

IN THE SUPREME COURT OF MISSOURI

No. SC85081

**STATE OF MISSOURI ex rel. MASTER FINANCIAL ASSET
SECURITIZATION TRUST 1998-1,**

Relator,

v.

THE HONORABLE DAVID W. RUSSELL, CIRCUIT JUDGE,

Respondent.

Original Proceeding in Prohibition and for Mandamus
against the Circuit Court of Clay County, Missouri,
the Honorable David W. Russell, Circuit Judge

REPLY BRIEF OF RELATOR

David Sturgeon-Garcia
Reed Smith Crosby Heafey LLP
Two Embarcadero Center, Suite 2000
San Francisco, CA 94111
(415) 543-8700 (telephone)
(415) 391-8269 (facsimile)

Scott Martin #42370
Leonard L. Wagner #39783
Husch & Eppenberger, LLC
1200 Main Street, Suite 1700
Kansas City, MO 64105
816-421-4800 (telephone)
816-421-0596 (facsimile)

ATTORNEYS FOR RELATOR
MASTER FINANCIAL ASSET
SECURITIZATION TRUST 1998-1

TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES.....	3
INTRODUCTION.....	7
ARGUMENTS IN REPLY TO RESPONDENT’S POINT I.....	8
I. The Three-Year Statute of Limitations In Section 516.130(2) Applies And Bars Plaintiffs’ Claims Against Relator	8
II. The Six-Year Statute of Limitations In Section 516.420 Does Not Apply To Plaintiffs’ Claims.....	9
A. Relator Is Not A Moneyed Corporation.....	9
1. Respondent Failed To Apply The Proper Standard For Determining Whether An Entity Is A “Moneyed Corporation”	9
2. Relator Is Not A Moneyed Corporation Under The <i>Walton Construction</i> Standard	11
a. Relator Is Not Authorized To Make Insurance.....	11
b. Relator Does Not Make Loans Upon Pledges or Deposits	12

c.	Relator Is Not A Bank, Is Not Subject To Banking Laws, And Does Not Exercise Banking Powers	12
B.	Plaintiffs’ Claim Is Not An Action On A Penal Statute.....	15
III.	Neither HOEPA Nor State Assignee Law Deprives Relator Of The Statute Of Limitations Applicable To It	18
IV.	Century Financial Is Not a “Moneyed Corporation”.....	22
	ARGUMENTS IN REPLY TO RESPONDENT’S POINT II.....	25
V.	Plaintiffs’ Untimely Claims Are Not Saved by <i>American Pipe</i> Tolling.....	25
VI.	Plaintiffs’ Claims Are Not Saved By The Relation Back Doctrine.....	27
VII.	Plaintiffs’ Claims Are Not Continuing Violations	29
	ARGUMENTS IN REPLY TO RESPONDENT’S POINT III.....	33
VIII.	The Five-Year Statute Of Limitations Under Section 516.120 Does Not Apply Because The Applicable Statute Of Limitations Is Section 516.130(2)	33
	CONCLUSION.....	34

TABLE OF AUTHORITIES

Cases

<i>Addison v. Jester</i> , 758 S.W.2d 454 (Mo. App. 1988).....	16
<i>American Pipe and Constr. Co. v. Utah</i> , 414 U.S. 538 (1974).....	25
<i>Appleton Elec. Co. v. Graves Truck Line, Inc.</i> , 635 F.2d 603 (7 th Cir. 1980).....	26
<i>Arneil v. Ramsey</i> , 550 F.2d 774 (2d Cir. 1977).....	25
<i>Baker v. Century Financial Group, Inc.</i> , 2001 U.S. Dist. Lexis 24320 (W.D. Mo. Nov. 19, 2001).....	18
<i>Bank of New York v. Heath</i> , 2001 WL 1771825 (Cook Co. Cir. Ill. Oct. 26, 2001).....	18,21
<i>Baron v. Kurn</i> , 164 S.W.2d 310 (Mo. 1942).....	23
<i>Brooks v. Terra Funding, Inc.</i> , 2002 U.S. Dist. Lexis 15363, (W.D. Tenn. July 31, 2002).....	20
<i>Brown v. Maguire’s Real Estate Agency</i> , 121 S.W.2d 754 (Mo. App. 1938).....	23
<i>Bryant v. Mortgage Capital Resource Corp.</i> , 197 F.Supp.2d 1357 (N.D. Ga. 2002).....	19
<i>Butler v. Mitchell-Hugeback, Inc.</i> , 895 S.W.2d 15 (Mo. Banc 1995).....	23
<i>Chevalier v. Baird Sav. Ass’n</i> , 72 F.R.D. 140 (D.C. Pa. 1976).....	25
<i>City of St. Louis v. Carpenter</i> , 341 S.W.2d 786 (Mo. 1961).....	17
<i>Cooper v. First Gov’t Mortgage & Inv. Corp.</i> , 238 F.Supp.2d 50 (D.D.C. 2002).....	19
<i>Cullen v. Margiotta</i> , 811 F.2d 698 (2d Cir. 1976).....	24

<i>Dash v. FirstPlus Home Loan Trust 1996-2</i> , 2003 WL 1038355 (M.D.N.C. 2003).....	19,20,31
<i>Davis v. Laclede Gas Co.</i> , 603 S.W.2d 554 (Mo. banc 1980).....	30
<i>Division of Labor Standards v. Walton Construction Management Co., Inc.</i> , 984 S.W.2d 152 (Mo. App. W.D. 1999).....	passim
<i>Dowdy v. First Metro. Mortgage Co.</i> , 2002 WL 745851 (N.D. Ill. 2002)...	19,22
<i>Faircloth v. Nat'l Home Loan Corp.</i> , 2003 WL 1232825 (M.D.N.C. 2003)..	31
<i>Frazier v. Preferred Credit</i> , 2002 WL 31039856, (W.D. Tenn. July 31, 2002).....	20
<i>Goodkin v. 8182 Maryland Assoc. Ltd. Partnership</i> , 80 S.W.3d 484 (Mo. App. E.D. 2002).....	28,29
<i>Hoey v. St. Luke's Episcopal Presbyterian Hosp.</i> , 713 S.W.2d 636 (Mo. App. E.D. 1986).....	26
<i>In re Activision Sec. Litigation</i> , 1986 WL 15339 (N.D. Cal. Oct. 20, 1986)....	26
<i>Julian v. Burrus</i> , 600 S.W.2d 133 (Mo. App. W.D. 1980).....	8
<i>Lato v. Concord Homes, Inc.</i> , 659 S.W.2d 593 (Mo. App. E.D. 1983).....	28
<i>McDermott v. Mercury Capital Serv., Inc.</i> , 1996 U.S. Dist. Lexis 22077 (N.D. Ga. 1996).....	26
<i>Meadows v. Pacific Inland Sec. Corp.</i> , 36 F.Supp.2d 1240 (S.D. Cal. 1999)....	26
<i>Miller v. Pacific Shore Funding</i> , 224 F.Supp.2d 977 (D. Md. 2002)...	21, 29,31
<i>Modern Tractor & Supply Co. v. Leo Journagan Constr. Co., Inc.</i> , 863 S.W.2d 949 (Mo. App. S.D. 1993).....	29,30

<i>Mott v. R.G. Dickenson & Co.</i> , 1993 U.S. Dist. Lexis 3047 (D. Kan. 1993)...	26
<i>Mull v. Alliance Mortgage Banking Corp.</i> , 219 F.Supp.2d 895 (W.D. Tenn. 2002).....	20
<i>Ryan v. Spiegelhalter</i> , 64 S.W.3d 302 (Mo. banc 2002).....	32
<i>Sansone v. Sansone</i> , 586 S.W.2d 87 (Mo. App. E.D. 1979).....	23
<i>Schultz by Schultz v. Romanace</i> , 906 S.W.2d 393 (Mo. App. S.D. 1995)...	28
<i>Securities Indus. Ass'n v. Clark</i> , 885 F.2d 1034 (2d Cir. 1989).....	12
<i>State ex rel. Nixon v. American Tobacco Co., Inc.</i> , 34 S.W.3d 122 (Mo. banc 2000)	27
<i>State ex rel. Webster v. Myers</i> , 779 S.W.2d 286 (Mo. App. 1989).....	17
<i>Street v. PSB Lending Corp.</i> , 2002 U.S. Dist. Lexis 15365, (W.D. Tenn. July 31, 2002).....	20
<i>Tabor v. Ford</i> , 240 S.W.2d 737 (Mo. App. 1951).....	16,17
<i>Taylor v. Currency Services</i> , 218 S.W.2d 600 (Mo. 1949).....	13
<i>Tobler's Flowers, Inc. v. Southwestern Bell Tel. Co.</i> , 632 S.W.2d 15, 19 (Mo. App. W.D. 1982).....	14
<i>Vandenbroeck v. Contimortgage Corp.</i> , 53 F.Supp.2d 965 (W.D. Mich. 1999).....	18,19,21
<i>Williams v. FirstPlus Home Loan Trust 1996-2</i> , 209 F.R.D. 404 (W.D. Tenn. July 9, 2002).....	21
<i>Williams v. Zed Corp. (f/k/a Ditech Funding Corp.)</i> , Case No. 02-2045 GV (W.D. Tenn. Aug. 15, 2002).....	19,20

<i>Windscheffel v. Benoit</i> , 646 S.W.2d 354 (Mo. 1983).....	28
--	----

Statutes

§ 351.385 RSMo.....	23
§ 362.010(3) RSMo.....	12
§ 407.100 RSMo.....	16
§ 408.030.2 RSMo.....	16
§ 408.231 RSMo.....	29
§ 408.236 RSMo.....	8,16
§ 408.240 RSMo.....	16
§ 408.562 RSMo.....	8
§ 516.100 RSMo.....	28
§ 516.120(2) RSMo.....	31,33
§ 516.130(2) RSMo.....	passim
§ 516.420 RSMo.....	passim
12 U.S.C. § 24.....	13
15 U.S.C. § 1640(e).....	20
15 U.S.C. § 1641(d)(1).....	passim

Rules

Rule 55.33(c), Mo. Sup. Ct. R.....	28
Rule 74.04(f), Mo. Sup. Ct. R.....	14

INTRODUCTION

While long on rhetoric, Respondent's Brief is noticeably short on any legal authority that supports Respondent's ruling or the novel propositions advocated. At Plaintiffs' urging, Respondent created and applied a definition of "moneyed corporation" that no court has ever endorsed. In fact, the definition created is contrary to Missouri precedent defining "moneyed corporation" and the fundamental policies of repose that are the foundation of statutes of limitations. Indeed, the record confirms that none of the requirements of a "moneyed corporation" are met as to Relator. Judge Preston Dean of the 16th Judicial District (Jackson County), unlike Respondent, properly applied the definition of a "moneyed corporation" and held that claims under the Missouri Second Mortgage Loan Act are governed by section 516.130(2)'s three-year statute of limitations. *Schwartz v. Bann-Cor Mortgage*, Case No. 00CV226639-01. (224-226).

Plaintiffs had three years (two more than provided under the federal law they seek to rely upon) to file any claims against Relator. They did not do so, and their time-barred claims should be dismissed. Accordingly, Relator respectfully requests that the preliminary writ of prohibition be made absolute.

ARGUMENTS IN REPLY TO RESPONDENT'S POINT I

I. The Three-Year Statute Of Limitations In Section 516.130(2) Applies And Bars Plaintiffs' Claims Against Relator.

Section 516.130(2)¹ states in pertinent part: “An action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state” must be commenced within three years. By its plain terms, this statute applies to Plaintiffs' claim against Relator.

First, Plaintiffs' claims are based “upon a statute” — Missouri's Second Mortgage Loan Act (“SMLA”). (A64, Exhibit 2 at ¶ 2 and A75). Second, the claim is an action for a “penalty or forfeiture” because the remedies Plaintiffs seek include the forfeiture of all past and future interest on their loans (section 408.236), as well as other damages, penalties, and attorneys' fees (section 408.562). (A80-A81, Exhibit 2 at ¶¶ 80-83). See *Julian v. Burrus*, 600 S.W.2d 133, 141 (Mo. App. W.D. 1980) (return of usurious interest as well as award of attorneys' fees pursuant to then-existing usury statute constituted a penalty or forfeiture and thus action was governed by section 516.130(2)). Indeed, all parties agree Plaintiffs' claims are based upon a statute for a forfeiture. (A63-A87, Exhibit 2). Third, a claim under the SMLA is “given to the party aggrieved,” *i.e.*, the borrower. See Section 408.562.

Neither Plaintiffs nor Respondent have disputed that each of section 516.130(2)'s requirements have been met. Instead, Plaintiffs argued, and Respondent agreed, that

¹ Except as otherwise indicated, all statutory references herein are to RSMo 2002.

section 516.420, rather than section 516.130(2), applies to this case. Plaintiffs and Respondent are wrong.

II. The Six-Year Statute Of Limitations In Section 516.420 Does Not Apply To Plaintiffs' Claims.

Respondent ruled Plaintiffs' claims are governed by the six-year statute of limitations set forth in section 516.420, which provides in pertinent part:

None of the provisions of sections 516.380 to 516.420 shall apply to suits against moneyed corporations . . . to recover any penalty or forfeiture imposed . . . but all such suits shall be brought within six years

However, Relator is not a "moneyed corporation." Nor is this an action on a "penal" statute.

A. Relator Is Not A Moneyed Corporation.

1. Respondent Failed To Apply The Proper Standard For Determining Whether An Entity Is A "Moneyed Corporation."

Respondent ruled section 516.420 applies because it concluded that Relator was a "moneyed corporation." However, Respondent failed to apply the proper standard in determining whether an entity is a "moneyed corporation."

Plaintiffs and Relator agree the proper test is that set forth in *Division of Labor Standards v. Walton Construction Management Co., Inc.*, 984 S.W.2d 152, 156 (Mo. App. W.D. 1999). (Respondent's Brief at 26). In *Walton Construction*, the Court of

Appeals defined the term “moneyed corporation” as a “corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurance.” *Id.*

However, Respondent did not apply the *Walton Construction* standard. Instead, Respondent made up and applied a new standard:

We can deal with a lot of technicalities on whether or not there’s a word in the statute that fits into their purpose

* * *

The bottom line purpose of all of these companies is to handle money Thus I think that they’re a moneyed corporation.

(A141, Exhibit 6 at page 20:15-19, A142, Exhibit 6 at page 21:3-5, 11-13).

“Handling money” is *not* the standard announced in *Walton Construction*. Nor is it the definition of “moneyed corporation” used in any other case or jurisdiction. All corporations “handle money.” But it clearly was not the Missouri Legislature’s intent that every for-profit corporation be considered a moneyed corporation; if it were, the Legislature would have said so and would not have created a statute uniquely applicable to penal actions against “moneyed” corporations. *Walton Construction*, 984 S.W.2d at 156.

2. Relator Is Not A Moneyed Corporation Under The *Walton Construction* Standard.

Relator does not meet any of the three prongs of the *Walton Construction* definition of a “moneyed corporation.” Indeed, Relator is not a corporation at all. It is a Delaware business trust. (Petition for Writ of Prohibition, ¶ 6; Admitted in Respondent’s Answer, ¶ 6). Respondent grudgingly concedes that a business trust, such as Relator, “may not be a ‘corporation’ in a technical sense.” (Respondent’s Brief at 61). Accordingly, even apart from failing to meet the three-part *Walton Construction* test, section 516.420 does not apply by its plain terms.

Respondent argues a business trust should be treated as the equivalent of a corporation for purposes of section 516.420. (Respondent’s Brief at 60-61). However, Respondent has cited no authority supporting the argument that a business trust is the equivalent of a corporation for statute of limitations purposes, or that the Legislature had any intent to treat such a trust as a corporation for such purposes. Nor did Plaintiffs ever attempt to show that a business trust has powers or privileges “not possessed” by individuals or partnerships. For this reason alone, the Court should reject Respondent’s moneyed corporation arguments.

a. Relator Is Not Authorized To Make Insurance.

Turning to the three *Walton Construction* requirements, Plaintiffs and Relator agree Relator is *not* authorized by law to make insurance. (A113-114, Exhibit 5 at ¶¶ 1-12; A93-A111, Exhibit 4). Therefore, Relator does not satisfy the “making insurance” prong of the *Walton Construction* test.

b. Relator Does Not Make Loans Upon Pledges Or Deposits.

Nor does Relator “make loans” – let alone make “loans upon pledges or deposits.” (A113-A114, Exhibit 5 at ¶¶ 10-13). On the contrary, Relator acquires mortgage loans (A113-A114, Exhibit 5 at ¶¶ 10-13) – a point Respondent concedes. See Respondent’s Brief at 61-62 (“Relator is a ‘secondary market’ assignee, singularly engaged in the business of purchasing, acquiring and pooling a number of second mortgage loans”). Nor were the loans acquired by Relator made upon pledges or deposits. See *infra* at p. 23. Therefore, Relator also does not satisfy the “loans upon pledges or deposits” prong of the *Walton Construction* test.

c. Relator Is Not A Bank, Is Not Subject To Banking Laws, And Does Not Exercise Banking Powers.

Relator is not a bank – another point Respondent concedes. (Petition for Writ of Prohibition ¶ 6; Admitted in Respondent’s Answer ¶ 6). Nor does Respondent dispute that Relator, as a Delaware business trust, is bound by the terms of the governing Trust Agreement and the powers delineated therein. (A113-A114, Exhibit 5 at ¶¶10-12).

Under Missouri law, a bank “means any corporation soliciting, receiving or accepting money, or its equivalent, on deposit as a business, whether the deposit is made subject to check, or is evidenced by a certificate of deposit, a passbook, a note, a receipt, or other writing.” Section 362.010(3). Relator does not accept money on deposit and is not authorized to do so under the terms of the governing Trust Agreement. (A113-A114, Exhibit 5 at ¶¶10-12). Yet, the distinguishing feature of a bank in Missouri and

elsewhere is the power to accept deposits. See Taylor v. Currency Services, 218 S.W.2d 600, 602-03 (Mo. 1949) (defining banking as receiving or accepting money on deposit).

Nor is Relator subject to state or federal banking laws. (A113-A114, Exhibit 5 at ¶¶ 10-12). Relator is a trust that holds mortgage loans. Indeed, Respondent makes no argument that Relator is regulated under state or federal banking laws. (Respondent's Brief at 61-62).

Instead, Respondent argues Relator is a "moneyed corporation" because it supposedly exercises "banking powers" by holding pooled mortgage loan assets. (Respondent's Brief at 61). This argument is flawed for several reasons.

First, Respondent argues Relator qualifies as a "moneyed corporation" for the same reasons Century Financial allegedly qualifies as a "moneyed corporation." This argument is a red herring. Plaintiffs assert Century Financial is a moneyed corporation for two reasons: (1) Century Financial loaned money; and (2) Century Financial was allegedly subject to banking law. (Respondent's Brief at 25-34). Neither of these arguments apply to Relator. Relator does not lend money, and it is not regulated under state or federal banking law. (A113-A114, Exhibit 5 at ¶¶ 10-13).

Second, Respondent relies on *Securities Indus. Ass'n v. Clarke*, 885 F.2d 1034 (2d Cir. 1989). This reliance is misplaced. In *Clark*, the United States Court of Appeals for the Second Circuit held that a national bank's sale of mortgage pass-through certificates was within the "business of banking" under 12 U.S.C. section 24 and therefore was not prohibited by the Glass-Steagall Act. *Id.* at 1052. The Second Circuit's decision in *Clark* is of no moment because the defendant in *Clark* was a national bank. The defendant

therefore obviously had “banking powers.” Relator, in contrast, is not a national bank, and the National Bank Act has no application here at all.

Third, Respondent reasserts the novel and unsupported “handling money” definition. (Respondent’s Brief at 63). But, as discussed above, Respondent’s definition fails to include *any* of the requisite criteria established by *Walton Construction*. In short, Respondent’s arguments “prove too much” because, if accepted, the statute of limitations applicable to penal actions against “moneyed corporations” would be applicable to *any* corporation, which can by law “handle money” and “hold mortgages.” In other words, because all corporations have the authority and power to undertake such activities, including banks, then according to Plaintiffs’ argument, all corporations should be deemed to be “moneyed corporations,” thereby effectively making the specific reference to “moneyed” corporations meaningless. As the court stated in *Walton Construction*, the Legislature did not intend such a result.²

² The half-hearted assertion – apparently an afterthought – that the record in connection with Relator’s Motion for Summary Judgment was not adequately developed, is not supported by any objection in the record. (Respondent’s Brief at 64). Plaintiffs also failed to submit any affidavit in opposition to Relator’s Motion comporting with Missouri Supreme Court Rule 74.04(f). Any right to complain that further discovery was necessary was therefore waived. *Tobler’s Flowers, Inc. v. Southwestern Bell Tel. Co.*, 632 S.W.2d 15, 19 (Mo. App. W.D. 1982). Further, Respondent does not identify any relevant discovery that was sought but not provided.

B. Plaintiffs' Claim Is Not An Action On A Penal Statute.

Respondent also incorrectly asserts section 516.420 governs all suits against “moneyed corporations.” Respondent states: “The operation and effect of the statute is not limited to specific types of actions (e.g., remedial v. penal). The statute, instead applies to claims against a specific type of defendant (i.e., a ‘moneyed corporation’).” (Respondent’s Brief at 37). Respondent is mistaken. Section 516.420 applies only to actions on *penal* statutes against “moneyed corporations.” Indeed, the statute is entitled “ACTIONS ON PENAL STATUTES.” See Section 516.420. Plaintiffs’ action is not, and never has been, an action on a penal statute, as it is an action being pursued by private, allegedly aggrieved parties, not the State of Missouri or any other governmental body.

In addition, contrary to Respondent’s argument, section 516.420 is not a broad statute of limitations applicable to any action against “moneyed corporations.” Section 516.420 is a limited, narrowly construed exception to certain limitations periods applicable to actions on penal statutes. Actions on penal statutes are governed by sections 516.380 through 516.420. Section 516.420 provides a six-year exception for actions on penal statutes against “moneyed corporations,” stating that “[n]one of the provisions of sections 516.380 to 516.420 shall apply to suits against moneyed corporations . . . but all such suits shall be brought within six years” Section 516.420.

Respondent argues that Plaintiffs’ action is on a penal statute. (Respondent’s Brief at 39). Respondent is again mistaken. While Plaintiffs’ claim is an action for a

penalty or a forfeiture under the SMLA, their claim does not constitute an “action on a penal statute” as that term is used in section 516.420. Rather, their action is remedial because they are proceeding under provisions of the SMLA under which recovery would accrue to the party aggrieved – *i.e.*, the borrower – through a private action. See *Tabor v. Ford*, 240 S.W.2d 737, 740 (Mo. App. 1951) (“[I]f a statute imposes a penalty or forfeiture which accrues to the party aggrieved, to be recovered by private action . . . it is remedial and not a penal statute. But if a statute imposes a penalty or forfeiture, to be recovered by the Government, then the statute is regarded as penal and not remedial.”).

The Court of Appeals’ decision in *Addison v. Jester*, 758 S.W.2d 454 (Mo. App. 1988) is likewise pertinent. In *Addison*, the court concluded an action under Missouri’s usury statute, section 408.030.2, was remedial “because it imposes a penalty which accrues to the party aggrieved to be recovered by private action.” *Id.* at 457 (quoting *Tabor*, 240 S.W.2d at 740). Significantly, section 408.030.2 provides remedies to the party aggrieved similar to those provided by the SMLA, *i.e.*, forfeiture of interest and the cost of suit including attorneys’ fees. See Section 408.030.2; Section 408.236; Section 408.562.

Admittedly, the SMLA provides that persons who violate the SMLA are “guilty of a class A misdemeanor” Section 408.240. Thus, a violation of the SMLA may be the subject of a penal action brought by an appropriate prosecuting body. But that is not the action being pursued here.

While a statute can be both remedial and penal, it is deemed remedial where, as here, the claim is brought by a private plaintiff and not the government. See *Tabor*, 240

S.W.2d at 740 (statute was both remedial and penal because government could recover penalties while individuals could recover damages for violation). “Where a statute is both remedial and penal, remedial in one part while penal in another, it should be considered a remedial statute when enforcement of the remedy is sought and penal when enforcement of the penalty is sought.” *State ex rel. Webster v. Myers*, 779 S.W.2d 286, 289-90 (Mo. App. 1989) (quoting *City of St. Louis v. Carpenter*, 341 S.W.2d 786, 788 (Mo. 1961)). Here, Plaintiffs are proceeding under the remedial portion of the SMLA because they are parties allegedly aggrieved, *i.e.*, the borrowers, and seeking redress via private action.

Accordingly, as a statute of limitations applicable to penal actions, section 516.420 is not applicable. Rather, as a remedial action upon a statute for a forfeiture or penalty, section 516.130(2)’s three-year statute governs. See *State ex rel. Webster*, 779 S.W.2d at 289-90 (state’s action for restitution and injunctive relief under section 407.100 was remedial and therefore governed by section 516.130(2)’s three-year statute of limitations).

III. Neither HOEPA Nor State Assignee Law Deprives Relator Of The Statute Of Limitations Applicable To It.

Apparently recognizing that Relator does not meet the definition of “moneyed corporation” in any respect, Respondent resorts to an unprecedented theory – that an assignee provision in the Home Ownership and Equity Protection Act (“HOEPA”), 15 U.S.C. section 1641(d)(1), deprives Relator of any defense, including any statute of limitations defense, independent of defenses that can be asserted by Century Financial.

Notably, Respondent does not provide a single citation to any authority that supports this novel interpretation of that federal statute. Indeed, Respondent merely assumed that section 1641(d)(1) applied as urged by Plaintiffs even though they did not submit any evidence supporting their assertion that their loans were “high cost” loans subject to HOEPA. Moreover, Respondent does not cite a single case that holds an assignee is deprived of its personal statute of limitations defense by taking an assignment of a loan.

HOEPA does not determine the statute of limitations applicable to alleged state law claims. While HOEPA, 15 U.S.C. section 1641(d)(1), provides that an assignee of a “high cost” mortgage is “subject to all claims and defenses with respect to that mortgage that the consumer could assert against creditor of the mortgage,” this language merely eliminates the holder in due course defense, as case after case holds. *E.g.*, *Baker v. Century Financial Group, Inc.*, 2001 U.S. Dist. Lexis 24320, *7 (W.D. Mo. Nov. 19, 2001) (“Section 1641(d) is not an independent basis for liability, but rather a limitation of the common law holder-in-due-course rule.”) (*citing* *Vandenbroeck v. Contimortgage Corp.*, 53 F. Supp. 2d 965, 968 (W.D. Mich. 1999)). *Accord* *Bank of New York v. Heath*, 2001 WL 1771825, *2 (Cook Co. Cir. Ct. Ill. Oct. 26, 2001) (“To find that section 1641(d)(1) provides for [an Illinois] Consumer Fraud Act claim against an assignee would go beyond merely eliminating holder in due course defenses, and would create new rights and claims that did not previously exist. The [Illinois] Consumer Fraud Act is not available as a remedy against an assignee, and there is no authority to suggest that section 1641(d)(1) is intended to create such a remedy.”); *Dowdy v. First Metro. Mortgage Co.*, 2002 WL 745851, *2 (N.D. Ill. 2002) (HOEPA section 1641(d)(1) merely

eliminates holder in due course defense and therefore, does not entitle “plaintiffs to new rights or claims that would not otherwise be cognizable under the law”); *Dash v. FirstPlus Home Loan Trust 1996-2*, 2003 WL 1038355, *10 (M.D.N.C. Mar. 6, 2003) (HOEPA merely eliminates holder in due course defense and “is not intended to bestow any rights upon the borrower nor constitute an independent basis of liability.”).

Neither *Bryant v. Mortgage Capital Resource Corp.*, 197 F. Supp. 2d 1357 (N.D. Ga. 2002), nor *Cooper v. First Gov’t Mortgage Inv. Corp.*, 238 F. Supp. 2d 50 (D.D.C. 2002) – on which Respondent so heavily relies – hold that an assignee is deprived of its personal statute of limitations defense, even though these decisions take an expansive view of the scope of the HOEPA assignee provision.

Moreover, *Williams v. Zed Corp.*, Case No. 02-2045 GV (W.D. Tenn. Aug. 15, 2002) (A227-251) – which Respondent also cites (Respondent’s Brief at 85) – interprets HOEPA section 1641(d)(1) as merely eliminating the holder in due course defense consistent with *Vandenbroeck* and its progeny cited by Relator. *Id.*, slip op. at 19 (“HOEPA does nothing to alter the requirements of Article III standing; rather, it merely eliminates holder in due course defenses for assignees of certain high cost mortgages when the assignee holds the plaintiffs’ loans.”). Indeed, in *Williams*, the plaintiffs argued that HOEPA section 1641(d)(1) placed the assignee defendants “in the shoes” of the originating lender and thus deprived the assignees of any defenses, including their standing defense. The district court rejected this argument and held the plaintiffs lacked standing to sue any assignee defendant that did not hold the plaintiffs’ loans.

The same argument – that assignee defendants do not possess any defenses distinct from the defenses available to the lender – has been repeatedly rejected by federal courts across the country in second mortgage cases filed by affiliated Plaintiffs’ counsel. See Dash, 2003 WL 1038355, at *10; *Berry v. GMAC-Residential Funding Corp.*, 2002 U.S. Dist. Lexis 15362, *35-36 (W.D. Tenn. July 31, 2002); *Brooks v. Terra Funding, Inc.*, 2002 U.S. Dist. Lexis 15363, *39-40 (W.D. Tenn. July 31, 2002); *Frazier v. Preferred Credit*, 2002 WL 31039856, *9 (W.D. Tenn. July 31, 2002); *Street v. PSB Lending Corp.*, 2002 U.S. Dist. Lexis 15365, *50-51 (W.D. Tenn. July 31, 2002); *Mull v. Alliance Mortgage Banking Corp.*, 219 F. Supp. 2d 895 (W.D. Tenn. 2002); *Williams v. FirstPlus Home Loan Trust 1996-2*, 209 F.R.D. 404 (W.D. Tenn. July 9, 2002).

Section 1641(d)(1) says nothing about what statute of limitations applies to claims against an assignee in state court, and in fact, under HOEPA, the statute of limitations applicable to a claim based on the federal Act is *one* year. 15 U.S.C. § 1640(e). Accordingly, there is nothing untoward about a three-year statute of limitations applying to a state law claim.

Respondent’s argument effectively asks this Court to interpret HOEPA section 1641(d)(1) as reviving state law claims against Relator that are otherwise time-barred, thus creating new rights of relief. This is contrary to the weight of recent authority interpreting that federal statute. E.g., *Baker*, 2001 U.S. Dist. Lexis 24320, at *7; *Vandenbroeck*, 53 F. Supp. 2d at 968; *Heath*, 2001 WL 1771825, at *2; *Dowdy*, 2002 WL 745851, at *2; *Dash*, 2003 WL 1038355, at *10.

Respondent's assertion that *Miller v. Pacific Shore Funding*, 224 F. Supp. 2d 977 (D. Md. 2002) stands for the proposition that the "period of limitation applicable to claims against residential second mortgage lender governs claims against assignee alleged to be derivatively liable for lenders' acts under HOEPA" is a gross distortion of the court's statute of limitations holding. (Respondent's Brief at 53-54) The *Miller* court held that the plaintiffs' SMLA claims against a mortgage company were barred by the general **three-year** state statute of limitations and, therefore, so were the claims against the assignee of the mortgage. There was no argument by the plaintiffs that the mortgage lender was covered by a special or different statute of limitations. *Id.* at 985. The *Miller* holding plainly does not support the converse, *i.e.*, that if claims against a mortgage company are not time-barred, neither are claims against subsequently added assignees. *Id.*

Regardless of the validity of their dubious derivative liability theory as an abstract matter, Plaintiffs are also judicially estopped from relying on HOEPA in an attempt to create derivative liability, because they affirmatively *denied* making any claim against assignee defendants based on HOEPA in successfully moving to remand this case to State Court. (A158) ("[HOEPA] is not an element, substantial or otherwise, to the Bakers' state law claims, but **serves only to do away with the holder in due course defense**") (emphasis added). Plaintiffs ignore, or seek to minimize, this prior representation now. But they cannot reject and embrace the federal Act at whim.

Finally, Respondent argues Plaintiffs' claims against Relator are not barred because Relator is supposedly the "alter ego" of Century Financial. (Respondent's Brief

at 54) There is not a shred of evidence that Relator is the alter ego of Century Financial. In fact, Plaintiffs have not alleged *any* relationship between Century Financial and Relator other than sale of loans, let alone any common ownership or control, or parent-subsidary relationship.³

IV. Century Financial Is Not A “Moneyed Corporation.”

Since there is no merit to Respondent’s argument that Relator is “derivatively” bound by the statute of limitations applicable to Century Financial, whether the three-year or six-year statute is applicable to Century Financial is irrelevant. However, Century Financial also is not a “moneyed corporation,” and section 516.420 does not apply to it either.

First, there is no evidence Century Financial is authorized by law to make insurance. (A113-114, Exhibit 5 at ¶¶ 1-12; A93-A111, Exhibit 4). As was the case with Relator, Respondent makes no argument to the contrary.

Second, there is no evidence Century Financial makes loans “upon deposits or pledges.” (A93-A111, Exhibit 4). Century Financial makes loans secured by mortgages or deeds of trust on real property. However, a mortgage or deed of trust – a security interest in real property – is distinct from a pledge, which is a possessory security interest in personal or intangible property. See *Sansone v. Sansone*, 586 S.W.2d 87, 89-90 (Mo. App. E.D. 1979). A mortgage also is distinguishable from a loan *upon a deposit*, which

³ Respondent also refers to previous litigation between Century Financial and Master Financial, Inc., but Relator was not a party to this prior litigation.

is a loan entered into by a bank and a depositor, in which the depositor's account is security for the loan. *Brown v. Maguire's Real Estate Agency*, 121 S.W.2d 754, 760 (Mo. App. 1938).

Respondent asserts that "Relator fails to offer any explanation as to why a distinction should be made between a 'mortgage' and a 'pledge' or 'deposit' for purposes of defining a 'moneyed corporation under § 516.420 RSMo." (Respondent's Brief at 33). The explanation, however, is straightforward: The *Walton Construction* court made the distinction in defining a "moneyed corporation." The court did not define the term as any corporation which simply lends money. The court defined the term as a "corporation having banking powers, or having the power to make loans upon pledges or deposits" *Walton Construction*, 984 S.W.2d at 156. Moreover, the *Walton Construction* court's definition must be strictly construed because "statutes of limitations are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within a claimed exception." *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo. banc 1995). As the Court stated in *Baron v. Kurn*, 164 S.W.2d 310, 317 (Mo. 1942):

It has often been pointed out that statutes of limitations rest upon reasons of sound public policy in that they tend to promote the peace and welfare of society, safeguard against fraud and oppression and compel the settlement of claims within a reasonable period after their origin and while the evidence remains fresh in the memory of the witnesses.

Id.

Third, Century Financial is not a bank and is not subject to banking laws so as to imbue it with “banking powers.” Respondent does not dispute that Century Financial is not chartered as a state or federal bank. Rather, Respondent reasoned that making mortgage loans amounts to a “banking power” because mortgage lenders loan money to borrowers, and banks also are independently authorized today to make loans to borrowers. Again, if this argument were accepted, all corporations would have “banking powers” because Missouri law authorizes any corporation to loan money secured by real estate. See Section 351.385 (“Each corporation shall have power. . . (8) to invest its surplus funds . . . and to lend money and take and hold real . . . property as security for payment of funds so invested or loaned.”). Merely by engaging in an activity that may also be engaged in by a bank does not transform a mortgage lender into a bank, or convey “banking powers.”

ARGUMENTS IN REPLY TO RESPONDENT’S POINT II

V. Plaintiffs’ Untimely Claims Are Not Saved By *American Pipe* Tolling.

Respondent alternatively argues that the limitations period was “tolled” by the filing of the original Petition asserting an alleged defendant class. (Respondent’s Brief at 66).

Although “the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action,” *American Pipe and Constr. Co. v.*

Utah, 414 U.S. 538, 553 (1974), that tolling doctrine applies **only** to claims against the parties named as defendants in the original petition:

[T]his tolling doctrine can only be applied to defendants as of the time they were added as party defendants in one of the complaints filed by plaintiffs.

Thus, for example, we hold that the statute of limitations was not tolled for mortgagors of [originator] until it was added as a defendant in the second amended complaint Otherwise, defendants would be required to defend against actions of which they had no knowledge whatsoever until after the statute of limitations had run.

Chevalier v. Baird Sav. Ass'n, 72 F.R.D. 140, 155 (E.D. Pa. 1976) (emphasis added).

Contrary to Respondent's characterization, *Chevalier* has not been "universally rejected." (Respondent's Brief at 69). Rather, *Chevalier* represents the majority and better-reasoned rule. E.g., *Arneil v. Ramsey*, 550 F.2d 774, 782 n.10 (2d Cir. 1977) ("[p]laintiffs contend that the statute was tolled as to all defendants. However, nothing in *American Pipe* suggests that the statute be suspended from the running in favor of a person not named as a defendant in the class suit, and we decline to extend the rule. A different conclusion would not comport with reason"); *McDermott v. Mercury Capital Serv., Inc.*, 1996 U.S. Dist. Lexis 22077, *7-8 (N.D. Ga. May 2, 1996) ("[s]everal courts have specifically held that the filing of a class action complaint does not toll the statute of limitations against unnamed defendants who are added later"); *Cullen v. Margiotta*, 811 F.2d 698, 726 (2d Cir. 1976) (tolling is "inapplicable to persons who were not defendants, since commencement of a suit against others is insufficient to give a

nondefendant notice of the assertion of claims against him”); *Mott v. R.G. Dickenson & Co.*, 1993 U.S. Dist. Lexis 3047, *15 (D. Kan. Feb. 24, 1993).

In *Appleton Elec. Co. v. Graves Truck Line, Inc.*, 635 F.2d 603, 610 (7th Cir. 1980), which Respondent cites, the court addressed a different question – whether the statute of limitations was tolled where a class of defendants was certified *before* the statute of limitations ran. *Id.* at 4, 12, 16-17 (defendant class certified February 25, 1972 before statute of limitations ran December 21, 1972). That court held that under those circumstances the statute of limitations was tolled from the time the defendant class was instituted until the putative defendant class members had the opportunity to opt out. *Id.* at 16-17. To the extent that Respondent argues that *In re Activision Sec. Litigation*, 1986 WL 15339, *3 (N.D. Cal. Oct. 20, 1986) or *Meadows v. Pacific Inland Sec. Corp.*, 36 F. Supp. 2d 1240 (S.D. Cal. 1999) support tolling here, Respondent is mistaken. Both cases required a showing that the unnamed defendant had notice of the plaintiffs’ claims. Plaintiffs offered no evidence in this case that Relator had such notice, despite their opportunity to take such discovery.

Here, in contrast, the statute of limitations ran *years* ago and no motion to certify a defendant class has even been filed. Moreover, in this case, Plaintiffs have sought to rejoin more than 35 assignee defendants – previously dismissed because the Plaintiffs lacked standing to sue them – instead of prosecuting the supposed “defendant class allegations.”

To allow Plaintiffs to toll the limitations period against unnamed defendants merely by asserting defendant class *allegations* will saddle the Missouri courts with

untimely class claims for years to come and make Missouri a magnet for plaintiffs' class action lawyers. Therefore, this Court should hold that the mere filing of the original Petition by the Bakers cannot and did not toll claims against the 1998-1 Trust, which was not named as a defendant until the First Amended Petition was filed on July 11, 2001. (A1-A62, Exhibit 1).

VI. Plaintiffs' Untimely Claims Are Not Saved By The Doctrine Of Relation Back.

Respondent also attempts to invoke the "relation back" doctrine. This argument has been waived and, even if it were not, lacks any basis under Missouri law.

Since Plaintiffs did not make this argument to the trial court, it is not appropriately first raised here. See, e.g., *State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 129 (Mo. banc 2000).

However, even if the Court chooses to consider this relation back argument, subsequent petitions do not relate back to the filing of the original petition, under Missouri law, where they only serve to add additional defendants (as opposed to correcting misidentified parties). Mo. Sup. Ct. R. 55.33(c); *Windscheffel v. Benoit*, 646 S.W.2d 354, 357 (Mo. banc 1983) (relation back unavailable where plaintiff added new parties); *Goodkin v. 8182 Maryland Assoc. Ltd. Partnership*, 80 S.W.3d 484, 488-89 (Mo. App. E.D. 2002) ("A mistake in failing to add a party defendant does not trigger relation-back."); *Hoey v. St. Luke's Episcopal Presbyterian Hosp.*, 713 S.W.2d 636, 638 (Mo. App. E.D. 1986) (dismissal based on the statute of limitations upheld because addition of new defendant did not relate back).

The fact Plaintiffs named “John Doe” defendants does not alter the analysis. In *Schultz by Schultz v. Romanace*, 906 S.W.2d 393, 394 (Mo. App. S.D. 1995), the Court of Appeals specifically rejected plaintiffs’ argument that naming two new defendants was merely a correction of “John/Jane Doe” names in the original petition and that the first amended petition therefore related back to the original. *Id.* at 395-96. The court explained that replacing “John Doe” defendants is not the same as replacing misnamed defendants, but is instead akin to adding new parties. *Id.* Significantly, the court noted that the defendants were not substituted for the “John Doe” defendants as their names were added with no deletion of the fictitious defendants in the original complaint. *Id.*

The same is true here. Plaintiffs added the Relator as a *new* defendant, not as a replacement for a misnamed defendant. Therefore, Plaintiffs’ claims against the Relator cannot relate back to the filing of the original Petition, and all claims against the Relator are therefore time-barred.

VII. Plaintiffs’ Claims Are Not Continuing Violations.

Finally, Respondent points to the “continuing violation” doctrine, and asserts that Plaintiffs’ claims are timely under that theory. Again, Respondent cannot rely on this doctrine to salvage Plaintiffs’ time-barred claims. Plaintiffs each allege in the Second Amended Petition that at *origination*, Century charged them certain “fees and costs, each of which was an illegal settlement charge, in violation of Missouri’s Second Mortgage Loan Act (§408.231 *et. seq.* MO. REV. STAT.).” (A63-A87, Exhibit 2 at ¶ 53 (Bakers), ¶ 57 (Coxes), and ¶ 61 (Springers)). Respondent now argues, however, that Plaintiffs’ claims are “continuing” because the 1998-1 Trust continues to “charge” and “receive” the

allegedly illegal fees that were charged to the borrowers at origination. In other words, Respondent argues in essence that no limitations will ever apply to Plaintiffs' claims.

Yet, a claim accrues when the damage resulting from an alleged wrong is "sustained and is capable of ascertainment." Section 516.100. The statute of limitations therefore begins to run when the plaintiff could have first maintained the action to a successful result. *Modern Tractor & Supply Co. v. Leo Journagan Constr. Co., Inc.*, 863 S.W.2d 949, 952 (Mo. App. S.D. 1993). Stated differently, the claim accrues when "a plaintiff with a recognized legal theory of recovery sustains compensable damages." *Goodkin v. 8182 Maryland Assoc. Ltd. Partnership*, 80 S.W.3d 484, 488 (Mo. App. E.D. 2002).

Respondent's reliance on *Davis v. Laclede Gas Co.*, 603 S.W.2d 554 (Mo. banc 1980) is misplaced. While the *Davis* court held the defendant committed a continuous tort, it specifically limited its ruling to the "peculiar and particular circumstances of this case." Courts have not applied the *Davis* rule of law to cases where the plaintiff has pled continuing and repeated damages or where the wrong is of such a character that all of the damages, past and future, are capable of ascertainment in a single action. See *Modern Tractor*, 868 S.W.2d at 953; *Lato v. Concord Homes, Inc.*, 659 S.W.2d 593, 595 (Mo. App. E.D. 1983). Indeed, the Court stated in *Davis*:

We have concluded that the following rule of law should be applied in the peculiar and particular circumstances of this case: **if the wrong done is of such a character that it may be said that all of the damages, past and future, are capable of ascertainment in a single action so that the entire**

damage accrues in the first instance, the statute of limitation begins to run from that time. If, on the other hand, the wrong may be said to continue from day to day, and to create a fresh injury from day to day, and the wrong is capable of being terminated, a right of action exists for the damages suffered within the statutory period immediately preceding suit.

Davis v. Laclede Gas Co., 603 S.W.2d at 556 (emphasis added). Under the *Davis* rule, Plaintiffs' claims are not continuing, since all of the damages, past and future, were capable of ascertainment at the loan origination date.

In a class action suit involving the Maryland Secondary Mortgage Loan Law, the class representatives made the same kind of continuing violation argument. *Miller v. Pacific Shore Funding*, 224 F. Supp. 2d at 9. The United States District Court, District of Maryland flatly rejected it:

The argument is ingenious, but flawed. The apparently punctuated charging, receipt and collection are no more than the lingering, ongoing, continuing aspects of a unitary action initiated more than three years ago. If, as [plaintiff] alleges, that action violates the SMLL, the violation has inflicted a single monetary injury whose amount increases steadily over time. "The wrong that continues over time," however, is "different from a wrong which comes into existence or becomes known only after a passage of time." More than three years before filing his suit, at the closing of the loan, [plaintiff] had sufficient knowledge of circumstances indicating he might have been harmed. The allegedly illegal fees were itemized on the

face of loan documents he signed on that date. The continuing charging, collecting, and receiving of those fees by the lender or its assignees do not continuously renew the accrual of his cause of action. His claims are time-barred as a matter of law and must, therefore, be dismissed.

Id. (citation omitted). See also *Faircloth*, 2003 WL 1232825 at *5-6 (rejecting plaintiffs’ “continuous violation” argument and holding that statute of limitations began to run upon loan closing); *Dash*, 2003 WL 1038355, at n. 10.

Here, the allegedly improper fees and costs and all future damages flowing therefrom were sustained and capable of ascertainment on the date each loan was closed. Plaintiffs acknowledge the complained-of fees and costs were incurred by each Plaintiff at the moment that they executed their loan documents and agreed to be bound by the terms contained therein:

The [Plaintiffs] ***incurred these Origination Fees and closing costs and fees when the loan was funded*** by financing such over the life of the loan, as evidenced by the fact that such charges were included in the principal balance of the note.

(A63-A87, Exhibit 2 at ¶ 54 (Bakers), ¶ 58 (Coxes), and ¶62 (Springers)) (emphasis added). (Accord Respondent’s Brief at p. 7, ¶11).

In short, Plaintiffs’ right to bring suit was triggered by the execution of their respective loan documents at closing, when they actually incurred and were charged the allegedly improper fees and costs. It is this right to bring an action that triggers the statute of limitations. *Ryan v. Spiegelhalter*, 64 S.W.3d 302, 309 (Mo. banc 2002).

Because all of Plaintiffs' loans closed more than three years prior to suit being filed against Relator, Plaintiffs' claims are time-barred.

ARGUMENTS IN REPLY TO RESPONDENT'S POINT III

VIII. The Five-Year Statute Of Limitations Under Section 516.120 Does Not Apply

Because The Applicable Statute Of Limitations Is Section 516.130(2).

As a last ditch argument, Respondent contends that if this Court does not conclude the 1998-1 Trust is a "moneyed corporation" or is derivatively liable, then the proper statute of limitations is the five-year period under section 516.120(2). This section 516.120(2) provides for a five-year statute of limitations on "[a]n action upon a liability created by a statute *other than a penalty or forfeiture.*" (emphasis added).

As previously discussed, Plaintiffs' claims, which arise under the SMLA, are claims based *upon* a statute for forfeiture. (A63-A87, Exhibit 2). The Plaintiffs' action, therefore, falls outside the scope of section 516.120(2), since it specifically excludes actions created by a statute for forfeiture. Rather, the applicable statute of limitations is section 516.130(2), which applies to actions upon a statute for a penalty or forfeiture where the action is given to the party aggrieved.

CONCLUSION

For the reasons stated above, the preliminary writ should be made absolute.

Respectfully submitted,

HUSCH & EPPENBERGER, LLC

By: _____
Scott Martin MO Bar #42370
Leonard L. Wagner MO Bar #39783
1200 Main Street, Suite 1700
Kansas City, MO 64105
Telephone: (816) 421-4800
Facsimile: (816) 421-0596

David Sturgeon-Garcia
Reed Smith Crosby Heafey LLP
Two Embarcadero Center, Suite 2000
San Francisco, CA 94111
Telephone: (415) 543-8700
Facsimile: (415)391-8269

Attorneys for RELATOR MASTER
FINANCIAL ASSET SECURITIZATION
TRUST 1998-1

CERTIFICATE OF COMPLIANCE

I hereby certify in accordance with Rule 84.06(c) that this brief complies with the limitations in Rule 84.06(b), and that the number of words in this brief, as counted pursuant to Rule 84.06(b) by the word-processing system used to prepare the brief, is 7,611.

I further certify in accordance with Rule 84.06(g) that the floppy disk submitted with this brief has been scanned for viruses and is virus-free.

Leonard L. Wagner, MO Bar #39783
Husch & Eppenberger, LLC
1200 Main Street, Suite 1700
Kansas City, Missouri 64105
Telephone (816) 421-4800
Attorney for Relator Master Financial
Asset Securitization Trust 1998-1

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Reply Brief of Relator and a floppy disk containing a copy of the same were hand-delivered this 14th day of May, 2003, to each of the following:

J. Michael Vaughan, Esq.
Kip D. Richards, Esq.
David M. Skeens, Esq.
Walters, Bender, Strohbahn & Vaughan, P.C.
2500 City Center Square
1100 Main Street
P.O. Box 26188
Kansas City, MO 64196
Telephone: (816) 421-6620
Attorneys for Respondent and Plaintiffs

Mark A. Olthoff, Esq.
Russell Scarritt Jones, Esq.
Shughart Thomson & Kilroy, P.C.
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, MO 64105
Telephone: (816) 421-3355
Attorneys for Wilmington Trust Corporation

and I further certify that a copy and a floppy disk were mailed by U.S. Mail, postage prepaid, this same date to:

Maurice Graham, Esq.
Gray, Ritter & Graham, P.C.
701 Market, Suite 800
St. Louis, MO 63101
Telephone: (314) 241-5620
Attorneys for Respondent and Plaintiffs

Leonard L. Wagner, Attorney for Relator