NO. 15-_____

In the Supreme Court of the United States

DONALD C. BURNIAC,

Petitioner,

–v–

WELLS FARGO BANK, N.A., and
UNKNOWN TRUSTEE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

CARSON J. TUCKER
COUNSEL FOR PETITIONER
LAW OFFICES OF CARSON J. TUCKER
117 N. FIRST ST., SUITE 111
ANN ARBOR, MI 48104
(734) 629-5870
CJTUCKER@LEXFORI.ORG

JUNE 13, 2016

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Did the federal district court's summary judgment dismissing Petitioner's state-law claims after removal by Respondent Bank, after which and during the state court's injunction on the non-judicial foreclosure sale of Petitioner's home, and after which a "default" had been entered against the Bank by the state trial court, violate principles of federalism where the Bank generally appeared in the state court action, and never moved to set aside the injunction or the default as required by substantive law of the state of Michigan?

2. Was the federal district court's order (after the wrongful removal when the Respondent Bank was in default and under injunction not to summarily sell Petitioner's home in a non-judicial foreclosure proceeding) dissolving the state trial court's order enjoining the summary non-judicial foreclosure sale of Petitioner's home and entering summary judgment on all state-law claims deprive Petitioner of his state and federal constitutional right to a trial by jury on the merits with respect to his fundamental right to ownership and possession of real property?

3. Did the failure to record a proper assignment of a whole mortgage interest to the Bank (or to otherwise demonstrate how the Bank came into possession of the ostensible right to foreclose) prevent non-judicial foreclosure by advertisement, and require remand for a trial on the merits of Petitioner's state law claims?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION OF THE COURT 1
CONSTITUTIONAL AND STATUTORY PROVISIONS 1
INTRODUCTION 3
STATEMENT OF THE CASE 13
REASONS FOR GRANTING THE PETITION 17
I. THE STATE TRIAL COURT ENTERED DEFAULT AND THE BANK'S LIABILITY WAS DETERMINED UNLESS AND UNTIL IT FILED A MOTION TO SET ASIDE THE DEFAULT IN ACCORDANCE WITH MICHIGAN SUBSTANTIVE LAW, WHICH IT NEVER DID 17
II. MR. BURNIAC ASSERTED HIS RIGHT TO A JUDICIAL PROCEEDING PRIOR TO THE FORECLOSURE AND THEREFORE HE WAS ENTITLED TO A TRIAL ON THE MERITS OF HIS CLAIMS 24
CONCLUSION 35

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

Opinion of the Sixth Circuit (January 13, 2016)..... 1a

District Court Opinion and Order Granting Defendant's Motion for Summary Judgment (January 28, 2015)..... 16a

District Court Opinion and Order Denying Plaintiff's Motion to Remand (December 17, 2013)..... 63a

Order Granting Preliminary Injunctive Relief (June 18, 2013)..... 87a

Verified Complaint and Demand for Jury Trial, Relevant Excerpt (May 20, 2013)..... 89a

Docket Entry: Default Request, Affidavit, and Entry (June 20, 2013)..... 91a

TABLE OF AUTHORITIES

Page

CASES

Al-Shimmari v. Detroit Medical Center,
477 Mich. 280, 713 N.W.2d 29 (2007) 19

American Central Corp. v. Stevens Van Lines, Inc., 103 Mich.App. 507,
303 N.W.2d 234 (1981) 12

Armstrong v. Manzo,
380 U.S. 545 (1965) 24

Arnold v. DMR Financial Services,
448 Mich. 671, 532 N.W.2d 852 (1995) 24, 25

Austin v. Anderson,
279 Mich. 424, 272 N.W.2d 730 (1937) 30

Beal v. Missouri Pacific R. Co.,
312 U.S. 45 (1941) 10

Butner v. Neustadter,
324 F.2d 783 (9th Cir. 1963) 20

Coe v. Armour Fertilizer Works,
237 U.S. 413 (1915) 24

Cousins v. Wigoda,
409 U.S. 1201 (1972) 9

Davenport v. HSBC Bank, USA,
275 Mich. App. 344, 739 N.W.2d 383 (2007) 28

Dohm v. Haskin,
88 Mich. 144, 50 N.W. 108 (1891) 29

Emmons v. Emmons,
136 Mich. App. 157, 355 N.W.2d 898 (1984). 11, 22

TABLE OF AUTHORITIES—Continued

Page

Erie R.R. v. Tompkins,
304 U.S. 64 (1938) 13

Feldman v. Equit. Trust. Co.,
278 Mich. 619, 280 N.W. 809 (1937)..... 25, 26, 27

Feller v. National Enquirer,
555 F.Supp. 1114 (N.D. Ohio 1982)..... 20, 21

Fox v. Jacobs,
289 Mich. 619, 286 N.W. 854 (1939)..... 28, 29

Frontier Ins. Co. v. Blaty,
454 F.3d 590 (6th Cir. 2006) 21

Gjokaj v. HSBC Mortg. Services, Inc.,
602 F.Appx. 275 (6th Cir. 2015)..... 22

Goss v. ABN AMRO Mortg. Group,
549 Fed. Appx. 466 (2013)..... 33

Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70, 415 U.S. 423 (1974)..... 34, 35

Great Lakes Co. v. Huffman,
319 U.S. 293 (1943) 10

Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit,
874 F.2d 332 (6th Cir. 1989) 17

Holliday v. Wells Fargo Bank, NA,
569 F. Appx. 366 (6th Cir. 2014)..... 22

In re Estate of Gordon, 222 Mich. App. 148,
564 N.W.2d 497 (1997).....passim

TABLE OF AUTHORITIES—Continued

Page

Kim v. JP Morgan Chase Bank, N.A.,
493 Mich. 98, 825 N.W.2d 329 (2012).....passim

Kokkonen v. Guardian Life Ins. Co. of Am.,
511 U.S. 375 (1994) 17

Kuschinski v. Equit. & Centr. Trust,
277 Mich. 23, 268 N.W. 797 (1936)..... 28

Mfrs. Hanover Mtg. Corp. v. Snell,
142 Mich. App. 548, 370 N.W.2d 401 (1985)..... 30

Miller v. Davis,
507 F.2d 308 (6th Cir. 1974) 13

Mitchum v. Foster,
407 U.S. 225 (1972) 9

Peralta v. Heights Med. Ctr., Inc.,
485 U.S. 80 (1988) 24

Philips v. Mirac, Inc.,
470 Mich. 415, 685 N.W.2d 174 (2004)..... 10, 13

Ragnone v. Wirsing,
141 Mich. App. 263, 367 N.W.2d 369 (1985)..... 19

Reid v. Rylander,
270 Mich. 263, 258 N.W. 630 (1935)..... 30

Simler v Conner,
372 U.S. 221 (1963) 23, 24

Trainor v. Hernandez,
431 U.S. 434 (1977) 10

Tray v. Whitney,
35 Mich. App. 529, 192 N.W.2d 628 (1971) 32

TABLE OF AUTHORITIES—Continued

Page

Wood v. DAIIE,
413 Mich. 573,
321 N.W.2d 653 (1982) 12, 20, 23, 33

Worth v. Dortman,
94 Mich. App. 103, 288 N.W.2d 603 (1979) 21, 23

Zaiter v. Riverfront Complex, Ltd,
463 Mich. 544, 620 N.W.2d 646 (2001) 12

CONSTITUTIONAL PROVISIONS

Mich. Const. 1963, art. 1, § 14 ..... 1, 10

STATUTES

28 U.S.C. § 1257(a) 1

MCL 600.2932(5) 32

MCL 600.3201 14

MCL 600.3204(1) 14

MCL 600.3204(3) 14, 25, 27

MCL 600.3204(4) 14

MCL 600.3205a 14

MCL 600.3205c 14

JUDICIAL RULES

MCR 2.102(E)(2) 19

MCR 2.116(D)(1) 19

MCR 2.603(A)(3) ..... passim

MCR 2.612 ..... passim

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

Ennis & Malek, *Bank Risk of Failure and Too Big to Fail Policy*, ECONOMIC QUARTERLY, vol. 91/2 (Spring 2005) 5, 8

O'Hara & Shaw, *Deposit Insurance and Wealth Effects: The Value of Being Too Big to Fail*, 45 JOURNAL OF FINANCE 1587-601 (December 1990)..... 5, 8

Peterson, *Cracking the Mortgage Assignment Shell Game*, 85 FLA. BAR JOURNAL 9 (Nov. 2011)..... 6

Stern & Feldman, *Too Big to Fail: The Hazards of Bank Bailouts*, Brookings Institution Press, Washington, DC (2004) 5, 8

OPINIONS BELOW

The Sixth Circuit Court of Appeals opinion (App.1a) is reported at 810 F.3d 429 (2016). The opinion of the United States District Court for the Eastern District of Michigan is unpublished and appears at 2015 WL 401018 (U.S.D.C. E.D. Mich. 2015) (App.16a).

JURISDICTION OF THE COURT

This Court has jurisdiction over Mr. Burniac's Petition pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner contends that the decision of the Circuit Court of Appeals violated his state-court rights to a civil trial by a jury pursuant to Michigan Constitution 1963, art. 1, § 14 and Michigan Court Rules governing entry of default, MCR 2.603(A).

- **Mich. Const. 1963, art. 1, § 14**

  The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law.

- **Mich. Ct. R. 2.603**

(A) Entry of Default; Notice; Effect.

(1) If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party.

(2) Notice that the default has been entered must be sent to all parties who have appeared and to the defaulted party. If the defaulted party has not appeared, the notice to the defaulted party may be served by personal service, by ordinary first-class mail at his or her last known address or the place of service, or as otherwise directed by the court.

(a) In the district court, the court clerk shall send the notice.

(b) In all other courts, the notice must be sent by the party who sought entry of the default. Proof of service and a copy of the notice must be filed with the court.

(3) Once the default of a party has been entered, that party may not proceed with the action until the default has been set aside by the court in accordance with subrule (D) or MCR 2.612.

INTRODUCTION

In May of 2013, Petitioner, Donald C. Burniac, filed suit in Michigan state court against the Respondent, Wells Fargo Bank, N.A. (the Bank), claiming the Bank failed to produce adequate and sufficient proofs of its right to initiate and execute summary, non-judicial foreclosure and sale of Mr. Burniac's family home. Mr. Burniac's claims were based largely in Michigan common and statutory law. Mr. Burniac requested a trial by jury pursuant to the Michigan Constitution and requested an injunction on the sheriff's sale. (App.89a)

The Bank generally appeared in the state court action and stipulated with Mr. Burniac's counsel for a two-week adjournment of the trial court's show cause hearing on Mr. Burniac's motion to enjoin the sale. The bank failed to appear at the hearing. The trial court entered an injunction prohibiting the summary, non-judicial foreclosure sale of Petitioner's home pending a jury trial on the merits of Petitioner's state law claims. (App.87a-88a) A default was then entered against the Bank in the state court proceedings. (App.91a-94a)

Pursuant to Michigan Court Rules, MCR 2.603(A)(3), before proceeding further in the action, the Bank was required to file a motion to set aside the default. The Bank failed to do this and instead filed for removal of the case to federal court.

The federal district court ignored the state court's default against the Bank and the substantive

requirement that further proceedings could not be had until the Bank filed a motion to set aside the default (which the Bank never did), ignored the state court's injunction prohibiting the summary, non-judicial foreclosure sale of Mr. Burniac's home, ignored the state court's order that a jury trial on the merits of his state-law claims be held, and entered summary judgment in favor of the Bank. (App.16a-62a).

Mr. Burniac appealed to the Sixth Circuit Court of Appeals. Mr. Burniac argued that the federal district court could not proceed to adjudicate Mr. Burniac's substantive state-law claims because the Bank never filed a motion to set aside the default before proceeding further. Mr. Burniac also challenged the federal court's summary disposition of his state-law claims in light of the fact the trial court specifically enjoined the non-judicial foreclosure sale of Mr. Burniac's home and ordered a hearing on the merits. Mr. Burniac specifically requested a trial by jury and the Michigan Constitution, as well as the U.S. Constitution provides that he is entitled to a jury trial on the substantive question of his property rights.

In a published opinion, the Sixth Circuit affirmed. (App.1a-15a) The panel held that because a default judgment had not been entered, the federal district court was free to ignore the procedures required for setting aside the default and proceed to summarily adjudicate the merits of Mr. Burniac's petition. The Court affirmed the district court's entry of summary judgment for the Bank.

Petitioner claims legal error in the federal district court's order and judgment on the legal grounds more fully developed in this petition, and claims

further error in the Circuit Court of Appeals affirmance of the federal district court's order and judgment. Petitioner respectfully seeks review in this Court.

State and federal courts in this country have had to address an economic tragedy of historic proportion. Never before has an entire segment of the population (10 million by some estimates) of all economic backgrounds and social positions been so negatively affected at once. Mr. Burniac, like so many other normal, hard-working people in this country, believed in the promise of its future. He believed in the concept of appreciating real estate values. He invested in his family's home for over 25 years. He sheltered his family and raised his kids in it.

And, like so many others hoping to realize the value of their hard work, Mr. Burniac refinanced his home, which, because of the manipulations in the financial industry and the incentivized risk-taking encouraged by a decades old policy deeming the Banks "too-big-to-fail" (TBTF),[1] had supposedly nearly tripled in value within the short span of a few years.

The Banks were allowed to securitize mortgages. But rather than treat these instruments as whole

---

[1] See Ennis & Malek, *Bank Risk of Failure and Too Big to Fail Policy*, ECONOMIC QUARTERLY, vol. 91/2 (Spring 2005); Stern & Feldman, *Too Big to Fail: The Hazards of Bank Bailouts*, Brookings Institution Press, Washington, DC (2004); O'Hara & Shaw, *Deposit Insurance and Wealth Effects: The Value of Being Too Big to Fail*, 45 JOURNAL OF FINANCE 1587-601 (December 1990).

interests in people's "real property", i.e., their homes, the securitized mortgages were treated (thanks to earlier and arguably inapplicable (and retroactive) modifications to the UCC)[2] like ordinary bundled and divisible securities and sold onto the open investment markets as desirable and valuable parts of attractive investment portfolios.

The problem is, in their haste to cash in on these over inflated home values, the Banks allowed proof of the assignments and transfers of the mortgages to be legitimized without visible proof of ownership, and many of those verifications were forged by "robo-signers". Transfers of the mortgage instruments from one entity to another were signed and verified without proof being demonstrated to the notary of the existence of the actual mortgage in the hands of the transferring entity. These methods, well-documented in hindsight, made it easier for the banks to churn out and slough off their interests in the whole mortgages. The banks ignored and otherwise refused to abide by the individual states' requirements to have such assignments and transfers properly recorded in local deed rooms in the counties and parishes in which the properties were located. And, as in this case, when they did comply with the recording requirement, they provided the forged and unverified signatures as proof of the instrument's transfer.

All of a sudden, whole mortgage interests in the residential real property of individual homeowners were being assigned, split and sold on the open world

---

[2] Peterson, *Cracking the Mortgage Assignment Shell Game*, 85 FLA. BAR JOURNAL 9 (Nov. 2011), p. 4.

market with no verifiable proof of a traceable chain of title, much less legitimated rights of the holders to seek payment from the homeowner who had borrowed money on the basis of the artificially inflated values that preceded the bursting of the bubble. When the homeowners rightly asked for proof that the holder of the claimed interest had a right to payments due on the note, the legal connivances began.

State law (common law and statutory), like Michigan's in the instant case, had previously correctly required that a transfer of an entire interest in the mortgage of real property had to be properly verified and recorded in the deed room of the relevant county in which the property was located. A foreclosure by advertisement (a non-judicial foreclosure) to recover possession of the property was deemed *void ab initio* if the entity seeking to foreclose or otherwise recover could not produce legitimate proof. Michigan, like so many other states required, in the absence of this proof, a full (not summary) judicial proceeding (a trial on the merits—which is what the state court ordered in this case) to be conducted so that the claimed right to foreclose on the property could be properly vetted and legitimized through discovery and the adversarial process.

Under pressure from the banking industry who had created the crisis under the TBTF policies set in place by deregulation, lax oversight, and government -subsidized incentives for risk-taking, the state courts changed the common law, holding that non-judicial foreclosures were <u>voidable</u> only upon a demonstration by the homeowner that there would

be some prejudice. In this case, the Bank asserted that to claim a legitimate reason to void the transaction, Mr. Burniac would have to show what was deemed a "threat of double recovery". In other words, Mr. Burniac would have to show (without the benefit of a trial) some other interest holder might come along and claim a right to recover on the note. This is hypocrisy in its purest form when considered in light of the fact that the banks were already paid once as a result of selling the security, another time as a result of the FDIC and bailout packages post-collapse, and now, assert (or transfer yet again) their claimed rights to recover the property through a non-judicial foreclosure by advertisement proceeding.

The banks for the most part were spared the misery of having to explain themselves, blindly chanting the mantra "too big to fail".[3] But, for all the banks, and all of their well-funded rescues, there were individual people in this country, like Mr. Burniac, who were not "too big to fail." Indeed, the law allowed them to suffer *en masse*, so that the bailouts could work for the benefit of a few- the banks. Indeed, it has been well-documented that the TBTF policy increases and incentivizes high-risk behavior.[4]

And for each of the estimated number of those, like Mr. Burniac, their lifetime of work and investment, the day to day toils and troubles they suffered to maintain and keep their homes were erased and

---

[3] See Ennis & Malek, *supra*; Stern & Feldman, *supra*. O'Hara & Shaw, *supra*.

[4] *Id.*

invalidated in a relatively short period of time. State after state bent to the bank's mantra, changing the law to accommodate the evident and admitted failures of the banks to have simply engaged in the most basic of real property exercises—properly validating and then recording valid assignments of real estate interests.

Failures to provide legitimate proof of transfer of ownership in security of a whole mortgage went from being void to merely voidable upon a showing of prejudice by the homeowner. This unprecedented change in the law worked a fundamental unfairness to homeowners in that it allowed utter dispossession of real property in which they had a certain amount of equity, if not a lifetime of work and value. This erasure by fiat constituted an usurpation of one of the fundamental rights of this country to own and possess real property.

A state court is the presumptive arbiter of the constitutional rights of its citizens. *Cousins v. Wigoda*, 409 U.S. 1201, 1205 (1972). This court has advised that federal courts will not casually enjoin the conduct of pending state court proceedings. *Id.* at 1206, citing *Mitchum v. Foster*, 407 U.S. 225 (1972) "[I]n a Union where both the States and the Federal Government are sovereign entities, there are basic concerns of federalism which counsel against interference by federal courts with legitimate state functions, particularly with the operation of state courts." *Trainor v. Hernandez*, 431 U.S. 434, 441 (1977).

In Michigan, the right to a jury trial in a civil case is constitutionally protected if demanded by the

party. Mich. Const. 1963, art. 1, § 14. See also *Philips v. Mirac, Inc.*, 470 Mich. 415; 685 N.W.2d 174 (2004) A judicial proceeding was ordered in this case to consider Mr. Burniac's state law claims. (App.87a-88a) And, Mr. Burniac demanded a jury trial. (App.89a)

Notwithstanding that federal courts have authority to continue state court proceedings, they are to give "scrupulous regard (to) the rightful independence of state governments" principally in the state's procedures governing jury trials affecting its citizens' constitutional rights. *Beal v. Missouri Pacific R. Co.*, 312 U.S. 45, 50 (1941). In *Beal*, *supra*, the Court held, that in this intergovernmental context, the two classic preconditions for the exercise of equity jurisdiction assumed new dimensions. Thus, "[a]lthough the existence of an adequate remedy at law barring equitable relief normally would be determined by inquiring into the remedies available in the federal rather than in the state courts," *Great Lakes Co. v. Huffman*, 319 U.S. 293, 297 (1943), equitable restraint requires the federal court to abide by the state court's substantive procedures and methods. See *Trainor v. Hernandez*, 431 U.S. 434, 441 (1977).

It would be unnatural to conclude that in failing to exercise such restraint, the federal court inadvertently, or otherwise, removed the opportunity of Mr. Burniac to obtain those fundamental constitutional rights he would otherwise have had to pursue in the state court proceedings. Specifically, the trial court in the state court proceeding determined Mr. Burniac had produced enough initial evidence to entitle him to an injunction. The Bank generally appeared in the proceeding (sufficient in

Michigan to submit to the jurisdiction of the state courts), see *In re Estate of Gordon*, 222 Mich. App. 148, 158; 564 N.W.2d 497 (1997) (any action on the part of a defendant that recognizes the pending proceedings, with the exception of objecting to the court's jurisdiction, will constitute a general appearance). And, a default was entered against the Bank for its failure to appear at the hearing to show cause as to why an injunction should not enter to prevent the sale of Mr. Burniac's home. (App.91a-94a).

And, in Michigan, once a default is entered, as informal a process as that is, *Emmons v. Emmons*, 136 Mich. App. 157, 164; 355 N.W.2d 898 (1984), the party against whom that entry is made must file a motion to set aside the default before proceeding further in the case, or suffer the consequences. See Michigan Court Rule (MCR) 2.603(A)(3) ("once the default of a party has been entered, that party may not proceed with the action until the default has been set aside by the court in accordance with subrule (D) or MCR 2.612") Unless it is set aside through the proper procedure (filing by the party of the motion required by MCR 2.603(A)(3)), a default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating the issues. *Zaiter v. Riverfront Complex, Ltd*, 463 Mich. 544, 554; 620 N.W.2d 646 (2001) See also *Wood v. DAIIE*, 413 Mich. 573, 578; 321 N.W.2d 653 (1982) and *American Central Corp. v. Stevens Van Lines, Inc.*, 103 Mich.App. 507, 512, 303 N.W.2d 234 (1981) ("Entry of a default is equivalent to an admission by the defaulting party as to all well-pleaded allegations.")

So, the real questions for the Court here is can the federal district court, and the Court of Appeals circumvent, or otherwise usurp, the Michigan state court proceedings (1) requiring a jury trial where one is demanded; and (2) not allowing a party (here the Bank) to proceed further if a default has been entered against it? The answer is no, because the federal courts must respect the substantive state laws governing judicial proceedings affecting the constitutional rights of its citizens. And here, that of course is the state of Michigan's constitutional right to a trial by jury in all civil proceedings respecting a citizen's constitutional right to equity in his real property.

Mr. Burniac's complaint demanded an accounting and a valuation of the equity in his home. He also claimed breach of the mortgage contract. Finally, he sought to litigate the Bank's purported right (proof) to conduct a non-judicial foreclosure sale. This latter demand entitled him to a trial, *i.e.*, a judicial consideration of the Bank's ostensible entitlement—the Bank would have to prove, at a trial, that the assignment to it by Washington Mutual was legitimate.

So, in addition to challenging the Bank's purported right to a non-judicial foreclosure (although it never produced legitimate proof of the validity of the assignment by the infamous robo-signer Mary Jo McGowan to it from Washington Mutual), Mr. Burniac sought an accounting and proof that can only be passed upon by a civil jury. This is required by the Michigan Constitution to be adjudicated by a jury, not summarily, as the federal district court did here. *Taub*, 496

Mich at 704; *Philips v. Mirac, Inc.*, 470 Mich. 415; 685 N.W.2d 174 (2004).

Mr. Burniac's rights to a trial on the claims he has lodged with respect to his property rights pass all tests concerning whether state substantive law should prevail in a federal court proceeding. See, *e.g.*, *Miller v. Davis*, 507 F.2d 308, 314 (6th Cir. 1974) (applying *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938)).

STATEMENT OF THE CASE

On May 20, 2013, Petitioner, owner of his primary residence located at 10075 Red Maple Drive, Plymouth, Michigan, described further as Lot 279, Ridgewood Hills Subdivision No. 3, as recorded in Liber 101, Pages 29, 30, 31 and 32 of Plats, Wayne County Records, Tax ID No. 78-050-03-0279-000, filed a 13 count complaint in the Wayne County Circuit Court, Michigan, against Defendants, Wells Fargo, N.A., and Unknown Trustees (hereafter the Bank, unless otherwise specified). Mr. Burniac filed the Complaint after the Bank sought to foreclose on his home pursuant to Michigan's statutory procedures for "non-judicial foreclosure by advertisement", which are regulated and defined by state law. See generally, Michigan Compiled Laws (MCL) 600.3201 *et seq.* and *Kim v. JP Morgan Chase Bank, N.A.*, 493 Mich. 98, 119-120; 825 N.W.2d 329, 339-340 (2012) (Markman, J., concurring) (stating cases challenging the non-judicial foreclosure by advertisement process are "concerned with Michigan law, not federal law" and [t]he critical issue is whether [the Bank]

satisfied the Michigan "foreclosure by advertisement" statute, which implicates" whether the state statutory procedures were followed in accordance with "Michigan caselaw") (emphasis in original).

Twelve of the thirteen counts in Mr. Burniac's complaint were state-law claims, either citing to the specific provisions of the Michigan statutory "foreclosure by advertisement" provisions, MCL 600.3204(1) and (3), (4); MCL 600.3205a; and MCL 600.3205c, or stating state common-law claims regulated by Michigan case law.

On May 21, 2013, Mr. Burniac filed a motion to preserve the status quo, and to enjoin the foreclosure by advertisement, and the foreclosure sale at a Sheriff's Auction of his family's home. On May 21, 2013, the trial court entered an order to show cause on Plaintiff's motion and set a hearing date on the motion for Friday, May 31, 2013. (App.87a-88a) The trial court's order states, in part, as follows:

> The Court has reviewed these documents, from which it appears that unless the Court enjoins the sheriff's sale scheduled for Thursday, May 23, 2013, until a hearing on the merits, the status quo will change, and Plaintiff will suffer irreparable harm, in that he will lose his home, a unique parcel of real estate, and the Court is otherwise fully advised in the premises.
>
> IT IS ORDERED:
>
> This Temporary Restraining Order is and shall be effective upon entry, and preserves the status quo, by restraining and enjoining

> the sheriff's sale of the real property, commonly known as 10075 Red Maple Drive, Plymouth, MI 48170, pending a hearing relative to Plaintiff's request for a preliminary seeking the same relief through trial.

(App.87a-88a)

On Friday, May 31, 2013, counsel for the Bank made a general appearance in the state court proceedings, and with the consent of the trial court, stipulated with Plaintiff's counsel to a two-week adjournment until June 14, 2013. See State Court Docket Entry, 5/31/2013 (App.94a) The Bank's counsel did not appear at the June 14, 2013 hearing.

On June 18, 2013, the trial court entered an order granting preliminary injunctive relief. (App.87a-88a) Since the Bank failed to appear at the June 14, 2013 hearing per the state trial court's order to show cause, Petitioner's trial attorney, pursuant to state trial court procedures in the state of Michigan had entered on the docket a default against the Bank. (App.94a) The "entry of default" was listed on the state trial court's "Register of Actions" for Case No. 13-006534-CH as being entered on June 20, 2013. *Id.*

The Bank filed its Notice of Removal to the federal district court on the same day, June 20, 2013.

Mr. Burniac's trial counsel filed a motion to remand, raising, among other issues, the impossibility of the Bank to have removed the case to federal court in the current posture, *i.e.*, challenging how the Bank, after generally appearing and submitting itself to the jurisdiction of the state court, and after

agreeing, but failing, to respond and appear to show cause why the injunction should not enter could simply remove the action to federal court without seeking to recognize the state trial court's orders, including the injunction; the order to show cause and appear; and the entry of default.

The district court ignored the fact of the Bank's general appearance. The district court found that personal service had never been effectuated on the Bank. And, the district court ignored the entry of default and Michigan Court Rule (MCR 2.603(A)(3)) stating that before a party can proceed any further once a default has been entered against it, that party must file a motion to set aside the default. Otherwise, the liability of the party is established.

The district court therefore concluded that even if default was entered, "it would not have been proper in the state court because none of the Defendants was properly served." (App.85a) The district court denied Petitioner's Motion to Remand, and went on to address the substantive merits of the Bank's Motion for Summary Judgment.

In this latter regard, the district court addressed some, but not all, of the substantive state-law claims raised by Petitioner. Of those state-law claims that the district court did address, the district court entered summary judgment for the Bank.

The Sixth Circuit Court of Appeals affirmed.

REASONS FOR GRANTING THE PETITION

I. THE STATE TRIAL COURT ENTERED DEFAULT AND THE BANK'S LIABILITY WAS DETERMINED UNLESS AND UNTIL IT FILED A MOTION TO SET ASIDE THE DEFAULT IN ACCORDANCE WITH MICHIGAN SUBSTANTIVE LAW, WHICH IT NEVER DID

Federal district courts are courts of limited jurisdiction and the burden of proof to establish a district court's jurisdiction rests with the removing party. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Therefore, removal should be strictly construed and all doubt must be in favor of remanding the case to the state court. *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 339 (6th Cir. 1989).

The Bank's general appearance in the state court constituted full submission to the then-existing orders and jurisdiction of the state trial court, including the entry of default and the state court injunction. *In re Estate of Gordon*, 222 Mich. App. 148, 158; 564 N.W.2d 497, 502 (1997). Mr. Burniac challenged the removal on, among other grounds, that the Bank, despite having entered its appearance in the state court action never moved to set aside the default entered against it, and never otherwise contested that action on the part of the state court (including the standing injunction). See MCR 2.603(A)(3).

MCR 2.603(A)(3) provides: "Once the default of a party has been entered, that party may not proceed

with the action until the default has been set aside by the court in accordance with subrule (D) or MCR 2.612." Subrule (D), in turn, provides that "[a] motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

The district court denied the challenge to the removal, and therefore disagreed with Mr. Burniac that the entry of default, the appearance by the Bank, and its failure to move the trial court to set aside that default constituted legal error. The district court reasoned the default was irrelevant concluding the Bank had not been properly served in the state court action. While recognizing the Bank's general appearance in the state court action stating "the only affirmative action taken by [the Bank] was stipulated to adjourn the show cause hearing" on May 31, 2013, the district court nonetheless went on and on to discuss the proper rules of service of process under Michigan law. (App.67a, 79a, 82a)

This was an irrelevant consideration and legal error. "A party who enters a general appearance and contests a cause of action on the merits submits to the court's jurisdiction and waives service of process objections." *In re Estate of Gordon*, 222 Mich. App. 148, 158; 564 N.W.2d 497, 502 (1997). There, the Court of Appeals stated:

> [A]ny action on the part of a defendant that recognizes the pending proceedings, with the exception of objecting to the court's jurisdiction, will constitute a general appear-

> ance. Only two requirements must be met to render an act adequate to support the inference that there is an appearance: (1) knowledge of the pending proceedings and (2) an intent to appear. *Ragnone v. Wirsing*, 141 Mich. App. 263, 265, 367 N.W.2d 369 (1985). A party that submits to the court's jurisdiction may not be dismissed for not having received service of process. MCR 2.102(E)(2)."

In re Estate of Gordon, 222 Mich. App. at 158, n. 9 (emphasis added).

Thus, as noted, an appearance occurs when a party simply has knowledge of the pending proceedings and shows an intent to appear. *Id.* at 158. Rather than objecting to service of process in the first responsive pleading filed and contesting the jurisdiction of the state trial court, see MCR 2.116(D)(1), the Bank's general appearance, its stipulation to adjourn the show cause hearing, and then its notice of removal constituted a waiver of the objection regarding service of process. *Al-Shimmari v. Detroit Medical Center*, 477 Mich. 280, 293; 713 N.W.2d 29, 35 (2007).

When the Bank sought to remove the case to the federal court, it still had to follow state-law procedures for challenging the trial court's injunction and the entry of default because a federal court "takes the case as it finds it on removal and treats everything that occurred in the state court as if it had taken place in federal court." *Butner v. Neustadter*, 324 F.2d 783, 785 (9th Cir. 1963); *Feller v.*

National Enquirer, 555 F.Supp. 1114, 1119 (N.D. Ohio 1982).

Under Michigan law, the Bank had appeared generally in the action to answer to the trial court's motion to show cause why the injunction should not remain, *i.e.*, to contest the action on its merits. See *In re Estate of Gordon*, 222 Mich. App. at 158. Upon removal, which Mr. Burniac contested, and notwithstanding the district court's denial of his motion to remand, the Bank was still obligated to respond to the state trial court's motion to show cause why the injunction should not remain in place, and move to set aside the state trial court's entry of default. The default was entered on the state court's register of actions on the same day the removal was filed by the Bank (June 20, 2013). (App.91a-94a)

Moreover, as noted, the Bank was obliged by Michigan state law to move the trial court to set aside the entry of default. See MCR 2.603(A)(3) ("Once the default of a party has been entered, that party may not proceed with the action until the default has been set aside by the court in accordance with subrule (D) or MCR 2.612."). See also *Wood v. Detroit Auto Inter-Insurance Exch.*, 413 Mich. 573, 578, 321 N.W.2d 653 (1982) (noting that a defaulted party has no right to litigate any issues other than further proceedings to determine the amount of damages because "a default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating that issue"); *Worth v. Dortman*, 94 Mich. App. 103, 109-110, 288 N.W.2d 603 (1979) (affirming the trial court's ruling that a defaulted party "had no further standing to contest" the litigation).

The district court assumed the case in the status it was in when removed. *Feller*, *supra*. Petitioner has challenged the district court's failure to apply this rule requiring assumption of the state court proceedings. Moreover, the Bank was required to demonstrate good cause to justify setting aside entry of a default. *Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 595 (6th Cir. 2006). The district court's reasoning (that the Bank was not properly served) ignored the fact the Bank had made a general appearance and could no longer contest service.

The Bank never challenged the entry of default, instead filing the removal and taking the district court's lead that its general appearance in the state court proceedings to contest the injunction meant nothing. This constitutes an effective waiver of the right to appeal the entry of the default. *Frontier*, *supra* at 596. Yet, the district court's acquiescence in the Bank's removal, and its allowance to proceed with a summary judgment motion effectively nullified the state court's orders and authority.

Moreover, it prevented the entire litigation of the state-law claims, which were the major issues raised in Petitioner's complaint, from being litigated in a forum best suited to address the state-law issues concerning proper adherence to Michigan's foreclosure by advertisement statutes. See *Gjokaj v. HSBC Mortg. Services, Inc.*, 602 F. Appx. 275 (6th Cir. 2015), cert denied 136 S.Ct. 321 (2015) (properly raised statutory claims filed prior to foreclosure sale entitled to judicial consideration—the remedy for a failure to comply with foreclosure by advertisement and loan modification is judicial foreclosure), citing

Holliday v. Wells Fargo Bank, NA, 569 F. Appx. 366, 370 (6th Cir. 2014). Petitioner did exercise this right, in the state court proceedings, but the district court usurped the process by failing to assume the case in its posture in the state court, and simply foreclosing any future litigation to which Petitioner was entitled regarding his property.

Contrary to the Sixth Circuit's conclusions, Petitioner does not contend a "default judgment" was entered. (App.7a). The record does reveal that a "default" was entered on the state court's docket, which is in itself not an insignificant fact, despite being considered a mere formality. (App.91a-94a) While a "default" status, as opposed to a "default judgment" is a mere formality, in Michigan, it is effectuated upon the filing of the form. Default is a mere formality the operation of which occurs upon filing of the form in the court file. *Emmons v. Emmons*, 136 Mich. App. 157, 164; 355 N.W.2d 898 (1984) (default is a formality upon the happening of certain events and where all parties had notice of default in open court the failure to file the default was not a substantial defect or irregularity). However, despite being a formality, unless it is set aside, a default prevents a party from litigating any issues other than further proceedings to determine the amount of damages because "a default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating that issue". *Wood v. Detroit Auto Inter-Insurance Exch.*, 413 Mich. 573, 578, 321 N.W.2d 653 (1982) and *Worth v. Dortman*, 94 Mich. App. 103, 109-110, 288 N.W.2d 603 (1979) (affirming the trial court's ruling that a defaulted party "had no further standing to contest"

the litigation). In addition to statutory claims, Mr. Burniac did seek an accounting and claimed a breach of contract against the Bank. This would, at a minimum, entitle him to a jury trial on the merits. See *Simler v Conner*, 372 U.S. 221, 223 (1963).

This was legal error that can only be remedied by a remand to the state court. In all cases, the Michigan court rules required the Bank to file a motion to set aside the default.

Any other action by the Bank was null. As a matter of Michigan law, the Bank could only file one pleading, a motion to set aside the default per MCR 2.603 or 2.612. It did not do this.

The state law rule governing general appearances is a substantive state law rule, which means that the federal district court had to acknowledge the Bank's appearance in the state court proceedings. Further, and more importantly, the procedure for setting aside the entry of a default, not to mention the effects of such an entry are also substantive. The effect of entry of a default is that liability is established; the party against whom default is entered can either move to set aside the default, or litigate the damages. Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, "it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915). As this Court observed in *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) only "wip[ing] the slate clean . . . would have restored the petitioner to the position he would have occupied had due process

of law been accorded to him in the first place." *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86-87 (1988). See also *Simler v. Conner*, 372 U.S. 221, 223 (1963).

II. MR. BURNIAC ASSERTED HIS RIGHT TO A JUDICIAL PROCEEDING PRIOR TO THE FORECLOSURE AND THEREFORE HE WAS ENTITLED TO A TRIAL ON THE MERITS OF HIS CLAIMS

Mr. Burniac requested a trial by jury on his state law claims. Rather than receive such a trial, the federal district court allowed summary foreclosure of Mr. Burniac's home. Michigan state law and the fact that Mr. Burniac challenged the non-judicial foreclosure by filing an affirmative action seeking to litigate the question, *i.e.*, seeking judicial foreclosure through trial by jury, meant that the federal district court could not summarily dispose of Mr. Burniac's state law claims.

Under traditional real property law in Michigan, as in every other state, a mortgage could be foreclosed by advertisement and the mortgagor was not affected by the fact that others had a partial unrecorded interests in the mortgage. *Arnold v. DMR Financial Services*, 448 Mich. 671, 676-677; 532 N.W.2d 852 (1995). However, as the Court noted in *Arnold*, *supra* at 675 "if [the mortgage] have been assigned . . . that all the assignments thereof shall have been recorded." (emphasis added). See also MCL 600.3204(3) (statute authorizing foreclosures by advertisement). The Court in *Arnold* simply held this language applied only to the situation in which the actual whole mortgage interest in the property had been assigned and not

recorded. *Id.*, citing *Feldman v. Equit. Trust. Co.*, 278 Mich. 619, 624-625; 280 N.W. 809 (1937).

Only the record holder of the whole mortgage can foreclose by advertisement. *Arnold*, *supra* at 676-677. Thus, *Arnold*, *supra* and *Feldman*, *supra* dealt with unrecorded assignments of partial interests—not unrecorded assignments of the whole mortgage interest. The Court in *Feldman*, *supra* discussed whether a foreclosure sale under such circumstances would be considered void. Again, the language of the statute at issue, § 14426, 3 Mich. Comp. Laws 1929, provided that if the mortgage was assigned, all such assignments had to be recorded. The Court noted the distinction between strict adherence to the "foreclosure by advertisement" statutes in which recordation was a requirement where the assignment was "absolute", as opposed to an assignment of only a partial interest for security. *Id.*

The Court explained the reason for this distinction. The only legally entitled entity having the power to exercise the "summary" foreclosure by advertisement process is the holder of whole, undivided legal interest in the title. *Feldman*, *supra* at 624. On the other hand, an assignee of a part interest in the mortgage whose assignment was not recorded has no right to exercise such power—and their name in the foreclosure proceedings adds nothing to it. *Id.* This is because, without proof that the whole interest passed from the prior holder to the one asserting the right to foreclose without judicial oversight, the latter has no more of a right to assert an interest in the property without judicial oversight than the actual possessor, or anyone else coming in

off the street purporting to have said interest. Hence, judicial action is required to mete out the respective real and equitable interests of the parties.

The requirement of recordation of the whole interest avoided the necessity to take in extraneous evidence. As the *Feldman* Court explained further:

> The statute concerning foreclosure by advertisement . . . requires as a condition precedent to that procedure a recording of the mortgage, and all assignments. It is the plain intent of that statute that it is a condition precedent to the right to foreclose by advertisement that the title of an assignee of a mortgage appear of record, and of record in such manner that evidence extraneous to the record will not be needed to put it beyond reasonable question. This is not a requirement of supertechnical niceties and details of description. It means only that, the ordinary rules of evidence and interpretation considered, if the record, without the aid of extraneous evidence, does not put the title of the assignee of a mortgage beyond doubt, he cannot foreclose by advertisement. If he cannot remedy the defects in the record, he must resort to foreclosure by [judicial] action.

Id. at 624-625 (emphasis added).

Put simply, foreclosure by advertisement assumes, and the publicly recorded assignments demonstrate, without resort to anything extraneous, that the one initiating the foreclosure by advertisement holds the right to the entire interest.

Otherwise, foreclosure by judicial action must occur so that proofs can be presented to correct the failure of proofs on the public records.

The Michigan Supreme Court in *Kim v. JP Morgan Chase Bank, N.A.*, 493 Mich. 98; 825 N.W.2d 329 (2012) got the first part right. A failure to record an assignment is non-compliant with the strict language of MCL 600.3204(3). But, the Court did not adequately appreciate the distinction between assignment of partial interests and assignment of the whole interest, which led to the confusion in holding that a failure to record the latter had the same legal effect as a failure to record the former—in other words that both situations render the sale voidable not *void ab initio*. But, the reality is Michigan law has always held a failure to record the entire mortgage instrument renders the foreclosure by advertisement *void ab initio*, subject to a judicial action in equity to bring in the proofs to demonstrate the evidence of the assignment, if it does indeed exist.

What led the Court to this breakdown in the chain of precedent was that it criticized the Michigan Court of Appeals reliance on *Davenport v. HSBC Bank, USA*, 275 Mich. App. 344; 739 N.W.2d 383 (2007). *Davenport* was correct. The Supreme Court majority in *Kim*, *supra*, did not seem to fully appreciate the distinction between the foreclosure by advertisement and foreclosure by judicial action and the absolute requirement that an assignment of the whole interest be properly recorded and validated before the latter process can be legitimated in retrospect at the time of the judgment of possession. So, the Supreme Court in *Kim* then concluded, again,

incorrectly, that the foreclosure by advertisement is "voidable" only, and thus, that an after-the-fact inquiry involving "prejudice" can cure the defect sufficient to legitimize a previously illegitimate foreclosure by advertisement.

None of the cases cited by the Supreme Court in *Kim* fix this error. *Kuschinski v. Equit. & Centr. Trust*, 277 Mich. 23; 268 N.W. 797 (1936) addressed the question of the effect of an order issued by a trial court enjoining transfer of a deed after it was sold at a sheriff's sale. The Court noted that under such circumstances, the transfer was voidable, not void upon an ability to prove ownership of the interest.

The Court also cited *Fox v. Jacobs*, 289 Mich. 619; 286 N.W. 854 (1939) as justifying the conclusion that a failure to record an assignment makes a statutory foreclosure by advertisement voidable only, not *void ab initio*. However, there, the challenging party challenged the provision of notice in that the notice did not describe the assignments. *Id.* at 622. There was no defect in the record of assignment to the foreclosing party on the property books. *Id.* at 622-623. The original holder of the mortgage assigned it to another entity, which then assigned it to the trustees who eventually sought to foreclose on the property. *Id.* at 621. All assignments were legitimized and properly recorded. *Id.* at 621 (assignment from the original holder of the mortgage to the second entity recorded), 622 (assignment from the second entity to the foreclosing trustees recorded).

In any case, a party seeking to foreclose where there is no assignment (or a technically invalid assignment as in this case) demonstrating that he or

she has the right to do so does have to foreclose by judicial action because that is the only way to introduce, vet, and have properly admitted into evidence the proofs necessary to correct the failure in the publicly recorded property documents. "The right to foreclose by advertisement is conferred solely by the statute, and its provisions must be strictly complied with. Under this statute, the mortgage and assignment must not only be recorded, but they must be executed in such a manner as to entitle them to record." *Dohm v. Haskin*, 88 Mich. 144, 147; 50 N.W. 108 (1891) (emphasis added).

In fact, all the cases that do address the precise factual circumstances—a failure to record a valid assignment of the entire mortgage interest and follow the strict requirements of the foreclosure by advertisement procedures—at least before the Supreme Court's decision in *Kim*, *supra*, concluded that the defect renders the foreclosure by advertisement *void ab initio*.

It is a rather simple concept. Such a summary proceeding as a foreclosure by advertisement—taking someone's home and removing them from it in a simple set of procedures requiring publication, notice, advertisement, and sale without judicial oversight is a significant occlusion of the fundamental vein of liberty and enjoyment of property rights. Therefore, it only makes sense that such a sale would be *void ab initio* if all technical, verifiable records were not properly executed, recorded, and publicly accessible. "The failure of the defendant to keep the mortgages recorded in compliance with [the statute] precludes their foreclosure by advertisement."

Austin v. Anderson, 279 Mich. 424, 428; 272 N.W.2d 730 (1937) (emphasis added).

Foreclosure by advertisement is not a judicial proceeding at all. *Mfrs. Hanover Mtg. Corp. v. Snell*, 142 Mich. App. 548, 552-553; 370 N.W.2d 401 (1985). Legally triable issues (those outside of the record) are not a part of summary proceedings. *Reid v. Rylander*, 270 Mich. 263, 267; 258 N.W. 630 (1935). So, the burden, at every step of the way to establishing the right to possession after the sale is on the plaintiff seeking it; and this requires "evidence of compliance with every statutory provision relative to foreclosure by advertisement." *Id.*

Obviously, in the instant case, this reliance by the federal district court on an improper articulation of real property law in Michigan made all the difference. There was no judicial oversight prior to the Bank's attempt to foreclosure by advertisement, even though there was no valid recorded assignment from Washington Mutual, or any other valid mesne conveyance to the Bank. Mr. Burniac, in the least, is entitled to the benefit of the federal court's duty to parse through the jurisprudence and demonstrate how the Michigan Supreme Court decision in *Kim* arrived at the conclusion that a statutory foreclosure by advertisement is not *void ab initio*, but merely voidable where an assignment of the entire mortgage interest is not recorded.

Justice Markman, concurring with the result in *Kim*, *supra* at 120-121, provided the most critical analysis when considering whether a bank complied with Michigan's foreclosure by advertisement statutory requirements, with a "nonexhaustive listing" of "some

of the factors that might be relevant in this demonstration." Applied to Mr. Burniac these include: "whether [Petitioner] 'act[ed] promptly after [becoming] aware of the facts' on which [he] based [his] complaint" and "whether [Mr. Burniac] made an effort to redeem the property during the redemption period".

In the instant case, Mr. Burniac not only acted promptly, but he engaged in every means of inquiry and investigation to request proof from the Bank that they indeed held a valid right to enforce the loan allegedly transferred to the Bank by Washington Mutual. To no avail. First, by filing an affirmative action challenging the very basis for the Bank's purported right to foreclose on the property, and by requesting adjudication by a jury in a court of law of the merits of that right, Mr. Burniac took steps to ensure that a judicial disposition, with all attendant evidentiary protections and safeguards, would occur before the foreclosure sale so that he could protect his interests in his property.

This was thwarted by the federal district court's improper acceptance of the case as properly removed without regard or respect for the posture it was in at the state court. At least, the federal district court had to address the injunction against the sale and the default entered against the Bank for its general appearance and subsequent failure to appear to challenge or otherwise set aside the injunction. The only way to remedy this according to substantive state law rules was for the Bank to file the required motion to set aside the default.

Further, the district court then entered summary judgment before a trial could be had. In effect, the

district court usurped Mr. Burniac's right to his day in court to have the Bank explain how and whether it had come into possession of a valid right to attempt to sell his property by a non-judicial foreclosure sale under Michigan law.

The right to try the case in equity comes with the requirement to establish facts, which, if proved might result in a different outcome than that which appears on the record. Thus, all that is recorded with respect to a certain parcel in the register of deeds is already record evidence of which the courts may take notice; there is no need for a bill in equity to try the case on the claiming there is an unimpeded title.

However, one in possession of land in which it is claimed there is another who holds an actionable interest has no way to compel the holder to prove his or her claim. If the assignment is not recorded (or if it is invalid), the holder can wait until it is in his or her advantage to foreclose on the property. See MCL 600.2932(5); *Tray v. Whitney*, 35 Mich. App. 529, 534; 192 N.W.2d 628 (1971). This is countered by the strictly adhered to requirement that the assignment must be recorded, or the foreclosure is void, without a full jury trial and judicial oversight—a judicial foreclosure.

Under Michigan law, a claim that a mortgagor was required to establish that a mortgage servicer, or some subsequent party improperly foreclosed on the mortgage, sounds in equity and must be heard by a court. *Goss v. ABN AMRO Mortg. Group*, 549 Fed. Appx. 466 (2013). Indeed, the possessor is entitled to raise all legal issues impeding the foreclosure, including

the language of the mortgage itself. This is a right that Petitioner timely asserted.

The result of the federal court's decision to summarily adjudge Petitioner's case was as follows. Petitioner filed an action alleging both statutory and common-law state claims against the Bank, seeking a determination of allegations that the Bank violated Michigan statutory law regarding non-judicial foreclosure (sale of his home without a judicial proceeding); and that he was entitled to an accounting; and a jury trial on the merits (the proofs) of the Bank's ostensible right. There is no question the Bank generally appeared in the state court action, and appellate counsel for the Bank did not even challenge that at oral argument in the Court of Appeals. The state trial court entered an injunction preventing the sale of Petitioner's home. The Bank failed to show up at the show cause hearing and a "default" was entered on the docket. Instead of moving to set aside the default, as it was required to do, the Bank filed removal on the same day.

Now, the Bank will say, what it has said all along, that despite all of these purportedly nominal deficiencies, the federal district court had the right to summarily adjudicate the merits of Mr. Burniac's claims. However, under Michigan substantive law, the entry of a default settles the issue of liability, but not damages. *Wood*, 413 Mich. at 578 ("It is an established principle of Michigan law that a default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating the issue.")

Notwithstanding federal courts may continue state court proceedings under federal rules of similar direction, and may dissolve or otherwise adjudicate the propriety of an injunctive order, the federal court must still respect the substance of the state court orders. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 436 (1974). This, however, is a shield, not a sword. A party who seeks to remove the case cannot use the procedural aspect to make an end run around the substantive consequences of the state court's orders. Denying these substantive effects deprived Mr. Burniac of that process due to him for diligently prosecuting and pursuing his cause of action prior to the non-judicial foreclosure. In the least, he was entitled to a jury trial on the question, a full judicial proceeding to vet the Bank's purported right to foreclose. The Bank cannot use the removal process as a sword to effectively sever Petitioner's state and federal constitutional rights to due process via trial on his state law claims before a jury of his peers.

That the Court of Appeals ruled whether or not the Bank filed a general appearance was imamterial was also error. The critical fact of the Bank's appearance (which under Michigan law is beyond dispute) is that once it did so, it was required to file a motion to set aside the default that was entered in the state court proceedings. The district court having the obligation to take the case as it was could also not ignore this substantive requirement.

CONCLUSION

The district court erred in allowing removal of the case without acknowledging the status of the state court proceedings. Moreover, it prevented the state-law claims, which were the major issues raised in Mr. Burniac's complaint, from being fully litigated in a forum best suited to address the state-law issues concerning proper adherence to Michigan's foreclosure by advertisement statutes.

There was no valid assignment of the rights in Mr. Burniac's property from Washington Mutual (WAMU) to the Bank. The Bank acknowledged as much in a consent order with the Office of the Comptroller of the Currency, which the Bank did not come into compliance with until May 25, 2016. http://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-61.html. And, the Bank paid $70 million in civil related penalties for having done precisely what it did in Mr. Burniac's case. *Id.* As identified in the original consent order http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47k.pdf, the Bank admitted robo-signing the transfer of mortgages.

Moreover, not only are courts continuing to accept the asserted right of the banks to foreclose on the basis of these invalid assignments of interest, since there is no equitable determination by a court of law on the subject, the courts are quietly acquiescing in the manipulated values that were attributed to these properties in the first place, without every providing an opportunity to the home-owners to challenge the inflated valuations, and the

possibility of their own entitlements to mitigation of the debt allegedly owed.

Mr. Burniac believes the decision of the Court of Appeals and the legal issues raised by his case are of national significance. Mr. Burniac would like the opportunity to present this case to the Court. This Court can and should address the legal issues raised in this case, because there are so many others like it in which state and federal courts have ignored, overlooked, or simply done away with fundamental precepts of common law and foundational rights to judicial process and substantive protections afforded to the People.

Respectfully submitted,

CARSON J. TUCKER, ESQ.
COUNSEL FOR PETITIONER
LAW OFFICES OF CARSON J. TUCKER
117 N. FIRST ST., SUITE 111
ANN ARBOR, MI 48104
(734) 629-5870
CJTUCKER@LEXFORI.ORG

JUNE 13, 2016

APPENDIX TABLE OF CONTENTS

Opinion of the Sixth Circuit
(January 13, 2016)..... 1a

District Court Opinion and Order Granting Defendant's Motion for Summary Judgment
(January 28, 2015)..... 16a

District Court Opinion and Order Denying Plaintiff's Motion to Remand
(December 17, 2013)..... 63a

Order Granting Preliminary Injunctive Relief
(June 18, 2013) 87a

Verified Complaint and Demand for Jury Trial, Relevant Excerpt (May 20, 2013) 89a

Docket Entry: Default Request, Affidavit, and Entry (June 20, 2013)..... 91a

OPINION OF THE SIXTH CIRCUIT (JANUARY 13, 2016)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONALD C. BURNIAC,

Plaintiff-Appellant,

v.

WELLS FARGO BANK, N.A.;
UNKNOWN TRUSTEE,

Defendants-Appellees.

No. 15-1230

Appeal from the United States District Court
for the Eastern District of Michigan at Flint.
No. 4:13-cv-12741—Mark A. Goldsmith, District Judge.

Before: MOORE, CLAY, and
GILMAN, Circuit Judges.

RONALD LEE GILMAN, Circuit Judge.

Due to unpaid monthly mortgage payments, Donald C. Burniac's residence in Plymouth, Michigan became subject to foreclosure. In May 2013, Burniac filed suit in state court against Wells Fargo Bank, N.A. (Wells Fargo or the Bank) to prevent the foreclosure sale. Burniac's complaint alleged, in part,

that the assignment of his mortgage from Washington Mutual Bank (WaMu) to Wells Fargo was invalid.

The state court purportedly entered a default judgment against the Bank and preliminarily enjoined the foreclosure sale. In June 2013, Wells Fargo removed the case to the United States District Court for the Eastern District of Michigan, which subsequently denied Burniac's motion to remand. The district court later granted Wells Fargo's motion for summary judgment.

Burniac has appealed, arguing that the district court committed procedural errors and misapplied state substantive law governing the case. He first contends that the purported default judgment against Wells Fargo and the state court's preliminary injunction prevented the district court from issuing its own summary-judgment order and required remand of the case to the state court. Burniac also asserts that the district court erred in denying his state-law claim alleging that deficiencies in the assignment of his mortgage to Wells Fargo prevented the Bank from foreclosing. For the reasons set forth below, we AFFIRM the judgment of the district court.

I. BACKGROUND

A. Factual Background

In 2003, Burniac and his wife executed a mortgage on their home in Plymouth, Michigan to secure a loan from WaMu. Wells Fargo acted as servicer of the mortgage and sent Burniac his monthly mortgage statements. WaMu assigned ownership of Burniac's mortgage to Wells Fargo in 2007, although Burniac disputes the validity of that assignment. After the

assignment, Burniac continued to receive his monthly mortgage statements from Wells Fargo. WaMu filed for bankruptcy in September 2008.

Burniac sent his mortgage payments to Wells Fargo for several years thereafter, but he eventually experienced economic hardships and ceased making the monthly payments. Wells Fargo subsequently initiated foreclosure proceedings on his property, and a foreclosure sale was scheduled for May 23, 2013.

B. State-Court Proceedings

To prevent the foreclosure sale, Burniac filed suit in Michigan's Wayne County Circuit Court on May 20, 2013 against the Bank. Burniac's 13-count complaint alleged sundry claims, including a claim that deficiencies in the assignment of Burniac's mortgage to Wells Fargo violated the requirements for nonjudicial foreclosure-by-advertisement under Michigan law. In particular, Burniac's complaint asserted that the signatures on the assignment were forged by "robo-signers" or that the signers had no authority to execute the assignment.

On May 21, 2013, Burniac sought a temporary restraining order, which the state court granted on the same day. The state court also set a hearing for May 31, 2013 on Burniac's request for a preliminary injunction. Burniac and Wells Fargo stipulated to adjourn the hearing until June 14, 2013. Wells Fargo, however, did not attend the rescheduled hearing, and the state court issued a preliminary injunction on June 18, 2013.

On June 20, 2013, Burniac filed a "DEFAULT REQUEST, AFFIDAVIT, AND ENTRY" form. The

section of the form labelled "REQUEST AND AFFIDAVIT" states that Burniac's trial attorney was "request[ing] the clerk to enter the default" of Wells Fargo. Under the section labelled "DEFAULT ENTRY," the form states: "The default of [Wells Fargo] for failure to plead or otherwise defend is entered." Beneath that text are two lines with captions below them. One is titled "Date"; the other, "Court clerk." Both lines are left blank. The state-court docket displays no other entries concerning a default judgment. Wells Fargo removed the case to federal court on the same day that Burniac filed his request for a default judgment.

C. Federal-Court Proceedings

Burniac filed a motion to remand the case back to state court, but the district court concluded that subject-matter jurisdiction was proper based on diversity of citizenship and denied the motion in December 2013. The district court subsequently granted Wells Fargo's motion for summary judgment in January 2015. This timely appeal followed.

II. ANALYSIS

Burniac's contentions can best be grouped into two camps: (1) challenges based on procedural errors allegedly committed by the district court, and (2) challenges to the district court's substantive-law rulings on summary judgment. We will deal with each contention in turn.

A. Standard of Review

A district court's grant of summary judgment is reviewed de novo. *Keith v. Cnty. of Oakland*, 703 F.3d

918, 923 (6th Cir. 2013). Summary judgment is proper when no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In considering a motion for summary judgment, "we draw all reasonable inferences in favor of the non-moving party and construe all evidence in the light most favorable to the non-moving party." *Tingle v. Arbors at Hilliard*, 692 F.3d 523, 529 (6th Cir. 2012) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). But "[c]onclusory statements unadorned with supporting facts are insufficient to establish a factual dispute that will defeat summary judgment." *Alexander v. CareSource*, 576 F.3d 551, 560 (6th Cir. 2009). We also review de novo the denial of a motion to remand a case to state court. *Village of Oakwood v. State Bank and Trust Co.*, 539 F.3d 373, 377 (6th Cir. 2008).

B. Burniac's Procedural Challenges Fail Because a Default Judgment Was Never Entered Against Wells Fargo and the State Court's Preliminary Injunction Neither Prevented the District Court from Issuing a Summary-Judgment Order nor Required Remand of the Case to the State Court

Burniac's procedural objections center around two events that allegedly occurred in state court prior to removal: (1) the purported entry of a default judgment against Wells Fargo, and (2) the issuance of a preliminary injunction against the foreclosure sale. Parts of Burniac's briefs attack the district

court's authority to issue a summary-judgment order after the entry of the purported default judgment and the preliminary injunction. Other sections of his briefs appear to challenge the court's denial of Burniac's motion to remand for the same reasons. We will address both contentions.

1. Wells Fargo's Failure to Move to Set Aside the State Court's Purported Default Judgment and Its Preliminary Injunction Did Not Impair the District Court's Ability to Grant Summary Judgment in Favor of the Bank

Burniac attacks the district court's authority to issue a summary-judgment order in favor of Wells Fargo because the Bank never moved to set aside the purported default judgment and the preliminary injunction issued in state court. The foundation for these claims appears to derive from Burniac's assertion that, when a case is removed from state court, a federal court "takes the case as it finds it on removal." *Butner v. Neustadter*, 324 F.2d 783, 785 (9th Cir. 1963). We agree. *See Granny Goose Foods, Inc. v. Bhd. of Teamsters and Auto Truck Drivers Local No. 70 of Alameda Cnty.*, 415 U.S. 423, 436 (1974) ("After removal, the federal court takes the case up where the State court left it off." (internal quotation marks omitted)). From this uncontroversial premise, however, Burniac argues that Wells Fargo was required to move to set aside the state court's purported default judgment and its preliminary injunction before the district court could properly issue a summary-judgment order. But nothing about the posture of this case prior to its removal on June 20, 2013 encumbered the district court's authority to issue a summary-judgment order in favor of Wells Fargo.

a. A Default Judgment Was Never Entered in State Court

With regard to the entry of the purported default judgment, the parties spill much ink disputing whether Wells Fargo entered a general appearance in state court before the hearing on June 14, 2013. They do this because either proper service on or the general appearance of a defendant is a necessary condition for a valid default judgment. And Wells Fargo contends that Burniac never properly served the Bank. We need not reach the general-appearance issue, however, because a default judgment was never in fact entered in state court.

Rule 2.603 of the Michigan Court Rules governs default judgments. If a defendant fails to appear, then "[o]n request of the plaintiff supported by an affidavit . . . , the clerk may sign and enter a default judgment . . . against the defendant." Mich. Ct. R. 2.603(B)(2). On June 20, 2013, Burniac filed a "DEFAULT REQUEST, AFFIDAVIT, AND ENTRY" form, requesting the entry of a default judgment against Wells Fargo. The import of this request is hotly contested by the parties. Burniac claims that his filing effected a default judgment against Wells Fargo because his "trial attorney, pursuant to state trial court procedures in the state of Michigan had entered on the docket a default against" Wells Fargo. (Emphasis in original.) Wells Fargo, on the other hand, contends that Burniac's request was not itself the entry of a default judgment. The record clearly supports Wells Fargo's view.

The state-court docket entry for June 20, 2013 reads "Default, Request, Affidavit and Entry Filed." When read in isolation, the proximity of "entry" and

"filed" could plausibly lead a reader to the conclusion that a default judgment was entered. Any potential ambiguity, however, is erased by the document associated with this entry. That document is titled "DEFAULT REQUEST, AFFIDAVIT, AND ENTRY." Read together, the docket entry and the title of the document suggest that a document with the title "DEFAULT REQUEST, AFFIDAVIT, AND ENTRY" was filed—not that a default judgment was entered and filed.

The content of the form Burniac filed further bolsters Wells Fargo's position. Under the section captioned "REQUEST AND AFFIDAVIT," the form states that Burniac's trial attorney was "request[ing] the clerk to enter the default of" Wells Fargo. (Emphasis added.) Although this text indicates that Burniac complied with the requirement that he first request a default judgment before one is entered, *see* Mich. Ct. R. 2.603(B)(2), it undercuts his apparent assertion that the filing of the form was alone sufficient to effect a default judgment against Wells Fargo.

Under the section labelled "DEFAULT ENTRY," the form states: "The default of [Wells Fargo] for failure to plead or otherwise defend is entered." Beneath that text are two lines: one captioned "Date" and the other captioned "Court clerk." The clear implication of this section is that a default is not operative until the clerk signs and dates the form on the lines provided. This plain reading of the form is buttressed by the Michigan Court Rules. *See* Mich. Ct. R. 2.603(B)(2) ("On request of the plaintiff supported by an affidavit . . . , the clerk may sign and enter a default judgment . . . against the defendant."). Both lines are blank, and the state-court docket displays

no other entries concerning a default judgment. The evidence thus conclusively establishes that the state court never entered a default judgment against Wells Fargo.

This conclusion should come as no surprise to Burniac because, in his Reply Brief, he essentially admits that no default judgment was ever entered against Wells Fargo: "[T]he Bank's own efforts to remove the case prevented any further actions from occurring in the state court, including entry by the court clerk of the default, as the case was removed on the day that Mr. Burniac's counsel filed the default for entry." (Emphasis added.) Because the record shows that a default judgment was never entered against Wells Fargo, the Bank was not required to move to set aside the purported judgment before the district court could issue a summary-judgment order in the Bank's favor.

b. A Preliminary Injunction Does Not Preclude Summary Judgment

The preliminary injunction, which was in fact issued by the state court, was likewise no barrier to the district court's summary-judgment order. As an initial matter, despite Burniac's contention that Wells Fargo "had to follow state-law procedures for challenging the [state] trial court's injunction and the entry of default," "[t]he Federal Rules of Civil Procedure, like other provisions of federal law, govern the mode of proceedings in federal court after removal," *Granny Goose Foods, Inc. v. Bhd. of Teamsters and Auto Truck Drivers Local No. 70 of Alameda Cnty.*, 415 U.S. 423, 438 (1974) (citing Fed. R. Civ. P. 81(c) ("These rules apply to a civil action

after it is removed from a state court.")); *see also id.* at 437 ("[O]nce a case has been removed to federal court, it is settled that federal rather than state law governs the future course of proceedings, notwithstanding state court orders issued prior to removal.").

A preliminary injunction "maintain[s] the status quo pending determination of an action on its merits." *Blaylock v. Cheker Oil Co.*, 547 F.2d 962, 965 (6th Cir. 1976). Accordingly, a final order on the merits extinguishes a preliminary injunction. *See U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1093 (9th Cir. 2010) (noting that a preliminary injunction "dissolves *ipso facto* when a final judgment is entered in the cause"); *Venezia v. Robinson*, 16 F.3d 209, 211 (7th Cir. 1994) ("A preliminary injunction cannot survive the dismissal of a complaint."); *Cypress Barn, Inc. v. W. Elec. Co., Inc.*, 812 F.2d 1363, 1364 (11th Cir. 1987) ("Since a preliminary injunction is interlocutory in nature, it cannot survive a final order of dismissal.").

Unlike the purported default judgment, the state court did in fact issue a preliminary injunction against Wells Fargo on June 18, 2013, which was prior to the removal of this case. The district court, however, subsequently granted summary judgment in favor of Wells Fargo on January 28, 2015. Because the summary judgment was a final order, its issuance immediately extinguished the state court's preliminary injunction. *See U.S. Philips Corp.*, 590 F.3d at 1093. Wells Fargo therefore had no procedural obligation to first move to set aside the preliminary injunction before the district court issued its grant of summary judgment.

2. The District Court Did Not Err in Denying Burniac's Motion to Remand Because a Default Judgment was Never Entered Against Wells Fargo and a Preliminary Injunction Does Not Preclude Removal

Turning to the district court's denial of Burniac's motion to remand, Burniac's challenges mirror those advanced in opposing the summary-judgment order. They are equally unavailing. The purported default judgment against Wells Fargo could not render the district court's denial of Burniac's motion to remand erroneous because, as noted above, a default judgment was never entered. As for the preliminary injunction, federal law explicitly contemplates the removal of cases in which injunctions were issued prior to removal. 28 U.S.C. § 1450 ("Whenever any action is removed from a State court to a district court of the United States, . . . [a]ll injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court."); *see also Granny Goose Foods*, 415 U.S. at 436 (noting that, under § 1450, "injunctions[] and other orders obtained in state court all remain effective after the case is removed to federal court"). The state court's preliminary injunction consequently did not bar removal of the case, and Burniac's attacks on the district court's denial of his motion to remand fail.

C. Burniac's Challenges Based on the District Court's Application of Michigan Law Fail Because, Even Assuming that Wells Fargo Violated Michigan Law, Burniac Has Not Demonstrated that He Was Prejudiced by Those Violations

Burniac also objects to the district court's summary-judgment order on the grounds that the district court misapplied Michigan foreclosure law. The thrust of Burniac's grievances in this regard appears to be that Wells Fargo could not foreclose under Michigan's foreclosure-by-advertisement statute either because it never received a validly assigned interest in Burniac's mortgage, or because Wells Fargo never recorded that interest. This argument appears to relate back, albeit in an indirect fashion, to Count One of Burniac's complaint, which alleges that Wells Fargo violated Michigan's nonjudicial foreclosure-by-advertisement statute (Mich. Comp. Laws § 600.3204) because the mortgage assignment was invalid.

We discern no other identifiable claims concerning the merits of the district court's summary-judgment order in Burniac's initial brief. We will therefore proceed to address Burniac's sole claim that summary judgment was improper because Wells Fargo violated Mich. Comp. Laws § 600.3204. *See LoCoco v. Med. Sav. Ins. Co.*, 530 F.3d 442, 451 (6th Cir. 2008) (noting that a party "waives an issue when he fails to present it in his initial briefs" (internal quotation marks omitted)).

This attack on the district court's summary-judgment order fails because, even assuming without deciding that Wells Fargo violated §600.3204, Burniac was not prejudiced by the violation. Because this case was removed from Michigan state court on the

basis of diversity of citizenship, the substantive law of Michigan applies. *See Berrington v. Wal-Mart Stores Inc.*, 696 F.3d 604, 607 (6th Cir. 2012) (applying Michigan law in a diversity-of-citizenship case). In applying state law, we are "bound by controlling decisions of [the state's highest] court." *Id.* (internal quotation marks omitted). We are therefore precluded from heeding the intimations in Burniac's briefs that we possess the authority to overrule the decisions of the Michigan Supreme Court.

In *Kim v. JPMorgan Chase Bank, N.A.*, 825 N.W.2d 329, 336–37 (Mich. 2012), the Michigan Supreme Court analyzed the effect of a violation of Mich. Comp. Laws § 600.3204 on foreclosure proceedings initiated pursuant to that section. *Kim* held "that defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable, not void *ab initio*." *Id.* at 337. Accordingly, to prevail on a suit based on a violation of § 600.3204, "plaintiffs must show that they were prejudiced by defendant's failure to comply with" that statute. *Id.* "To demonstrate such prejudice, they must show that they would have been in a better position to preserve their interest in the property absent defendant's noncompliance with the statute." *Id.*

This court subsequently acknowledged the necessity of demonstrating prejudice to prevail on a § 600.3204 claim. *See Conlin v. Mortg. Elec. Registration Sys., Inc.*, 714 F.3d 355, 362 (6th Cir. 2013) ("Post-*Kim*, Michigan mortgagors seeking to set aside a sheriff's sale under § 600.3204 will have to demonstrate prejudice (e.g., double liability) . . . ."). Addressing similar allegations of a robo-signed or

otherwise invalid assignment, the *Conlin* court concluded that the plaintiff had failed to demonstrate prejudice. *Id.* In reaching this conclusion, the court explained that the plaintiff "has not shown that he will be subject to liability from anyone other than U.S. Bank; he has not shown that he would have been in any better position to keep the property absent the defect; and he has not shown that he has been prejudiced in any other way." *Id.*

Burniac has similarly failed to meet his burden of demonstrating prejudice from Wells Fargo's purported violation of § 600.3204. Beyond a few conclusory statements that he "fears double recovery," and that "it may be that no other party" seeks to enforce the mortgage, "[b]ut, there is no guarantee," Burniac has produced no evidence to indicate that there is any threat of double liability. Moreover, "[c]onclusory statements unadorned with supporting facts are insufficient to establish a factual dispute that will defeat summary judgment." *Alexander v. CareSource*, 576 F.3d 551, 560 (6th Cir. 2009).

The speculative nature of Burniac's fear is further underscored by the fact that he admits in his complaint that WaMu, who assigned his mortgage to Wells Fargo, filed for bankruptcy in 2008 and "is now out of business, and otherwise 'dead' as a 'corporate person.'" Burniac has identified no entities, other than Wells Fargo, that are likely to enforce the mortgage. He therefore has failed to show that Wells Fargo's purported violation of the Michigan statute exposes him to double liability.

Moreover, Burniac has failed to show how the alleged assignment deficiencies placed him in a worse position to preserve his interest in his home. Indeed,

the purported assignment deficiencies did not cause Burniac confusion as to whom he should pay because, both before and after the assignment, Burniac received his monthly mortgage statements from Wells Fargo.

Burniac, like the plaintiff in *Conlin*, has failed to demonstrate that the alleged assignment irregularities (1) will subject him to double liability, (2) placed him in a worse position to keep his property, or (3) prejudiced him in any other way. Accordingly, Burniac's objections to the district court's application of Michigan foreclosure law fail.

III. CONCLUSION

For all of the reasons set forth above, we AFFIRM the judgment of the district court.

DISTRICT COURT OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (JANUARY 28, 2015)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DONALD C. BURNIAC,

Plaintiff,

v.

WELLS FARGO BANK, N.A., et al.,

Defendants.

Case No. 13-CV-12741

Before: Hon. Mark A. GOLDSMITH
United States District Judge

I. INTRODUCTION

Before the Court in this foreclosure matter is Defendant Wells Fargo Bank, N.A.'s motion for summary judgment (Dkt. 17). Defendant argues that Plaintiff Donald Burniac's thirteen-count Complaint is subject to dismissal, and Wells Fargo is entitled to judgment as a matter of law, because Plaintiff has failed to raise a genuine issue of material fact regarding any of his claims. Plaintiff filed a response (Dkt. 22),

and Defendant filed a reply (Dkt. 24). The Court determined that oral argument would not assist with resolution of Defendant's motion. *See* 11/18/14 Order (Dkt. 26).

Having reviewed Plaintiff's Complaint, the parties' briefing, and the relevant authority, the Court concludes that Plaintiff's claims are not sustainable. Accordingly, for the reasons set forth below, the Court grants Defendant's motion.

II. BACKGROUND

In 2003, Plaintiff executed a note and mortgage with Washington Mutual Bank ("WaMU") for the purchase of his residence; the mortgage was recorded on February 25, 2003. Compl. ¶ 9. Plaintiff claims the mortgage loan was pooled, i.e., securitized, with a number of other mortgage loans, although he provides no evidence that his specific mortgage loan was actually pooled; Defendant Wells Fargo claims it was not.

Wells Fargo began servicing the loan in February 2007. *See* 2/26/12 Letter (Dkt. 1-1 (97 of 121 (cm/ecf page)). In March 2007, the mortgage was assigned from WaMu to Wells Fargo. *See* Assignment (Dkt. 17-5). The assignment is signed by Mary Jo McGowan—a purported Assistant Vice President of WaMu—and notarized by Maria Leonor Gerholdt. *Id.* Plaintiff claims this assignment was fraudulently executed by Nationwide Title Clearing ("NTC"), a "now disgraced robo-signing, forgery, and mortgage document fraud mill." Compl. ¶¶ 13-15. Plaintiff alleges these signatures were false or done without the signer's personal knowledge. *Id.* ¶¶ 19-21. In the alternative, Plaintiff asserts that NTC did not have

WaMu's authority to execute the assignment. *Id.* ¶ 22. Plaintiff claims the assignment was, thus, invalid and void.

The assignment was recorded shortly after its execution. *See* Assignment. In September 2008, WaMu filed for Chapter 11 bankruptcy. Compl. ¶ 27.

Plaintiff alleges that Wells Fargo told him that it would modify his loan, but only if he fell behind in his payments. *Id.* ¶ 44. Plaintiff claims Wells Fargo then put him through "Paperwork Hell," where it would continuously request documents from him, and then claim to have never received the documents. *Id.* ¶¶ 49-50. Wells Fargo ultimately denied Plaintiff's request for a modification. *Id.*¶ 56.

Defendant—via counsel—then sent Plaintiff a notice pursuant to Mich. Comp. Laws § 600.3205a, inviting him to participate in the pre-foreclosure statutory modification process. *See* Notice (Dkt. 17-6). In his Complaint, Plaintiff claims that he "contacted the foreclosing law firm [] within the requisite time-frame," but that Defendant scheduled the sheriff's sale instead of holding a meeting. *Id.* ¶¶ 58-60. Defendant has attached an affidavit to its motion stating that Plaintiff never requested the required loan modification meeting in response to the notice. Affidavit of Ebony Gerwin ("Gerwin Aff.") (Dkt. 17-7).

Defendant then scheduled a sheriff's sale for the property. Compl. ¶ 61. The record suggests this case was filed before the sale commenced.

Plaintiff also includes in his Complaint scattered and vague allegations of harassing collection calls; wrongful assessment of monthly late fees; misappropriating funds paid by Plaintiff; not paying insurance

premiums; and failing to properly credit his account for payments made. *Id.* ¶¶ 63-65, 134.

Plaintiff's Complaint contains thirteen causes of action:

(1) Declaratory judgment that Defendant violated Mich. Comp. Laws §§ 600.3204(1)

and (3);

(2) Declaratory judgment that Defendant violated Mich. Comp. Laws §§ 600.3204(4), .3205a, and .3205c;

(3) Breach of the mortgage contract;

(4) Intentional fraud;

(5) Constructive fraud;

(6) Tortious interference with contractual relations;

(7) Civil conspiracy;

(8) Violation of Michigan's Regulation of Collection Practices Act;

(9) Violation of Michigan's Occupational Code;

(10) Accounting;

(11) Breach of contract of the implied duty of good faith and fair dealing;

(12) Declaratory judgment regarding whether Defendant violated federal regulations; and

(13) Quiet title.

III. SUMMARY JUDGMENT STANDARD

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When a defendant seeks summary judgment, the defendant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quotation marks omitted). "[A] plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment . . . as long as the plaintiff has had a full opportunity to conduct discovery." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). When evaluating the evidence, courts draw all inferences in favor of the non-moving party. *Warf v. United States Dep't of Veterans Affairs*, 713 F.3d 874, 877 (6th Cir. 2013).

In response to Defendant's motion, Plaintiff offers no new evidence or testimony revealed through the discovery process. Rather, he relies exclusively on the same documents attached to his Complaint, as well as the allegations within the Complaint itself. However, with respect to his allegations, to "defeat a motion for summary judgment[,] a plaintiff can no longer rely on the conclusory allegations of its complaint." *Id.* at 878 (quotation marks omitted).

The one exception to this rule is that a verified complaint that is signed "under penalty of perjury

pursuant to 28 U.S.C. § 1746 . . . carries the same weight as would an affidavit for purposes of summary judgment." *El Bey v. Roop*, 530 F.3d 407, 414 (6th Cir. 2008). Nevertheless, "[a]lthough statements in a verified complaint may function as the equivalent of affidavit statements for purposes of summary judgment, . . . affidavit statements must be based on personal knowledge." *Weberg v. Franks*, 229 F.3d 514, 526 n.13 (6th Cir. 2000) (citation omitted). To the extent the allegations are not based on personal knowledge, they may be disregarded for purposes of summary judgment. *Id.* Furthermore, "[c]onclusory assertions, . . . even those advanced in the form of a verified complaint, are not sufficient to show a genuine issue of fact necessary for the denial of summary judgment." *Lee v. Hill*, No. 12-cv-10486, 2013 WL 5179059, at *4 (E.D. Mich. Sept. 12, 2013) (quotation marks omitted).

Although Plaintiff generally "swear[s] or affirm[s] that the . . . allegations [in his Complaint] are true to the best of [his] knowledge, information, and belief," Compl. at 43, Plaintiff does not differentiate between those allegations that are based on his knowledge and those that are based on his belief, nor does he expressly swear to the allegations "under penalty of perjury." Therefore, the allegations in Plaintiff's Complaint alone are insufficient for purposes of defeating summary judgment. *See Totman v. Louisville Jefferson Cnty. Metro Gov't*, 391 F. App'x 454, 464 (6th Cir. 2010) (holding that a similar statement in a complaint "indicates that the allegations of the complaint go beyond [the plaintiff's] personal knowledge and extend to matters within [his] beliefs. His beliefs, however, do not meet the evidentiary

standard set forth in Rule 56[(c)(4)] of the Federal Rules of Civil Procedure."); *see also Cruse v. Wayne*, 12-cv-479, 2014 WL 713001, at *4 n.3 (W.D. Mich. Feb. 25, 2014) (citing *Tenneco Auto. Operating Co., Inc. v. Kingdom Auto Parts*, 410 F. App'x 841, 848 (6th Cir. 2010) (court did not abuse its discretion in disregarding unsworn declarations, because the declarations were not made under penalty of perjury and did "not specify which statements were made under information and belief and which were made from personal knowledge")).

IV. ANALYSIS

A. Local Rule 7.1(a) Concurrence Requirement

In his response to Defendant's motion for summary judgment, Plaintiff requests that the Court strike Defendant's motion. Plaintiff claims that Defendant never sought concurrence in the motion, as required by Eastern District of Michigan Local Rule 7.1(a) and the Court's practice guidelines. Pl. Resp. at 10-14. Plaintiff claims Defendant's statement of concurrence is untrue, and that Defendant's counsel refused to respond to Plaintiff's requests for updates on his loan modification request. *Id.* Defendant disputes this claim, stating that it discussed the motion during conferences with the Court and in "several conversations and exchanges" with Plaintiff's counsel. Def. Reply at 1-2 (Dkt. 24).

The Court need not resolve this factual dispute, however, because it finds this argument unavailing for two reasons. First, the goal of the concurrence requirement is to avoid the needless spending of time and resources by the parties and the Court on motions

to which there is actually agreement in the relief sought. It is clear from Plaintiff's response to Defendant's motion, however, that he does not concur in the motion. Further, Plaintiff has failed to identify how he was legally harmed or prejudiced by the purported failure to seek concurrence. Therefore, the Court declines to punish Defendant based on the purported failure to seek concurrence.

Second, Plaintiff's request to strike Defendant's motion based on the alleged failure to seek concurrence is procedurally deficient. Federal Rule of Civil Procedure 7(b) requires that "[a] request for a court order must be made by motion." Here, Plaintiff's request to strike was not made by motion, but rather through argument contained in his response to Defendant's motion. This is improper. *See James v. Fed. Home Loan Mortg. Corp.*, No. 13-13029, 2014 WL 4773648, at *16 n.10 (E.D. Mich. Sept. 24, 2014) (denying request for leave to amend that was raised in a response brief); E.D. Mich. Local Rule App'x ECF, R5(e) ("[A] response or reply to a motion must not be combined with a counter-motion."); *see also Ioselev v. Schilling*, No. 10–1091, 2013 WL 271711, at *5 n.8 (M.D. Fla. Jan. 24, 2013) (denying request to strike affidavits because "including this request for affirmative relief in their response to Plaintiff's Motion rather than filing a separate motion is improper").

Therefore, the Court denies Plaintiff's request to strike Defendant's motion based on Defendant's alleged failure to seek concurrence.

B. The Unknown Defendants

Plaintiff originally brought this action against three Defendants: (i) Wells Fargo Bank, N.A.; (ii) "Unknown Trustee, as Trustee on behalf of the asset-backed security in which the loan at issue was pooled;" and (iii) "Unknown Trust, the unknown asset-backed security at issue." Compl. (Dkt. 1-1). The two unknown Defendants were included based on Plaintiff's belief that his mortgage loan was securitized, Compl. ¶ 11, a fact Wells Fargo disputes, see Def. Resp. to Mot. to Remand at 2-3 (Dkt. 6).

After the parties were unsuccessful in their attempt to resolve this matter, the Court issued a Case Management and Scheduling Order granting the parties until July 31, 2014 to complete discovery. *See* CMO (Dkt. 9). Despite the close of discovery, however, Plaintiff still has not identified the unknown Defendants with any particularity. Plaintiff has not sought to amend the case caption to name these Defendants, nor does he even identify these Defendants in his response to Defendant's motion for summary judgment. Wells Fargo, on the other hand, continues to assert that no such entities exist. *See* Def. Br. at 21 (Dkt. 17) ("The terms are made-up attorney rhetoric and . . . Defendant did not and could not have any 'agreement' with any such fictitious 'Trust' or 'Trustee.'").

Trial and liability against these unknown Defendants would not be possible without their identification. Accordingly, given that the discovery and dispositive-motion deadline have now passed without Plaintiff identifying these Defendants, the Court dismisses the claims against them. *See Anderson v. Bank of Am., N.A.*, No. 13-12834, 2013 WL 5770507, at

*1 n.2 (E.D. Mich. Oct. 24, 2013) ("Although Plaintiff names an Unknown Trustee and Unknown Trust as Defendants, there is no trust or trustee that has an interest in the mortgage loan at issue here. Therefore, the claims against the Unknown Trustee and Unknown Trust are DISMISSED.").

C. Abandoned Claims

Wells Fargo seeks summary judgment on all counts contained within Plaintiff's Complaint. Plaintiff responded to Defendant's motion, explaining why he believes some of the counts should not be subject to summary judgment. However, Plaintiff did not respond to Defendant's dispositive arguments regarding five causes of action: (i) tortious interference with contractual relations (count six); (ii) Michigan's occupational code (count nine); (iii) accounting (count ten); (iv) failure to comply with condition precedent under code of federal regulations (count twelve); and (v) quiet title (count thirteen).

The Court deems Plaintiff's failure to address Defendant's dispositive arguments regarding these claims as abandonment of these causes of action. *See Brown v. VHS of Michigan, Inc.*, 545 F. App'x 368, 372 (6th Cir. 2013) ("This Court's jurisprudence on abandonment of claims is clear: a plaintiff is deemed to have abandoned a claim when a plaintiff fails to address it in response to a motion for summary judgment.").

Furthermore, the Court has reviewed the claims, Defendant's arguments, and numerous cases addressing these exact same claims raised by Plaintiff's counsel. *See, e.g., Anderson*, 2013 WL 5770507, at *1-6; *Goodwin v. CitiMortgage, Inc.*, No. 12-760, 2013 WL

4499003, at *1-8 (W.D. Mich. Aug. 19, 2013); *McDonald v. Green Tree Servicing, LLC*, No. 13-12993, 2014 WL 1260708, at *3-8 (E.D. Mich. Mar. 27, 2014). Even if the Court was to conclude that Plaintiff had not abandoned these claims, they would be subject to dismissal on their merits in any event.

Therefore, the Court dismisses these causes of action with prejudice.

D. Count One: Mich. Comp. Laws §§ 600.3204(1), (3)

Plaintiff's first claim is entitled "declaratory relief that the foreclosure violates MCL 600.3204(1) & (3)." Compl. ¶ 68-107. Although entitled a claim for "declaratory relief," Plaintiff also seeks a temporary restraining order, a preliminary injunction, damages, and costs and fees. *Id.* ¶ 107.

Plaintiff's claim is based on a purportedly invalid assignment from WaMu to Defendant Wells Fargo via NTC. Plaintiff claims that the signatures on the assignment were forged or done without knowledge, and thus the assignment is invalid. *Id.* ¶ 83-85, 91-97. Plaintiff refers to this practice as "robo-signing." *Id.* ¶ 13. Plaintiff also asserts that, even if the signatures were not forged, NTC did not have the authority to execute the assignment on behalf of WaMu or the purported unknown Trust. Id. ¶¶ 22, 86-88. Plaintiff further claims that there were issues with the purported transfer of the mortgage loan for pooling, and that "none of the Defendants, nor any other person or entity has the authority to foreclose upon the [p]roperty." *Id.* ¶¶ 99, 103.

Defendant first argues that this claim is subject to dismissal because Plaintiff has not introduced

evidence of the purported violations. Def. Br. at 5-7. Defendant maintains that Plaintiff has failed to buttress his assertion that NTC did not have the authority to execute the document on WaMu's behalf, nor has Plaintiff shown that a genuine issue of material fact exists that the signatures were falsified. *Id.*

Defendant also claims that Plaintiff does not have standing to raise this claim—even if there was an error in the assignment—because he has not shown prejudice from the error. *Id.* at 7-12. Defendant notes that Plaintiff does not claim that some other entity exists to challenge Defendant's ownership status, nor does Plaintiff allege that some entity other than Defendant has sought to enforce or threatened to enforce the note or mortgage. Id. at 10-11.

Plaintiff responds that a document executed by forgery is null and void, and, therefore, the assignment is invalid. Pl. Resp. at 15. Plaintiff also argues that he has standing to raise such a claim. *Id.* at 15-16. Plaintiff does not directly respond to Defendant's argument regarding a threat of double recovery.

This Court recently addressed the issue of a borrower's standing to challenge assignments in *Etts v. Deutsche Bank National Trust Company*, No. 13-11588, 2014 WL 645358, at *6-8 (E.D. Mich. Feb. 19, 2014). In that case, the plaintiff alleged the assignment was invalid because the assignor purportedly did not hold the note and/or mortgage at the time of the assignment due to a bankruptcy. Quoting *Livonia Properties Holdings, LLC v. 12840-12976 Farmington Road Holdings, LLC*, 399 F. App'x 97, 99 (6th Cir. 2010), this Court explained that there is "'ample authority to support the proposition that a litigant

who is not a party to an assignment lacks standing to challenge that assignment.'" *Id.* This Court did clarify, however, that there is an exception to this rule if the obligor asserts a defense to foreclosure that "renders the assignment absolutely invalid or ineffective, or void. . . . These defenses include nonassignability of the instrument, assignee's lack of title, and a prior revocation of the assignment." *Id.* (quotation marks omitted).

This Court also explained the reason behind granting these exceptions; they exist to allow the borrower to protect himself or herself from having to pay the same debt twice. Therefore, "[w]ithout a genuine claim that [a foreclosing defendant] is not the rightful owner of the loan and that [a plaintiff] might therefore be subject to double liability on its debt, [a plaintiff] cannot credibly claim to have standing to challenge" the assignment. *Id.* (alterations in original) (quotation marks omitted). Recent Michigan case law similarly requires a plaintiff to show prejudice to sustain a cause of action under Michigan's foreclosure statutes, *i.e.*, that he or she would have been in a better position to preserve his or her interest in the home absent the purported defect. *See Kim v. JPMorgan Chase Bank, N.A.*, 825 N.W.2d 329, 337 (Mich. 2012).

With respect to Plaintiff's allegations based on purported defects with the assignment, the Court finds that this claim is deficient. Plaintiff argues that the assignment was "robo-signed," i.e., fraudulent and/or done without the assignor's authority. In support of this claim, Plaintiff attaches to his Complaint: (i) the assignment (Dkt. 1-1 (77 cm/ecf page)); (ii) articles and blog posts about state attorneys general

investigating companies for robo-signing (Dkt. 1-1 (79-84 cm/ecf pages)); (iii) other documents purportedly signed by the NTC signers, which purportedly reveal different signatures (Dkt. 1-1 (86-91 cm/ecf pages)); and (iv) an article suggesting that some signers at NTC may not understand assignments (Dkt. 1-1 (93-95 cm/ecf pages)). These documents fail to raise a genuine issue of material fact that Plaintiff's instruments, in particular, were subject to false signatures. Nor has Plaintiff introduced evidence to support his claim that NTC lacked authority to effectuate the assignment on behalf of WaMu. Nevertheless, even if such evidence existed, this claim would fail.

Numerous courts, including the Sixth Circuit, have concluded that similar allegations of robo-signing, if true, would result in the action being voidable, not void. *See Connolly v. Deutsche Bank Nat'l Trust Co.*, 581 F. App'x 500, 507 (6th Cir. 2014) (in discussing robo-signing allegations, noting that "the plaintiff was a third party to the assignments and could only prove that any defect was merely voidable"); *Ross v. Wells Fargo Bank, N.A.*, No. 14-627, 2014 WL 5390659, at *5 (W.D. Mich. Oct. 22, 2014) (collecting cases, and rejecting the argument that the "assignments are invalid because they were robo-signed and thus fraudulent," because this "is not one of the defenses permitted by *Livonia*, and thus, [the plaintiffs] lack standing to challenge the assignment"); *see also Maraulo v. CitiMortgage, Inc.*, No. 12-10250, 2013 WL 530944, at *5-8 (E.D. Mich. Feb. 11, 2013) (Goldsmith, J.) (dismissing same claim of robo-signing under *Livonia Properties*).

Furthermore, Plaintiff has failed to sufficiently allege or show the threat of double recovery required to sustain such a cause of action. In *Conlin v. Mortgage Electronic Registration Systems, Inc.*, 714 F.3d 355, 361-362 (6th Cir. 2013), the Sixth Circuit examined a similar claim of a purportedly invalid assignment due to "robo-signing." Citing, in part, *Livonia Properties*, the Sixth Circuit explained that, "[p]ost-*Kim*, Michigan mortgagors seeking to set aside a sheriff's sale under § 600.3204 will have to demonstrate prejudice (e.g., double liability)." The Sixth Circuit ultimately concluded that dismissal of the plaintiff's claim was appropriate because,

> [e]ven were the assignment from MERS to U.S. Bank invalid, thereby creating a defect in the foreclosure process under § 600.3204(1)(d), Plaintiff has not shown that he was prejudiced. He has not shown that he will be subject to double liability from anyone other than U.S. Bank; he has not shown that he would have been in any better position to keep the property absent the defect; and he has not shown that he has been prejudiced in any other way.

Id. at 362.

Plaintiff's claim suffers from the same defect. Plaintiff broadly alleges in his Complaint that he "fears double recovery." Compl. ¶ 105. However, on summary judgment, Plaintiff has failed to attest to this fear or explain why it is valid. Plaintiff has introduced no evidence that his mortgage and note have been severed. Nor does Plaintiff sufficiently explain in either his Complaint or his response to Defendant's motion (i) why he fears double recovery,

(ii) which entities have sought or likely will seek to enforce the note or mortgage other than Defendant, or (iii) whether any such action has been taken. Plaintiff does not allege that WaMu—nor any other entity other than Wells Fargo—has demanded payment from him based on the purportedly fraudulent nature of the assignment. To the contrary, Plaintiff acknowledges that WaMu filed for Chapter 11 bankruptcy in 2008, Compl. ¶ 27, and Plaintiff has not identified any entity other than Wells Fargo that may own the note and/or mortgage. Further, Plaintiff has not explained, nor even alleged, how he would have been in a better position to preserve his interest in the property but for the purportedly fraudulent assignment.[1]

---

[1] Plaintiff's reliance on *Kim*, 825 N.W.2d at 329 and *Sobh v. Bank of Am.*, N.A., No. 308441, 2013 WL 2460022, at *1-3 (Mich. Ct. App. June 6, 2013), is misplaced. As Chief Judge Rosen explained in *Griffin v. JPMorgan Chase Bank, N.A.*, No. 13-10002, 2013 WL 6587870, at *4 (E.D. Mich. Dec. 16, 2013), *Kim* and *Sobh* "do not so broadly hold, as Plaintiff suggests, that all 'mortgagor litigants . . . have standing to challenge assignments of mortgages or lack thereof.' . . . Rather, *Kim* and *Sobh* address what happens when there are defects or irregularities in the foreclosure process." *See also McDonald*, 2014 WL 1260708, at *3-4 (rejecting same argument raised by Gantz Associates based on *Kim* and *Sobh*, because those cases do not stand for the proposition that a litigant has standing to challenge assignments of mortgages, but rather suggest that a litigant has standing to sue if the statutory requirements regarding recordation of those assignments are not satisfied).

Moreover, both *Kim* and *Sobh* recognized that a borrower challenging an assignment must show prejudice, *i.e.*, "that they would have been in a better position to preserve their interest in the property absent the noncompliance with the statute." *See Kim*, 825 N.W.2d at 337. Plaintiff has failed to make such a showing here.

Numerous courts have concluded that similar conclusory allegations of a "fear[of] double recovery" are deficient. *See, e.g., Ross*, 2014 WL 5390659, at *5; *Griffin v. JPMorgan Chase, Bank, N.A.*, No. 13-10002, 2013 WL 6587870, at *4 n.8 (E.D. Mich. Dec. 16, 2013) ("Plaintiffs' general assertion that they 'fear double recovery' . . . and thus fit within the exception to the general rule . . . is not sufficiently pled."); *Stroud v. Bank of Am., N.A.*, No. 13-10334, 2013 WL 3582363, at *7 (E.D. Mich. July 12, 2013) ("Plaintiff does not substantiate this fear by, for example, alleging that a second entity is attempting to collect on the underlying debt. That Plaintiff is fearful of double liability does not make the risk of such liability plausible, particularly in light of Plaintiff's acknowledgement that First Street (the original mortgagee) has dissolved . . . ."); *Goodwin*, 2013 WL 4499003, at *2 n.1 ("While a 'genuine claim' that a plaintiff might be subject to double recovery can provide that plaintiff with standing to challenge an assignment between two third-parties, . . . this bald assertion [of a fear of possible double recovery] is not such a genuine claim; Plaintiff has not put forth a plausible argument that a party other than CMI also claims rightful ownership of the mortgage."); *Maraulo*, 2013 WL 530944, at *7 (rejecting same argument of robo-signing because "none of the facts alleged indicate that the assignment may subject Plaintiffs to a risk of having to pay their mortgage twice. In fact, Plaintiffs' complaint alleges that the assignor of the mortgage, American, went out of business in 2008 and ceased to exist as a corporate entity."). The Court agrees with these decisions.

To the extent Plaintiff's allegations are based on purported issues with the alleged securitization, the Court first notes that Plaintiff does not have standing to raise such a claim. *See Smith v. Litton Loan Servicing, LP*, 517 F. App'x 395, 397-398 (6th Cir. 2013) ("Smith was neither a party nor a third-party beneficiary to the Pooling and Servicing Agreement, so even if its terms were violated, Smith may not challenge compliance with the Pooling and Servicing Agreement.").

Nevertheless, even if he did have standing, Plaintiff has not raised a genuine issue of material fact with respect to this claim. The only evidence Plaintiff introduces of securitization are (i) Form 8-Ks referencing pooling and servicing agreements (PSAs) from February and April 2003 (Dkt. 1-1 (65-68 cm/ecf pages)), and (ii) images of various websites describing mortgage-backed securities (Dkt. 1-1 (70-75 cm/ecf pages)). However, Plaintiff has not shown that his mortgage loan in particular was securitized and/or part of the described PSAs, and Wells Fargo expressly claims that it was not. Def. Resp. to Mot. to Remand at 2 ("A cursory review of the chain of title to the Property shows that the Mortgage was never pooled."); *see also* 2/26/12 Letter (Dkt. 1-1 (97 of 121 (cm/ecf page))) ("Please be advised that [Wells Fargo] does not disburse original documents. However, [Wells Fargo] does have a valid loan and lien on this property.").

Moreover, Plaintiff alleges that the PSAs "absolutely require[] the transfer of the Mortgage and Note to be done in a specified way, within a specified time frame, i.e., one year, which was not done in this case." Compl. ¶ 99. However, Plaintiff

fails to explain precisely with which portion of the PSA the purported securitization failed to comply—the timing or some other requirement. Therefore, the Court rejects this claim as deficient as well.

Accordingly, the Court dismisses Plaintiff's claim for "declaratory relief that the foreclosure violates MCL 600.3204(1) & (3)" (count one).

E. Count Two: Mich. Comp. Laws §§ 600.3204(4), 600.3205a, and 600.3205c

Plaintiff alleges that Defendant violated Mich. Comp. Laws §§ 600.3204(4), 600.3205a, and 600.3205c when it initiated foreclosure proceedings while a loan modification request was under review. Plaintiff claims that "Defendants were absolutely required to permit Plaintiff to participate in the statutory modification process, to lock in a 90 day freeze on foreclosures, and to refrain from conducting a sheriff's sale if Plaintiff qualified for modification." Compl. ¶ 112. According to Plaintiff, "although [he] contacted the foreclosing law firm prior to the deadline, and informed a representative that he wished to participate in the statutory modification process, the firm illegally informed Plaintiff that he was required to deal directly with the Servicer, and Defendants rushed to sheriff's sale prior to the expiration of Plaintiff's rights under MCL 600.3205 *et seq.*" *Id.* ¶ 113.

Defendant argues this claim is subject to dismissal because Plaintiff did not request a timely meeting in response to the Notice of Modification Opportunity, as required by statute. Def. Br. at 12-13. In support of this argument, Defendant attaches to its motion an affidavit by Ebony Gerwin—an attorney at Trott & Trott, P.C.,—who states that Trott & Trott, on behalf

of Wells Fargo, sent the written notice required by Mich. Comp. Laws §§ 600.3204 and .3205a-e to Plaintiff, but that "Plaintiff failed to ever request a meeting under the Notice in connection with Mich. Comp. Laws § 600.3205b." Gerwin Aff. (Dkt. 17-7).

Plaintiff responds that he has alleged in his Complaint that he requested the meeting "prior to the deadline," and that this raises a genuine issue of material fact precluding dismissal. Pl. Resp. at 16-18. The Court disagrees.

Plaintiff concedes that Defendant, via Trott & Trott, sent the required loan modification notice in March 2013. However, the parties dispute whether Plaintiff requested a meeting pursuant to that notice, as required to trigger the statutory protections. Pl. Resp. at 17. Plaintiff, via his Complaint, suggests that he did so; Defendant, via an affidavit provided by Gerwin, claims he did not.

"The Sixth Circuit has held that a plaintiff's bare assertion that he requested a meeting with the foreclosing party's representative, as required by [Mich. Comp. Laws] § 600.3205b to trigger the mortgagee's duty to engage in loan modification negotiations, is insufficient to satisfy the *T[w]ombly/Iqbal* pleading standard." *See Ross*, 2014 WL 5390659, at *5 (dismissing same claim brought by the same plaintiff's counsel) (citing *Farnsworth v. Nationstar Mortg., LLC*, 569 F. App'x 421, 429 (6th Cir. 2014)). As explained by the Sixth Circuit in *Farnsworth*, a "bare allegation that [the plaintiff] satisfactorily requested a meeting under Mich. Comp. Laws § 3205b, unsupported by any additional facts, is just the sort of conclusory allegation that is insufficient to survive a motion to dismiss."

Farnsworth, 569 F. App'x at 429; *see also Thill v. Ocwen Loan Servicing, LLC*, 8 F. Supp. 3d 950, 953-954 (E.D. Mich. 2014) (collecting cases, and concluding that "Plaintiff has not, for example, alleged when . . . he contacted Defendant's designee or a housing counselor within the 30 day period. Simply articulating that Plaintiff complied with the statutory requirements and Defendants did not are legal conclusions that fall well short of *Twombly/Iqbal*. . . . Accordingly, this Court now joins . . . the numerous other courts that have rejected nearly identical loan modification claims filed by Gantz Associates."); *Hiller v. HSBC Fin. Corp.*, No. 13-12177, 2014 WL 656258, at *6 (E.D. Mich. Feb. 20, 2014) ("As it is clear that the relevant statutory provisions provide meticulous directions for all partie[s] involved in a foreclosure, absent more specific allegations the Court is left with pure conjecture, which is not sufficient.").

Here, Plaintiff has alleged that he "contacted the foreclosing law firm prior to the deadline, and informed a representative that he wished to participate in the statutory modification process." Compl. ¶ 113. Plaintiff does not specify when he made such a request, the means with which he did so (i.e., telephonically, e-mail, mail), and/or whether he personally made the request or did so through counsel. Nor does Plaintiff expand on his allegations to provide this sort of detailed information in response to Defendant's motion for summary judgment. As numerous courts have explained, these barebone allegations are insufficient to withstand a motion to dismiss, let alone one for summary judgment. Indeed, Plaintiff's failure to provide more details regarding the timing of his purported request is particularly worrisome in light

of the fact that at least two courts in this District have concluded that Plaintiff's counsel appears to misunderstand (at best) or intentionally misstate (at worst) the timing requirements set forth in Mich. Comp. Laws §§ 600.3205b and 3205c. *See Hewitt v. Bank of Am.*, No. 13-310, 2013 WL 3490668, at *8-9 (W.D. Mich. July 11, 2013) (noting that "Plaintiff selectively quotes from the foreclosure statutes to imply that he had 90 days to contact the designated entity to request a loan modification"); *Thill*, 8 F. Supp. 3d at 953-954 (finding that Plaintiff's counsel's suggestion regarding the 90-day period is a "blanket misstatement of law and unfortunately is not an isolated incident").

Furthermore, the only evidence that Plaintiff cites to in support of his claim that he actually made such a request is his Complaint. *See* Pl. Resp. at 17. But as described above, Plaintiff's Complaint cannot serve as an affidavit because it is based on his "knowledge, information, and belief," without distinguishing which allegations are based on his knowledge and which are based on belief. *See* Compl. at 43; *see also Totman v. Louisville Jefferson Cnty. Metro Gov't*, 391 F. App'x 454, 464 (6th Cir. 2010). Moreover, Plaintiff's Complaint was not sworn to under penalty of perjury. *See* 28 U.S.C. § 1746; *Tenneco Auto. Operating Co., Inc. v. Kingdom Auto Parts*, 410 F. App'x 841, 848 (6th Cir. 2010). Plaintiff has not provided any further evidence that he requested such a meeting, including a competing affidavit or declaration sworn to under penalty of perjury stating that he did so. Therefore, Plaintiff has not introduced sufficient evidence to create a genuine issue of material fact in light of Gerwin's

affidavit attesting that Plaintiff did not request such a meeting. *See McDonald*, 2014 WL 1260708, at *4-5 (allegation of requesting a meeting in "verified complaint" insufficient to create genuine issue of material fact, because complaint was not signed "under penalty of perjury," as required by 28 U.S.C. § 1746 and *El Bey v. Roop*, 530 F.3d 407, 414 (6th Cir. 2008)).

Accordingly, the Court dismisses Plaintiff's claim based on Michigan's loan modification statutes (count two).

F. Count Three: Breach of Contract

Plaintiff next raises a claim for breach of contract based on paragraphs 1 through 5 of the mortgage. According to Plaintiff, these paragraphs "set forth the manner in which Defendants were authorized by contract to bill Plaintiff for principal, interest, taxes, and insurance, to utilize his funds to pay the taxes and insurance, and to credit his account accordingly." Compl. ¶ 136. Plaintiff alleges that Defendant "breached these requirements of the contract, by failing to credit Plaintiff for payments made, by overcharging Plaintiff for taxes and/or insurance, by collecting funds from Plaintiff to pay insurance but failing to actually pay the same, and by foreclosing instead of cleaning up their own mistakes and/or intentional misconduct aimed at getting their hands on a bailout of [sic] otherwise by cashing in on a mortgage insurance policy." *Id.* ¶ 134.

Defendant argues that this claim is subject to dismissal because Plaintiff has not identified, much less shown a genuine issue of material fact regarding, any breach. Def. Br. at 14-15. Defendant maintains that Plaintiff has not identified any specific instance

of improper conduct or error in the crediting of payments, or any inaccuracy in the Customer Account Activity statement that Defendant provided to Plaintiff reflecting his payment history. *Id.*

Plaintiff, citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), responds that he has sufficiently alleged a claim for breach of contract because his allegations "need not be 'detailed,' as long as the Plaintiff goes beyond a mere recitation of a cause of action." Pl. Resp. at 19-20 (emphasis in original). Plaintiff claims that he has identified paragraphs 1 through 5 of the mortgage as the provisions that were breached, and that he has sufficiently alleged that "Wells Fargo muddled foreclosure, by failing to credit his account for payments made during Paperwork Hell, and that this made reinstatement impossible, because it fraudulently inflated the amount required to reinstate." *Id.*

The Court concludes that summary judgment on Plaintiff's claim for breach of contract is appropriate, because he has not raised a genuine issue of material fact regarding the purported breach. Although Plaintiff claims in conclusory fashion that "the Servicer has muddled the foreclosure process, by misappropriating funds paid by Plaintiff relative to his account, and failing to credit the account accordingly," Compl. ¶ 65, Plaintiff has failed to introduce any actual evidence of misappropriation or a specific payment that was not properly credited. Nor has Plaintiff provided any evidence—other than his own Complaint—of any improper overcharge, or of Defendant collecting funds to pay insurance, but then actually failing to pay this expense. Indeed, as Defendant highlights, Plaintiff fails to identify any

particular line item on the Customer Account Activity statement that he believes was incorrect. Def. Reply at 5.

Plaintiff's conclusory allegations, without further specificity and evidentiary support, are insufficient. Numerous courts have agreed that nearly identical conclusory allegations by Plaintiff's counsel in other cases were insufficient to withstand a motion to dismiss, let alone one for summary judgment. *See Thill*, 8 F. Supp. 3d at 955 (collecting cases, and finding that "Plaintiff's allegations do not identify the specific terms of the contract allegedly breached—such as identifying what payments were made, when or how they were supposed to be credited, what mistakes were made, why they are considered mistakes under the contract, etc." (quotation marks omitted)); *Ross*, 2014 WL 5390659, at *6 (concluding that the same "conclusory allegations, without accompanying factual development, are insufficient to state a claim"); *Alshaibani v. Litton Loan Servicing, LP*, 528 F. App'x 462, 465 (6th Cir. 2013) ("As a practical matter, Plaintiffs' factually unadorned allegation that Litton misapplied their payments does no more to render their claim plausible than would a simple legal conclusion that Litton breached the mortgage."); *Boone v. Seterus, Inc.*, No. 13-13457, 2014 WL 1460984, at *2 (E.D. Mich. Apr. 15, 2014) ("Here, Boone alleges that Defendants breached the requirements listed in paragraphs 1 through 5 of the mortgage by failing to credit her for payments she made, and then foreclosing . . . . Boone supplies no factual allegations as to how Seterus failed to credit Plaintiff for payments made. She merely offers a 'threadbare recital[] of the elements of a cause of

action.' (brackets in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Furthermore, Plaintiff's reliance on *Twombly*, and his claim that his allegations "need not be 'detailed,' as long as the Plaintiff goes beyond a mere recitation of a cause of action," Pl. Resp. at 19-20 (emphasis in original), is misplaced. The *Twombly* standard applies to a motion to dismiss. Here, however, Plaintiff is facing a motion for summary judgment. The standard for such a motion is different; Plaintiff must rebut that no genuine issue of material fact exists as to his claim and that Defendant is entitled to judgment as a matter of law. In other words, although all inferences are drawn in Plaintiff's favor, Plaintiff must present sufficient evidence to create a genuine issue of material fact that makes submission to the jury appropriate. *See Donald v. Sybra, Inc.*, 667 F.3d 757, 760 (6th Cir. 2012). At least one other court in this District has explained this difference to Plaintiff's counsel, but apparently to no avail. *See Cheesewright v. Bank of Am., N.A.*, No. 11-15631, 2013 WL 639135, at *3 (E.D. Mich. Feb. 21, 2013) ("This statement indicates confusion regarding the difference between surviving a Motion to Dismiss for Failure to State a Claim under Fed. R. Civ. P. 12(b)(6) and the instant Motion for Summary Judgment, made pursuant to Fed. R. Civ. P. 56."). In any event, Plaintiff has failed to meet his burden here.

Plaintiff also claims that any deficiency in his pleading or evidence is due to his decision not to pursue discovery in light of Defendant's purported promise to consider him for a loan modification during the discovery period. Pl. Resp. at 20-21.

Plaintiff argues that "Wells Fargo . . . . promised to review [him] for modification as a means to settle during the pendency of the Scheduling Order," and that "[i]f Wells Fargo had not strung Mr. Burniac along with lies during this time [regarding the pendency of the loan modification request], he would have engaged in discovery to further flesh out his claims, and he would have then had the opportunity to amend and provide even more specificity to his Complaint." *Id.*

The Court rejects Plaintiff's attempt to place the fault for his deficiencies on Defendant. After conducting numerous telephonic status conferences with the parties over the course of two-and-a-half months, the Court issued a Case Management and Scheduling Order that clearly set out the deadlines for discovery and dispositive motions. CMO (Dkt. 9). This CMO provided over four months for conducting fact and expert discovery. Plaintiff did not request an extension of the discovery deadline in light of the purported settlement discussions. Nor does Plaintiff explain why Defendant should be blamed for Plaintiff's decision not to proceed with discovery—despite the pending request for a loan modification review—when the deadline was approaching. This is particularly true in light of Plaintiff's allegation that by May 2014, Defendant's counsel was not responding (or barely responding) to Plaintiff's counsel's communications regarding the loan modification request. *See Pl.* Resp. at 12-14. Accordingly, the Court rejects Plaintiff's argument that he should not be faulted for his inability to provide the requisite evidence and specificity because he did not engage in discovery. *Id.*

The Court, therefore, grants Defendant's motion regarding Plaintiff's claim for breach of contract (count three).

G. Counts Four and Five: Intentional and Constructive Fraud

Plaintiff also raises claims for intentional and constructive fraud. In support of these claims, Plaintiff makes three allegations: (i) that Defendant knowingly and intentionally lied to Plaintiff that, if he agreed to stop making payments on the mortgage loan, Defendant would not conduct foreclosure proceedings and would grant a loan modification; (ii) that Defendant misrepresented that it had not receive loan modification documents Plaintiff sent, which resulted in him repeatedly submitting the same documentation and entering what he terms "Paperwork Hell"; and (iii) Defendant engaged in a conspiracy to "fabricate a phone paper trail that would suffice as a 'record chain of title,' by forging the Forged Assignment, and passing the same off as a legitimate document." Compl. ¶¶ 137-155.

Defendant responds that these claims are subject to dismissal because, among other reasons, the allegations fail to satisfy the specificity requirement of Federal Rule of Civil Procedure 9(b). Def. Br. at 15-17. Defendant maintains that Plaintiff does not explain who made the purported statements, when they were made, by what medium, whether there were witnesses, or how he was damaged. *Id.* at 17. Without directly addressing Defendant's concerns regarding Rule 9(b), Plaintiff responds that he has asserted claims for intentional and/or constructive fraud based on three issues:

> First, Plaintiff contends Defendants tricked him into default with lies claiming he was required to be in default to be considered for modification. Second, Plaintiff contends that Defendants tricked him further into default, so he could not afford to get caught back up again, with lies claiming his financial package had not been received, when it had, i.e.[,] the Paperwork Hell process. Third, Plaintiff contends that Defendants tricked him into a false sense of security, with lies claiming that his loan was not in foreclosure and was not going to be sold at sheriff's sale, and then with lies claiming that the sheriff's sale had never occurred.

Pl. Resp. at 22. Plaintiff also argues that if Defendant wanted additional details about these claims, it could have sought discovery from him. *Id.* at 23.

The Court concludes that Plaintiff's allegations are insufficient to survive Defendant's motion for summary judgment. However, a point of clarification is necessary before discussing the merits.

Plaintiff's claim appears to have shifted in part between his Complaint and his response to the motion for summary judgment. In his Complaint, Plaintiff challenges the assignment as one of the three grounds for his fraud claim. *See* Compl. ¶¶ 143-149. In his response to the motion for summary judgment, however, the third purported fraud that Plaintiff identifies is being told "that his loan was not in foreclosure and was not going to be sold at sheriff's sale, and then . . . that the sheriff's sale had never occurred." Pl. Resp. at 22. Therefore, it appears that Plaintiff has abandoned his fraud claims to the extent

they were based on the assignment. Furthermore, Plaintiff's allegation that he was falsely told that the "sheriff's sale had never occurred" appears to be a boilerplate response, given that the record suggests no such sale of Plaintiff's property has occurred; indeed, upon filing this litigation, Plaintiff obtained an order enjoining Defendants from selling the property at a sheriff's sale. There is no evidence in the record that the sale occurred thereafter. *See* Order Granting Preliminary Injunctive Relief (Dkt. 1-1 (118 of 121 (cm/ecf page)).

Nevertheless, even without these deficiencies, and considering all of the fraud allegations on their merits, the Court concludes that Plaintiff has failed to satisfy Rule 9(b). That rule requires that a party asserting a fraud claim "state with particularity the circumstances constituting fraud." The Sixth Circuit has interpreted Rule 9(b)'s particularity requirement as necessitating that a plaintiff, at a minimum, "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Frank v. Dana Corp.*, 547 F.3d 564, 570 (6th Cir. 2008) (quotation marks and citation omitted). Here, Plaintiff has not specified who made the purported statements, where and when they were made, or by what method they were communicated. Nor has Plaintiff provided any specificity regarding what, precisely, was said.

Numerous courts have found the same conclusory and boilerplate allegations made by Plaintiff's counsel here to be insufficient under Rule 9(b). *See, e.g., Thill*, 8 F. Supp. 3d at 956957

(collecting cases brought by Gantz Associates, and dismissing same allegations); *Cheesewright*, 2013 WL 639135, at *6-7 ("It is clear that Counts 8 and 9 could not even survive a Rule 12(b)(6) motion, let alone summary judgment. Plaintiffs' Complaint does not describe any specific statements, does not identify the speaker, the time or place of the statements, or explain how the statements were fraudulent."); *Ross*, 2014 WL 5390659, at *6-7 (dismissing same cookie-cutter allegations under Rule 9(b)); *Boone*, 2014 WL 1460984, at *4 (same).[2]

Furthermore, even if the allegations themselves were sufficiently pled, Plaintiff has introduced no evidence showing a genuine issue of material fact that these statements were made. As explained above, Plaintiff relies solely on his allegations in his Complaint. See Pl. Resp. at 22. But the Complaint was not sworn to under penalty of perjury, and it fails to differentiate between those statements that are based on personal knowledge and those based on belief. Plaintiff offers no other evidence or testimony—such as an affidavit or deposition—attesting to these purported statements. This is insufficient to survive summary judgment.

Finally, Plaintiff once again claims that Defendant should be faulted for these deficiencies, because Defendant purportedly led Plaintiff into believing they may settle during the discovery period. Pl. Resp.

---

[2] Because the Court dismisses Plaintiff's fraud claims for the reasons stated here, it need not address Defendant's alternative arguments regarding truthfulness, the statute of frauds, whether the statements were about future conduct, and injury. *See* Def. Br. 18-19.

at 23. Plaintiff argues that if "Wells Fargo really wanted more detail on the specifics of these allegations, it could have scheduled his deposition, or sent him requests for admission, or interrogatories, or requests for the production of documents." Id. The Court rejects this argument. Simply put, it is not Defendant's burden for Plaintiff to adequately plead and prove his claims.

Therefore, the Court dismisses Plaintiff's claims for intentional fraud (count four) and constructive fraud (count five).

H. Count Seven: Civil Conspiracy

Plaintiff next raises a claim for civil conspiracy, alleging that "Defendants have illegally, maliciously, and/or wrongfully conspired with one another with the intent to commit the torts of fraud and/or constructive fraud, and have further conspired to violate the Michigan Regulation of Collection Practices Act, and/or the various other torts alleged within the Counts contained within this Complaint, for the improper purpose covering [sic] up their failures, such that Defendants could force Plaintiff into foreclosure as soon as possible, and thereby effectuate a bailout and/or cash in on a private mortgage insurance policy." Compl. ¶ 163.

Defendant argues this claim is subject to dismissal for two reasons. First, Defendant asserts that a claim for civil conspiracy requires that an underlying tort have been committed, and Plaintiff has not shown any such tort. Def. Br. at 20-21. Second, Defendant claims that this cause of action requires Plaintiff to show an agreement, but Plaintiff has not proven any such agreement among Defendants,

nor even identified the unknown Trust or Trustee with whom Defendant is alleged to have conspired. *Id.* Plaintiff responds simply by claiming that he has sufficiently set forth a claim for conspiracy, and then quoting directly from his Complaint. Pl. Resp. at 23-24. Plaintiff does not address Defendant's argument regarding the lack of evidence of an agreement, nor his failure to identify the unknown Defendants.

"A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n*, 670 N.W.2d 569, 580 (Mich. Ct. App. 2003) (quoting *Admiral Ins. Co. v. Columbia Cas. Ins. Co.*, 486 N.W.2d 351 (Mich. Ct. App. 1992)). "[A] claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort." *Id.* (quoting *Early Detection Ctr., PC v. New York Life Ins. Co.*, 403 N.W.2d 830 (Mich. Ct. App. 1986)).

The Court agrees that summary judgment on this cause of action is appropriate. As described throughout this decision, Plaintiff has failed to state any separate, viable tort claim, or provide evidence of an agreement to commit an unlawful act. Moreover, Plaintiff fails to identify the purported unknown Defendants, and Plaintiff has not alleged (or raised a genuine issue of material fact regarding) a concerted action between Wells Fargo and any other entity. Accordingly, as has been previously explained by numerous courts in cases brought by Plaintiff's counsel that included this same conclusory claim, Plaintiff has failed to sustain a cause of action for civil conspiracy. *See Thill*, 8 F. Supp. 3d at 957; *Ross*, 2014 WL 5390659, at *7; *Boone*,

2014 WL 1460984, at *5; *Ordway v. Bank of Am., N.A.*, No. 13-13236, 2013 WL 6163936, at *4 (E.D. Mich. Nov. 20, 2013); *Anderson*, 2013 WL 5770507, at *6.

The Court, therefore, grants Defendant's motion regarding Plaintiff's claim for civil conspiracy (count seven).

I. Count Eight: Michigan's Regulation of Collection Practices Act

Plaintiff also raises a claim for alleged violations of Michigan's Regulation of Collection Practices Act ("RCPA"), Mich. Comp. Laws § 445.251, *et seq.* In his Complaint, Plaintiff alleges the following purported prohibited acts:

a. Communicating with Plaintiff in a misleading or deceptive manner.

b. Making an inaccurate, misleading, untrue, or deceptive statement or claim in a communication to collect a debt or concealing or not revealing the purpose of a communication when it is made in connection with collecting a debt.

c. Misrepresenting in a communication with Plaintiff the following: (i) the legal status of a legal action being taken or threatened, (ii) the legal rights of Defendants or Plaintiffs [sic].

d. Communicating with Plaintiff without accurately disclosing the caller's identity.

e. Communicating with Plaintiff when Plaintiff was actively represented by an

attorney because Plaintiff's attorney's name and address were known.

f. Using a harassing, oppressive, or abusive method to collect a debt, including causing a telephone to ring or engaging a person in telephone conversation repeatedly and continuously, or at unusual times or places which are known to be inconvenient to Plaintiff.

g. Failing to implement a procedure designed to prevent a violation by an employee.

Compl. ¶ 169. Plaintiff provides no further details of these alleged violations, other than to say that he "adopts and incorporates by reference each and every allegation contained in the [preceding] paragraphs [of the Complaint], as if fully set forth herein." *Id.* ¶ 167.

Defendant argues that Plaintiff only makes boilerplate allegations based on the statutory language, and that this is insufficient as a matter of law. Def. Br. at 21-22. Defendant highlights that Plaintiff fails to specify the purported actions that violated the statute, when these actions were taken, what was misrepresented, etc. *Id.*

Plaintiff responds that he has sufficiently alleged a claim under the RCPA, once again citing his Complaint. Pl. Resp. at 24. Plaintiff also argues that if Wells Fargo wanted additional details regarding the factual allegations supporting his claim, it could have engaged in discovery. Furthermore, Plaintiff reiterates his claim that, but for Defendant's promises to consider him for a loan modification, he would have "used the time to engage in offensive discovery

. . . which could have been used to file a 1st Amended Complaint containing the detail that Wells Fargo now complains is lacking." *Id.* at 25.

The Court concludes that this claim is subject to dismissal as woefully inadequately pled and supported. Numerous courts within this district have found that the exact same allegations contained here were vague and threadbare recitals that failed to state a claim. *See, e.g., Griffin v. JPMorgan Chase Bank, N.A.*, No. 13-10002, 2013 WL 6587870, at *5 (E.D. Mich. Dec. 16, 2013) (collecting cases, and concluding that "[t]his Court now joins the various other Michigan Federal courts that have rejected nearly identical vague and conclusory allegations brought under Michigan's Regulation of Collection Practices Act by [Gantz Associates]"); *Stroud v. Bank of Am., N.A.*, No. 13-10334, 2013 WL 3582363, at *9-10 (E.D. Mich. July 12, 2013). As explained more fully by Judge Bell of the Western District of Michigan:

> Rule 9(b), which provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake," is applicable to all allegations of fraud, including allegations of fraud under the MCPA. *See Zanger v. Gulf Stream Coach, Inc.*, No. 05–72300, 2005 WL 3416466, at *10 (E.D.Mich. Dec.13, 2005). Plaintiffs allege seven violations of the MCPA, four of which allege fraud: (1) communicating with Plaintiffs in a misleading or deceptive manner; (2) making a deceptive statement in a communication to collect a debt; (3) misrepresenting in a communication with Plaintiffs the legal status of a legal

action being taken and the legal rights of Plaintiffs; and (4) communicating with Plaintiffs without accurately disclosing the caller's identity. (Compl. ¶ 176(a)-(d).) Plaintiffs provide no details in these incredibly vague allegations. Plaintiffs do not provide the time or contents of the misrepresentations, nor do Plaintiffs provide who made the misrepresentation or when. Indeed, beyond the recitation of general behavior the MCPA prohibits, [this claim] is devoid of details.

As for the alleged violations of the MCPA which do not involve fraud—(1) communicating with Plaintiffs when Plaintiffs were actively represented by an attorney; (2) using a harassing, oppressive, or abusive method to collect a debt, including causing a telephone to ring or engaging a person in telephone conversations repeatedly and at unusual times; and (3) failing to implement a procedure designed to prevent a violation by an employee—Plaintiffs merely quote the statute. *See* Mich. Comp. Laws § 445.252(h), (n), (q). Beyond quoting subsections (h), (n), and (q) from the statute, Plaintiffs make no allegations regarding [the defendant]'s conduct. Even under the lower pleading standard for non-fraud claims, this pleading is woefully inadequate. A plaintiff must provide more than "a formulaic recitation of a cause of action's elements" to survive a motion to dismiss. *Twombly*, 550 U.S. at 555; *see also Brady v. Chase Home Fin.,*

> *LLC*, No. 1:11–CV–838, 2012 WL 1900606, at *10 (W.D. Mich. May 24, 2012) (Quist, J.) (dismissing a plaintiff's MCPA claim because the allegations "merely parrot certain provisions of the statute" and "fail to provide any factual 'meat' for her bare-bones claim").

Goodwin v. CitiMortgage, No. 12-760, 2013 WL 4499003, at *5 (W.D. Mich. Aug. 19, 2013). Plaintiff's allegations in this case are identical to those set forth in *Goodwin*, and, therefore, suffer the same deficiencies. Compare Comp. ¶¶ 167-172 with *Goodwin*, No. 12-760, Compl. ¶¶ 174-178 (Dkt. 12) (W.D. Mich.).

Plaintiff's arguments to the contrary are unavailing. First, Plaintiff argues that he "alleges that Wells Fargo made endless collection calls despite cease and desist requests; that Wells Fargo improperly threatened foreclosure; that Wells Fargo improperly assessed late fees; that Wells Fargo reported false and derogatory information to the credit reporting agencies regarding the Mortgage loan account; that Wells Fargo made false representations that Plaintiff committed wrongful conduct; and false statements as to its standing to foreclose." Pl. Resp. at 24. In support of this claim, Plaintiff cites paragraphs 62-66 and 167 of his Complaint. Plaintiff claims this is sufficient to survive a motion for summary judgment.

However, paragraphs 62-66 and 167 of the Complaint contain the same type of vague, non-specific accusations that fail to satisfy Rules 8 and 9, as discussed above. These allegations do not contain any further information about when these actions

were purportedly taken, by what method, who took them, or even what occurred. To the contrary, paragraph 63 specifically states that "Defendants' violations are too numerous to cite individually in this Complaint—the details of which will be further fleshed out through discovery." And, as courts have previously explained to Plaintiff's counsel, this language actually supports the Court's finding that Plaintiff's allegations are insufficient to withstand a motion to dismiss, let alone one for summary judgment. *See Griffin*, 2013 WL 6587870, at *6 ("Plaintiffs' indication that they will 'flesh out' the details of these violations during discovery indicates an acknowledgement by Plaintiffs that their . . . Complaint lacks the factual specificity required in this post-*Twombly/Iqbal* world." (brackets omitted)); *Stroud*, 2013 WL 3582363, at *10 n.8 (noting that the attorney from Gantz Associates "seems to acknowledge [the deficiencies in his pleadings] by merely inserting the violations listed in the statute and providing that 'the details' of these 'numerous violations' 'will be further fleshed out through discovery[.]'").[3]

Second, Plaintiff suggests that it is Defendant's fault that he cannot provide additional information or evidence, because he decided to forego conducting discovery during the discovery period in light of Defendant's promises (which Plaintiff now claims

---

[3] Given the lack of specificity in this case, Plaintiff's reliance on *Mielke v. Bank of America Home Loans Servicing LP*, No. 10-11576, 2011 WL 1464848, at *3-9 (E.D. Mich. Apr. 18, 2011)—a case in which the plaintiff pointed to specific language in loan servicing letters the plaintiff received and explained why these letters purportedly violated Michigan's Regulation of Collection Practices Act—is misplaced.

were false) to consider him for a modification. Pl. Resp. at 25. This argument is unpersuasive for the reasons discussed earlier, *i.e.*, Plaintiff had the opportunity to undertake discovery or request an extension to do so, but did not pursue either option.

Furthermore, Plaintiff's allegations are insufficient to withstand even a motion to dismiss under *Iqbal* and *Twombly*; he should not need additional discovery to provide more specificity for his claims, such as that he was subject to "endless collection calls by phone to Plaintiff, despite cease and desist requests." Compl. ¶ 63. The timing of such calls and when/how his "cease and desist requests" were made are matters within his own personal knowledge, as should be the remaining facts for his claims under the RCPA.

Finally, the Court rejects Plaintiff's argument that, "if Wells Fargo seeks additional details, . . . it could [have] scheduled Mr. Burniac's deposition, sent him interrogatories, requests for production of documents, or requests for admission." Pl. Resp. at 25. As described earlier, it is Plaintiff's burden to sufficiently plead his claims, and, to overcome Defendant's motion for summary judgment, he must provide evidence showing a genuine issue of material fact. Plaintiff has met neither of these burdens.

Therefore, the Court dismisses Plaintiff's claim for violations of Michigan's Regulation of Collection Practices Act (count eight).

J. Count Eleven: Breach of Contract of the Implied Duty of Good Faith and Fair Dealing

Finally, Plaintiff asserts a claim for breach of contract of the implied duty of good faith and fair dealing. Compl. ¶¶ 185-190. Plaintiff alleges that "Defendants had the discretion to charge Plaintiff for escrow items such as hazard insurance, and further to modify Plaintiff's Loan in accordance with the Home Affordable Mortgage Program and/or other loss mitigation programs." *Id.* ¶ 187. Plaintiff further claims that "Defendants charged Plaintiff for insurance, without paying the insurance policy, as a means to enrich themselves, and further as a means to force the loan into an improper default status, thereby leading to a bailout or to effectuate the cashing in on a private mortgage insurance policy." *Id.* ¶ 188.

Defendant argues that Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing. Def. Br. at 26. Plaintiff responds that Michigan does recognize such a cause of action where a party to the contract makes performance a matter of its own discretion. Pl. Resp. at 25-26. Plaintiff further asserts that Defendant had complete discretion over whether to modify his loan. *Id.* (Plaintiff does not address the escrow issue in response to Defendant's motion). In response, Defendant claims that Plaintiff has not identified any provision where Defendant reserved the right to decide how to perform, nor would the mortgage documents contain any such provision because "offering a loan modification was not even contemplated, much less agreed to, when this loan was originated." Def. Reply at 6-7.

In general, Michigan courts do not recognize breach of the implied covenant of good faith and fair dealing as a stand-alone cause of action. *See Fodale v. Waste Mgmt. of Mich., Inc.*, 718 N.W.2d 827, 841 (Mich. Ct. App. 2006). However, as Plaintiff recognizes, "[w]here a party to a contract makes the manner of its performance a matter of its own discretion, the law does not hesitate to imply the proviso that such discretion be exercised honestly and in good faith." *Burkhardt v. City Nat'l Bank of Detroit*, 226 N.W.2d 678, 680 (Mich. Ct. App. 1975). The Fifth Circuit, in interpreting Michigan law, has explained the covenant of good faith and fair dealing as follows:

> The implied covenant of good faith and fair dealing essentially serves to supply limits on the parties' conduct when their contract defers decision on a particular term, omits terms or provides ambiguous terms.

Hubbard Chevrolet Co. v. Gen. Motors Corp., 873 F.2d 873, 876-877 (5th Cir. 1989). "[B]reach of the implied duty of good faith and fair dealing [can serve as] a basis for breach of contract in Michigan." *Super v. Seterus, Inc.*, No. 13-11626, 2014 WL 902827, at *5 (E.D. Mich. Mar. 7, 2014).

As described, Plaintiff argues that Defendant retained discretion with respect to charging him escrow for insurance and granting a loan modification, but that Defendant did not pay the insurance policy or give him a modification. Compl. ¶¶ 187-188. However, Plaintiff does not explain what express contract serves as the basis for this purported discretion—the mortgage, the note, or some other purported agreement. Nor does Plaintiff cite any particular provision of such a document. This alone is

sufficient to dismiss this claim. *See Maraulo v. CitiMortgage, Inc.*, No. 12-10250, 2013 WL 530944, at *11 (E.D. Mich. Feb. 11, 2013) (Goldsmith, J.) (dismissing same claim brought by Gantz Associates because the "[p]laintiffs do not explain what contracts, if any, provide [the defendants] with this discretion").[4]

Furthermore, this claim cannot survive summary judgment on its merits as well. With respect to Plaintiff's claim about escrow, Plaintiff fails to provide any evidence that Defendant did not make the insurance payments despite charging him escrow, nor does he explain how Defendant retained the discretion to use the escrow to make these payments, as opposed to being obligated to do so. *See Soto v. Wells Fargo Bank*, No. 11-14064, 2012 WL 113534, at *5 (E.D. Mich. Jan. 13, 2012) (finding that concerns about discretion with respect to escrow payments no longer apply after enactment of the Real Estate Settlement Procedures Act ("RESPA")); *Cheesewright*, 2013 WL 639135, at *4 (same); *see also* Mortgage at 5 (Dkt. 17-3) ("Lender shall apply the Funds to pay the Escrow items no later than the time specified under RESPA.").

---

[4] Furthermore, although Plaintiff mentions purported issues with the escrow in his Complaint, he fails to address these claims in response to Defendant's motion for summary judgment. Instead, in his response, Plaintiff proclaims that "Wells Fargo had complete discretion over whether to modify Mr. Burniac's loan. . . . Mr. Burniac has therefore stated a claim for breach of the implied duty of good faith and fair dealing[.]" Pl. Resp. at 26. The Court, therefore, deems Plaintiff's claim abandoned to the extent it relies on purported defects with the escrow.

Regarding his claim based on the purported discretion to offer a loan modification, Plaintiff fails to cite any provision, in the mortgage or otherwise, that even considers loan modifications. Indeed, Plaintiff's claim appears to be non-contractual, claiming that Defendant failed to modify his loan "in accordance with the Home Affordable Modification Program and/or other loss mitigation programs." Compl. ¶ 187; *see Goodwin*, 2013 WL 4499003, at *7 (dismissing same claim because, even according to the plaintiff, "the discretion [the plaintiffs] allege [the defendants] possessed was expressly non-contractual," *i.e.*, "in accordance with HAMP and/or other loss mitigation programs."). To the extent he is relying on the mortgage and/or note, he fails to highlight any provision in those instruments addressing loan modifications. *See Maraulo*, 2013 WL 530944, at *11.

Accordingly, the Court now joins the numerous other courts that have rejected this same claim brought by Plaintiff's counsel in other cases. *See, e.g., Super*, 2014 WL 902827, at *5 (dismissing claim under statute of frauds); *Goodwin*, 2013 WL 4499003, at *7; *Hewitt*, 2013 WL 3490668, at *11 (same); *see also Cheesewright*, 2013 WL 639135, at *4-5.

V. CONCLUSION

For the foregoing reasons, the Court grants Defendant's motion for summary judgment (Dkt. 17).[5] The Court will issue a separate judgment in

---

[5] The Court typically would grant a party leave to file a motion for leave to amend if this was a decision on a motion to dismiss based on insufficiency of the pleadings. *See* Fed. R. Civ. P. 15. However, Plaintiff had a full and fair opportunity to participate

favor of Defendants contemporaneously with this decision.

Although the Court grants Defendant's motion, the Court also feels it necessary to briefly discuss the questionable conduct of Plaintiff's counsel—Adam Gantz—and his law firm—Gantz Associates—with respect to this case, and other similar matters in this District. When this case was removed to this Court—based on a standard complaint all too familiar at this point in this District—Plaintiff's counsel filed a motion to remand raising many of the same arguments that had been repeatedly rejected by other courts in this District. The Court highlighted this problem, implying that it would not be tolerant of this behavior in this litigation. *See* 12/17/13 Op. and Order at 5 n.3 (Dkt. 8)

---

in discovery in this case; he just chose not to use it. Further, the dispositive motion deadline has passed, and Defendant filed a motion for summary judgment, not a motion to dismiss. *See Kienzle v. General Motors, LLC*, No. 11-11930, 2013 WL 511397, at * 6 (E.D. Mich. Feb. 12, 2013) ("The Sixth Circuit has repeatedly held that allowing amendments after the close of discovery prejudices the defendant."); *Duggins v. Steak 'N Shake, Inc.*, 195 F.3d 828, 834 (6th Cir. 1999); *Arnold v. Midwest Recovery*, No. 09-10371, 2011 WL 309000, at *1 n.3 (E.D. Mich. Jan. 27, 2011) (denying request for leave to amend raised for the first time in response to a motion for summary judgment, because discovery had closed and the motion cutoff had passed). Moreover, Plaintiff has not even requested leave to amend to clarify his allegations in the face of Defendant's motion, nor has he filed a Rule 56(d) affidavit explaining what further discovery he needs; he simply faults Defendant for his own inability to sufficiently plead his claims. Therefore, the Court declines to grant Plaintiff leave to file a motion for leave to amend.

Upon the filing of Defendant's motion for summary judgment, Plaintiff filed a response (which was stricken twice as failing to satisfy the Court's CMO) as to many of the causes of action, as described above. However, most (if not all) of the arguments raised by Plaintiff's counsel have been repeatedly rejected by courts in this District as meritless and/or based on insufficient pleadings containing the same types of (and, in many places, identical) allegations as those at issue here.

This is not the first time that Plaintiff's counsel's troubling behavior of ignoring repeated court rulings rejecting his meritless claims has been raised. In *Thill v. Ocwen Loan Servicing, LLC*, 8 F. Supp. 3d 950, 958-959 (E.D. Mich. 2014), Chief Judge Rosen noted that none of Plaintiff's counsel's foreclosure matters filed since 2011 regarding "Paperwork Hell" have successfully survived dispositive motion practice, and that "consistently advancing the same rejected legal theories and pleadings borders on sanctionable and ethical misconduct." Judge Rosen warned "Adam Gantz, . . . and any other attorney associated with Gantz Associates . . . [to] review their obligations under Federal Rule of Civil Procedure 11 . . . as they proceed in advancing or maintaining similar actions in the future." *Id.* At least one other court in this district has followed Judge Rosen's lead, noting Plaintiff's counsel's questionable behavior of raising repeatedly rejected legal theories and claims. *See Jones v. Nationstar Mortg. LLC*, No. 14-11642, 2014 WL 5307168, at *1 n.1 (E.D. Mich. Oct. 16, 2014).

Like Judge Rosen, this Court is not unsympathetic to the plight of many homeowners here in Michigan and nationally, and the rights

homeowners may have if there are actual, legitimate claims arising out of the foreclosure process. However, as with Judge Rosen, "[t]he Court is not sympathetic . . . to counsel who bring questionable claims and utilize delay tactics in an effort to simply slow property proceedings in state court," a statement that seems to apply with great force toward Adam Gantz.

Nevertheless, the Court declines to assess sanctions or recommend disciplinary action against Adam Gantz at this time. If he continues to waste the Court's time and the resources of opposing parties by bringing boilerplate claims and raising repeatedly rejected and meritless arguments, however, future courts—including this one—may not be so lenient.

SO ORDERED.

/s/ Mark A. Goldsmith
United States District Judge

Dated: January 28, 2015
Detroit, Michigan

DISTRICT COURT OPINION AND ORDER DENYING PLAINTIFF'S MOTION TO REMAND (DECEMBER 17, 2013)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DONALD C. BURNIAC,

Plaintiff,

v.

WELLS FARGO BANK, N.A., et al.,

Defendants.

Case No. 13-CV-12741

Before: Hon. Mark A. GOLDSMITH
United States District Judge

I. INTRODUCTION

This case arises out of a threatened foreclosure of Plaintiff's property. Plaintiff sued Defendants Wells Fargo Bank, N.A. ("Wells Fargo"), "Unknown Trustee," and "Unknown Trust," in Wayne County Circuit Court, alleging a number of purported defects and fraudulent conduct, including that an assignment of the mortgage was forged. *See* Compl., Ex. A. to Notice of Removal (Dkt. 1-1). Wells Fargo removed the case to this Court based on federal question

jurisdiction, 28 U.S.C. § 1331, and diversity jurisdiction, 28 U.S.C. § 1332. Notice of Removal (Dkt. 1). Plaintiff filed a motion to remand (Dkt. 4); Wells Fargo filed a response (Dkt. 6);[1] Plaintiff filed a reply (Dkt. 7); and the Court heard oral argument on November 21, 2013. Because the Court concludes that Plaintiff's arguments are lacking in merit for the reasons explained below, the Court denies Plaintiff's motion to remand (Dkt. 4).

II. BACKGROUND

Plaintiff and Linda Burniac executed a mortgage on their property in Plymouth, Michigan in 2003 to secure a loan from Washington Mutual Bank. Compl., ¶ 9 (Dkt. 1-1); Def.'s Resp. at 1 (Dkt. 6). In 2007, the mortgage was assigned to Wells Fargo, although the validity of that assignment is disputed. Def.'s Resp. at 1; *see also* Compl. at ¶ 13.

Plaintiff subsequently defaulted on his loan repayment obligations, Compl. at ¶ 45; Def.'s Resp. at 1, prompting Wells Fargo to begin foreclosure proceedings. Def.'s Resp. at 1; *see also* Complaint at ¶ 78. Before the foreclosure sale took place, however, Plaintiff filed the instant lawsuit on May 20, 2013 in Wayne County Circuit Court. *See* Register of Actions,

---

[1] Plaintiff encourages the Court to disregard the last five pages of Defendant's response because it is 25 pages, rather than 20, in length. Pl.'s Reply at 1 n.1. In support of this argument, Plaintiff cites Eastern District of Michigan Local Rule 7.1(d)(3). However, that rule was amended earlier this year. The amended version increases the maximum page length for response briefs to 25 pages so as to accommodate the amendment to Local Rule 5.1(a)(3), which increased the required font size.

Ex. 11 to Def.'s Resp. (Dkt. 6-12). He alleges a variety of fraudulent and wrongful conduct, including that the assignment of his mortgage was forged, that Wells Fargo made wrongful statements regarding loan modification, and that his payments were misappropriated. Compl. at ¶¶ 14, 19, 22, 44, 65. Plaintiff's complaint includes the following counts:

- declaratory relief that the foreclosure violates Mich. Comp. Laws § 600.3204(1) and (3);
- declaratory relief that the foreclosure violates Mich. Comp. Laws §§ 600.3204(4), 600.3205a and 600.3205c;
- breach of contract based on the underlying mortgage;
- intentional fraud;
- constructive fraud;
- tortious interference with contractual relations;
- civil conspiracy;
- violation of Michigan's regulation of collective practices act;
- violation of Michigan's occupational code;
- "accounting";
- breach of contract of the implied duty of good faith and fair dealing;
- "declaratory relief regarding Defendants' failure to comply with the condition precedent under the code of federal regulations"; and
- quiet title.

On May 21, 2013—one day after filing his complaint—Plaintiff filed a "motion seeking ex-parte temporary restraining order and preliminary injunctive relief." *See* Mot. for TRO, Ex. 4 to Def.'s Resp. (Dkt. 6-5). Plaintiff sought to prevent the foreclosure sale that was scheduled for May 23, 2013. *Id.* at 2. The motion outlined Plaintiff's arguments regarding why a temporary restraining order (TRO) and preliminary injunction were appropriate. *Id.* at 3-8. The motion also explained that the TRO could be granted without notice to Wells Fargo because "immediate and irreparable damage will be caused by the delay required to effect notice." *Id.*

The state court granted a TRO that same day. *See* TRO, Ex. 5 to Def.'s Resp. (Dkt. 6-6). The court enjoined the sheriff's sale of the property pending a May 31, 2013 hearing on Plaintiff's request for a preliminary injunction. *Id.* at 2. At the end of the order, the court directed that

> [c]ounsel for Plaintiff shall serve a copy of this Order, as well as the Summons, the Verified Complaint, the motion, and all other applicable pleadings, as follows:
>
> 1. Certified mail, return receipt requested, with delivery restricted to the addressee, to Defendant, Wells Fargo Bank, N.A., at its headquarters located at 420 Montgomery Street, San Francisco, CA 94104-1207; and
>
> 2. Certified mail, return receipt requested, with delivery restricted to the addressee, to Defendants, Unknown Trustee and Unknown Trust, c/o Defendant, Wells Fargo Bank, N.A., at its headquarters located at 420

> Montgomery Street, San Francisco, CA 94104-1207.

Id. Plaintiff mailed the documents on May 22, 2013. Return of Service, Ex. 7 to Def.'s Mot. (6-8). The mailing was addressed to "Wells Fargo Bank, N.A., Attention: Mr. John G. Stumpf, 420 Montgomery Street, San Francisco, CA 94104-1207." *Id.*[2]

Plaintiff and Wells Fargo, through their respective counsel, subsequently stipulated to adjourn the show cause hearing regarding Plaintiff's request for a preliminary injunction until June 14, 2013. *See* Stipulated Order, Ex. 8 to Def.'s Resp. (Dkt. 6-9). The show cause hearing was held on June 14; defense counsel did not appear. Register of Actions, Ex. 11 to Def.'s Resp. (Dkt. 6-12). The state court issued a preliminary injunction on June 18, 2013. Preliminary Injunction, Ex. 9 to Def.'s Resp. (Dkt. 6-10).

The only affirmative action Defendant had taken at that point in the proceedings was to stipulate to adjourn the show cause hearing. Defendant did not

---

[2] The Return of Service form contains a checked box next to the statement "I served personally a copy of the summons and complaint." However, Plaintiff's briefing and oral argument on the instant motion confirm that personal service was never effectuated upon Defendants. Rather, Plaintiff states in his motion that he "served Defendants in accordance with the Order to Show Cause," i.e., that he served Wells Fargo "at its corporate headquarters (or principal office) by certified mail, return receipt requested, with delivery restricted to the addressee, Defendant's chairman, president, and CEO." *See* Pl.'s Mot. to Remand at 1 (Dkt. 4); Pl.'s Reply at 4 (Dkt. 7); *see also* Pl's Reply at 3 n.4 (explaining that the return receipt from . It thus appears that the person who completed the Return of Service form confused the term "personally" to mean personally mailed, rather than effectuated personal service.

file an answer or otherwise respond to the complaint. Accordingly, Plaintiff filed a "Default Request, Affidavit, and Entry" form on June 20, 2013. Default Request, Ex. 10 to Def.'s Resp. (Dkt. 6-11). The parties dispute whether a default ever was entered against Defendants.

Wells Fargo removed the action to this Court on June 20, 2013. Notice of Removal (Dkt. 1). Plaintiff filed a motion to remand thereafter. Mot. to Remand (Dkt. 4).

III. DISCUSSION

In support of his motion to remand, Plaintiff raises four arguments: (1) Wells Fargo could not remove this matter in light of the state court default entered against it; (2) Wells Fargo's "experimenting" in state court precludes removal; (3) remand is required because Wells Fargo omitted certain state court documents from its notice of removal; and (4) removal was improper under the rules of unanimity and diversity of citizenship in light of Defendants "Unknown Trust" and "Unknown Trustee."[3] The Court addresses each argument in turn.[4]

---

[3] The Court notes that Plaintiff's counsel's firm has raised these same arguments in numerous other cases in this district, and has failed in nearly every attempt. *See Botsford v. Bank of Am., N.A.*, No. 13-13379, 2013 WL 5676641, at *1 (E.D. Mich. Oct. 18, 2013); *Ordway v. Bank of Am., N.A.*, No. 13-13236, 2013 WL 5551083, at *1 (E.D. Mich. Oct. 8, 2013); *Jackson v. Bank of Am., N.A.*, No. 13-12430, 2013 WL 4670762 at *1 (E.D. Mich. Aug. 30, 2013); *Anderson v. Bank of Am., N.A.*, No. 13-12834, 2013 WL 4670825, at *2 (E.D. Mich. Aug. 30, 2013); *Griffin v. JPMorgan Chase Bank, N.A.*, No. 13-10002, 2013 WL 2237974, at *2-3 (E.D. Mich. May 21, 2013); *West v. Wells Fargo Bank, N.A.*, No. 12-13572, 2013 WL 1843676, at *4 (E.D. Mich. May 1,

A. Wells Fargo Can Remove Even with an Entry of Default

Plaintiff first argues that Wells Fargo was unable to remove this action in light of the entry of default against it in state court. Pl.'s Mot. to Remand at 2-3 (Dkt. 4). Plaintiff claims that under Michigan Court Rule 2.603(A)(3), Defendant's only option after the entry of default was to seek to set aside the default or to participate in a proceeding to ascertain the amount of damages to which Plaintiff is entitled. *Id.* Defendant responds that a default never was entered on the state court docket. Def.'s Resp. at 4-5 (Dkt. 6). In reply, Plaintiff highlights that the docket entry for his request for default includes the word "entry." Pl.'s Reply at 2 (Dkt. 7). Plaintiff also attaches to his reply a purported e-mail from the state court clarifying that "the Time Stamped Default constitutes the actual entry of the Default, Request, Affidavit, and Entry." 6/20/13 E-mail, Ex. A to Pl.'s Reply (Dkt. 7-1).

While the parties disagree whether a default actually was entered by the state court, the Court need not wade into this issue to resolve the instant motion. At the outset, an entry of default would not have been proper in the state court because none of

---

2013); *Mussall v. Bank of Am., N.A.*, No. 13-10321, 2013 U.S. Dist. LEXIS 27493, at *3 (E.D. Mich. Feb. 28, 2013). *But see Buterbaugh v. Selene Fin. LP*, No. 12-14763, 2013 WL 812106, at *3 (E.D. Mich. Mar. 4, 2013) (finding lack of unanimity where there was no consent by the Unknown Trust and JPMorgan was sued as *Trustee* for the Trust).

4 Because the Court concludes that removal was proper and that jurisdiction exists pursuant to 28 U.S.C. § 1332, it does not reach Plaintiff's final argument regarding supplemental jurisdiction.

the Defendants was properly served. Plaintiff argues that he served Wells Fargo by sending a copy of the summons and compliant via certified mail, return receipt requested, to Wells Fargo, with attention to John G. Stumpf, Wells Fargo's Chairman, President, and Chief Executive Officer. Pl.'s Reply at 2-3. Plaintiff also claims that he served Defendants Unknown Trust and Unknown Trustee by mailing the documents in this same manner to Wells Fargo. Pl.'s Mot. at 1. Defendant responds that this method of service is not proper under the Michigan Court Rules. Def.'s Resp. at 10. The Court agrees.

Federal Rules of Civil Procedure 4(e) and (h)(1) allow for service by "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made." Although the parties initially dispute whether Michigan Court Rule 2.105(D) (service methods for private corporations) or 2.105(E) (service methods for unincorporated voluntary associations) applies to Wells Fargo, a national banking association, *see* Def.'s Resp. at 7-8 (arguing for 2.105(D)); Pl.'s Reply at 3-4 (arguing for 2.105(E)), the Court need not resolve this issue because service was defective under either provision.

Both Michigan Court Rules 2.105(D)(2) and 2.105(E) permit service by "serving" a summons and copy of the complaint on a listed high ranking official and "sending" a summons and copy of the complaint, via registered mail, to the Defendant's office.[5] The

---

[5] Michigan Court Rule 2.105(D)(2) provides, in pertinent part, that service of process "on a domestic or foreign corporation may be made by . . . serving a summons and a copy of the complaint on a director, trustee or person in charge of an office or business

fact that the rules use differing language for the two steps—serving an individual and sending to the offices—demonstrates that simply mailing the document to a high ranking official does not constitute proper service.

Indeed, numerous courts have concluded that the rules' use of the term "serving" requires personal service upon the listed individual; mailing the documents is insufficient. *See, e.g.*, *State Farm Fire and Cas. Co. v. Hamilton Beach/Proctor-Silex, Inc.*, No. 05-74700, 2007 WL 127909, at *3-4 (E.D. Mich. Jan. 11, 2007) (concluding that mailing documents via registered mail was insufficient because the "deliberate distinction [between 'serving' and 'sending'] suggests that the Michigan Supreme Court did not intend that the term 'serving' be interpreted as synonymous with 'mailing'"); *see also Etherly v. Rehabitat Sys. of Michigan*, No. 13-11360, 2013 WL 3946079, at *1 (E.D. Mich. July 31, 2013) ("Michigan law allows service of process upon a corporation by serving a summons and a copy of the complaint on an officer or the resident agent personally or, alternatively, by serving a summons and a copy of the complaint on a director, trustee or person in charge of the office as

---

establishment of the corporation and sending a summons and a copy of the complaint by registered mail, addressed to the principal office of the corporation." Michigan Court Rule 2.105(E) similarly provides, in relevant part: "Service of process on a partnership association or an unincorporated voluntary association may be made by (1) serving a summons and a copy of the complaint on an officer, director, trustee, agent, or person in charge of an office or business establishment of the association, and (2) sending a summons and a copy of the complaint by registered mail, addressed to an office of the association."

well as sending a summons and a copy of the complaint by registered mail, addressed to the principal of the office of the corporation . . . . The Magistrate Judge correctly concluded that Michigan law does not permit service on a corporation by mail alone, certified, registered or otherwise. Mailing must be accompanied by personal service of the agent."); *Wheeler v. Fed. Nat'l Mortg. Ass'n*, No. 12-13685, 2013 WL 449918, at *3 (E.D. Mich. Jan. 4, 2013) (*Whalen, M.J.*) ("While Plaintiff may have fulfilled the certified mail portion of the § 2.105(D)(2) requirements, her failure to even allege that the service by certified mail was accompanied by personal service on 'a director, trustee, or person in charge of an office or business establishment' defeats her contention that Defendants were properly served."). Therefore, service was not effective under either Michigan Court Rule 2.105(D)(2) or (E) because Plaintiff did not effectuate personal service upon an applicable individual in combination with his certified mailing.

As an alternative argument, Plaintiff claims that service was effective because he complied with the terms of the TRO entered by the state court. Pl.'s Mot. at 1. In support of this argument, Plaintiff highlights the language in the order requiring that

> [c]ounsel for Plaintiff shall serve a copy of this Order, as well as the Summons, the Verified Complaint, the motion, and all other applicable pleadings, as follows:
>
> 1. Certified mail, return receipt requested, with delivery restricted to the addressee, to Defendant, Wells Fargo Bank, N.A., at its headquarters located at 420 Montgomery Street, San Francisco, CA 94104-1207; and

> 2. Certified mail, return receipt requested, with delivery restricted to the addressee, to Defendants, Unknown Trustee and Unknown Trust, c/o Defendant, Wells Fargo Bank, N.A., at its headquarters located at 420 Montgomery Street, San Francisco, CA 94104-1207.

Ex-Parte TRO, Ex. 5 to Def.'s Resp. (Dkt. 6-6). Plaintiff argues that this language constituted a grant of alternative service pursuant to Michigan Court Rule 2.105(I). Pl.'s Reply at 5. Defendant responds that the order does not mention alternative service, does not permit alternative service, and does not state that the provisions outlined above are in lieu of traditional service under Michigan Court Rule 2.105. Def.'s Resp. at 6.

Michigan Court Rule 2.105(I) permits service by alternative methods "[o]n a showing that service of process cannot reasonably be made as provided by" the other provisions of Michigan Court Rule 2.105. The rule goes on to require that

> [a] request for an order under this rule . . . be made in a verified motion dated not more than 14 days before it is filed. The motion must set forth sufficient facts to show that process cannot be served under this rule and must state the defendant's address or last known address, or that no address of the defendant is known. If the name or present address of the defendant is unknown, the moving party must set forth facts showing diligent efforts to ascertain it.

Michigan Court Rule 2.105(I)(2).

Here, the "motion" Plaintiff points to in support of his argument regarding alternative service is his motion for an ex-parte temporary restraining order. Pl.'s Reply at 5. However, this motion did not meet any of the above requirements: it was not verified, did not explain why process could not be served via the standard methods, did not state Wells Fargo's address, and did not set forth facts showing a diligent effort to ascertain the Unknown Defendants' addresses. *See* Pl.'s Mot. for TRO, Ex. 4 to Def.'s Resp. (Dkt. 6-5). Indeed, the motion does not even mention the phrase "alternative service."

In an attempt to skirt these deficiencies, Plaintiff argues that his statement in the motion that he would suffer "immediate and irreparable damage . . . by the delay to effect notice" satisfies the requirement of showing that service could not otherwise be had. Pl.'s Reply at 5 n.10. However, Plaintiff's present reliance on this statement for alternative service purposes is disingenuous. Plaintiff made the statement to explain why notice was not required under Michigan Court Rule 3.310(B)—the Michigan rule governing when a court can grant a temporary restraining order without notice to the adverse party. See Mot. for TRO at 2. Plaintiff was not referring to notice in regards to service of the summons and complaint, and Plaintiff cannot now pigeonhole that language into an argument regarding alternative service. There is simply no evidence or even suggestion in Plaintiff's motion that personal service of the summons and complaint—as opposed to the request for TRO—was impossible. The motion clearly was a motion for TRO pursuant to Michigan Court Rule 3.310(B), not a request for alternative service pursuant to 2.105(I)(2). As such,

Plaintiff did not meet the requirements for alternative service under Michigan Court Rule 2.105(I)(2).

Plaintiff also contends that service pursuant to a TRO is permissible under *Buterbaugh v. Selene Fin. LP*, No. 12-14763, 2013 WL 812106 (E.D. Mich. Mar. 4, 2013). Pl.'s Reply at 5 n.9. The court in *Buterbaugh* did find that service upon a defendant unknown trust was proper pursuant to the method outlined in the TRO, i.e., mailing the summons and complaint via certified mail to JPMorgan. *Buterbaugh*, 2013 WL 812106, at *3. However, in that case, JPMorgan was sued and served as "Trustee for the Unknown Trust," and the Court emphasized that "both JPMorgan and Selene were served in the same manner as the Unknown Trust and neither entity contends that service was improper as to it." *Id.* at *3 n.2 (emphasis added).

Here, Wells Fargo was not sued as Trustee for the Unknown Trust, and Wells Fargo does contend that service was improper as to it. As such, the Court finds that Plaintiff's motion for an ex-parte temporary restraining order was not a request for alternative service under Michigan Court Rule 2.105(I)(2), and the order granting the TRO was not a grant of alternative service under Michigan Court Rule 2.105(I)(1). Accordingly, Wells Fargo has not been properly served and any entry of default would have been improperly entered.

Moreover, even if Wells Fargo had been properly served, the state court's entry of default would not preclude removal. The case of *Wallace v. Interpublic Group of Companies, Inc.*, No. 09-11510, 2009 WL 1856543 (E.D. Mich. June 29, 2009), is instructive on

this point. In that case, a default was entered against the defendant in state court on April 6, 2009. Over two weeks later, the defendant removed the case to federal court and filed an answer to the complaint. *Id.* at *1. In seeking remand, the plaintiff raised the same argument as here, i.e., that the defendant was barred from removing in light of the state court default. *Id.* at *3.

Citing 28 U.S.C. § 1446(d), the district court noted that "[o]nce [the d]efendant filed a notice of removal, . . . the state court was deprived of jurisdiction over this matter," and that, as a result, the Federal Rules of Civil Procedure, rather than the Michigan Court Rules, applied. *Id.* Therefore, the court concluded that Michigan Court Rule 2.603(A)(3)—the same state court rule Plaintiff relies upon here—"did not preclude [d]efendant from filing a notice of removal." *Id.* Numerous other federal courts have impliedly reached the same result by analyzing motions to set aside state court defaults following removal. *See, e.g., Sieler v. Lenawee Stamping Corp.*, No. 10-12984, 2010 WL 5211473, at *2 (E.D. Mich. Dec. 16, 2010) (analyzing motion to set aside state court default under Fed. R. Civ. P. 55 after removal); *see also Butner v. Neustadter*, 324 F.2d 783, 785-786 (9th Cir. 1963) (state court default judgment—although it cannot prevent removal—is valid, but analyze set aside under Fed. R. Civ. P. 60); *Thomas v. JVM Realty Corp.*, No. 08-493, 2008 WL 2511216, at *1 (W.D. Mich. June 19, 2008). Accordingly, the Court concludes that the entry of default would not have prevented Wells Fargo from removing this case, even if valid.

B. Wells Fargo's Actions in State Court Do Not Require Remand

Plaintiff also argues that Wells Fargo waived its right to remove by "experimenting with the case in State Court before removal." Pl.'s Mot. at 5. In support of this argument, Plaintiff points to two "strategic decision[s]" purportedly taken by Wells Fargo in state court: (1) requesting to adjourn the show cause hearing by two weeks and (2) not appearing at the show cause hearing or otherwise opposing Plaintiff's motion for a preliminary injunction. *Id.* at 5-6. Defendant responds that the only action it took in state court was to consent to adjourn the show cause hearing; it never filed an answer or responded to the complaint, nor did it appear for or oppose any of Plaintiff's *ex parte* activities. Def.'s Resp. at 18-19. Therefore, Defendant contends that it did not "experiment" in state court. *Id.*

A defendant's waiver of the right to remove through participation in state court proceedings must be "clear and unequivocal," and typically requires "action on the part of defendants resulting in a decision on the merits of [a] defense." *McKinnon v. Doctor's Assocs., Inc.*, 769 F. Supp. 216, 219-220 (E.D. Mich. 1991) (internal citations omitted). "Merely defending against a temporary restraining order or request for an injunction in state court is not sufficient to constitute a waiver of the right of removal." *Id.* at 217. Here, Wells Fargo did not even defend against the temporary restraining order or request for an injunction; instead, it simply requested a two week adjournment of the show cause hearing. This request certainly did not "result[] in a decision

on the merits," and it falls far short of the threshold for a waiver of the right to remove.

Plaintiff relies on three cases to support his argument regarding "experimentation": *Rosenthal v. Coates*, 148 U.S. 142, 147 (1893); *State of Ohio v. Doe*, 433 F.3d 502, 507 (6th Cir. 2006); and *Zbranek v. Hofheinz*, 727 F. Supp. 324, 326 (E.D. Tex. 1989). Pl.'s Mot. at 5. These cases, however, are easily distinguishable. As noted by Wells Fargo, in each of the above cases, the litigation was well into the proceedings at the time of removal: after trial and appeal (Rosenthal), after appeals through the state court appellate system and the Supreme Court (Doe), and after the "state court litigation . . . [had] advanced considerably . . . [including] extensive motion practice." (*Zbranek*). Here, Defendant has not yet responded to the complaint.

Indeed, the lack of merit in Plaintiff's "experimentation" argument was exemplified during oral argument. At the hearing on Plaintiff's motion, Plaintiff's counsel continued to argue that Wells Fargo's "tactical decision" not to appear at the June 14, 2013 show cause hearing constituted experimentation, thereby precluding removal. However, when asked by the Court whether counsel would have raised the same argument had Wells Fargo appeared at the hearing, counsel acknowledged that he would have considered an appearance to be experimentation. In other words, Plaintiff's counsel appears to want it both ways, i.e., to have both appearing and not appearing constitute "experimentation" in state court. This argument is untenable.

Accordingly, Wells Fargo's agreement to adjourn the show cause hearing did not constitute such action

in state court to be considered a waiver of the right to remove.

C. The Omitted Documents Do Not Preclude Removal

Plaintiff next argues that remand is required because Wells Fargo did not comply with the removal statute's requirement to include state court process, pleadings, and orders with the notice of removal. *See* 28 U.S.C. § 1446(a). Plaintiff highlights five documents purportedly missing from Wells Fargo's removal papers: (1) the summons for Defendant Unknown Trustee; (2) the summons for Defendant Unknown Trust; (3) the stipulated order adjourning the show cause hearing; (4) the default entry for Defendant Unknown Trustee; and (5) the default entry for Defendant Unknown Trust. Pl.'s Mot. at 3-4.

Wells Fargo first responds that it did not need to include any of the pleadings, including the omitted ones, given that 28 U.S.C. § 1446(a) only requires the removing party to file documents that were "served upon such defendant or defendants." Here, Wells Fargo argues that service was not proper. Def.'s Resp. at 6-10. Second, Wells Fargo claims that it was never served with the four documents above that are directed to Defendants Unknown Trustee and Unknown Trust. Therefore, Wells Fargo could not have included these documents in its removal papers. Id. at 10. Third, Wells Fargo contends that no default was ever entered against Defendants Unknown Trust and Unknown Trustee, and thus the allegedly omitted "default entry" for these Defendants does not exist. *Id.* at 10. Lastly, Wells Fargo argues that any deficiency was *de minimis*, and was remedied by its

inclusion of the existing documents with its response to the motion to remand. *Id.* at 12-18.

Pursuant to 28 U.S.C. § 1446(a), a removing party must file with the district court "a copy of all process, pleadings, and orders served upon" it. At the outset, the Court notes that, as described above, Wells Fargo has not been properly served. Therefore, the purportedly missing documents did not need to be included with the notice of removal under 28 U.S.C. § 1446(a). *See Anderson v. Bank of America, N.A.*, No. 13-12834, 2013 WL 4670825, at *1 (E.D. Mich. Aug. 30, 2013) ("BOA's notice of removal did not need to include all of the state court record; rather, it needed to include only those documents on which it was served." (citing *Cook v. Randolph Cnty., Ga.*, 573 F.3d 1143, 1150 (11th Cir. 2009)).

Moreover, even if the documents had been properly served upon Wells Fargo, their omission would not preclude removal. It is true that removal statutes must be "strictly construed and all doubts resolved in favor of a remand." *Eastman v. Marine Mech. Corp.*, 438 F.3d 544, 550 (6th Cir. 2012) (discussing 28 U.S.C. § 1441(b)). However, the Sixth Circuit also has expressed a "reluctance to interpret statutory removal provisions in a grudging and rigid manner." *Klein v. Manor Healthcare Corp.*, Nos. 92-4328, 92-4347, 1994 WL 91786, at *4 (6th Cir. Mar. 22, 1994). Given this reluctance, the Court concludes that a "totally inconsequential defect in removal papers [does not] deprive the district court of jurisdiction over a case removed to it." *Walton v. Bayer Corp.*, 643 F.3d 994, 999 (7th Cir. 2011). Such a rule puts the Court in line with the predominant line of cases holding that the failure to include certain documents in a notice of

removal does not require remand per se. *See, e.g., Cadez v. Residential Credit Solutions, Inc.*, No. 13-10772, 2013 WL 2238486, at *1-2 (E.D. Mich. May 21, 2013); *In re Yasmin and Yaz (Drosiprenone) Mktg., Sales Practices and Products Liab. Litig.*, 692 F. Supp. 2d 1025, 1030 (S.D. Ill. 2010) ("[T]he predominant view is that the removing party's failure to file the required state court papers is 'curable in the federal courts if there is a motion to remand.'"); *see also Christenson Media Grp., Inc. v. Lang Indus., Inc.*, 782 F. Supp. 2d 1213, 1219 (D. Kan. 2011) ("failure to attach process . . . does not deprive this court of subject matter jurisdiction and does not require immediate remand"); *Washington v. Harris*, No. 11-2188, 2011 WL 2174942, at *1 (D. Kan. June 3, 2011) ("Plaintiff urges the Court to follow the minority view, which is based upon an understanding that the technical requirements of § 1446 are mandatory."); *Ackerberg v. Citicorp USA, Inc.*, 887 F. Supp. 2d 934, 938 (N.D. Cal. 2012) ("While plaintiff is correct that a few courts have held that failure to provide every required document along with the notice of removal is an incurable defect, the majority of courts – including those in this Circuit – have held otherwise."). Such a rule is further bolstered by 28 U.S.C. § 1447(b)'s grant of authority to district courts to "require the moving party to file with [the court's] clerk copies of all records and proceedings in such State court."

Indeed, the Court notes that Plaintiff's counsel's firm has repeatedly raised this same argument and failed in courts across this district. *See, e.g., Ordway v. Bank of Am., N.A.*, No. 13-13236, 2013 WL 5551083, at *3 (E.D. Mich. Oct. 8, 2013); *Anderson v.*

Bank of Am., N.A., No. 13-12834, 2013 WL 4670825, at *1 (E.D. Mich. Aug. 30, 2013); *Jackson v. Bank of Am., N.A.*, No. 13-12430, 2013 WL 4670762, at *1 (E.D. Mich. Aug. 30, 2013); *Griffin v. JPMorgan Chase Bank, N.A.*, No. 13-10002, 2013 WL 2237974, at *2-3 (E.D. Mich. May 21, 2013) (omission of summons was curable *de minimis* error); *Mussall v. Bank of America, N.A.*, No. 13-10321, 2013 U.S. Dist. LEXIS 27493, at *4-5 (E.D. Mich. Feb. 28, 2013) (same).

Here, Wells Fargo's failure to include the five documents is inconsequential, particularly given that only one of those documents actually concerned Wells Fargo—the stipulated order of adjournment. Further, Wells Fargo remedied any deficiency by providing the documents to the Court in its response to the motion to remand.

Plaintiff provides a number of non-binding cases, mostly from other jurisdictions, to support his claim that the failure to include all of the state court papers precludes removal. Pl.'s Mot. at 4-5. In each of those cases, however, the omitted documents would have affected the Court's ability to independently determine whether removal was proper. For example, the court in *Cook v. Robinson*, 612 F. Supp. 187, 190 (E.D. Va. 1985) noted that the "failure to submit the process served on defendants King and City of Richmond is significant because the process could have served as an independent means of determining whether the petition for removal was timely filed." *See also Andalusia Enters., Inc. v. Evanston Ins. Co.*, 487 F. Supp. 2d 1290, 1300 (N.D. Ala. 2007) (missing summons); *Kisor v. Collins*, 338 F. Supp. 2d 1279, 1280-1281 (N.D. Ala. 2004) (same); *State of Michigan v. Matthews-El*, No. 07-15028, 2007 U.S. Dist. LEXIS

99695, at *4 (E.D. Mich. Dec. 28, 2007) (noting that the court could not determinatively establish timeliness of removal due to defendant's failure to include state court records); *State of Michigan v. Wilborn*, No. 12-952, 2012 U.S. Dist. LEXIS 132542, at *1 (W.D. Mich. Sept. 18, 2012) (same). Here, Plaintiff does not dispute the timeliness of removal. Moreover, the Court is not bound by any of these decisions, and it finds the majority view provided by courts both inside and outside of this district to be more persuasive. Accordingly, even if the subject documents had been properly served, Wells Fargo's failure to include them is not fatal to its removal.

D. Unanimity and Diversity of Citizenship Do Not Bar Wells Fargo's Removal

Plaintiff also challenges Wells Fargo's removal under the rules of unanimity and diversity of citizenship based on Defendants Unknown Trust and Unknown Trustee. Pl.s' Mot. at 6-7. With regards to unanimity, Plaintiff contends that Defendants Unknown Trust and Unknown Trustee did not join in or consent to the removal. Pl.'s Mot. at 6. Plaintiff also claims that Wells Fargo has failed to establish that diversity of citizenship exists between the parties because it did not indicate the citizenship of Defendants Unknown Trust and Unknown Trustee in its removal papers. Pl.'s Mot. at 7.

In response, Wells Fargo argues that only those defendants that have been properly served must join in or consent to removal. Here, Wells Fargo reiterates, none of the Defendants has been properly served. Def.'s Resp. at 20. Wells Fargo also contends that the missing defendants did not need to join in or

consent to removal because they are fictitious entities against whom Plaintiff does not have a colorable claim. *Id.* at 21-22. For this same reason, Wells Fargo maintains that it did not need to indicate the citizenship of the Unknown Trust or Unknown Trustee, particularly because it is "not [Wells Fargo's] obligation to know the identity of the codefendants." *Id.* at 23.

A civil case filed in state court may be removed to federal court if it could have been brought in federal court originally. 28 U.S.C. § 1441(a). Federal courts have original, diversity jurisdiction under 28 U.S.C. § 1332(a) where "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States." When a case is removed to federal court from state court under 28 U.S.C. § 1441(a), "all defendants who have been properly joined and served must join in or consent to the removal of the action." 28 U.S.C. § 1446(b)(2)(A). This is known as the "rule of unanimity." *See Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 516 (6th Cir. 2003).

In determining whether the rule of unanimity has been satisfied, only those defendants who have been properly joined and served must be considered. For example, in *Anderson v. Bank of America, N.A.*, No. 13-12834, 2013 WL 4670825, at *2 (E.D. Mich. Aug. 30, 2013), the plaintiff served the defendants Unknown Trust and Unknown Trustee in the same manner as here: mailing the documents to the named defendant bank—Bank of America (BOA)—pursuant to a temporary restraining order. *Id.* After removal, the district court rejected the plaintiff's arguments regarding unanimity because the "plaintiff did not properly serve the Unknown Trust and Unknown Trustee under

either Michigan law or the Federal Rules." *Id.* The Court also noted that "mailing a copy of the[] documents to BOA [was] not 'reasonably calculated' to give the Unknown Trust and Unknown Trustee notice of plaintiff's lawsuit." *Id.; see also Mussall*, 2013 U.S. Dist. LEXIS 27493, at *3 (rejecting argument regarding lack of unanimity where defendants Unknown Trust and Unknown Trustee were not properly served). Similarly here, none of the Defendants—including Unknown Trust and Unknown Trustee—has been properly served. Therefore, the Court disregards Defendants Unknown Trust and Unknown Trustee for purposes of the rule of unanimity.[6]

With respect to Plaintiff's arguments about diversity of citizenship, "[i]n determining whether a civil action is removable on the basis of [diversity jurisdiction], the citizenship of defendants sued under fictitious names shall be disregarded." 28 U.S.C. § 1441(b)(1). "Would-be Defendants 'Unknown Trustee' and 'Unknown Trust' are precisely the types of 'defendants sued under fictitious names' that are not to be considered in determining diversity jurisdiction under 28 U.S.C. § 1441(b)." *Griffin v. JP Morgan Chase Bank, N.A.*, No. 13-10002, 2013 WL

---

[6] The decision in *Buterbaugh v. Selene Fin. LP.*, No. 12-14763, 2013 WL 812106, at *3-4 (E.D. Mich. Mar. 4, 2013) is distinguishable. In that case, the court found a lack of unanimity because the defendant Unknown Trust did not join in or consent to the removal. However, the Court's decision relied on the fact that the defendant JPMorgan was sued as Trustee for the Unknown Trust. Here, Wells Fargo has not been sued as Trustee for Defendant Unknown Trust. Rather, Wells Fargo has been sued as an independent entity separate from Defendants Unknown Trustee and Unknown Trust.

2237974, at *2 (E.D. Mich. May 21, 2013) ("[E]ven if [defendant] is in a better position to identify the unknown Defendants—as Plaintiffs[] claim—it is not required to determine their identity before filing a Notice of Removal."). Therefore, the citizenship of Defendants Unknown Trust and Trustee is disregarded for purposes of diversity jurisdiction.

Moreover, Plaintiff alleges that he is a citizen of Michigan, and Wells Fargo contends that it is a citizen of South Dakota for diversity purposes. *See* Compl., ¶ 1, Ex. A to Def.'s Notice of Removal (Dkt. 1-2); *see also* Notice of Removal at 2-3 (Dkt. 1). Plaintiff does not challenge these facts. Accordingly, based on the information before it, the Court finds that diversity jurisdiction is proper pursuant to 28 U.S.C. § 1332(a).

IV. CONCLUSION

For the foregoing reasons, the Court denies Plaintiff's motion to remand (Dkt. 4).

SO ORDERED.

/s/ Mark A. Goldsmith
United States District Judge

Dated: December 17, 2013
Flint, Michigan

ORDER GRANTING PRELIMINARY INJUNCTIVE RELIEF (JUNE 18, 2013)

STATE OF MICHIGAN
IN THE CIRCUIT COURT OF WAYNE COUNTY

DONALD C. BURNIAC,

Plaintiff,

v.

WELLS FARGO BANK, N.A., UNKNOWN TRUSTEE, as Trustee on Behalf of the Asset-Backed Security in which the Loan at Issue was Pooled; and UNKNOWN TRUST, the Unknown Asset-Backed Security at Issue,

Defendants.

No. 13-006534-CH

Before: Hon. Amy P. HATHAWAY
Circuit Court Judge

Plaintiff has filed a motion seeking immediate and preliminary injunctive relief. The Court has reviewed these documents and heard oral argument, from which it appears that, unless the Court restrains and enjoins the Defendants from selling the property at issue at sheriff's sale until a trial on the merits takes place or until further order of the Court, the status quo will change, and Plaintiff will suffer

irreparable harm, in that he will lose his home, and the Court is otherwise fully advised in the premises.

IT IS ORDERED:

For the reasons stated on the record, this Order is and shall be effective immediately upon entry, and preserves the status quo, by restraining and enjoining the foreclosure auction sale of the real property commonly known as 10075 Red Maple Drive, Plymouth, Michigan, pending a trial on the merits or further order of the Court.

The injunctive relief against Defendants is binding, in accordance with MCR 3.310(C)(4), on Defendants' officers, agents, employees, and attorneys and on all persons in active concert or participation with them who receive notice of this order by personal service or otherwise.

A bond or other form of security is not required because Defendants will not suffer damages as a result of the maintenance of the status quo until a hearing on the merits.

This order is issued on Monday, June 18, 2013, at 11:43. a.m.

/s/ Amy P. Hathaway
Circuit Court Judge

VERIFIED COMPLAINT AND DEMAND FOR JURY TRIAL, RELEVANT EXCERPT (MAY 20, 2013)

STATE OF MICHIGAN
IN THE WAYNE COUNTY CIRCUIT COURT

DONALD C. BURNIAC,

Plaintiff,

v.

WELLS FARGO BANK, N.A., UNKNOWN TRUSTEE, as Trustee on Behalf of the Asset-Backed Security in which the Loan at Issue was Pooled; and UNKNOWN TRUST, the Unknown Asset-Backed Security at Issue,

Defendants.

No. 13-006534-CH

There is no other pending or resolved civil matter arising out of the transaction or occurrence alleged in this Complaint.

Plaintiff, Donald C. Burniac, through his attorneys, Gantz Associates, hereby submits the following Verified Complaint against Defendants, Wells Fargo Bank, N.A. (the "Servicer"); Unknown Trustee, as Trustee of the currently unknown asset-backed security in which the loan at issue was pooled (the "Trustee");

and Unknown Trust, the currently unknown holders of said asset-backed security (the "Trust").

JURISDICTIONAL ALLEGATIONS

1. Plaintiff, Donald C. Burniac, is an individual, who resides in the real property at issue in this litigation, which is located in the Township of Plymouth, County of Wayne, State of Michigan, and is legally described as follows:

[. . .]

DOCKET ENTRY:
DEFAULT REQUEST, AFFIDAVIT, AND ENTRY
TRANSLATION AND ORIGINAL IMAGE
(JUNE 20, 2013)

STATE OF MICHIGAN, JUDICIAL DISTRICT
3RD JUDICIAL CIRCUIT

_____

Plaintiff name(s), address(es), and telephone no(s).

Donald C. Burniac
c/o Gantz Associates
27750 Middlebelt Road, Suite 100
Farmington Hills, MI 48334
Telephone: (248) 987-6505

Plaintiff's attorney, bar no., address, and telephone no.

Nickolas C. Buonodono (P70835)
Gantz Associates
27750 Middlebelt Road, Suite 100
Farmington Hills, MI 48334
Telephone: (248) 987-6505

v.

Defendant name(s), address(es), and telephone no(s).

Wells Fargo Bank, N.A.
420 Montgomery Street
San Francisco, CA 94104-1207
Telephone: (800) 869-3557

Defendants attorney, bar no. and telephone no.

Patrick Lannen (P73031)
Plunkett Cooney
38505 Woodward Avenue, Suite 2000

Bloomfield Hills, MI 48304
Phone: (248) 901-4000

Case No. 13-006534-CH
Hon. Amy P. Hathaway

Party in default: Defendant Wells Fargo Bank, N.A.

REQUEST AND AFFIDAVIT

1. I request the clerk to enter the default of the party named above for failure to plead or otherwise defend as provided by law.

2. The defaulted party is not an infant or incompetent person.

3. The defaulted party is not in the military service.

4. This affidavit is made on my personal knowledge and, if sworn as a witness, I can testify competently to the facts in this affidavit.

/s/ Nickolas C. Buonodono
Applicant/Attorney Signature
Bar No. P70835

Subscribed and sworn to before me on 06/20/2013 Oakland County, Michigan.

My commission expires: 11/09/2017

Signature:

/s/ Heather Zoro

Notary public, State of Michigan,
County of Oakland

REGISTER OF ACTIONS

Case No. 13-006534-CH

Party Information	
Defendant	Unknown Trust
Defendant	Unknown Trustee
Defendant	Wells Fargo Bank, N.A.
Plaintiff	Burniac, Donald C.

OTHER EVENTS AND HEARINGS

05/20/2013	Service Review Scheduled (Due Date: 08/19/2013) (Clerk: Tyler, F)
05/20/2013	Status Conference Scheduled (Clerk: Tyler, F)
05/20/2013	Case Filing and Jury Trial Fee - Paid $235.00 Fee Paid (Clerk: Tyler, F)
05/20/2013	Complaint, Filed (Clerk: Kiel, L)
05/21/2013	Motion for Injunction, Filed Fee: $20.00 Paid; Brief, Filed; Proof of Service, Filed; Notice of Hearing, Filed (Clerk Tyler, F)
05/21/2013	Order to Show Cause, Signed and Filed (Clerk: Tyler, F)

05/29/2013	Return of Service, Filed (Clerk: Tyler, F)
05/31/2013	CANCELED Show Cause Hearing (9:00 AM) (Judicial Officer Hathaway, Amy P.) Dismiss Hearing or Injunction as per PI atty will stip to motion
06/03/2013	Order to Show Cause, Signed and Filed (Clerk: Tyler, F)
06/14/2013	Show Cause Hearing (9:00 AM) (Judicial Officer Hathaway, Amy P.) As per order Result: Held
06/14/2013	Motion for Miscellaneous Action Granted, Order to Follow (Judicial Officer: Hathaway, Amy P.) PRELIMINARY INJUNCTION (Clerk: Hickman, T)
06/18/2013	Injunctive/Restraining Order, Signed and Filed (Clerk: Tyler, F)
06/20/2013	Default, Request, Affidavit and Entry Filed
06/26/2013	Special Conference (9:00 AM) (Judicial Officer Hathaway, Amy P.)
08/23/2013	Status Conference (11:30 AM) (Judicial Officer Hathaway, Amy P.)

08/19/2013 Reset by Court to 08/23/2013