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CAUSE NO. 2011-36476

MARY ELLEN WOLF AND DAVID WOLF, on behalf of themselves and all others similarly situated,	§	IN THE DISTRICT COURT OF
v.	§	
WELLS FARGO BANK, N.A., AS TRUSTEE FOR CARRINGTON MORTGAGE LOAN TRUST, TOM CROFT, NEW CENTURY MORTGAGE CORPORATION, AND CARRINGTON MORTGAGE SERVICES, LLC.	§	HARRIS COUNTY, TEXAS
	§	151ST JUDICIAL DISTRICT

FILED
Chris Daniel
District Clerk
MAY - 1 2013
Time: 1:20
Harris County, Texas
By ______ Deputy

ORDER GRANTING CLASS CERTIFICATION

On December 10, 2012, came on for hearing the Motion for Class Certification filed by Plaintiffs Mary Ellen Wolf and David Wolf (collectively "Plaintiffs"). Having taken notice of and considered the Court's entire file in this cause, all evidence and arguments of counsel, all accompanying affidavits and exhibits thereto, and all of the legal authorities and documents submitted in support of Plaintiffs' Motion, and GOOD CAUSE appearing, **IT IS HEREBY ORDERED** that Plaintiffs' Motion for Class Certification under Rule 42 of the TEXAS RULES OF CIVIL PROCEDURE is **GRANTED.**

A class action is a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment.[1] When properly applied the class action device is unquestionably a valuable tool in protecting the rights of our citizens, including Texas homeowners.[2]

Plaintiffs seek certification of a class consisting of "all persons and entities having a residential mortgage loan on real property in the State of Texas securitized into the 2006-NC4 Trust, with a court record, lien, claim, or claim against an interest in the real property filed in

[1] *Southwestern Refining Co., Inc. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000).
[2] *Id.* at 439.

RECORDER'S MEMORANDUM
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Texas after August 10, 2006, up to and including the date notice is first provided to the Class," and also seek certification of a subclass consisting of "all persons and entities that lost ownership to real property in the State of Texas resulting from a foreclosure initiated by Wells Fargo Bank, N.A., as Trustee for the 2006-NC4 Trust after August 10, 2006 up to and including the date notice is first provided to the Class." In support of this order, the Court makes the following **FINDINGS OF FACT AND CONCLUSIONS OF LAW** on the elements of this Rule 42 common-question class:

A. Factual Background

Wells Fargo Bank, N.A. ("Wells Fargo") is serving as a trustee of the Carrington Mortgage Loan Trust Series 2006-NC3 ("2006-NC3 Trust").[3] As trustee, Wells Fargo is responsible for the assets that are allegedly held in the trust.[4] According to McDonnell's expert analysis, there is no evidence in the record showing the Wolfs' Note and Security Instrument were properly negotiated, delivered, or transferred to all necessary parties in the securitization chain.[5] This is required under the mortgage loan purchase agreement and the Pooling and Servicing Agreement ("P&S Agreement")[6] in order to convey these instruments into the 2006-NC3 Trust.[7] There are fatal breaks in the chain of title which indicate these instruments were never transferred into the 2006-NC3 Trust.[8] In McDonnell's expert opinion, Defendant Wells Fargo is not the current owner and holder of the Wolfs' Note and Deed of Trust.[9]

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[3] Exhibit 7 of Plaintiffs' Memo in Support of Class Certification at pp. 23-24, ll. 12-5.
[4] *Id.*
[5] *Id.*
[6] Exhibit 9 of Plaintiffs' Memo in Support of Class Certification.
[7] Exhibit 7 of Plaintiffs' Memo in Support of Class Certification at pp. 23-24, ll. 12-5.
[8] *Id.*
[9] *Id.*

Even if Wells Fargo physically holds the Note, it does not mean they have the right to enforce the Note, collect on the Note, or to enforce the Security Instrument.[10] Paragraph one of the Note signed by the Wolfs states, "Lender, or anyone who takes this Note by transfer and who is entitled to receive payments under the Note, is called the 'Noteholder.'"[11] It is the Noteholder who would have the right to enforce the Note.[12] If Wells Fargo is in physical possession of the Note, it may have the right to negotiate the Note -- that is, sell it to someone else -- but it doesn't mean Wells Fargo has the right to enforce the Note.[13] Wells Fargo must prove it had the right to receive mortgage payments under the Note, it paid consideration for the Note, and the Note was legally and properly transferred into the 2006-NC3 Trust.[14]

According to McDonnell, the Pooling and Service Agreement governs the Wolfs' mortgage, conveyance, and transfer into the 2006-NC3 Trust.[15] In order for the Wolfs' Mortgage Loan[16] to be securitized into the 2006-NC3 Trust, New Century Mortgage Corporation would have had to sell the mortgage loan to an affiliate by the name of NC Capital Corporation who, for purposes of the securitization, is identified as the responsible party.[17] NC Capital Corporation entered into a mortgage loan purchase agreement with Carrington Securities LP and Stanwich Asset Acceptance Company LLC.[18] The mortgage loan purchase agreement states the responsible party would sell the mortgage loans to Carrington Securities LP, who, for purposes of the mortgage loan purchase agreement, was the seller's sponsor.[19] Carrington Securities LP,

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[10] Exhibit 7 of Plaintiffs' Memo in Support of Class Certification at pp. 25-26, ll. 8-11.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] Exhibit 7 of Plaintiffs' Memo in Support of Class Certification at p. 31, ll. 6-12.
[16] "mortgage loan" is a defined term in McDonnell's Report referring to the Wolfs' Note and Security Agreement.
[17] Exhibit 7 of Plaintiffs' Memo in Support of Class Certification at pp. 29-30, ll. 11-25.
[18] *Id.*
[19] *Id.*

as the seller's sponsor, is required to sell the mortgage loan to Stanwich Asset Acceptance Company LLC.[20] Stanwich Asset Acceptance Company LLC is the purchaser under the mortgage loan purchase agreement, and the depositor under the pooling and servicing agreement.[21] Stanwich Asset Acceptance Company LLC would then deposit the mortgage loan into the 2006-NC3 Trust over which Wells Fargo served as trustee.[22] The physical documents should have been transferred to Wells Fargo, as trustee.[23] According to the pooling and servicing agreement, Wells Fargo was required to deliver the documents to the custodian Deutsche Bank National Trust Company.[24] However, Wells Fargo never gave the original Note to Deutsche Bank National Trust Company at the time the Wolfs' mortgage was allegedly securitized into the 2006-NC3 Trust.[25]

McDonnell knows the Wolfs' filed the present lawsuit as a proposed class action,[26] she believes the claims asserted by the Wolfs and class members stem from a "common course of conduct" by Wells Fargo,[27] and it's her opinion the Wolfs and each member of the proposed class have suffered damages caused by Wells Fargo's common course of conduct and action.[28] McDonnell is also aware the Plaintiffs' seek to certify a class comprised of all Texas residents whose mortgages and deeds of trust have been allegedly transferred into the 2006-NC3 Trust.[29]

In McDonnell's expert opinion, there are numerous common questions of fact relating to the 2006-NC3 Trust securitization and foreclosure process that equally apply to the Wolfs' and

[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] Exhibit 7 of Plaintiffs' Memo in Support of Class Certification at p. 34, ll. 20-24.
[26] Exhibit 7 of Plaintiffs' Memo in Support of Class Certification at p. 40, ll. 13-16.
[27] Exhibit 7 of Plaintiffs' Memo in Support of Class Certification at p. 40, ll. 17-21.
[28] Exhibit 7 of Plaintiffs' Memo in Support of Class Certification at p. 40, ll. 22-25.
[29] Exhibit 7 of Plaintiffs' Memo in Support of Class Certification at p. 42, ll. 2-7.

the proposed class members.[30] At least one material fact issue is shared by every proposed class member that's common to the Wolf's facts in the present case.[31] Specifically, the Defendants are required to follow the exact same securitization procedure for transferring each class members' mortgage into the 2006-NC3 Trust,[32] and any fraudulent "transfer of lien" document filed with a county clerk's office in the State of Texas will involve common factual issues shared by the proposed class and the Wolfs.[33]

Recording an interest in real property in Texas is permissive, not mandatory.[34] Although an unrecorded deed of trust "is binding on a party to the [deed of trust]," it is "void as to a creditor or to a subsequent purchaser for a valuable consideration without notice" of the security interest created by the deed of trust.[35] Once a deed of trust is recorded, section 192.007 of the TEX. LOC. GOV'T CODE requires that any release, transfer, assignment, or other action relating to the deed of trust be recorded in the same manner as the original deed of trust was recorded.[36]

B. Numerosity

TEXAS RULE OF CIVIL PROCEDURE 42(a)(1) requires the class be so numerous that joinder of all members is impracticable.[37] The numerosity requirement of federal Rule 23(a) is met when a potential class is so numerous that joinder of all members is impracticable.[38] Both Texas and federal numerosity requirements are satisfied in the present case.

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[30] Exhibit 7 of Plaintiffs' Memo in Support of Class Certification at p. 42, ll. 8-12.
[31] Exhibit 7 of Plaintiffs' Memo in Support of Class Certification at p. 42, ll. 17-20.
[32] Exhibit 7 of Plaintiffs' Memo in Support of Class Certification at pp. 42-43, ll. 21-2.
[33] Exhibit 7 of Plaintiffs' Memo in Support of Class Certification at p. 43, ll. 3-23.
[34] TEX. PROP. CODE § 12.001(a).
[35] *Id.* at § 13.001(a)-(b).
[36] TEX. LOC. GOV'T CODE § 192.007.
[37] TEX. R. CIV. P. 42.
[38] *See Watson v. Shell Oil Co.*, 979 F.2d 1014, 1022 (5th Cir. 1992).

Texas law does not require proof of the precise number of class members.[39] The record reflects there are hundreds of potential class members.[40] Approximately 7,548 mortgage loans were allegedly transferred into the 2006-NC3 Trust.[41] The class is comprised of approximately five-hundred seventy-one (571) Texas residents who currently have or previously had a residential mortgage loan on real property located in the State of Texas securitized into the Carrington Mortgage Loan Trust, 2006-NC3 Asset Backed Pass-Through Certificates ("2006-NC3 Trust").[42] Approximately two-hundred thirty-three (233) of the mortgage loans involve real property located in Harris County, Texas.[43] The class is so numerous that joinder is impracticable.

C. Commonality

TEXAS RULE OF CIVIL PROCEDURE 42(a)(2) merely requires that there "be questions of law, or fact common to the class."[44] The threshold showing for commonality, in contrast to that for showing the predominance of common question, "is not high."[45] This "commonality" requirement is met under the federal rules when class members "have suffered the same injury" and "all of the class members' claims depend on a common issue of law or fact whose resolution will resolve an issue that is central to the validity of each one of the [] claims in one stroke."[46]

"What matters to class certification...is not the raising of common 'questions' — even in droves — but, rather the capacity of a class wide proceeding to generate common answers apt to

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[39] *Phillips v. Joint Legislative Committee*, 637 F.2d 1014, 1022 (5th Cir. 1981), cert. denied, 456 U.S. 960 (1982); *Carpenter v. Davis*, 424 F.2d 257, 260 (5th Cir. 1970).
[40] Exhibit 7 of Plaintiffs' Memo in Support of Class Certification –McDonnell Deposition at p. 41, ll. 1-24.
[41] Exhibit 7 of Plaintiffs' Memo in Support of Class Certification at p. 41, ll. 1-6.
[42] Exhibit 7 of Plaintiffs' Memo in Support of Class Certification at p. 41, ll. 7-13; *see also* Plaintiffs' Third Amended Petition [hereinafter "Plaintiffs' Petition"] at p. 5.
[43] Exhibit 7 of Plaintiffs' Memo in Support of Class Certification at p. 41, ll. 14-24.
[44] TEX. R. CIV. P. 42.
[45] *UPRG v. Hankins*, 111 S.W.3d 69, 74 (Tex. 2003).
[46] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982)) (some internal quotation marks omitted).

drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."[47] Plaintiffs' claims arise from the same set of facts and are based on identical legal theories involving an overarching and uniform course of conduct. More importantly, Plaintiffs' claims "depend upon a common contention that is capable of classwide resolution," and that contention is "of such a nature...that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[48]

There are questions of law and fact common to the class, as illustrated by the following examples of common questions:

1. whether the subject Note and Security Instrument were properly conveyed to Wells Fargo Bank, N.A., as Trustee for the 2006-NC3 Trust as required by the Pooling and Servicing Agreement executed on August 1, 2006 which governs the REMIC Trust;[49]

2. whether the "Transfer of Lien" filed with County Clerk's Offices in Texas is valid, and actually transfers the subject Note and Security Instrument to Wells Fargo Bank, N.A., as Trustee for the 2006-NC3 Trust;[50]

3. whether Wells Fargo Bank, N.A., as Trustee for the 2006-NC3 Trust has standing to foreclose on real property in the State of Texas;

4. whether Wells Fargo Bank, N.A., as Trustee for the 2006-NC3 Trust is the legal owner and holder of mortgage loans, mortgage liens, mortgage notes, or deeds of trust on real property in the State of Texas; and

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[47] *Id.* (quoting Nagareda, *Class Certification in the Age of Aggregate Proof,* 84 N.Y.U. L. Rev. 97, 132 (2009)); *see M.D. Ex Rel. Stukenberg v. Perry*, 675 F.3d 832, 838 (5th Cir. 2012) ("In order to satisfy commonality under *Wal-Mart*, a proposed class must prove that the claims of every class member 'depend upon a common contention that is capable of classwide resolution," meaning that the contention is "of such a nature...that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.' 131 S.Ct. at 2551.").

[48] *Wal-Mart*, 131 S. Ct. at 2551.

[49] Exhibit 5 of Plaintiffs' Memo in Support of Class Certification at p. 4.

[50] *Id.*

5. whether Defendants violated TEX. CIV. PRAC. & REM. CODE § 12.002 by filing the "Transfer of Lien" with County Clerk's Offices in Texas attempting to transfer mortgage loans, mortgage liens, mortgage notes, or deeds of trust from New Century Mortgage Corporation to Wells Fargo Bank, N.A., as Trustee for the 2006-NC3 Trust.

Common questions are those questions that, when answered as to the named plaintiff, are answered as to the class members.[51] The standard for commonality is not high.[52] Not all or even a great portion of the questions in the suit must be common to the class.[53] "A single common question can warrant certification."[54] Moreover, the common question may be one of law or fact; it does not have to be both.[55] Affirmative defenses do not destroy commonality.[56] However, the decision to abandon some claims in order to achieve commonality can become "one relevant factor in evaluating the requirements for class certification."[57] Plaintiffs have shown that there are common questions of law and fact sufficient to satisfy TEXAS RULE OF CIVIL PROCEDURE 42(a)(2).

D. Typicality

TEXAS RULE OF CIVIL PROCEDURE 42(a)(3) requires that the claims or defenses of the representatives be "typical" of the claims or defenses of the class.[58] This requirement is that the

[51] *Health & Tennis Corp. of America v. Jackson*, 928 S.W.2d 583, 590 (Tex. App.—San Antonio 1996, no writ); *Reserve Life Insurance Co. v. Kirkland*, 917 S.W.2d 836, 842 (Tex. App.—Houston [14th Dist.] 1996, no writ).
[52] *Union Pacific Resources Group, Inc. v. Hankins*, 111 S.W.3d 69, 74 (Tex. 2003).
[53] *Microsoft Corp. v. Manning*, 914 S.W.2d 602, 611 (Tex. App.—Texarkana 1996, writ dism'd); *Wente v. Georgia-Pacific Corp.*, 712 S.W.2d 253, 255 (Tex. App.—Austin 1986, no writ); *Reserve Life Insurance Co. v. Kirkland*, 917 S.W.2d at 842.
[54] *Health & Tennis Corp. of America v. Jackson*, 928 S.W.2d at 590, citing *Microsoft Corp. v. Manning*.
[55] *Health & Tennis Corp. of America v. Jackson*, 928 S.W.2d at 590.
[56] *Microsoft Corp. v. Manning*, 914 S.W.2d at 613.
[57] *Bowden v. Phillips Petroleum Co.*, 247 S.W.3d 690, 698 (Tex. 2008).
[58] TEX. R. CIV. P. 42.

claims of the representatives be "substantially similar" to those of the class members.[59] Whether a class representative's claims are "typical of the claims" of the class is ordinarily a question of fact to be decided by the district court in considering a motion for class certification.[60] In assessing whether a proposed class representative's claims are typical of those of the class, the focus is "less on the relative strengths of the named and unnamed plaintiffs' cases than on the similarity of the legal and remedial theories behind their claims."[61] In this action, the legal and remedial theories are identical for Plaintiffs and all Class Members.

Plaintiffs assert causes of action based upon conduct of Defendants, which is uniform across all Class Members. And each cause of action is asserted on behalf of each Class Member. Moreover, while the number of subject instruments will be different for each Class Member, the formula for determining each Class Member's recovery is identical.

Here, the Wolfs' claims and the claims of all other Class members arise from the Defendants' fraudulent transfers of mortgages into the 2006-NC3 Trust. All members of the Class, as property owners and mortgagees, have the same interests and suffer the same injury. The typicality requirement is satisfied if the class representative demonstrates that his claims have the same essential characteristics as those of the class as a whole.[62] Unsurprisingly, "the class representative must be a member of the class and have individual standing to sue."[63] The class representative's claims need not be identical to those of absent class members, only

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[59] *Dresser Industries, Inc. v. Snell*, 847 S.W.2d 367, 372 (Tex. App.—El Paso, no writ); *see East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977) (representatives and members need only "possess the same interest and suffer the same injury").
[60] *See Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969).
[61] *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 472 (5th Cir. 1986); *see Bertulli v. Indep. Ass'n of Cont.'s Cont'l Pilots*, 242 F.3d 290, 297, n.32 (5th Cir. 2001).
[62] *Microsoft Corp. v. Manning*, 914 S.W.2d 602, 613 (Tex. App.—Texarkana 1996, writ dism'd); *Cedar Crest Funeral Home, Inc. v. Lashley*, 889 S.W.2d 325, 331 (Tex. App.—Dallas 1993, no writ).
[63] *Southwestern Bell Telephone Co. v. Marketing on Hold Inc.*, 308 S.W.3d 909, 915 (Tex. 2010).

substantially similar.[64] All that is required is that the claims arise from the same pattern of conduct and be based on the same legal theory.[65] Public policy does not deny standing to a class plaintiff that holds contractually valid assignments from other class members.[66]

E. Adequacy

TEXAS RULE OF CIVIL PROCEDURE 42(a)(4) requires that the representative parties fairly and adequately protect the interests of the class.[67] Adequacy of representation is demonstrated by showing (1) that no conflict in the litigated issues exists between the representative and the class members, and (2) that class counsel is sufficiently qualified and experienced to prosecute the action vigorously.[68]

A court's adequacy determination involves an inquiry into: (1) the willingness and ability of the representatives to take an active role in and control the litigation and to protect the interests of absentees, (2) the zeal and competence of the representatives' counsel, and (3) any conflicts of interest between the named plaintiffs and the class they seek to represent.[69]

> The adequacy-of-representation requirement "tend[s] to merge" with the commonality and typicality criteria of Rule 23(a), which "serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the

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[64] *Reserve Life Insurance Co. v. Kirkland*, 917 S.W.2d 836, 842 (Tex. App.—Houston [14th Dist.] 1996, no writ); *Cedar Crest Funeral Home, Inc. v. Lashley*, 889 S.W.2d at 331.
[65] *Microsoft Corp. v. Manning*, 914 S.W.2d at 613.
[66] *Southwestern Bell Telephone Co. v. Marketing on Hold Inc.*, 308 S.W.3d 909, 916 (Tex. 2010).
[67] TEX. R. CIV. P. 42.
[68] *Health & Tennis Corp. of America v. Jackson*, 928 S.W.2d 583, 589 (Tex. App.—San Antonio 1996, no writ); *Microsoft Corp. v. Manning*, 914 S.W.2d 602, 614 (Tex. App.—Texarkana 1996, writ dism'd); *Weatherly v. Deloitte & Touche*, 905 S.W.2d 642, 651-652 (Tex. App.—Houston [14th Dist.] 1995, writ dism'd w.o.j.).
[69] *See Feder v. Elec. Data Sys.*, 429 F.3d 125, 130 (5th Cir. 2005) (internal quotation marks removed).

interests of the class members will be fairly and adequately protected in their absence."[70]

Interests are not considered antagonistic unless they relate directly to the matters in controversy.[71] Texas law "does not require a higher standard of involvement from a proposed class representative than from an individual plaintiff."[72] Courts therefore look to class counsel, not the named plaintiff, to determine whether vigorous prosecution is probable. "The qualifications and experience of the class counsel is of greater consequence than the knowledge of the class representatives."[73] If there is any doubt as to a class representative's adequacy, the trial court can easily satisfy it by requiring additional class representatives.

Departing from Federal Rule 23, Texas Rule 42(c)(1) expressly states that the "court may order the naming of additional parties in order to insure the adequacy of class representation." However, deciding not to sue for certain claims – often ones that can't be certified – may raise questions about class adequacy. "A class representative's decision to abandon certain claims may be detrimental to absent class members for whom those claims could be more lucrative or valuable, assuming those class members do not opt out of the class."[74]

There is no evidence in this case to show actual antagonism between the interests of the Plaintiffs and those of the class. Speculation about potential conflicts does not establish inadequacy.[75] Even if non-speculative conflict were shown, it must go to the heart of the case to

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[70] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626, n. 20 (1997) (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157, n.13 (1982)).
[71] *Health & Tennis Corp. of America v. Jackson*, 928 S.W.2d at 589, citing *Microsoft Corp. v. Manning*.
[72] *Health & Tennis Corp. of America v. Jackson*, 928 S.W.2d at 589, citing *Weatherly v. Deloitte & Touche*.
[73] *Health & Tennis Corp. of America v. Jackson*, 928 S.W.2d at 589, citing *Microsoft Corp. v. Manning*, 914 S.W.2d at 614; *Weatherly v. Deloitte & Touche*, 905 S.W.2d at 652.
[74] *Citizens Insurance Company of America v. Daccach*, 217 S.W.3d 430 453-454 (Tex. 2007).
[75] *Employers Cas. Co. v. Texas Ass'n of School Bds. Workers Comp. Self-Ins. Fund*, 886 S.W.2d 470, 476 (Tex. App.—Austin 1994, writ dism'd w.o.j).

allow a finding that a proposed class representative is inadequate.[76] The proposed representatives and their counsel will fairly and adequately protect the interests of the class.

F. Predominance

In order to maintain a lawsuit as class action under TEXAS RULE OF CIVIL PROCEDURE 42(b)(3), the named plaintiff must show "both that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[77] In applying this section, the trial court must consider "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."[78]

The Texas Supreme Court has stated that the "[t]est for predominance is not whether common issues outnumber uncommon issues but…'whether common or individual issues will be the object of most of the efforts of the litigants and the court.'"[79] The predominance inquiry applies to common defenses as well as common claims.[80] This requirement does not mean that all questions of law and fact must be identical, but that an issue of law or fact exists that inheres in the complaints of all the class members.[81] "Class certification will not be prevented merely

[76] *Adams v. Reagan*, 791 S.W.2d 284, 291 (Tex. App.—Forth Worth 1990, no writ).
[77] *TCI Cablevision of Dallas, Inc. v. Owens*, 8 S.W.3d 837, 842 (Tex. App.—Beaumont 2000).
[78] *Snyder Communications, L.P. v. Magana*, 142 S.W.3d 295, 299 (Tex. 2004).
[79] *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 693 (Tex. 2002) (quoting *Bernal*, 22 S.W.3d at 434).
[80] *Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201, 206-207 (Tex. 2007).
[81] *Entex, a Div. of Noram Energy Corp. v. City of Pearland*, 990 S.W.2d 904, 919 (Tex. App.—Houston [14 Dist.] 1999).

because damages must be determined separately for each class member. Likewise, defensive issues peculiar to different members do not destroy the entire class."[82]

In this case Plaintiffs allege, among other things, that Defendant Wells Fargo Bank, N.A., is not the current owner and holder of Wolfs' Note and Security Instrument ("Mortgage Loan"), and the Wolfs' Mortgage Loan was never transferred into the 2006-NC3 Trust for which Wells Fargo Bank, N.A. is *Trustee* in strict compliance with the Pooling and Servicing Agreement ("PSA") executed on August 1, 2006 between the parties. Based on the claims at issue, the controlling substantive issues in this case can be listed as follows:

1. whether the subject Note and Security Instrument were properly conveyed to Wells Fargo Bank, N.A., as Trustee for the 2006-NC3 Trust as required by the Pooling and Servicing Agreement executed on August 1, 2006 which governs the REMIC Trust;[83]

2. whether the "Transfer of Lien" filed with County Clerk's Offices in Texas is valid, and actually transfers the subject Note and Security Instrument to Wells Fargo Bank, N.A., as Trustee for the 2006-NC3 Trust;[84]

3. whether Wells Fargo Bank, N.A., as Trustee for the 2006-NC3 Trust has standing to foreclose on real property in the State of Texas;

4. whether Wells Fargo Bank, N.A., as Trustee for the 2006-NC3 Trust is the legal owner and holder of mortgage loans, mortgage liens, mortgage notes, or deeds of trust on real property in the State of Texas; and

5. whether Defendants violated TEX. CIV. PRAC. & REM. CODE § 12.002 by filing the "Transfer of Lien" with County Clerk's Offices in Texas attempting to transfer mortgage loans, mortgage liens, mortgage notes, or deeds

[82] *TCI Cablevision of Dallas, Inc. v. Owens*, 8 S.W.3d 837, 846 (Tex. App.—Beaumont 2000) (internal quotation omitted).
[83] Exhibit 5 of Plaintiffs' Memo in Support of Class Certification at p. 4.
[84] *Id.*

of trust from New Century Mortgage Corporation to Wells Fargo Bank, N.A., as Trustee for the 2006-NC3 Trust.

These controlling issues can be proven with common evidence. The focus of the trial is going to be on Defendants' conduct. Either they used a document with knowledge that the document is fraudulent or they did not. Plaintiffs allege that they have obtained evidence and examples of documents and testimony that could be used to prove on a classwide basis that Defendants used a document with knowledge that the document was fraudulent.[85]

1. The Texas Class Has a Common Trust Agreement

The Pooling and Service Agreement governing the 2006-NC3 Trust is applicable to the Wolfs' case, does not contain different terms for each class member, and uniformly applies to all class members. Thus the primary legal document upon which the claims will be decided appears uniform across the Texas class.

2. Violations of TEX. CIV. PRAC. & REM. CODE § 12.002 Will Uniformly Apply to All Class Members

Defendants made, presented, or used a document or other record with knowledge that the document or other record is a fraudulent court record or a fraudulent lien or claim against real property or an interest in real property. The documents or records filed or caused to be filed by Defendants, falsely represent Defendants' interest in the real property that is the subject of such instruments, causing damages and injuries to Plaintiffs and the Class. Defendants knew at the time of such filing the instruments falsely represented Defendants' interest in the real property that is the subject of such instruments.

[85] *Compare* Exhibit 11 of Plaintiffs' Memo in Support of Class Certification (Transfer of Lien), with Exhibit 9 of Plaintiffs' Memo in Support of Class Certification (PSA).

For over 100 years, Texas law has provided that the grantee or beneficiary of a deed of trust is the lender on the note secured by the deed of trust.[86] So long as a debt exists, the "security will follow the debt," and the assignment of the debt carries with it the rights created by the deed of trust securing the note.[87] Section 11.004 of the TEXAS PROPERTY CODE requires that county clerks in the State of Texas: (1) correctly record, as required by law, within a reasonable time after delivery, any instrument authorized or required to be recorded in that clerk's office that is proved, acknowledged, or sworn to according to law; (2) give a receipt, as required by law, for an instrument delivered for recording; (3) record instruments relating to the same property in the order the instruments are filed; and (4) provide and keep in the clerk's office the indexes required by law.[88]

Section 193.003 of the TEXAS LOCAL GOVERNMENT CODE requires that a county clerk maintain "a well-bound alphabetical index to all recorded deeds, powers of attorney, mortgages, and other instruments relating to real property" with "a cross-index that contains the names of the grantors and grantees in alphabetical order."[89] Under policies in effect for many years, employees of the County Clerk's Offices in Texas record as a "Grantee" any person identified as a "lender," "beneficiary," or "grantee" in a deed of trust.

Further evidence of commonality is that "Transfers of Lien" were filed by uniform documents generated by Defendants. An example of the form "Transfer of Lien" is attached.[90] The evidence shows Defendants prepared uniform "Transfer of Lien" national documents designed to ensure the same basic information regarding the 2006-NC3 Trust was filed in the

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[86] *See Lawson v. Gibbs,* 591 S.W.2d 292, 294 (Tex. Civ. App.—Houston [1st. Dist.] 1979, writ ref'd n.r.e.).
[87] A deed of trust in Texas creates a lien in favor of the lender; it does not operate as a transfer of title. This has been the law in Texas for more than a century. *See McLane v. Paschal,* 47 Tex. 365, 369 (1877); *see also Johnson v. Snell,* 504 S.W.2d 397, 399 (Tex. 1973).
[88] TEX. PROP. CODE § 11.004.
[89] TEX. LOC. GOV'T CODE § 193.003.
[90] Exhibit 11 of Plaintiffs' Memo in Support of Class Certification.

real property records at county clerk's offices nationwide, including county clerk's offices in this Texas class.

3. The Damages Sought Present Common Issues

The allegations in Plaintiffs' Third Amended Petition permit class-wide computation of damages.[91] While each class members' amount of damages may vary, the *calculation* of damages will be identical pursuant to Texas statutory law.[92] Furthermore, differences in the amount of damages suffered by individual class members do not destroy predominance or make this case unmanageable. In fact, Rule 23 explicitly envisions class actions with such individualized damage determinations.[93] When such individualized inquiries are necessary, if 'common questions predominate over individual questions as to liability, courts generally find the predominance standard of Rule 23(b) to be satisfied.[94]

4. Wells Fargo's Defenses Present Predominantly Common Issues

The defenses asserted by Wells Fargo include:[95] Plaintiffs lack standing, and non-compliance with the terms of the Pooling and Service Agreement.[96] These defenses are based on predominately common evidence. Therefore, common questions of fact and of law will predominate in the preparation and trial of this lawsuit.

G. Superiority

TEXAS RULE OF CIVIL PROCEDURE 42(b)(3) requires the Court to find that class treatment is "superior to other available methods for the fair and efficient adjudication of the

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[91] *See* Plaintiffs' Petition, at pp. 39-47.
[92] TEX. CIV. PRAC. & REM. CODE § 12.002.
[93] *See* FED. R. CIV. P. 23 advisory committee's note (1996 Amend., subdivision (c)(4)).
[94] *See* 5 *Moore's Federal Practice* § 23.46[2][a] (1997).
[95] *See* Defendants' Third Amended Answer and Second Amended Counterclaim, filed on July 12, 2012.
[96] Defendants rely on an unpublished case from Minnesota for this defense. *See Anderson v. Countrywide Home Loans*, 2011 WL 1627945, at *4 (D. Minn. April 8, 2011).

controversy."[97] Class actions are superior when individual actions would be wasteful, duplicative, present managerial difficulty or be adverse to judicial economy.[98] This analysis includes consideration of the class members' interest in controlling the actions individually, the extent of any other litigation by or against class member, the desirability of concentrating the litigation in the forum, and the difficulties of managing the case as a class.[99] The purpose of a class action is to "eliminate or reduce the threat of repetitive litigation," "prevent inconsistent resolution of similar cases," and allow a mechanism to litigate claims that would be uneconomical to pursue on an individual basis.[100]

The class members do not have a strong interest in bringing suit individually against Defendants, most of them are experiencing financial problems, and the cost of litigation would be prohibitively expensive in individual litigation. The nature of these wrongful foreclosure claims and the cost and complexity of the litigation make it desirable to concentrate the case in this forum, as opposed to individual cases. It would be inefficient, costly, and a waste of judicial resources, as well as an invitation for conflicting results, to require each class member to litigate the common issues presented in this cause in multiple individual cases. It is economically infeasible for the many hundreds of class members to litigate their claims against Defendants on an individual basis given the enormous expense associated with litigating these common questions.[101]

Not only would responding to Wells Fargo's defensive pleadings and arguments likely require an individual litigant to incur legal fees and costs far in excess of the individual's

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[97] TEX. R. CIV. P. 42.
[98] *Mullen v. Treasure Chest Casino, L.L.C.*, 186 F.3d 620, 627 (5th Cir. 1999).
[99] TEX. R. CIV. P. 42(b)(3)(A)-(D).
[100] *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 452 (Tex. 2000).
[101] *Phillips Petro. Co. v. Shutts*, 472 U.S. 797, 809 (1985) (explaining that a class action is the superior method when it is necessary to "permit the plaintiffs to pool claims which would be uneconomical to litigate individually").

damages, but in addition, it would be extraordinarily wasteful for the judicial system if similar lawsuits had to be replicated on an individual basis. In fact, without a class the courthouse door would most likely be shut to many of the class members. Here, the core issues can be decided for all class members using common proof. Thus, a class action is the superior method for the fair and efficient adjudication of this action.

Finally, this single-state case should yield a very manageable trial because it only applies Texas law, based upon a single common Trust Agreement, section 12.002 of the TEXAS CIVIL PRACTICE & REMEDIES CODE, and Defendants' routine pattern of business practices. Proceeding in this case on a class basis is superior to other available methods for the fair and efficient adjudication of this controversy.

H. Class Definition

The trial court is not bound by class definitions submitted by the parties, and may use its own definition as the needs of the case require.[102] The certified class is defined as:

> All persons and entities with a residential mortgage loan on real property in the State of Texas securitized into the 2006-NC4 Trust, with a court record, lien, claim against real property, or claim against an interest in real property filed by Defendants after August 10, 2006 up to and including the date notice is first provided to the Class.

The certified subclass is defined as:

> All persons and entities that lost ownership to real property in the State of Texas resulting from a foreclosure initiated by Wells Fargo Bank, N.A., as Trustee for the 2006-NC4 Trust after August 10, 2006 up to and including the date notice is first provided to the Class.

Excluded from the Class are:

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[102] *Bailey v. Kemper Cas. Ins. Co.*, 83 S.W.3d 840, 848 (Tex. App.—Texarkana 2002).

1. Defendant Wells Fargo Bank, N.A., any entity in which it has a controlling interest, its legal representatives, officers, directors, assigns and successors, and any other entity related to or affiliated with Defendant Wells Fargo Bank, N.A.;

2. Defendant Wells Fargo Bank, N.A.'s Board members or executive level officers, including its attorneys;

3. Defendant Tom Croft, his legal representatives, and agents;

4. Defendant New Century Mortgage Corporation, any entity in which it has a controlling interest, its legal representatives, officers, directors, assigns and successors, and any other entity related to or affiliated with Defendant New Century Mortgage Corporation;

5. Defendant Carrington Mortgage Services, LLC, any entity in which it has a controlling interest, its legal representatives, officers, directors, assigns and successors, and any other entity related to or affiliated with Defendant Carrington Mortgage Services, LLC;

6. Defendant Carrington Mortgage Services, LLC's Board members or executive level officers, including its attorneys;

7. governmental entities;

8. persons or entities that timely and properly excluded themselves from the Class; and

9. all claims for personal injury, wrongful death, or any incidental or consequential damages over and above those sought herein, except as authorized by law.

I. Class Claims, Issues, and Defenses

1. *Plaintiffs' Claims*

Plaintiffs claim violations of TEX. CIV. PRAC. & REM. CODE § 12 in which Plaintiffs allege Defendants made, presented, or used a document or other record with knowledge that the document or other record is a fraudulent court record or a fraudulent lien or claim against real

property or an interest in real property. Any action by the 2006-NC3 Trust in contravention of the PSA is void under New York Trust Law.[103]

The deadline to assign, convey and transfer the mortgage loans and notes into the 2006-NC3 Trust was August 10, 2006 ("Closing Date")[104] according to the PSA. On August 10, 2006, all rights, title and interest in the Plaintiffs' mortgage loans were purportedly transferred and assigned to Wells Fargo as Trustee for the 2006-NC3 Trust. Therefore, the 2006-NC3 Trust allegedly owned the Plaintiffs' mortgage loan and note as of the Closing Date on August 10, 2006. The assignments filed by Defendants purported to create liens on Plaintiffs' property or claims on Plaintiffs' property for the payment of a debt or security interest as defined by TEX. CIV. PRAC. & REM. CODE § 12.001(3).

Additionally, a document or instrument is presumed to be fraudulent if it is not provided for by the constitution of the laws of this state or of the United States, if it is not created by the implied or express consent or agreement of the obligor, debtor, or the owner of the real or personal property, or is not an equitable, constructive, or other lien imposed by a court.[105]

Plaintiffs allege Defendants made, presented, or used a document or other record with intent that the document or other record be given the same legal effect as a court record or document of a court created by or established under the Texas constitution or laws of the State of Texas, evidencing a valid lien or claim against real property or an interest in real property.

Plaintiffs allege the documents or records filed or caused to be filed by Defendants, falsely represent Defendants' interest in the real property that is the subject of such instruments,

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[103] *See* New York Estates, Powers & Trusts, Part 2, § 7-2.4 ("If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust...is void").
[104] PSA Section 2.01. On the Closing Date, Stanwich will transfer, assign, set over and otherwise convey to Wells Fargo without recourse, all the right, title and interest of Stanwich in and to the Mortgage Loans. Such assignment includes all interest and principal received by Stanwich or the Servicer on or with respect to the Mortgage Loans.
[105] *See* TEX. GOV'T CODE ANN. § 51.901(c).

causing damages and injuries to Plaintiffs and the Class. Defendants knew at the time of such filing the instruments falsely represented Defendants' interest in the real property that is the subject of such instruments. Defendants made, presented, or used a document or other record with intent to cause Plaintiffs and the Class Members to suffer financial injury, mental anguish, or emotional distress.

Plaintiffs' allege Defendants' conduct and actions violated TEX. CIV. PRAC. & REM. CODE § 12 on or after August 10, 2006 in violation of the PSA and New York law, for which Plaintiffs and the Class Members seek judgment against Defendants, jointly and severally, equal to $10,000 per violation, together with attorney's fees, court costs, and exemplary damages in an amount determined by the Court.

2. *Defendants' Contentions and Defenses*

Defendants contend the note and deed of trust were legally and validly assigned under Texas law. Defendants further contend the note was indorsed "in blank" pursuant to Section 3.205(b) of the TEXAS BUSINESS & COMMERCE CODE, and that, therefore, whoever has possession of the note is the holder and a valid assignee. Defendants contend the note and deed of trust were assigned pursuant to the terms of the PSA.

Defendants also assert, however, that Plaintiffs do not have standing to contest whether the note and deed of trust were assigned pursuant to the terms of the PSA because Plaintiffs were not parties to, or third party beneficiaries of, the PSA.[106] However, the Texas Supreme Court recently held that so long as a plaintiff has standing on *some* claim, he has standing to pursue class certification as to that claim.[107]

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[106] A plaintiff need not have standing on *all* claims of the purported class in order to seek class certification. *See Heckman v. Williamson County*, 369 S.W.3d 137 (Tex. 2012).
[107] *Id.*

Defendants contend the filing of an assignment of lien or assignment of deed of trust does not give rise to liability under Section 12.002 of the TEXAS CIVIL PRACTICE & REMEDIES CODE because those assignments do not purport to create a lien or claim on real property but, rather, merely purport to transfer an existing deed of trust from one entity to another.

J. Requirements of TEX. R. CIV. P. 42(c)(1)(D)

The required elements of Plaintiffs' claim for violations of Section 12.002 of the TEXAS CIVIL PRACTICE & REMEDIES CODE ("CPRC") provide:

> (a) A person may not make, present, or use a document or other record with:
>
> (1) knowledge that the document or other record is a fraudulent court record or a fraudulent lien or claim against real or personal property or an interest in real or personal property;
>
> (2) intent that the document or other record be given the same legal effect as a court record or document of a court created by or established under the constitution or laws of this state or the United States or another entity listed in Section 37.01, Penal Code, evidencing a valid lien or claim against real or personal property or an interest in real or personal property; and
>
> (3) intent to cause another person to suffer:
>
> (A) physical injury;
>
> (B) financial injury; or
>
> (C) mental anguish or emotional distress.
>
> (b) A person who violates Subsection (a) or (a-1) is liable to each injured person for:
>
> (1) the greater of:
>
> (A) $10,000; or

(B) the actual damages caused by the violation;

(2) court costs;

(3) reasonable attorney's fees; and

(4) exemplary damages in an amount determined by the court.

TEX. CIV. PRAC. & REM. CODE § 12.002.

K. Appointment of Class Counsel Pursuant to Rule 42(g)

An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.[108] Pursuant to Rule 42(g), the court *must* consider (1) the work counsel has done in identifying or investigating potential claims in the action, (2) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, (3) counsel's knowledge of the applicable law, and (4) the resources counsel will commit to representing the class.[109] Plaintiffs retained qualified counsel with significant experience prosecuting large consumer rights class actions and other complex litigation.[110] The adequacy requirement is met because Plaintiffs' counsel will fairly and adequately represent the interests of the class.

In addition, the court *may* (1) consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class, and (2) direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for

[108] TEX. R. CIV. P. 42(g).
[109] TEX. R. CIV. P. 42(g).
[110] Exhibit 14 of Plaintiffs' Memo in Support of Class Certification (Affidavit and Declaration of W. Craft Hughes).

attorney fees and nontaxable costs.[111] The rule further provides that the "order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs."[112]

Therefore, the Court appoints Plaintiffs Mary Ellen Wolf and David Wolf as Class Representatives of the above-described Class. The Court hereby appoints attorneys W. Craft Hughes, Jarrett L. Ellzey, and the law firm of HUGHES ELLZEY, LLP as Class Counsel ("Class Counsel"). The Court has considered the work Class Counsel has performed in (i) identifying and investigating potential claims in this action, (ii) Class Counsels' experience in handling class actions, other complex litigation, and claims of the type asserted in this action, (iii) Class Counsels' knowledge of the applicable law, and (iv) the resources Class Counsel will commit to representing the Class. The Court also finds that Class Counsel is experienced and adequate counsel, and will fairly and adequately represent the interests of the Class.

It is further ORDERED that the parties shall meet and confer within two weeks of the date of this Order and, within 30 days of the date of this Order, file a plan or the appropriate motion and order (or competing plans or motions and orders) with respect to the identification of and notice to class members pursuant to Texas Rule of Civil Procedure 42(c)2.

SIGNED this ______ day of MAY -1 2013, 2013.

HONORABLE MIKE ENGELHART

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[111] TEX. R. CIV. P. 42.
[112] *Id.*