before this Substitution of Trustee is recorded.

Dated: 6-23-09

By: MORTGAGE ELECTRONIC REGISTRATION
 SYSTEMS, INC.

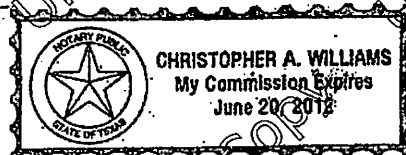
Kari Marx Assistant Secretary

STATE OF Texas
 COUNTY OF Dallas

On 6/24/09, before me Christopher A. Williams, personally appeared Kari Marx, known to me (or proved to me on the oath of or through) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed.

WITNESS MY HAND AND OFFICIAL SEAL

Notary Public's Signature



No. 12-4150
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RICHARD AND GWEN DUTCHER, *et al.*,

Plaintiffs-Appellants,

v.

STUART T. MATHESON; MATHESON, MORTENSEN, OLSEN & JEPSON, P.C.;
RECONTRUST COMPANY, N.A.; BAC HOME LOANS SERVICING LP;
and BANK OF AMERICA, N.A.,

Defendants-Appellees,

STATE OF UTAH

Amicus Curiae.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
UTAH

The Honorable Judge Ted Stewart; D.C. No. 2:11-CV-00666-TS

**BRIEF *AMICUS CURIAE* OF THE OFFICE OF THE COMPTROLLER OF THE
CURRENCY IN RESPONSE TO THE COURT'S BRIEFING ORDER**

AMY S. FRIEND
Chief Counsel

DANIEL P. STIPANO
Deputy Chief Counsel

HORACE G. SNEED
DOUGLAS B. JORDAN
Attorneys

Attorneys for Amicus Curiae
Office of the Comptroller
of the Currency
400 Seventh Street, S.W.
Washington, D.C. 20219

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE <i>AMICUS CURIAE</i>	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
12 U.S.C. § 92a	5
12 C.F.R. § 9.7	6
STANDARDS OF REVIEW	7
ARGUMENT	7
1. Under 12 C.F.R. § 9.7(d), what state does 12 U.S.C. § 92a “refer[] to” when a national bank based in one state serves as the trustee of a trust deed on real property located in another state?”	8
2. If the state 12 U.S.C. § 92a “refer[s] to” is not the state where the real property is located, may the national bank conduct a non-judicial foreclosure notwithstanding the fact that the state where the real property is located – while allowing a bank to serve as a trustee of real-property trust deed – permits only two types of trustees to conduct non-judicial foreclosures: (1) any active member of the state bar “who maintains a place within the state where the trustor or other interested parties may meet with the trustee”; and (2) title insurance companies that “actually do[] business” and maintain “bona fide office[s] in the state”? <i>See Utah Code § 57-1-21.</i>	8-9
3. Is 12 C.F.R. § 9.7 a permissible interpretation of 12 U.S.C. § 92a that is entitled to <i>Chevron</i> deference?	10

Page

CONCLUSION	15
------------------	----

TABLE OF AUTHORITIES

	Page
<i>Arlington v. FCC</i> , 133 S.Ct. 1863 (2013)	10
<i>Auer v. Robbins</i> , 519 U.S. 452 (1997)	7
<i>Decker v. Northwest Environmental Defense Center</i> , 133 S.Ct. 1326 (2013)	7
<i>Smiley v. Citibank (South Dakota), N.A.</i> , 517 U.S. 735 (1996).....	7, 10, 11
<i>United States v. Mead Corp.</i> , 533 U.S. 218 (2001)	7, 11-12
<i>Wachovia Bank, N.A. v. Schmidt</i> , 546 U.S. 303 (2006)	11

FEDERAL STATUTES

12 U.S.C. § 21 <i>et seq.</i>	1
12 U.S.C. § 29 (Second)	3
12 U.S.C. § 29 (Third)	3
12 U.S.C. § 92a	2, 5, 6, 7, 8, 9, 11, 13
12 U.S.C. § 92a(a)	5, 10, 11, 12
12 U.S.C. § 92a(b)	6
12 U.S.C. § 92a(j)	11

Page

12 U.S.C. § 93a	11
12 U.S.C. § 93(d)	2
12 U.S.C. § 371	3

FEDERAL REGULATIONS

12 C.F.R. § 9.7	2, 3, 6, 7, 10, 11, 12, 13, 14, 15
12 C.F.R. § 9.7(b)	8
12 C.F.R. § 9.7(d)	2, 6, 8
12 C.F.R. § 9.7(e)	6

MISCELLANEOUS

Federal Rule of Appellate Procedure 29(a)	2
“Fiduciary Activities of National Banks”, 66 F.R. 34792-01, 2001 WL 731641.....	7, 8, 9 11, 12, 13
<u>http://www.occ.gov/topics/consumer-protection/foreclosure-prevention/correcting-foreclosure-practices.html</u> (Accessed June 14, 2013) ..	4
OCC Interpretive Letter No. 646 (April 1994)	3
OCC Interpretive Letter No. 695 1995 OCC Ltr. Lexis 194	6, 12
OCC Interpretive Letter No. 866 (October 1999).....	12, 13

	Page
OCC Interpretive Letter No. 872 (December,1999).	12, 13
OCC News Release 2011-47 (April 13, 2011)	4
Utah Code § 57-1-21	2, 9

No. 12-4150
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RICHARD AND GWEN DUTCHER, *et al.*,

Plaintiffs-Appellants,

v.

STUART T. MATHESON; MATHESON, MORTENSEN, OLSEN & JEPPSON,
P.C.; RECONTRUST COMPANY, N.A.; BAC HOME LOANS SERVICING LP;
and BANK OF AMERICA, N.A.,

Defendants-Appellees,

STATE OF UTAH

Amicus Curiae.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH

BRIEF *AMICUS CURIAE* OF THE OFFICE
OF THE COMPTROLLER OF THE CURRENCY IN RESPONSE TO THE
COURT'S BRIEFING ORDER

INTEREST OF THE *AMICUS CURIAE*

The Office of the Comptroller of the Currency ("OCC") is a bureau of the United States Treasury Department charged with the administration of the National Bank Act, 12 U.S.C. §§ 21 *et seq.*, and oversight of the national banking system as well as the system of federally chartered savings associations. The OCC

has comprehensive authority over the chartering, supervision, and regulation of virtually every aspect of the operation of banks organized under the National Bank Act and other statutes, including 12 U.S.C. § 92a.

The OCC is authorized generally to represent itself in litigation by 12 U.S.C. § 93(d), comes within the authority of Federal Rule of Appellate Procedure 29(a), and has been invited by the Court to file this brief.

QUESTIONS PRESENTED

1. Under 12 C.F.R. § 9.7(d), what state does 12 U.S.C. § 92a “refer[] to” when a national bank based in one state serves as the trustee of a trust deed on real property located in another state?

2. If the state 12 U.S.C. § 92a “refer[s] to” is not the state where the real property is located, may the national bank conduct a non-judicial foreclosure notwithstanding the fact that the state where the real property is located – while allowing a bank to serve as a trustee of real-property trust deed – permits only two types of trustees to conduct non-judicial foreclosures: 1) any active member of the state bar “who maintains a place within the state where the trustor or other interested parties may meet with the trustee”; and 2) title insurance companies that “actually do[] business” and maintain “bona fide office[s] in the state”? *See* Utah Code § 57-1-21.

3. Is 12 C.F.R. § 9.7 a permissible interpretation of 12 U.S.C. § 92a that is entitled to *Chevron* deference?

STATEMENT OF THE CASE

This *amicus* brief responds to the Briefing Order of the Court on May 31, 2013, inviting the OCC to comment on any of the issues in this case, but

instructing that the OCC pay particular attention to the questions stated above.

The OCC responds to those questions below.

The regulation at the center of this case, 12 C.F.R. § 9.7, governs national bank trust powers generally, and is not at all specific to the use of those powers in the context of a deed of trust and foreclosure. Because this case arises in the context of foreclosure, we preface our answer to the Court's questions by briefly addressing the role of foreclosure in the real estate lending process, and the OCC's enforcement role with respect to abuse of foreclosure processes.

National banks have express authority under 12 U.S.C. § 371 to make loans secured by real estate. Section 371 also authorizes national banks to service loans, an authority that includes the power to foreclose upon collateral. *See* OCC Interpretive Letter No. 646 (April 1994) ("Lending includes not only the initial extension of credit but also collecting payments, foreclosing on collateral if the debtor defaults, and managing [acquired] assets."). It is well-established that national banks have the authority to acquire real property assets through foreclosure on loans or in satisfaction of debts previously contracted, and to hold, manage, and convey such assets in the course of their dealings. *See* 12 U.S.C. § 29 (Second), (Third).

The OCC expects national banks, in all aspects of loan servicing, including foreclosure, to comply with all applicable laws and have strong internal controls. When deficiencies have been discovered, the OCC has taken aggressive actions to hold national banks accountable and to get the problems fixed. In April 2011, the OCC, together with the Office of Thrift Supervision (“OTS,”) took formal enforcement actions against 12 mortgage servicers, including Bank of America, for unsafe and unsound practices related to residential mortgage loan servicing and foreclosure processing. *See* News Release 2011-47 (April 13, 2011). These enforcement actions consisted of cease and desist orders requiring the national bank mortgage servicers to promptly correct the deficiencies. On February 28, 2013, the OCC executed amendments to the cease and desist orders with most of these servicers. These amendments by the OCC (in addition to actions taken by the Board of Governors of the Federal Reserve System) have resulted in payments to-date of approximately \$2.4 billion by the servicers to borrowers whose homes were in foreclosure in 2009 and 2010. *See* <http://www.occ.gov/topics/consumer-protection/foreclosure-prevention/correcting-foreclosure-practices.html> (accessed June 14, 2013).¹⁷ Wrongful practices of the sort addressed in the

¹⁷ The OCC has additionally issued guidance on the handling of imminent foreclosure sales to large and midsized national banks and federal savings associations, which requires servicers to review foreclosures prior to their completion

aforementioned enforcement orders are not at issue in this case, and, by filing this brief, the OCC in no way condones any unsafe or unsound foreclosure practices engaged in by Bank of America or ReconTrust.

12 U.S.C. § 92a

The statute at issue, 12 U.S.C. § 92a, is codified with the national banking laws,^{2/} and states in relevant part:

The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefore, when not in contravention of state or local law, the right to act as trustee * * * or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

12 U.S.C. § 92a(a). The succeeding statutory provision further clarifies the meaning of this text by specifying that when a state authorizes fiduciary powers by State banks, trust companies or other corporations which compete with national banks, the exercise of such powers by national banks “shall not be deemed to be in

to ensure the servicer is complying with applicable laws and regulations and that appropriate foreclosure prevention efforts have been made. *Id.*

^{2/} Section 92a was originally enacted as part of the Federal Reserve Act in 1913 and amended in 1918. In 1962, Congress removed section 92a from the Federal Reserve Act and re-enacted it as part of a separate statute administered by the OCC.

contravention of State or local law within the meaning of this section.” 12 U.S.C.

§ 92a(b).^{3/}

12 C.F.R. § 9.7

The OCC regulation at issue, amended in 2001, addresses situations in which a national bank conducts fiduciary business in more than one state. Section 9.7 interprets 12 U.S.C. § 92a by specifying that: “The state laws that apply to a national bank’s fiduciary activities by virtue of 12 U.S.C. 92a are the laws of the state in which the bank acts in a fiduciary capacity.” 12 C.F.R. § 9.7(e). The regulation further specifies three core activities that determine where a national bank acts in a fiduciary capacity: the state in which the bank “accepts the fiduciary appointment, executes the documents that create the fiduciary relationship, and makes discretionary decisions” regarding the relationship. 12 C.F.R. § 9.7(d). “If these activities take place in more than one state, then the state in which the bank acts in a fiduciary capacity for section 92a purposes is the state that the bank designates from among those states.” 12 C.F.R. § 9.7(d).

^{3/} The OCC has stated that: “Congress’s purpose in adding section 92a(b) in 1918 was to prevent states from preventing national banks from exercising fiduciary powers through prohibitory laws while allowing their own state banks and trust companies to have these powers.” Interpretive Letter No. 695 at 11, 1995 OCC Ltr. Lexis 194, *33 (Dec. 8, 1995).

The Federal Register preamble (“the Preamble”) to the 2001 amendments provides the authoritative OCC guide to the intended operation of the regulation. “Fiduciary Activities of National Banks.” 66 F.R. 34792-01, 2001 WL 731641.

STANDARDS OF REVIEW

The OCC’s interpretations of section 92a to resolve ambiguities or fill gaps are entitled to judicial deference under *Chevron*. *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996); *United States v. Mead Corp.*, 533 U.S. 218, 231 & n.13 (2001). The OCC’s interpretations of its own regulations are also entitled to deference so long as the interpretation is not “plainly erroneous or inconsistent with the regulation.” *Decker v. Northwest Environmental Defense Center*, 133 S.Ct. 1326, 1337 (2013); *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

ARGUMENT

In response to the Court’s Briefing Order, the OCC responds to the Court’s questions as follows: 1) The state in which a national bank acts in a fiduciary capacity is where the bank is “located” for purposes of 12 U.S.C. § 92a and that state’s law determines the fiduciary capacities in which a national bank may act in **any** state; 2) a national bank permitted to act as a foreclosure trustee under the laws of the state where it is “located” may act in that capacity in another state even though the laws of that state may provide otherwise; and 3) Twelve C.F.R. § 9.7 is

a permissible interpretation of 12 U.S.C. § 92a that is entitled to *Chevron* deference.

1. Under 12 C.F.R. § 9.7(d), what state does 12 U.S.C. § 92a “refer[] to” when a national bank based in one state serves as the trustee of a trust deed on real property located in another state?”

The regulation makes clear that the state in which the bank **acts in a fiduciary capacity** for each fiduciary relationship is where the bank is “located” for purposes of 12 U.S.C. § 92a, and further identifies three fiduciary acts that are determinative of where the bank is “located” for a fiduciary relationship. They are the location where the bank: (1) accepted the fiduciary appointment; (2) executed the documents that create the fiduciary relationship; and (3) makes discretionary decisions regarding fiduciary assets. 12 C.F.R. § 9.7(d).^{4/}

2. If the state 12 U.S.C. § 92a “refer[s] to” is not the state where the real property is located, may the national bank conduct a non-judicial foreclosure notwithstanding the fact that the state where the real property is located – while allowing a bank to serve as a trustee of real-property trust deed – permits only two types of trustees to conduct non-judicial foreclosures:

^{4/} Neither the state where the national bank is “based” nor the state where the property that is the subject of the fiduciary relationship is located is determinative of which state’s law applies to determine eligibility to act as a fiduciary. *See* 12 C.F.R. § 9.7(b)(national bank may act as fiduciary for relationships that include property located in other states.) *See also* Preamble, 66 F.R. at 34794-95: “[W]e disagree that ‘location’ for purposes of section 92a is appropriately determined by a main office or bank branch. As previously discussed, the Contravention Clause of section 92a requires that a bank look to the laws of the state in which it acts in one or more fiduciary capacities in order to determine the limits on those capacities.”

1) any active member of the state bar “who maintains a place within the state where the trustor or other interested parties may meet with the trustee”; and 2) title insurance companies that “actually do[] business” and maintain “bona fide office[s] in the state”? See Utah Code § 57-1-21.

Yes. A national bank otherwise authorized to exercise fiduciary powers under 12 U.S.C. § 92a pursuant to the laws of the state where it is “located” for purposes of the particular fiduciary relationship may transact business authorized as a result of its fiduciary status with respect to property that is the subject of the fiduciary relationship, even though the law of the state where the property is located restricts that activity to fiduciaries recognized under the law of the state where the property is located. See Preamble at 34793, *supra* (“12 U.S.C. 92a does not subject the exercise of a national bank’s fiduciary powers to restrictions or preconditions, such as licensing requirements, under state law.”). A national bank permitted to act as a foreclosure trustee under the laws of the state where it is located, here Texas, may act in that role in another state even though the laws of that state, here Utah, may limit eligibility to act as a fiduciary for that type of transaction to specific entities. We note, however, that the national bank is subject to Utah requirements governing the conduct of the foreclosure, including, for example, requirements pertaining to the notice that must be provided to the borrower.

3. Is 12 C.F.R. § 9.7 a permissible interpretation of 12 U.S.C. § 92a that is entitled to *Chevron* deference?

Yes. Section 9.7 is a permissible interpretation because it falls within the OCC's statutory authority to promulgate regulations implementing section 92a, because section 92a does not have a contrary plain meaning, and because the interpretation is a reasonable interpretation of an ambiguous statutory provision. The regulation is entitled to *Chevron* deference because the other requirements for deference are also met, including the requisite formality.

Under the *Chevron* line of authority, Section 9.7 is entitled to a background presumption of Congressional intent: that Congress contemplates that ambiguity in a statute administered by an agency will "be resolved, first and foremost, by the agency, and [that Congress] desired the agency, rather than the courts, to possess whatever degree of discretion the ambiguity allows." *Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013), quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996). Here, Supreme Court authority establishes that section 92a(a) is ambiguous, and does not have a plain meaning inconsistent with the OCC's interpretation. The operative portions of section 92a(a) make dispositive the state in which the national bank is "located."⁵⁷ The Supreme Court has held that the

⁵⁷ The text of section 92a(a) refers to a single state. The statute authorizes the Comptroller to grant fiduciary powers "when not in contravention of State or local

term “located,” as it appears in federal banking laws, has “no fixed, plain meaning.” *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 312 (2006)(national bank is a citizen for diversity jurisdiction purposes of the state in which its main office is “located.”); *see also id.* (collecting multiple statutory applications of “located.”) The Court amplified: “[L]ocated,” as its appearances in the banking laws reveal, * * * is a chameleon word; its meaning depends on the context in and purpose for which it is used.” *Id.* at 318. Accordingly, section 92a does not carry a plain meaning that forecloses the OCC’s interpretation.

There is no other basis for withholding *Chevron* deference from the OCC’s interpretation. Section 9.7 represents an interpretation of a provision of section 92a that the OCC is responsible for administering. *See* 12 U.S.C. §§ 92a(j);^{6/} 93a. Section 9.7 is a “full-dress regulation” satisfying the formality requirements for *Chevron* deference. *See Smiley, supra*, 517 U.S. at 741; *cf. United States v. Mead*

law,” with reference to fiduciary powers given to national bank competitors, including “State banks,” “under the laws of the State in which the national bank is located.” 12 U.S.C. § 92a(a). The most natural reading of this text, and the only reading consistent with canons of statutory construction and with the statutory purpose, is that the three references to “State” refer to the same state and not to different states. *See Preamble*, 66 F.R. at 34794.

^{6/} “The Comptroller of the Currency is authorized and empowered to promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein.” 12 U.S.C. § 92a(j).

Corp., 533 U.S. 218, 231 n.13 (2001)(OCC entitled to deference even in absence of formal regulations).

Finally, *Chevron* Step Two is satisfied because the OCC's interpretation of the ambiguous statutory terms is reasonable in light of the context and purpose of section 92a(a). There is no suggestion that the rulemaking was procedurally deficient. In response to a Notice of Proposed Rulemaking, the OCC received 25 comments, including four from state bank supervisors and one from a state bank supervisors' organization, which the OCC considered in promulgating the final rule. The OCC considered, and stated the reasons for accepting or not accepting, the arguments advanced by these commenters and others. *See, e.g.*, Preamble, 66 F.R. at 34793.

Substantively, the rulemaking, designed to provide clarity and certainty for national banks' multi-state fiduciary activities, rested on the analysis contained in three earlier Interpretive Letters: IL 695,⁷ 866, and 872. *See* Preamble, 66 F.R. at 34792. Interpretive Letter 695 concluded that a national bank with its main office

⁷ There is no inconsistency between IL 695 and section 9.7. The fact situation addressed in IL 695 contemplated that the bank would act in a fiduciary capacity in multiple states, and therefore would be subject to the laws of each of those respective states. IL 695 at *34 n.7. The fact situation posed by the Court, in contrast, contemplates the conduct of fiduciary activities in one state with respect to property located in another state. The principles are applied consistently in each instance.

in one state may have trust offices in another state. IL 866 and IL 872 addressed, among other things, where a national bank is deemed to be acting in a fiduciary capacity for purposes of section 92a. The amended section 9.7 codified those interpretations. 66 F.R. at 34792.

As the Preamble explained in construing the text of the statute, the statutory grant of authority does not limit where a national bank may act in a fiduciary capacity, does not require that the bank's customers or the property involved in the fiduciary relationship be located in the same state as the bank, and does not limit a bank to acting in a fiduciary capacity in a single state. 66 F.R. at 34794. In the rulemaking, the OCC isolated three core fiduciary activities – accepting a fiduciary appointment, executing documents that create the fiduciary relationship, and making decisions regarding the investment or distribution of assets – that determine with certainty which state's laws would govern for the purpose of section 92a. 66 F.R. at 34794. The rulemaking also clarified the section 92a delineation between substantive state law governing the trust itself and federal law governing eligibility to act as fiduciary. 66 F.R. at 34795-96.

The reasonableness of the OCC's conclusions is further supported by its consultation of the parallel conclusions reached by another agency, the then-independent OTS. 66 F.R. at 34793 n.3.

Accordingly, section 9.7 represents a careful synthesis of statutory analysis and policy choices, drawing heavily upon agency expertise and codifying previous interpretations, that is entitled to *Chevron* deference.

CONCLUSION

The OCC appreciates the opportunity provided by the Court to comment on the application and validity of Section 9.7.

Respectfully submitted,

AMY S. FRIEND
Chief Counsel

DANIEL P. STIPANO
Deputy Chief Counsel

HORACE G. SNEED
Director of Litigation

JULY 2013

/s/ Douglas B. Jordan
DOUGLAS B. JORDAN
Senior Counsel

Attorneys for *Amicus Curiae*
Office of the Comptroller
of the Currency
400 7th Street, S.W.
Washington, D.C. 20219
Telephone: (202) 649-6308
douglas.jordan@occ.treas.gov

CERTIFICATE OF SERVICE

I, Douglas B. Jordan, certify that on July 12, 2013, I served a copy of the foregoing Brief *Amicus Curiae* upon the following counsel of record by electronic service:

Marcus R. Mumford, Esq.
MUMFORD RAWSON, LLC
15 West South Temple
Suite 1000
Salt Lake City, UT 84101
mmumford@mumfordrawson.com
Attorney for Appellants

Amy Miller, Esq.
McGuire Woods LLP
2001 K Street, N.W.
Suite 400
Washington, D.C. 20006
amiller@mcguirewoods.com
Attorney for Appellees ReconTrust Company, N.A., BAC Home Loans Servicing, LP, and Bank of America, N.A.

Craig Robert Mariger, Esq.
JONES WALDO HOLBROOK & MCDOUGH, PC
170 South Main Street
Suite 1500
Salt Lake City, UT 84101-1648
emariger@joneswaldo.com
Attorney for Appellees Stuart T. Matheson and Matheson, Mortensen, Olsen, & Jeppson, PC.

Jerrold S. Jensen, Esq.
Thomas Dibblee Roberts, Esq.
State Agency Counsel
Office of the Attorney General for the State of Utah
160 East 300 South, 5th Floor

P.O. Box 140857
Salt Lake City, UT 84114
Attorneys for Amicus Curiae, State of Utah

/s/ Douglas B. Jordan
Douglas B. Jordan
Office of the Comptroller
of the Currency
400 7th Street, S.W.
Washington D.C. 20219

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a) AND BRIEFING
ORDER**

The Court's May 31, 2013 Briefing Order instructed that the OCC's *Amicus* Brief "not exceed 15 pages in length in a 13 point font."

This Brief complies with those instructions because it was prepared using WordPerfect X6 Times New Roman 14 point font, and totals 15 pages.

Date: July 12, 2013

/s/ Douglas B. Jordan
Douglas B. Jordan
Office of the Comptroller
of the Currency
400 7th Street, S.W.
Washington D.C. 20219

CERTIFICATE OF DIGITAL SUBMISSION

I certify that the foregoing Brief *Amicus Curiae* submitted in digital form via the Court's ECF system is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Norton Symantec Endpoint Protection software (July 12, 2013) and is free of viruses. In addition, I certify that all required privacy redactions have been made.

Date: July 12, 2013

/s/ Douglas B. Jordan
Douglas B. Jordan
Office of the Comptroller
of the Currency
400 7th Street, S.W.
Washington D.C. 20219

No. 13-852

In the Supreme Court of the United States

FEDERAL NATIONAL MORTGAGE ASSOCIATION,
PETITIONER

v.

LORAIN SUNDQUIST

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF UTAH

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

AMY S. FRIEND
*Senior Deputy Comptroller
and Chief Counsel*
KAREN O. SOLOMON
DANIEL P. STIPANO
Deputy Chief Counsels
HORACE G. SNEED
Director of Litigation
DOUGLAS B. JORDAN
Attorney
*Office of the Comptroller of
the Currency*
Washington, D.C. 20219

DONALD B. VERRILLI, JR.
*Solicitor General
Counsel of Record*
JOYCE R. BRANDA
*Acting Assistant Attorney
General*
MALCOLM L. STEWART
Deputy Solicitor General
ALLON KEDEM
*Assistant to the Solicitor
General*
*Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

QUESTION PRESENTED

The Office of the Comptroller of the Currency (OCC) may authorize a national bank to exercise fiduciary powers "when not in contravention of State or local law." 12 U.S.C. 92a(a). The question presented is as follows:

Whether the OCC has reasonably construed Section 92a(a) as referring to the laws of the State in which a national bank performs certain core fiduciary activities.

(I)

TABLE OF CONTENTS

	Page
Interest of the United States.....	1
Statement	1
Discussion.....	7
A. The Utah Supreme Court’s interlocutory decision is not a “final judgment” over which this Court has jurisdiction	8
B. A substantial question exists as to the timeliness of the petition	10
C. The OCC has reasonably interpreted Section 92a as applying the law of the State in which a national bank performs certain core fiduciary functions	12
D. The decision below is in substantial tension, though not in direct conflict, with an unpublished decision of the Tenth Circuit.....	20
E. Although the question presented will likely warrant this Court’s review in an appropriate case, this is not a suitable vehicle.....	22
Conclusion	23

TABLE OF AUTHORITIES

Cases:

<i>Barnett Bank of Marion Cnty., N.A. v. Nelson</i> , 517 U.S. 25 (1996)	18
<i>Chevron U.S.A. Inc. v. NRDC, Inc.</i> , 467 U.S. 837 (1984).....	16
<i>Corestates Trust Fee Litig., In re</i> , 39 F.3d 61 (3d Cir. 1994)	2
<i>Cox Broad. Corp. v. Cohn</i> , 420 U.S. 469 (1975)	9
<i>Davis v. Elmira Sav. Bank</i> , 161 U.S. 275 (1896)	1, 12
<i>Dutcher v. Matheson</i> , 733 F.3d 980 (10th Cir. 2013)	21
<i>FDA v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000).....	6

(III)

IV

Cases—Continued:	Page
<i>Garrett v. ReconTrust Co.</i> , 546 Fed. Appx. 736 (10th Cir. 2013).....	20, 21
<i>Hibbs v. Winn</i> , 542 U.S. 88 (2004)	11
<i>Jaldin v. ReconTrust Co.</i> , 539 Fed. Appx. 97 (4th Cir. 2013), cert. denied, 134 S. Ct. 2293 (2014)...	21, 22
<i>Jefferson v. City of Tarrant</i> , 522 U.S. 75 (1997).....	8, 9
<i>Market St. Ry. v. Railroad Comm'n</i> , 324 U.S. 548 (1945).....	8
<i>Marquette Nat'l Bank v. First of Omaha Serv. Corp.</i> , 439 U.S. 299 (1978).....	15, 17, 19, 20
<i>Missouri v. Jenkins</i> , 495 U.S. 33 (1990)	10
<i>Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co.</i> , 513 U.S. 251 (1995)	2
<i>Raygor v. Regents of the Univ. of Minn.</i> , 534 U.S. 533 (2002)	6
<i>Smiley v. Citibank (S.D.)</i> , N.A., 517 U.S. 735 (1996)	16
<i>Wachovia Bank, N.A. v. Schmidt</i> , 546 U.S. 303 (2006).....	16
<i>Young v. Harper</i> , 520 U.S. 143 (1997)	11

Statutes, regulations and rules:

Act of Sept. 28, 1962, Pub. L. No. 87-722, 76 Stat. 668	2
Federal Reserve Act, ch. 6, § 11(k), 38 Stat. 262.....	2
National Bank Act, 12 U.S.C. 1 <i>et seq.</i>	1
12 U.S.C. 29 (Second).....	2
12 U.S.C. 29 (Third)	2
12 U.S.C. 36.....	15
12 U.S.C. 85.....	15, 20
12 U.S.C. 92a.....	<i>passim</i>
12 U.S.C. 92a(a)	<i>passim</i>
12 U.S.C. 92a(j).....	3, 19

V

Statutes, regulations and rules—Continued:	Page
12 U.S.C. 93a.....	2
12 U.S.C. 371.....	2
Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, § 101, 108 Stat. 2339.....	13
28 U.S.C. 1257(a)	8, 9
28 U.S.C. 2101(c).....	10
Utah Code Ann. (LexisNexis 2010):	
§ 57-1-21(1)(a)(i).....	5
§ 57-1-21(1)(a)(iv).....	5
§ 57-1-23.....	5
§ 57-1-24.....	5
12 C.F.R.:	
Pt. 9.....	3
Section 9.7	14
Section 9.7(a).....	3
Section 9.7(b)	3, 14
Section 9.7(d)	4, 6, 14
Section 9.7(e)(1)	4
Section 9.7(e)(2)	4
Sup. Ct. R. 13.3	10, 11, 12
Utah R. App. P.:	
Rule 35(a)	10
Rule 35(d)	10
Miscellaneous:	
65 Fed. Reg. 75,875 (Dec. 5, 2000)	13
66 Fed. Reg. (July 2, 2001):	
p. 34,792.....	3, 14, 18, 22
pp. 34,792-34,793.....	17
p. 34,795.....	17

VI

Miscellaneous—Continued:	Page
Office of the Comptroller of the Currency Interpretive Ltr. No. 695, 1995 WL 788085 (Dec. 8, 1995)	13
Office of the Comptroller of the Currency Interpretive Ltr. No. 866 (Oct. 8, 1999), http://www.occ.gov/static/interpretations-and-precedents/oct99/int866.pdf	13, 14, 15, 18
Office of the Comptroller of the Currency Interpretive Ltr. No. 872 (Oct. 28, 1999), http://www.occ.gov/static/interpretations-and-precedents/dec99/int872.pdf	13
Restatement (Second) of Trusts (1959).....	14
Restatement (Third) of Trusts (2007)	15

In the Supreme Court of the United States

No. 13-852

FEDERAL NATIONAL MORTGAGE ASSOCIATION,
PETITIONER

v.

LORAIN SUNDQUIST

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF UTAH

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the order of the Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The National Bank Act (Act), 12 U.S.C. 1 *et seq.*, established a system of nationally chartered banks. "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States." *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896).

a. The Office of the Comptroller of the Currency (OCC) is a bureau within the Department of the Treasury charged with administration of the Act and

(1)

with "superintendence of national banks." *Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254 (1995). In furtherance of that role, the OCC is "authorized to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. 93a.

The Act vests national banks with certain enumerated powers. Among these are the power to "purchase, hold, and convey real estate," including as security for and in satisfaction of debts. 12 U.S.C. 29 (Second) and (Third); see 12 U.S.C. 371 (authorizing mortgage lending). The Act further provides:

The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

12 U.S.C. 92a(a).¹

¹ Section 92a was originally enacted in 1913 as part of the Federal Reserve Act, ch. 6, § 11(k), 38 Stat. 262. In 1962, Congress removed Section 92a from the Federal Reserve Act and transferred authority from the Board of Governors of the Federal Reserve System to the OCC. See Act of Sept. 28, 1962, Pub. L. No. 87-722, 76 Stat. 668. Although the provision was codified at 12 U.S.C. 92a, the 1962 statutory revision did not purport to amend the National Bank Act or place the provision therein. See *In re Corestates Trust Fee Litig.*, 39 F.3d 61, 67 (3d Cir. 1994). The

The Act authorizes the OCC “to promulgate such regulations as [it] may deem necessary to enforce compliance with the provisions of [Section 92a] and the proper exercise of the powers granted therein.” 12 U.S.C. 92a(j). The OCC has issued regulations that specify the requirements for a national bank to obtain approval to act as a fiduciary and the conditions under which fiduciary powers may be exercised. See 12 C.F.R. Pt. 9.

b. In 2001, the OCC undertook notice-and-comment rulemaking to “address[] the application of 12 U.S.C. 92a in the context of a national bank engaging in fiduciary activities in more than one state.” 66 Fed. Reg. 34,792 (July 2, 2001). The rulemaking reflected advice from three prior interpretive letters in which the OCC had been asked by national banks to opine on their authority to act in a fiduciary capacity in multiple States and to solicit and service customers across state lines. *Ibid.* The current regulations provide that, if a national bank has been given approval to act as a fiduciary, it “may act in a fiduciary capacity in any state.” 12 C.F.R. 9.7(a). The bank may also market fiduciary services to customers in other States, may act as a fiduciary for those customers, and may serve in a fiduciary capacity “for relationships that include property located in other states.” 12 C.F.R. 9.7(b).

As noted above, a national bank may exercise fiduciary powers only “when not in contravention of State or local law, * * * under the laws of the State in which the national bank is located.” 12 U.S.C. 92a(a). The regulations provide that, “[f]or each fiduciary

provision is nevertheless commonly referred to as being part of National Bank Act, a convention followed in this brief.

relationship, the state referred to in section 92a is the state in which the bank acts in a fiduciary capacity for that relationship.” 12 C.F.R. 9.7(d). For this purpose, the State in which a national bank “acts in a fiduciary capacity” is the State where it performs three core fiduciary functions: “[1] accept[ing] the fiduciary appointment, [2] execut[ing] the documents that create the fiduciary relationship, and [3] mak[ing] discretionary decisions” regarding the relationship. *Ibid.* “If these activities take place in more than one state, then the state in which the bank acts in a fiduciary capacity for section 92a purposes is the state that the bank designates from among those states.” *Ibid.* The regulations further provide that a national bank’s fiduciary powers are subject only to “the laws of the state in which the bank acts in a fiduciary capacity.” 12 C.F.R. 9.7(e)(1). All other “state laws limiting or establishing preconditions on the exercise of fiduciary powers are not applicable to national banks.” 12 C.F.R. 9.7(e)(2).

2. a. In 2006, respondent executed a deed of trust as security for a loan on her Utah property. In 2009, she stopped making payments on the mortgage. The beneficiary under the deed of trust appointed ReconTrust Company N.A., a national bank, as the successor trustee. In January 2011, ReconTrust gave notice to respondent of a planned trustee’s sale of the property. In May 2011, ReconTrust conducted a nonjudicial foreclosure of the property and deeded it to petitioner. Pet. App. 3a.

Respondent remained in residence, and in June 2011, petitioner filed an unlawful detainer action to take possession of the property. Pet. App. 3a. At a hearing to decide possession during the pendency of

the litigation, respondent argued that ReconTrust had not been authorized by Utah law to conduct the non-judicial foreclosure. *Id.* at 3a, 30a-31a. Under Utah law, the power of sale in a nonjudicial foreclosure may be exercised only by active Utah State Bar members or by title insurance companies doing business in the State. Utah Code Ann. § 57-1-21(1)(a)(i) and (iv) (LexisNexis 2010); see *id.* §§ 57-1-23, 57-1-24.

Respondent argued that the sale was invalid under Utah law because ReconTrust was neither a member of the state bar nor a title insurance company, and therefore was not a qualified trustee. Pet. App. 3a, 30a-31a. In response, petitioner argued that “ReconTrust, as a national bank, was authorized to conduct the sale under federal law and that federal law preempted the Utah statute.” *Id.* at 2a. The district court ruled in favor of petitioner. *Id.* at 3a, 36a.

b. The Utah Supreme Court granted respondent’s petition for interlocutory review and stayed her eviction pending appeal. Pet. App. 3a. The court focused on language in Section 92a that gives a national bank authority “to act as a trustee or in a fiduciary capacity ‘when not in contravention of [the] State [law] . . . in which the national bank is located.’” *Id.* at 10a (brackets in original) (quoting 12 U.S.C. 92a(a)). The court stated that the “key inquiry under the statute is determining where a national bank is ‘located.’” *Ibid.* The court concluded that “a national bank is located in the place or places[]where it acts or conducts business,” *id.* at 11a, and that a bank “certainly acts as a trustee in the state in which it liquidates trust assets,” *id.* at 12a. The court held on that basis that “Congress ha[d] directly spoken to the question at issue,”

making ReconTrust subject to the law of Utah—the State in which the sale was conducted. *Id.* at 13a.

The Utah Supreme Court further held that, “even if the plain meaning of the statute were not clear,” two “clear statement” canons of statutory construction would dictate the conclusion that Utah law controls. Pet. App. 14a; see *id.* at 14a-18a. Under the first canon, a federal statute will not be read to “pre-empt the historic powers of the States” absent “a clear statement of [Congress’s] intention to do so.” *Id.* at 14a (quoting *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543 (2002)). Under the second canon, a clear statement is needed to overcome doubt “that Congress would leave the determination of major policy questions to agency discretion.” *Id.* at 16a (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)). The court found petitioner’s view of Section 92a, under which the “provision delegates to the Comptroller the discretion to authorize one state to regulate the terms and conditions of a foreclosure sale in another state,” to be inconsistent with both those canons of construction. *Id.* at 17a.

The Utah Supreme Court further stated that, even if it were necessary to consider the OCC’s regulation, the court would “find the Comptroller’s current interpretation of the statute * * * to be unreasonable.” Pet. App. 18a. The court described the regulation as “inexplicably defin[ing] a bank’s ‘location’ as the place where it engages in three specific activities,” namely, the three core fiduciary functions specified in 12 C.F.R. 9.7(d). Pet. App. 19a. The court found “nothing in the statute itself that ascribes any particular significance [to] these three particular acts,” which “could theoretically be performed in any location

without regard to the location of the trust property.”
Ibid.

Having concluded that the Act did not preempt Utah law, the Utah Supreme Court reserved judgment on all other issues. Pet. App. 23a. The court remanded the case to the district court, where “the parties are free to raise any arguments they may have regarding the validity of the foreclosure sale and trustee’s deed and the appropriateness of the order of restitution.” *Ibid.*

Justice Lee filed an opinion concurring in part and concurring in the judgment. Justice Lee disagreed with the majority’s conclusion that the statute was unambiguous as to the meaning of “located.” Pet. App. 24a-27a. He nevertheless agreed that Utah law governed ReconTrust’s fiduciary powers, based on the first clear-statement rule relied upon by the majority — “that on a matter of traditional state sovereignty over the disposition of title to property of an inherently local nature, [a court should not] lightly deem Congress to have intruded on the local state’s sovereignty.” *Id.* at 27a.

DISCUSSION

Although the decision below is incorrect, the petition for a writ of certiorari should be denied. Two serious jurisdictional obstacles would likely prevent the Court from reaching the merits if it granted review in this case. And while the decision below is in substantial tension with an unpublished decision of the Tenth Circuit, it does not squarely conflict with any published appellate decision.

A. The Utah Supreme Court's Interlocutory Decision Is Not A "Final Judgment" Over Which This Court Has Jurisdiction

This Court's jurisdiction to review state-court decisions is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. 1257(a). That provision "establishes a firm final judgment rule." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). "To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.'" *Ibid.* (quoting *Market St. Ry. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945)).

The Utah Supreme Court's avowedly "interlocutory" (Pet. App. 3a) decision in this case did not finally determine or terminate the litigation. Based on its conclusion that the district court had incorrectly resolved the preemption issue, the Utah Supreme Court "vacate[d] the district court's order of restitution and remand[ed] for additional proceedings." *Id.* at 2a. The Utah Supreme Court recognized that the parties had "raise[d] a variety of other issues relating to the validity of the nonjudicial foreclosure sale, the validity of the trustee's deed, and the propriety of the order of restitution." *Id.* at 23a. Those issues remain to be resolved in the first instance by the district court on remand. *Id.* at 23a-24a.

This case does not fall "within the 'limited set of situations in which [this Court has] found finality as to the federal issue despite the ordering of further pro-

ceedings in the lower state courts.’” *Jefferson*, 522 U.S. at 82; see *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975). Of the four *Cox Broadcasting* categories, see *id.* at 477-483, the one most arguably relevant here is the fourth, which includes cases in which “reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action,” *id.* at 482-483. The present case, however, does not appear to meet that description. Even if this Court granted a writ of certiorari and reversed the Utah Supreme Court’s non-preemption holding, respondent might nevertheless prevail on one of her remaining defenses.

Several of those defenses appear to be tied to the question whether ReconTrust was “authorized” under Utah law to conduct the foreclosure sale. See Resp. Utah S. Ct. Br., 2011 WL 11556544, at *12-*16 (Nov. 3, 2011). That question would become moot if this Court granted review and held that Utah law did not govern ReconTrust’s authority to foreclose. But respondent’s other defenses to foreclosure, left unresolved by the Utah Supreme Court, would require resolution even if the federal issue were decided in petitioner’s favor. See Resp. Utah S. Ct. Reply Br., 2012 WL 10194574, at *7 n.5 (July 27, 2012) (arguing that petitioner was not the beneficiary of the trust deed at the time of the foreclosure sale and therefore was not in a position to make a credit bid for the property). Because reversal of the Utah Supreme Court’s ruling would not “be preclusive of any further litigation” regarding the validity of the foreclosure, *Cox Broad.*, 420 U.S. at 482-483, the decision below is not a “final judgment” within the meaning of 28 U.S.C. 1257(a).

**B. A Substantial Question Exists As To The Timeliness
Of The Petition**

Under 28 U.S.C. 2101(c), absent an extension of time, a petition for a writ of certiorari must be filed “within ninety days after the entry of * * * judgment,” a requirement that this Court has described as “mandatory and jurisdictional.” *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). In this case, the Utah Supreme Court’s judgment was entered on July 23, 2013, Pet. App. 1a, making the petition due on October 21. Because petitioner waited until December 2 to seek an extension of time in which to file, respondent argues (Br. in Opp. 1-2, 6-7) that the petition is untimely.

Petitioner contends (Reply Br. 2-3) that the 90-day filing period did not begin to run until the Utah Supreme Court denied its petition for rehearing on September 16, 2013. Under this Court’s rules, if a rehearing petition is timely filed, or if the lower court “appropriately entertains” an untimely rehearing petition, the 90-day period for seeking this Court’s review begins to run when the lower court disposes of the rehearing petition. Sup. Ct. R. 13.3. Petitioner’s rehearing petition in the Utah Supreme Court was apparently untimely, since it was filed three days beyond the 14-day period allowed under Utah Rule of Appellate Procedure 35(a).² Pet. App. 41a-43a. Petitioner argues (Reply Br. 2-3) that the Utah Supreme Court nevertheless entertained the rehearing petition because (1) the petition was received and circulated to the court, despite the rule that an untimely rehearing petition “will not be received by the clerk,” Utah R.

² Petitioner “maintains that the rehearing petition was timely” (Reply Br. 3) but does not state the basis for that claim.

App. P. 35(d); (2) the court denied the petition rather than dismissing it, employing language in its order similar to language used to deny timely petitions; and (3) the court declined to act on respondent's motion to strike the rehearing petition as untimely, and it has not acted on respondent's request to clarify that the petition was denied as untimely. According to petitioner, this treatment of the rehearing petition shows that the petition was "assuredly 'entertain[ed]' by the court below." Reply Br. 3 (brackets in original).

Although this Court has not precisely defined the term "appropriately entertains" in Supreme Court Rule 13.3, two of its precedents provide guidance. In *Young v. Harper*, 520 U.S. 143 (1997), the 90-day clock was deemed reset by a tardy rehearing petition when the court of appeals had granted permission to file a late petition, had treated it as timely, and had delayed issuance of its mandate until the petition was denied. *Id.* at 147 n.1. In *Hibbs v. Winn*, 542 U.S. 88 (2004), "[t]he Court of Appeals, on its own motion, recalled its mandate and ordered the parties to brief the question whether the case should be reheard en banc." *Id.* at 97. As this Court explained, the court of appeals' briefing order in *Hibbs*, like the decision in *Young* to entertain the untimely petition, shared a "key characteristic" with a timely rehearing petition: "All three raise the question whether the court will modify the judgment and alter the parties' rights." *Id.* at 98.

Thus, in both *Young* and *Hibbs*, the courts of appeals had expressly indicated, in orders issued *before* the ultimate denials of rehearing, that they would consider on the merits whether the cases should be reheard. To be sure, no decision of this Court holds that the circumstances identified by petitioner are

insufficient to restart the 90-day deadline for filing a petition for a writ of certiorari. To accept the certiorari petition as timely in the present circumstances, however, would substantially expand Supreme Court Rule 13.3 beyond past practice.

C. The OCC Has Reasonably Interpreted Section 92a As Applying The Law Of The State In Which A National Bank Performs Certain Core Fiduciary Functions

Section 92a permits a national bank, when authorized by the OCC, to exercise fiduciary powers "when not in contravention of State or local law." 12 U.S.C. 92a(a). The OCC has reasonably interpreted that language, and the other references to "State" in Section 92a, as referring to the State in which a national bank performs certain core fiduciary functions. Under the OCC's approach, a national bank that performs those functions in one State must comply with that State's law (and only with that State's law), even if the trust property is located in another State. The Utah Supreme Court held that, at least in cases involving the sale of real property, the national bank's authority to perform trust functions must instead be determined under the law of the State where the property is located. That holding is incorrect.

1. "National banks are instrumentalities of the Federal government," *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896), and they possess the powers conferred on them by federal law. The OCC may authorize a national bank to act as a fiduciary, 12 U.S.C. 92a(a), and it is undisputed that ReconTrust received such authorization. The question is whether ReconTrust's exercise of federally granted fiduciary authority in the circumstances of this case would be "in contravention of State or local law." *Ibid.*

In the various National Bank Act provisions that refer to state law, “the references to state laws occur in conjunction with references to, or descriptions of, the national bank’s acting in a fiduciary capacity.” OCC Interpretive Ltr. No. 866, at 5 (Oct. 8, 1999).³ The most logical inference, and the one drawn by the OCC, is that the statute uses the term “State”—including in Section 92a(a)’s phrase “the State in which the national bank is located”—to mean the “state where it acts in a fiduciary capacity.” *Id.* at 6.

In 1994, Congress enacted the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, § 101, 108 Stat. 2339, which permitted national banks to establish branch offices across state lines. That change in the legal regime, combined with “new technologies that greatly facilitate[d] the marketing and delivery of fiduciary services to customers nationwide,” produced an “increase in national banks’ interstate fiduciary operations.” 65 Fed. Reg. 75,875 (Dec. 5, 2000). As a result, the OCC received questions from national banks about their authority to perform fiduciary activities in, and on behalf of customers from, multiple States, as well as questions about the law that would apply to those activities. See OCC Interpretive Ltr. No. 872 (Oct. 28, 1999)⁴; OCC Interpretive Ltr. No. 866; OCC Interpretive Ltr. No. 695 (Dec. 8, 1995).⁵

The OCC accordingly initiated a rulemaking to “address[] the application of 12 U.S.C. 92a in the con-

³ Available at <http://www.occ.gov/static/interpretations-and-precedents/oct99/int866.pdf>.

⁴ Available at <http://www.occ.gov/static/interpretations-and-precedents/dec99/int872.pdf>.

⁵ Available at 1995 WL 788085.

text of a national bank engaging in fiduciary activities in more than one state.” 66 Fed. Reg. at 34,792. “The purpose of the rulemaking was to provide clarity and certainty for national banks’ multi-state fiduciary activities.” *Ibid.* After soliciting and reviewing public comments, the OCC promulgated regulations, now codified at 12 C.F.R. 9.7, to govern “Multi-state fiduciary operations.”

The regulations confirm that a national bank, “[w]hile acting in a fiduciary capacity in one state, * * * [may] act as fiduciary for[] customers located in any state, and it may act as fiduciary for relationships that include property located in other states.” 12 C.F.R. 9.7(b). The regulations further provide that, “[f]or each fiduciary relationship, the state referred to in section 92a is the state in which the bank acts in a fiduciary capacity for that relationship.” 12 C.F.R. 9.7(d).

To determine where a national bank “acts in a fiduciary capacity,” the regulations follow the approach that the OCC had outlined in its prior interpretive advice. 66 Fed. Reg. at 34,792. That advice had concluded that “the best construction of the statute” was to define the location of fiduciary activity as “the place at which the bank performs core functions of a fiduciary.” OCC Interpretive Ltr. No. 866, at 6. A fiduciary’s “core functions include accepting the appointment, executing the documents that create the fiduciary relationship, and making decisions regarding the investment or distribution of fiduciary assets.” *Ibid.*; see 12 C.F.R. 9.7(d) (similar). Under widely accepted principles of trust law, those “core functions” constitute essential features of a fiduciary relationship: its establishment, see Restatement (Second) of Trusts

§ 169 (1959) (trustee's duty to administer trust begins "[u]pon acceptance of the trust by the trustee"); its scope, see Restatement (Third) of Trusts § 76(1) (2007) ("The trustee has a duty to administer the trust * * * in accordance with the terms of the trust."); and its proper administration, see *id.* § 87 cmt. a ("The most important of the discretionary powers in most trusts are those having to do with various aspects of the investment function, together with, in many trusts, those having to do with discretionary distributions.").

The OCC has also noted that its "core functions" approach is "consistent with [the] analysis employed by the courts and the OCC in other situations." OCC Interpretive Ltr. No. 866, at 6. For instance, federal law permits a national bank to charge interest "at the rate allowed by the laws of the State * * * where the bank is located." 12 U.S.C. 85. For purposes of that provision, a national bank that issues credit cards is not "located" wherever its customers reside or make their credit card purchases, which "would make the meaning of [the] term 'located' too uncertain." OCC Interpretive Ltr. No. 866, at 6 (citing *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 311-313 (1978)). Similarly, a national bank's authority to operate a branch, see 12 U.S.C. 36, depends on where "certain key bank activities" occur, not on the location of the bank's interactions with customers. OCC Interpretive Ltr. No. 866, at 6. To tie a bank's fiduciary powers to the location of its customers therefore "would be fundamentally inconsistent with how national banks are permitted to exercise other authorized powers." *Id.* at 7.

The OCC's core-functions approach to determining the location of a national bank's fiduciary activities thus is consistent with trust-law principles, with other parts of the Act, and with the realities of modern banking. It therefore is a "permissible construction of the statute" by the agency charged with its enforcement, *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984), and should accordingly be given deference, see *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996) ("The Comptroller of the Currency * * * is charged with the enforcement of banking laws to an extent that warrants the invocation of the rule of deference with respect to his deliberative conclusions as to the meaning of these laws.") (citation, quotation marks, and brackets omitted).

2. The Utah Supreme Court held that its own reading of Section 92a was compelled by the "plain meaning" of the statute, Pet. App. 10a-13a, and that the OCC's regulation was unreasonable, *id.* at 18a-21a. The court also held that its view was compelled by two "clear statement" canons of statutory interpretation. *Id.* at 14a-18a. Those holdings are erroneous.

a. This Court has recognized that "the term 'located,' as it appears in the National Bank Act, has no fixed, plain meaning." *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 313 (2006); see *id.* at 318 ("['L]ocated,' as its appearances in the banking laws reveal, * * * is a chameleon word; its meaning depends on the context in and purpose for which it is used."). In using such a plastic term, "Congress * * * understood that the ambiguity would be resolved, first and foremost, by the agency." *Smiley*, 517 U.S. at 740-741.

The Utah Supreme Court stated that “[a] national bank is located in those places where it acts or conducts business.” Pet. App. 12a. By itself, that statement is not logically inconsistent with the OCC’s determination that a bank is “located” in the State where it performs enumerated fiduciary activities. The court went astray, however, in concluding that, when a national bank sells trust assets as a trustee, it “acts or conducts business” *only* in the State where the *property* is located. *Ibid.*

Because Section 92a refers to “*the State* in which the national bank is located,” 12 U.S.C. 92a(a) (emphasis added), the most natural inference is that the laws of a single State will apply to the management of a particular trust. Because a single trust may contain property located in several different States, the Utah Supreme Court’s property-based rule could subject a national bank’s conduct of a single fiduciary relationship to the laws of several different States—a result that could “throw into confusion the complex system of modern interstate banking.” *Marquette Nat’l Bank*, 439 U.S. at 312. The OCC’s core-functions approach, by contrast, means that for each fiduciary relationship, there is only “one state in which [a national bank] acts in a fiduciary capacity for purposes of 12 U.S.C. 92a.” 66 Fed. Reg. at 34,792-34,793; see *id.* at 34,795 (recognizing the need “to simplify the determination of where a bank with multi-state operations is acting in a fiduciary capacity”).

b. The Utah Supreme Court also erred in holding that its interpretation of the statute was compelled by two “clear statement” canons of statutory construction. Pet. App. 14a-18a.

i. The presumption against construing statutes to “alter the usual constitutional balance between the States and the Federal Government,” Pet. 14a (citation omitted), has no application here. Because national banks derive their authority from federal law, the scope of that authority is presumed to be set by federal law and to preempt any inconsistent state law. “[I]n the context of national bank legislation, * * * grants of both enumerated and incidental ‘powers’ to national banks as grants of authority [are] not normally limited by, but rather ordinarily pre-empt[], contrary state law.” *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 32 (1996). “[W]here Congress has not expressly conditioned the grant of ‘power’ upon a grant of state permission, the Court has ordinarily found that no such condition applies.” *Id.* at 34.

In any event, the OCC’s core-functions approach “does not mean that national banks may engage in fiduciary activities free from state-imposed restrictions. Rather, [it] simply identifies *which* state’s laws will apply.” OCC Interpretive Ltr. No. 866, at 7. The regulations thus provide much-needed “clarity and certainty for national banks’ multi-state fiduciary activities,” 66 Fed. Reg. at 34,792, while preserving an appropriate role for state law.

ii. Any presumption against delegating “major questions of policy” to an agency, Pet. App. 16a (quotation marks omitted), would be similarly inapplicable here. Section 92a authorizes the OCC “to grant [fiduciary powers] by special permit to national banks applying therefor, when not in contravention of State or local law.” 12 U.S.C. 92a(a). The statute itself thus resolves the “major questions of policy,” by making clear both that national banks may exercise fiduciary

powers and that they must do so in compliance with state law.

Although the statute does not set forth a standard for determining *which* State's law will apply to a particular fiduciary activity (beyond indicating that it is "the State in which the national bank is located," 12 U.S.C. 92a(a)), Congress's intent to vest the OCC with interpretive authority on this interstitial question is beyond reasonable dispute. Section 92a empowers the OCC "to promulgate such regulations as [it] may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein." 12 U.S.C. 92a(j). Identifying the State whose laws will govern particular fiduciary activities is undoubtedly a prerequisite to determining whether a national bank has "proper[ly] exercise[d]" its fiduciary authority. See Br. in Opp. 8-10.

c. The Utah Supreme Court suggested that, under the OCC's core-functions approach, "a national bank based in Texas . . . would have a competitive advantage over a national bank based in Utah as well as Utah-chartered banks." Pet. App. 21a (citation and brackets omitted). It is true that, under the OCC's approach, some national banks may exercise fiduciary powers with respect to property located in Utah in circumstances where a Utah bank would be unable to. That potential disparity, however, is merely the consequence of the "national banking system" that "Congress intended to facilitate." *Marquette Nat'l Bank*, 439 U.S. at 314-315 (citation omitted).

In *Marquette National Bank*, this Court interpreted a provision of the Act that authorized national banks to charge interest "at the rate allowed by the laws of the State in which the bank is 'located.'" 439

U.S. at 308 (quoting 12 U.S.C. 85). The Court read that language as authorizing a national bank located in Nebraska to issue credit cards to Minnesota residents at interest rates that were consistent with Nebraska law but were in excess of the rates permitted by Minnesota's usury laws. *Id.* at 313-314. The Court rejected the argument, made by a bank subject to Minnesota law, that this result would "upset[] the competitive equality now existing between state and national banks." *Id.* at 314. The Court observed that "such inequalities" were a "necessary part" of the "system of interstate banking" that Congress had created. *Ibid.* Substantially the same analysis applies here.

D. The Decision Below Is In Substantial Tension, Though Not In Direct Conflict, With An Unpublished Decision Of The Tenth Circuit

Petitioner contends (Pet. 28-30) that the decision below conflicts with the Tenth Circuit's decision in *Garrett v. ReconTrust Co.*, 546 Fed. Appx. 736 (2013). Although substantial tension exists between the two decisions, the two are not squarely in conflict.

In *Garrett*, the plaintiff alleged that the defendant national bank had conducted a nonjudicial foreclosure sale of his Utah residence in violation of Utah law. 564 Fed. Appx. at 737. The plaintiff "argue[d] that Section 92a, by its plain language, dictates that Utah law, not Texas law, applied to the foreclosure sale of [his] residence." *Id.* at 738. The Tenth Circuit concluded that Section 92a is ambiguous because it "provides no direction as to the critical question: in which 'State' is the national bank 'located' where, as here, activities related to the foreclosure sale occur in more than one state?" *Ibid.* The court accordingly resolved the case based on the OCC's regulations, as well as on

statements made by the OCC in a brief filed at the invitation of the court in another case, *Dutcher v. Matheson*, 733 F.3d 980 (10th Cir. 2013).⁶ See *Garrett*, 546 Fed. Appx. at 739-742.

The Tenth Circuit in *Garrett* granted the parties leave to file supplemental briefs addressing the Utah Supreme Court's decision in this case. 546 Fed. Appx. at 739 n.1. The court ultimately declined, however, to resolve the plaintiff's challenge to the validity of the pertinent OCC regulation because that challenge had not been raised in a timely manner. *Ibid.*; see *id.* at 739 (explaining that, because the plaintiff had timely "raise[d] arguments only as to the *meaning* of [the pertinent OCC rule], and not to the *reasonableness* of the regulations themselves," the court would "limit [its] inquiry accordingly"). Because the Tenth Circuit expressly reserved the question whether the OCC regulation is valid, no square conflict between the two decisions exists. And because the decision in *Garrett* is nonprecedential, the question presented here remains open within the Tenth Circuit. There is substantial tension between the two decisions, however, because the Tenth Circuit's conclusion that Section 92a(a) is ambiguous is logically irreconcilable with the Utah Supreme Court's holding that "the plain meaning of the statute" compels application of Utah law. Pet. App. 12a.⁷

⁶ In *Dutcher*, the Tenth Circuit remanded for further proceedings to determine whether the district court had subject-matter jurisdiction, without addressing the preemption issue presented here. See 733 F.3d at 983, 990.

⁷ Petitioner also suggests (Pet. 29-30) that the decision below conflicts with the Fourth Circuit's decision in *Jaldin v. ReconTrust Co.*, 539 Fed. Appx. 97 (2013) (per curiam), cert. denied, 134 S. Ct.

E. Although The Question Presented Will Likely Warrant This Court's Review In An Appropriate Case, This Is Not A Suitable Vehicle

The OCC's regulations constitute an integral part of the national banking system, on which national banks rely to determine their authority and legal obligations. See Clearing House Ass'n Amicus Br. 8 ("National banks rely heavily on the OCC's interstate fiduciary regulations to provide fiduciary services on an interstate basis to their customers, wherever such customers, and their property, happen to be located."). The ruling below significantly undermines the "clarity and certainty" that the OCC regulations are designed to achieve. 66 Fed. Reg. at 34,792.

In light of the jurisdictional obstacles identified above (see pp. 8-12, *supra*), however, this case is not a suitable vehicle for resolution of the question presented. And because the Utah Supreme Court is the only appellate court that has squarely addressed a challenge to the validity of the OCC rule at issue here, this Court's resolution of the question presented might benefit from further consideration of the issue in the lower courts. The Court therefore should wait to address the issue in an appropriate case.

2293 (2014). The court in *Jaldin* held that Section 92a preempted a Virginia statute that granted certain fiduciary powers to "state banks, but not national banks that do not have their principal office in Virginia." *Id.* at 101. Because Utah law does not permit state banks to conduct nonjudicial foreclosures, the *Jaldin* court's primary rationale for finding preemption is inapplicable here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

AMY S. FRIEND
*Senior Deputy Comptroller
and Chief Counsel*

KAREN O. SOLOMON
DANIEL P. STIPANO
Deputy Chief Counsels

HORACE G. SNEED
Director of Litigation

DOUGLAS B. JORDAN
*Attorney
Office of the Comptroller of
the Currency*

DONALD B. VERRILLI, JR.
Solicitor General

JOYCE R. BRANDA
*Acting Assistant Attorney
General*

MALCOLM L. STEWART
Deputy Solicitor General

ALLON KEDEM
*Assistant to the Solicitor
General*

OCTOBER 2014