TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

MISSOURI CONSTITUTION

MISSOURI STATUTES

MISSOURI RULES

FEDERAL STATUTES, RULES, AND REGULATIONS

FEDERAL RULES OF CIVIL PROCEDURE

<u>OTHER STATE STATUTES</u>

<u>OTHER AUTHORITIES</u>

JURISDICTIONAL STATEMENT

Relators' request the Court to review Respondent's decision to deny Relators' Rule 55.27(b) motion for judgment on the pleadings and apply the 6-year statue of limitations set out in § 516.420 RSMo 2000 to the plaintiffs' claims in this case. Although the Court ordinarily should not review by means of a remedial writ a ruling of the type at issue here, since it constitutes a ruling on a question of law and does not amount to an act or decision in excess of jurisdiction, State ex rel. Morasch v. Kimberlain, 654 S.W.2d 889 (Mo. banc 1986), Respondent agrees that review by a writ may be appropriate in this case given the nature of this action as a class action, the number of similar class actions pending before the Missouri courts, and the fact that the Sixteenth Judicial Circuit wrongly decided the limitations defense that Relators raise, first in McLean v. First Horizon Home Loan Corp. (Division 16), and again in Schwartz v. Bann-Cor Mortgage (Division 15). See Mo. Const., art.4, § 4.1; State ex rel. Noranda Aluminum, Inc. v. Rains, 706 S.W.2d 861 (Mo. banc 1986).[1]

[1] On March 31, 2003, after this Court issued its writ or prohibition, the circuit court in McLean amended its decision to apply a 3-year statute of limitations and held that the mortgage lender in that case was a "moneyed corporation" and that the plaintiffs' statutory claims were therefore subject to the 6-year statute of limitations in § 516.420 RSMo. (A247-48) The decision in McLean is now consistent with the decisions of the Seventh and Twenty-Second Judicial Circuits in this and the Baker, Gilmor and Turner cases.

STATEMENT OF RELATED CASE

There is another case pending before the Court in which the same or substantially the same issues have been raised, namely, Baker v. Century Financial Group, Inc., et al., SC85081. The disposition of that case may affect or control the Court's decision in this case.

INTRODUCTION

The Court should quash its preliminary order of prohibition. This is a lawsuit against a moneylender, SMC Lending, Inc., and the "secondary market" assignees that purchased, sold and/or profited from the residential second mortgage loans that SMC Lending originated and made. Relators are two such "secondary market" assignees, having purchased and acquired a number of second mortgage loans that SMC Lending made to the homeowners of this state. Relators, through their bank trustees (U.S. Bank National Association and Wilmington Trust Company), used the loans, along with numerous others, as collateral to back a series of asset-backed notes that Relators sold to the public. Relators, through their loan servicing agent and U.S. Bank National Association, then collected the monthly loan payments due on the second mortgage home loans and disbursed the money to their investors.

The above activities define the nature of the businesses in which SMC Lending and Relators are singularly engaged. Such activities -- the making, buying and selling of residential loans, the collection and disbursement of loan proceeds, and the use of such loans as collateral to back public notes and securities issued for purposes of investment -- also epitomize exactly what it is that a "moneyed corporation" is and does. The businesses involved in this case are not construction companies or manufacturing enterprises. They are instead financial concerns: a moneylender and two statutory trusts engaged exclusively in the business of lending, selling and profiting from money, and the documents giving rise to an obligation to pay money. Money is the stock in trade of both SMC Lending and Relators, not building materials or goods. Both SMC Lending and Relators use money to make a money profit. Both SMC Lending and Relators are unquestionably "moneyed corporations."

With undisputed facts such as these, Respondent correctly decided that SMC Lending and its assignees, including Relators, were "moneyed corporations" and applied the 6-year statute set out in § 516.420 RSMo 2000. As Respondent found on the record before him in the Baker case, "[The] real purpose … the bottom line purpose [of SMC Lending and Relators] is to … handle money and handle loans." (Respondent's Suggestions in Opposition to Petition Writ of Prohibition "SIO-PWP," Ex. 14 at 20-21)[2] Respondent's

---

[2]Respondent did not officially state his conclusion that statutory trusts like Relators could be "moneyed corporations" under § 516.420 RSMo until December 19, 2002, when he denied the movant-trust's motion for summary judgment in Baker v. Century Financial Group, Inc. (SIO-PWP, Ex. 13; Ex. 14 at 22-23) Here, Respondent denied Relators' Rule 55.27(b) motion for judgment on the pleadings on the grounds that SMC Lending was a "moneyed corporation." As such, the 6-year statute applied to the claims against SMC Lending. The 6-year statute likewise applied to Relators since they "stand in the shoes" of and cannot raise a limitations defense different from that which is available to SMC

finding was absolutely correct and that decision should stand. Accordingly, the Court should quash its preliminary order of prohibition and hold that the plaintiffs' claims under the Missouri Second Mortgage Loans Act and § 408.562 RSMo are governed by § 516.420 RSMo, Missouri's 6-year statute of limitations.

Even if it determines that Relators are not "moneyed corporations" for purposes of § 516.420 RSMo, the Court should still quash its preliminary order of prohibition. So long as the Court determines that SMC Lending was a "moneyed corporation," the 6-year statute of limitations applicable to the plaintiffs' claims against SMC Lending will also apply to Relators. The claims are the same. As the purchasers and holders of the loans that the plaintiffs allege SMC Lending made in violation of Missouri law, Relators "stand in the shoes" of SMC Lending, and thus, cannot raise a limitations defense different from that which is available to SMC Lending. Relators, in other words, are derivatively liable to the plaintiffs for the unlawful loans that SMC Lending made pursuant to, among other things, the rule of assignee liability enacted as a part of the Home Ownership and Equity Protection Act ("HOEPA"), which provides in part: "any person who purchases or is otherwise assigned ... [a high interest loan] shall be subject to all claims and defenses with respect to that mortgage that the consumer could assert against the creditor of the mortgage." 15 U.S.C. § 1641(d).

In addition, Respondent submits that no matter what statute of limitations it decides to apply, the Court should still quash its preliminary order of prohibition and

---

Lending. (See infra, Point I.B.3)

allow the case to proceed for any or all of these reasons:

1. The plaintiffs' claims against Relators were timely commenced because the plaintiffs timely filed suit against SMC Lending.

2. The plaintiffs' claims against Relators were timely commenced because the SMLA, § 408.233 RSMo, makes it unlawful for any person, firm or corporation to "charge, contract for or receive" the interest and excessive or unauthorized fees and closing costs on which the plaintiffs base their claims. Because the record shows that Relators "received" and in many cases continue to receive interest and/or a portion of the allegedly unlawful origination fees and closing costs as a part of each borrower's monthly mortgage payment, the "receipt" of those funds by Relators each month constitutes a new or continuing violation of the SMLA, which triggers the statute of limitations anew.

3. The plaintiffs' claims against Relators were timely commenced since the plaintiffs timely filed suit against U.S. Bank National Association, Relators' bank trustee, on September 1, 2000.

4. The plaintiffs' claims against Relators were timely commenced since the plaintiffs' claims against Relators "relate back" to the filing of the lawsuit against U.S. Bank <u>Trust</u> National Association on June 29, 2000 and/or against U.S. Bank National Association on September 1, 2000.

5. The plaintiffs' claims against Relators were timely commenced because the plaintiffs' filed suit against a "defendant class" to which Relators belong, and thus, the statute of limitations was tolled on June 29, 2000, when the lawsuit was first filed.

Finally, Respondent submits in the alternative that, should the Court conclude that neither SMC Lending nor Relators are "moneyed corporations," and that the 6-year statute of limitations in § 516.420 RSMo does not apply, the Court should nevertheless determine whether the 5-year statute of limitations in § 516.120(2) RSMo, rather than the 3-year statute in § 516.130(2) RSMo, governs the plaintiffs' claims in this case on the grounds that the plaintiffs' claims under the Missouri Second Mortgage Loans Act and § 408.562 RSMo constitute an action to enforce a statutory liability "other than a penalty or forfeiture."

STATEMENT OF FACTS

Relators have omitted from their Statement of Facts a number of facts material to the questions before the Court. As a result, Respondent is compelled to submit the following Statement of Facts, which is based primarily on the plaintiffs' Fourth Amended Petition (A17-38), the well-pled allegations and substance of which should be presumed as true for purposes of this proceeding:

The Plaintiff Borrowers

1. The named plaintiffs in this case are Missouri homeowners who obtained a second mortgage loan, secured by their homes, from SMC Lending, Inc., a California-based mortgage lender. (A17-38, ¶¶1, 22-23, 26-42)

2. Plaintiff Danita Couch ("Couch") obtained her loan from SMC Lending on or about September 10, 1997. The loan was for $30,000.00, payable over 25 years at 15.99% interest. In exchange, SMC Lending took a second mortgage on Ms. Couch's home in

Smithville and charged Couch, among other things, a $3,000.00 loan origination fee. (A17-38, ¶¶31-34)

3. Although the interest rate for the Couch loan was 15.99%, the Annual Percentage Rate (APR) was 17.895% (See A17-38, ¶33; A76, 81)

4. Couch has paid and continues to pay the monthly installments due on her second mortgage loan. (A17-38, ¶¶44, 59; see IRS Form 1098s and monthly invoices included within SIO-PWP, Ex. 1; also A85-86)

5. Plaintiffs David and Nancy Beebe (the "Beebes") obtained their loan from SMC Lending on or about November 14, 1997. The loan was for $33,750.00, payable over 25 years at 12.5% interest. In exchange, SMC Lending took a second mortgage on the Beebes' home in Independence and charged the Beebes, among other things, a $3,375.00 loan origination fee. (A17-38, ¶¶35-38)

6. Although the annual interest rate for the Beebe loan was 12.5%, the APR was 14.101% (See A17-38, ¶37; A87, 92)

7. The Beebes have paid and continue to pay the monthly installments due on their second mortgage loan. (A1-22, ¶¶44, 59; see IRS Form 1098s and monthly invoices included within SIO-PWP, Ex. 2; also A96-97)

8. The origination fees and closing costs on which Couch and the Beebes base their claims were incurred at the time the loans were made and became a part of the principal loan amount. (A1-22, ¶30, 34, 38) The origination fees and closing costs were identified as a part of the "prepaid finance charges" on the Couch and Beebe loan documents. (Id., ¶¶33, 37; A79, 80, 90, 91)

Defendant SMC Lending, Inc.

9. Defendant SMC Lending, Inc. made each of the residential second mortgage loans at issue in this case. (A17-38, ¶¶23, 26-42)

10. It appears that from approximately April 25, 1997 through March 31, 2002, SMC Lending operated as a HUD-approved lender and mortgagee and that, although subject to regulation by the Missouri Division of Finance, SMC Lending was exempt from state licensing requirements as a "mortgage banker" pursuant to Chapter 443 RSMo (A282-83); see 67 Fed. Reg. 44,231, 44,232 (July 1, 2002) (reflecting termination of HUD status) (A284-85, 287)

11. SMC Lending was in the business of making second mortgage home loans. SMC Lending loaned money to Couch and the Beebes and no fewer than 140 <u>other</u> Missouri homeowners in exchange for certain fees and a second mortgage interest in the residential Missouri real estate they owned. (A17-38, ¶¶1, 23, 26-42, 47) The other Missouri loans violated the SMLA in the same way that the Couch and Beebe loans violated the SMLA. (A17-38, ¶¶26-30, 44, 47, 48-49; <u>see</u>, SIO-PWP, Ex. 9)

12. Relators did not dispute the facts set out in the preceding paragraph or argue that SMC Lending was not a "moneyed corporation" in its motion for judgment on the pleadings. (A147-150, 168-172) Relators only argued that <u>they</u> were not "moneyed corporations." (Id. at 169)

13. After making each of the loans at issue in this case in violation of the SMLA, SMC Lending sold and assigned the loans to one of several entities on a "secondary market." (A17-38, ¶¶1, 2, 7, 8, 11, 12, 19, 21, 24, 58; SIO-PWP, Ex. 10) Relators are but

two of the "secondary market" assignees that purchased unlawful loans made by SMC Lending. (Id.; Petition for Writ of Prohibition, ¶¶1-2)

Relators

14. Relators purchased and hold several of the approximately 142 residential second mortgage loans that SMC Lending made to the plaintiff class, including the Couch and Beebe loans. (SIO-PWP, Ex's 10, 11)

15. Trust 1998-1 purchased the Couch loan on February 11, 1998. (A154) Trust 1998-2 purchased the Beebe loan on March 12, 1998. (A162) Neither Relator holds the loan made to Plaintiff Shirley Morrow. (A154, 162)

16. Relators are subject to U.S. Department of Treasury Regulations and, under the operative trust agreements, Relators have the power, among other things, to: (a) purchase, acquire, hold and collect principal and interest on the Home Loans and other assets of the trusts and the proceeds therefrom; (b) issue certain notes, certificates and other instruments representing the beneficial interest in the "Trust Estate" (i.e., "Securities" and the "Residual Interest"); (c) make payments on Securities and in respect of the Residual Interest; (d) purchase the "Initial Home Loans" having an aggregate principal balance of approximately $875 million, collectively, pursuant to their Sales and Servicing Agreements; and (e) purchase Subsequent Home Loans from a "Pre-Funding Account." (See A98-109; A110-113; SIO-PWP, Ex. 23 at 11; Ex. 24 at 11; Ex.'s 25-28; Trust Agreements [Ex.'s 27-28] Sec. 2.03)

17. Relators are business or "statutory" trusts, organized and existing pursuant to Delaware statutory law, namely 12 Del. C. §§ 3801 et seq. (See Petition for Writ of

Prohibition, ¶¶1-2)

18. Relators, through their bank trustees, U.S. Bank National Association and Wilmington Trust Company, used the residential second mortgage loans that Relators purchased on the secondary market as collateral for a series of asset-backed securities that Relators and their trustees sold to the public. (Petition for Writ of Prohibition, ¶¶1-2; A110-123; also SIO-PWP, Ex.'s 3-4, 10-11, 22-28)

19. The existence of this "secondary market" and the capital that Relators and their fellow market participants provided to SMC Lending, by agreeing to repurchase the loans that it originated, enabled SMC Lending and other similar lenders to make the second mortgage loans in the first place. (See A17-38, ¶¶1-2, 19, 21, 24, 26-30, 44-46, 48-49, 53-64; S. Rep. No. 169, 103d Cong., 2d Sess. 5 (1994) *reprinted in* 1994 U.S.C.C.A.N. 1881, 1912).

20. After acquiring the loans, Relators, through their loan servicing agent and U.S. Bank National Association, collected the monthly loan payments due on the second mortgage loans and disbursed the money to their investors. (A110-123; also SIO-PWP, Ex.'s 3-4, 10-11, 22-28)

21. Since acquiring the Couch and Beebe loans, Relators have "received" payments of interest from Ms. Couch and the Beebes, as well as a portion of the pre-paid origination fees and closing costs that were financed as a part of the principal loan amounts. (A17-38, ¶¶24, 30, 34, 38, 44, 48, 51-64; A85-86, 96-97; also IRS Form 1098's and monthly invoices included within SIO-PWP, Ex.'s 1-2)

The Claims to Enforce a Statutory Liability

22. The plaintiffs allege that their loans from SMC Lending violated Missouri law, specifically the Missouri Second Mortgage Loans Act, §§ 408.231, et seq. RSMo. (the "SMLA") because the plaintiffs were charged and paid excessive "loan origination" fees and/or certain other closing costs and fees that the SMLA, § 408.233 RSMo, prohibits any person, firm or corporation from "directly or indirectly charg[ing], contract[ing] for or receiv[ing] in connection with any second mortgage loan." (A17-38, ¶¶26-42, 53-55 (quoting § 408.233.1 RSMo))

23. The plaintiffs, individually and on behalf of all other similarly situated and similarly aggrieved Missouri homeowners, sued (1) SMC Lending, as the lender and maker of all the second mortgage loans at issue; (2) the assignees of SMC Lending, including Relators, which voluntarily purchased and acquired the unlawful second mortgage loans from SMC Lending or an intervening assignee; and (3) the trustees of any such "trust-assignees" like Relators which acquired the loans (e.g., U.S. Bank National Association and Wilmington Trust Company, the bank trustees of Relators). (A17-38, ¶¶2, 7, 8, 11, 12, 19, 21, 24, 58-63)

24. The plaintiffs' claims against SMC Lending and its assignees, including Relators, are premised on the violation of the SMLA and are brought pursuant to the SMLA and Missouri law, specifically §§ 408.233.1, 408.236, 408.562 RSMo. 2000. (A17-38; ¶¶43-71)

25. The plaintiffs seek to recover for themselves and for the plaintiff class they represent all of the allegedly excessive and/or unauthorized origination fees, closing costs

and interest that they were charged, contracted to pay and paid, a forfeiture of or an order barring any interest not yet due, punitive damages and reasonable attorneys' fees. (Id., ¶¶58-63, Prayer for Relief)

Allegations of Assignee Liability

26. The plaintiffs allege that Relators and the other members of the Defendant Class are the assignees of the unlawful loans made by SMC Lending and that, as "the purchasers and/or assignees and holders of … the notes and deeds of trust given under the [subject loans],"

> [Relators and the other] ASSIGNEE DEFENDANTS (individually, and as a defendant class, …) are liable to PLAINTIFFS and THE [PLAINTIFF CLASS], just as SMC LENDING is liable to PLAINTIFFS and THE SECOND MORTGAGE CLASS.

(A14-15, ¶58)

27. The prospectus for each Relator disclosed that Relators were buying high cost loans (i.e., loans with interest rates greater than 10%) and that the "assignees" of such loans (i.e., Relators) will "<u>generally be subject to all claims ... that the [borrower] could assert against the [lender]</u>." (A101; also SIO-PWP, Ex. 3 at ii, S-4, S-10-11, S-16; Ex. 4 at ii, S-4, S-10-11, S-16)

28. The prospectus for each Relator also disclosed that the high cost loans were <u>consumer</u> loans and that the consumer protection laws of different states would apply:

> GENERAL LEGAL CONSIDERATIONS
>
> <u>Applicable state laws generally regulate interest rates and other charges</u> that

> may be assessed on borrowers, [and] require certain disclosures to borrowers, . . . In addition, most states have other laws, public policies and general principles of equity relating to the protection of consumers and the prevention of unfair and deceptive practices which may apply to the origination, servicing and collection of the Loan Assets.
>
> The Loan Assets may also be subject to federal laws, including:. . . (vii) the Home Ownership and Equity Protection Act ["HOEPA"].

(A106) (emphasis added)

> In addition, substantive requirements are imposed upon lenders in connection with the origination and the servicing of mortgage loans by numerous federal and some state consumer protection laws. These laws include the federal Truth-in-Lending Act, Real Estate Settlement Procedures Act, Equal Credit Opportunity Act, Fair Credit Billing Act, Fair Credit Reporting Act, and related statutes and regulations. These federal laws impose specific statutory liabilities upon lenders who originate mortgage loans and who fail to comply with the provisions of the applicable laws. In some cases, this liability may affect assignees of the Mortgage Loans.

(A107) (emphasis added)

> [The] provisions [HOEPA] impose additional disclosure and other requirements on creditors with respect to non-purchase money mortgage loans with high interest rates or high up-front fees and charges ("covered loans"). In general, mortgage loans within the purview of [HOEPA] have annual percentage rates over 10% greater than the yield on Treasury Securities of comparable maturity and/or fees and points which exceed the greater of 8% of the total loan amount of $400. The provisions of [HOEPA] apply on a mandatory basis to all mortgage loans originated on or after October 1, 1995. These provisions can impose specific statutory liabilities upon creditors who fail to comply with their provisions and may affect the enforceability of the related loans. In addition, any assignee of a creditor would generally be subject to all claims and defenses that the consumer could assert against the creditor, including, without limitation, the right to rescind the mortgage loan. A substantial majority of the loans originated or purchased by the Transferor are covered by [HOEPA].

(A109) (emphasis added)

29. The following written notice accompanied the loans papers that Relators

received with the Couch and Beebe loans:

HOEPA ASSIGNMENT

HOME OWNERSHIP AND EQUITY PROTECTION ACT

> NOTICE: THIS IS A MORTGAGE SUBJECT TO SPECIAL RULES UNDER THE FEDERAL TRUTH-IN-LENDING ACT. <u>PURCHASERS OR ASSIGNEES OF THIS MORTGAGE COULD BE LIABLE FOR ALL CLAIMS AND DEFENSES WITH RESPECT TO THE MORTGAGE THAT THE BORROWER COULD ASSERT AGAINST THE CREDITOR</u>.

(A83, 94) (emphasis added)

Procedural History

30. Plaintiff Danita Couch and Jack T. Chastain, Sr., her father (collectively "Couch")[3] originally commenced this lawsuit on June 29, 2000 against SMC Lending and U.S. Bank <u>Trust</u> National Association. (SIO-PWP, Ex. 5)

31. Couch filed the lawsuit as both a <u>plaintiffs</u> and <u>defendant</u> class action. Couch filed suit both individually and on behalf of a class of putative plaintiffs to whom SMC Lending had made a residential second mortgage loans in violation of the SMLA. (SIO-PWP, Ex. 5, ¶¶1-2, 9-38) In addition, Couch named U.S. Bank <u>Trust</u> National Association in her original petition both individually and as the representative of a "class" of trust and trustee defendants that had purchased and held the allegedly unlawful Missouri loans that SMC Lending made. (Id., ¶¶4, 6, 44)

32. On September 1, 2000 Couch added the bank trustee of Relators, U.S. Bank

[3]Jack Chastain is named as a plaintiff because he co-signed Danita Couch's promissory note. (A17-38, ¶¶3, 31)

National Association, as a defendant along with U.S. Bank Trust National Association via the First Amended Petition. (SIO-PWP, Ex. 6) Couch named U.S. Bank National Association as a defendant both individually and as the representative of the "class" of trust and trustee defendants that had purchased and held the allegedly unlawful Missouri loans of SMC Lending. (Id., ¶¶ 1-2, 7, 8, 21, 40-47)

33. Between August 2000 and November 2001, the defendants removed the case to federal court two (2) times. Each time, the federal court remanded the case to Clay County. (A1-3)

34. On January 3, 2002, Couch filed a Third Amended Petition specifically naming Relators as defendants, together with a number of other business entities deemed to be the holders and assignees of the unlawful loans that SMC Lending made during the relevant period. (A3)

35. On April 8, 2002, the Beebes joined the case as additional plaintiffs via the Fourth Amended Petition.[4] (A17-38)

36. On April 16, 2002, SMC Lending filed its Answer to the Fourth Amended Petition and asserted that the plaintiffs' claims were barred by limitations. (A50, ¶f) SMC Lending did not mention any specific statute. (Id.)

---

[4] Also joining the case on April 8, 2002 as a named plaintiff was Ms. Shirley Morrow, whose loan was made on January 14, 2000. Relators' motion was not directed toward Ms. Morrows' claims. Hence, the claims of Ms. Morrow are not at issue and remain pending.

37. On April 22, 2002, Relators filed a Joint Answer to the Fourth Amended Petition and asserted that the plaintiffs' claims were barred by limitations. (A72, ¶11) Relators did not mention any specific statute. (Id.)

38. On March 6, 2002, the plaintiffs filed their "Motion for Order Determining that this Action Should be Maintained as a Plaintiffs Class Action" pursuant to Mo. Rule 52.08. (A4, 124-131)

39. On August 5, 2002, Relators filed their Suggestions in Opposition to the Plaintiffs' motion to certify a plaintiff class and asserted that § 516.130(2) RSMo governed the plaintiffs' claims and that the definition of the plaintiff class should be limited to a corresponding period of 3 years. (A10, 132, 135-139)

40. On November 12, 2002, the Plaintiffs filed a reply brief in connection with the motion to certify and responded to Relators' arguments. (A13, 140-146)

41. On November 21, 2002, Relators filed their motion for judgment on the pleadings pursuant to Mo. Rule 55.27(b). (A13, 147-151, 168-172) The motion was directed solely to the claims of Danita Couch and the Beebes. (Id.)

42. On December 3, 2002, the plaintiffs filed their "Unopposed Motion for Enlargement of Time," and requested Respondent to extend the deadline for filing suggestions in opposition to Relators' motion for judgment on the pleadings through December 16, 2002. (A187-188)

43. On December 11, 2002, the plaintiffs filed a "Bench Brief Regarding Application of a 6-Year Statute of Limitations" in connection with their Motion to Certify a Plaintiff Class. (A190-200)

44. On December 11, 2002, before hearing any of the arguments on the plaintiffs' Motion to Certify, Respondent advised the parties that he intended to first resolve Relators' motion for judgment on the pleadings. (A231-46) The parties agreed that Respondent could hear and decide the motion first, and could consider the Plaintiffs' Bench Brief Regarding Application of a 6-Year Statute of Limitations in connection with the same. (Id.) After the arguments, Respondent denied Relators' motion, holding that SMC Lending was a "moneyed corporation" for purposes of § 516.420 RSMo and that the plaintiffs' claims against SMC Lending and its assignees, including Relators, were subject to the 6-year statute of limitations. (SIO-PWP, Ex. 12 at 4)[5]

45. On December 11, 2002, Respondent also entered an Order certifying a class of claimant-borrowers comprised of those persons who obtained residential second mortgage loans from SMC Lending and limited the definition of the plaintiff class to a corresponding period of 6 years. (SIO-PWP, Ex. 12 at 18-19)

46. On January 2, 2003, Respondent entered another Order certifying a Class of

---

[5] Section 516.420 RSMo 2000 provides:

"None of the provisions of sections 516.380 to 516.420 shall apply to suits against moneyed corporations or against the directors or stockholders thereof, to recover any penalty or forfeiture imposed, or to enforce any liability created by the act of incorporation or any other law; but all such suits shall be brought within six years after the discovery by the aggrieved party of the facts upon which such penalty or forfeiture attached, or by which such liability was created."

claimant-borrowers in a second mortgage case similar to this one, Baker v. Century Financial Group, Inc. (SIO-PWP, Ex. 15) Respondent concluded that the mortgage lender in that case was a "moneyed corporation" for purposes of § 516.420 RSMo and limited the definition of the plaintiff class to a corresponding period of 6 years. (Id.)

47. On January 2, 2003, Respondent entered another Order certifying a Class of claimant-borrowers in a second mortgage case similar to this one, Gilmor v. Preferred Credit Corporation. (SIO-PWP, Ex. 16) Respondent concluded that the mortgage lender in that case was a "moneyed corporation" for purposes of § 516.420 RSMo and limited the definition of the plaintiff class to a corresponding period of 6 years. (Id.)

48. On January 19, 2002, Respondent denied a motion for summary judgment filed by Defendant Master Financial Asset Securitization Trust 1998-1 in Baker v. Century Financial Group, Inc., concluding that both the mortgage lender and the statutory trust that acquired the named plaintiffs' second mortgage loans were "moneyed corporations" for purposes of § 516.420 RSMo and that the 6-year statue of limitations applied. (SIO-PWP, Ex.'s 13; 14 at 21-22)

Other Decisions on the Limitations Issue

49. To date, no less than three Missouri circuit courts have addressed the limitations issue that this case presents; and courts in all three circuit courts have concluded that that the 6-year statute in § 516.420 RSMo rather than the 3-year statute in § 516.130(2) applies to statutory claims like those which the plaintiffs are asserting under the SMLA and § 408.562 RSMo.

50. Although as Relators note, Judge Marco Roldan, 16th Judicial Circuit

(Jackson County), initially applied a 3-year statute of limitations in McLean v. First Horizon Home Loan Corp., No. 00CV228530, Judge Roldan later amended that decision and ruled on March 31, 2003 that the mortgage lender in McLean is a "moneyed corporation" and that the 6-year statute of limitations set out in § 516.420 RSMo governs the plaintiffs' claims. (A247-48)

51. In addition, Judge Timothy J. Wilson, 22nd Judicial Circuit (St. Louis City), in Turner v. Ditech Funding Corp., No. 012-1314, has concluded that the mortgage lender in that case is a "moneyed corporation" and that the 6-year statute of limitations in § 516.420 governs the plaintiffs' claims. (SIO-PWP, Ex. 17)

52. Most recently, Judge Preston Dean, 16th Judicial Circuit (Jackson County), ruled on April 8, 2003 in Schwartz v. Bann-Cor Mortgage, No. 00CV226639-01, that the mortgage lender in that case is not a "moneyed corporation" and that the plaintiffs' claims under the SMLA and § 408.562 RSMo are governed by the 3-year statute of limitations in § 516.130(2) RSMo. (A249-251)

POINTS RELIED ON

I.

THE COURT SHOULD QUASH ITS PRELIMINARY ORDER OF PROHIBITION AND HOLD THAT RESPONDENT CORRECTLY DENIED RELATORS' RULE 55.27(B) MOTION FOR JUDGMENT ON THE PLEADINGS BECAUSE THE PLEADINGS SHOW THAT THE 6-YEAR STATUTE OF LIMITATIONS SET OUT IN § 516.420 RSMO GOVERNS PLAINTIFFS' STATUTORY CLAIMS IN THAT THE PLAINTIFFS ARE SEEKING TO "ENFORCE A LIABILITY" AND/OR TO RECOVER A "PENALTY OR FORFEITURE" IMPOSED BY THE SMLA AND § 408.562 RSMO AGAINST AND FROM SMC LENDING, INC., A "MONEYED CORPORATION," AND THE ASSIGNEES OF SMC LENDING, INC., INCLUDING RELATORS, WHICH ARE ALSO "MONEYED CORPORATIONS" FOR PURPOSES OF § 516.420 RSMO 2000

- **Fielder v. Credit Acceptance Corporation, 19 F.Supp.2d 966 (W.D. Mo. 1998)**
- **Division of Labor Standards v. Walton Construction Management Co., Inc., 984 S.W.2d 152 (Mo. App. WD 1998)**
- **§ 516.420 RSMo (2000)**

II.

THE COURT SHOULD QUASH ITS PRELIMINARY ORDER OF PROHIBITION BECAUSE UNDER EITHER A SIX-YEAR OR THREE-YEAR STATUTE OF LIMITATIONS, PLAINTIFFS' CLAIMS ARE TIMELY IN THAT: (A) COMMENCEMENT OF SUIT AGAINST SMC LENDING IN LESS THAN THREE YEARS FROM THE DATE OF THE NAMED PLAINTIFFS' LOANS MAKES SUIT TIMELY AGAINST RELATORS AND ALL OTHER ASSIGNEE DEFENDANTS REGARDLESS OF WHAT LIMITATIONS PERIOD OR ACCRUAL DATE IS APPLIED; (B) THE SMLA MAKES IT ILLEGAL TO HAVE "DIRECTLY OR INDIRECTLY CHARGED, CONTRACTED FOR OR RECEIVED" ANY ILLEGAL FEES AND SO THE LIMITATIONS PERIOD RUNS FROM EACH TIME A BORROWER IS CHARGED OR THE NOTE HOLDER RECEIVES ILLEGAL FEES AND/OR INTEREST AND RELATORS RECEIVED PAYMENT FROM THE NAMED PLAINTIFFS WITHIN THREE YEARS OF THE COMMENCMENT OF SUIT AGAINST RELATORS; (C) SUIT WAS TIMELY FILED AGAINST RELATORS' TRUSTEE AND THUS SUIT IS TIMELY AS TO RELATORS; (D) BRINGING RELATORS INTO THE SUIT ON JANUARY 3, 2002 RELATES BACK TO THE ORIGINAL FILING OF SUIT AGAINST DEFENDANT U.S. BANK TRUST N.A. ON JUNE 29, 2000 OR TO THE ADDITION OF U.S. BANK N.A. AS A DEFENDANT ON SEPTEMBER 1, 2000; AND (E) COMMENCEMENT OF SUIT ON JUNE 29, 2000 AGAINST A

DEFENDANT CLASS TOLLED CLAIMS AGAINST ANY MEMBER OF THAT CLASS, INCLUDING RELATORS.

- **Johnson Development Co. v. First National Bank of St. Louis, 999 S.W.2d 314 (Mo. App. ED 1985)**
- **Davis v. Laclede Gas Co., 603 S.W.2d 554 (Mo. banc 1980)**
- **Appleton Electric Co. v. Graves Truck Line, Inc., 635 F.2d 603 (7th Cir. 1980)**

III.

IN THE ABSENCE OF § 516.420, THE PROPER STATUTE OF LIMITATIONS WOULD NOT BE THE 3-YEAR PERIOD UNDER § 516.130 BUT THE FIVE-YEAR PERIOD UNDER § 516.120(2) BECAUSE IF THE REMEDIES AVAILABLE UNDER THE SMLA ARE NOT PENALTIES OR FORFEITURES BUT ARE REMEDIAL, AS RELATORS HAVE CONTENDED, THEN THE STATUTE IS REMEDIAL AND § 516.120(2) APPLIES.

- **§ 516.420 RSMo 2000**
- **§ 516.120(2) RSMo 2000**
- **34 Mo. Prac. Personal Injury and Tort Handbook § 29.5 (2002 ed.)**

ARGUMENT

The Court should dissolve its preliminary writ of prohibition and allow this case to proceed because:

I.

THE COURT SHOULD QUASH ITS PRELIMINARY ORDER OF PROHIBITION AND HOLD THAT RESPONDENT CORRECTLY DENIED RELATORS' RULE 55.27(B) MOTION FOR JUDGMENT ON THE PLEADINGS BECAUSE THE PLEADINGS SHOW THAT THE 6-YEAR STATUTE OF LIMITATIONS SET OUT IN § 516.420 RSMO GOVERNS PLAINTIFFS' STATUTORY CLAIMS IN THAT THE PLAINTIFFS ARE SEEKING TO "ENFORCE A LIABILITY" AND/OR TO RECOVER A "PENALTY OR FORFEITURE" IMPOSED BY THE SMLA AND § 408.562 RSMO AGAINST AND FROM SMC LENDING, INC., A "MONEYED CORPORATION," AND THE ASSIGNEES OF SMC LENDING, INC., INCLUDING RELATORS, WHICH ARE ALSO "MONEYED CORPORATIONS" FOR PURPOSES OF § 516.420 RSMO 2000

A. STANDARD OF REVIEW

Relators' recitation of the standard of review is incomplete. Although the issue over which of two or more statutes of limitations applies in a case is ordinarily a question of law to be reviewed on appeal *de novo*, a limitations defense may turn on the facts. See Business Men's Assurance Co. of America v. Graham, 984 S.W.2d 501 (Mo. banc 1999). Moreover, the limitations issue that Relators present was asserted in support of a Rule 55.27(b) motion for judgment on the pleadings, which Respondent denied. Hence, the Court should review Respondent's ruling using the standard applicable to such motions. See Yahne v. Pettis County Sheriff Dept., 73 S.W.3d 717, 718 (Mo. App. WD 2002). The standard of review will be important if the Court determines that the record does not support Respondent's conclusion as a matter of law, but that Respondent's decision to deny Relators' motion was nevertheless appropriate given the absence of any significant "merits" discovery on the issue of whether SMC Lending and/or Relators are in fact "moneyed corporations" for purposes of § 516.420 RSMo.

The position of a party moving for judgment on the pleadings is similar to that of a party filing a motion to dismiss under Rule 55.27(a)(6). Madison Block Pharmacy, Inc. v. United States Fidelity & Guaranty Co., 620 S.W.2d 343, 345 (Mo. banc 1981). "The party moving for judgment on the pleadings admits, for purposes of the motion, the truth of all well pleaded facts in the opposing party's pleadings." Id. Consequently, to determine the propriety of Respondent's decision, the Court must review the allegations of the plaintiffs' petition to determine the sufficiency of the facts pleaded therein as a matter of law, assuming all of the facts pleaded to be true and resolving all reasonable inferences arising therefrom in favor of the plaintiffs. Id.; Joseph v. Marriott Intern., Inc., 967 S.W.2d 624, 627 (Mo. App. WD 1998). A motion for judgment on the pleadings should be sustained only when the facts, even if assumed to be true as stated above, conclusively show that the moving party is entitled to judgment as a matter of law. See Madison, 620 S.W.2d at 345. Thus, "[a] motion for judgment on the pleadings should not be sustained where a material issue of fact exists." Id.; Brown v. Scheible, 814 S.W.2d 5, 7 (Mo. App. ED 1991) (emphasis added); Chase Elec. Co. v. Acme Battery Mfg. Co., 798 S.W.2d 204, 210 (Mo. App. ED 1990); Village of Cottleville v. Star Concrete Co., 764 S.W.2d 651, 210 (Mo. App. ED 1988).

B. RESPONDENT CORRECTLY DENIED RELATORS' RULE 55.27(B) MOTION FOR JUDGMENT ON THE PLEADINGS SINCE THE FACTS AS PLED SHOWED THAT THE 6-YEAR STATUTE OF LIMITATIONS SET OUT IN § 516.420 RSMO GOVERNS PLAINTIFFS' STATUTORY CLAIMS AGAINST SMC LENDING AND RELATORS

Respondent correctly denied Relators' Rule 55.27(b) motion for judgment on the pleadings. The allegations of the plaintiffs' Fourth Amended Petition stated facts from which Respondent could conclude and/or reasonably infer that (1) SMC Lending was a "moneyed corporation" within the meaning of § 516.420 RSMo 2000 and (2) that Relators, even if not "moneyed corporations" themselves (and they are), were nonetheless barred as assignees from raising a limitations defense different from that available to SMC Lending.

1. Respondent Could Reasonably Conclude and Infer that SMC Lending was a "Moneyed Corporation" within the Meaning of § 516.420 RSMo

The allegations of the plaintiffs' petition are sufficient to establish the fact that SMC Lending is a "moneyed corporation" for purposes § 516.420 RSMo 2000. The petition makes clear the fact that SMC Lending was a moneylender, lending money to consumers throughout the country. (SOF, ¶¶2-13) Lending money and then selling and profiting from its loans of money was what SMC Lending did. SMC Lending had the power to make loans and lend money, and it did in fact make loans and lend money to each of the named plaintiffs and the no fewer than 139 other Missouri homeowners who are now members of the certified plaintiff class. (Id.) All of the loans were secured by Missouri real estate. In each instance, SMC Lending turned around and sold the loans on a "secondary market" -- comprised of entities like Relators, which purchased the loans and revenue streams for purposes of investment, and solely for the sake of making a profit. (Id., ¶¶9-25)

Such activities -- the making, buying, pooling and selling of residential loans at a profit, epitomize what it is that a "moneyed corporation" is and does. SMC Lending is not a construction company or manufacturing concern. SMC Lending is a financial business that deals exclusively in money and the paper that gives rise to a recurring obligation to pay money. SMC Lending is a lender of money and certainly exercises "banking powers." SMC Lending "lends" money to homeowners in exchange for fees and costs and an interest in collateral, specifically real estate. SMC Lending competes with banks, must comply with the banking laws, and, like a bank, markets and discounts the loans it originates to investors like Relators, which use the loans and money-streams they generate for investment and profit. With factual allegations and inferences like these, Respondent could readily infer and conclude as he did that SMC Lending was in fact (or certainly could be deemed to be on facts not yet developed) a "moneyed corporation" for purposes of § 516.420 RSMo.

a. A Mortgage Lender is a "Moneyed Corporation"

Respondent's conclusion was correct. In Division of Labor Standards v. Walton Construction Management Co., Inc., 984 S.W.2d 152 (Mo. App. WD 1998), the court of appeals held that the term "moneyed corporation" as used in § 516.420 RSMo means "a corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurance." Id. at 156 (emphasis added). As this definition makes clear, a business association need not actually be a bank or insurance company to be a "moneyed corporation." The term is much broader than that and unquestionably includes mortgage lenders like SMC Lending. See, e.g., Fielder v. Credit Acceptance Corporation, 19 F.Supp.2d 966 (W.D. Mo. 1998), vacated in part on other grounds, 188 F.3d 1031 (8^{th} Cir. 1999) (non-bank auto finance company that financed purchase and sale of used automobiles and charged and obtained finance charges and interest in conjunction such agreements was "moneyed corporation" for purpose of 6-year statute); Hobbs v. National Bank of Commerce of Kansas City, Mo., 101 F. 75 (2^{nd} Cir. 1900) (term "moneyed corporation" included mortgage company that sold bonds secured by mortgages); Marble Mortgage Co. v. Franchise Tax Board, 241 Cal.App.2d 26, 50 Cal. Rptr. 345 (1966) (corporation engaged in the purchase and assignment of first deeds of trust was "financial [moneyed] corporation");[6] Morris v. Essex Investment Co. v. Director of

---

[6] In Marble Mortgage Co. v. Franchise Tax Board, the court held that a California company "engaged in the business of initiating loans secured by first deeds of trust … with the intention of assigning them to various institutional investors, a business commonly referred to as 'mortgage bankers' or 'loan correspondents'" was a "financial" (or moneyed) corporation for purposes of the California franchise tax. 241 Cal.App.2d at 29, 50 Cal.Rptr. at 347. In reaching its decision, the court found compelling the fact that

Division of Taxation, 161 A.2d 491 (N.J. 1960) (second mortgage lender was "financial business" subject to taxation as a bank); Grice v Anderson, 96 S.E. 222 (S.C. 1918) (business formed to "'buy, sell, mortgage and improve real estate, deal in negotiable paper, bonds, stocks and all other securities'" was "moneyed corporation"); Fletcher Cyc. Corp. 375 (Perm Ed) ("'moneyed corporations' has been defined to mean those businesses engaging in activities that involve dealing in money or financing"). If an auto-finance company is a "moneyed corporation" for purposes of § 516.420 RSMo, a mortgage lender like SMC Lending, which makes and sells mortgage loans, must surely be a "moneyed corporation" too.[7]

The "definition" of "moneyed corporation" that the court of appeals set forth in the Walton case came from New York, the state from which the court in Walton Construction concluded that § 516.420 RSMo (originally enacted in 1865) was likely borrowed. 984 S.W.2d at 155. At the time the Missouri legislature enacted what is now § 516.420, the

---

the loans Marble Mortgage made "were primarily on single family homes of the same nature as real estate loans made by banks, …" Id.; also see Morris Plan Co. of San Francisco v. Johnson, 37 Cal.App.2d 621, 624, 100 P.2d 493, 495 (1940) words "'financial corporation,'… designate and include moneyed corporations performing some of the functions of a national bank").

[7] Neither in Fielder nor in Hobbs did the court state that the conclusion it reached was dependent on the fact that the "moneyed corporation" before it could make "loans on pledges or deposits."

statutes of New York 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. (citing 1 N.Y. rev. Stat. 598, § 1 and Mutual Ins. Co. of Buffalo v. Board of Supervisors of Erie County, 4 N.Y. 442 (1851)). (A319-20) Such expansive language was not unintentional.

Banks and insurance companies were only two types of corporations deemed to be “moneyed corporations” under New York law. See Mutual Ins., 4 N.Y. at 444. There were (and are still today) a host of others, including any “trust, loan, mortgage security, guaranty or indemnity company or association, and every corporation or association having the power and receiving money on deposit.” See N.Y. Rev. Stat., vol. II, L. 1874, ch. 324 (A331-334); Hobbs, 101 F. at 76 (New York banking law expressly includes banks, savings banks, trust companies, building and mutual loan corporations, co-operative loan associations, mortgage loan or investment corporations, and safe-deposit companies); N.Y. Code of Civil Procedure § 394 (A318-319) (applicable to “moneyed corporations or banking associations”). In construing the term “moneyed corporation” as used in § 516.420, recourse to New York law is appropriate. Walton, 984 S.W.2d at 155. Accordingly, the Court should find that because a mortgage lender was (and still is) considered a “moneyed corporation” under New York law, Respondent’s conclusion that SMC Lending was “moneyed corporation” is correct.

Interestingly, Relators cite to New York General Corporation Law, sec. 3, subdiv. 6, which today defines a “moneyed corporation” as “a corporation formed under or subject to the Banking Law or the Insurance Law.” (Brief of Relators at 24 n. 24; Compare N.Y. Rev.

Stat., vol. II, § 51[A330]) Relators' argument is fatal to their point. A mortgage lender like SMC Lending is in fact "subject to [New York] Banking Law." See New York Banking Law, § 6-i; id; Article 12-D, §§ 589, 590, 590-a (regulations applicable to entities originating, funding and servicing residential mortgage loans and identifying those activities as a "banking function") (A3014-318); cf. New York Business Corporate Law § 301(a) (the name of a corporation shall not contain the words "finance," "loan," "mortgage" absent approval of the "superintendent of banks or the superintendent of insurance" (A319-20). The same is true in Missouri.

All entities and persons that "engage in the business of brokering, funding, originating, servicing or purchasing of residential mortgage loans" in Missouri are subject to Chapter 443 of the Missouri Revised Statutes. See § 443.805.1 RSMo 2000; §§ 443.800 to 443.893 RSMo 2000. Although a mortgage lender like SMC Lending may be exempted from the state licensing provisions if they fall within an exemption set forth in § 443.803.1(8) RSMo, § 443.801.3(8)(j) RSMo 2000, the license exemption only applies if the lender remains subject to federal banking laws. See § 443.801.1(19) RSMo, which provides:

> a mortgage loan company which is subject to licensing, supervision, or annual audit requirements by the Federal National Mortgage Association (FNMA), or the Federal Home Loan Mortgage Corporation (FHLMC), or the United States Veterans Administration (VA), or the United States Department of Housing and Urban Development (HUD), or a successor of

any of the foregoing agencies or entities, as an approved lender, loan correspondent, seller, or servicer

§ 443.801.1(19) RSMo 2000.

During the time that it was engaged in lending operations in Missouri, SMC Lending was a "mortgage banker" subject to regulation by the Missouri Division of Finance. (SOF, ¶10) By law, the Division of Finance has "charge" of the laws "relating to banks, trust companies, and the banking businesses of the state." § 361.020.1 RSMo 2000. SMC Lending was also apparently exempt from state licensing requirements since it was instead subject to the licensing, supervision, and annual audit requirements of the United States Department of Housing and Urban Development (HUD). (SOF, ¶10) As a result, SMC Lending unquestionably falls within the definition set forth by the court in the Walton case. SMC Lending is subject to regulation by the Missouri Division of Finance; and the Division ensured that, to avoid licensing within the state, comparable federal regulation would still apply. That is what occurred here. SMC Lending was subject to federal "banking law." The National Housing Act, 12 U.S.C. §§ 1701, et seq. is found in Chapter 13 of Title 12 of the United States Code, governing "Banks and Banking." In addition, the operation of mortgage lenders is governed by various chapters of the federal banking law, with which SMC Lending had to comply (as is shown by the loan papers): Title 12 of the United States Code including, among other things, Chapters 27 (Real Estate Settlement Procedures Act), 29 (mortgage disclosures), 38 and 38A (mortgage foreclosures), and 49 (Homeowners' Protection Act of 1998). Beyond any doubt SMC Lending was a "moneyed corporation" for purposes of § 516.420 RSMo.

i. The Power to Loan Money

Relators argue that, even though its business was making and selling loans secured by real estate, SMC Lending cannot be deemed to be a "moneyed corporation" because every Missouri corporation has the power to loan money secured by real estate. (Brief of Relators at 22-23) Relators either miss or have subtly misconstrued the point. It is not what SMC Lending could do that makes it a "moneyed corporation." It is what SMC Lending did do. SMC Lending is not a "moneyed corporation" because it has "the power" under Missouri law to loan money secured by real estate, like every other corporation. SMC Lending is a "moneyed corporation" because lending money secured by real estate is the *sine qua non* of its existence. The business of SMC Lending is lending money. SMC Lending is a moneylender which, in competition with and just like a bank, made and sold residential mortgage loans subject to banking laws. Certainly, SMC Lending is more like a bank than any other type of business. A mortgage lender need not have each and every power that a bank has in order to exercise banking powers. The fact that SMC Lending is in fact subject to regulation by the Missouri Division of Finance and the federal banking laws is proof positive of this point.

ii. Loans Upon Pledges or Deposits

Reading the opinion of the Walton Construction case as literally as they can, Relators also argue that, despite its obvious status as a moneylender, SMC Lending is not a "moneyed corporation" because the petition here does not state that SMC Lending could make "'loans upon pledges or deposits,'" as opposed to loans secured by mortgages. (Brief of Relators at 21-22 & n. 10) The petition need not expressly allege this fact. Apart from the fact that SMC Lending unquestionably exercises banking powers as an enterprise subject to state and federal banking laws, and is singularly engaged in the business of lending money secured by collateral, and notwithstanding the question of whether or not SMC Lending also could or did in fact make or have the power to make loans upon pledges or deposits, given the absence of any "merits" discovery on the point, Relators fail 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. The statute, itself, makes no such distinction. The word "mortgage" doesn't even appear. There is simply no logical basis for making Relators' distinction between a mortgage and a pledge, particularly since a business engaged in the mortgage lending business is a "moneyed corporation."

Relators' reliance on Sansone v. Sansone, 586 S.W.2d 87 (Mo. App. ED 1979) is misplaced. In Sansone, the court of appeals construed the word "mortgage" as used in § 516.150 RSMo, which pertains to actions or proceedings "under power of sale to foreclose any mortgage or deed of trust,…". Id. at 90. The court of appeals did not construe § 516.420 or even a statutory definition, which was itself defined, as was the case in Walton. Neither § 516.420 nor any other Missouri statute defines the term "moneyed corporation." However, New York statutes and cases make it clear that the term "moneyed corporation" was not synonymous with a bank or insurance company and included mortgage lenders such as SMC Lending, whether or not they could or did in fact make loans upon pledges or deposits.

Accordingly, the Court should find that Respondent was able to and did in fact properly conclude that SMC Lending was a "moneyed corporation" within the meaning of § 516.420 RSMo. As Respondent found on the record before him, "[The] real purpose … the bottom line purpose [of SMC Lending and Relators] is to … handle money and handle loans." (SIO-PWP, Ex. 14 at 20-21) Respondent was absolutely correct and the Court should quash its preliminary writ of prohibition. The plaintiffs' claims under the Missouri Second Mortgage Loans Act and § 408.562 RSMo. are governed by the 6-year statute of limitations set out in § 516.420 RSMo.

2. Because SMC Lending is a "Moneyed Corporation," Respondent Correctly Applied the 6-Year Statute to the Plaintiffs' Claims

As the petition in this case makes clear, the named plaintiffs seek to "enforce a liability" and/or to recover a "penalty or forfeiture" imposed by Missouri law against and from SMC Lending, a moneylender, and its various assignees, including the Relator Trusts. Specifically, the plaintiffs seek to recover both for themselves and for the individual members of the certified plaintiff class (1) the excessive, unauthorized and/or unlawful interest, origination fees, closing costs and interest that they were charged, contracted to pay and/or did in fact pay for their loans, (2) a forfeiture of or order barring the collection of any interest not yet due, and (3) punitive damages, and attorneys' fees. The plaintiffs seek this relief pursuant to the SMLA, §§ 408.233, 408.236, and 408.562 RSMo 2000, all Missouri statutes.[8]

[8] Section 408.562 RSMo 2000 provides as follows:

Because plaintiffs are seeking to "enforce a liability" <u>and/or</u> to recover a "penalty or forfeiture" imposed by the SMLA and § 408.562 against and from SMC Lending, a "moneyed corporation," and its derivatively liable assignees, which are also "moneyed corporations," the plaintiffs' claims are governed by § 516.420 RSMo. The language of § 516.420 is crystal clear: "<u>all</u>" suits "to recover <u>any</u> penalty or forfeiture imposed, <u>or</u> to enforce <u>any</u> liability created by <u>any</u> … law … shall be brought within six years after the discovery by the aggrieved party of the facts upon which such penalty or forfeiture attached, or by which such liability was created." § 516.420 RSMo. 2000. Accordingly, Respondent correctly denied Relators' motion for judgment on the pleadings and applied Missouri's 6-year statute. <u>Cf</u>. <u>Nolan v. Kolar</u>, 629 S.W.2d 661, 663 (Mo. App. 1982) (statute providing for forfeiture of 10% of amount of deed of trust for failure to timely acknowledge satisfaction of deed of trust was subject to § 516.420); <u>Fielder v. Credit Acceptance Corp.</u>, 19 F. Supp.2d at 974 (6-year statute set out in § 516.420 applies to

---

"In addition to any other remedies or penalties provided for by law, any person who suffers any loss of money or property as a result of any act, method or practice in violation of the provisions of sections 408.100 to 408.561 may bring an action in the circuit court of the county in which any of the defendants reside, in which the plaintiff resides, or in which the transaction complained of occurred to recover actual damages. The court may, in its discretion, award punitive damages and may award to the prevailing party in such action attorney's fees, based on the amount of time reasonably expended, and may provide such equitable relief as it deems necessary and proper."

consumer class action brought against auto loan finance company pursuant to § 408.562 RSMo.).

Judge Ortrie Smith's opinion in Fielder is particularly persuasive and on point. In Fielder, the plaintiffs all purchased used automobiles, financed by a lender-assignee. The plaintiffs brought a class action against the lender-assignee based on the seller's violations of the Motor Vehicle Time Sales Act, Chapter 365 of the Revised Missouri Statutes. 19 F.Supp.2d at 973. As purchasers aggrieved by a violation of that statutory enactment, the plaintiffs in Fielder sought to recover all of the "monies they paid for finance charges, delinquency and collection charges, as well as the right to injunctive relief, declaratory relief, punitive damages and attorneys' fees." Id. The purchasers sought this relief in part pursuant to § 408.562, the same statute on which the plaintiffs in this case rely. Just like Relators here, the defendant assignee in Fielder argued that the claims of some of the class members under § 408.562 were barred by Missouri's 3-year statute of limitations, § 516.130(2). Judge Smith rejected this argument and held that, because the defendant was a moneyed corporation, "the applicable statute of limitations [was] six years per Mo. Rev. Stat. Section 516.420." Id. at 975. The result in this case should be the same.

a. Section 516.420 Governs All Suits Against "Moneyed Corporations"

By its terms, Missouri's 6-year statute of limitations, § 516.420 RSMo, governs all suits against "moneyed corporations," in which a statutory liability is sought to be enforced. The language of the statute leaves no room for doubt: "all" suits "to recover any penalty or forfeiture imposed, or to enforce any liability created by any … law … shall be brought within six years after the discovery by the aggrieved party of the facts upon which such penalty or forfeiture attached, or by which such liability was created." § 516.420 RSMo. 2000.

The language of § 516.420 RSMo. is expansive and covers all claims against "moneyed corporations." 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"). Because SMC Lending and/or its assignees, including Relators, are such "moneyed corporations," Respondent correctly denied Relators Rule 55.27(b) motion for judgment on the pleadings and applied Missouri's 6-year statue.

Relators' reliance on § 516.130(2) as the applicable statute of limitations is simply wrong. Section 516.130(2) is a general statute of limitations applicable to, *e.g.*, actions "upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such a party and the state." § 516.130(2) RSMo. Section 516.420 RSMo is a specific statute of limitations that applies to "all" actions brought against moneyed corporations like SMC Lending and Relators. As the more specific statute addressing "all" suits against "moneyed corporations," § 516.420 RSMo. trumps or displaces § 516.130(2) RSMo. See, e.g., Laughlin v. Forgrave, 432 S.W.2d 308, 312-13 (Mo. banc 1968) (more specific statute of limitation prevails over general statute of limitation); see also § 516.300 RSMo. 2000 ("[§ 516.130] shall not extend to any action which is or shall be otherwise limited by any statute; but such action should be brought within the time limited but such statute"); § 516.420 RSMo. 2000 ("all" suits "to recover any penalty or forfeiture imposed, or to enforce any liability created by any … law … shall be brought within six years after the discovery by the aggrieved party of the facts upon which such penalty or forfeiture attached, or by which such liability was created"). The Court should effectuate the statute as worded.

b. Plaintiffs' Claims Need Not be an Action Upon a Statute for a Penalty or Forfeiture to Fall Within § 516.420

The application of § 516.420 RSMo is not, as Relator's argue, limited solely to an action upon a statute to enforce a penalty or forfeiture. The language of the statute is broader than that: it applies to "all" suits "to recover any penalty or forfeiture imposed, or to enforce any liability created by the act of incorporation on any other law." Hence, Plaintiffs' claims need not be an action upon which a statute to recover a penalty or forfeiture like that described in § 516.130(2) RSMo. An action such as this, to enforce a statutory liability made available under the SMLA and § 408.562 RSMo, unquestionably falls within the ambit of § 516.420 RSMo, even though it may not constitute an action upon a statute to enforce a "penalty or forfeiture." See Platt v. Wilmot, 193 U.S. 602, 609-10 (1904) ("the words 'liability created by law,' were held in Brinckerhoff v. Bostwick, 99 N.Y. 185, 1 N.E. 663 [1885], to mean statutory liabilities, which, as stated by Judge Earl (page 192, N.E. p. 666), 'comprehend not only liabilities created by the title and chapter of the Revised Statutes referred to, but also those created by other statutes and the Constitution of 1846 (art. 8, § 7)'"). As a result, § 516.420 RSMo by its terms applies to the plaintiffs' statutory claims. Walton, 985 S.W.2d at 155 (recourse to New York law is appropriate in construing the term "moneyed corporation as used in § 516.420").

c. Plaintiffs' Claims May Be Deemed an Action on a "Penal Statute"

Even if the Court concludes that, despite its plain language, § 516.420 RSMo only applies to actions arising from or based on a "penal statute," as opposed to any action or statutory action brought against a "moneyed corporation," the trial court still correctly applied the 6-year statute contained in § 516.420 RSMo. As Relators admit, the plaintiffs' action under the SMLA and § 408.562 constitutes a statutory action for a penalty or forfeiture. (Brief of Relator at 16) As such, the plaintiffs' statutory claims are governed by § 516.400 RSMo, which is unquestionably trumped by § 516.420 RSMo.

Relator suggests that plaintiffs' claims are instead governed by § 516.130(2) RSMo. a 3-year statute. Section 516.130(2) provides:

> 516.130 What actions within three years, - (2) Ac 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.

§ 516.130 RSMo. 2000.

However, Missouri has a second three year statute, § 516.400, which provides:

> 516.400. When penalty goes to party aggrieved, three years
>
> All actions upon any statute for any penalty or forfeiture, given in whole or in part to the party aggrieved, shall be commenced within three years after the commission of the offense, and not after.

§ 516.400 RSMo. 2000.

Given Relator's admissions that the plaintiffs' action constitutes an action upon a statute for a penalty or forfeiture given to the plaintiffs by § 408.562 RSMo as the "parties aggrieved," the Court may find that the plaintiffs' claims are governed by § 516.420 RSMo.

Under the SMLA, it is ["unlawful"] for anyone to directly or indirectly charge, contract for or receive fees or costs in association with a second mortgage loan that are not permitted by the SMLA. Violators must forfeit all interest to which they would otherwise be entitled on the loan. (A17-38, ¶¶ 45, 53-63); see also §§ 408.233, 408.236 RSMo. 2000). In addition, § 408.240 RSMo. provides that persons who violate the SMLA or who participate in such a violation "shall be guilty of a Class A misdemeanor." These provisions render the SMLA a "penal" statute, at least for purposes of § 516.420 RSMo., the 6-year statute. See, e.g., Nolan, 629 S.W.2d at 663 (statute providing for forfeiture of 10% of amount of deed of trust for failure to timely acknowledge satisfaction of deed of trust was subject to 6-year statute of limitation on actions under penal statutes); Fielder, 19 F. Supp.2d at 974 (6-year statute set out in § 408.420 applies to consumer class action against auto loan finance company based on Chapter 365 RSMo. and § 408.562); see also King v. Morgan, 873 S.W.2d 272, 275 (Mo. App. 1994) (statute providing for misdemeanor and monetary penalties was penal in nature); Julian v. Burrus, 600 S.W.2d 133, 142 (Mo. App. 1980) (§ 408.050 RSMo. [which is similar to § 408.562] is a penal statute since it "primarily involve[s] the imposition of penalties and forfeitures and authorize[s] the aggrieved person to initiate … suit for the imposition of such as the legal vehicle and means whereby they could be imposed").

Relators' reliance on Julian v. Burrus is misplaced. While the court in Julian held that the plaintiff's usury claim under § 408.050 RSMo. was governed by the 3-year statute in § 516.130(2) RSMo, the defendant in Julian was not a "moneyed corporation." Hence, the court did not address the operation and effect of § 516.420 RSMo, which was irrelevant since the defendant was an individual. Moreover, the plaintiff in Julian did not argue that § 516.400 RSMo, Missouri's second 3-year statute for actions to enforce a statutory penalty, as opposed to § 516.130(2) applied to his claims (since nothing would have been gained if § 516.400 applied). Even if the court had applied § 516.400, the plaintiffs' claims against the defendant-individual would have still been barred. Accordingly, the opinion in Julian is neither persuasive nor dispositive of the limitations issue presented here.

If anything, the opinion in Julian actually supports Respondent's conclusion that the plaintiffs' claims under the SMLA and § 408.562 RSMo. constitute an action to "enforce a liability" and/or to recover a "penalty or forfeiture" imposed by Missouri law and are therefore unquestionably governed by § 516.420 since SMC Lending and/or Relators are "moneyed corporations." See Julian, 600 S.W.2d at 142 (§ 408.050 [which is similar to § 408.562] is a penal statute since § 408.050 "basically and primarily involve[s] the imposition of penalties and forfeitures and authorize[s] the aggrieved person to initiate the suit for the imposition of such as the legal vehicle and means whereby they could be imposed); Fielder, 19 F. Supp.2d at 974 (6-year statute set out in § 516.420 applies to consumer class action against auto loan finance company pursuant to §

408.562 RSMo.).[9]

3. Respondent Correctly Ruled that Relators Could not Raise a Limitations Defense Different from that Available to SMC Lending

Relators argue as a fall back that, even if SMC Lending is a "moneyed corporation," Respondent still impermissibly denied Relators' Rule 55.27(b) motion for judgment on the pleadings and applied the 6-year statute since Relators, unlike SMC Lending, are not "moneyed corporations." Relator's argument is flawed. Relators cannot argue that the claims of either Danita Couch or David and Nancy Beebe are barred by limitations.

From the inception of this lawsuit, the plaintiffs have alleged that Relators and all the other "Assignee Defendants" and holders of the unlawful loans were in effect *derivatively liable* (i.e., subject to all claims with respect to the mortgages) that the plaintiffs and the members of the plaintiff class could assert against SMC Lending). All of the petitions in this case have alleged:

---

[9] Both § 516.130(2) and § 516.400 conceivably could apply to those situations where the claimant brings an action on a penal statute against a defendant that is not a "moneyed corporation." See Powell v. St Louis Dairy Co., 276 F.2d 464, 465 (8th Cir. 1960 (plaintiffs' action against dairy "fall within the statutory provisions of limitations involving actions penal in nature, viz., § 516.130 and § 516.400, and provide for the barring of the action after three years").

> As the purchasers and/or assignees and holders or as trustee for the assignees and holders of the notes and deeds of trust given under the Second Mortgage Loans by the REPRESENTATIVE PLAINTIFFS and every other member of THE SECOND MORTGAGE CLASS, the ASSIGNEE DEFENDANTS (individually, and as a defendant class, as hereinafter alleged) are liable to the REPRESENTATIVE PLAINTIFFS and THE SECOND MORTGAGE CLASS, <u>just as SMC LENDING is liable to REPRESENTATIVE PLAINTIFFS and THE SECOND MORTGAGE CLASS</u>.

(OP, ¶33) (emphasis added)

The plaintiffs' theory of derivative liability is well grounded. As the purchasers and assignees (holders) of the residential second mortgage loans, Relators can be held liable to Couch and the Beebes and to each of the other members of the plaintiff class. It does not matter that Relators arguably may not have participated directly in the statutory violations on which the plaintiffs base their claims (although that fact has yet to be determined). What's important is that Relators purchased and hold the "high interest" loans that SMC Lending originated and made in violation of Missouri law.

Such "assignee" liability for the plaintiffs' state law claims arises in the first instance by virtue of the HOEPA rule of assignee liability, 15 U.S.C. § 1641(d), which applies to "high cost mortgages" like those at issue here. 15 US.C. § 1641(d); <u>Bryant v. Mortgage Capital Resource Corp.</u>, 197 F.Supp.2d 1357 (N.D. Ga. 2002). Such assignee liability can also arise by virtue of the well-established common law principle that an "assignee takes the obligation, chose, or other thing assigned subject to the same restrictions, limitations, and defects as it had in the hands of the assignor." <u>St. Louis Union Trust Co. v. Hunt</u>, 169 S.W.2d 433, 441 (Mo. App. 1943).

a. Assignee Liability Under 15 U.S.C. § 1641(d)

As a purchaser or assignee (holder) of the subject second mortgage home loans, Relators received the promissory notes and deeds of trusts for the loans "subject to all claims and defenses with respect to [the] mortgage[s] that the consumer [i.e., Couch, the Beebes and other class members] could assert against the creditor of the mortgage [i.e., SMC Lending], . . ." 15 U.S.C. § 1641(d). This includes the plaintiffs' claims for the violation of the SMLA. See Bryant, 197 F.Supp.2d at 1364-65 (consumers had affirmative right to assert claims against assignee based solely upon mortgage lender's independent violations of state law in connection with issuance of loans); Vandenbroeck v. ContiMortgage Corp., 53 F.Supp.2d 965, 968 (W.D. Mich. 1999) (discussing operation of § 1641(d) in non-TILA cases).

Congress enacted 15 U.S.C. § 1641(d) as a part of the Home Ownership Equity Protection Act of 1994 ("HOEPA"). The statute in effect "eliminates holder-in-due-course protections for assignees of certain high cost mortgages [as defined by 15 U.S.C. § 1602(aa)] and renders them subject to all claims and defenses that the borrower could assert against the original lender." Vandenbroeck, 53 F.Supp.2d at 968 (emphasis added); Bryant, 197 F.Supp.2d at 1364-65. The operation and effect of § 1641(d) is unmistakable.

15 U.S.C. § 1641(d) in part provides:

> (1) … Any person who purchases or is otherwise assigned a mortgage referred to in [15 U.S.C. § 1602(aa)] shall be subject to all claims and defenses with respect to the that mortgage that the consumer could assert

> <u>against the creditor of the mortgage</u>, unless the purchaser or assignee demonstrates, by a preponderance of the evidence, that a reasonable person exercising ordinary due diligence, could not determine, based on the documentation required by this [title] . . .that the mortgage was a mortgage referred to in [15 U.S.C. § 1602 (aa)] ...

(Emphasis added.)

Section 1641(d)(1) provides in clear and unambiguous terms that assignees like Relators are subject to all claims and defenses under <u>any</u> law that a borrower could have asserted against the original lender. <u>Vandenbroeck</u>, 53 F.Supp.2d at 968. Hence, it does not matter that Relators may not have initially charged the excessive fees and closing costs on which the plaintiffs bring their claims. Relators received the unlawful loans "subject to all of the claims" that the plaintiffs and other class members can assert against SMC Lending. Since acquiring the loans, Relators have collected and received (and continue to collect and receive) interest on the loans. Relators have also collected and received a portion of the illegal origination fees and closing costs, since they were financed and paid as apart of the principal loan amount. If SMC Lending is barred from recovering any interest on the loans and/or if SMC Lending is obligated to return the excessive or unauthorized origination fees and closing costs, so too must Relators, as the assignees and holders of the "tainted loans."

i. The Mortgages at Issue are "High Cost Mortgages"

Most if not all of the second mortgage home loans at issue in this case are believed to be "high cost mortgages" within the meaning of § 1641(d). As a result, the HOEPA rule of assignee liability applies under § 1641(d). To constitute a "high cost" mortgage within the meaning of § 1641(d), the loan must be a "closed-end loan" that is "not used for acquisition or construction," and having up-front fees or interest rates above certain "triggers" established by HOEPA. 15 U.S.C. § 1641(aa). There are two (2) such triggers: (1) the "APR" trigger (10% more than comparable Treasury securities); and (2) the "points and fees" trigger (originally $400 or 8% of the total loan amount). <u>Either</u> trigger will suffice.

Respondent submits that each of the loans on which the plaintiffs base their claims against Relators will (or likely may) satisfy either or both of the subject triggers. Both the Couch and Beebe loans do.[10] The illegal charges, together with the other "points and fees" for the Couch and Beebe loans were payable by them at or before the loan closing and were in fact identified in the loan papers as being both "prepaid" (A79-80; A90-91) and meet the points and fees trigger. In addition, the Couch loan meets the interest trigger as well.[11] The

---

[10]As Respondent recognized in the Order Certifying a Plaintiff Class (SIO-PWP, Ex. 16), an inference that the Couch and Beebe loans are HOEPA loans arises by comparing the terms of the loans alleged in the petition to the HOEPA triggers.

[11]15 U.S.C. § 1602(aa)(1)(A). <u>Compare</u> the Annual Percentage Rate for the Couch loan (A81) with the comparable federal rate (A301) [Couch APR = 17.895% vs. 6.60% 07/15/97 or 6.65% 08/15/97 depending on the date of the application; <u>see</u> 12 CFR Ch.II (1-1-01 Edition) Federal Reserve System, Pt. 226, Supp. I, Section 226.32(a)(1)(i)(1), (2) and (4) at page 441)]

fact that the loans were HOEPA loans was consistent with the HOEPA Notices that Couch and the Beebes received as a part of their loan documents. (A83, 94) Consequently, Respondent correctly held that, as the assignees and recipients of these "high cost mortgages," Relators were subject to and bound by the same limitations period applicable to SMC Lending.

Respondent anticipates that Relators may cite in their reply to a recent decision from the United States District Court for the Western District of Tennessee in Terry v. Community Bank of Northern Virginia et al., 2003 WL 1571937 (W.D. Tenn.), and argue that the HOEPA rule of assignee liability does not apply. In Terry, the plaintiffs alleged in their complaint that they "paid nothing at closing." Id. at *5. The district court held in the face of this allegation that the "points and fees" were not payable at or before closing but were instead paid over the life of the loan. Terry is distinguishable. In this case, the "fees and points" were not only payable at or before closing, they were in fact "prepaid" as of the closing, according to the lender's own documents. (A79-80; A90-91) To the extent that Relators argue that financing "points and fees" cancels the important consumer protections of HOEPA, not only would such completely undermine HOEPA, it simply would be wrong. Here the plaintiffs at this juncture of the proceeding are entitled to all favorable inferences in support of their claim and their claims that these are HOEPA loans must be presumed for purposes of this limitations issue.[12]

[12] Congress made no distinction in its efforts to protect borrowers from those that actually paid the high "fees and points" and those that financed them. See, e.g., Riegle

ii. The Legislative History of § 1641(d)

Holding Relators liable for the "bad" loans of SMC Lending makes good sense and effectuates the intention of Congress with regard to the second mortgage home loans at issue in this case. As the amended petition and referenced loan documents show, the experiences of Couch and the Beebes with SMC Lending was neither unique nor accidental. SMC Lending came to Missouri and intentionally overcharged the plaintiffs and over a 130 other Missouri homeowners. (SIO-PWP: Ex. 10) SMC Lending then scattered and sold these 130 plus "high cost" Missouri mortgages to a number of different entities, which in turn, sold and assigned the notes and deeds to still other entities, including Relators. (Id.) Neither SMC Lending nor any of the subsequent assignees, including Relators, should be permitted to avoid liability by virtue of these shotgun assignments.

The legislative history of § 1641(d) makes clear the intention of Congress to hold assignees like Relators derivatively liable for the relief that borrowers like Couch and the Beebes seek. In describing its enactment, Congress put it this way:

> 9. Assignee Liability
>
> The bill eliminates "holder-in-due-course" protections for assignees of High Cost Mortgages. Assignees of High Cost Mortgages <u>are subject to all</u>

Community Development Act, 1994 Pub.L.No. 103-325, 1994 U.S.C.C.A.N. 1908-1909 (discussing finance charges "imposed" directly or indirectly by the creditor).

> claims and defenses, whether under Truth in Lending or other law, that could be raised against the original lender….
>
> By imposing assignee liability, the Committee seeks to ensure that the High Cost Mortgage market polices itself. Unscrupulous lenders were limited in the past by their own capital resources. Today, however, with loans sold on a regular basis, an unscrupulous player can create havoc in a community by selling loans as fast as they are originated. Providing assignee liability will halt the flow of capital to such lenders.

S.Rep. No. 169, 103d Cong., 2d Sess. 5 (1994) *reprinted in* 1994 U.S.C.C.A.N. 1881, 1912 (emphasis added).

The plaintiffs allege and believe that SMC Lending was such an "unscrupulous player" and that Relators and each of the other players on the "secondary market" enabled SMC Lending to make the subject unlawful loans and must now pay the price - whether or not they were affiliated with SMC Lending, or otherwise had actual knowledge of or directly participated in the wrongful conduct on which the plaintiffs base their claims. This is the point and purpose of § 1641(d). Given the potential for abuse, and the significant risk that homeowners like Couch and the Beebes and the members of the plaintiff class might lose their homes if the original lender could simply transfer an unlawful loan to an assignee, which then asserted a "holder in due course" or some other defense, Congress decided to make the assignee jointly and severally liable with the lender, and expressly determined that the assignees will be subject to all "claims" and defenses that the borrowers could raise against the lender. Bryant, 197 F.Supp.2d at 1364-65.

b. Assignee Liability Under State Law

Even if some of the mortgages at issue in this case were not "high cost mortgages" within the meaning of HOEPA, Relators can still be liable to the plaintiffs and the plaintiff class as assignees under Missouri law. In Missouri, as in most other states, an assignee acquires no greater rights than the assignor had at the time of the assignment. Kracman v. Ozark Electric Cooperative, Inc., 816 S.W.2d 688 (Mo. App. S.D. 1991). Consequently, Relators and each of the other assignees (holders) of an SMC Lending loan, took the promissory notes and trust deeds "subject to the same restrictions, limitations, and defects as [they] had in the hands of [SMC Lending]." St. Louis Union Trust Co. v. Hunt, 169 S.W.2d 433, 441 (Mo. App. 1943). Hence, if SMC Lending is barred from recovering any interest on the loan, so too are Relators, as assignees. See also, e.g., Hilfiker v. Preyer, 690 S.W.2d 451, 453 (Mo. App. S.D. 1985) (assignee stands in stead of assignor); Stewart v. Kane, 111 S.W.2d 971, 975 (Mo. App. 1938) (assignee "stands in the stead of the assignor and has no greater right or interest than [the assignor] had at the time of the assignment").[13]

---

[13] Also see In re Cleveland, 53 B.R. 814, 819 (Bankr. E.D. Va. 1985) (assignee of trust deed stood in the shoes of assignors, taking no better a position than assignors, who held an invalid deed of trust); Foster v. Foster, 703 So.2d 1107, 1109 (Fla. App. Dist. 2 1997) ("assignee of a mortgage has the same status and rights as if he or she had been named in

In addition, the "holder in due course" defense will not be available to Relators, notwithstanding the operation and effect of § 1641(d). Each of the loans that Relators received came with the statutory notice required by 15 U.S.C. § 1641(d)(4). (See, e.g., A83, 94) The existence of the 1641(d)(4) notice eliminates any "holder in due course" defense to the plaintiffs' claims since it makes the borrowers' "promise to pay" conditional. See § 400.3-104(a) RSMo 2000 ("negotiable instrument" must contain an "unconditional" promise to pay); § 400.3-302(1) (holder in due course status requires presence of "negotiable instrument"); cf. Illinois State Bank of Quincy, Ill. v. Yates, 678 S.W.2d 819, 823-24 (Mo. App. E.D. 1984) (holder of note secured by deed of trust was not holder in due course given condition); Thomas v. Ford Motor Credit Co., 429 A.2d 277, 281-82 (Md. App. 1981) (existence of consumer credit notice "eliminate[s] the possibility of anyone acquiring holder-in-due-course status"). Without such a defense, Relators will be liable to the plaintiffs and the other class members whose loans they hold.

Furthermore, liability may also be imposed against Relators if they are found to be so closely connected to SMC Lending or one another that any or all should be considered

---

the mortgage"); Cole v. Angora Enterprises, Inc., 403 So.2d 1010, 1012 (Fla. App. 1981) ("assignee [of mortgage] with notice accedes to no greater rights than his assignor"); Financial Credit Corp. v. Williams, 229 A.2d 712, 715 (Md. App. 1967) ("[mortgage] can have no greater value in the hands of the appellant-assignee even if the assignee be deemed a bona fide purchaser for value").

one-in-the-same for purposes of the subject loans, see, e.g., Kaw Valley State Bank & Trust Co. v. Riddle, 549 P.2d 927 (Kan. 1976) (denying holder in due course status given close relationship with assignor), or if, as here, the second mortgage loans are invalid as to the interest paid and due pursuant to § 408.236 RSMo 2000 given the excessive "origination" fees and closing costs, cf. Lucas v. Beco Homes, Inc., 494 S.W.2d 417 (Mo. App. 1973) ("usury" is not a defense to holder-in-due-course status), or if Relators knew of or participated in the unlawful lending scheme on which the plaintiffs base their claims (thereby negating the "good faith" requirement), thereby giving rise to a civil conspiracy. [14]

4. As Assignees, Relators Cannot Assert a Limitations Defense Different from that Available to SMC Lending

Because the liability that Couch and the Beebes seek to impose against Relators and the other "non-originating" defendants is derivative of the liability of SMC Lending, and not separate and distinct from it, Relators, by definition, cannot raise a limitations defense different from that available to SMC Lending. Hence, a timely suit against SMC Lending is by necessity a timely suit against all other entities like Relators, which are

---

[14] Also, since the illegal non-interest charges that the lender initially charged and contracted for in violation of § 408.233.1 were funded as a part of the principal loan amount, Relators, themselves, are "receiving," and therefore "violating," the SMLA each time it receives a monthly loan payment, separate and apart from the receipt of illegal interest.

derivatively liable for the wrongful acts of SMC Lending. See 15 U.S.C. § 1641(d)(1) ("any person who purchases or is otherwise assigned a [HOEPA] mortgage … shall be subject to all claims and defenses with respect to that mortgage that the consumer could asset against the creditor of the mortgage..."); Bryant, 197 F. Supp.2d at 1364-65 (consumers had affirmative right to assert claims against assignee based solely upon mortgage lender's independent violations of state law in connection with issuance of loans); Cooper v. First Government Mortgage & Investment Corp., 238 F.Supp.2d 50, 55 (D.D.C. 2002) ("Congress made assignees subject to all claims and defenses, whether under [TILA] or other law, that could be raised against the original lender"); Miller v. Pacific Shore Funding, 224 F.Supp.2d 977, 996-97 (D. Md. 2002) (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).

Such a rule makes sense. When a plaintiff alleges that one defendant is derivatively liable for the acts of another, the plaintiff is essentially arguing that the two defendants are the same for purposes of her claims. This is the nature of derivative liability. The "derivatively liable" defendant has not committed a separate actionable wrong, so there is no separate conduct or injury to discover before the plaintiff's cause of action accrues and the limitations period begins to run. Therefore, a defendant derivatively liable for the acts of another is regarded as the same legal entity for statue of limitations purposes. See, e.g., Miller, 224 F.Supp.2d at 996-97 (period of limitation applicable to claims against residential second mortgage lender also applied to claims against assignee alleged to be derivatively liable for lenders' acts under HOEPA); cf.

National Labor Relations Board v. O'Neill, 965 F.2d 1522, 1529 (9th Cir. 1992) (where two parties are alter egos, and derivatively liable for each other, timely service against one is sufficient to initiate proceedings against both); Wm. Passalacqua Builders v. Resnick Developers South, 933 F.2d 131, 143 (2d Cir. 1991) (action to enforce judgment against alter ego companies is not time-barred because alter egos are treated as one entity); Livingstone v. Dept. of Treasury, 456 NW2d 684 (Mich. 1990) (timely assessment against corporate taxpayer preserved later-filed assessment against derivatively liable corporate officer).

Relators argue that the opinion in Nolan v. Kolar, 629 S.W.2d 661 (Mo.App. ED 1982) stands for the proposition that they are entitled to their "own" statute of limitations. That is not correct. The plaintiff in Nolan did not allege that one of the two defendants she sued was derivatively liable for the acts of the other, e.g., under a theory like *respondeat superior*. Rather, the plaintiff brought her claims against the individual defendants and the defendant bank, each in their/its own capacity. That is not the case here. (A30-31, ¶58) Moreover, Nolan did not involve 15 U.S.C. § 1641(d) or address the language of the statute and its unambiguous mandate that a purchaser or assignee of second mortgage home loan, receive the loans "subject to all claims and defenses with respect to [the] mortgage[s] that the consumer [i.e., Couch, the Beebes and other class members] could assert against the creditor of the mortgage [i.e., SMC Lending]." On this point Nolan is inapposite.

Relying on Dash v. FirstPlus Home Loan Trust 1996-2, 2003 WL 103855 (M.D.N.C.) and Dowdy v. First Metropolitan Mortgage Co., 2002 WL 745851 (N.D. Ill.

2002) Relators argue that 15 U.S.C. § 1641(d) does not make an assignee of a "HOEPA" loan responsible for the acts of the loan originator. Neither case is at odds with what Respondent decided. The plaintiffs here do not seek to enforce a "new" or different "claim" against Relators. To the contrary, and as their petitions make clear, Relators seek to assert the very same state law statutory claims that they are able to assert against SMC Lending against Relators as well, as the assignees of the unlawful loans. This is precisely what the statute allows. 15 U.S.C. § 1641(d). Since the claims are the same, there by definition cannot be two separate or different periods of limitations. Consequently, Respondent correctly decided that the 6-year statute would apply as against Relators as well.[15]

Finally, Relators apparently contend that the plaintiffs should in some way be "estopped" from arguing that Relators are liable as assignees under the HOEPA rule of assignee liability given their prior reliance on the Vandenbroeck case. That simply is not true. While the Vandenbroeck case did in fact state that HOEPA "does not bestow any

---

[15] To the extent Dash or Dowdy holds otherwise, they were incorrectly decided. See Bryant, 197 F.Supp.2d at 1364-65. Also, the 1-year statute of limitations "under HOEPA" that Relator cites (Brief at 26) applies solely to a private right of action brought pursuant to 15 U.S.C. § 1640. Hence, the 1-year statute of limitations does not apply since the plaintiffs are not asserting such right of action. They merely seek to hold the assignees of the unlawful loans liable as the "enabler" of the loans, just as Congress intended.

new rights on the borrower; rather it eliminates the holder-in-due course defense," 53 F.Supp.2d at 968, the court was very clear: "[15 U.S.C. § 1641(d)] eliminates holder-in-due course protections for assignees of certain high cost mortgages [as defined by 15 U.S.C. § 1602(aa)] <u>and renders them subject to all claims and defenses that the borrower could assert against the original lender</u>. <u>Vandenbroeck</u>, 53 F.Supp.2d at 968 (emphasis added). This is precisely what the plaintiffs' have contended all along. (See Original Petition, SIO-PWP, Ex. 5, ¶33) The plaintiffs rely on the statute, which by its terms, does not itself create any new federal law claim or cause of action; the statute instead eliminates <u>all</u> defenses that Relators could conceivably raise in the face of the plaintiffs' otherwise legally sufficient state law claims <u>and</u> makes Relators and all other assignees joint, severally and derivatively liable to the plaintiffs along with SMC Lending. As the legislative history of the enactment provides:

> 9. Assignee Liability
>
> The bill eliminates "holder-in-due-course" protections for assignees of High Cost Mortgages. Assignees of High Cost Mortgages <u>are subject to all claims</u> and defenses, whether under Truth in Lending or other law, <u>that could be raised against the original lender</u>….

S.Rep. No. 169, 103d Cong., 2d Sess. 5 (1994) *reprinted in* 1994 U.S.C.C.A.N. 1881, 1912 (emphasis added).[16]

---

[16] <u>Cf</u>. *state court* cases involving the similar FTC Holder Rule: <u>Rosemond v. Campbell</u>, 343 S.E.2d 641, 646 (S.C. App. 1986) ("the assignee's liability under the [FTC] statutes is derivative: unless the consumer has a valid claim against the seller, he has no claim against the assignee"); <u>Oxford Finance Companies, Inc. v. Velez</u>, 807 S.W.2d 460 (Tex.

This principle is simple and fair: A loan that violates Missouri law cannot suddenly become "lawful" when it ends up in the hands of an "assignee" – especially where, as here, the original lender never intended to keep the loan in the first place and the "assignee" is in the business of buying up such loans for a profit. It would indeed be grossly unjust if, as Relators suggest, the remedies and relief available to aggrieved borrowers like the plaintiffs were extinguished completely, simply because the lender that signed them up in violation of the SMLA turned around and assigned the loan papers to a "professional" assignee the very next day, and under a scheme that was in place before the illegal loans were ever made. Congress recognized as much when it enacted 15 U.S.C. § 1641(d), a statute that does not create any federal law claim or separate cause of action, but which simply renders an assignee derivatively liable for all of the claims (contract and tort) that a plaintiff can otherwise legally state against the assignor. Bryant,

---

App. 1991) (FTC Holder Rule "notifies *all potential holders* that, if, they accept assignment of the contract, they will be 'stepping into the seller's shoes'"); also cf. 41 Fed.Reg. 20,023-24 (1976) ("the words 'Claims and Defenses' … [as used by the FTC] are not given any special definition by the [FTC] … The phrase simply incorporates those things, which as a matter of other applicable law, constitute legally sufficient claims and defenses in a sales transaction … Appropriate statutes, decisions, and rules in each transaction will control…."); cf. also LaBarre v. Credit Acceptance Corp., 175 F.3d 640, 644 (8th Cir. [Minn.] 1999) (FTC Holder Rule allows consumers to assert state-related claims and defenses against any holder of a consumer contract).

197 F.Supp.2d at 1364-65.

5. Relators, Individually and/or Through their Trustees, are Also “Moneyed Corporations”

Although the plaintiffs have not had an opportunity to discover and fully develop the facts material to this particular point, the record in this and other similar second mortgage cases shows that Relators, themselves, are also properly considered “moneyed corporations.” Hence, even if they are entitled to their own statute of limitations, a point that Respondent denies, the statute is still Missouri’s 6-year statute, § 516.420 RSMo 2000.

Relators are business trusts engaged in the business of buying loans (streams of money), which they use to collateralize certain notes or evidences of indebtedness that they sell to the public for investment. As their prospectuses reveal, Relators were created to hold hundreds of millions of dollars in high interest second mortgage loans. (SIO-PWP: Ex. 3 at 5-14; Ex. 4 at 5-15) The investment interests in each mortgage pool were created through the issuance of a series of asset backed notes. (Id.) The prospectuses expressly describe each Relator’s activities as “(i) acquiring, holding and managing the Home Loans and other assets of the Trust and proceeds therefrom, (ii) issuing the Securities; (iii) making payments on the Securities, and (iv) engaging in related activities.” (Id.) These activities fall squarely within the definition of a “moneyed corporation” - an enterprise that takes custody of money and is used for facilitating the transmission of money.

a. Relators' Status as "Statutory" Trusts Does not Preclude a Finding that Relators are "Moneyed Corporations" for Purposes of § 516.420 RSMo

Relators argue that they cannot be "moneyed corporations" because they are business "trusts" rather than "corporations." The Court should reject this argument for a number of reasons.

First, Relators' argument elevates form over substance and is directly contrary to the Missouri Constitution, which defines a "corporation" as "all joint stock companies or associations having any powers or privileges not possessed by individuals or partnerships." Mo. Const., art. 11, § 1; see Forest City Mfg. Co. v. International Ladies' Garment Workers' Union Local, No. 104, 111 S.W.2d 934, 939 (Mo. App. 1938) (construing art. 12, § 11 of the Constitution of 1875 [now art. 11, § 1] and related statutory provisions to mean that such associations (i.e., those having powers or privileges not possessed by individuals or partnerships) are to be treated as corporations under Missouri law); see also General Heat and Power Co., Inc. v. Diversified Mortgage Investors, 552 F.2d 556, 559 (3rd Cir. 1977) (district court's interpretation of Pennsylvania long arm statute as applying only to corporations is patently unreasonable because it effectively leaves partnerships, joint stock companies and business trusts entirely outside the reach of the statute). Accordingly, the Court should hold that, as business trusts, Relators may be deemed to be (and are) "moneyed corporations" under § 516.420 RSMo.

Second, Relators' argument ignores the reality that when § 516.420 was enacted in

1865, there were no "statutory" trusts. Moreover, even though a business trust may not be a "corporation" in a technical sense, Relators have the attributes of a corporation and are similar in their practical effect, as the trust documents demonstrate. See State Street Trust Co. v. Hall, 41 N.E.2d 30, 33 (Mass. 1942); Swartz v. Sher, 184 N.E.2d 51 (Mass. 1962); 12 Del. C. §§ 3801, et seq. The "estate" of the trust corresponds to the capital of the incorporated company, the trustees to the board of directors, the beneficiaries to the stockholders, the beneficial interests to shares of stock, and the declaration of trust, to the charter. This is why several courts have held that a business trust falls within the legal definition of a corporation for purposes of state corporation laws and taxation. See id. In fact, and as stated above, Missouri places business trusts in the same category as corporations. See Mo. Const., art. 11, § 1; (N.Y. Rev. Stat. - A331-334: referring to "corporation[s] or association[s] as "moneyed corporations"; see also Restatement (Second) Trust, § 1 (1959) comment b (excluding a business trust from the trust rules since it is "a special kind of business association and can best be dealt with in connection with other business associations").

b. Relators Exercise "Banking Powers" and are "Moneyed Corporations"

For reasons substantially the same as those discussed with regard to SMC Lending above, Relators are properly regarded as "moneyed corporations." Relators are "secondary market" assignees, singularly engaged in the business of purchasing, acquiring and pooling a number of second mortgage loans solely for the purposes of investment. Relators, through their bank trustees (U.S. Bank National Association and

Wilmington Trust Company), pooled the loans with numerous others as collateral to back a series of asset-backed notes that Relators sold to the public. Relators, through their loan servicing agent and U.S. Bank, also collected the monthly loan payments due on the second mortgage home loans and disbursed the money to their investors. As issuers of asset-backed notes, Relators are engaged in an activity falling within the "incidental powers" of a bank. <u>See</u> <u>Securities Industry Assoc. v. Security Pacific Bank</u>, 885 F.2d 1034, 1044-45 (2nd Cir. 1989) (citing decision of the Comptroller of Currency: "the process of pooling bank assets and selling certificates representing interests therein .. is a convenient and useful means of selling mortgages [and thus] falls within the 'incidental powers' of a national bank").

Although Relators argued otherwise, Respondent, who is now all too familiar with how Relators operate, rejected this form over substance argument and concluded that the business trust involved in the <u>Baker v. Century Financial Group</u> was a "moneyed corporation" As Respondent observed:

> Reading several of these cases over the course of weeks, it has been a little bit confusing to me, but I think the <u>Walton</u> case does help. <u>Maybe in my simplistic mind, I try to simplify too much, but to me, when I'm looking at something as a moneyed or non-moneyed corporation so I can distinguish between the three and six-year statute of limitations, I look at it in terms of what's the real purpose of the defendant in this case, the business I'm dealing with or what I'm looking at</u>? In <u>Walton</u>, the real business was construction, the real business is just individuals loaning money or helping out. They have other lives. They're not set up for the purpose of dealing with money.
>
> <u>The companies I'm dealing with in this case and the other cases that are before me right now are corporations that are set up for the purpose of dealing with money</u>.

> The bottom line purpose of all of these companies is to handle money and to handle money by loans and to handle loans. There may be corporate shells all up and down the line here, and there may be technical severance of obligations and boards and purposes which try to deal with statutes and states and usury laws and whatever else it might be, but they're all set up for one purpose, and that is to work hand in hand for the handling of loans and money, loans to people on second mortgages, the collection of that money, the distribution of that money.
>
> Thus, I think they're a moneyed corporation. If I didn't make that clear last week, I want to make it clear now because that's what the heart of this thing is.

(SIO-PWP, Ex. 14 at 21-22) (emphasis added)

Respondent's reasoning and logic are sound and apply equally as well in this case. The Court should adopt Respondent's reasoning and hold that Relators are "moneyed corporations" under § 516.420 RSMo 2000 as a matter of law. Alternatively, the Court should find that Relators, at the very least, may be deemed to be "moneyed corporations" under § 516.4420 if the evidence in the case as more fully developed shows them to be businesses having "banking" powers or otherwise engaged in the business of using money to make money. See Fielder, 19 F.Supp.2d 966; Marble Mortgage, 241 Cal.App.2d 56, 50 Cal. Rptr. 345; Grice v. Anderson, 96 S.E. 222, 224 (citing Platt v. Wilmot, 103 U.S. 602(1904): "If a corporation shall make it a business to lend money, to borrow money, to deal in negotiable paper, bonds, stocks, and other securities, it is a moneyed corporation").

C. THE RECORD IS NOT FULLY DEVELOPED

Relators have repeatedly argued in their brief that there is "no evidence" in the record of a fact, and ergo, that fact does not exist. The factual premise Relators assert in this argument does not justify the inferential legal conclusion Relators reach because of the procedural posture of this case. That there is "no evidence" in the record proves nothing because no factual record is "supposed to exist at this procedural juncture. Neither merits discovery nor a trial have occurred. The lack of a factual record is caused by Relators' request for a review by writ of a ruling on a motion for judgment on the pleadings. Although it may at first appear persuasive, Relators' repeated use of the "no evidence" argument when closely examined is nothing more than a clever lawyer's argument with no probative force or logical validity. Relators' logical legerdemain should be ignored.

The best example of Relators' use of this argument is found in their brief at p.18. There, Relators argue that there is "no evidence" that Relators are "a moneyed corporation." Of course there would not be expected to be evidence at this stage of the proceeding, i.e. a motion for judgment on the pleadings, as to those facts which might bear on that factual determination. Moreover, Relators failed to note that the pleadings in the case do not establish when it was that Couch and the Beebes, as the "aggrieved parties" first "discovered" the "facts upon which [the] penalty or forfeiture [they seek to recover] attached, or by which [the] liability [they seek to enforce] was created." § 516.420 RSMo 2000.[17] Consequently, Respondent respectfully suggests that, if there are

[17] Certainly if Relators' argument is accepted, the statute would not have begun to run against Relators when the loans were made in 1997 since Relators didn't even own the loans at that point. (A154, 162)

factual questions that may impact the Court's ultimate decision in this case, the Court should be mindful that the record is far from fully developed, quash the preliminary writ, and return this matter to the trial court for full development of the factual record.

II.

THE COURT SHOULD QUASH ITS PRELIMINARY ORDER OF PROHIBITION BECAUSE UNDER EITHER A SIX-YEAR OR THREE-YEAR STATUTE OF LIMITATIONS, PLAINTIFFS' CLAIMS ARE TIMELY IN THAT: (A) COMMENCEMENT OF SUIT AGAINST SMC LENDING IN LESS THAN THREE YEARS FROM THE DATE OF THE NAMED PLAINTIFFS' LOANS MAKES SUIT TIMELY AGAINST RELATORS AND ALL OTHER ASSIGNEE DEFENDANTS REGARDLESS OF WHAT LIMITATIONS PERIOD OR ACCRUAL DATE IS APPLIED; (B) THE SMLA MAKES IT ILLEGAL TO HAVE "DIRECTLY OR INDIRECTLY CHARGED, CONTRACTED FOR OR RECEIVED" ANY ILLEGAL FEES AND SO THE LIMITATIONS PERIOD RUNS FROM EACH TIME A BORROWER IS CHARGED OR THE NOTE HOLDER RECEIVES ILLEGAL FEES AND/OR INTEREST AND RELATORS RECEIVED PAYMENT FROM THE NAMED PLAINTIFFS WITHIN THREE YEARS OF THE COMMENCMENT OF SUIT AGAINST RELATORS; (C) SUIT WAS TIMELY FILED AGAINST RELATORS' TRUSTEE AND THUS SUIT IS TIMELY AS TO RELATORS; (D) BRINGING RELATORS INTO THE SUIT ON JANUARY 3, 2002 RELATES BACK TO THE ORIGINAL FILING OF SUIT AGAINST DEFENDANT U.S. BANK TRUST N.A. ON JUNE 29, 2000 OR TO

THE ADDITION OF U.S. BANK N.A. AS A DEFENDANT ON SEPTEMBER 1, 2000; AND (E) COMMENCEMENT OF SUIT ON JUNE 29, 2000 AGAINST A DEFENDANT CLASS TOLLED CLAIMS AGAINST ANY MEMBER OF THAT CLASS, INCLUDING RELATORS.

A. COMMENCEMENT OF SUIT AGAINST SMC LENDING IN LESS THAN THREE YEARS FROM THE DATE OF THE NAMED PLAINTIFFS' LOANS MAKES SUIT TIMELY AGAINST RELATORS AND ALL OTHER ASSIGNEE DEFENDANTS REGARDLESS OF WHAT LIMITATIONS PERIOD OR ACCRUAL DATE IS APPLIED

Because Relators are derivatively and jointly and severally liable for the acts of SMC Lending as the assignees and holders of the unlawful second mortgage loans at issue in this case, commencement of this suit against SMC Lending within three years by a named Plaintiff means that suit against any assignee defendant, including Relators, also is timely. See supra Point I.B.3.

B. THE SMLA MAKES IT ILLEGAL TO HAVE "DIRECTLY OR INDIRECTLY CHARGED, CONTRACTED FOR OR RECEIVED" ANY ILLEGAL FEE AND SO THE LIMITATIONS PERIOD RUNS FROM THE LAST TIME A BORROWER IS CHARGED OR THE NOTE HOLDER RECEIVES ILLEGAL FEES AND/OR INTEREST AND RELATORS RECEIVED PAYMENT FROM THE NAMED

PLAINTIFFS WITHIN THREE YEARS OF THE COMMENCEMENT OF SUIT AGAINST RELATORS

The whole question of whether there is a continuing violation under the SMLA is really the basic statute of limitations question of when does the cause of action accrue. Relators' claim that the date of the loan is the date of accrual and thus no claim can be brought more than 6 (or 3 or 5) years after the loan is made. Such a rule, however, is inconsistent with long established Missouri law and the statutory scheme of both the SMLA, Missouri usury law and Missouri statutes of limitations in general. It is also inconsistent with Congress' intent as a part of HOEPA to make assignees liable for the sins of the originating lender. Nor does a "date of the loan" accrual rule adequately address the realities of mortgage lending transactions. These obligations continue for decades and the notes are often sold numerous times. Accordingly, a potentially liable party under the SMLA (one who directly or indirectly charges, contract for or receives illegal fees) may not come into the picture until years after the loan is made. For these reasons, the proper accrual rule is that each payment is a continuing violation of the SMLA; that is, the proper date of accrual is the date on which the last payment was made. As such, each Plaintiffs loan was timely, even under a 3-year statute of limitations.[18]

18

Plaintiff	Loan Date	Last Payment	Date Plaintiff Added	Date Relators Added
Danita Couch	09/10/97	Current	06/29/00 original filing	01/03/02
David & Nancy Beebe	11/14/97	Current	04/08/02	01/03/02

First, the SMLA's own provisions support finding that each payment represents a continuing violation. Under the SMLA any person who directly or indirectly charges, contracts for or receives any illegal closing costs and fees is liable under the Act. RSMo § 408.233.1. Thus, for the purpose of determining the statute of limitations, deeming that a SMLA claim accrues at the time the loan was made only makes sense, if at all, in regard to the originating lender as that lender is known when the loan is made. Such an accrual date is wholly inapplicable to downstream assignees, like Relators, who only subsequent to the making of the loan even come into the picture. Certainly it is possible that a loan subject to the SMLA would be sold more than 6 years (or 3 years) after it was made and yet under the accrual theory Relators advance, that subsequent assignee would be immune from liability despite receiving a portion of the illegal fees each time a payment is made.[19] The Missouri legislature recognized the transferability of such loans by putting in the "charges, contracts for or receives" language and such plain intent will be thwarted by application of a rigid, "loan date" based accrual date.

It should also be noted that a loan date accrual could make it impossible for the borrower to even determine in some case who to timely sue. The actual holders of these

[19] Not surprisingly, Relators want it both ways when it comes to its relation to the originating lender in connection with the statute of limitations. For accrual purposes, Relator contends that the cause of action runs from the date the originating lender made the loan while at the same time arguing that a determination that the originating lender is a moneyed corporation does not extend to them.

loans are difficult to find. A typical loan has been sold several times and sits in some trust that the borrower knows nothing about. We could spend pages talking about how difficult it has been for us, as lawyers, to even figure out who these holders are. A loan date accrual coupled with a three year statute of limitations will effectively mean that the ultimate holders of these loans, the persons HOPEA says should police the industry, might not be timely discovered and sued.

The idea of a continuing violation is well established under Missouri law. See Johnson Development Co. v. First National Bank of St. Louis, 999 S.W.2d 314, 317 (Mo. App. ED 1999) (one year limitations period for making claim to bank for forged check ran from each time customer gets a new statement of account from which a forgery can be determined); Davis v. Laclede Gas Co., 603 S.W.2d 554, 556 (Mo. banc 1980)("If . . . 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."); see also Smith v. Smith Barney Harris Upham & Co. Inc., 505 F.Supp. 1380 (WD Mo. 1981); Bulke v. Central Missouri Electric Cooperative, 966 S.W.2d 15 (Mo. App. WD 1998).

Further, in the context of the issue of whether a cause of action arising from a written obligation to pay money runs from the date the documents are executed or from payment, Missouri's usury laws are particularly instructive. Such laws firmly establish the concept that the cause of action runs from payment (which of course is the counterpart to the term "receive" in the SMLA). See e.g. § 408.030.2 RSMo (claim for payment of interest "greater than permitted by law" must be "brought within five years from the time when said interest should have been paid”); § 408.052.4 RSMo (providing that a claim based on the charging of points or fees beyond that allowed by § 408.052 RSMo must be “brought within five yeas of such payment”); see also Addison v. Jester, 758 S.W.2d 454 (Mo. App. WD 1988) (usury claim under § 408.030.2 RSMo covers only interest actually paid); § 408.060 RSMo (allowing defense of usury to any claim provided the amount upon proof that the usurious amount was actually paid). Plainly, these statutes and case law interpreting them make clear that Missouri recognizes that a cause of action relating to contracts for the payment of money accrue as of payment.

The result should be no different here in connection with claims that stem from the overcharging of origination fees or the charging of prohibited closing costs in connection with a loan. There is also an interest overcharge aspect to these SMLA claims. Specifically, an express remedy under the SMLA is that a violation means that the lender is barred from the collection of any interest on the loan. § 408.236 RSMo. Thus, by continuing to collect interest on these loans despite the fact that they violate the SMLA a further violation occurs each month. This fact furthers the idea that the accrual of usury claims should likewise guide the determination of when a SMLA claim accrues.

It is significant also that Missouri’s own general statute of limitations provision recognizes the idea of a continuing violation:

> [F]or the purposes of section 516.100 to 516.370, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, **but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item**

of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained.

§ 516.100 RSMo (emphasis added).

Relators may complain that a last payment accrual date is inequitable as a claim could remain viable for decades. Such a potential result is no different, however, then the 10 year statute of limitations currently available to a lender to collect on a debt. See § 516.110 RSMo. For example, the lender on a 30 year note could some 10 years after a missed payment in year 28 sue to recover that payment thus making the borrower subject to suit some 38 years after the loan was made.

In opposition to recognition of a continuing violation in this matter, Relators point to decisions from other jurisdictions (federal district courts in Maryland and North Carolina (two cases, same judge) in which a continuing violation argument was rejected in cases involving claims for charges made in connection with second mortgage loans. Miller v. Pacific Shore Funding , 224 F.Supp. 2d 977, 989-90 (D. Md. 2002); Faircloth v. National Home Loan Corp., 2003 WL 1232825 at *5-6 (M.D.N.C., March 17, 2003); Dash v. FirstPlus Home Loan Trust 1996-2, 2003 WL 103855 at n. 12. On the other hand, federal district courts considering the same issue have adopted the continuing violation theory in a second mortgage class action lawsuit. See Williams v. Zed Corporation (f/k/a) DiTech Funding Corporation et al., Case No. 02-2045 GV (W.D. Tenn., August 15, 2002) (copy attached at A227). Williams involved class action claims against second mortgage loan originators and various assignees that held the class members' loans. (A227 at 1-2) The asserted class action claims included Tennessee state law claims for excessive loan fees. (A227 at 2) The defendants contended that such claims were barred by a statute of limitations requiring that claims be brought within three years from "the date of payment of the charges, fees or commissions." (A227 at 24) In rejecting the contention that the claims were time barred the court adopted a continuing violation theory holding as follows:

> Since the fees charged were included in the amount of principal to be repaid over the course of the mortgage, the date of payment of the charges has not occurred until the mortgage is satisfied in full. Since plaintiffs continue to pay the mortgage on a monthly basis, section 47-14-118(b) [statute of limitations] cannot bar their claim for excessive charges.

(A227 at 24)

Respondent believes the Williams case to be the more reasoned decision and should guide this Court particularly in light of the fact that Missouri has long recognized the idea of a continuing violation and has expressly through its statutes deemed that the time of a payment will control the accrual of causes of action arising from obligations to pay money.

For the above reasons, the Court should hold that the plaintiffs' claims accrue as of the last payment made on the illegal loan and therefore the plaintiffs' claims are timely under a 6- or 3-year statute. Such a finding at to the accrual date is the only decision that ensures fulfillment of the intent of the Missouri legislature that any person who ever "receives" charges that violate the SMLA could be held liable. Such a ruling likewise promotes the intent of Congress under HOEPA that assignees stand in the shoes of the originating lender.

C. SUIT WAS TIMELY FILED AGAINST RELATORS' TRUSTEE, AND THUS, SUIT IS TIMELY AS TO RELATORS

Under Missouri law, a trustee is deemed the legal owner of trust property and is the "proper party against whom suit may be filed and judgment affecting title to trust property may be entered." McBee v. Gustaaf Vandecnoke Revocable Trust, 986 S.W.2d 170, 172 (Mo. banc 1999). Accordingly, the plaintiffs instituted suit on June 29, 2000 against U.S. Bank Trust National Association as a defendant in its capacity as both a holder or the trustee for the holder of the loans of plaintiffs or other members of the plaintiff class. (SIO-PWP, Ex. 5, ¶4) Eight weeks later, as the result of differing representations from U.S. Bank Trust National Association and its counsel, the plaintiffs determined that U.S. Bank National Association, an affiliate of U.S. Bank Trust National Association, should be added as a trustee/holder defendant. (SIO-PWP, Ex. 6 at n. 1) Hence, on September 1, 2000, Plaintiffs filed their First Amended Petition adding U.S. Bank National Association to the case. (SIO-PWP, Ex. 6).

The addition of U.S. Bank National Association relates back to the original filing against U.S. Bank Trust National Association. Under Mo. R. Civ. P. 55.33, an amendment to change a party will relate back if "the party to be brought in by amendment: (1) has received such notice of the institution of the action as will not prejudice the party in maintaining the party's defense on the merits and (2) knew or should have know that, but for a mistake concerning the identify of the proper party, the action would have been brought against the party."

The criterion under Rule 55.33 is met. First, because both U.S. Bank Trust National Association and U.S. Bank, National Association are wholly owned subsidiaries of U.S. Bancorp and their counsel that told plaintiffs of the mistake is the same counsel that continues to represent U.S. Bank National Association and Relators, there is plainly no prejudice to Relators and they knew that naming U.S. Bank Trust National Association was a mistake. The fact that the amendment adding U.S. Bank National Association came only eight weeks after initiation of suit and before the filing of any responsive pleading further demonstrates that no prejudice resulted from this course of events.

In any event, whether going by the June 29 date or September 1 date, the claims of both of the named plaintiffs that Relators seek to dismiss are timely as Ms. Couch's loan closed September 10, 1997 and the Beebes' loan closed November 14, 1997. Thus, the fact that the actual trusts were not named until January of 2002 does matter because suit against the trustee was commenced timely, even under the 3-year limitations period Relators urge.

D. BRINGING RELATORS INTO THE SUIT ON JANUARY 3, 2002 RELATES BACK TO THE ORIGINAL FILING OF SUIT AGAINST DEFENDANT U.S. BANK TRUST N.A. ON JUNE 29, 2000 OR TO THE ADDITION OF U.S. BANK NATIONAL ASSOCIATION AS A DEFENDANT ON SEPTEMBER 1, 2000

Furthermore, even absent the fact that the trustee was sued within 3 years, the addition of Relators to this action in January of 2002 would relate back to the original filing of the Petition in June 2000 under a traditional relation back analysis. That is, U.S. Bank National Association has known from the inception of this suit and before which trusts hold which individuals loans. Therefore, Relators can claim no prejudice by the fact that despite continued discovery requests for such information, the plaintiffs were not able to pin down the exact trusts holding Ms. Couch's loan until December of 2001. Indeed, the addition of her holder, 1998-1, and the other holders in January of 2002 was done wholesale as U.S. Bank National Association simply identified the universe of its trusts that held SMC Lending originated Missouri loans without identifying the specific holder of Ms. Couch's loan. That there is no prejudice is further demonstrated by the fact that U.S. Bank has vigorously defended this case from its inception with the same attorneys who represent Relators.

Thus, it is entirely proper to relate back the naming of Relators to June 29, 2000 under the equities of Mo. Rule 55.33(c). The claim relates to the same transactions as the original petition, Relators received notice during the limitations period of the institution of the action and knew or should have known that it was an intended defendant, and neither Relator will be prejudiced by the relation back to the original filing date. Garavaglia v. J.L. Mason of Missouri, Inc., 733 S.W.2d 53, 55 (Mo. App. 1987). Thus, for this separate reason, the denial by the trial court of Relators' motion to dismiss was proper.

E. COMMENCEMENT OF SUIT ON JUNE 29, 2000 AGAINST A DEFENDANT CLASS TOLLED CLAIMS AGAINST ANY MEMBERS OF THAT CLASS, INCLUDING RELATORS

Even assuming that SMLA claims accrue at the date of the loan, the claims against Relators are not time barred under the 3-year statute of limitations as the limitations period for claims against the defendant class, which includes Relators, was tolled when the Original Petition was filed on June 29, 2000. [20]

Danita Couch obtained her second mortgage loan from SMC Lending on September 10, 1997. On June 29, 2000, she commenced this lawsuit asserting claims under the SMLA on behalf of herself and a plaintiff class against SMC Lending and also against U.S. Bank Trust National Association, individually and as the representative of a defendant class of assignees that obtained loans originated by SMC Lending. Indeed, the first paragraph of the petition makes clear that the claims are being asserted against a defendant class: "This action is brought as a plaintiffs' class action against SMC LENDING, INC. … and defendants **(including a defendant class)** that have purchased or had assigned and now hold or previously held the hereinafter described second mortgages." (SIO-PWP, Ex. 5, ¶1 (emphasis added)) The original Petition later defines the defendant class to include any person or entity or their trustee that ever received any interest on the second mortgage loans at issue or that "have every held or now hold, by

---

[20] As shown in Section B above, because there is a continuing violation with each loan payment, the SMLA claim accrues on the date of the most recent payment.

virtue of transfer or assignment or otherwise (including acting as trustee of such holder or assignee), the Second Mortgage Loans of the REPRESENTATIVE PLAINTIFFS or THE SECOND MORTGAGE CLASS…" (SIO-PWP, Ex. 5, ¶64) As the holder of the named plaintiffs' residential second mortgage loans, Relators are undisputedly within the defendant class.

The principle that the commencement of the original class action suit tolls the running of the statute of limitations for all members of the putative class until the class is certified or certification is denied was made clear by the Supreme Court in American Pipe and Construction Co. v. Utah, 414 U.S. 538, 554, 94 S.Ct. 756 (1974). American Pipe involved a plaintiff class action, but it was subsequently determined that tolling applies equally to defendant classes. Appleton Electric Co. v. Graves Truck Line, Inc., 635 F.2d 603, 609-10 (7th Cir. 1980), cert denied, 451 U.S. 976 (1981).

The Appleton decision is particularly helpful and is the seminal decision on tolling as to a defendant class. In reaching its conclusion that tolling should run from the date of the commencement of the suit against the defendant class, Appleton rejected the earlier decision in In Chevalier v. Baird Savings Ass'n, 72 F.R.D. 140, 155 (D.C. Pa. 1976), on which Relators rely. In Chevalier the court held that there was no tolling as to a member of a defendant class until that putative class member was named in an amended complaint. Id. at 155. Concerning Chevalier and the whole concept of due process in tolling as to a defendant class, the Appleton court stated as follows:

> We do not agree with the Chevalier decision. … Our reading of the cases convinces us that due process is not offended by the tolling doctrine,

even where a defendant has no notice of a suit until after a limitations period has run. Cf. United States v. Wahl, supra. The Supreme Court specifically rejected the contention that due process was abridged by the tolling doctrine in American Pipe , supra, 414 U.S. at 556,-59, 94 S.Ct. at 767-69.

We are persuaded that implicit in the Supreme Court's American Pipe decision was the Court's determination that "effectuation of the purpose of litigative efficiency and economy," (which Rule 23 was designed to perform) transcends the policies of repose and certainty behind statutes of limitations. 414 U.S. at 556, 94 S.Ct. at 767. We are guided by that conclusion in the instant case to hold that where a class action suit is instituted against a class of unnamed defendants, pursuant to Rule 23(b)(3), the statute of limitations is tolled as to all putative members of the defendant class. Where, as here, the class is ultimately certified, we hold that the statute is tolled as to any particular defendant until he is notified of the suit and chooses to opt out.

A contrary rule would sound the death knell for suits brought against a defendant class, nullifying that part of Rule 23 that specifically authorizes such suits. This, in turn, would have a potentially devastating effect on the federal courts. Plaintiffs would, in each case, be required to file protective suits, pending class certification, to stop the running of the statute of limitations.

Appleton Electric Co., 635 F.2d at 609-10.

The same conclusion was reached by the Alabama Supreme Court which, in holding that the statute of limitations was tolled as to the entire defendant class from the inception of the defendant class claim, stated as follows: “We do not agree with the holding in *Chevalier*. We find that the better rule is the one expressed by the Seventh Circuit Court of Appeals in *Appleton Electric Co. v. Graves Truck Line, Inc.* [full citation omitted].” White v. Sims, 470 So.2d 1191, 1193 (Ala. 1985); see also In re Activision Securities Litigation, 1986 WL 15339, *3 (N.D. Cal.) (statute of limitations as to a defendant class was tolled from the filing of the defendant class claims); In re Bestline Products Securities and Antitrust Litigation, 1975 WL 386, *3 (S.D. Fla.) (statute of limitations as to claims against defendant class tolled as to all defendant class members from initiation of suit until time certification as to the defendant class was denied).

Relators argue that Appleton should not be followed as it has been “rejected” by the majority of courts to consider the issue. This contention is not true. First, the Appleton decision comes from the highest court (Seventh Circuit) to consider the issue and from that decision a writ of certiorari to the Supreme Court was denied. Second, the majority of the courts considering the issue actually follow Appleton and hold that tolling as to a defendant class occurs regardless of whether the defendant class member has actual notice of the claim prior to the expiration of the statute of limitations. Compare White v. Sims, 470 So.2d 1191, 1193 (Ala. 1985) (tolling as to defendant class from time defendant class claims filed); In re Activision Securities Litigation, 1986 WL 15339, *3 (N.D. Cal.) (statute of limitations as to a defendant class was tolled from the filing of the defendant class claims); In re Bestline Products Securities and Antitrust Litigation, 1975 WL 386, *3 (S.D. Fla.) (statute of limitations as to claims against defendant class tolled as to all defendant class members from initiation of those claims until certification as to the defendant class was denied) with Meadows v. Pacific Inland Securities Corp., 36 F.Supp.2d 1240 (S.D. Cal. 1999) (holding that no tolling as to defendant class unless plaintiff could show that the defendant class member did have notice of the pendency of the class action).

As to the other cases other than Meadows that Relators list as part of the "majority" that reject Appleton -- In re Activision Securities Litigation,, Chevalier and Carlson v. Independent School Dist. No. 623, 392 N.W.2d 216, 223 (Minn. 1986) -- none actually reject Appleton or are otherwise in accord with Meadows. While In re Activision Securities Litigation does discuss the importance of notice to the defendant class members, the holding of the case was as noted above -- the statute of limitations was tolled as to the entire defendant class from the date of the filing of the defendant class claims. 1986 WL 15339 at * 3 (N.D. Cal.).

Chevalier, decided in 1976, obviously does not address Appleton, a 1980 decision, but, as noted, holds that there can be no tolling until the defendant is actually named in the suit. Chevalier, 72 F.R.D. at 155. No other court has adopted the holding of Chevalier but as noted above it has been widely criticized. Further, neither Relators nor any other assignee defendant can credibly contend that there can be no tolling until a defendant is actually added when they have argued successfully that prior to certification the named plaintiffs have standing to sue only those assignee defendants that actually hold such named plaintiffs' loans. That is, you cannot say out of one side of your mouth that there is no tolling unless you actually add the defendant and from the other side argue that such defendants cannot be added until after certification.

Nor does Carlson v. Independent School Dist. No. 623, 392 N.W.2d 216 (Minn. 1986) provide the support claimed by Relators as its statements in connection with class action tolling were dicta. Carlson involved, among other things, the decision of the Minnesota Court of Appeals that a 6-month to file requirement regarding state law based discrimination claims was procedural and therefore subject to tolling and that the commencement of class action claims under the discrimination law had tolled that statute of limitations as to all members of a defendant class. Id. at 220. The Minnesota Supreme Court reversed the finding that the file within 6-month rule was procedural and instead found it to be jurisdictional and, therefore, cannot be tolled. Id. at 222. Thus, the later discussion by the Minnesota Supreme Court of the tolling issue and its comments that to have tolling of a defendant class, each putative class member must have notice, on which Relators rely, was only dicta.

Finally, the ultimate holding of Meadows v. Pacific Inland Securities Corp., 36 F.Supp.2d 1240 (S.D. Cal. 1999) was that the court allowed the plaintiffs leave to amend their complaint to assert that the putative class defendants did have notice of the class action on which they based their tolling argument. Id. at 1250. Likewise, should this Court feel that "notice" to the putative defendant class members is necessary to have tolling as to a defendant class, plaintiffs should be given the opportunity to establish that there was in fact such notice. To that end, it is again important to note that evidence of such notice is in the record because certainly U.S. Bank knew of the suit as it was named in the amended petition on September 1, 2000 and as the trustee of Relators, such notice to U.S. Bank is imputed to Relators.

In summary, the commencement of claims against a defendant class that includes Relators in less than three years from the loans of the named Plaintiff Danita Couch tolled the limitations period as to Relators regardless of whether the statute of limitations is deemed to be 6 years, 3 years or 5 years, and regardless of when the claim against Relators is deemed to accrue. For this additional reason, Respondent properly denied Relators' motion for judgment on the pleadings and the preliminary order in prohibition should be quashed.

III.

IN THE ABSENCE OF § 516.420, THE PROPER STATUTE OF LIMITATIONS WOULD NOT BE THE 3-YEAR PERIOD UNDER § 516.130 BUT THE FIVE-YEAR PERIOD UNDER § 516.120(2) BECAUSE IF THE REMEDIES AVAILABLE UNDER THE SMLA ARE NOT PENALTIES OR FORFEITURES BUT ARE REMEDIAL, AS RELATORS HAVE CONTENDED, THEN THE STATUTE IS REMEDIAL AND § 516.120(2) APPLIES.

If the plaintiffs' claims under the SMLA and § 408.562 are penal, as Relators contend, then § 516.400 RSMo and § 516.420 RSMo apply and the 6-year statute contained in the latter statute governs the claims of the plaintiffs and the plaintiff class. Relators, however, have argued that the plaintiffs' claims are more remedial than penal. (SIO-PWP, Ex. 21 at 2, n. 3) Relators cannot have it both ways; and if the Court would deem the SMLA to be remedial in nature, then the Court should determine whether the applicable statute of limitations is Missouri's 5-year statute, § 516.120(2) RSMo. Section 516.120 provides in pertinent part:

> "Within five years:
>
> (1) All actions upon contracts, obligations or liabilities, express or implied
>
> * * *
>
> (2) An action upon a liability created by a statute <u>other than a penalty or forfeiture</u>; * * *"

(Emphasis added). <u>Cf</u>. 34 Mo. Prac. Personal Injury and Tort Handbook § 29.5 (2002 ed.). ("A private [right of] action for damages under [the Missouri Merchandising Practices Act] is an action on a liability created by a statue, so that the five-year general statue of limitations for actions on contracts, obligations and liabilities, V.A.M.S. § 516.120(3), likely applies"). Notably, statues under Missouri's usury laws, which exact damages not unlike the SMLA, <u>see</u> <u>e.g.</u> § 408.030 (twice the interest paid plus costs and attorneys fees), § 408.052 (the return of excessive loan fees or if not returned on demand twice the amount of fees plus costs and attorney fees), and which rest also in Chapter 408 of the Missouri statutes, are deemed to be remedial. <u>State ex rel Crist v. Nationwide Finance Corporation of Missouri</u>, 588 S.W.2d 8, 11 (Mo. App. 1979) (usury statutes are "remedial in nature"); <u>accord</u> <u>Garrett v. Citizens Savings Association</u>, 636 S.W.2d 104, 108 (Mo. App. 1982).

Application of the 5-year statute of limitations is also consistent with the general statute of limitations law that when a statute does not expressly provide a limitations period, courts will generally apply the most analogous limitations period. Woody v. State Farm Fire & Casualty Company, 965 F. Supp. 691, 693 (E.D. Pa. 1997); Johnson & Higgins of Texas v. Kenneco Energy, Inc., 962 S.W.2d 507, 518 (Tex. 1998). In this case, that most analogous period would be those statutes under Chapter 408, which of course is the statutory framework within which the SMLA resides, and which call for a 5-year limitations period running from payment. See e.g. § 408.030.2 RSMo (claim for payment of interest "greater than permitted by law" must be "brought within five years from the time when said interest should have been paid"); § 408.052.4 (providing that a claim based on the charging of points or fees beyond that allowed by § 408.052 must be "brought within five yeas of such payment") .

For these reasons, should the Court believe that § 516.420 does not govern the SMLA claims, given the remedial nature of the relief sought, then the Court should decide whether the proper statute of limitations is the 5-year statute in § 516.120(2) RSMo as opposed to the 3-year statute in § 516.130(2) RSMo. The application of the 5-year statue would be appropriate if the Court determines the plaintiffs' claims under the Missouri Second Mortgage Loans Act and § 408.562 RSMo are not governed by § 516.420, but do constitute an action to enforce a statutory liability "other than a penalty or forfeiture."

CONCLUSION

The Court should quash its preliminary order of prohibition and, like Respondent, hold that the claims under the Missouri Second Mortgage Loans Act and § 408.562 RSMo. 2000 that the named plaintiffs are asserting against SMC Lending, Inc, and its assignees, including Relators, are governed by the 6-year statute of limitations set out in § 516.420 RSMo. 2000.

Dated: May 2, 2003

Respectfully submitted,

WALTERS BENDER STROHBEHN
& VAUGHAN, P.C.

By____
J. Michael Vaughan Mo. Bar #24989
Kip D. Richards Mo. Bar #39743
David M. Skeens Mo. Bar #35728
2500 City Center Square
12th & Baltimore
P.O. Box 26188
Kansas City, MO 64196
(816) 421-6620
(816) 421-4747 (Facsimile)

and

Maurice Graham Mo. Bar #18029
GRAY, RITTER & GRAHAM, P.C.
701 Market, Suite 800
St. Louis, MO 63101
(314) 241-5620
(314) 241-4140 (fax)

ATTORNEYS FOR RESPONDENT

RULE 84.06(C) CERTIFICATION

The undersigned certifies that the foregoing brief complies with the limitations of Rule 84.06(b), that the brief contains 23,966 words, including footnotes, and that a genuine copy of the brief, together with a copy of the appendix and a floppy disk containing the same, was this 2nd day of May 2003

hand-delivered to:

Russell S. Jones
Mark A. Olthoff
SHUGHART THOMPSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street, Suite 1700
Kansas City, Missouri 64105
816.374.0509 (fax #)
Attorneys for Relators/Defendants
FirstPlus Home Loan Owner
Trusts 1998-1 and 1998-2

mailed by United States mail, first-class postage prepaid, to:

Kenneth E. Siemens
MURPHY TAYLOR SEIMENS & ELLIOTT
3007 Frederick Avenue
P.O. Box 6157
St. Joseph, MO 64506
(816) 364-9677 (fax #)
Attorneys for Defendant SMC Lending, Inc.

Daniel McClain
Randolph Willis
RASMUSSEN WILLIS DICKEY & MOORE, LLC
9200 Ward Parkway, #310
Kansas City, MO 64114
(816) 960-1669
Attorneys for Defendants Homecoming Financial
And GMAC-Residential Funding Corp.

Honorable David W. Russell
CIRCUIT COURT OF CLAY COUNTY MISSOURI
11 S. Water
Liberty, MO 64068

RULE 84.06(g) CERTIFICATION

The undersigned certifies that each floppy disk filed with the Court and/or served on the parties pursuant to Rule 84.06(g) were scanned for viruses and that each was virus-free.