No. A14-0834

State of Minnesota
In Supreme Court

In re Petition for Disciplinary Action against
William Bernard Butler, a Minnesota Attorney,
Registration No. 227921.

RESPONDENT'S BRIEF AND ADDENDUM

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Respondent

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Petitioner

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Holding below:

Referee Johnson found that Respondent violated Rule 3.1.

Apposite Cases and Statutes:

Minn. R. Prof. C. 3.1
In Re Westby, 639 N.W.2d 358, 367 (Minn. 2002)
Minn. R. Evid. 802
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2. Whether Petitioner Has Proven, By Clear and Convincing Evidence, that Respondent Has Violated Rule 3.4(c).

Holding below:

Referee Johnson found that Respondent violated Rule 3.4(c).

Apposite Cases and Statutes:

Minn. R. Prof. C. 3.4(c)
In Re Westby, 639 N.W.2d 358, 367 (Minn. 2002)
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STANDARD OF REVIEW

This Court reviews *de novo* the Findings and Conclusions contained in Referee William Johnson's December 1, 2014 Recommendation for Discipline. Minn. R. Prof. Resp. 14(e) (findings conclusive unless Respondent objects).

The Petitioner, the Director of the Minnesota Board of Professional Responsibility, must prove, by clear and convincing evidence, that Respondent William B. Butler violated the Rules of Professional Conduct. *In Re Westby*, 639 N.W.2d 358, 367 (Minn. 2002).

STATEMENT OF THE CASE

The Petitioner did not and cannot prove that Respondent violated Rule 3.1 (asserted "frivolous" claims) or Rule 3.4(c) (knowingly disobeyed a court order or rule). Petitioner's entire case rests upon federal court orders and hearsay commentary from federal judges who did not appear at trial and were not subject to cross examination.

The facts show that Respondent thoroughly researched the mechanics of securitized mortgages prior to bringing any claim, researched the facts of each individual case and brought each case in state court. The facts further show that every case brought by Respondent was a quiet title action brought under chapter 559 of the Minnesota Statutes where the defendant/lienholder bears the burden of proof. No federal judge in any order criticizing and attacking Respondent acknowledged 150 years of Minnesota law placing the burden of proof on the lienholder defendant. The facts further show that Respondent consistently asserted that the sole and exclusive legal title owner of a securitized mortgage is a securitized mortgage is a securitization trustee and that a securitization trustee who can assert legal title to the mortgage only by showing and proving physical delivery of loan documents in accordance with the terms and timing of the document that created the trust.

Finally, the facts show that in 2011 every major bank defendant admitted to precisely the issues Respondent complained of—conducting foreclosures without first verifying the trustee's legal ownership of the note and mortgage. The facts show that in July of 2011 Mortgage Electronic Registration Systems altered its rules to require foreclosures only in the name of or on behalf of the "note owner." The facts show that

Courts in New York, Texas and California have agreed with Respondent's fundamental claim that a securitization trustee who cannot prove timely delivery of mortgage loan documents cannot assert legal title to a securitized mortgage loan.

Petitioner did not and cannot prove that Respondent violated Rules 3.1 and 3.4(c).

STATEMENT OF THE FACTS

Disputed Findings and Conclusions.

Pursuant to Rule 14(e) of the Minnesota Rules of Professional Responsibility, Respondent disputes Referee William Johnson's Finding Nos. 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, 36 and 37. Respondent disputes Referee William Johnson's Conclusion Nos. 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13 and 15. As for Conclusion No. 1, this Court's holding in *Jackson v. Mortgage Electronic Registration Systems, Inc.*, 770 N.W.2d 487 (Minn. 2009) speaks for itself.

Facts Relating to Finding Nos. 8, 9, 10 and 12—Allegations of Filing "Frivolous" Lawsuits in Violation of Rule 3.1

In 2009 this Court in *Jackson v. MERS* held that a foreclosing bank need not record assignments of notes:

> Thus, **we hold that** even though an assignment of the promissory note with no accompanying assignment of the security instrument constitutes a mere equitable assignment of the mortgage, **it does not by operation of law need to be recorded to meet the requirements necessary to commence a foreclosure by advertisement**.
>
> In sum, we conclude that both of plaintiffs' arguments fail. First, we conclude that **the plain language of sections 580.02 and 580.04 of the foreclosure by advertisement statutes use the term mortgage to refer to security instrument assignments and not to promissory note assignments**. Second, this interpretation is consistent with our longstanding principles of real property law which establish that while a promissory note assignment does constitute an equitable assignment of the security instrument, a promissory note assignment is not an assignment affecting legal title, **and only assignments of legal title of the security instrument must be recorded in order to commence a foreclosure by advertisement.**

Jackson, 770 N.W.2d at 501.

Conclusion No. 2 of the Recommendation concludes that "there appears little to no chance that Respondent's "show me the note" cases, see paragraphs 7 through 9, supra, could succeed" due to *Jackson v. MERs* and *Stein v. Chase Home Finance, LLC,* 662 F.3d 976 (8th Cir. 2011). All of the Complaints referenced in paragraphs 7 through 9 contained a quiet title claim under Chapter 559 of the Minnesota Statutes. (*See* Exs. 12, 17, 20, 23, 25, 27, 29, 31, 33, 35, 41 and 43.)

Paragraphs 7 through 9 of the Recommendation indicate that *Stein v. Chase Home Finance, LLC,* 662 F.3d 976 (8th Cir. 2011) was a significant decision that should have caused Respondent to refrain from filing any further quiet title cases. Stein was a *pro se* plaintiff in federal district court. Respondent represented Stein on appeal to the Eighth Circuit. Stein did not assert a quiet title action under Chapter 559 of the Minnesota Statutes. (Ex. 8.) Respondent was not involved in the drafting of the *Stein* Complaint. The *Stein* Complaint did not assert a quiet title action under Chapter 559. The complaint in *Jackson v. MERs* did not assert a quiet title claim under chapter 559.

In November of 2010, Georgetown Professor Adam Levitin provided the following testimony before Congress regarding chain of title problems in securitized loans:

> A second problem and potentially more serious problem relating to standing to foreclose is the issue of chain of title in mortgage securitizations. As explained above, securitization involves a series of transfers both of the note and the mortgage from the originator to sponsor to depositor to the trust.

(Ex. 201-7, p. 19.)

> Trust law creates additional requirements for transfers. RMBS typically involve a transfer of the assets to a New York common law trust. Transfers to New York

> common law trusts are governed by the common law of gifts. **In New York, such a transfer requires actual delivery of the transferred assets in a manner such that no one else could claim ownership. This is done to avoid fraudulent transfer concerns. For a transfer to a New York common law trust, the mere recital of a transfer is insufficient to effectuate a transfer; there must be delivery in as perfect a manner as possible.**

(Ex. 201-7, p. 22.)

On April 13, 2011, the parent corporation of the Defendant in *Stein*, JPMorgan Chase Bank, N.A. ("Chase"), pursuant to the Federal Deposit Insurance Corporation Act, 12 U.S.C. § 1818(d), executed a Stipulation and Consent Order with the Office of the Comptroller of the Currency ("OCC Order"), in which Chase stipulated to having engaged in "unsafe and unsound" banking practices relating to foreclosing on securitized mortgages. Chase's admissions included foreclosing in the name of the wrong party, foreclosing without first identifying the legal "owner" of the note and mortgage and further failing to adequately supervise foreclosing lawyers:

> (2) In connection with certain foreclosures of loans in its residential mortgage servicing portfolio, the Bank:
>
> (a) filed or caused to be filed in state and federal courts affidavits executed by its employees or employees of third-party service providers making various assertions, **such as ownership of the mortgage note and mortgage ...**in which the affiant represented that the assertions in the affidavit were based on personal knowledge or based on a review by the affiant of the relevant books and records, when, in many cases, they were not based on such personal knowledge or review of the relevant books and records;
>
> (b) filed or caused to be filed in state and federal courts, or in local land record offices, numerous affidavits or other mortgage-related documents that were not properly notarized, including those not signed or affirmed in the presence of a notary;

(c) **litigated foreclosure proceedings and initiated non-judicial foreclosure proceedings without always ensuring that either the promissory note or the mortgage document were properly endorsed or assigned and, if necessary, in the possession of the appropriate party at the appropriate time**;

(d) **failed to devote sufficient financial, staffing and managerial resources to ensure proper administration of its foreclosure processes;**

(e) that the bank "failed to sufficiently **oversee outside counsel and other third-party providers handling foreclosure-related services.**

By reason of the conduct set forth above, the Bank engaged in unsafe or unsound banking practices.

(Ex. 201-4, pp. 2-3.) (Emphasis added.)

In the OCC Order Chase agreed to develop an "Action Plan" that would correct its "unsafe and unsound" practices and would ensure compliance with state law and with MERS Rules:

(3) The Action Plan shall address, at a minimum:

(d) governance and controls to ensure compliance with all applicable federal and state laws (including the U.S. Bankruptcy Code and the Servicemembers Civil Relief Act ("SCRA")), rules, regulations, and court orders and requirements, **as well as the Membership Rules of MERSCORP, servicing guides of the Government Sponsored Enterprises ("GSEs") or investors,** including those with the Federal Housing Administration and those required by the Home Affordable Modification Program ("HAMP"), and loss share agreements with the Federal Deposit Insurance Corporation (collectively "Legal Requirements"), and the requirements of this Order.

(Ex. 201-4, pp. 5-6.)

In addition to Chase, the following 13 banks also entered into identical OCC Orders on April 13, 2011: **Bank of America, Citibank, US Bank, Wells Fargo,**

HSBC Bank, Aurora Bank, Everbank and Everbank Financial Corp., PNC Bank, MetLife Bank, One West Bank, IMB HoldCo. LLC, and Sovereign Bank ("Banks"). The foregoing Consent Orders can be found on the OCC's website at:

> http://www.occ.gov/topics/consumer-protection/foreclosure-prevention/correcting- foreclosure-practices.html.

In each and every Consent Order executed by the Banks, the Banks agreed to develop an "Action Plan" that would ensure that future foreclosures complied with all state and federal laws, GSE (Fannie Mae and Freddie Mac) servicing guides, and amended MERS rules.

Also on April 13, 2011, two years after the decision in *Jackson v. Mortgage Elec. Registration Sys., Inc.*, 770 N.W.2d 487 (Minn. 2009), both Mortgage Electronic Registration Systems ("MERS") and MERSCORP also entered into Order and Consent Decrees with the OCC pursuant to the authority of the Federal Deposit Insurance Act. (Ex. 201-5.)

As a consequence of the OCC Consent Orders, on July 22, 2011, MERS changed its Rules, specifically Rule 8(e) to henceforth require that all MERS foreclosures be in the name of, or expressly on behalf of, the "note owner." (Ex. 201-6, p. 26.) Amended Rule 8(e) requires that all MERS Members comply with Amended Rule 8 notwithstanding state law:

> …until MERS has identified and MERSCORP has published a list of states that do not require and executed assignment of the Security Instrument from MERS to the note owner's servicer, or to such other party expressly and specifically designated by the note owner before initiating foreclosure proceedings or filing Legal Proceedings, **the note owner or the note-owner's servicer shall cause** the Certifying Officer to execute the assignment from MERS to the note owner's

servicer, or to such other party expressly and specifically designated by the **note owner before initiating foreclosure or filing Legal Proceedings in all states**.

(Ex. 201-7, p. 27.)

On July 21, 2011, Ramsey County District Court Judge Elena Ostby denied Wells Fargo's motion to dismiss under Rule 12 of the Minnesota Rules of Civil Procedure in *Cartier v. Wells Fargo*. Judge Ostby did not apply the federal *Iqbal/Twombly* Rule 12 "plausibility" standard, but instead applied the Minnesota "possibility" standard. (Ex. 201-9.)

September 13, 2011, prior to the Eight Circuit oral argument in *Stein*, the Eighth Circuit Bankruptcy Appellate Panel reversed the lower court's summary judgment in favor of a mortgage holder because the mortgagee's "**failure to produce the note prior to or at the hearing on its motion to dismiss** (treated as a motion for summary judgment) **precluded a determination that [the mortgagee] has the right, as a matter of law, to enforce the promissory note**." *In Re Banks*, 457 B.R. 9, 12 (8th Cir. BAP 2011). (Ex. 201-3.)

The Recommendation also places significance on the "blistering 54 page Order" of Federal Judge Patrick Schiltz in *Welk v. GMAC*. The Schiltz Order labeled Respondent's claims in that case "frivolous" "show me the note" claims.

The transcript of the January 20, 2012 hearing before Judge Schiltz in *Welk* shows very clearly Respondent's theory of the case, namely that only a securitization trustee can assert valid legal ownership of a securitized mortgage and only if the securitization can prove that it received the securitization loan documents—the note and

mortgage—in accordance with the terms of the PSA:

> MR. BUTLER: Well, if I can explain the special circumstances. And I think how much detail I would need to go into this in a pleading, I don't think I need to go any more detail, but I will explain the special circumstances to the Court. The special circumstances are that these **are all securitized loans. In securitized loans the only potentially valid legal titleholder to a note and a mortgage is a trust;** that's potentially. **You will note in this case there's a couple of trusts identified.**

(Ex. 306, p. 96.)

> MR. BUTLER: Well, potentially because if it's securitized, then there are equitable interests in the note out there. That is, the way securitization works, the note goes into a pooling and servicing agreement and gets transferred through various intermediaries down to a pooling and servicing agreement trust. **The trust, and only the trust, according to every pooling and servicing agreement, is the legal owner of –**

(Ex. 306, pp. 34-35.)

> The fact of the matter is -- and, again, six months of dealing with the chairman of securitization at a major, international law firm, I understand pooling agreements. And I understand when the chain of title of both mortgages and notes breaks down, **it potentially multiply exposes these people, my clients, to multiple claims.** So you could have, for example, a servicer who is foreclosing and maybe its parent is in bankruptcy. The servicer forecloses, takes back average Joe's property. Mortgage-backed securities litigants sue the trust, and the trust says what the heck happened, servicer never delivered us the note, **the pooling and servicing agreement says we have all right, title, and interest in the note and potentially make a claim against our clients.**

(Ex. 306, p. 31.)

> MR. BUTLER: That's a good question. There would be many potential fact points where you could say that. For example, after Ms. Welk's loan was originated, it was – if it was and it was securitized, it was supposed to go into a pooling and servicing agreement. And then once it got into a pooling and servicing agreement, it was supposed to be endorsed to one or two parties **and then deposited in a trust, which is a sole legal owner of the note and mortgage.**

(Ex. 306, p. 98.)

MR. BUTLER: Well, at that point if there's a break in chain of title -- and, **again, pooling and servicing agreements require a clear chain of title, and I hope this is articulated in the complaint -- a clear chain of title down to the PSA trust and the PSA trust, according to every PSA is the sole and exclusive legal owner of the note and mortgage,** and so when that happens, there is a break in the chain of title and Ms. Welk doesn't know that, doesn't know your legal position, is potentially flawed. **You've got a serious potential problem with not only taking her house**
back, but also collecting on that note. And that is really what is going on across the country.

(Ex. 306, p. 99.)

THE COURT: When the Eighth Circuit says it, when the Minnesota Supreme Court says it, when every federal judge you've asked this question of has said it, when every state judge that you have approached has said it, I don't understand why we're still arguing about this.

MR. BUTLER: Well, the state judges who have ruled on this -- and I would encourage the Court to also review Judge Ostby's decision.

THE COURT: Judge Ostby does not say a single word about the show-me-the-note theory. She does not say a single word about it.

MR. BUTLER: Because she recognizes, and she is the only one, who said that this is a quiet title case. She recognizes it's not a show-me-the-note case.

(Ex. 306, p. 24.)

Paragraph 57 of the 34-page *Welk* Complaint states:

57. Plaintiffs each have standing to make these claims because their properties are encumbered with an invalid and unenforceable mortgage. Minnesota statutes expressly contemplate, authorize and confer standing on a property owner to quiet title by removing adverse claims and encumbrances on real estate (chapter 559 of the Minnesota Statutes), to bring an action to set aside a foreclosure by advertisement (Minn. Stat. §§ 580.20 and 580.21), to quiet title by removing adverse claims and encumbrances on real estate (chapter 559 of the Minnesota Statutes), and to seek an adjudication of disputed rights under a contract or security agreement (chapter 555 of Minnesota Statutes).

(Ex. 12, p. 15.)

Facts Relating to Finding Nos. 13-21—Allegations that Joining Law Firms in Quiet Title and Slander of Title Cases was "Fraudulent" and Violated Rule 3.1

As noted above, in every case complained one or more bank defendant had executed, in April of 2011, an Order and Consent Decree admitting to "unsafe and unsound" foreclosure practices, admitted to foreclosing without first identifying the legal owner of the note or mortgage and admitted to failing to supervise "outside counsel." (Ex. 201-4, pp. 2-3.)

On January 25, 2012, Respondent deposed Paul Weingarten, attorney with the law firm of Usset, Weingarten and Liebo. At that deposition Respondent learned that Mr. Weingarten had his MERS signing authority revoked, Mr. Weingarten did not investigate or make inquiry into the out-of-state signers of foreclosure documents but rather trusted the Banks who had executed OCC Orders to provide him with accurate information. (Ex. 305.) Mr. Weingarten admitted that MERS had revoked his signing authority as a result of changes in MERS Rules. (Ex. 305, p. 86.) Mr. Weingarten and his firm continued to perform foreclosure after MERS had revoked their signing authority.

On April 30, 2012 Judge Patrick Schiltz denied a foreclosing law firm's motion to dismiss and remanded *Mutua v. Deutsche Bank Nat. Trust Co.*, 2012 WL 151724 (D. Minn. April 30, 2012) applying the following standard:

> Under Minnesota law, an attorney may be liable to a third-party non-client when the attorney "knowingly participates with his client in the perpetration of a fraudulent or unlawful act." *McDonald v. Stewart*, 182 N.W.2d 437, 440 (Minn.1970). **The fact that the attorney's allegedly wrongful conduct was within the scope of his role as an attorney does not by itself render him immune.** *Cf. Rucker v. Schmidt*, 768 N.W.2d 408, 411–12 (Minn.Ct.App.2009)

(attorney who allegedly helped client fraudulently undervalue an asset during a dissolution proceeding was not immune from liability to client's ex-wife).

Other Facts Relevant to Disputed Legal Conclusions

In March of 2011, a study of the Judicial Conference Advisory Committee on Civil Rule did a study of federal judge behavior after the decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and determined that federal courts dismissed 91.9 percent of "financial instrument" claims after Iqbal, a 44 percent increase from 2006. (Ex. 203, p. 14, J. Cecil, G. Cort, M. Williams & J Bataillon, Motions to Dismiss for Failure to State a Claim after Iqbal, Report to the Judicial Conference Advisory Committee on Civil Rules, (Federal Judicial Center, March 2011)).

On August 17, 2011, Federal Judge John Tunheim interpreted the holding in *Jackson* as follows in *Geweke v. U.S. Bank*, 2011 WL 4538088, p. 3 (August 17, 2011) as follows:

> Before discussing Defendants' specific objections to the R & R regarding their motion to dismiss, the Court will address a Minnesota Supreme Court case that underlies many of Defendants' objections. *See Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487 (Minn.2009). In *Jackson*, the Minnesota Supreme Court discussed the difference between a promissory note (debt obligation) and an underlying security instrument (interest in the property). *Id.* at 493–94. **The Supreme Court held that only assignments of the security instrument—not the note—need be recorded prior to foreclosure by advertisement, and that the term "mortgage" refers only to the security instrument.** *Id.* at 496 (citing Minn. Stat. §§ 580.02, .04).
>
> The Supreme Court arrived at this ruling even though "an assignment of the promissory note operates as an **equitable** assignment of the underlying security instrument." *Id.* at 497 (emphasis added). When a note is assigned, the party receiving the note obtains "a beneficial interest in property" that "gives the holder the right to acquire formal legal title." *Id.* (quoting Black's Law Dictionary 1523). **However, this equitable title does not automatically include legal or record title[5] to a property, which may remain with the party who keeps the security**

> **instrument in his name. *Id.* at 499. When a party obtains equitable but not legal title to a security instrument, there is no obligation for the party to record their equitable title prior to a foreclosure by advertisement. *Id.* at 500–01.**

Geweke, p. 3.

On August 6, 2014, this Court decided *Walsh v. U.S. Bank,* 851 N.W.2d 598 (Minn. 2014). The Minnesota Supreme Court rejected the *Iqbal* standard in *Walsh*.

On August 1, 2011, Respondent obtained three temporary restraining orders enjoining evictions in a quiet title action in state court. (Exs. 210, 211, and 212.)

Respondent originally filed all of the Complaints the Director complains of in Minnesota State District Courts.

After Judge Ostby issued her July 11, 2011 Order denying Wells Fargo's Rule 12 motion to dismiss in *Cartier v. Wells* applying the Minnesota "possibility" standard, Wells Fargo removed the case the federal court. On June 27, 2012, federal judge John Tunheim granted Wells Fargo's identical Rule 12 motion to dismiss in *Cartier v. Wells*, this time applying the federal "plausibility" standard. (Ex. 208.)

On October 9, 2012 Respondent obtained a temporary restraining order in state court enjoining a Fannie Mae eviction. (Ex. 317.)

On November 8, 2012, the Eighth Circuit reversed the Minnesota Federal District Court in one of Respondent's cases, *Murphy v. Aurora Loan Services,* 699 F.2d 1027 (8th Cir. 2012), finding that Respondent's Complaint stated a claim regarding failure to record assignments of mortgage.

On April 29, 2013, the New York Superior Court decided *Wells Fargo v.*

Erobobo, 2013 WL 1831799, 2013 N.Y. Slip. Op. 50675(U), 39 Misc.2d 1220(A) (NY Supreme Court, Kings County, 4/29/13). *Erobobo* held that transfer a securitized mortgage loan to a securitization trustee after the closing date of the securitization trust is void and that a securitization trustee making a claim based on a post-closing transfer lacks legal capacity. (Ex. 340.)

On May 13, 2013, the United States Supreme Court denied Respondent's Petition for Certiorari in *Murphy v. Aurora Loan Services.* 133 S.Ct. 2358. The petition asserted that the lower courts violated the Erie Doctrine by dismissing the plaintiffs' Complaint applying federal procedural rules (Rule 12 and *Iqbal* standard) in violation of state substantive law rights (burden of proof is on the defendant in a Minnesota quiet title action).

On June 6, 2013, a Texas Bankruptcy Court decided *Saldivar v. JPMorgan Chase*, 2013 WL 2452699 (Bky. S.D. Tex. June 5, 2013) (holding securitization trustee's claim to the mortgage is void *ab initio* if it cannot show that it received physical delivery of loan documents prior to the closing of the securitization trust). (Ex. 339.)

On August 8, 2013 in a published decision the California Court of Appeals decided *Glaski v. Bank of America, N.A.*, 218 Cal.Rptr.4th 1079 (2013) holding that securitization trustee's claim to mortgage is void if not received prior to the closing date of the securitization trust.

On October 7, 2013, the United States Supreme Court denied Respondent's

Petition for Certiorari in *Karnatcheva v. JP Morgan,* 134 S.Ct. 72.

Rule 41 of the Federal Rules of Civil Procedure provides that a Plaintiff may dismiss an action without court order by filing a notice of dismissal before the opposing party serves an answer or a motion for summary judgment:

> VOLUNTARY DISMISSAL.
>
> (1) *By the Plaintiff.*
>
> (A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:
>
> (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment;

Fed. R. Civ. P. 41.

ARGUMENT

I. RESPONDENT'S CLAIMS IN EVERY LAWSUIT ARE SUPPORTED AND SUBSTANTIATED BY MINNESOTA LAW, NEW YORK COURTS, TEXAS COURTS, THE CALIFORNIA COURT OF APPEALS AND MORTGAGE SECURITIZATION EXPERTS

A. Respondent Has Not Violated Rule 3.1

Rule 3.1 prohibits a lawyer from asserting claim that has no basis in law or fact. As is plain from Rule 3.1 itself and this Court's comment, it is not frivolous to assert a claim where the evidence substantiating the claim will be obtained in discovery:

> **Rule 3.1 Meritorious Claims and Contentions**
>
> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for a defendant in a criminal proceeding, or a respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.
>
> (Amended effective October 1, 2005.)
>
> ***Comment***
>
> *[1]* ***The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure.*** *The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However,* ***the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.***
>
> *[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or* ***because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail.*** *The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action*

taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this rule.

Minn. R. Prof. C. 3.1.

The Recommendation makes no independent factual findings from evidence presented at trial. Every factual finding is based on a federal pleading or federal judge's comment in federal court order. Clear and convincing evidence requires proof by admissible, credible evidence subject to cross examination. Minn. R. Evid. 802 (hearsay inadmissible); Minn. R. Evid. 805 (hearsay statements within admissible hearsay documents are inadmissible to prove truth of the matter asserted).

The Recommendation makes no mention of the fact that every one of the Complaints complained of asserted a quiet title action under chapter 559. Paragraph 5 of Respondent's Answer herein contains the following synthesis of Minnesota quiet title law, provided to every federal court that dismissed every one of Respondent's Complaints:

> The first Minnesota legislature enacted Minnesota's quiet title statute, chapter 559, in 1858. The mechanics of quieting adverse title interests has remained virtually unchanged in Minnesota since that time.
>
> To state a claim to quiet title, a plaintiff alleges **(i) possession (ii) of real property and (iii) that the defendant claims some adverse interest therein.** ***Barber v. Evans*****, 27 Minn. 92, 93, 6 N.W. 445, 446 (1880). Once a claim is stated, the burden of proof shifts to the defendant.** *Id.*

The object of this statute is:

to force one claiming an adverse claim or lien to establish or *abandon his claim*; that with respect to the claim of the defendant the position of the parties is the reverse of that occupied by the parties to an ordinary action; **that *the defendant becomes practically plaintiff; and takes the affirmative in pleading and proof,* whi**le the plaintiff becomes practically the defendant, and defends against the claim.

Alt v. Groff, 65 Minn. 191, 192, 68 N.W. 9, 10 (1896) (emphasis added).

The elements of the claim **and the shifting of the burden of proof have remained unchanged since the statute was enacted.** A quiet title action under the statute is specifically reserved for those situations where the invalidity of the interest is **NOT APPARENT** on its face. *New England Mut. Life Ins. v. Capehart*, 65 N.W. 258, 259 (1895) (emphasis added).

It is well-settled Minnesota law that a quiet title action may be brought by one in possession of real property against an entity claiming a lien or mortgage on the property. *Donahue v. Stearns*, 31 Minn. 244, 245 (1883). A quiet title action is appropriate **where a lien or claim appears apparently good against the title for which the relief is sought.** *Maloney v. Finnigan*, 38 Minn. 70, 71 (1887) (emphasis added). The only facts necessary to set up a claim under the statute are possession by the plaintiff and a claim adverse to him by the defendant. *Steele v. Fish*, 2 Minn. 153 (1858). **All the plaintiff need show is possession; the burden is then on the defendant to prove the validity of his claim.** *Walton v. Perkins*, 28 Minn. 413 (1881).

The current version of West's Minnesota Practice, the Minnesota practitioner's guide, confirms the foregoing and adds:

It is not necessary for the plaintiff to allege his title in detail, nor to state or exhibit the nature of the defendant's adverse claim." 6A Minn. Prac. § 54.12 (3d ed.) (internal cites omitted). "It is for an answering defendant to disclose the nature of his adverse claim in his answer." 6A Minn. Prac. § 54.15 (3d ed.)

Furthermore, as part of drafting and adopting the Minnesota Rules of Civil Procedure, in 1951 the Minnesota Supreme Court reviewed chapter 559 and the burden-shifting case law above. In 1952 the Minnesota Supreme Court carved out a very specific exception to the normal procedural rules for quiet title actions brought under chapter 559. Rule 81.01 of the Minnesota Rules of Civil Procedure Provides:

The rules do not govern pleadings, practice and procedure in the statutory

> and other proceedings listed in Appendix A insofar as they are inconsistent or in conflict with the rules.
>
> Minn. R. Civ. P. 81.01.
>
> From 1952 to the present, Appendix A has listed quiet title actions brought under chapter 559:
>
> **Chapter 559… Action to determine adverse claims.**
>
> Minn. R. Civ. P. App. A. The Minnesota Supreme Court has reviewed, revised and amended the Rules in 1959, 1968, 1975, 1985, 1998, 2000, 2005, 2006, 2007 and 2010. Each time it had the opportunity to review Rule 81.01 and its exclusion of Chapter 559 quiet title claims from the normal rules, and each time it chose to exempt them. Chapter 559′s express exclusion, including necessarily the quiet title burden-shifting case law above, has been in Appendix A every year since 1952.

(Answer, ¶ 5.)

Respondent in good faith argued to every federal court that application of the *Iqbal/Twombly* standard to dismiss a Minnesota quiet title action violated Respondents' clients' right to due process. Respondent repeated argued, and twice unsuccessfully petitioned the United States Supreme Court, that burden of proof in a lawsuit is a substantive right and that the federal courts' application of Federal Rule 12 to deny that right was a violation of substantive due process. Neither Petitioner nor Referee Johnson has responded to this fact or provided any evidence that Respondent's petitions to the United States Supreme Court were insincere or groundless.

The Referee's Recommendation also misconstrues Respondent's *Erie* position. Respondent never argued that federal courts should apply state procedural rules. Respondent argued that Minnesota state substantive law placing the burden of proof on the defendant bank/mortgagees required that the federal courts reject the *Iqbal/Twombly*

standard and require the bank/mortgagees to meet their burden of proof. In the context of a securitized mortgage, this requires the securitization trustee prove its legal title by showing timely delivery and acceptance of the mortgage loan documents.

Every federal court order dismissing Respondent's Complaints applied the *Iqbal* standard. No federal court decided Respondent's Complaints placed the burden of proof on the defendant Banks.

Professor Adam Levitin and Court in New York, Texas and California agree with Respondent's theory as articulated to Judge Schiltz at the January 2012 hearing that resulted in $80,000 in sanctions. The only legal owner of a securitized mortgage is a securitization trustee. A securitization trustee can assert legal title to a securitized mortgage only if it can show timely delivery of the mortgage loan documents in accordance with the terms of the trust. In the *Welk* case, seven of the mortgagees' claims are void as a matter of law as result of the *Erobobo, Saldivar* and *Glaski* decisions. (*See* Ex. 307-313). For these seven properties, if the trustee's sole basis for legal title is the assignment of mortgage dated and recorded years after the closing of the trust, then the trustee must have filed IRS Form 1066 paying all back taxes and penalties to show that it has ratified the *ultra vires* transfer in violation of New York law and REMIC tax rules. (Ex. 314.) That information can only be obtained through discovery which Judge Schiltz denied by dismissing the *Welk* Complaint and sanctioning Respondent.

In sum, there is no clear and convincing evidence that any Complaint in question was "frivolous." In virtually every case one or more named defendant has admitted to

"unsafe and unsound" foreclosure practices including foreclosing when it had not first identified the legal owner of the note or mortgage. In every case one or more named defendant had stipulated and agreed to comply with all state laws, GSE servicing guides and new MERS rules. Every case was a quiet title action brought under chapter 559 where the burden of proof is on the defendant/lienholder. In every case the federal court refused to acknowledge the defendants' the burden of proof, refused to allow discovery and applied the *Iqbal/Twombly* standard to dismiss the complaint.

As to Respondent's dismissal and refiling of lawsuits, the transcript speaks for itself. There is no evidence that Respondent dismissed and refiled any case to delay or gain any tactical advantage. The critical comments of federal judges guessing at Respondent's motives are unsubstantiated and inadmissible. Respondent dismissed and refiled the affected cases in strict accordance and compliance with Federal Rule 41, solely to add plaintiffs to cases in order to keep clients in their homes. The dismissals and refiling did not delay the federal courts' processing of any case.

Similarly, there is no evidence that Respondent "fraudulently" joined any law firm. The deposition of Paul Weingarten is clear. Notwithstanding the fact that their clients have executed orders admitting to "unsafe and unsound" foreclosure practices and have had their MERS signing authority revoked, foreclosing lawyers like Mr. Weingarten turn a blind eye to their clients' admitted fraud. Mr. Weingarten never investigates his client's legal title, obtains his client "referrals" and documents through a faceless electronic "LendStar" system and asks no questions of his clients. Mr. Weingarten does not question the authority of the signers of the documents he receives in the mail after he

prepares them in spite of the OCC Orders in which his clients have admitted to recording unauthorized documents and failing to supervise outside counsel. (Ex. 305, pp. 10-11; 38; 43; 81; 85; and 96.)

B. Respondent Has Not Violated Rule 3.4(c)

Petitioner bears the burden of proving, by clear and convincing evidence, that Respondent has willfully disobeyed a court order:

> **Rule 3.4Fairness to Opposing Party and Counsel**
>
> A lawyer shall not:
>
> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

Minn. R. Prof. C. 3.4(c).

The Referee and Petitioner contend that Respondent has violated Rule 3.4(c) by failing to pay over $300,000 in federal sanctions orders.

Petitioner has not presented clear and convincing evidence that Respondent has willfully violated any court order or rule. Respondent testified that he does not have the financial means to pay nearly $300,000 in federal court sanctions. Petitioner did not present any evidence, much less clear and convincing evidence, that Respondent has any ability to pay the sanctions.

CONCLUSION

There is no evidence that Respondent violated Rules 3.1 or 3.4(c). Respondent's quiet title Complaints are supported by Minnesota law and his factual and legal assertions regarding legal title to securitized mortgages are supported by Professor Adam Levitin and the *Erobobo*, *Saldivar* and *Glaski* courts. There is no evidence that Respondent has willfully violated any court order.

Dated: February 6, 2015

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