UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
BROWARD DIVISION

CASE NO.

THEODORE D'APUZZO, P.A.,
Individually and on Behalf of All
Others Similarly Situated,

Plaintiff,

CLASS ACTION

v.

THE UNITED STATES OF AMERICA,

Defendant.
_________________________________/

CLASS ACTION COMPLAINT

Plaintiff, Theodore D'Apuzzo, P.A. ("Plaintiff"), individually and on behalf of all others similarly situated, sues Defendant, The United States of America ("Defendant"), and as grounds states:

NATURE OF ACTION

1. This is a class action brought on behalf of users of the Public Access to Court Electronic Records system ("PACER"), an electronic system employed by federal courts to provide the public with access to court records, who were improperly charged to access judicial opinions.

2. According to the plain language of PACER'S Electronic Public Access Fee Schedule, available at PACER's website https://www.pacer.gov/ ("Fee Schedule"), "No fee is charged for access to judicial opinions." That is, PACER users are meant to have free access to judicial opinions.

3. This policy, which has been in place since at least 2005, stems from an explicit directive contained in the E-Government Act of 2002, the law that gave rise to PACER, requiring all federal courts, including district and bankruptcy courts, to provide "[a]ccess to the substance of all written opinions issued by the court…." H.R. 2458, 107th Cong. §205(a)(5) (2002) ("E-Government Act").

4. Despite the plain language of the Fee Schedule, and the E-Government Act's directive, many documents constituting judicial opinions are <u>not</u> available for free in PACER. Instead, PACER users wishing to access such opinions are forced to pay, just as with every other type of document available on PACER.

5. The Judicial Conference of the United States ("Judicial Conference"), the judicial body charged with implementing PACER, has defined "written opinions" as "any document issued by a judge or judges of the court sitting in that capacity, that sets forth a reasoned explanation for a court's decision." Ultimately, however, it is up to each individual judge (or judges' staff) to designate a document as a "judicial opinion" for purposes of PACER billing.

6. The result is that numerous documents that constitute a judicial opinion under the Judicial Conference's definition, or any other objective standard – including, ironically, many whose title actually contain the word "opinion", or which are described as "opinions" in the documents themselves, or which are explicitly referred to as an "opinion" on PACER's docket sheet for the particular case – are not flagged as "judicial opinions" for purposes of PACER billing, thus forcing users to pay to access them.

7. Defendant continues to foster a situation where PACER users are improperly required to pay to access judicial opinions.

8. This failure by Defendant is a breach of its contracts with Plaintiff and other members of the proposed Class (defined below).

9. Defendant likewise is breaching the implied covenant of good faith and fair dealing with PACER users.

10. As well, Defendant's improper collection of payments for judicial opinions is in contravention of relevant statutes and related policies and procedures, including the E-Government Act and the Fee Schedule, and constitutes an illegal exaction in violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

11. Accordingly, Defendant owes Plaintiff and the Class damages as compensation for the improper charges.

JURISDICTION AND VENUE

12. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1346(a)(2). Venue is proper in this District, where the Plaintiff resides, pursuant to 28 U.S.C. §1402(a)(1) and 28 U.S.C. §1391(e)(1).

PARTIES

13. Plaintiff, Theodore D'Apuzzo, P.A., is a Florida corporation with its principal place of business in Fort Lauderdale, Florida. During the time period of the proposed Class, Plaintiff utilized PACER to access judicial opinions, for which access it was charged. Plaintiff has not been reimbursed or otherwise compensated for the charges.

14. Defendant, The United States of America, includes the Administrative Office of the United States Courts ("AO"), which administers and maintains PACER, and agents acting at the direction of or on behalf of the AO.

FACTUAL ALLEGATIONS

The PACER System

15. According to the AO's website, http://www.uscourts.gov, PACER is an electronic public access service that allows users to obtain case and docket information online from federal appellate, district, and bankruptcy courts. PACER is made available by the Federal Judiciary in keeping with its commitment to providing the public with access to court information via a centralized service. PACER's mission is to facilitate and improve electronic public access to court information at a reasonable cost, in accordance with legislative and judicial policies, security requirements, and user demands. PACER hosts millions of case file documents and docket information for all district, bankruptcy, and appellate courts.

16. The AO's Programs Division manages the development and maintenance of PACER and, through the PACER Service Center, provides centralized billing, registration, and technical support services for the Judiciary and the public.

17. Among PACER's users are attorneys; state and local governments, including city, state, and federal employees; educational institutions, including students, educators, and staff; journalists and media organizations; judges and court staff; and the general public.

PACER User Fees

18. As mandated by Congress, PACER is funded through user fees set by the Judicial Conference. The Judicial Appropriations Act of 1992, Pub. L. 102–140, title III, § 303, 105 Stat. 810 (1991), as amended by the E-Government Act of 2002, Pub. L. 107–347, title II, § 205(e), 116 Stat. 2915 (2002), provides:

> **Court Fees for Electronic Access to Information**
>
> (a) The Judicial Conference ***may, only to the extent necessary, prescribe reasonable fees***, pursuant to sections 1913, 1914, 1926, 1930, and 1932 of title

> 28, United States Code, for collection by the courts under those sections for access to information available through automatic data processing equipment. … The Director of the Administrative Office of the United States Courts, under the direction of the Judicial Conference of the United States, shall prescribe a schedule of reasonable fees for electronic access to information which the Director is required to maintain and make available to the public.

Id. (codified as amended at 28 U.S.C. 1913 note) (emphasis added).

19. Congress expressly limited the AO's ability to charge user fees for access to electronic court information by substituting the phrase "only to the extent necessary" in place of "shall hereafter" in the above statute. E-Government Act, § 205(e).

20. In accordance with this statute, the Judicial Conference prescribed user fees for electronic public access to court records, as reflected in the Fee Schedule published on PACER's website https://www.pacer.gov/. The Fee Schedule provides in pertinent part:

> **<u>Fees for Public Access to Court Electronic Records (PACER)</u>**
>
> (1) Except as provided below, for electronic access to any case document, docket sheet, or case-specific report via PACER: $0.10 per page, not to exceed the fee for thirty pages.
>
> ***
>
> **<u>Free Access and Exemptions</u>**
>
> (8) Automatic Fee Exemptions:
>
> ***
>
> - No fee is charged for access to judicial opinions.

Id. (emphasis in original).

21. Per the unambiguous language of the Fee Schedule, then, PACER users should <u>not</u> be charged for access to judicial opinions.

22. Moreover, this policy of "free" access to judicial opinions via PACER is hardly new. To the contrary, this policy has been announced publicly almost since PACER'S inception.

23. For instance, a July 2005 official PACER announcement ("2005 Announcement") contained a prominent, bolded announcement as its main headline entitled **NEW! Free Written Opinions**, which stated in pertinent part, "In the spirit of the E-Government Act of 2002, modifications have been made to the District Court CM/ECF system to provide our customers with **access to written opinions free of charge**…. *Id.* (text emphasis added).[1]

24. The announcement went on to reiterate this "free" access to opinions: "PACER customers can also access opinions via existing reports and queries…and **will not be billed for accessing the written opinion** document itself….If the customer … clicks on the document number hyperlink for a written opinion document, the customer **will not be charged** for viewing the document." *Id.* (emphasis added). The same information was repeated in later PACER announcements, for instance, in January and April 2006.[2]

25. A similar announcement was made in an official 2012 PACER "summary."[3] A section of that document, entitled "**Free Information and Exemptions**," discussed the costs involved in providing the public with electronic access to court records, and stated that a "great deal of federal court information" is provided to the public at "no charge." The summary included examples of such "free" information, with the first example being "judicial opinions":

> **Free Information and Exemptions**
>
> There is a high cost to providing electronic public access, and as described above, Congress decided in 1991 that the funds needed to improve electronic access to court information were to be provided by the users of this information through reasonable fees rather than by all tax payers through appropriated funds. It is also important to note, however, that the public access program does provide a great

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[1] The announcement may still be viewed on the PACER website at https://www.pacer.gov/announcements/quarterly/qa200507.pdf (last visited November 10, 2016).

[2] These announcements may still be viewed on the PACER website at https://www.pacer.gov/announcements/quarterly/qa200601.pdf (last visited October 26, 2016) and https://www.pacer.gov/announcements/quarterly/qa200604.pdf (last visited November 5, 2016), respectively.

[3] The summary may still be viewed on the PACER website at https://www.pacer.gov/documents/epasum2012.pdf (last visited October 27, 2016).

> deal of federal court information to the American public for **no charge**. For example:
>
> - The Judiciary does not charge for access to judicial opinions….

Id. (text emphasis added).

26. Consistent with these PACER announcements, the "Frequently Asked Questions" page relating to electronic case access on the AO website states, "There is no charge to view court opinions…."[4]

27. The policy of providing free PACER access to judicial opinions is consistent with both the language and purpose of the E-Government Act and related laws, which were meant to increase public access to court documents.

PACER Improperly Charges for Access to Judicial Opinions

28. Despite telling its users that "judicial opinions" are exempt from charges, PACER charges its users to access numerous court documents that clearly constitute judicial opinions.

29. The E-Government Act does not define "judicial opinions," but the 2005 Announcement explained that "[w]ritten opinions have been defined by the Judicial Conference as 'any document issued by a judge or judges of the court sitting in that capacity, that sets forth a reasoned explanation for a court's decision.'" *Id.* p. 1. That announcement went on to state that "[t]he responsibility for determining which documents meet this definition rests with the authoring judge." *Id.*

30. Although the definition of written opinions by the Judicial Conference appears straightforward enough, courts throughout the United States have applied the language very inconsistently, so that many court documents that satisfy that definition are nonetheless not

[4] http://www.uscourts.gov/courtrecords/electronic-filing-cmecf/faqs-case-management-electronic-case-files-cmecf (last visited November 11, 2016).

flagged as "judicial opinions." As a result, PACER users are improperly required to pay for access to many such opinions, in plain violation of the Fee Schedule.

31. Defendant, including the AO, is liable for these improper charges, since the charges stem from Defendant's failure to promulgate a definition of "judicial opinion" that could be applied consistently by the courts of the United States, or to otherwise implement safeguards to prevent judicial opinions from requiring a charge to be accessed via PACER.

32. An example of a court document that is a "judicial opinion", but which was not flagged as such in PACER and thus requires a charge to be accessed, is found in **Exhibit A**, for which Plaintiff was charged to access. The document, from the district court in the Southern District of Florida, meets the Judicial Conference's definition of a written opinion. It is a "document" that was "issued by a judge … sitting in that capacity", and "sets forth a reasoned explanation for [the] court's decision." Yet, Plaintiff and other users are required to pay to access this document.

33. Plaintiff also was charged to access the document attached in **Exhibit B**, a judicial opinion issued by the district court in the Western District of Washington.

34. Other examples of court documents that constitute judicial opinions but that are not available for free in PACER abound. One is the detailed, 82-page ruling issued by the bankruptcy court for the Southern District of Florida following a trial, attached as **Exhibit C**. Not only does it meet the Judicial Conference's definition of a written opinion, the document more than once refers to itself as an "Opinion." Ex. C, p. 2, fn. 3 (explaining abbreviations used "throughout this Opinion"); p. 37, fn. 53 ("For purposes of this Opinion….").

35. The title given to a court document should not by itself, of course, control whether that document is a "judicial opinion" for purposes of PACER billing. Even so, many documents

in PACER that are not flagged as judicial opinions, and thus require users to pay for access to them, contain the word "Opinion" in their very title. For instance, attached as **Exhibit D** is a document entitled "Opinion Granting Defendants' Motion to Dismiss", a 29-page ruling from the bankruptcy court in the Eastern District of Michigan. Not only is the document actually entitled "Opinion", the issuing judge twice referred to the document as an "opinion." Ex D, p. 1 ("For the reasons explained in this opinion…."); p. 28 (The Court will enter an order consistent with this opinion").

36. Similar is the "Memorandum Opinion and Order" from the district court in the District of Columbia (copy attached as **Exhibit E**). As with Exhibit D, besides the "Opinion" in its title, this document refers to itself as an "opinion" in its text. Ex. E, p. 4 (directing responses to be filed within 21 days "of the issuance of this opinion"). Yet, users may pay to access this document.

37. Yet another example is the "Opinion and Order" from the district court in the Southern District of Ohio (copy attached as **Exhibit F**). Again, in addition to the title, the document twice refers to itself as an "Opinion", on page 6 fn. 2 and page 7. This document was not flagged as a judicial opinion, however.

38. The "Opinion and Order" from the district court in the Middle District of Florida attached as **Exhibit G**, too, was not flagged as a judicial opinion in PACER.

39. It is not only titles or internal references that are often inconsistent with PACER's treatment of a court document as something other than a judicial opinion. For instance, some documents are not flagged as judicial opinions even though they are referred to as opinions in PACER's own docket sheet for the particular case. An example is the "Opinion and Order" issued by the district court in Oregon (copy attached as **Exhibit H**), which requires a charge to

access. Not only does its title contain the word "Opinion", the accompanying docket report entry in PACER states, "See 5-page opinion & order attached."

40. Further illustrating the inconsistency with how court rulings are flagged as "opinions" in PACER, another document in the same case as Exhibit H, issued a few months earlier, bearing the identical title of "Opinion & Order" was flagged as an "opinion" (copy attached as **Exhibit I**), and thus is freely available.

41. Similar is the "Consent Decree and Order of Dismissal With Prejudice," from the district court in Minnesota (copy attached as **Exhibit J**). The accompanying docket report entry refers to it as a "Written Opinion", yet PACER users must pay to access this document.

42. In short, PACER users are being improperly charged to access many court documents that constitute "judicial opinions," in contravention of PACER's Fee Schedule and the E-Government Act, which was enacted to provide the public with access to judicial opinions.

43. All conditions precedent to this action have occurred, been performed, or have been excused.

44. Plaintiff has retained the law firms of Giuliano Law, P.A., and Van Ness Law Firm, PLC, as its attorneys in this action and has incurred attorneys' fees and costs in prosecuting this action.

CLASS ACTION ALLEGATIONS

45. Plaintiff brings this class action on behalf of itself and all others similarly situated as members of a proposed Class defined as follows:

> **All PACER users who, within the last six years, paid to access a document constituting a judicial opinion in PACER**.

Excluded from the Class is the United States government and the agencies and officers thereof; any judges, justices, or judicial officers presiding over this matter, the members of their immediate families, and their judicial staff; Plaintiff's legal counsel and their law firms; and PACER users who have incurred improper charges to access judicial opinions in excess of $10,000.

46. This action is brought as and may properly be maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of these rules.

47. ***Numerosity Under Rule 23(a)(1).*** The Class is so numerous that the individual joinder of all members ("Class Members") is impracticable. While the exact number of Class Members is currently unknown and can only be ascertained through appropriate discovery, PACER has millions of users and many of those users have improperly been charged to access judicial opinions. This is more than sufficient to satisfy the numerosity requirement. Each of these Class Members can also be ascertained by referencing the AO's business records, which include the contact information for Class Members.

48. ***Commonality Under Rule 23(a)(2).*** Common legal and factual questions exist that predominate over any questions affecting only individual Class Members. These common questions, which do not vary among Class Members and which may be determined without reference to any Class Member's individual circumstances, include, but are not limited to:

A. Whether Defendant charged PACER users, including Plaintiff and other Class Members, for access to judicial opinions in breach of its contract with the users;

B. Whether Defendant owed a duty to PACER users, including Plaintiff and other Class Members, to not bill them to access judicial opinions;

C. Whether PACER users, including Plaintiff and other Class Members, are improperly charged to access judicial opinions;

D. Whether Defendant breached the implied covenant of good faith and fair dealing by charging PACER users to access judicial opinions;

E. Whether Defendant's conduct of unnecessarily and unreasonably charging PACER users to access judicial opinions, in contravention of the Fee Schedule as promulgated under the E-Government Act and related laws, constituted an illegal exaction; and

F. Whether Plaintiff and other Class Members have been damaged by the wrongs alleged and are entitled to compensatory damages.

49. Each of these common questions is also susceptible to a common answer that is capable of classwide resolution and will resolve an issue central to the validity of the claims.

50. ***Adequacy of Representation Under Rule 23(a)(4).*** Plaintiff is an adequate Class representative because it is a Class Member, and its interests do not conflict with the Class's interests. Plaintiff has retained counsel that is competent and experienced in prosecuting class actions. Plaintiff and its counsel intend to prosecute this action vigorously for the Class's benefit and will fairly and adequately protect the Class's interests.

51. ***Rule 23(b)(2) Generally Applicable Grounds.*** The Class can be properly maintained under Rule 23(b)(2). Defendant has charged, and continues charging, Plaintiff and other Class Members for access to court documents constituting "judicial opinions." Defendant, therefore, has acted or refused to act, with respect the issues presented in this Complaint, on grounds generally applicable to the Class.

52. ***Rule 23(b)(3) Predominance and Superiority.*** The Class can be properly maintained under Rule 23(b)(3), because the above common questions of law and fact predominate over any questions affecting only individual Class Members. A class action is also superior to other available methods for the fair and efficient adjudication of this litigation because individual litigation of each Class Member's claim is impracticable. Even if each Class Member could afford individual litigation, the court system could not. It would be unduly burdensome if thousands of individual cases were to proceed. Individual litigation also presents

the potential for inconsistent or contradictory judgments, the prospect of a race to the courthouse, and the risk of an inequitable allocation of recovery among those with equally meritorious claims. Individual litigation would increase the expense and delay to all parties and the courts because it requires individual resolution of common legal and factual questions. By contrast, the class-action device presents far fewer management difficulties and provides the benefit of a single adjudication, economies of scale, and comprehensive supervision by a single court.

CLAIMS FOR RELIEF

COUNT I
Breach of Contract

53. Plaintiff, individually and on behalf of the Class, incorporates by reference all of the allegations contained in paragraphs 1-52 of this Complaint.

54. As part of the process to register with and access PACER, Plaintiff and the Class entered into contracts with Defendant, which had actual authority to enter into said contracts.

55. These contracts incorporated the terms provided to Plaintiff and the Class during the registration process for PACER, and include the Fee Schedule.

56. Under the terms of the contracts, and specifically the Fee Schedule, PACER users are not supposed to be charged to access "judicial opinions" via PACER.

57. By charging Plaintiff and the Class to access "judicial opinions" via PACER, Defendant violated the express terms of the contracts. As a result, the Defendant breached their contracts with Plaintiff and the Class.

58. Plaintiff and the Class performed their duties under the contracts or were excused from doing so.

59. As a direct and proximate cause of Defendant's breach of the contracts, Plaintiff and the Class were harmed and are owed compensatory damages.

COUNT II
Breach of the Implied Covenant of Good Faith and Fair Dealing

60. Plaintiff, individually and on behalf of the Class, incorporates by reference all of the allegations contained in paragraphs 1-52 of this Complaint.

61. As part of the process to register and access PACER, Plaintiff and the Class entered into contracts with Defendant, which had actual authority to enter into said contracts.

62. Federal common law imposes an implied covenant of good faith and fair dealing in the performance of all contracts.

63. These contracts incorporated the terms provided to Plaintiff and the Class during the registration process for PACER, and include the Fee Schedule.

64. Under the terms of the contracts, and specifically the Fee Schedule, PACER users are not supposed to be charged to access "judicial opinions" via PACER.

65. Defendant has breached the implied covenant of good faith and fair dealing in the performance of these PACER contracts by charging users to access judicial opinions. This breach, in turn, stems from Defendant's failure to promulgate a definition of "judicial opinion" that could be applied consistently by the various courts of the United States, or to otherwise implement safeguards to ensure free access to judicial opinions via PACER.

66. Plaintiff and the Class performed their duties under the contracts or were excused from doing so.

67. As a direct and proximate cause of Defendant's breach of the implied covenant of good faith and fair dealing under the contracts, Plaintiff and the Class were harmed and are owed compensatory damages.

COUNT III
Illegal Exaction

68. Plaintiff, individually and on behalf of the Class, incorporates by reference all of the allegations contained in paragraphs 1-52 of this Complaint.

69. Defendant, acting through the AO, improperly collected user fees from Plaintiff and the Class in excess of those authorized by Congress under the E-Government Act and under the PACER Fee Schedule.

70. The E-Government Act provides that "[t]he Judicial Conference may, ***only to the extent necessary***, prescribe reasonable fees … for collection by the courts … for access to information available through automatic data processing equipment" and that "[t]he Director of the [AO], under direction of the Judicial Conference … shall prescribe a schedule of ***reasonable*** fees for electronic access to information …." 28 U.S.C. 1913 note (emphasis added).

71. The Fee Schedule plainly states that "[n]o fee is charged for access to judicial opinions."

72. By improperly charging PACER users, including Plaintiff and other Class Members, for access to "judicial opinions," Defendant collected charges from Plaintiff and the Class in excess of that authorized by the E-Government Act and the Fee Schedule, which charges are both unnecessary and unreasonable.

73. By necessary implication, the E-Government Act, the Fee Schedule, and other related policies and procedures promulgated by Defendant provide that the remedy for their violation entails a return of money unlawfully exacted. By directly prescribing the limits on fees charged to PACER users, these laws, policies, and procedures lead to the conclusion that they provide a monetary remedy for fees charged in excess of the prescribed limits.

74. Plaintiff and the Class are intended beneficiaries of the E-Government Act and related policies and procedures, as PACER's mission is to facilitate and improve electronic public access to court information at a reasonable cost, in accordance with legislative and Judiciary policies, security requirements, and user demands.

75. Defendant has retained the funds it unlawfully collected from Plaintiff and the Class for access of judicial opinions via PACER and has not reimbursed or otherwise compensated Plaintiff and the Class.

76. Plaintiff and the Class seek return of all funds improperly paid, exacted, or taken from them in contravention of the E-Government Act and related policies and procedures.

Prayer for Relief

Plaintiff, on behalf of itself and the Class, requests that the Court order the following relief and enter judgment against the Defendant as follows:

A. An order certifying the proposed Class under Federal Rule of Civil Procedure 23;

B. An order appointing Plaintiff and its counsel to represent the Class;

C. A finding that Defendant breached its contracts with Plaintiff and the Class;

D. A finding that Defendant breached the implied covenant of good faith and fair dealing with the Class;

E. A finding that the Defendant illegally exacted money from Plaintiff and the Class in violation of the Due Process Clause of the Fifth Amendment;

F. A judgment awarding Plaintiff and the Class compensatory damages and any other damages authorized by law in amounts to be proven at trial;

G. Pre-judgment and post-judgment interest at the maximum allowable rate;

H. Attorneys' fees and expenses and the costs of this action; and

I. All other relief, including equitable and injunctive relief, that this Court deems necessary, just, and proper.

Dated: November 22, 2016

By: */s/ Nicole W. Giuliano*

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JS 44 (Rev. 08/16)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

Theodore D'Apuzzo, P.A.

(b) County of Residence of First Listed Plaintiff Broward
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*

see attachment

DEFENDANTS

The United States of America

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ❒ 1 U.S. Government Plaintiff
- ❒ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ❒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	❒ 1	❒ 1	Incorporated *or* Principal Place of Business In This State	❒ 4	❒ 4
Citizen of Another State	❒ 2	❒ 2	Incorporated *and* Principal Place of Business In Another State	❒ 5	❒ 5
Citizen or Subject of a Foreign Country	❒ 3	❒ 3	Foreign Nation	❒ 6	❒ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ❒ 110 Insurance
- ❒ 120 Marine
- ❒ 130 Miller Act
- ❒ 140 Negotiable Instrument
- ❒ 150 Recovery of Overpayment & Enforcement of Judgment
- ❒ 151 Medicare Act
- ❒ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ❒ 153 Recovery of Overpayment of Veteran's Benefits
- ❒ 160 Stockholders' Suits
- ☒ 190 Other Contract
- ❒ 195 Contract Product Liability
- ❒ 196 Franchise

REAL PROPERTY
- ❒ 210 Land Condemnation
- ❒ 220 Foreclosure
- ❒ 230 Rent Lease & Ejectment
- ❒ 240 Torts to Land
- ❒ 245 Tort Product Liability
- ❒ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ❒ 310 Airplane
- ❒ 315 Airplane Product Liability
- ❒ 320 Assault, Libel & Slander
- ❒ 330 Federal Employers' Liability
- ❒ 340 Marine
- ❒ 345 Marine Product Liability
- ❒ 350 Motor Vehicle
- ❒ 355 Motor Vehicle Product Liability
- ❒ 360 Other Personal Injury
- ❒ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ❒ 365 Personal Injury - Product Liability
- ❒ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ❒ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ❒ 370 Other Fraud
- ❒ 371 Truth in Lending
- ❒ 380 Other Personal Property Damage
- ❒ 385 Property Damage Product Liability

CIVIL RIGHTS
- ❒ 440 Other Civil Rights
- ❒ 441 Voting
- ❒ 442 Employment
- ❒ 443 Housing/ Accommodations
- ❒ 445 Amer. w/Disabilities - Employment
- ❒ 446 Amer. w/Disabilities - Other
- ❒ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ❒ 463 Alien Detainee
- ❒ 510 Motions to Vacate Sentence
- ❒ 530 General
- ❒ 535 Death Penalty

Other:
- ❒ 540 Mandamus & Other
- ❒ 550 Civil Rights
- ❒ 555 Prison Condition
- ❒ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ❒ 625 Drug Related Seizure of Property 21 USC 881
- ❒ 690 Other

LABOR
- ❒ 710 Fair Labor Standards Act
- ❒ 720 Labor/Management Relations
- ❒ 740 Railway Labor Act
- ❒ 751 Family and Medical Leave Act
- ❒ 790 Other Labor Litigation
- ❒ 791 Employee Retirement Income Security Act

IMMIGRATION
- ❒ 462 Naturalization Application
- ❒ 465 Other Immigration Actions

BANKRUPTCY
- ❒ 422 Appeal 28 USC 158
- ❒ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ❒ 820 Copyrights
- ❒ 830 Patent
- ❒ 840 Trademark

SOCIAL SECURITY
- ❒ 861 HIA (1395ff)
- ❒ 862 Black Lung (923)
- ❒ 863 DIWC/DIWW (405(g))
- ❒ 864 SSID Title XVI
- ❒ 865 RSI (405(g))

FEDERAL TAX SUITS
- ❒ 870 Taxes (U.S. Plaintiff or Defendant)
- ❒ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ❒ 375 False Claims Act
- ❒ 376 Qui Tam (31 USC 3729(a))
- ❒ 400 State Reapportionment
- ❒ 410 Antitrust
- ❒ 430 Banks and Banking
- ❒ 450 Commerce
- ❒ 460 Deportation
- ❒ 470 Racketeer Influenced and Corrupt Organizations
- ❒ 480 Consumer Credit
- ❒ 490 Cable/Sat TV
- ❒ 850 Securities/Commodities/ Exchange
- ❒ 890 Other Statutory Actions
- ❒ 891 Agricultural Acts
- ❒ 893 Environmental Matters
- ❒ 895 Freedom of Information Act
- ❒ 896 Arbitration
- ❒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ❒ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

- ☒ 1 Original Proceeding
- ❒ 2 Removed from State Court
- ❒ 3 Remanded from Appellate Court
- ❒ 4 Reinstated or Reopened
- ❒ 5 Transferred from Another District *(specify)*
- ❒ 6 Multidistrict Litigation - Transfer
- ❒ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing **(*Do not cite jurisdictional statutes unless diversity*)**:
28 U.S.C. 1346

Brief description of cause:
PACER users are improperly charged to access judicial opinions

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ❒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE
11/22/2016

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

Print Save As... Reset

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked**.** (See Section III below**; NOTE: federal question actions take precedence over diversity cases.**)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: Nature of Suit Code Descriptions.

V. **Origin.** Place an "X" in one of the seven boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statue.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Florida

Theodore D'Apuzzo, P.A., Individually and on Behalf of All Others Similarly Situated,	)	
Plaintiff(s)	)	
v.	)	Civil Action No.
The United States of America	)	
Defendant(s)	)	

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

Attention: Wifredo A. Ferrer
U.S. Attorney for the Southern District of Florida
99 N.E. 4th Street
Miami, Fl. 33132

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Nicole W. Giuliano
Giuliano Law, P.A.
500 E. Broward Blvd., Suite 1710
Fort Lauderdale, FL 33394

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: ____________________

____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* ____________________
was received by me on *(date)* __________ .

❒ I personally served the summons on the individual at *(place)* ____________________
____________________ on *(date)* __________ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* __________
____________________ , a person of suitable age and discretion who resides there,
on *(date)* __________ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* ____________________ , who is
designated by law to accept service of process on behalf of *(name of organization)* __________
____________________ on *(date)* __________ ; or

❒ I returned the summons unexecuted because ____________________ ; or

❒ Other *(specify)*:

My fees are $ __________ for travel and $ __________ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: __________

____
Server's signature

____
Printed name and title

____
Server's address

Additional information regarding attempted service, etc:

Print Save As... Reset

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 10-CIV-60037-COHN/SELTZER

LINDA GEORGIAN and
INTERACTIVE INFORMATION
NETWORKS, LLC,

Plaintiffs,

v.

THE ZODIAC GROUP, INC.,
DAVID FELGER,
DANIEL FELGER, and
MATTHEW PEREZ,

Defendants.
_______________________________/

ORDER DENYING DEFENDANTS' REQUEST FOR JUDICIAL NOTICE

THIS CAUSE is before the Court on Defendants' Request for Judicial Notice [DE 208] ("Motion"). The Court has reviewed the Request for Judicial Notice, Plaintiffs' Opposition [DE 231], Defendants' Reply [DE 253], and is otherwise advised in the premises.

Defendants inform the Court that it "must" take judicial notice of (1) "the transcribed content of Facebook's automated message for customer support stating that it does not possess live customer support," (2) "the transcribed content [sic] Google's automated message for customer support stating that Google do [sic] not possess live customer support" and (3) "the transcribed content [sic] Google's automated message containing the information to learn how to delete information from the search results." Request for Judicial Notice at 1, 3. Defendants contend the Court must take judicial notice of this information because Linda Georgian testified, purportedly falsely, that she called the websites of Google and Facebook and had conversations with representatives from both websites.[1] See id. at 4.

In other words, Defendants insist the Court take judicial notice of the "transcribed content" so that Defendants can impeach Georgian with it. See id. ("This Court must take judicial notice of these facts to impeach Georgian upon her falsely testifying that she had these conversations."). Defendants, therefore, ask the Court to take judicial notice of more than the "transcribed content." Indeed, Defendants ask the Court to take judicial notice of the truth of the representations within the transcribed content.[2] Notably, however, Defendants cite no case wherein a court has taken judicial notice of similar information.[3]

"A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2)

---

1 Defendants also ask the Court to take judicial notice of this information because it is relevant to sanctions against Plaintiffs' counsel for "failure to do a proper examination" of his client's representations and relevant to "potential evidence of fraud committed upon this Court." See Motion at 4.

2 Defendants reveal as much in their Reply: "The facts that Facebook and Google's lack of customer service do not require any speculation to discover." Defendants' assertion is not a model of clarity, but it clearly indicates that Defendants seek judicial notice of more than the "transcribed content" they reference in their Motion.

3 Defendants cite only four cases in their Motion. First, they cite United States v. Jones, 29 F.3d 1549 (11th Cir. 1994) which held that a district court improperly took judicial notice of findings of fact from a previous suit. Defendants also cite Maynard v. Pneumatic Products Corp., 256 F.3d 1259 (11th Cir. 2001), which Defendants, as has become their custom, cite incorrectly in their Motion. Cf. Defendants' Reply in Support of Motion for Summary Judgment [DE 256] at 14. Regardless, in Maynard, the Eleventh Circuit concluded that the district court could have taken judicial notice of whether charges filed against a party were timely. Thus, the information was not akin to the information at issue here. Penultimately, Defendants cite Jones v. Int'l Riding Helmets, Ltd., 49 F.3d 692 (11th Cir. 1995). That case never mentions judicial notice. Lastly, Defendants cite an unpublished case, In re Ocon, Case No. No. 08-11226, 2009 WL 405370 (11th Cir. Feb. 19, 2009), but that case also has nothing to do with judicial notice.

capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). "A court shall take judicial notice if requested by a party and supplied with the necessary information." Id. 201(d). Nonetheless, the Court cannot take judicial notice of the information proffered by Defendants.

The purported facts that neither Google nor Facebook provide live customer service is not "generally known within the territorial jurisdiction of the trial court." Likewise, despite the investigation Defendants direct the Court to undertake, see Motion at 3, the information is subject to reasonable dispute and it is not capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Cf. Fed. R. Evid. 201(b). Indeed, the multi-stepped directions (that Defendants submit the Court "must" take) not only fail to demonstrate that the information is indisputable, but belies Defendants' assertion that the information is "capable of accurate and ready determination." Among other problems, there is no way of telling how long the messages have been in place (i.e., whether the messages are the same now as they were when Georgian claims she called the sites). Consequently, the accuracy of the facts within the transcribed information can reasonably be questioned.

In light of the foregoing, it is **ORDERED AND ADJUDGED** that Defendants' Request for Judicial Notice [DE 208] is **DENIED**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 26th day of July, 2011.

James I. Cohn

JAMES I. COHN
United States District Judge

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ORGANO GOLD INT'L, INC., Plaintiff, v. LUIS VENTURA, et al., Defendants.	CASE NO. C16-487RAJ ORDER

This matter comes before the Court on Defendant L&A Ventura Management, Inc.'s ("L&A Ventura") response to the Court's May 3, 2016 Order to Show Cause. *See* Dkt. # 31. In that May 3, 2016 order, the Court restrained Defendants L&A Ventura and Luis Ventura from engaging in certain activity this Court found violated various non-competition agreements between Defendants and Plaintiff Organo Gold Int'l, Inc. ("Organo"). Dkt. # 27 at 21. The Court has considered the submissions of the Parties and will convert the temporary restraining order ("TRO") to a preliminary injunction.

Defendants argue that the Court should not convert the TRO into a preliminary injunction because Total Life Changes, LLC ("TLC") – the company for which Mr. Ventura currently works as a distributor – has ceased selling ganoderma-based products. *See* Dkt. # 31 at 2. As a result, they argue that Organo is no longer likely to suffer harm.

Defendants are correct to a certain extent. If TLC truly stops selling such products – and its chief operating officer has attested as much (*see* Dkt. # 38-1 (Licari Decl.) ¶ 3) – then Defendants will not run afoul of a portion of the injunction by participating in TLC.

Case 2:16-cv-00487-RAJ Document 39 Filed 07/28/16 Page 2 of 5

Defendants, of course, may still be subject to this Court's contempt power if TLC actually continues to sell ganoderma-based products. *See Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1130 (9th Cir. 2006) (quoting *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993)).

But the fact that TLC has apparently stopped selling ganoderma-based products does not negate the likelihood of harm. A complete dissolution of the TRO (as Defendants request) removes any impediments on Defendants' "[s]oliciting, recruiting, or raiding Organo's distributors or customers." *See* Dkt. # 27 at 21. The Court found irreparable harm primarily because Organo was particularly vulnerable to such poaching. *See id.* at 16-18. Those same considerations remain, regardless of whether Defendants continue to participate in TLC or whether TLC stops selling ganoderma.

Defendants further contest the breadth of the TRO, arguing that it should be narrowed to only the 92 distributors Defendants personally enrolled. *See* Dkt. # 31 at 9. Defendants previously raised this argument. *See* Dkt. # 30 [Apr. 27, 2016 Hearing Tr.] at 31:18-32:6. The Court rejected it then and it rejects it now. Despite their best efforts, Defendants draw little useful distinction between Mr. Ventura's entire downline and the 92 unidentified individuals he apparently had personal contact with. The fact is, Mr. Ventura retains unique knowledge about the internal workings of Organo – he must, as he worked within their structure for years. That knowledge is not inherently personal to those distributors he had personal contact with; it inheres to the organization.

Defendants cite *Amazon.com, Inc. v. Powers*, No. C12-1911RAJ, 2012 WL 6726538 (W.D. Wash. Dec. 27, 2012) in support of their request to narrow the scope of the injunction. But *Amazon.com* is distinguishable for the simple reason that Organo has "demonstrate[d] that more general restrictions are necessary" because of the nature of MLM sphere. *See id.* at *9.

Defendants also request that the Court narrow the geographical scope of the injunction to only countries where Organo is legally doing business. *See* Dkt. # 31 at 11.

Specifically, Defendants appear to request that the Court carve out El Salvador, Curacao, Panama, Bolivia, Nicaragua, and Guatemala from the scope of the injunction. *See* Dkt. # 32 (Ventura Decl.) ¶ 5. The Court rejects Defendants' request.

This Court reasoned that a worldwide restriction was appropriate under the circumstances because of the nature of the MLM business and because other courts had approved nationwide noncompete clauses in similar circumstances. *See* Dkt. # 27 at 11 (citing *PartyLite Gifts, Inc. v. MacMillan*, 895 F. Supp. 2d 1213, 1226 (M.D. Fla. 2012) (finding nationwide non-compete provision to be reasonable); *YTB Travel Network of Illinois, Inc. v. McLaughlin*, No. 09-CV-369-JPG, 2009 WL 1609020, at *4 (S.D. Ill. June 9, 2009) (finding that lack of a geographic limitation was irrelevant in network marketing involving online business)).

Furthermore, it is clear that Organo has distributors servicing those countries and has invested resources into growing its operations in those countries. *See* Dkt. # 37 (Perrett Decl.) ¶¶ 4-6. Given the nature of the MLM business and the realities of modern infrastructure, whether or not Organo has physical locations in those countries is largely irrelevant. The focus is whether the limitation is reasonably limited to Organo's business interests. *See ISC-Bunker Ramo Corp. v. Altech, Inc.*, 765 F. Supp. 1310, 1336 (N.D. Ill. 1990). The Court finds that the worldwide scope is reasonable here, especially as Organo has established it has business interests in the identified countries.

Defendants also argue that the Court should narrow the scope of the injunction to, apparently, only specific provisions of the Distributor Application and Organo's Policies and Procedures. *See* Dkt. # 31 at 12. But Defendants fail to identify any specific terms that should remain. And this Court has already identified relevant (and likely applicable) terms Defendants remain subject to. *See* Dkt. # 27 at 9-11. In any event, to the extent Defendants contend that these provisions either do not apply to them or have not been subject to the same level of proof, the Court notes simply that the party moving for civil contempt "has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court. The burden then shifts to the contemnors to demonstrate why they were unable to comply." *See F.T.C. v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999) (quoting *Stone v. City & Cnty. of San Francisco*, 968 F.2d 850, 856 n.9 (9th Cir. 1992)).

Next, Defendants contend that the injunction should be modified to exclude any language prohibiting Defendants from soliciting Organo's existing customers to a ganoderma or healthy beverage business. *See* Dkt. # 31 at 12-13. The Court agrees with Organo that Defendants' desire to lift this prohibition lacks credibility. *See* Dkt. # 35 at 10.

Finally, the Court addresses Defendants' request that the bond amount be increased to $750,000. *See* Dkt. # 31 at 13. To this end, Mr. Ventura guesses that if he was "permitted to continue working as a TLC distributor, between February 2016 and February 2017, my income at TLC would conservatively be $750,000 and $1,000,000." *See* Dkt. # 32 (Ventura Decl.) ¶ 6.

The Court does not agree with Defendants' request. First, Organo correctly notes that Mr. Ventura offers little basis for his speculative estimate. *See* Dkt. # 35 at 10-11. And second, the injunction does not inherently prohibit Mr. Ventura from working for TLC. If TLC ceases its sale of ganoderma based products, then the injunction does not bar him from participating in TLC. Instead, it the injunction would simply prohibit him from soliciting Organo's distributors or customers to TLC. Mr. Ventura has been extraordinarily successful in the MLM sphere. *See* Dkt. # 16 (Ventura Decl.) ¶¶ 2-3. There seems little reason why he cannot continue to be successful with these limitations, whether at TLC or another non-directly competitive opportunity.

I. PRELIMINARY INJUNCTION

Effective upon posting $100,000 bond or equivalent security with this Court, and upon service of this Order, Defendants L&A Ventura Management, Inc. and Luis Ventura are hereby enjoined from taking the following actions:

1. Violating the express terms of the Distributor Application with Organo and Organo's Policies and Procedures, including by competing with Organo by participating in an opportunity that directly competes with Organo by offering ganoderma-based products or by soliciting Organo's existing customers to any ganoderma or healthy beverage MLM business;
2. Soliciting, recruiting, or raiding Organo's distributors or customers;
3. The preliminary injunction will become effective upon formal service of this Order and will remain in effect pending further order of this Court or February 1, 2017, whichever comes first.

DATED this 28th day of July, 2016.

The Honorable Richard A. Jones
United States District Judge

ORDERED in the Southern District of Florida on August 18, 2016.

Paul G. Hyman, Jr.
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

In re:	**CASE NO.: 13-20853-BKC-PGH**
TLFO, LLC, **Debtor(s).** ________________________/	**Chapter 11**
TransUnion Risk and Alternative Data Solutions, Inc., **Plaintiff,** **v.** **The Best One, Inc. and Ole Poulsen,** **Defendants.** ________________________/	**ADV. NO.: 14-01793-BKC-PGH-A**

TRIAL ORDER

THIS MATTER came before the Court for trial (the "Trial") on May 16 and 17, 2016, and June 15, 22, 23, 24, and 27, 2016, upon (1) the *Second Amended Complaint* (the "Complaint") (ECF No. 61) and the *Motion to Enforce Sale Order and* *to Hold The Best One, Inc. in Contempt* (the "Motion to Enforce Sale Order") (ECF No. 1282, Case No. 13-20853-BKC-PGH)[1] filed by Plaintiff TransUnion Risk and Alternative Data Solutions, Inc. ("TRADS"); (2) the *Answer, Affirmative Defenses, and Counterclaim* (the "TBO Counterclaim") (ECF Nos. 333 and 334) filed by Defendant The Best One, Inc. ("TBO"); and (3) the *Answer, Affirmative Defenses, and Counterclaim* (the "Poulsen Counterclaim") (ECF Nos. 335 and 336) filed by Ole Poulsen ("Poulsen," and together with TBO, the "Defendants"). For the reasons discussed in detail below, the Court finds in favor of Plaintiff TRADS.

FINDINGS OF FACT AND PROCEDURAL BACKGROUND

I. The Parties

Plaintiff TRADS is a Delaware corporation and a subsidiary of TransUnion Corp. ("TransUnion"). For simplicity's sake, the Court will refer collectively to TRADS and TransUnion as "TransUnion-TRADS." Defendant TBO, now known as IDI, Inc.,[2] is a Florida corporation, which was formed by Michael Brauser in 2014. Mr. Brauser now serves as TBO's executive chairman. Defendant Poulsen is an individual currently living in Oregon. TLO, LLC ("TLO")[3] is the entity whose chapter 11

[1] TransUnion-TRADS filed the Motion to Enforce Sale Order in the underlying TLO, LLC bankruptcy proceeding. *See* Case No. 13-20853-BKC-PGH. On January 28, 2015, the Court entered an Order on the Motion to Enforce Sale Order, in which the Court held that the Motion alleged substantially the same facts as those alleged in this adversary proceeding and that as a result, the Motion to Enforce Sale Order would be consolidated with this adversary proceeding. *See Order* (ECF No. 1297, Case No. 13-20853-BKC-PGH).

[2] Even though TBO is now known as IDI, in order to avoid confusion, the Court will refer to IDI as TBO throughout the Order.

[3] As reflected in the caption for this proceeding, after filing for chapter 11 bankruptcy relief and going through the reorganization process, TLO became known as TLFO, LLC. However, the Court will refer to TLFO, LLC as TLO throughout this Opinion for simplicity's sake.

bankruptcy filing prompted the events which led to the litigation now before the Court.

II. <u>TLO: Inception through Bankruptcy Filing</u>

In March 2009, Hank Asher formed TLO with two co-founders, Poulsen and John Walsh. Initially, Poulsen and Mr. Walsh each contributed $100.00 in exchange for each receiving a 10% equity interest in TLO and Mr. Asher contributed $800.00 in exchange for an 80% equity interest in TLO. Mr. Asher served as the *de facto* CEO and Poulsen served as the Chief Science Officer of TLO.

Between its formation in 2009 and its eventual bankruptcy filing in 2013, TLO developed a commercial product known as TLOxp. TLOxp was and is a program which allows users to search for information regarding individuals and entities. TLOxp relies on the ability to obtain data from various sources and more importantly, to process and sort that data. In order to process and sort the data, TLO utilized a computer programming language called BOLT and a computer program called BParser. BOLT was—and still is—a computer programming language which allows programmers to write programs, or scripts, for data processing and sorting. BParser was—and still is—a computer program which converts BOLT scripts into the universal, standard computer language known as C++ so that the BOLT scripts can be executed by a computer. BParser utilizes a "runtime library" to compile BOLT scripts into machine-readable code. For simplicity's sake, the Court will refer collectively to BOLT, BParser, the scripts written in BOLT, the BParser source code, the BParser executable version, and the runtime library as the "BOLT IP." The only commercial entities to have ever used the BOLT IP are TLO and, as discussed in detail later, TransUnion-TRADS.

Throughout its existence, TLO was a financially troubled company. In order to keep it afloat, Mr. Asher, through his corporation Technology Investors Inc., provided more than $88 million in funding to TLO. However, on January 11, 2013, Mr. Asher suddenly and unexpectedly passed away. Thereafter, his daughters Desiree Asher and Carly Asher Yoost (together, the "Asher Sisters") stepped in to manage TLO. At the time, TLO was losing more than $3 million per month and had only 45 days' worth of working capital. Moreover, at some point after Mr. Asher's passing, Poulsen stopped coming into the TLO offices and his employment as Chief Science Officer was eventually terminated by TLO several months later. Shortly thereafter, the Asher Sisters along with TLO's senior management decided that TLO would file for chapter 11 bankruptcy relief and retained bankruptcy attorney Robert C. Furr and his law firm Furr & Cohen, PA ("Furr & Cohen"). On May 9, 2013, TLO filed its voluntary chapter 11 bankruptcy petition (the "Petition Date").

III. <u>The § 363 Sale of Substantially All of TLO's Assets</u>

The Asher Sisters personally provided a total of $6 million in Court-approved debtor-in-possession financing in order for TLO to temporarily stay in business. Ultimately, however, it was determined that the only reasonable course of action was to sell TLO's business and assets. TLO, through its attorney Mr. Furr, engaged a Court-approved investment banker who identified several potential buyers, one of which was TransUnion-TRADS.

These potential buyers, including TransUnion-TRADS, signed non-disclosure agreements and conducted due diligence. In October 2013, TransUnion-TRADS made a $105 million "stalking horse" bid for the sale and purchase of substantially all of TLO's assets, including the BOLT IP.[4] TLO chose TransUnion-TRADS as the stalking horse as it had made the highest and best offer at the time. On October 15, 2013, TLO filed a *Motion for Entry of Order: (I) Approving Procedures in Connection with the Sale of Substantially All of the Debtor's Assets Free and Clear of Liens, Claims, Encumbrances and Other Interests, (II) Authorizing the Payment of Breakup Fee and Expense Reimbursement, (III) Setting Bid Deadline, Auction and Sale Approval Hearing Dates, (IV) Establishing Notice Procedures and Approving Forms of Notice, and (V) Approving Procedures Related to Assumption and Assignment of Executory Contracts and Unexpired Leases* (the "Bid Procedures Motion").[5] The Bid Procedures Motion (1) disclosed that the sale would be free and clear of all liens, claims, encumbrances and other interests in the acquired assets, with all liens, claims, encumbrances, and other interests to attach to the proceeds of the sale; (2) requested that an auction be held on November 20, 2013 (the "§ 363 Auction") and that a sale hearing be held on November 22, 2013 (the "Sale Hearing"); and (3) sought approval of bidding procedures.

---

[4] A *Notice of Filing of Stalking Horse APA* (ECF No. 389, Case No. 13-20853) was filed on November 1, 2013, in the TLO bankruptcy proceeding and was admitted into evidence at Trial, although not for its truth, as Exhibit 342.

[5] Pl.'s Ex. 291; *see also*, ECF No. 291, Case No. 13-20853 (as a result of an electronic filing error by the filing attorney, the Clerk re-docketed the Bid Procedures Motion at ECF No. 350).

After a hearing on the Bid Procedures Motion, the Court entered an Order on October 24, 2013, approving the bid procedures, scheduling the § 363 Auction to take place on November 20, 2013, and setting a hearing on November 22, 2013, to consider approval of the sale to the successful bidder (the "Bid Procedures Order"). *See* Bid Procedures Order.[6] The October 24, 2013, Bid Procedures Order also contained, in pertinent part, the following provisions:

> 7. [TLO] is authorized to enter into an asset purchase agreement, on terms it deems reasonable after consultation with the Committee and Tech. Inc., with the Proposed Buyer, for the sale, free and clear of all liens, claims, liabilities, and other interests, of substantially all assets of [TLO] . . . provided, however, . . . the Sale pursuant to the Stalking Horse APA to the Proposed Buyer shall occur only if the Bankruptcy Court enters an order approving such Sale.
>
> . . .
>
> 13. Objections to the transactions contemplated by the Sale (a "Sale Objection") shall (i) be filed with this Court and served on the Notice Parties, so as to be received on or before November 18, 2013 (the "Sale Objection Deadline"), at 5:00 p.m. (prevailing Eastern Time); (ii) be in writing and conform to the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court; (iii) set forth the name of the objecting party, the nature and amount of any claims or interests held or asserted against [TLO's] estate or properties, the basis for the objection and the specific grounds therefor; and (iv) be served so as to be received by the Sale Objection Deadline on all Notice Parties.
>
> 14. The failure to file and serve a Sale Objection by the Sale Objection Deadline shall be a bar to the assertion thereof at the Sale Hearing or thereafter.

Bid Procedures Order, ¶¶ 7, 13-14 (emphasis added). The Notice of Bid Deadline, Auction, and Sale Hearing attached as Exhibit 1 to the Bid Procedures Order further spelled out that "[TLO] intend[ed] to enter into an asset purchase agreement . . . for

[6] Pl.'s Ex. 308; *see also*, ECF No. 351, Case No. 13-20853.

the sale, free and clear of all liens, claims, liabilities, and other interests, to the maximum extent permitted by section 363 of the Bankruptcy Code, of substantially all assets of [TLO]." *Id.*, Ex. 1, ¶ 2 (emphasis added).

On November 1, 2013, TLO filed the *Motion for Order (I) Approving the Sale of Substantially All of the Debtor's Assets Free and Clear of All Liens, Claims, Encumbrances and Other Interests (Other than Assumed Liabilities), (II) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (III) Granting Related Relief* (the "Sale Motion").[7] As Exhibit B to the Sale Motion, TLO attached the stalking horse asset purchase agreement (the "Stalking Horse APA") between TLO as the seller and TransUnion-TRADS as the buyer. The Sale Motion provided that pursuant to the Stalking Horse APA, TLO would "sell, transfer, convey, assign and deliver to the [successful bidder], at the Closing . . . , free and clear of all Interests . . . , all of [TLO's] right, title and interest throughout the world in and to all of the assets of [TLO] existing as of the Closing, whether tangible or intangible, real, personal or mixed . . . (collectively, the "Acquired Assets")." Sale Mot., ¶ 18(a). In relevant part, the Sale Motion identified the Acquired Assets to include:

> ¶ 18(a)(ii). All (A) patents, patent applications, patent disclosures and all related continuation, continuation-in-part, divisional, reissue, re-examination, utility model, certificate of invention and design patents and patent applications, design registrations and applications for design registrations, (B) trademarks, service marks, logos, tradenames and corporate names and registrations and applications for registration thereof, (C) copyrights and registrations and applications for

[7] Pl.'s Exs. 341, 343; *see also*, ECF No. 388, Case No. 13-20853 (as a result of an electronic filing error by the filing attorney, the Clerk re-docketed the Sale Motion at ECF No. 390).

registration thereof, including moral rights of authors, (D) computer software and documentation, including all source code, object code and works-for-hire, (E) trade secrets and confidential business information, whether patentable or non-patentable and whether or not reduced to practice, know-how, manufacturing and product processes and techniques, research and development information, copyrightable works, financial, marketing and business data, pricing and cost information, business and marketing plans, customer and supplier lists and information, Data (defined below), internet domain name registrations, and internet protocol addresses, (F) other proprietary rights relating to any of the foregoing (including, without limitation, remedies against infringements thereof and rights of protection of interest therein under the laws of all jurisdictions), and (G) copies and tangible embodiments thereof, including all books or records related thereto (collectively, "Intellectual Property"). The Intellectual Property shall include, but not be limited to, the items set forth on Schedule 1.1(a)(ii) to the Stalking Horse APA (the "Intellectual Property Listing") which lists each patent, copyright registration, trademark, service mark, trade name and registration of a trademark, service mark or trade name and any other registration which has been issued to or is otherwise owned by [TLO] with respect to any of its Intellectual Property, identifies each pending patent, copyright, trademark, service mark or trade name application which [TLO] has made or is otherwise owned by [TLO] with respect to any of its Intellectual Property, identifies all computer software owned by [TLO], including names and functional descriptions of each software system and of each material component or module thereof, and identifies each license or other agreement pursuant to which [TLO] has granted any rights to any third party with respect to any of its Intellectual Property.

¶ 18(a)(iii). Any right that [TLO] has to sue for past, present or future infringement, misappropriation or violation of rights relating to the Intellectual Property and to retain any damages and profits due or accrued (the "Intellectual Property Claims").

¶ 18(a)(iv). Any right that [TLO] has (a) to collect royalties and other payments under or on account of any of the Intellectual Property and (b) to collect or receive royalties pursuant to 11 U.S.C. §365(n) . . . .

¶ 18(a)(v). All invention assignment agreements.

¶ 18(a)(vi). All books and records related to the Intellectual Property.

. . .

> ¶ 18(a)(viii). Any and all data and information (collectively, the "Data") licensed, obtained, or otherwise received, developed, generated or recorded, by [TLO], including but not limited to any and all copies, reproductions, embodiments or versions of any information or data (whether in electronic, human or machine readable or executable form or any other format) in the possession, custody or control of [TLO] or its representatives, or that [TLO] or its representatives otherwise has the right to access.

Sale Mot., ¶ 18(a); *see also*, Stalking Horse APA, Section 1.1(a). TLO attached a draft order approving the Sale Motion as Exhibit A to the Sale Motion and specifically requested that the Court's order approving the Sale Motion include the following provisions:

> ¶ 20(a). Technology Investors Inc. ("Tech. Inc.") and Michael Kuzy, as the personal representative of the estate of Hank Asher (the "Personal Representative" of the "Asher Estate") . . . , have acknowledged that all intellectual property or any of the other assets used or useful by [TLO] in the conduct of the Business of [TLO] (the "Business Assets"), which Business Assets were ever owned by Tech. Inc. or Hank Asher, were intended to be contributed to [TLO], and were so contributed. Tech. Inc. and the Personal Representative have further acknowledged that neither Tech. Inc. nor the Personal Representative, respectively, have any claim or interest whatsoever in any Business Assets. Accordingly, the sale of all Business Assets to the Buyer as a component of the Acquired Assets shall be free and clear of all and any interests of Tech. Inc. or the Asher Estate.
>
> ¶ 20(b). To the extent that Ole Poulsen holds or asserts any interests of any kind in the [BParser code converter software] used or useful by [TLO] in the conduct of the Business (the "BParser Code") or any other Business Assets, such BParser Code and other Business Asset shall be deemed an Acquired Asset and may be sold to the Buyer free and clear of all such interests pursuant to section 363 (f) and/or 363 (h) of the Bankruptcy Code because (among other reasons) such interests are in bona fide dispute and Ole Poulsen has been provided notice of and an opportunity to object to and be heard with respect to the Sale and [he did not timely file an objection][any timely filed objection has been withdrawn or overruled].

Sale Mot., ¶ 20 (emphasis added). TLO represented in the Sale Motion that these provisions were "appropriate because [TLO] will cause all parties who allege an Interest in the Acquired Assets, including but not limited to the Asher Estate and Ole Poulsen, to be served with a copy of this Motion and the form of [Sale] Order. All such interested parties have also been provided notice of the Sale Hearing and all relevant deadline for objecting to the relief requested in this Motion." *Id.*, ¶ 21.

The Stalking Horse APA, attached to the Sale Motion as Exhibit B, contained extensive representations and warranties by TLO. *See* Sale Mot., Ex. B., Article II. These representations and warranties included, in pertinent part, the following:

> Section 2.5 Ownership of Assets. [TLO] is the true and lawful exclusive owner of, and has good title to, all of the assets (tangible or intangible) purported to be owned by it. [TLO] is now or prior to the Closing will be in possession of and have good title to, have valid leasehold interests in, or have other rights to use, in all rights, assets and properties of every kind, nature, character and description (whether real, personal or mixed, whether tangible or intangible, whether absolute, accrued, contingent, fixed or otherwise, wherever situated) that are used in, or required or necessary for the conduct of the Business as presently conducted. All such rights, assets and properties are included in the Acquired Assets. [TLO] will be able, upon entry of the [Sale] Order, to transfer all right, title and interest in the Acquired Assets to Buyer, free and clear of any Security Interests or other Interests. No direct or indirect subsidiary or other Affiliate of [TLO] will, as of immediately prior to the Closing, own any rights, assets and properties of any kind, nature, character and description (whether real, personal or mixed, whether tangible or intangible, whether absolute, accrued, contingent, fixed or otherwise, wherever situated) that are used in the conduct of the Business. . . .
>
> Section 2.6 Intellectual Property.
>
> (a) *Ownership; Sufficiency*. Each item of Intellectual Property owned by [TLO], in whole or in part, including each item identified in

the Intellectual Property Listing[8] (the "Seller Owned Intellectual Property"), and each item of Intellectual Property licensed to [TLO] by any third party (the "Seller Licensed Intellectual Property" and, collectively with the Seller Owned Intellectual Property, the "Seller Intellectual Property") will be available for use by Buyer immediately following the Closing on substantially identical terms and conditions as it was immediately prior to the Closing without violating, infringing or misappropriating any Intellectual Property rights of any Person. The Seller Intellectual Property assigned to Buyer constitutes all Intellectual Property necessary for Buyer (i) to develop, design, test, modify, make, use, sell, have made, used and sold, import, reproduce, correct, modify, enhance, create derivative works of, support, maintain, market, distribute, commercialize, and otherwise make available ("Exploit") the Customer Offerings (defined below) in the manner so done currently by [TLO], (ii) to Exploit the Software and Documentation (as herein defined) and the computer, communications and network systems (both desktop and enterprise-wide) used by [TLO] or to develop, provide, distribute, support, maintain or test the Customer Offerings ("Internal Systems") as currently done by [TLO], and (iii) otherwise to continue to operate, without interference or limitation, the Business in the manner so operated currently by [TLO]. The Seller Intellectual Property assigned and licensed to Buyer includes all systems and tools required to be maintained by [TLO] pursuant to any Assigned Contract. "Customer Offerings" shall mean with respect to [TLO] (a) the products (including Software and Documentation) that [TLO] (i) currently develops, markets, distributes, makes available, sells or licenses to third parties, or (ii) currently plans to develop, market, distribute, make available, sell or license to third parties in the future and (b) the services and service offerings that [TLO] (i) currently provides or makes available to third parties, or (ii) currently plans to provide or make available to third parties in the future. The assets set forth in the exhibits to the CPS Assignment are not currently used in the operation of the Business and are used solely by [TLO] to make available to law enforcement agencies certain internet monitoring services currently offered by [TLO] without charge to law enforcement to identify and investigate offenders who victimize children or use the Internet to distribute child pornography (the "CPS Services").

. . .

(e) *Source Code*. Other than in the Ordinary Course of Business, [TLO] has not licensed, distributed or disclosed, and Knows of no

[8] The Intellectual Property Listing is located at Schedule 1.1(a)(ii) of the Stalking Horse APA. The Intellectual Property Listing identified TLOxp, the product marketed by TLO to consumers, and numerous other computer applications and processes, which specifically included BOLT and BParser.

distribution or disclosure by others (including its employees and contractors) of, the Seller Source Code (defined below) to any Person, except pursuant to the agreements listed in Section 2.6(e) of the Disclosure Schedule, and [TLO] has taken all reasonable physical and electronic security measures to prevent disclosure of the Seller Source Code (defined below). No event has occurred, and no circumstance or condition exists, that (with or without notice or lapse of time, or both) will, or would reasonably be expected to, nor will the consummation of the transactions contemplated hereby, result in the disclosure or release of such Seller Source Code by [TLO] or escrow agent(s) or any other Person to any third party. "Seller Source Code" means the Software (defined below) included in the Customer Offerings or Internal Systems. "Software" means computer software code, applications, utilities, development tools, diagnostics, databases and embedded systems, whether in source code, interpreted code or object code form. "Documentation" means printed, visual or electronic materials, reports, white papers, documentation, specifications, designs, flow charts, code listings, instructions, user manuals, frequently asked questions, release notes, recall notices, error logs, diagnostic reports, marketing materials, packaging, labeling, service manuals and other information describing the use, operation, installation, configuration, features, functionality, pricing, marketing or correction of a product, whether or not provided to end user.

(f) *Authorship*. All of the Seller Intellectual Property assigned to Buyer comprising, incorporated in or bundled with the Customer Offerings or Internal Systems have been designed, authored, tested and debugged by (i) regular employees of [TLO] within the scope of their employment or by independent contractors of [TLO] who have executed valid and binding agreements expressly assigning all right, title and interest in such materials to [TLO], waiving their non-assignable rights (including moral rights) in favor of the Seller and its permitted assigns and licensees, and have no residual claim to such materials or (ii) owners of [TLO] that have executed valid and binding agreements expressly assigning all right, title and interest in such materials to [TLO], waiving their non-assignable rights (including moral rights) in favor of the Seller and its permitted assigns and licensees, and have no residual claim to such materials.

. . .

(h) Employee and Contractor Assignments. Each past and present employee of [TLO] and each past and present independent contractor of [TLO] has executed a valid and binding written agreement expressly assigning to [TLO] all right, title and interest in any inventions and works of authorship, whether or not patentable, invented, created,

> developed, conceived and/or reduced to practice during the term of such employee's employment or such independent contractor's work for [TLO], and all Intellectual Property rights therein, and has waived all moral rights therein to the extent legally permissible.[9]

See Sale Mot., Ex. B., Article II. Moreover, the Stalking Horse APA contained numerous conditions to closing, one of which specifically provided that "the representations and warranties [TLO] set forth in Article II (other than in Section 2.5) shall be true and correct in all material respects and the representations and warranties of [TLO] in Section 2.5 <u>shall be true and correct in all respects</u>, in each case as of the date of this Agreement and as of the Closing as though made as of the Closing[.]" Sale Mot., Ex. B., Article V, § 5.1(d) (emphasis added).

Attached as Exhibit A to the Sale Motion was a proposed Order (I) Approving the Sale of Substantially All of the Debtor's Assets Free and Clear of All Liens, Claims, Encumbrances and Other Interests (Other than Assumed Liabilities), (II) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (III) Granting Related Relief (the "Draft Sale Order"). The Draft Sale Order contains the following provisions, in pertinent part:

> S. [TLO] is the sole and lawful owner of the Acquired Assets. The Acquired Assets constitute property of [TLO's] estate, and title thereto is vested in [TLO's] estate within the meaning of section 541(a) of the Bankruptcy Code. The Sale of the Acquired Assets to the Buyer will be, as of the Closing, a legal, valid and effective transfer of such assets, and shall, at Closing, vest the Buyer with all right, title and interest to the Acquired Assets, with any Interests to attach to the consideration to be received by [TLO] in the same priority and subject to the same defenses and avoidability, if any, as of the Closing. The Buyer would not enter into the Stalking Horse APA to acquire the Acquired Assets if the sale

[9] Section 2.6(f) of the Disclosure Schedules provided, however, that "Hank Asher (deceased) and Ole Poulsen, as owners of [TLO] did not execute agreements expressly assigning all right, title and interest in all materials to [TLO]. Ole Poulsen was an employee of [TLO]." Sale Mot., Ex. B, Disclosure Schedules.

> of the Acquired Assets were not free and clear of all Interests (other than the Assumed Liabilities), or if the Buyer would, or in the future could, be liable on account of any such Interests. . . .
>
> T. [TLO] may sell, convey and assign the Acquired Assets to the Buyer free and clear of all Interests, because, with respect to each creditor or entity that holds an Interest in the Acquired Assets, one or more of the standards set forth in Bankruptcy Code sections 363(f)(1)-(5) has been satisfied. Those holders of Interests who did not object or who withdrew their objections to the Sale are deemed to have consented to the Sale Motion and Sale of the Acquired Assets to the Buyer pursuant to Bankruptcy Code section 363(f)(2). Those holders of Interests who did object fall within one or more of the other subsections of Bankruptcy Code section 363(f), which subsections [TLO] has satisfied.
>
> . . .
>
> V. Without limiting the generality of the foregoing, <u>to the extent that Ole Poulsen holds or asserts any interests of any kind in the [BParser code converter software] used or useful by [TLO] in the conduct of the Business (the "BParser Code") or any other Business Assets, such BParser Code and other Business Asset shall be deemed an Acquired Asset and may be sold to the Buyer free and clear of all such interests pursuant to section 363 (f) and/or 363 (h)</u> of the Bankruptcy Code because (among other reasons) such interests are in bona fide dispute and Ole Poulsen has been provided notice of and an opportunity to object to and be heard with respect to the Sale and [he did not timely file an objection] [any timely filed objection has been withdrawn or overruled].

See Sale Mot., Ex. A, ¶¶ S – V (emphasis added). TLO and TransUnion-TRADS specifically negotiated for the inclusion of these provisions in the Draft Sale Order, and Mr. Furr and Philip D. Anker, counsel for TLO and TransUnion-TRADS, respectively, discussed the need for these provisions in order to address Poulsen's potential claim of ownership of the BOLT IP.

On November 4, 2013, the Clerk of Court issued a *Notice of Hearing* (ECF No. 391, Case No. 13-20853) with respect to the Sale Motion, scheduling a preliminary hearing for November 5, 2013, at 1:30 PM. Although the November 5, 2013, hearing was a preliminary hearing, TLO disclosed Poulsen's potential claim of ownership of the BOLT IP to the Court at that hearing.[10] The November 5, 2013, hearing was also scheduled pursuant to the Bid Procedures Order to allow any objections to the Stalking Horse APA to be heard. Poulsen did not appear at the November 5, 2013, hearing, and no objections to the Stalking Horse APA were filed. *Id*.

Thereafter, on November 20 and 21, 2013, the § 363 Auction to sell substantially all of TLO's assets was conducted. After receiving multiple bids over the course of the nearly 24-hour-long auction, TransUnion-TRADS emerged as the bidder who made the highest and best offer, and the final sale price was set at $154 million. The Court conducted a final hearing on the Sale Motion on November 22, 2013. Numerous objections to the Sale Motion were filed, and the Court heard and ruled on those objections at the November 22, 2013, hearing. Poulsen, however, *did not* file an objection to the Sale Motion and did not appear at the November 22, 2013, hearing on the Sale Motion. At the Sale Hearing, the Court received evidence showing that TLO claimed ownership of the BOLT IP and intended to sell the BOLT IP free and clear of any claims or interests.[11] At the end of the Sale Hearing, the Court specifically found that there was no evidence that TransUnion-TRADS acted in bad

[10] *See* Ex. 351, Nov. 5, 2013 Hr'g Tr.

[11] The transcript of the November 22, 2013, Sale Hearing was admitted into evidence at Trial as Plaintiff's Exhibit 371. The evidence admitted at the Sale Hearing included separate sworn declarations by Ms. Asher and Ms. Yoost stating that: "The Assets to be sold (the 'Acquired Assets') pursuant to the Sale Motion are generally set forth in Section 1.1(a) of the Stalking Horse APA, which was attached to the Sale Motion." The declarations thus expressly incorporated the Stalking Horse APA, which included several representations that TLO owned the BOLT IP. These declarations were also admitted into evidence at Trial, although not for their truth, as Plaintiff's Exhibits 489 and 480, respectively.

faith and approved the proposed sale as requested, with the only qualification being that the sale be "in accordance with all of the various concessions that [Mr.] Anker made on the record."[12] These concessions related to objections which were raised at the Sale Hearing, none of which were raised by Poulsen or related to TLO's ownership of or ability to sell the BOLT IP.[13] The Court instructed Mr. Furr to circulate the proposed order approving the sale to "all counsel that were raising objections, that were resolved through . . . Mr. Anker's presentation" and to counsel for the backup bidder.[14] Mr. Furr testified at Trial that he did circulate the proposed order in accordance with the Court's instructions and that there were no significant objections to the form of the proposed order.[15] With respect to issues relevant to the Court here, the proposed order ultimately uploaded by Mr. Furr was virtually identical to the Draft Sale Order.

Subsequently, the Court entered the *Order (I) Approving the Sale of Substantially All of the Debtor's Assets Free and Clear of All Liens, Claims, Encumbrances and Other Interests (Other than Assumed Liabilities), (II) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (III) Granting Related Relief* (the "Sale Order") (ECF No. 610, Case No. 13-20853)[16] on December 13, 2013. The Sale Order contains the following relevant

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[12] Pl.'s Ex. 371, 185:4-14.

[13] The objections raised at the Sale Hearing are reflected in the Plaintiff's Exhibit 371.

[14] Pl.'s Ex. 371, 185:15-18, 186:3-8.

[15] Tr. Vol. I, 147:13-25.

[16] Pl.'s Ex. 374.

findings of fact:

> C. [TLO] has provided timely, adequate, and sufficient notice of the Sale Motion and the relief sought therein[.] . . .
>
> . . .
>
> H. . . . [TransUnion-TRADS] is a "good faith purchaser" entitled to the full benefits and protections of section 363(m) of the Bankruptcy Code with respect to the Sale of the Acquired Assets.
>
> . . .
>
> S. [TLO] is the sole and lawful owner of the Acquired Assets. The Acquired Assets constitute property of [TLO]'s estate, and title thereto is vested in [TLO's] estate within the meaning of section 541(a) of the Bankruptcy Code. . . . [TransUnion-TRADS] would not enter into the Stalking Horse APA to acquire the Acquired Assets if the sale of the Acquired Assets were not free and clear of all Interests[.] . . .
>
> T. [TLO] may sell, convey and assign the Acquired Assets to [TransUnion-TRADS] free and clear of all Interests, because, with respect to each creditor or entity that holds an Interest in the Acquired Assets, one or more of the standards set forth in Bankruptcy Code sections 363(f)(1)-(5) has been satisfied. Those holders of Interests who did not object or who withdrew their objections to the Sale are deemed to have consented to the Sale Motion and Sale of the Acquired Assets to [TransUnion-TRADS] pursuant to Bankruptcy Code section 363(f)(2).
>
> V. Without limiting the generality of the foregoing, <u>to the extent that Ole Poulsen holds or asserts any interests of any kind in the BParser code converter software used or useful by [TLO] in the conduct of the Business (the "BParser Code") or any other Business Assets, such BParser Code and other Business Asset shall be deemed an Acquired Asset and may be sold to [TransUnion-TRADS] free and clear of all such interests</u> pursuant to section 363 (f) and/or 363 (h) of the Bankruptcy Code because (among other reasons) such interests are in bona fide dispute and Ole Poulsen has been provided actual notice of and an opportunity to object to and be heard with respect to the Sale and he did not timely file an objection.

Sale Order, 4, 7, 10-12 (emphasis added). The Sale Order goes on to order and adjudge, in relevant part, that:

> 1. The relief requested in the Sale Motion is granted in its entirety.
>
> 2. All objections and responses, whether filed or asserted in open Court, to the Sale Motion, this Order or the relief requested (including the assumption and assignment of all Assigned Contracts) herein that have not been overruled, withdrawn, waived, settled or otherwise resolved, are hereby overruled and denied on the merits with prejudice. . . .
>
> 3. Notice of the Sale Motion, the Auction, and the Sale Hearing (including without limitation, the notice provided by the Sale Notice . . .) was fair and equitable under the circumstances and complied in all respects with Bankruptcy Code sections 102(1), 363 and 365, Bankruptcy Rules 2002, 6004, 6006, 9006 and 9007 and Local Rule 6004-1.
>
> . . .
>
> 5. The Stalking Horse APA and the Sale pursuant to the Stalking Horse APA are hereby approved and authorized in all respects[.] . . .
>
> 6. [TransUnion-TRADS] is a good faith purchaser of the Acquired Assets, free and clear of Interests, and is hereby granted and entitled to all of the protections provided to such a good faith purchaser under section 363 of the Bankruptcy Code, and shall be entitled to such protection even before this Order becomes final and non-appealable. Pursuant to section 363(m) of the Bankruptcy Code, if any or all of the provisions of this Order are hereafter reversed, modified, or vacated by a subsequent order of this Court or any other court, such reversal, modification, or vacatur shall not affect the validity and enforceability of the Sale or any sale, transfer or assignment under the Stalking Horse APA or obligation or right granted pursuant to the terms of this Order (unless stayed pending appeal prior to the Closing), and notwithstanding any reversal, modification or vacatur, any sale, transfer or assignment shall be governed in all respects by the original provisions of this Order or the Stalking Horse APA, as the case may be.
>
> 7. The Sale approved by this Order is not subject to avoidance or any recovery or damages pursuant to section 363(n) of the Bankruptcy Code.

. . .

12. The Sale of the Acquired Assets and the assumption and assignment of the Assigned Contracts to [TransUnion-TRADS] shall vest [TransUnion-TRADS] with all right, title and interest of [TLO] to the Acquired Assets free and clear of any and all Interests and other liabilities of any kind or nature whatsoever . . . , however imposed, with any such Interests to attach only to the proceeds of the Sale of the Acquired Assets with the same priority, validity, force, and effect as they now have in or against the Acquired Assets.

. . .

14. The filing of the Sale Motion and the service of the Sale Notice and the Notice of Assignment and Cure in accordance with the Bidding Procedures Order shall be deemed to provide sufficient notice as to the Sale of the Acquired Assets free and clear of all Interests in accordance with Bankruptcy Rules 2002 and 6004 and Local Rule 6004-1. Following the Closing, no holder of any Interest with respect to the Acquired Assets may interfere with [TransUnion-TRADS's] use and enjoyment of the Acquired Assets based on or related to such Interest, or any actions that [TLO] may take in the Chapter 11 Case and, after the Closing, no interested party may take any action to prevent, interfere with or otherwise enjoin consummation of the Sale or other transactions contemplated by this Order.

. . .

47. The Stalking Horse APA shall not be subject to rejection or avoidance under any circumstances. This Order and the Stalking Horse APA shall inure to the benefit of [TLO], its estate, creditors, [TransUnion-TRADS] and its respective successors and assigns.

. . .

51. This Court shall retain jurisdiction to (a) interpret, implement and enforce the terms and provisions of this Order, the Bidding Procedures Order, and the Stalking Horse APA, including all amendments thereto and any waivers and consents thereunder and each of the agreements executed in connection therewith, in all respects, and (b) to decide any disputes concerning this Order, the Bidding Procedures Order or the Stalking Horse APA, or the rights and duties of the parties hereunder or thereunder or any issues relating to the Stalking Horse APA, the Bidding Procedures Order or this Order including, but not

> limited to, . . . all issues and disputes arising in connection with the relief authorized herein, inclusive of those concerning the transfer of the Acquired Assets to [TransUnion-TRADS] free and clear of all Interests.

Id. at 16-22, 37, 39. Poulsen has not sought reconsideration of or appealed the Sale Order, and the Sale Order is final.

IV. Notice of the § 363 Sale

For the following reasons, the Court finds that Poulsen received adequate notice of every critical motion and hearing in connection with the § 363 sale of substantially all of TLO's assets, including the BOLT IP.

A. Poulsen's Address

Prior to the Petition Date, Mr. Furr sent an email to Derek Dubner,[17] then TLO's General Counsel, requesting the mailing addresses for TLO's equity interest holders. Mr. Dubner forwarded this request to Daniel MacLachlan,[18] then TLO's CFO. Mr. MacLachlan responded, emailing Mr. Furr a list of equity holders, which included Poulsen. According to the list emailed to Mr. Furr by Mr. MacLachlan, Poulsen's mailing address was 2633 South Ocean Boulevard, Highland Beach, Florida 33487.[19] According to their testimony at Trial, neither Mr. Dubner nor Mr. MacLachlan ever provided Mr. Furr or anyone at Furr & Cohen with a different mailing address for Poulsen.

[17] Mr. Dubner is now the CEO of TBO.

[18] Mr. MacLachlan is now the CFO of TBO.

[19] Pl.'s Ex. 179.

Mr. Furr and Furr & Cohen used the list provided by Mr. MacLachlan to create both the mailing matrix for TLO's bankruptcy petition and the mailing matrix for TLO's equity holders. Specifically, Barbara Nasralla, a legal assistant at Furr & Cohen, entered the information contained in this list into the Best Case software program[20] to compile the list of equity holders. At Trial, Ms. Nasralla explained that when entering Poulsen's, or any other creditor's or equity holder's, address into the Best Case program, the Best Case program directs you to enter the appropriate zip code immediately after entering the street address without entering the city or the state. After entering the zip code, the Best Case program then automatically populates the city and state portion of the address. Ms. Nasralla explained that for this reason, Poulsen's address on the equity holders mailing matrix is listed as 2633 South Ocean Boulevard, Boca Raton, Florida 33487, rather than Highland Beach, Florida.[21]

In March 2013—more than one month prior to Petition Date and six months before the filing of the Sale Motion—Poulsen moved to Bend, Oregon,[22] where his mailing address was, and still is, 18800 Bull Springs Road, Bend, Oregon 97701. Poulsen, however, did not request that Furr & Cohen update his address from Florida to Oregon until November 13, 2013, when he emailed Alvin Goldstein, an attorney

[20] Best Case is a software program used by bankruptcy practitioners throughout the country to prepare bankruptcy petitions and schedules.

[21] Tr. Vol. I, 207:18-209:3, 210:10-18.

[22] Mr. MacLachlan knew prior to the Petition Date that Poulsen moved to Oregon in March 2013. However, Mr. MacLachlan still provided Poulsen's Florida mailing address to Mr. Furr and Furr & Cohen. Mr. MacLachlan never provided Furr & Cohen an updated address for Poulsen.

with the office of Furr & Cohen, requesting that Mr. Goldstein update his mailing address from "2633 S Ocean Blvd" to the Bend, Oregon address listed above.[23] Poulsen never filed an official notice of change of address with the Court pursuant to Bankruptcy Rule 2002(g).

B. Certificates of Service Regarding Sale-Related Filings

TLO retained two outside vendors to serve documents in the TLO bankruptcy proceeding. These two outside vendors were BK Attorney Services ("BKAS") and Epiq Bankruptcy Solutions, LLC ("Epiq"). According to the testimony at Trial of its owner Jay Jump,[24] BKAS is an authorized and official third-party servicing provider for the Bankruptcy Court system. BKAS acts as a servicing agent in thousands of bankruptcy cases nationwide. Similarly, Epiq is a nationally-known bankruptcy servicing provider.

i. The Bid Procedures Motion

As discussed above, on October 15, 2013, TLO filed the Bid Procedures Motion. One day later, on October 16, 2013, TLO filed a *Certificate of Service* (the "Bid Procedures Motion COS") (ECF No. 302, Case No. 13-20853) with respect to the Bid Procedures Motion, the *Order Granting Motion to Shorten Time to Notice Hearing on the Bid Procedures Motion* (the "Order Shortening Time") (ECF No. 297, Case No. 13-20853), and several other filings not relevant here. TLO utilized BKAS to serve these

[23] *See* Poulsen-Goldstein Email, Pl.'s Ex. 362; Tr. Vol. I, 228:19-229:18.

[24] Mr. Jump testified at Trial *via* a pre-recorded video-taped deposition. TransUnion-TRADS designated certain portions of the deposition as its direct examination of Mr. Jump, and TBO cross-designated certain portions of the deposition as its cross examination of Mr. Jump.

documents. The Bid Procedures Motion COS was signed by Mr. Jump and certified that the Bid Procedures Motion and the Order Shortening Time "were deposited for delivery by the United States Postal Service, via First Class United States Mail, postage prepaid, with sufficient postage thereon to the parties listed on the mailing matrix exhibit, a copy of which is attached hereto and incorporated as if fully set forth herein." Bid Procedures Mot. COS, 5. Poulsen was not listed on the mailing matrix attached to the Bid Procedures Motion COS.

ii. The Bid Procedures Order

As indicated above, the Bid Procedures Order scheduled, among other things, the § 363 Auction for November 20, 2013, and the final hearing on the Sale Motion for November 22, 2013. TLO filed a *Certificate of Service* (the "Bid Procedures Order COS")[25] with respect to the Bid Procedures Order on October 29, 2013. The Bid Procedures Order COS certified that on October 28, 2013, through BKAS, the Bid Procedures Order "[was] deposited for delivery by the United States Postal Service, via First Class United States Mail, postage prepaid, with sufficient postage thereon to the parties listed on the mailing matrix exhibit, a copy of which is attached hereto and incorporated as if fully set forth herein." Bid Procedures Order COS, 5. Poulsen was listed on the mailing matrix at the following address: "2633 SO OCEAN BLVD, BOCA RATON, FL 33487." *Id*. at 9.

According to Mr. Jump's testimony, the return address on each of the envelopes mailed by BKAS in the TLO case was the address of the offices of Furr & Cohen.

[25] Pl.'s Exs. 322, 323; *see also*, ECF No. 369, Case No. 13-20853.

Thus, if any mail sent out by BKAS was returned as undeliverable, it would have been returned to the offices of Furr & Cohen. Mr. Goldstein testified at Trial that nothing served on Poulsen by BKAS was returned as undeliverable to Furr & Cohen.[26] The Court finds Mr. Goldstein's testimony to be credible.

iii. The Sale Motion and the Stalking Horse APA

On November 4, 2013, TLO filed a *Certificate of Service* (the "Sale Motion COS")[27] with respect to the Sale Motion and the Notice of Filing of Stalking Horse APA. The Sale Motion COS certified that through BKAS on November 4, 2013, the Sale Motion, along with its exhibits, and the Notice of Filing of Stalking Horse APA "were deposited for delivery by the United States Postal Service, via First Class United States Mail, postage prepaid, with sufficient postage thereon to the parties listed on the mailing matrix exhibit, a copy of which is attached hereto and incorporated as if fully set forth herein." Sale Mot. COS, 1. Poulsen was listed on the mailing matrix at the following address: "2633 SO OCEAN BLVD, BOCA RATON, FL 33487." *Id.* at 2.

Mr. Jump identified a copy of the Sale Motion COS, which was kept as a business record[28] of BKAS, and testified that he signed the Sale Motion COS and that he caused the Sale Motion, along with its exhibits, and the Notice of Filing of Stalking Horse APA to be mailed with adequate postage to each person or entity listed on the

[26] Tr. Vol. I, 300:23-301:22, 303:3-21.

[27] Pl.'s Ex. 345; *see also*, ECF No. 400, Case No. 13-20853.

[28] Pl.'s Ex. 348. The Sale Motion COS was referred to as Exhibit 16 in the video-taped deposition of Mr. Jump.

mailing matrix. Specifically, Mr. Jump testified that he caused copies of the Sale Motion, along with its exhibits, and the Notice of Filing of Stalking Horse APA to be mailed to Poulsen at 2633 South Ocean Boulevard, Boca Raton, Florida 33487. As noted above, Mr. Goldstein testified at Trial that nothing served on Poulsen by BKAS was returned as undeliverable to Furr & Cohen.[29]

iv. The Notice of Preliminary Hearing on the Sale Motion

On November 4, 2013, TLO filed a *Certificate of Service* (the "Sale Motion NOH COS")[30] with respect to the Notice of Hearing on the Sale Motion. The Sale Motion NOH COS certified that through BKAS, the Notice of Hearing on the Sale Motion "[was] deposited for delivery by the United States Postal Service, via First Class United States Mail, postage prepaid, with sufficient postage thereon to the parties listed on the mailing matrix exhibit, a copy of which is attached hereto and incorporated as if fully set forth herein." Sale Motion NOH COS, 1. Poulsen was listed on the mailing matrix at the following address: "2633 SO OCEAN BLVD, BOCA RATON, FL 33487." *Id.* at 2. At Trial, Mr. Jump identified a copy of the Sale Motion NOH COS as a certificate of service produced by his company BKAS.

v. The Sale Order

After the Court entered the Sale Order on December 13, 2013, TLO filed a *Certificate of Service* (the "Sale Order COS")[31] with respect to the Sale Order. The

[29] Tr. Vol. I, 300:23-201:22.

[30] Pl.'s Ex. 346; *see also,* ECF No. 401, Case No. 13-20853. The Sale Motion NOH COS was referred to as Exhibit 17 in the video-taped deposition of Mr. Jump.

[31] Pl.'s Ex. 391; *see also*, ECF No. 694, Case No. 13-20853. The Sale Order COS was referred to as Exhibit 6 in the video-taped deposition of Regina Amporfro.

Sale Order COS reflects that Epiq served the Sale Order on behalf of TLO on January 17, 2014,[32] and Pete Caris, a Noticing Supervisor at Epiq at the time, certified that he served the Sale Order "by causing true and correct copies to be enclosed securely in separate postage pre-paid envelopes and delivered via first class mail to those parties listed on the annexed Exhibit A." Sale Order COS, 1. Poulsen was listed on Exhibit A at the following address: "18800 BULL SPRINGS ROAD BEND OR 97701." *Id*., Ex. A., 16. Poulsen was served with the Sale Order at his Oregon address because, as previously noted, during the time between service of the Sale Motion and service of the Sale Order, Poulsen emailed Mr. Goldstein to request that his mailing address be changed from his Florida address to his Oregon address.

At Trial, one of Epiq's employees, senior case manager and team lead Regina Amporfro,[33] identified the Sale Order COS and confirmed that it was signed by Mr. Caris. Ms. Amporfro testified that Mr. Caris was diligent in his work and to her knowledge, never falsely executed a declaration that he effected service of a document. Based on the Sale Order COS and Epiq's procedures, Ms. Amporfro testified that Poulsen was in fact served with the Sale Order at his Oregon address and that the service mailed to Poulsen was not returned as undeliverable.

Mr. Goldstein testified at Trial that although undeliverable mailings sent by BKAS would be returned to Furr & Cohen as Furr & Cohen's address was listed as

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[32] Mr. Goldstein testified at Trial that due to an intra-office error at Furr & Cohen resulting from the Christmas holidays and staff vacations, the December 13, 2013, Sale Order was not served until January 17, 2014.

[33] Ms. Amporfro testified at Trial *via* a pre-recorded video-taped deposition. TransUnion-TRADS designated certain portions of the deposition as its direct examination of Ms. Amporfro.

the return address, undeliverable mailings sent by Epiq would be returned to Epiq as Epiq used its own mailing address as the return address on its mailings. Mr. Goldstein further testified that he inquired with Epiq on three separate occasions, including in October 2014, as to the existence of any returned mail and that nothing in Epiq's response indicated that the mailing to Poulsen containing the Sale Order was returned as undeliverable.[34]

The Court finds the testimony of Ms. Amporfro and Mr. Goldstein to be credible on this issue despite Poulsen's testimony that he never received the Sale Order.

vi. Summary

The following represent the critical documents related to the § 363 sale. All were mailed to Poulsen at either his Florida address or his Oregon address.

Sent to 2633 South Ocean Boulevard, Boca Raton, Florida 33487:

1. The Bid Procedures Order COS

    - Served by BKAS on October 28, 2013;
    - Scheduled a November 5, 2013, hearing to allow any objections to the Stalking Horse APA to be heard;
    - Scheduled the § 363 Auction for November 20, 2013; and
    - Scheduled the final hearing on the Sale Motion for November 22, 2013.

2. The Sale Motion

    - Served by BKAS on November 4, 2013;

[34] Tr. Vol. I, 305:21-306:8 (Mr. Goldstein testifying: "We had contacted Epic [sic], I believe on three separate occasions requesting that they advise us on whether or not they received anything back from Ole Poulsen. Over the course of probably close to a year, Epic [sic] consistently told us, no, they had not received anything back."); Tr. Vol. II, 372:3-378:7.

- Identified the assets to be sold, the "Acquired Assets" to include the BOLT IP;[35]
- Contained a summary of the Stalking Horse APA; and
- Included a copy of the Draft Sale Order, which contained a provision specifically addressing Poulsen's potential claim of ownership of the BOLT IP and which provided that the sale would be "free and clear" of any such claim by Poulsen.

3. <u>The Stalking Horse APA</u>

- Served by BKAS on November 4, 2013;
- Attached to the Sale Motion as Exhibit B; and
- Contained extensive representations and warranties by TLO, including that:
    i. TLO owned all of the Acquired Assets, including the Intellectual Property, which encompassed the BOLT IP;
    ii. TLO owned, specifically, all of the Intellectual Property;
    iii. TLO owned, specifically, the Source Code;
    iv. All the Intellectual Property was authored by TLO employees or owners; and
    v. Poulsen was an employee of TLO.

4. <u>The Notice of Preliminary Hearing on the Sale Motion</u>

- Served by BKAS on November 4, 2013;

Sent to 18800 Bull Springs Road, Bend, Oregon 97701:

5. <u>The Sale Order</u>

- Served by Epiq on January 17, 2013;
- Made the following relevant findings of fact:
    i. TLO provided timely, adequate, and sufficient notice of the Sale Motion and the relief sought therein;
    ii. TransUnion-TRADS is a "good faith purchaser" entitled to the full benefits and protections of § 363(m) with respect to the Acquired Assets;

[35] The Sale Motion, the Stalking Horse APA, and the Sale Order refer to the intellectual property at issue as the "BParser Code." However, as noted earlier, for simplicity's sake, the Court refers collectively to BOLT, BParser, the scripts written in BOLT, the BParser source code, the BParser executable version, and the runtime library as the "BOLT IP."

iii. TLO is the sole and lawful owner of the Acquired Assets (defined to include the BOLT IP);
iv. TransUnion-TRADS would not purchase the Acquired Assets if the sale was not free and clear of all interests;
v. TLO may sell, convey, and assign the Acquired Assets to TransUnion-TRADS free and clear of all interests;
vi. To the extent Poulsen holds or asserts any interest in the BOLT IP, the BOLT IP shall be deemed an Acquired Asset and may be sold free and clear of Poulsen's interest pursuant to § 363(f) or (h).

- Overruled numerous objections to the sale;
- Concluded that TransUnion-TRADS was a "good faith purchaser" as a matter of law; and
- Contained the Amended and Restated Asset Purchase Agreement.

The Certificates of Service with respect to these documents reflect that TLO mailed Poulsen all of the critical documents related to the § 363 sale. The testimony of Mr. Goldstein, Mr. Jump, and Ms. Amporfro confirms that, as reflected in the Certificates of Service, mailings containing these documents were in fact sent to Poulsen.

C. Poulsen's Receipt of Mail Addressed to Him at the Florida Address

As discussed below, the evidence shows that while living in Oregon, Poulsen received mail addressed to his Florida address.

i. Mail Forwarding by the United States Postal Service

On March 20, 2013, Poulsen submitted, *via* an online form located on the website of the United States Postal Service (the "Postal Service""), a change of address request. Through this request Poulsen sought a change of address to begin on March 28, 2013. This request was confirmed *via* email dated March 22, 2013, from the Postal Service (addresschange@usps.gov) to Poulsen (ole367p@gmail.com).[36] This confirmation email specifically advised Poulsen to "make sure to notify other important parties of [his] change of address" and that "mail forwarding only covers . . . mail for a period of up to 12 months." A declaration (the "First Wilson Declaration") from James D. Wilson, Manager of Address Management for the Postal Service, also confirms that Poulsen requested that his address be changed effective March 28, 2013, from "2633 S Ocean Blvd, Highland Beach, FL 33487 to the new address of 18800 Bull Springs Rd, Bend OR 97701."[37] First Wilson Decl., 1. Finally, Poulsen himself confirmed at Trial that he requested that his address be changed in March 2013 from his Florida address to his Oregon address and that his mail be forwarded accordingly.[38]

The following demonstrate that whether addressed to Highland Beach or Boca Raton, the Postal Service did indeed forward mail which was addressed to Poulsen at his Florida address to his Oregon address.

a. The Sale Motion

As previously discussed, BKAS, on behalf of TLO, served the Sale Motion on all interested parties. *See* Sale Mot. COS. The Sale Motion COS certified that on November 4, 2013, the Sale Motion, along with its exhibits and the Notice of Filing of

[36] Pl.'s Ex. 160.

[37] The Pl.'s Ex. 452. Attached to the First Wilson Declaration and acknowledged by Mr. Wilson as a regularly-kept business record is the Postal Service's change of address or forwarding request record regarding Poulsen.

[38] Tr. Vol. VI, 1408:6-1409:1.

Stalking Horse APA, was served on Poulsen at "2633 SO OCEAN BLVD, BOCA RATON, FL 33487." *Id.* at 2. Although by this time Poulsen had moved from Florida to Oregon, the evidence shows that Poulsen presumably received the Sale Motion.

The return address listed on the envelope mailed by BKAS was the address of Furr & Cohen's office, and Mr. Goldstein testified at Trial that the envelope was not returned as undeliverable to Furr & Cohen. Moreover, the evidence shows that Poulsen had mail forwarding in place with the Postal Service at the time the Sale Motion was served. Poulsen's mail forwarding was effective for one year—from March 28, 2013, through March 27, 2014. BKAS served the Sale Motion on November 4, 2013.

At the time it served the Sale Motion, BKAS used—and still uses—a postal sorting system called "the Bell and Howell elevate postal sorting system" (the "B&H System"). According to the testimony of Mr. Jump, the B&H System scans each envelope that BKAS designates for mailing, verifies the address on the envelope against the Postal Service's move-update database, and "sprays"[39] an intelligent mail barcode (an "IMB") on the envelope.[40] The IMB contains, among other information about the mailing, the recipient's address.[41] If the addressee on the envelope had completed a change of address form with the Postal Service, as Poulsen had, it was

[39] After being checked by the first camera in the B&H System, the address information is digitized and run through a database. Tr. Vol. II, 461:8-25. The envelope is then sent back to the "print sprayer," and "the print sprayer will print the new or changed address information in [IMB] code format on the front of the envelope." *Id.* at 461:19-25.

[40] Tr. Vol. II, 457:4-24.

[41] Tr. Vol. II, 458:2-459:6.

part of the move-update database, and the IMB sprayed on the envelope would have reflected the new address:

> Q [Mr. Anker]: . . . Do you . . . have an understanding as to whether, if an individual fills out a change of address form with the postal service, and it is processed by the postal service, that change of address becomes part of the move update database?
>
> A [Mr. Jump]: That is my understanding, yes.
>
> Q: Okay. So let's assume that was the case here, would the envelope then not have gone out with the address as it was on the certificate of service, 263 South Ocean Boulevard, Boca Raton?
>
> A: The address that was on the envelope, that was printed on the envelope by our printer, would have been the Boca Raton address, 26 -- whatever it was, 2633 South something.
>
> Q: South Ocean Boulevard.
>
> A: South Ocean Boulevard. So the envelope that left our office had that address on the front of the envelope as the destination address, that's what came off of our printer.
> When we dropped it into the postal sorting system, at that point it got run through the USPS move update database, and the IMB Code was sprayed on there, and if he had a return of address or a change of address card in the system, then the proper IMB information reflecting that change should have been sprayed on the bottom of the envelope.

Tr. Vol. II, 460:5-461:7. The Postal Service would have then read the IMB on the envelope and sent the mail directly to Poulsen at his Oregon addrss.[42] Mr. Jump testified that the B&H System was regularly tested and certified as functioning properly and that BKAS never received any complaints that the B&H System it used did not work properly.[43]

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[42] Tr. Vol. II, 462:5-10.

[43] Tr. Vol. II, 475:1-13.

It is undisputed that BKAS used the B&H System in connection with the mailing of the Sale Motion to Poulsen.[44] Because Poulsen had a mail forwarding request active with the Postal Service in November 2013, the IMB sprayed on the envelope enclosing the Sale Motion would have reflected Poulsen's Oregon address. Therefore, the Postal Office would have scanned the IMB and sent the envelope to Poulsen directly at the Oregon address.

b. The Disclosure Order

The evidence suggests that after he moved to Oregon, Poulsen received the *Order (I) Setting Hearing to Consider Approval of Disclosure Statement; (II) Setting Deadline for Filing Objections to Disclosure Statement; and (III) Directing Plan Proponent to Serve Notice* (the "Disclosure Order")[45] which was mailed to him at the Boca Raton address on November 6, 2013.

The Disclosure Order directed TLO to serve the Disclosure Order on, among others, "all equity security holders," which included Poulsen. *See* Disclosure Order, 3. Section 3(B) of the Disclosure Order instructed TLO to serve the Disclosure Statement[46] and the Plan[47] on "any party in interest who requests in writing a copy of the [D]isclosure [S]tatement and [P]lan[.]" Disclosure Order, 3. Thus, in accordance with the Disclosure Order, Epiq, on behalf of TLO, mailed Poulsen the Disclosure

[44] Tr. Vol. II, 467:17-468:19.

[45] Pl.'s Ex. 344; *see also*, ECF No. 397, Case No. 13-20853.

[46] The "Disclosure Statement" refers to TLO's *Disclosure Statement* (ECF No. 378, Case No. 13-20853).

[47] The "Plan" refers to TLO's *Plan of Liquidation* (the "Plan") (ECF No. 377, Case No. 13-20853).

Order, but did not mail Poulsen the Plan or the Disclosure Statement.[48] Shortly thereafter, on November 13, 2013, Poulsen emailed Mr. Goldstein and requested copies of the Plan and the Disclosure Statement as directed by the Disclosure Order.[49]

Poulsen testified at Trial that he did not receive the Disclosure Order and instead requested the Plan and the Disclosure Statement based on conversations he had with other equity holders.[50] However, when considered in conjunction with the other evidence, the Court does not find Poulsen's testimony on this issue to be credible. Instead, the Court finds that Poulsen received the Disclosure Order in the mail, read the Disclosure Order, noticed that the envelope containing the Disclosure Order was addressed to his Florida address, and subsequently emailed Mr. Goldstein to request copies of the Plan and the Disclosure Statement and to instruct Mr. Goldstein that his address should be changed to the Oregon address.

c. The Poulsen Chart

Poulsen's attorney, Luis Salazar, created a spreadsheet purportedly reflecting every document Poulsen received in connection with the TLO bankruptcy proceeding. *See* Poulsen Spreadsheet, Poulsen's Ex. A. Chronologically, the first document on this spreadsheet is an *Order* (ECF No. 598, Case No. 13-20853), unrelated to the § 363

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[48] The *Certificate of Service* (the "Disclosure COS") (ECF No. 435, Case No. 13-20853) on the Plan, the Disclosure Statement, and the Disclosure Order prepared by Epiq on November 6, 2013 on behalf of TLO indicates that the Plan and the Disclosure Statement were served on the parties listed on Exhibit A and that the Disclosure Order was served on the parties listed on Exhibit B. *See* Disclosure COS, Pl.'s Ex. 354, 1. Exhibit A to the Disclosure COS does not include Poulsen. *Id*. at 4. Exhibit B, however, does include Poulsen. *Id*. at 10.

[49] *See* Poulsen-Goldstein Email, Pl.'s Ex. 362.

[50] Tr. Vol. VII, 1658:15-1660:7.

sale, dated December 11, 2013. *Id.* at 1. This Order was entered nearly one month after Poulsen emailed Mr. Goldstein requesting that his address be changed to the Oregon address. However, Poulsen testified at Trial that he received documents related to the TLO bankruptcy proceeding prior to December 11, 2013, and that he retained every document he received. These documents are not reflected on the Poulsen Spreadsheet, a fact which Poulsen could not explain at Trial:

> Q [by Mr. Anker]: So your testimony is that before . . . December 11, 2013, . . . you didn't throw anything out, you retained it all, it's your testimony under oath, [that] not one single document got forwarded to you? Is that your testimony?
>
> A: No. I just told you that some documents got forwarded and some got sent directly to my address [in Oregon].
>
> . . .
>
> Q: . . . Is it your testimony that before December 11, 2013, not a single piece of paper in this bankruptcy addressed to you in Florida got forwarded to you in Oregon?
>
> A: No. I'm not saying that.
>
> . . .
>
> Q: [referring to the Poulsen Spreadsheet] Do you see that there is not a single date prior to December 11, 2013?
>
> A: I see that.
>
> Q: Did you have any explanation of how it can be that, even though some papers got forwarded to you, and the bankruptcy was filed in May of 2013, there's not a single entry here prior to December 11, 2013?
>
> A: I cannot explain that.

Tr. Vol. VI 1415:3-11, 18-22; 1416:3-14. If Poulsen received TLO-related documents prior to December 11, 2013, and retained those documents, those documents should be reflected in the Poulsen Spreadsheet.

In addition to Poulsen's testimony, a review of the relevant certificates of service filed in the TLO bankruptcy proceeding confirms that Poulsen received TLO-related documents prior to December 11, 2013. Poulsen testified unequivocally that some of the TLO-related documents he received were addressed to his Florida address and forwarded to him by the Postal Service. The certificates of service on the documents in the Poulsen Spreadsheet (all of which are dated December 11, 2013, or later) reflect that as of December 11 2013, at the latest, all TLO-related documents were being served on Poulsen at his Oregon address or on his attorney, Mr. Salazar. *See, e.g.,* Case No. 13-20853, ECF Nos. 616, 808, 965, 990, 1022, 1046, 1103, 1145, 1163, 1193, 1268, and 1290. Thus, the documents he received which bore his Florida address, as he so testified, must have been received prior to December 11, 2013.

For these reasons, the Court questions the accuracy, and thus the persuasiveness, of the Poulsen Spreadsheet. As a result, the Court assigns no weight to the Poulsen Spreadsheet.

ii. Highland Beach vs. Boca Raton

Mr. Wilson, as Manager of Address Management for the Postal Service, provided a second declaration (the "Second Wilson Declaration")[51] explicitly stating

[51] Pl.'s Ex. 456. Both the First and the Second Wilson Declarations were also the subject of the *Order Granting Plaintiff's Motion to Admit Declarations* (ECF No. 249), entered in this adversary proceeding on January 22, 2016.

that "mail bearing the address 2633 S Ocean Blvd, Highland Beach, FL 33487 or 2633 SO Ocean Blvd, Boca Raton, FL [33487][52] would be considered to be the same address." Second Wilson Decl., 1 (emphasis added). In support of this statement, Mr. Wilson attached two pages printed from the "Look Up a ZIP code" function located on the Postal Service's website. The first page shows that when "2633 SO OCEAN BLVD, BOCA RATON FL 33487" is entered into the "Look Up a ZIP code" function, the corresponding full address produced by the "Look Up a ZIP code" function is "2633 S OCEAN BLVD, HIGHLAND BEACH FL 33487-1831." The second page shows that when "2633 S OCEAN BLVD, HIGHLAND BEACH FL 33487" is entered into the "Look Up a ZIP code" function, the corresponding full address produced is the same—"2633 S OCEAN BLVD, HIGHLAND BEACH FL 33487-1831."

Based upon the evidence discussed above and notwithstanding the Defendants' arguments to the contrary, as discussed more fully below, the Court finds that for purposes of mail delivery,[53] 2633 South Ocean Boulevard, ***Highland Beach***, Florida 33487 is equivalent to 2633 South Ocean Boulevard, ***Boca Raton***, Florida 33487.

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[52] The Second Wilson Declaration contains a typographical error in the ZIP code of the Boca Raton address. Instead of 33487, the ZIP code for the Boca Raton address is listed as "33847." (emphasis added). The attachments to the Second Wilson Declaration show that the appropriate ZIP code for both the Boca Raton address and the Highland Beach address is "33487." (emphasis added). Accordingly, the Court is satisfied that "33847" is simply a typographical error, which is why the Court altered and bracketed the ZIP code.

[53] For purposes of this Opinion, it only matters that the Postal Service considered the Boca Raton address and the Highland Beach address to be the same address. However, it is worth noting that Poulsen himself, on at least one occasion, acknowledged the equivalence of the two addresses. On March 8, 2013, Poulsen signed a contract with a moving company to move his belongings from Florida to Oregon. *See* Pl.'s Ex. 156, 2-3. The contract listed his address as "2633 S OCEAN BLVD BOCA RATON, FL 33487." *Id*. at 2. On March 11, 2013, a representative of the moving company sent Poulsen an email and attached a "letter to confirm the details of [his] relocation" from Florida to Oregon. The representative asked Poulsen to "[l]et [her] know if something [was] not correct." *See* Pl.'s Ex. 157. The attached letter listed the loading address for the move as "2633 S Ocean Boulevard, Boca Raton,

iii. Returned Mail Addressed to Poulsen at the Boca Raton Address

As discussed above, when BKAS served documents in connection with the TLO bankruptcy proceeding, BKAS used Furr & Cohen's address as the return address on every envelope, and Mr. Goldstein testified that Furr & Cohen received no returned mail which was addressed to Poulsen at any address. Mr. Goldstein also testified that he contacted Epiq on three occasions prior to December 2014 as to whether any mail addressed to Poulsen had been returned and that Epiq responded that nothing mailed to Poulsen was returned as undeliverable. Nonetheless, the Defendants still contend that the Boca Raton address is not the same as the Highland Beach address, that as a result, nothing addressed to Poulsen at the Boca Raton address was deliverable or subject to forwarding, and that Poulsen thus never received any documents which were addressed to him at the Boca Raton address. Neither of the Defendants, however, offered evidence to contradict the Second Wilson Declaration, which stated that the Boca Raton address and the Highland Beach address are considered the same address by the Postal Service.

The Defendants offered and the Court admitted into evidence two envelopes addressed and mailed to the Boca Raton address which were stamped as "RETURN TO SENDER," "NOT DELIVERABLE AS ADDRESSED," and "UNABLE TO FORWARD." The first, TBO's Exhibit NNNN, was mailed to Poulsen from his attorney's office on June 11, 2015—more than two years after Poulsen moved to Oregon and submitted his change of address request to the Postal Service. As

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Miami, FL 33487." *Id.* at 2. Poulsen replied to the representative's email the same day, stating: "This all looks correct." *See* Pl.'s Ex. 158; Tr. Vol. VI, 1404:1-15.

indicated on the confirmation email the Postal Service sent to Poulsen in March 2013, mail forwarding services last for up to one year, not two. In June 2015, Poulsen's mail forwarding service had already expired. It is thus no surprise that the mail was undeliverable as addressed since Poulsen no longer lived there and that the Postal Service was unable to forward it since Poulsen's forwarding service expired in March 2014. The second envelope, Poulsen's Exhibit B, was mailed to "Current Occupant" again from his attorney's office. There is no evidence in the record that at the time the envelope was mailed there was a "Current Occupant" at the Boca Raton address, which would explain why the envelope was not deliverable as addressed. Like the first envelope, the second envelope was sent more than one year after Poulsen moved to Oregon and submitted his change of address request with the Postal Service. More importantly, because the envelope was addressed to "Current Occupant," the Postal Service would never have had any reason to forward it to Poulsen. For these reasons, the Court finds that TBO's Exhibit NNNN and Poulsen's Exhibit B are unpersuasive.

TBO also introduced, and the Court admitted, a July 2015 email chain between Mr. Goldstein and Mark Euler, Senior Legal Counsel at Epiq.[54] Attached to Mr. Euler's July 2015 email was a spreadsheet prepared by Epiq listing the TLO mailings sent by Epiq which were returned to Epiq as undeliverable (the "Epiq Spreadsheet"). *Id*. at 9-12. The Epiq Spreadsheet reflects that five documents sent to Poulsen were returned as undeliverable:

1. The Plan;

[54] *See* Euler-Goldstein Email Chain, TBO's Ex. OOOO, 7.

2. The Disclosure Statement;

3. The Disclosure Order;

4. TLO's *Fourth Emergency Motion for Order Authorizing Post-Petition Financing*;[55] and

5. A *Notice of Hearing.*[56]

Id. at 3, 12. More particularly, the Epiq Spreadsheet reflects that these five mailings were served on Poulsen on November 8, 2013, that Poulsen's new address is 18800 Bull Springs Road, Bend, OR 97701, and that the returned mail containing these five documents was received and processed by Epiq on December 19, 2014. The Epiq Spreadsheet does not reflect the address to which these five documents were initially sent.

The Defendants' apparent position is that because these five documents were returned as undeliverable after being addressed and mailed to Poulsen at the Boca Raton address, the Court should find that all of the mail sent to the Boca Raton address, including the critical § 363 sale documents, was undeliverable, not subject to forwarding by the Postal Service, and not received by Poulsen. For the following reasons, however, the Epiq Spreadsheet is not persuasive to the Court.

To begin with, Mr. Goldstein testified at Trial that some of the five documents that were purportedly returned as undeliverable were documents that Furr & Cohen did not ask Epiq to serve on Poulsen. Particularly, the Disclosure Order directed TLO to serve the Disclosure Order on, among others, "all equity security holders" (which

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[55] ECF No. 405, Case No. 13-20853.

[56] ECF No. 408, Case No. 13-20853.

included Poulsen), but instructed TLO to serve the Plan and the Disclosure Statement on a more limited group, which did not include "all equity security holders" or any other category of individuals that would have included Poulsen. *See* Disclosure Order, 3. Thus, in accordance with the Disclosure Order, Epiq mailed Poulsen the Disclosure Order, but did not mail Poulsen the Plan or the Disclosure Statement.[57] Ms. Amporfro's testimony confirmed this.[58]

Furthermore, contrary to the Epiq Spreadsheet, the evidence suggests that Poulsen did indeed receive the Disclosure Order, which was mailed to him at the Boca Raton address on November 6, 2013. Section 3(B) of the Disclosure Order provides that TLO must serve the Disclosure Statement and the Plan on "any party in interest who requests in writing a copy of the [D]isclosure [S]tatement and [P]lan[.]" Disclosure Order, 3. As discussed above, Poulsen emailed Mr. Goldstein on November 13, 2013, and requested copies of the Plan and the Disclosure Statement. *See* Ex. 362.

Finally, Poulsen himself testified at Trial that some of the TLO-related documents which he received at his Oregon address were addressed to his Florida address and forwarded to him by the Postal Service. Referring to a list of documents he received after he moved to Oregon, Poulsen testified, "It was like almost every single document [on the list] was addressed to the address in Florida." Tr. Vol. VI,

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[57] The *Certificate of Service* (the "Disclosure COS") (ECF No. 435, Case No. 13-20853) on the Plan, the Disclosure Statement, and the Disclosure Order prepared by Epiq on November 6, 2013, on behalf of TLO indicates that the Plan and the Disclosure Statement were served on the parties listed on Exhibit A and that the Disclosure Order was served on the parties listed on Exhibit B. *See* Disclosure COS, Pl.'s Ex. 354, 1. Exhibit A to the Disclosure COS does not include Poulsen. *Id*. at 4. Exhibit B, however, does include Poulsen. *Id*. at 10.

[58] Tr. Vol. V, 1214:24-1217:22.

1414:12-14. When asked whether it was his testimony that before December 11, 2013, "not one single document got forwarded to [him]," Poulsen responded, "No. I just told you that some documents got forwarded and some got sent directly to my [Oregon] address." *Id*. at 1415:3-11. In order to make a finding based upon the Epiq Spreadsheet that not a single piece of mail addressed to Poulsen at the Boca Raton address ever reached Poulsen, the Court would have to disregard Poulsen's own testimony and the Second Wilson Declaration.[59]

Accordingly, the Court finds that the Defendants' evidence of returned mail is not persuasive. For this reason and for the additional reasons discussed above, the Court finds that mail sent to Poulsen at the Boca Raton, Florida address was forwarded by the Postal Service to his Oregon address.

V. **<u>TransUnion-TRADS's Good Faith</u>**

One of the critical issues before the Court is whether TransUnion-TRADS acted in good faith in connection with the § 363 sale.[60] Prior to the § 363 Auction, the Sale Hearing, and the closing of the sale, TransUnion-TRADS engaged in extensive due diligence. As discussed below, this due diligence led TransUnion-TRADS to believe that TLO owned the BOLT IP and thus that TLO had an absolute right to sell the BOLT IP along with the rest of TLO's assets.

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[59] As previously noted, the Defendants did not present any evidence contradicting the Second Wilson Declaration, which unequivocally stated that the Postal Service viewed the Boca Raton address to be the same as the Highland Beach address.

[60] Although the Court already made a specific finding at the Sale Hearing that TransUnion-TRADS did indeed act in good faith, the Court will once again consider the issue.

A. Due Diligence

Lawyers and technology professionals at TransUnion-TRADS obtained adequate information from TLO during the due diligence period that led them to accept TLO's representation that it owned the BOLT IP.

Mick Forde, TransUnion-TRADS's Vice President of Legal and Regulatory, led the legal due diligence effort, which focused in part on the issue of whether TLO owned the BOLT IP. Mr. Forde had several conversations with TLO management, including Ms. Asher, Ms. Yoost, and TLO's Chief Operating Officer Armando Escalante on the issue. Each of these individuals informed Mr. Forde that TLO owned the BOLT IP.[61] Moreover, Ms. Yoost confirmed Mr. Forde's testimony, stating that during the initial due diligence period, she communicated to TransUnion-TRADS her belief that TLO owned the BOLT IP: "So there [were] conversation where, and it would have been during those initial due diligent meetings, where we did discuss that the source code was not in our possession, that it had been taken by an ex-employee, and we felt that it was rightfully owned by TLO. I believe we provided reasons of why we felt that way[.]" Tr. Vol. V, 1169:2-17.

TransUnion-TRADS's technology due diligence team received the same representations from TLO that Mr. Forde received—that TLO owned the BOLT IP. Michael Lynch, a technology professional with TransUnion-TRADS, led the technology due diligence effort. Mr. Lynch testified that through their due diligence efforts, he and the other members of the technology due diligence team "tried to

[61] Tr. Vol. VI, 1452:2-1457:8; 1499:25-1501:15.

understand . . . all aspects of the company from a technology and security perspective”:

> . . . We start by understanding the business that the company is in, what products they sell, how they sell them, who their customers are, what lines of business and verticals they’re in.
>
> Once we have a grounding and understanding of that, we try to understand the application architecture, what are the various application components that exist in the enterprise, what functions do they do, are they custom developed, are they third party software. Then we move into the infrastructure space, try to understand the data centers, the offices, you know, the hardware, the servers, the storage, and then we also try to understand things like the operations architecture, how do they do operations from an IT perspective, how do they do development of Go (phonetic) from an IT perspective, we do spend some time on IT financials, to understand what the budgets are, the IT organization, where they have people and where the potential needs are, in addition to key projects that are out there. It's a very fast paced project -- or process.

Tr. Vol. IV, 729:7-730:6. Mr. Lynch and Kevin McClowry, another TransUnion-TRADS technology professional who reported to Lynch, testified that Scott Wagner—then, the Chief Technology Officer of TLO—was their primary source of information regarding TLO’s technology during the due diligence process[62] and that Mr. Wagner told them that TLO owned the BOLT IP.[63] Specifically, Mr. Lynch testified as follows:

> Q [by Mr. Firsenbaum]: What information, if any, did you learn about the BOLT system during these meetings?
>
> A [by Mr. Lynch]: So, we learned what BOLT was, and effectively what it does. So it is a proprietary programming language, syntax, it is a set of scripts that are written in that syntax, and then it’s also a set of business rules and processes that are executed using those scripts.

[62] Tr. Vol. IV, 730:7-13, 813:13-15.

[63] Tr. Vol. IV, 816: 1-16 (“It was certainly conveyed very directly that . . . the entirety of the TLO XP platform, which included [the BOLT IP] and other components, was, in fact, TLO’s property.”).

Q: When you say that you learned that it was proprietary and homegrown, what do you mean by those terms?

A: That it was developed by TLO associates.

Q: Did you receive any information about whether BOLT was used anywhere outside of TLO?

A: We had understood that it was not used outside of TLO.

Q: What information, if any, did you learn about BParser during these meetings?

A: So during these meetings we had learned that BParser was a code converter, a compiler that would convert BOLT syntax into C++ syntax.
We also learned that the source code for BParser was not in the possession of TLO, but that TLO owned the source code and the binary form of the BParser application.

. . .
Q: Had you ever seen or heard of BOLT or BParser before your due diligence at TLO?

A: I have not.

Q: What information were you given about TLO not being in possession of the BParser source code?

A: That while TLO was not in possession of the source code for BParser, that they felt they owned the source code and the application, which is inclusive of the source code and the binary; that they had asked for the return of that source code from [Poulsen], but it was denied.

Q: Who at TLO provided you the information that did not possess the BParser source code?

A: Scott Wagner.

Q: And did Mr. Wagner convey to you his belief regarding ownership of the BOLT language?

A: Yes, he did.

Q: And what did he convey to you?

> A: So he conveyed that the BOLT, the BOLT application, inclusive of the Syntax, the programming language, the scripts and the business logic and rules, and algorithm that were created with those scripts were owned by TLO.
>
> Q: And what did he convey to you about his understanding of the ownership interest of the BParser executable and the BParser runtime library, the BParser source code?
>
> A: [Mr. Wagner] conveyed that TLO owned both the BParser source code and the runtime executable, but was not in possession of the source code.

Tr. Vol. IV, 731:12-733:15. Mr. Wagner, who no longer works for TransUnion-TRADS and is not affiliated with any of the parties before the Court, provided testimony at Trial which confirmed the testimony of Mr. Lynch and Mr. McClowry.[64]

Through a company called Black Duck, TransUnion-TRADS conducted an audit of TLO's intellectual property. This audit consisted of Black Duck scanning all of TLO's software, including, but not limited to, the BOLT IP, to see if there were any unaccounted-for licenses attached to any of the software.[65] The Black Duck audit concluded that there were no licenses attached to the BOLT IP.[66] Mr. McClowry testified to the significance of this audit, stating that the audit verified what the due diligence team had been hearing from TLO employees—that TLO owned the BOLT IP—because the fact that there were no licenses attached to the BOLT IP showed

[64] Tr. Vol. IV, 594:5-20 (referring to the BOLT IP as a "proprietary language" indicating "that it is one that was built by people at the company for use at that company, and is used only at that location"); 612:17-615:14 (Mr. Wagner explaining his view that TLO owned the BOLT IP).

[65] Tr. Vol. IV, 816:24-818:24.

[66] Tr. Vol. IV, 818:25-819:21.

that TLO owned the BOLT IP because TLO would not need to obtain a license for something that it already owned.[67]

TransUnion-TRADS's due diligence team knew that TLO was in possession of, and was using, all components of the BOLT IP, except for the BParser source code, which Poulsen took with him when he left TLO. Mr. Lynch and Mr. McClowry authored several documents before and after the sale noting the lack of possession of the BParser source code. In certain instances, they wrote that the source code was "not owned" by TLO, and in other instances they wrote that it was "not in TRADS possession."[68] Mr. Lynch and Mr. McClowry both testified at Trial that they used the terms "own" and "possess" interchangeably to convey simply that TLO did not have the source code.[69] Mr. Forde also testified that he understood from these documents, in conjunction with the conversations and meetings he had with TLO employees, that the issue concerned only access to—not ownership of—the source code.[70]

Eventually, Mr. Forde, as the leader of TransUnion-TRADS's legal due diligence effort, became confident that TLO owned the entirety of the BOLT IP:

> A [by Mr. Forde]: . . . To make ourselves comfortable on the piece we could not access [the source code], we focused on ownership, and worked to confirm that TLO did, in fact, own that piece of the [BOLT] IP. To do

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[67] Tr. Vol. IV, 818:25-820:4.

[68] The documents authored by Mr. Lynch and Mr. McClowry include TBO's Exhibit E, 1-2 (due diligence findings which reflect, among other things, that the source code "is not 'owned' and available to TLO"); TBO's Exhibit Y, 54 (post-sale document reflecting that the source code "is not in TRADS possession"); TBO's Exhibt OO, 1 (post-sale email reflecting that TRADS does not yet "have/own the source code"); TBO's Exhibit UU, 1-2 (post-sale email reflecting that the source code "is not in TRADS possession").

[69] Tr. Vol. IV, 736:14-22; 742:24-743:11; 744:14-21; 835:1-18.

[70] Tr Vol. VI, 1452:7-1453:21.

> so, our understanding, or my understanding . . . my understanding is that IP can be – ownership and IP can be demonstrated either if it is developed by an employee while in the course of their employment, or if it could be, or if developed outside employment, but transferred and assigned into the company.
>
> So we spent a great deal of time – well, we spent time focusing on . . . Poulsen's employment status with the company, and we were assured . . . in conversations in the Akerman conference room, Desiree Asher, Carly Asher was there for a few of the conversations. Both of them confirmed that Mr. Poulsen was an employee. . . .
>
> So based on those assurances and the information we received, we determined, we became comfortable he was an employee of TLO, and therefore, anything he may have developed during his employment with TLO belonged to TLO.

Tr. Vol. VI, 1459:7-1461:3. Mr. Forde, however, sought to ensure that TLO provided a written representation in the final asset purchase agreement confirming TLO's prior oral representations regarding Poulsen's status as an employee of TLO and TLO's ownership of the BOLT IP:

> [W]e made sure that we received appropriate assurance, both in our communication with the company and their counsel, but also written confirmation in the form of reps and warranties and assurances in the asset purchase agreement, that . . . Poulsen was an employee of TLO.

Tr. Vol. VI, 1461:8-13. The final Amended and Restated Asset Purchase Agreement (the "Executed APA")[71] between TLO and TransUnion-TRADS, which does not differ materially from the Stalking Horse APA discussed in detail above, contains significant representations made by TLO that Poulsen was an employee of TLO and that TLO owned the BOLT IP. The Executed APA defines the "Acquired Assets" to include, among other things, the BOLT IP and represents and warrants that TLO

[71] The Executed APA, dated December 12, 2013, is attached to the Sale Order as Exhibit A. *See* Pl.'s Ex. 374, Ex. A.

was the "true and lawful exclusive owner" of the BOLT IP. *See* Sale Order, Ex. A, §§ 1.1, 2.5, and 2.6. More specifically, Schedule 2.6(f) of the Executed APA provides that Poulsen, as an owner of TLO, "did not execute [an] agreement[] expressly assigning all right, title and interest in all materials to [TLO]"[72] and that "Poulsen was an employee" of TLO.[73] Mr. Forde testified that this explicit statement that Poulsen was an employee of TLO was critical to TransUnion-TRADS because it "was sort of closing the loop on ownership of the [BOLT] IP for us." Tr. Vol. I, 1476:7-20.

B. The Significance of the BOLT IP to TransUnion-TRADS

The undisputed testimony at Trial reveals that TransUnion-TRADS would not have paid $154 million for substantially all of the assets of TLO if the assets included in the sale did not include the BOLT IP. Mr. Lynch testified that he understood prior to the sale that each of the individual components of the BOLT IP was integral to TLO's business and that if he believed TLO did not legally own any of the components of the BOLT IP, he would not have recommended that TransUnion-TRADS purchase TLO's assets because those assets would have had substantially limited value.[74] Chris Cartwright, the President of U.S. Information Services at TransUnion-TRADS, also testified unequivocally that TransUnion-TRADS would not have purchased

[72] Schedule 2.6(f) explicitly did not "modify or qualify any representation or warranty in any section of the [Executed APA] other than 2.6(f) and 2.6(a)." *See* Sale Order, Ex. A, Schedule 2.6(f). Thus, Schedule 2.6(f) did not alter the representations and warranties made in Section 2.5 of the Executed APA as to the ownership of the BOLT IP.

[73] *See* Sale Order, Ex. A, Schedule 2.6(f).

[74] Tr. Vol. IV, 747:5-749:3 (testifying that "every component within the TLO application architect is important and critical" and that "if [TLO] did not own the BOLT [IP], we would have advised to not buy TLO").

TLO's business if the BOLT IP was not part of the assets to be purchased.[75] He explained that without the BOLT IP, TransUnion-TRADS would have to shut down operations in order to develop a replacement for the BOLT IP, which would take approximately two years, likely causing significant losses both in terms of revenue and customers.[76]

VI. Poulsen's Creation of the BOLT IP and His Employment with TLO

TransUnion-TRADS's good faith belief that TLO owned the BOLT IP stemmed primarily from what it learned from TLO employees. The evidence admitted at Trial and discussed below shows that Poulsen was not only an owner of TLO, but that he was also an employee of TLO. Moreover, the evidence admitted at Trial and discussed below also shows that Poulsen created the BOLT IP after the formation of TLO while an employee of TLO.

A. Testimony of Former TLO Employees

Mr. Wagner, TLO's Chief Technology Officer, testified at Trial that during 2010, 2011, and 2012, Poulsen appeared to be working full-time at TLO's offices in Boca Raton and that as a result, he viewed Poulsen as "a regular full-time employee at TLO." Tr. Vol. IV, 610:14-611:18. Mr. Wagner further testified that he knew that Poulsen was TLO's Chief Science Officer, that he worked with Poulsen using the BOLT IP to create and execute data transformation scripts in the BOLT language,

[75] Tr. Vol. III, 521:14-522:17.

[76] Tr. Vol. III, 522:8-523:2.

and that he personally observed Poulsen creating and executing these scripts while is his office at TLO.[77]

Sisidhar Mukkamalla, who worked as a programmer at TLO, similarly testified at Trial as to his belief that Poulsen was an employee of TLO. Mr. Mukkamalla testified that in January 2009, he interviewed with Poulsen, Mr. Asher, and Mr. Wagner for a position as a programmer at TLO and that based, at least partially, on his interview experience, he believed Poulsen was an employee of TLO.[78] Mr. Mukkamalla also testified that it was his understanding that the BOLT IP was created "sometime around January 2010" because "that's when it was introduced to us, to TLO, and there was a lot of excitement, of [a] new language that we [could] use." Tr. Vol. V, 1010:4-24.

Mike Wyman, another programmer at TLO, testified at Trial that it was his understanding that Poulsen developed the BOLT IP while he was an employee of TLO and that while an employee of TLO, anything Poulsen developed belonged to TLO.[79] Mr. Wyman also specifically testified to the timing of Poulsen's creation of the BOLT IP, stating that he understood that the BOLT IP was created "sometime around the end of 2009, the beginning of 2010." Tr. Vol. V, 1053:20-23. Mr. Wyman identified a document marked Plaintiff's Exhibit 23 as an email he received from Poulsen on November 20, 2009, in which Poulsen attached the "syntax definition" of

[77] Tr. Vol. IV, 610:8-611:1.

[78] Tr. Vol. V, 1007:14-22.

[79] Tr. Vol. V, 1063:3-1064:1.

the programming language which would eventually become known as "BOLT." According to his testimony, Mr. Wyman had never seen this language prior to the November 20, 2009, email.[80] Mr. Wyman identified a second document marked Plaintiff's Exhibit 38 as an email thread,[81] which included an email he received from Mr. Asher on December 31, 2009:

> Q [by Mr. Firsembaum]: Directing your attention to the bottom email in this email chain from Mr. Asher to . . . Poulsen December 31st, 2009, at 6:20 p.m., and I'd like to direct your attention to the second page now, the carryover to that email, you'll see that there are asterisks listed in the email, and directing your attention to the characters underneath those asterisks, do you recognize those characters?
>
> A: Yes, I do.
>
> Q: What are they?
>
> A: I take those to be programming language for the program Snip-It.
>
> Q: And what understanding, if any, do you have as to the name of that program, as to what that programming language – as to the name that was given to that programming language?
>
> A: It's my understanding this was the programming language that eventually become known as BOLT.
>
> Q: Mr. Asher writes above the asterisks, Ole's new language! Check Ole's new language for reading raw data above that. Do you see those statements?
>
> A: Yes, I do.
>
> Q: What understanding, if any, did you have in the December 2009 period as to whether this language that eventually become known to you as BOLT was a new language?

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[80] Tr. Vol. V, 1054:6-1055:13.

[81] Tr. Vol. V, 1055:14-20.

A: Basically because I had never seen anything about BOLT prior to this point in time.

Q: What conclusion did you reach . . .

A: I had [come] to the conclusion that it was something brand new, with this, Hank's new language statement in this email.

Tr. Vol. V, 1056:8-1057:14. This email was also sent to Poulsen at his TLO-issued email address and to several other TLO employees.[82]

Finally, when asked at Trial about TBO's Exhibit A, Mr. Wyman testified that it was an email he sent to Poulsen on October 9, 2007—before the formation of TLO—in which he wrote to Poulsen, "So tell me more about your new sorting algorithm." Tr. Vol. V, 1061:6-14; TBO's Ex. A. The Defendants take the position that this email is evidence that Poulsen created the BOLT IP in 2007, prior to the formation of TLO, and that Poulsen thus could not have created the BOLT IP in his capacity as an employee of TLO. However, Mr. Wyman testified that to his knowledge, the BOLT IP is not a sorting algorithm[83] and that in any event, at the time he wrote this email, he was not inquiring about BOLT because he had never heard of BOLT.[84]

Joseph Belden, the head of TLO's Information Technology department, testified at Trial that he worked with Poulsen at TLO from 2009 through 2013[85] and

[82] Tr. Vol. V, 1055:14-1056:7; Pl.'s Ex. 38.

[83] Tr. Vol. V, 1060:24-1061:5. Mr. Mukkamalla also testified that he would not characterize BOLT as a "sorting algorithm." Tr. Vol. V., 1009:5-10.

[84] Tr. Vol. V, 1061:15-1062:6.

[85] Tr. Vol. VI, 1319:15-1320:8.

that Poulsen was in the offices at TLO "[e]very day, other than maybe sickness or vacation." Tr. Vol. VI, 1315:18-25.

Poulsen himself admitted at Trial that he was not an independent contractor for TLO.[86] He testified, however, that he was also not an employee of TLO, but instead was simply an owner or partner.[87] Poulsen further testified at Trial that he created the BOLT IP prior to the formation of TLO.[88] As to the timing of the creation of the BOLT IP, the Court does not find Poulsen's testimony credible on this issue in light of the other contradictory evidence.

Accordingly, the Court finds that based upon the evidence discussed above, Poulsen created the BOLT IP in late December 2009 or early January 2010, after the formation of TLO. The question of whether Poulsen was an employee at this time, however, is a question of law which the Court will address below.

B. Documentation of Poulsen's Employment Status

Poulsen held the title of TLO's Chief Science Officer. As such, Poulsen had numerous responsibilities at TLO beyond his work on the BOLT IP. Poulsen interviewed, supervised, and managed other TLO programmers. Mr. Belden testified: "I interacted with him all the time with decisions concerning the hardware, electrical

[86] Tr. Vol. VI, 1341:24-1342:1.

[87] Tr. Vol. VI, 1341:3-7. It is certainly not disputed that Poulsen held an equity interest in TLO, which technically did make him an "owner" of TLO.

[88] Tr. Vol. VI, 1568:16-1572:24; 1602:14-16.

things, data center things, our large scale computing systems, all of those kind of things that related to hardware" on which TLO's computer infrastructure operated.[89]

Poulsen also met with potential investors to discuss TLO's technology with them and was held out to potential investors as a crucial part of TLO's team in his capacity as Chief Science Officer. TLO's October 2011 Business Plan, which was sent to potential investors, described Poulsen as being "responsible for the in-house developed languages and database approaches that have been used to create the speed and unique power of TLO's supercomputer-based knowledge engine and proprietary algorithms."[90]

As compensation, Poulsen received from TLO what TLO considered to be a salary in the form of guaranteed payments paid *via* direct deposit payroll.[91] These payments were substantial and were not a distribution of "profits" to TLO equity owners. TLO never was profitable—it had no profits to distribute—and other equity holders who were not employees of TLO did not receive any such payments.[92] TLO's Operating Agreement stated that any salary paid to TLO equity holders who worked at the company would be in the form of such "guaranteed payments."[93]

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[89] Tr. Vol. VI, 1314:4-11; 1315:9-17.

[90] Pl.'s Exs. 76 and 77 (the Business Plan is an attachment to the emails between members of TLO's senior management and potential investors).

[91] *See, e.g.*, Tr. Vol. VII, 1720:3-23.

[92] Tr. Vol. IV, 899:16-900:3.

[93] Pl.'s Exs. 20; 117 at 18.

Poulsen also received common employee benefits such as health insurance, a company issued cell phone, and a corporate credit card. Poulsen did not receive a 1099 tax form as an independent contractor would.[94]

Poulsen had an office at TLO's facilities in Boca Raton,[95] and as discussed above, the programmers and IT staff who worked with him testified that he worked there as a regular full-time employee from 2009 until he left in 2013. While he suggested at Trial that he sometimes did not show up for work at TLO, Poulsen admitted at his deposition that from 2008 to the beginning of 2013 he "would spend time in [his TLO] office almost every day." Tr. Vol. VII, 1715:21-1716:13. With the clarification that TLO did not legally exist in 2008, Poulsen testified at trial that "[o]ther than that," his deposition testimony was accurate. *Id*. In addition to office space, TLO issued Poulsen a computer in his office which he used while working at TLO, a TLO email address, and a TLO phone extension.[96]

Finally, there were only two written agreements between Mr. Asher and Poulsen regarding TLO. The first agreement, signed on October 20, 2008, provided that "Hank [Asher] and Ole [Poulsen] agree that what stock they own in their companies collectively is 90% owned by Hank and 10% owned by Ole" (the "Asher-Poulsen Ownership Agreement").[97] The Asher-Poulsen Ownership Agreement

[94] Tr. Vol. VII, 1717:13-1719:14.

[95] Tr. Vol. VII, 1714:23-1715:1.

[96] Tr. Vol. VII, 1712:16-1713:1.

[97] *See* Pl.'s Ex. 214 (the Asher-Poulsen Ownership Agreement is attached to the email from Mr. MacLachlan, when he was TLO's CFO, to Mr. Furr and Mr. Goldstein).

provided that it covered "all businesses that Hank and Ole are developing," including "JARI Research, all computer companies in development and that will be in development by Hank and Ole, . . . and all future companies that Hank and Ole develop." As Poulsen admitted, the Asher-Poulsen Ownership Agreement nowhere suggests that Poulsen would be entitled to keep any intellectual property that he created, or helped create, for any such business, which by its terms, would eventually include TLO.[98]

The second written agreement between Mr. Asher and Poulsen was TLO's Operating Agreement.[99] The Operating Agreement contained no provision regarding ownership of intellectual property and contained no provisions regarding license fees or royalties owed to Poulsen for use of the BOLT IP.

VII. Poulsen's Actions after Entry of the Sale Order

As the evidence discussed in the preceding section shows, Poulsen received the Sale Motion and the Sale Order. However, even if Poulsen did not receive the Sale Motion or the Sale Order or if Poulsen received the Sale Motion and the Sale Order but failed to review them, at the very least, Poulsen admitted at Trial that he became aware of the sale of TLO's assets within one or two days after the § 363 Auction,[100] which occurred on November 20, 2013. Despite this awareness, Poulsen did nothing

[98] Tr. Vol. VI, 1348:4-25.

[99] Pl.'s Ex. 20.

[100] Tr. Vol. VI, 1401:12-18.

to determine whether the BOLT IP was part of the sale or to assert his purported rights to ownership of the BOLT IP or to the proceeds of the § 363 sale.

Even though he was aware that a sale of substantially all of the assets of TLO had occurred, Poulsen did not file a motion to reconsider the Sale Order. Poulsen did not appeal the Sale Order. Poulsen did not seek to prevent the sale from closing. Poulsen did not file a claim in the TLO bankruptcy proceeding asserting that he owned the BOLT IP or that he was entitled to any proceeds of the sale. These proceeds, to which Poulsen could have asserted a claim based upon his alleged ownership of the BOLT IP, were in excess of $126,000,000.00 through June 2014.

Poulsen testified at Trial that he did nothing because he did not know the BOLT IP was sold as part of TLO's § 363 sale.[101] The evidence, however, demonstrates that Poulsen knew or should have known that the BOLT IP, which he now claims to own, was part of the sale. According to his own testimony, Poulsen was put on notice as early as June 2013 that TLO claimed ownership of the BOLT IP. In June 2013, Poulsen and his personal counsel Mike Moore attended a meeting at Furr & Cohen's offices with TLO's senior management team and outside bankruptcy counsel. Poulsen testified at Trial that he told Ms. Asher that he owned the BOLT IP and significantly, that Ms. Asher made it clear to him that TLO disputed that assertion. In particular, according to Poulsen, Ms. Asher informed Poulsen at the meeting that "the position of the company is that we own the IP."[102] Thus, according to Poulsen's own testimony,

[101] Tr. Vol. VI, 1401:24-1402:5.

[102] Tr. Vol. VII, 1666:2-1667:22.

months before the § 363 Auction and the sale, Poulsen knew that TLO's position was that it owned the BOLT IP. Moreover, it is not disputed that a copy of the Sale Order was mailed to Poulsen at his Oregon address. The Defendants offered no evidence that Poulsen failed to receive the Sale Order.[103] Poulsen offered no explanation for why he did not assert his purported ownership of the BOLT IP and challenge the validity of the sale soon after receiving the Sale Order.

Once Poulsen knew about the sale, which the Court finds he did at the time of the sale or soon after the entry of the Sale Order, he should have taken steps to verify whether the BOLT IP was included in the sale. He did not do so and consequently did nothing about the sale of what he claimed was his property, the BOLT IP, until TransUnion-TRADS filed the Motion to Enforce Sale Order and the adversary proceeding now before the Court.

VIII. <u>TBO's Post-Sale Actions, the Motion to Enforce Sale Order, and the Adversary Proceeding</u>

TBO and its principal Mr. Brauser, through his company Data Acquisition Group ("DAG"), actively participated throughout the entirety of the TLO bankruptcy proceeding, and both TBO and Mr. Brauser were fully aware of the sale and its terms before and after it occurred. DAG was served with the Bid Procedures Order, the Sale Motion and Stalking Horse APA, and the Sale Order. *See* Bid Procedures Order COS,

[103] At Trial, Poulsen testified that he did not know if he ever received a copy of the Sale Order. Tr. Vol. VI, 1402:5-8.

2;[104] Sale Motion COS, 2; Sale Order COS, 7.[105] DAG appeared through its attorney Mr. Salazar, who is now Poulsen's attorney, at the November 5, 2013, preliminary hearing and at the Sale Hearing. *See* Exs. 351, 2:21-24; 371, 2:12-14.

At no point, prior to the closing of the sale, did Mr. Brauser or DAG question TLO's assertion and representation that TLO owned the BOLT IP. However, even though Mr. Brauser knew that the BOLT IP was included in the sale of TLO's assets to TransUnion-TRADS, Mr. Brauser formed a new entity, TBO, and endeavored to acquire both TransUnion-TRADS's employees and the BOLT IP after the closing of the sale.[106] Eventually, TBO and Poulsen signed a purchase agreement (the "BOLT IP Purchase Agreement") on October 14, 2014.[107] Under the BOLT IP Purchase Agreement, Poulsen purported to sell the "BParser Code converter software, including a compiler and run-time library," to TBO for $250,000.00 plus a share in any royalties that might someday be obtained. *See* BOLT IP Purchase Agreement, at 1, 3, and 8. The BOLT IP Purchase Agreement did not make any reference to the BOLT programming language, which TBO nevertheless now claims to own. *Id*. TBO indemnified Poulsen for any legal expenses that might arise out of any dispute with

[104] Mr. Brauser was specifically served with the Bid Procedures Order as a result of his position with Applied Data Sciences LLC. *See* Bid Procedures Order COS, 2. Applied Data Sciences LLC was served via Mr. Brauser at 4400 Biscayne Blvd #850, Miami FL 33137, which is coincidentally the same address listed for DAG. *Id*.

[105] The Sale Order COS reflects that the Sale Order was served on DAG via Mr. Brauser as "partner/member." *See* Sale Order COS, Ex. A, at 5. The Sale Order COS also reflects that Mr. Brauser was served individually with the Sale Order. *Id*. at 15.

[106] Tr. Vol. VI, 1290:17-1294:10.

[107] Pl.'s Ex. 434.

TransUnion-TRADS. *Id*. Poulsen admitted at Trial that prior to entering into the BOLT IP Purchase Agreement, he did not read the Sale Order, and Mr. Brauser also confirmed that, before signing the BOLT IP Purchase Agreement, he took no steps to review the Sale Order.[108]

Having knowledge of Mr. Brauser's and TBO's actions, TransUnion-TRADS instituted the above-captioned adversary proceeding on October 27, 2014. TransUnion-TRADS's Amended Complaint seeks a declaratory judgment against TBO and Poulsen that TransUnion-TRADS owns the BOLT IP free and clear of any interest of Poulsen or TBO and that Poulsen and TBO violated the Sale Order.[109] Poulsen and TBO asserted Counterclaims against TransUnion-TRADS, seeking declaratory judgments that Poulsen owned the BOLT IP at the time of the sale and that TBO, by virtue of the BOLT IP Purchase Agreement, now owns the BOLT IP.

TransUnion-TRADS also filed the Motion to Enforce Sale Order in the underlying TLO bankruptcy proceeding on January 13, 2015. Through the Motion to Enforce Sale Order, TransUnion-TRADS seeks an order from this Court (1) directing TBO to stop asserting that it owns the BOLT IP and to stop using the BOLT IP; (2) ordering TBO to turn over any and all copies of the BOLT IP which TBO has in its possession; (3) ordering Poulsen to provide TransUnion-TRADS with any and all information related to the BOLT IP; (4) holding TBO in contempt for violating the Sale Order; and (5) issuing sanctions against TBO in the form of damages.

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[108] Tr. Vol. VI, 1286:15-20.

[109] *See,* Am. Compl., ECF No. 61.

CONCLUSIONS OF LAW

I. Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(b).[110] This is a core proceeding under 28 U.S.C. § 157. The Defendants previously filed a *Motion to Dismiss for Lack of Jurisdiction and/or Abstain* (the "Motion to Dismiss") (ECF No. 88), on which the Court deferred ruling until Trial. Because the Court finds that it has jurisdiction over this matter, the Court denies that Motion.

II. The Defendants Failed to Establish a Basis for Overturning the Sale Order

An order from a bankruptcy court approving the sale of assets represents a final appealable judicial order and transfers property rights which are good against the world. *See In re Daewoo Motor Co. Ltd., Dealership Litig.*, No. MDL-1510, 2005 WL 8005218, at *6 (M.D. Fla. Jan. 6, 2005); *Regions Bank v. J.R. Oil Co., LLC*, 387 F.3d 721, 732 (8th Cir. 2004). Accordingly, after a court approves or confirms a sale, that sale may be vacated only when the party seeking to overturn the sale establishes that there was fraud, unfairness, or mistake in the conduct of the sale or establishes some other basis for relief under Federal Rule of Civil Procedure 60(b). *See, Hayes v. Sullivan*, 1992 WL 486914 (D.Mass. 1992); *FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281, 286 (7th Cir. 2002).

[110] "While the sale of assets under 11 U.S.C. § 363 is final as to the entire world, including those who were not parties to the sale, . . . the bankruptcy court nonetheless always retains jurisdiction to consider the enforceability of its own orders, including reconsideration of a sale to determine if it was properly conducted." *S. Motor Co. of Dade Cty. Carter-Pritchett-Hodges, Inc.* (*In re MMH Auto. Grp., LLC*, 385 B.R. 347, 355 (Bankr. S.D. Fla. 2008).

In other words, "[f]inal sale orders of bankruptcy courts may not be challenged or collaterally attacked outside of [the proscribed] method of challenges, objections[,] and appeals," and it is considered an impermissible collateral attack to challenge a final sale order "outside of the proscribed method of challenging a final order, generally by way of ancillary proceedings in the same court or in another court." *In re Daewoo Motor Co.*, 2005 WL 8005218, at *7 (noting that "[m]ost tellingly, [p]laintiffs do not seek here, and have not sought in the past, to directly challenge or undo the . . . court's orders approving the [transaction]"); *see also, In re Maxko Petroleum, LLC*, 425 B.R. 852, 874 (Bankr. S.D. Fla. 2010) (subsequently affirmed) (refusing to allow defendants to collaterally attack a final sale order and the finality of the auction sale approved by that order because "it was only in response to litigation commenced by [plaintiff] months after the fact that [defendants] formally raised this issue"). The Defendants here never filed an appeal of the Sale Order. The Defendants never filed a motion to reconsider or to otherwise vacate the Sale Order. Neither of the Defendants even filed a claim in the TLO bankruptcy proceeding. In the two and a half years since the entry of the Sale Order, the Defendants have not instituted any proceeding challenging the validity of the Sale Order with respect to the BOLT IP.

Instead, TransUnion-TRADS instituted this adversary proceeding seeking a declaratory judgment and filed the Motion to Enforce Sale Order in the underlying bankruptcy proceeding after learning that the Defendants were claiming ownership of the BOLT IP in violation of the Sale Order. Only then did the Defendants seek to establish their purported ownership of the BOLT IP, and even then, the Defendants merely filed Counterclaims seeking declaratory judgments—they did not seek to actually overturn the Sale Order.[111] The Courts believes this constitutes an impermissible collateral attack of the Sale Order.[112] Nevertheless, the Court will fully address the issues and arguments raised by the Defendants in their pleadings and at Trial.

A. Rule 60(b)

In the absence of an appeal of a final sale order, the only manner in which a sale order may be challenged is through Rule 60(b). *S. Motor Co. of Dade Cty. v. Carter-Pritchett-Hodges, Inc. (In re MMH Auto. Grp., LLC)*, 385 B.R. 347, 355 (Bankr. S.D. Fla. 2008). Rule 60(b) provides that the Court may relieve a party from a final judgment, order, or proceeding for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

[111] The Defendants' prayers for relief request that the Court enter judgment declaring that: (1) Poulsen owned the BOLT IP; (2) Poulsen did not execute agreements expressly assigning all right, title, and interest in the BOLT IP to TLO; (3) Poulsen assigned his right, title, and interest in the BOLT IP to TBO; and (4) at most, TLO had a non-exclusive revocable implied license to use the BOLT IP.

[112] TransUnion-TRADS asserts that the Sale Order is *res judicata*. Application of the doctrine of *res judicata*, however, is not appropriate here. "*Res judicata* normally only applies against parties who participated in the prior proceedings and 'had a full and fair opportunity to litigate the matter in the proceeding that is to be given preclusive effect.'" *Regions Bank v. J.R. Oil Co., LLC*, 387 F.3d 721, 731 (8th Cir. 2004) (citation omitted); *see also, Schafler v. Indian Spring Maint. Ass'n*, 139 F. App'x 147, 150 (11th Cir. 2005) (discussing the general applicability of the *res judicata* doctrine). Poulsen had notice of the Sale Motion, but neither Poulsen nor TBO actively participated in the sale process. "Normal principals of *res judicata*, however, are not necessary" for the Sale Order to bar the Defendants' challenges to the sale—"[a] bankruptcy sale under 11 U.S.C. § 363, free and clear of all liens, is a judgment that is good as against the world, not merely as against parties to the proceedings." *Regions Bank*, 387 F.3d at 731 (emphasis added). The Sale Order, therefore, is shielded from collateral attack not by *res judicata*, but by virtue of the nature of rights transferred under § 363. *Id.* at 733.

(3) fraud, misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

See Fed. R. Civ. P. 60(b). In the context of reviewing whether an order or judgment should be set aside, it is also appropriate to consider whether the party against whom the order or judgment was entered received proper notice of the relief sought. *In re MMH Auto. Grp., LLC*, 385 B.R. at 356.

Based upon the evidence received at Trial and discussed above, the Court finds that the Defendants did not establish any basis which would justify granting relief from the Sale Order. Specifically, the Defendants did not establish any fraud, misrepresentation, or misconduct by either TLO or TransUnion-TRADS. Moreover, as discussed in the next section, the evidence shows that Poulsen was served with notice of and received due process as to the sale of substantially all of TLO's assets, which included the BOLT IP.

B. Notice and Due Process

According to the Defendants, one of the grounds upon which reconsideration of the Sale Order is appropriate is that Poulsen failed to receive proper notice and due process. However, for the following reasons, the Defendants did not establish that Poulsen failed to receive proper notice of and due process as to the § 363 sale.

As courts have long recognized, the requirement of "[n]otice is the cornerstone underpinning Bankruptcy Code procedure." *Western Auto Supply Co. v. Savage Arms,* *Inc. (In re Savage Indus., Inc.)*, 43 F.3d 714, 720 (1st Cir. 1994). Provisions mandating that bankruptcy courts may only take actions which affect parties' rights "after notice and a hearing" appear throughout the Bankruptcy Code, including in the context of § 363 sales. *See Morgan Olson L.L.C. v. Frederico (In re Grumman Olson Indus., Inc.)*, 467 B.R. 694, 706 (S.D.N.Y. 2012) (noting that "[c]ourts have held in general that, for due process reasons, a party that did not receive adequate notice of bankruptcy proceedings could not be bound by orders issued during those proceedings"). Section 363(b)(1) provides, in part, that a trustee or a debtor-in-possession may sell assets other than in the ordinary course of business only after notice and a hearing. "Undoubtedly, parties holding known liens or asserting known interests in property to be sold are entitled to actual notice of a debtor's intent to sell such property free and clear of those interests."[113] *Unaatuq, LLC v. Green (In re Catholic Bishop of N. Alaska)*, 509 B.R. 229, 241-42 (Bankr. D. Alaska 2014), *aff'd*, 525 B.R. 723 (D. Alaska 2015), *and aff'd*, No. 4:14-CV-0012-HRH, 2015 WL 632185 (D. Alaska Feb. 12, 2015); *see also, In re MMH Auto. Grp., LLC*, 385 B.R. at 357.

In the Bankruptcy Code, "after notice and a hearing" means "after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances." 11 U.S.C. § 102(1)(A). The Federal Rules of Bankruptcy Procedure also provide specific rules which relate to serving

[113] It is true that "a party whose interest is hidden, whether by design or failure to do what is necessary to protect or disclose such interest, cannot complain that its interest has been compromised without notice, because, logically, the trustee cannot be expected to know that a 'hidden' interest exists." *In re MMH Auto. Grp., LLC*, 385 B.R. at 357. Although TransUnion-TRADS appears to argue otherwise, the evidence presented at trial shows that TLO was on notice prior to the sale that Poulsen had asserted or would assert in the future that he had ownership rights in the BOLT IP.

notice of § 363 sales. Bankruptcy Rule 6004(a) provides that "[n]otice of a proposed use, sale, or lease of property, other than cash collateral, not in the ordinary course of business shall be given pursuant to [Bankruptcy] Rule 2002(a)(2),[114] (c)(1),[115] (i), and (k)[116] and, if applicable, in accordance with § 363(b)(2) of the Code." Bankruptcy Rule 6004(c) provides that any motion seeking "authority to sell property free and clear of liens or other interests shall be made in accordance with Rule 9014 and shall be served on the parties who have liens or other interests in the property to be sold." Bankruptcy Rule 9014, in turn, directs that any relief to which the rule applies will be requested by motion, "and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought."

The notice requirements described above are "founded in fundamental notions of procedural due process." *In re Savage Indus., Inc.*, 43 F.3d at 721; *see also*, *A–Fab Eng'g, Inc. v. C.W. Mining Co. (In re C.W. Mining Co.)*, 431 B.R. 307 (B.A.P. 10th Cir. 2009). "It is well settled that in order for any proceeding to satisfy due process, there must be 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *In re Grumman Olson Indus., Inc.*, 467 B.R. at 706-07

[114] Bankruptcy Rule 2002(a)(2) provides that at least 21 days' notice by mail shall be provided for "a proposed use, sale, or lease of property of the estate other than in the ordinary course of business, unless the court for cause shown shortens the time or directs another method of giving notice[.]"

[115] Bankruptcy Rule 2002(c)(1) provides that "the notice of a proposed use, sale, or lease of property required by subdivision (a)(2) of this rule shall include the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections."

[116] Subsections (i) and (k) of Rule 2002 of the Bankruptcy Code relate to service on committees and the United States Trustee, respectively.

(*quoting Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)).

Whether the requirements of notice and due process were satisfied is a factual inquiry which must be made on a case-by-case basis. *Hadder v. Walker Cty., Ala*., No. 6:14-CV-00586-LSC, 2014 WL 4957231, at *4 (N.D. Ala. Oct. 2, 2014) (noting that "notice under the Due Process Clause is context-specific"). Indeed, a court may find that notice and due process requirements were met even when the notice mailed was not actually received by the aggrieved party. Due process simply requires that notice must be reasonably calculated to apprise interested parties of the proceedings and the opportunity to objection. Proof of actual receipt of a mailed notice is not required to satisfy due process requirements. *Dusenbery v. U.S*., 534 U.S. 161, 170, 122 S.Ct. 694, 151 L.Ed.2d 597 (2002); *Sanders v. Henry Cty., Ga*., 484 F. App'x 395, 397 (11th Cir. 2012); *In re Johns-Manville Corp*., No. 82 B 11656 (CGM), 2016 WL 3574051, at *14 (Bankr. S.D.N.Y. June 30, 2016). Moreover, if mailed to the appropriate address, "[s]ervice by mail is <u>complete upon mailing</u>." *Green v. Sheppard (In re Sheppard)*, 173 B.R. 799, 805 (Bankr. N.D. Ga. 1994) (*citing* Fed. R. Civ. P. 5(b); Fed. R. Bankr. P. 7005). Thus, there is no requirement that "all risk of non-receipt must be eliminated":

> The Supreme Court has frequently said . . . that, under most circumstances, notice sent by ordinary mail is deemed reasonably calculated to inform interested parties that their property rights are in jeopardy. The mails are an "efficient and inexpensive means of communication" that generally may be relied upon to deliver notice where it is sent. In the context of a wide variety of proceedings that threaten to deprive individuals of their property interests, the Supreme Court has consistently held that mailed notice satisfies the requirements of due process. Though the mails are not one hundred

> percent reliable, none of these cases requires actual receipt of notice that is properly mailed.

Weigner v. City of New York, 852 F.2d 646, 649-50 (2d Cir. 1988) (internal citations omitted). Finally, there is a rebuttable presumption that an item which was properly mailed was received by the addressee. *Konst v. Fla. E. Coast Ry. Co.*, 71 F.3d 850, 851 (11th Cir. 1996). This "presumption of receipt' arises upon proof that the item was properly addressed, had sufficient postage, and was deposited in the mail." *Anderson v. Branch Banking & Trust Co.*, 119 F. Supp. 3d 1328, 1341 (S.D. Fla. 2015) (internal citation and quotation marks omitted). Mere denial of receipt is insufficient to rebut the presumption. *Id.*

As the Court previously discussed in detail, the evidence shows that TLO served Poulsen with notice of every motion and hearing which was critical to the sale process and that every notice was deposited in the mail, addressed to Poulsen's address in either Florida[117] or Oregon, and contained sufficient postage. The evidence also shows that the Court conducted multiple hearings throughout the sale process and allowed any interested party who appeared at those hearings to raise objections. The Court finds that the notice given and the hearings conducted were reasonable and appropriate under the circumstances and that every notice satisfied the requirements of due process as they were reasonably calculated under all the circumstances to apprise Poulsen of the pendency of the proceedings and to afford him an opportunity to present his objections. Poulsen is presumed to have received

[117] As previously discussed, mail addressed to Poulsen at his Florida address, whether Boca Raton or Highland Beach, was forwarded by the Postal Service to his Oregon address.

the relevant notices as they were properly mailed to him, and the Defendants did not present any persuasive evidence to rebut that presumption.

C. TransUnion-TRADS is Entitled to Protection as a Good Faith Purchaser

Notwithstanding whether the requirements of § 363(f) have been met, § 363(m) provides that the reversal or modification of a sale authorized under § 363(b) or (c) "does not affect the validity of [the] sale . . . to an entity that purchased . . . such property in good faith . . . unless such authorization and such sale . . . were stayed pending appeal." 11 U.S.C. § 363(m). Section 363(m) gives purchasers of a debtor's assets an "assurance of finality" with respect to "who has rights to estate property." *FirstBank Puerto Rico v. Barclays Capital Inc. (In re Lehman Bros. Holding Inc.)*, 492 B.R. 191, 201 (Bankr. S.D.N.Y. 2013) (subsequently affirmed) (*quoting Licensing by Paolo, Inc. v. Sinatra (In re Gucci)*, 126 F.3d 380, 387 (2d Cir. 1997)); *see also, In re CHC Indus., Inc.*, 389 B.R. 767, 774 (Bankr. M.D. Fla. 2007). At the time of TLO's § 363 sale, the Court made a finding that TransUnion-TRADS was a good faith purchaser.[118] However, because the Defendants now assert that TransUnion-TRADS did not act in good faith, the Court will once again analyze TransUnion-TRADS's status as a good faith purchaser.

Although the Bankruptcy Code does not define the meaning of "good faith purchaser," most courts have adopted a traditional equitable definition: "one who purchases the assets for value, in good faith and without notice of adverse claims." *23 Jefferson St. LLC v. 636 Assets, Inc.*, No. 14-CV-7150 CBA, 2015 WL 5037343, at *4

[118] "Bankruptcy courts routinely make a finding of good faith at the time of the § 363 sale approval." *In re Gucci*, 126 F.3d at 389.

(E.D.N.Y. Aug. 25, 2015). There is no dispute that TranUnion-TRADS purchased the assets for value—$154 million. The issue here is whether TranUnion-TRADS purchased the assets in good faith and without notice of adverse claims. The analysis of whether a purchaser of a debtor's assets acted in good faith is focused on the conduct of the purchaser in the course of the bankruptcy proceedings; this includes the purchaser's actions in preparation for and during the sale itself. *See, e.g., Badami v. Burgess (In re Burgess),* 246 B.R. 352, 356 (B.A.P. 8th Cir. 2000). "Typically, the requisite misconduct necessary to establish a lack of good faith involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." *Id.* (internal quotations omitted*); see also, Bay Harbour Mgmt., L.C. v. Lehman Bros. Holdings, Inc. (In re Lehman Bros. Holdings, Inc.)*, 415 B.R. 77, 84 (S.D.N.Y. 2009).

The Defendants did not present any evidence at Trial that TransUnion-TRADS engaged in any kind of fraud or collusion. The Defendants presented no evidence that TransUnion-TRADS otherwise failed to act in good faith. Although TransUnion-TRADS knew that TLO did not possess the source code because Poulsen took it with him upon leaving TLO, the Defendants did not present evidence that TransUnion-TRADS had such knowledge of an adverse claim to the BOLT IP which would rise to a level that would negate TransUnion-TRADS's good faith. On the contrary, the Court finds that based upon the evidence discussed above and otherwise presented at Trial, TransUnion-TRADS acted in good faith during the sale process and is thus entitled to the § 363(m) protections afforded to good faith purchasers.

D. Equitable Mootness

Although most commonly applied to untimely appeals, the doctrine of equitable mootness is equally applicable to motions to reconsider or overturn final orders in bankruptcy proceedings. *See, e.g., Almeroth v. Innovative Clinical Sols., Ltd.* (*In re Innovative Clinical Sols., Ltd.)*, 302 B.R. 136, 141 (Bankr. D. Del. 2003); *S.N. Phelps & Co. v. Circle K. Corp. (In re Circle K Corp.)*, 171 B.R. 666, 669 (Bankr. D. Ariz. 1994). "The equitable mootness doctrine . . . applies when appellants 'have failed and neglected diligently to pursue their available remedies to obtain a stay' and circumstances have changed so as to 'render it inequitable to consider the merits of the appeal.'" *Darby v. Zimmerman (In re Popp)*, 323 B.R. 260, 270-71 (B.A.P. 9th Cir. 2005) (*quoting Focus Media Inc. v. Nat'l Broad. Co. Inc. (In re Focus Media, Inc.)*, 378 F.3d 916, 923 (9th Cir. 2004)). Courts have applied the doctrine of equitable mootness when the appellant has failed to obtain a stay and the ensuing transactions are too "complex and difficult to unwind." *Lowenschuss v. Selnick (In re Lowenschuss),* 170 F.3d 923, 933 (9th Cir. 1999). Moreover, "[u]nder this widely recognized and accepted doctrine, the courts have held that [an action] should be dismissed as moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable." *In re Innovative Clinical Sols., Ltd.*, 302 B.R. at 141. Essentially, "[t]he test for mootness reflects a court's concern for striking the proper balance between the equitable considerations of finality and good faith reliance on a judgment and the competing interests that underlie the right of a party to seek review of a bankruptcy court order adversely affecting him." *In re VOIP, Inc.*, 461 B.R. 899, 902 (S.D. Fla. 2011) (*quoting First Union Real Estate Equity and Mortg. Invs. v. Club Assocs. (In re Club Assocs.*), 956 F.2d 1065, 1069 (11th Cir. 1992)).

Here, the evidence discussed clearly above shows that Poulsen sat on his rights and failed to challenge the Sale Order in a timely matter. TransUnion-TRADS paid $154 million to acquire the assets of TLO. Relying on the finality of the Sale Order and its "free and clear" provisions, TransUnion-TRADS has been operating the business acquired from TLO for nearly two years. Moreover, the proceeds of the sale—to which Poulsen could have asserted a claim—were distributed long ago. The evidence shows that Poulsen had actual knowledge of the sale. Poulsen's assertion that he did not know until recently that the BOLT IP was included in the sale is irrelevant because to the extent this assertion is true, Poulsen's lack of knowledge is a result of his own failure to read the pleadings he received and his failure to investigate the terms of the sale. Accordingly, the Defendants' attempt to now challenge the validity of the Sale Order is barred by the doctrine of equitable mootness.

III. <u>The Sale of the BOLT IP was Authorized under § 363(f)</u>

Pursuant to § 363(f), the trustee or the debtor-in-possession may sell property under § 363(b) free and clear of any interest in such property only if the trustee or the debtor-in-possession satisfies one of five conditions, two of which are: "such entity consents" or "such interest is in bona fide dispute." *See* 11 U.S.C. § 363(f)(2), (4). The Defendants assert that as to the BOLT IP, TLO failed to establish at the time of the sale that it satisfied one of the conditions outlined in § 363(f). Even though the

Defendants did not establish any grounds for the Court to reconsider the Sale Order, the Court will still address whether there was a legal basis, at the time of the sale, for TLO to sell the BOLT IP free and clear of Poulsen's purported interest. For the reasons that follow, the Court finds that TLO was authorized under § 363(f) to sell the BOLT IP free and clear of Poulsen's purported claims and interests.

A. Consent

As just discussed, the Bankruptcy Code delineates the conditions under which an interest can be extinguished by a bankruptcy sale. One of those conditions is the consent of the interest holder. Lack of objection to the sale—provided that there has been adequate notice—constitutes consent. *See, e.g., In re Daufuskie Island Props., LLC,* 431 B.R. 626, 647 (Bankr. D. S.C. 2010); *In re Enron Corp.*, 2004 WL 5361245, at *2 (Bankr. S.D.N.Y. 2004) (holding that "[t]hose parties who did not object, or who withdrew their objections, . . . are deemed to have consented pursuant to section 363(f)(2) of the Bankruptcy Code."). "It could not be otherwise; transaction costs would be prohibitive if everyone who might have an interest in the bankrupt's assets had to execute a formal consent before they could be sold." *FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281, 285-86 (7th Cir. 2002) *cert. denied*, 538 U.S. 962, 123 S. Ct. 1769, 155 L. Ed. 2d 513 (2003).

Here, TLO provided Poulsen with adequate notice of and due process as to the impending sale as discussed above. Poulsen did not appear at any of the hearings and did not object in any way to the sale. Accordingly, the Court finds that Poulsen impliedly consented to the § 363 sale of TLO's assets, including the BOLT IP, free and clear of any liens and interests. TLO was thus authorized, pursuant to § 363(f)(2), to sell the BOLT IP free and clear of Poulsen's purported interest in the BOLT IP as part of its § 363(b) sale.

B. Bona Fide Dispute

A trustee or a debtor-in-possession may also sell property under § 363(b) free and clear of any interest in the property if such interest is in bona fide dispute. *See* 11 U.S.C. § 363(f)(4). "Section 363(f)(4) does not contemplate or require that the court resolve or determine any dispute about ownership before a sale hearing, but rather requires only an examination of whether there is an objective basis for either a factual or legal dispute about ownership." *In re Genesys Research Inst., Inc.*, No. 15-12794-JNF, 2016 WL 3583229, at *20 (Bankr. D. Mass. June 24, 2016); *see also, In re MMH Auto. Grp., LLC*, 385 B.R. at 370. "The purpose of § 363(f)(4) is to permit property of the estate to be sold free and clear of interests that are disputed by the estate 'so that liquidation of the estate's assets need not be delayed while such disputes are being litigated.'" *In re Gulf States Steel, Inc. of Ala.*, 285 B.R. 497, 507 (Bankr. N.D. Ala. 2002) (*quoting In re Clark*, 266 B.R. 163, 171 (9th Cir. BAP 2001)).

The evidence admitted at Trial and discussed in detail above shows that at the time of the sale, TLO owned the BOLT IP. At the very least, however, there was a bona fide dispute as to who owned the BOLT IP. Accordingly, pursuant to § 363(f)(4), TLO was authorized to sell the BOLT IP free and clear of Poulsen's purported interest in the BOLT IP as part of its § 363(b) sale.

IV. <u>TLO Owned the BOLT IP at the Time of the Sale</u>

The ultimate position of the Defendants is that TLO did not own the BOLT IP and thus had no right to sell it as part of its § 363 sale because Poulsen, as the creator of the BOLT IP, was the rightful owner of the BOLT IP. Although the Defendants failed to establish a basis to overturn the Sale Order so as to reconsider TLO's right to sell the BOLT IP, the Court will nonetheless address the issue of the ownership of the BOLT IP. This issue of ownership hinges on whether Poulsen was an "employee" of TLO when he created the BOLT IP. For the reasons that follow, the Court finds that Poulsen was an employee of TLO when he created the BOLT IP and that as a result, TLO did in fact own the BOLT IP at the time of the § 363 sale.

"Computer programs receive copyright protection under the Copyright Act as 'literary works.'" *Woods v. Resnick*, 725 F. Supp. 2d 809, 817 (W.D. Wis. 2010) (*citing* 17 U.S.C. §§ 101 and 102(a)(1)). Generally, the author of a work, including a computer program, is the owner of that work. 17 U.S.C. § 201(a). However, in the case of a "work made for hire," the owner of the work is the entity for whom the work was prepared "unless the parties have expressly agreed otherwise in a <u>written instrument</u> signed by them." 17 U.S.C. § 201(b) (emphasis added). The copyright statute defines a "work made for hire" as "a work prepared by an employee within the scope of his or her employment." 17 U.S.C. § 101. The Supreme Court of the United States has held that to determine whether an individual was an employee, and whether he created a work within the scope of his employment, courts should look to the general common law of agency. *Cmty. for Creative Non–Violence v. Reid*, 490 U.S. 730, 740, 109 S.Ct.

2166, 104 L.Ed.2d 811 (1989); *Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 1313, 1318 (11th Cir. 2015). In addition to looking at control over the manner and means of the work, courts using the common law agency test consider a number of other factors:

> [T]he skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Ashkenazi v. S. Broward Hosp. Dist., 607 F. App'x 958, 961 (11th Cir. 2015) (internal quotation marks omitted) (*quoting Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992)). "Because the common-law test contains no shorthand formula or magic phrase that can be applied to find the answer, all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *JustMed, Inc. v. Byce*, 600 F.3d 1118, 1125–26 (9th Cir. 2010) (internal citations omitted).

At its inception, TLO was a technology start-up company. As previously discussed, Poulsen was one of its founders and owners. Start-up companies often present a unique challenge to courts when attempting to discern whether an individual was an employee, an owner, or both as start-up companies conduct their businesses more informally than established businesses.

For instance, in the context of a dispute over the ownership of source code between an employer and the creator of the source code, the court in *JustMed v. Byce* found that the defendant, Byce, was an employee of the plaintiff, JustMed, when he created the source code because: (1) Byce was not hired for a specific duration or to perform a discrete task; (2) Byce's employment ended because of a dispute, not because his work on the source code ended; (3) Byce had a formal title; (4) Byce earned a regular salary from JustMed; and (5) Byce's work was integral to JustMed's regular business and JustMed sold its primary product by emphasizing that the software could constantly be updated. *See JustMed v. Byce*, 600 F.3d at 1127. The court made this finding even though JustMed "did not exercise much control over the manner and means by which Byce created the source code" as the court found that control "is not as important to a technology start-up as it might be to an established company" and emphasized that "Byce was an inventive computer programmer expected to work independently." *Id.* at 1127-28. The court even discounted Byce's emphasis on JustMed's failure to pay benefits and to fill out appropriate employment and tax forms, reasoning that this failure "is more likely attributable to the start-up nature of the business than to Byce's alleged status as an independent contractor." *Id.* at 1128. Ultimately, the court held that Byce was an employee and that JustMed owned the source code as a work made for hire, stating that although the informal nature of JustMed's business made "it more difficult to decide whether a hired party [was] an employee or an independent contractor," this fact "should not make the company more susceptible to losing control over software integral to its product." *Id.*

The Court finds the *JustMed v. Byce* opinion discussed above to be highly persuasive.[119] The evidence admitted at Trial shows that like Byce, Poulsen, with respect to his work with TLO: (1) was not hired for a specific duration or to perform a discrete task; (2) left TLO not because his work had come to a logical conclusion, but because of a dispute with TLO management; (3) had a formal title, Chief Science Officer; (4) earned a regular salary in the form of guaranteed payments; and (5) performed work and made contributions to TLO which were essential to TLO's business and product. Moreover, Poulsen interviewed and hired perspective TLO employees, received medical benefits from TLO, had a TLO email address and a corporate credit card, and worked "full time" at TLO's offices in Boca Raton from 2009 through 2013. The fact that TLO's management did not exercise significant control over the manner and means by which Poulsen worked is not significant as TLO was a start-up company and more importantly, Poulsen was a high-level, innovative computer programmer who was expected to work independently. The Court finds that for these reasons and based upon the evidence discussed above and presented at Trial, Poulsen was in fact an employee of TLO in late 2009 or early 2010 when he

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[119] Poulsen's assertion that he was neither an employee nor an independent contractor, but rather an owner is not persuasive. Although it is true that under certain circumstances, an owner cannot be considered an employee of a business, the circumstances necessary for such a finding are not present here. In *Woods v. Resnick*, for instance, the court found that Woods was not an employee of F & I because Woods was an equal partner in F & I with equal voting rights, which meant that "unless both [Woods and his partner] agree[d] to a particular action, deadlock [would ensue]." 725 F. Supp. 2d at 824. The court reasoned that "[i]n other words, the company [did] not have the ability to compel either owner to take action" and under such a scenario, "there [was] no basis for finding that Woods was an employee under the control of F & I." *Id.*; *see also, Heimerdinger v. Collins*, 2009 WL 1743764, *4 (D. Utah 2009) (rejecting similar work-for-hire claim on ground that partners are generally not employees of the partnership). Here, Poulsen was not an equal partner in or a majority owner of TLO. Poulsen was a minority owner of TLO. Accordingly, his assertion that he was not an employee of TLO because he was an owner of TLO is unpersuasive.

created the BOLT IP who did not have an express, written agreement providing that he would retain ownership of anything he created while employed by TLO.

V. <u>Conclusion</u>

For the foregoing reasons, the evidence shows that the Defendants failed to establish a basis under Rule 60 for reconsidering or overturning the Sale Order. Poulsen received notice of all of the critical motions and hearings related to the § 363 sale of substantially all of TLO's assets, including the Sale Motion and the Sale Order. Poulsen sat on his rights for years, failing to file a motion to reconsider or to appeal the Sale Order, and accordingly, the Defendants' challenge of the Sale Order and the ownership of the BOLT IP is further barred pursuant to the doctrine of equitable mootness. Additionally, TransUnion-TRADS purchased TLO's assets in good faith and is entitled to the protections that § 363(m) affords to good faith purchasers. Finally, the Court finds that TLO was the owner of the BOLT IP at the time of the § 363 sale and that TLO was in any event entitled to sell the BOLT IP free and clear of Poulsen's purported interest pursuant to § 363(f).

<u>ORDER</u>

Based upon the evidence received at Trial and for the reasons discussed in detail above, the Court hereby **ORDERS AND ADJUDGES** that:

1. TransUnion Risk and Alternative Data Solutions, Inc.'s *Motion to Enforce Sale Order and Motion for Contempt* (ECF No. 1282, Case No. 13-20853) is **GRANTED**.

2. The *Motion to Dismiss* (ECF No. 88) filed by Defendants TBO *nka* IDI, Inc. and Ole Poulsen is **DENIED**.
3. Defendants TBO *nka* IDI, Inc. and Ole Poulsen failed to establish any basis for the Court to reconsider or to overturn the Sale Order.
4. TransUnion Risk and Alternative Data Solutions, Inc. is the sole owner of the BOLT IP pursuant to the Sale Order.
5. TLO owned the BOLT IP at the time of the § 363 sale and thus was entitled to sell the BOLT IP to TransUnion Risk and Alternative Data Solutions, Inc. free and clear of Poulsen's purported interest.
6. Defendant TBO *nka* IDI, Inc. is hereby found to have knowingly violated the Sale Order and shall be sanctioned so as to compensate TransUnion Risk and Alternative Data Solutions, Inc. for the attorney's fees and costs incurred in this litigation.
7. The Court will enter a separate final judgment:
   a. Granting the Motion to Enforce Sale Order;
   b. Granting final judgment to TransUnion Risk and Alternative Data Solutions, Inc. and against Defendants TBO *nka* IDI, Inc. and Ole Poulsen with respect to TransUnion Risk and Alternative Data Solutions, Inc.'s Complaint and the Counterclaims filed by Defendants TBO *nka* IDI, Inc. and Ole Poulsen; and

c. Issuing an injunction in favor of TransUnion Risk and Alternative Data Solutions, Inc. and against Defendants TBO *nka* IDI, Inc. and Ole Poulsen.

8. The Court retains jurisdiction to determine the amount of damages and attorney's fees to be awarded in favor of TransUnion Risk and Alternative Data Solutions, Inc. and against Defendant TBO *nka* IDI, Inc.. The parties shall contact Vivian Corrales, Judge Hyman's Courtroom Deputy, to schedule an evidentiary hearing on damages and attorney's fees when discovery is complete on this issue.

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Copies furnished to:

All interested parties and their attorneys by the Clerk of Court

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	Chapter 7
David C. Kapla,	Case No. 11-68878
Debtor.	Hon. Phillip J. Shefferly
______________________________/	
David C. Kapla,	Adversary Proceeding No. 12-04000-PJS
Plaintiff,	
v.	
Federal National Mortgage Association, Inc.,	
Defendant,	
and	
Federal Housing Finance Agency,	
Intervenor-Defendant.	
______________________________/	

OPINION GRANTING DEFENDANTS' MOTION TO DISMISS

Introduction

The plaintiff in this adversary proceeding is the debtor in this Chapter 7 case. The plaintiff filed this adversary proceeding to set aside a foreclosure sale of his home and to obtain other relief. The defendants filed a motion to dismiss the adversary proceeding. For the reasons explained in this opinion, the Court grants the motion.

Jurisdiction

The Court has jurisdiction over this matter under 28 U.S.C. §§ 1334(a) and 157(a). The complaint alleges that this is a core proceeding under 28 U.S.C. § 157(b)(2). The Court finds that it is not a core proceeding, but instead is related to a case under title 11. The parties have not objected to the Court hearing and determining this matter, and to enter appropriate orders and judgments.

Background

On November 7, 2011, David C. Kapla ("Debtor") filed a Chapter 13 petition. The Debtor's schedule A filed with his petition states that he has a "fee simple" interest in a home located at 36419 Avondale Street, Westland, Michigan ("Property"). On November 14, 2011, Fannie Mae filed a motion for relief from the automatic stay to enforce its rights in the Property. The motion alleged that the Debtor did not have any interest in the Property because of a foreclosure sale of the Property that was held on September 15, 2010. The motion further alleged that the time to redeem from the foreclosure sale under applicable Michigan law expired on September 15, 2011. Finally, the motion alleged that because the Debtor did not redeem from the foreclosure sale, the Debtor's bankruptcy estate did not have an interest in the Property. The Debtor objected to the motion. On December 13, 2011, the Court held a hearing. At the conclusion of the hearing, the Court granted the motion. The order granting the motion was entered on December 15, 2011. The Debtor then converted his bankruptcy case from Chapter 13 to Chapter 7. The Debtor also moved for reconsideration of the order granting Fannie Mae's motion for relief from the automatic stay. The Court denied the Debtor's motion.

After converting his case to Chapter 7, the Debtor filed this adversary proceeding against Fannie Mae on January 1, 2012. The complaint seeks to set aside the foreclosure sale of the Property, and requests various other forms of injunctive and declaratory relief against Fannie Mae. Although the Debtor's claims against Fannie Mae all relate to events that occurred prior to the Debtor's bankruptcy case, the Debtor's schedule B filed in his bankruptcy case does not list any claims against Fannie Mae.

After the complaint was served on Fannie Mae, the Debtor and Fannie Mae stipulated to extend the time for Fannie Mae to answer the complaint. On April 24, 2012, the Debtor and Fannie Mae stipulated to permit the Federal Housing Finance Agency ("FHFA") to intervene as a defendant in this adversary proceeding. The stipulation explains that on September 6, 2008, FHFA was appointed as the conservator of Fannie Mae in accordance with the Housing and Economic Recovery Act of 2008, Pub. L. 110-289, 122 Stat. 2654 (codified at 12 U.S.C. § 4617), and the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. §§ 4501 - 4642) The stipulation further explains that FHFA, as conservator of Fannie Mae, succeeded to all of the rights, titles, powers and privileges of Fannie Mae, including the right to sue and be sued in federal court. On April 27, 2012, the Court entered an order approving the stipulation and permitting FHFA to intervene.

On April 30, 2012, FHFA and Fannie Mae ("Defendants") filed a motion to dismiss this adversary proceeding pursuant to Fed. R. Bankr. P. 7012(b) and Fed. R. Civ. P. 12(b)(6). By agreement of the parties, the Debtor obtained several extensions of time to answer the motion. Eventually, the Debtor filed an answer to the motion. The Defendants subsequently filed a reply to the Debtor's answer. On October 29, 2012, the Court held a hearing on the motion, and took the matter under advisement.

The complaint

The complaint alleges the following facts.

On June 24, 1994, the Debtor obtained financing from D&N Bank for the purchase of the Property (¶ 8). D&N Bank assigned the mortgage to Bank of America pursuant to an assignment recorded July 27, 2000 (¶ 9). Bank of America serviced the loan for Fannie Mae (¶ 10). When the Debtor began to experience financial problems and became late on his mortgage payments, he tried to work with Bank of America, but Bank of America insisted that his account be placed into default, accelerated, and then foreclosed (¶ 18). At that time, the Debtor would have qualified for a reverse mortgage, but neither Bank of America nor Fannie Mae would engage in good faith discussions with the Debtor to resolve his delinquency (¶ 19). Fannie Mae treated the Debtor differently than other similarly situated homeowners in distress by not allowing him to refinance a reverse mortgage to pay off Fannie Mae (¶ 26). Fannie Mae also acted in bad faith by refusing to offer the Debtor all of the available options that it provided to other distressed homeowners, and by failing to accept a payment that was just beyond 30 days late (¶ 33). When the Debtor was laid off from his job, he defaulted on the mortgage (¶ 11). Pursuant to the statutory provisions in Michigan regarding non-judicial mortgage foreclosures, Bank of America, the "seller servicer," purchased the Property at a sheriff sale held on September 15, 2010 (¶ 12). After the sheriff sale, Bank of America executed and delivered a quit claim deed of the Property to Fannie Mae on May 2, 2011 (¶ 14). Fannie Mae is a corporation operated by the United States that was "placed under the conservatorship of a federal agency in September, 2008" (¶ 7) in order to "prevent it from going out of business" (¶ 12). After the one year redemption period from the foreclosure sale expired on September 15, 2011, Fannie Mae brought a summary proceeding in the 18th Judicial District Court for the State of Michigan ("State Court Lawsuit") on October 14, 2011 (¶ 15). On October 24, 2011, a judgment of possession ("State Court Judgment") was entered in the State Court Lawsuit in favor of Fannie Mae and against the Debtor (¶ 15).

The complaint contains four counts. Count I seeks injunctive relief staying any eviction of the Debtor from the Property. Count II seeks declaratory relief adjudicating that Fannie Mae is a government actor, and that its actions with respect to the Property have deprived the Debtor of equal protection and due process. Count III seeks a money judgment against Fannie Mae for violations of 42 U.S.C. § 1983. Count IV seeks a money judgment against Fannie Mae because it has deprived the Debtor of equal protection. The Defendants' motion seeks dismissal of all four counts.

Applicable legal standard

Fed. R. Civ. P. 8(a)(2), incorporated by Fed. R. Bankr. P. 7008(a), requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" The purpose of this pleading standard is "to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation marks and citation omitted). A motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), incorporated by Fed. R. Bankr. P. 7012, challenges whether a complaint meets this standard.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). In deciding a motion to dismiss for failure to state a claim upon which relief may be granted, "[t]he court must construe the complaint in the light most favorable to the plaintiff [and] accept all the factual allegations as true . . . . A court may not grant a Rule 12(b)(6) motion based on disbelief of a complaint's factual allegations." Bovee v. Coopers & Lybrand C.P.A., 272 F.3d 356, 360 (6th Cir. 2001) (citations omitted).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Twombly, 550 U.S. at 555 (citations omitted).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions . . . ." Id. "[A] formulaic recitation of the elements of a cause of action will not do." Id. (citation omitted). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Ashcroft v. Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557). Likewise, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. (citing Twombly, 550 U.S. at 555). This is because "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Id. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" Id. (quoting Twombly, 550 U.S. at 557).

Ordinarily, in considering a motion to discuss under Rule 12(b)(6), a court's review is limited to the allegations in the complaint and "any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to [a] defendant's motion to dismiss so long as they are referred to in the [c]omplaint and are central to the claims" in the complaint. Bassett v. National Collegiate Athletic Association, 528 F.3d 426, 430 (6th Cir. 2008) (citing Amini v. Oberlin College, 259 F.3d 493, 502 (6th Cir. 2001)). However, Fed. R. Civ. P. 12(d), incorporated by Fed. R. Bankr P. 7012, states that "[i]f, on a motion under Rule 12(b)(6) . . . , matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." The rule goes on to provide that in such event, "[a]ll parties must be given a reasonable opportunity to present all of the material that is pertinent to the motion."

The Debtor's complaint in this case has a number of documents attached as exhibits. Most of these documents relate to the Property and include the assignment of mortgage from D&N Bank to Bank of America (Exhibit B), the sheriff's deed (Exhibit C), the quit claim deed from Bank of America to Fannie Mae (Exhibit D), and the State Court Judgment (Exhibit E). However, two of the documents do not specifically relate to the Property and instead relate more generally to Fannie Mae. Exhibit A is a Congressional Research Report for Congress dated September 15, 2008 titled "Fannie Mae and Freddie Mac in Conservatorship." This five page document provides a summary of the actions taken by FHFA on September 7, 2008 to place Fannie Mae and Freddie Mac into conservatorships. The complaint refers to Exhibit A in paragraph 7, which alleges that Fannie Mae "was placed under the conservatorship of a federal agency in September, 2008." Exhibit F consists of two separate deeds, neither of which relate in any way to the Debtor or the Property, and both of which are signed by Fannie Mae. The complaint refers to Exhibit F in paragraph 20, which alleges that Fannie Mae obtains exemptions on the transfer tax of its properties by claiming that it is a United States government entity.

Although the Defendants' motion seeks dismissal under Fed. R. Civ. P. 12(b)(6), which only requires the court to measure the sufficiency of the complaint, many lengthy documents are attached to the motion as exhibits: statements of Edward J. DeMarco, the acting director of FHFA (Exhibits A and B), a fiscal year 2012 Analytical Perspectives report on the Budget of the U.S. Government from the Office of Management and Budget (Exhibit C), statements by James B. Lockhart issued in 2008 and 2009 (Exhibits D and E), FHFA Reports to Congress for 2009 and 2010 (Exhibits F and G), a Form10-K Annual Report for Fannie Mae to the United States Securities and Exchange Commission for fiscal year 2011 (Exhibit H), and a copy of a published opinion from a United States District Court (Exhibit I). None of these exhibits are referred to in the Debtor's complaint.

At the hearing on the motion, the Court inquired of the parties whether it should consider the exhibits attached to the Defendants' motion pursuant to Rule 12(d) and treat the motion as a motion for summary judgment. The Defendants answered yes. The Debtor's answer was a bit more complicated. Initially, the Debtor stated that the Court should review and consider all of the documents attached by the parties as exhibits to their papers. However, the Debtor later stated that the Debtor had not been given a reasonable opportunity to present all matters that might be pertinent to the Defendants' motion and that the Debtor would like to have the opportunity to take discovery and learn all of the facts that may be pertinent to the motion.

In light of the Debtor's response to the Court's questions at the hearing, it would be improper for the Court to consider the Defendants' exhibits to their motion without providing the Debtor a reasonable opportunity to present all of the material that he may wish to present pertinent to the motion. Consistent with Fed. R. Civ. P. 12(d), for purposes of adjudicating the Defendants' motion to dismiss, the Court will therefore exclude from consideration all of the exhibits attached to the motion other than Exhibit I, which the Court may permissibly consider since it is a legal authority that is cited in the memorandum of law in support of the motion. The Court will not treat the motion as a motion for summary judgment under Fed. R. Civ. P. 56, and will instead analyze the motion solely as a motion to dismiss for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6).

Discussion

The Defendants' motion makes four basic arguments. First, the Defendants argue that the Debtor can prevail on any of the four counts in his complaint only if the actions alleged to have taken place were performed by a "government actor." The Defendants assert that Fannie Mae is not a government actor for constitutional purposes under long standing precedent of the United States Supreme Court, and that FHFA's appointment as conservator of Fannie Mae does not somehow transform Fannie Mae into a government actor. Second, the Defendants argue that even if Fannie Mae is a government actor, the Debtor's complaint must still be dismissed because the statutorily prescribed non-judicial foreclosure process used with respect to the foreclosure sale of the Property under Michigan law satisfies all of the due process requirements imposed upon a government actor. Third, the Defendants argue that the Debtor's complaint is an impermissible attempt to relitigate issues already decided in the State Court Lawsuit and is, therefore, barred under both the Rooker-Feldman doctrine and under principles of res judicata. Finally, the Defendants argue that the Debtor lacks standing to challenge the foreclosure sale of the Property.

Although the Defendants and the Debtor both request that the Court first tackle the issue of whether Fannie Mae is a government actor, it makes much more sense for the Court to first consider the Defendants' Rooker-Feldman argument because the Court may not have jurisdiction to adjudicate any other issues if the Rooker-Feldman doctrine is applicable to this case.[1]

Rooker-Feldman requires dismissal of some of the Debtor's claims

Under the U.S. Supreme "Court's Rooker-Feldman abstention doctrine, . . . a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." Johnson v. De Grandy, 512 U.S. 997, 1005-06 (1994) (citing District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923)).

> [A]ppellate jurisdiction to reverse or modify a state-court judgment is lodged . . . exclusively in [the Supreme] Court. Federal district courts . . . are empowered to exercise original, not appellate, jurisdiction. Plaintiffs in Rooker and Feldman had litigated and lost in state court. Their federal complaints . . . essentially invited federal courts of first instance to review and reverse unfavorable state-court judgments. We declared such suits out of bounds, *i.e.*, properly dismissed for want of subject-matter jurisdiction.

Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 283-84 (2005). The doctrine "is confined to cases . . . brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Id. at 284. For Rooker-Feldman to apply, the party asserting claims in federal court must have first lost in state court. The Sixth Circuit Court of Appeals has succinctly stated the rule as follows: "The *Rooker-Feldman* doctrine applies, if it

[1] Although the Defendants' motion to dismiss is brought under Fed. R. Civ. P. 12(b)(6), incorporated by Fed. R. Bankr. P. 7012, the Defendants' Rooker-Feldman argument is more properly considered under Fed. R. Civ. P. 12(b)(1), incorporated by Fed. R. Bankr. P. 7012, since this argument challenges this Court's subject matter jurisdiction.

applies at all, only when the state court loser files a new lawsuit in federal court *after* the state court adversely rules." Rugiero v. DiNardo (In re Rugiero), No. 11-2639, 2012 WL 4800059, at *2 (6th Cir. Oct. 10, 2012).

The Debtor argues that the Rooker-Feldman doctrine does not apply in this case because this adversary proceeding "is running parallel with on-going state court litigation pertaining to the invalidity of the state court possession judgment and Sheriff's Sale by Fannie Mae . . . ." (Debtor's Br. at 27, docket entry no. 38). In other words, the Debtor has not yet lost and the State Court Lawsuit is ongoing. The Debtor's point of law is correct: the Rooker-Feldman doctrine is not triggered solely because there is a pending state court action concerning the same matter before the federal court. Exxon Mobil Corp., 544 U.S. at 292. However, the Debtor's factual assertion that the Debtor did not lose in state court is simply wrong.

The State Court Judgment was entered in the State Court Lawsuit on October 24, 2011. The State Court Judgment unambiguously awarded possession of the Property to Fannie Mae. The State Court Judgment obviously makes the Debtor the loser in the State Court Lawsuit. The Debtor has not identified any "on-going state court litigation." The State Court Lawsuit is over. The Debtor did not file the complaint in this adversary proceeding until January 1, 2012, more than two months after the State Court Judgment. The only remaining question regarding the application of Rooker-Feldman to this adversary proceeding is whether the claims in the Debtor's complaint allege an injury caused by the State Court Judgment, or whether they allege some other injury. Although the parties do not address this question in their briefs, the Sixth Circuit has addressed the legal principles that govern this question.

In Kovacic v. Cuyahoga County Department of Children & Family Services, 606 F.3d 301 (6th Cir. 2010), the Sixth Circuit explained how the Supreme Court in Exxon Mobil Corp. "tightened the scope of *Rooker-Feldman*." Id. at 309.

> In post-*Exxon* analysis, we have distinguished between plaintiffs who bring an impermissible attack on a state court judgment—situations in which *Rooker-Feldman* applies—and plaintiffs who assert independent claims before the district court—situations in which *Rooker-Feldman* does not apply.
>
> In *McCormick*, we explained that the pertinent inquiry after *Exxon* is whether the "source of the injury" upon which plaintiff bases his federal claim is the state court judgment, not simply whether the injury complained of is "inextricably intertwined" with the state-court judgment[.]

Id. (citing McCormick v. Braverman, 451 F.3d 382, 393 (6th Cir. 2006) (other citations omitted). The Sixth Circuit in McCormick emphasized that "[t]he key point is that the source of the injury must be from the state court judgment itself; a claim alleging another source of injury is an independent claim." 451 F.3d at 394; see also Hood v. Keller, 341 F.3d 593, 597 (6th Cir. 2003) (instructing that in Rooker-Feldman determinations, "federal courts cannot simply compare the *issues* involved in the state-court proceeding to those raised in the federal-court plaintiff's complaint, but instead must pay close attention to the *relief* sought by the federal-court plaintiff") (internal quotation marks and citation omitted).

The allegations of fact in the Debtor's complaint in this adversary proceeding virtually all relate to the foreclosure sale of the Property. Counts I and II of the complaint specifically request the Court to set aside the foreclosure sale and allow the Debtor to retain possession of the Property. These counts directly challenge the State Court Judgment, which awarded possession of the Property to Fannie Mae based upon the deed that it received from the successful purchaser at the foreclosure sale. It is hard to see how any of the Debtor's claims attacking the foreclosure sale could be heard by this Court without this Court having to review the State Court Lawsuit and then make a finding that the State Court Judgment wrongly decided the issues before the state court. Therefore, the Court lacks jurisdiction over counts I and II of the Debtor's complaint.

However, the complaint also contains some allegations of fact that do not attack the foreclosure sale of the Property, or the injury caused by the State Court Judgment, but instead relate to other conduct of Fannie Mae. For example, paragraph 17 of the complaint alleges that the Debtor qualified for a reverse mortgage on the Property; paragraph 19 alleges that the Debtor would have qualified for a reverse mortgage, but Fannie Mae would not engage him in any good faith discussions; paragraph 26 alleges that Fannie Mae treated the Debtor differently than other similarly situated homeowners in distress by not allowing him to finance a reverse mortgage to pay off Fannie Mae; paragraph 33 alleges that Fannie Mae acted in bad faith by refusing to accept a payment from the Debtor that was just beyond 30 days late and by refusing to offer the Debtor all available options that it made applicable to other distressed homeowners; paragraph 34 alleges that Fannie Mae treated the Debtor differently than similarly situated homeowners to whom it had granted late payment forbearances, short sales, reverse mortgages and loan modifications; and paragraph 40 alleges that Fannie Mae selectively denied or refused to properly and fairly consider and/or approve the Debtor for a short sale, reverse mortgage and/or loan modification. Counts III and IV of the Debtor's complaint each request a judgment awarding the Debtor damages in excess of $75,000 along with punitive and exemplary damages, costs, interests and attorney's fees.

Apart from whether these additional allegations of fact are sufficient to state a claim for relief under either count III or IV, the point here is that for Rooker-Feldman purposes, these allegations must first be scrutinized to determine whether they complain about the injury caused by the State

Court Judgment, or whether they complain about a different injury for which an independent claim may exist against Fannie Mae. Keeping in mind that this matter is before the Court upon the Defendants' motion to dismiss, and accepting, as the Court must, that all of the factual allegations in the Debtor's complaint are true, the Court concludes that the allegations contained in paragraphs 17, 19, 26, 33, 34 and 40, and the relief sought in counts III and IV, do not complain of an injury caused by the State Court Judgment. Instead, these allegations complain of a different injury, consisting of Fannie Mae's failure to approve the Debtor for a reverse mortgage and failure to afford the Debtor those alternatives that it made available to other distressed homeowners. That alleged injury could conceivably give rise to an independent claim against Fannie Mae that does not require this Court either to set aside the foreclosure sale or the State Court Judgment. As such, Rooker-Feldman does not apply to those claims. Therefore, this Court does not lack jurisdiction over those claims, which form the basis for counts III and IV of the Debtor's complaint. Those claims may proceed in this adversary proceeding, subject, of course, to the Defendants' other arguments as to why such claims should still be dismissed under Rule 12(b)(6).

In sum, the Court holds that the Rooker-Feldman doctrine prevents this Court from having jurisdiction to consider the Debtor's attack on the foreclosure sale and the State Court Judgment. The Debtor is the loser in the State Court Lawsuit, which adjudicated the validity of the foreclosure sale. The State Court Judgment was entered prior to the time that this adversary proceeding was filed. On the other hand, the Debtor is not precluded by Rooker-Feldman from asserting other independent claims against Fannie Mae that relate to injuries not caused by the foreclosure sale and the State Court Judgment, but are alleged to be caused by other conduct of Fannie Mae. Because the application of Rooker-Feldman does not bar *all* of the claims set forth in the Debtor's complaint, the Court will grant the Defendants' motion based upon Rooker-Feldman only in part. The Court will therefore consider the Defendants' other arguments for dismissal of the Debtor's remaining claims.

Fannie Mae is not a government actor for purposes of constitutional claims, requiring dismissal of the Debtor's remaining claims

The Defendants assert that even if some of the Debtor's claims in his complaint survive a Rooker-Feldman analysis, and are therefore within this Court's jurisdiction, the Defendants' motion to dismiss must still be granted because all of the Debtor's remaining claims are based on alleged constitutional violations by Fannie Mae. Although the Debtor's complaint is not entirely precise or consistent in its use of the terms due process and equal protection, it is sufficiently clear to the Court that all of the Debtor's remaining claims against the Defendants are claims for constitutional violations. The Debtor does not contend otherwise. As such, the determination of whether these claims must be dismissed turns on the question of whether Fannie Mae is a "government actor," because an entity is only liable for claims based on constitutional violations if the entity is held to be a government actor. Dusenbery v. United States, 534 U.S. 161, 167 (2002) ("The Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of property without 'due process of law.'"); Center for Bio-Ethical Reform, Inc. v. Napolitano, 648 F.3d 365, 379 (6th Cir. 2011) (holding that "[t]he Fifth Amendment . . . does not itself contain a guarantee of equal protection, but instead, incorporates, as against the federal government, the Equal Protection Clause of the Fourteenth Amendment" and evaluating "equal protection claims against the federal government under the Fifth Amendment just as [it] would evaluate equal protection claims against the state and local governments under the Fourteenth Amendment"). The parties agree that the question of whether Fannie Mae is a government actor for purposes of a constitutional claim is an important one. However, they do not seem to agree on what case law governs the issue.

The Defendants' motion argues that the United States Supreme Court has set forth a controlling three-part test in Lebron v. National Railroad Passenger Corporation, 513 U.S. 374 (1995) to determine whether a private corporation can be considered to be a government actor for purposes of federal constitutional claims. Lebron involved an action brought by the plaintiff against the National Railroad Passenger Corporation, commonly known as Amtrak. The plaintiff claimed that Amtrak violated his First Amendment rights by refusing to place his advertisement on an Amtrak billboard because of the advertisement's political content. Id. at 377. The issue before the court was whether Amtrak "was . . . itself a federal entity" for the purpose of determining claims based upon individual rights guaranteed by the Constitution. Id. at 378-79. The court conducted an extensive review of the history of government created and government sponsored entities. The court then turned to the specific facts and circumstances of Amtrak. First, the court noted that Congress established Amtrak by special legislation in 1970. Id. at 383-84. Second, the court noted that the purpose for creating Amtrak was to further federal government objectives of requiring the continuance and improvement of railroad passenger service in the interest of the public convenience and necessity. Id. at 384. Third, the court noted that the legislation creating Amtrak "provides for a board of nine members, six of whom are appointed directly by the President of the United States," with the other three appointments made by the President upon "the advice and consent of the Senate." Id. at 385. The court further noted other devices for government control of Amtrak provided for in the legislation creating Amtrak. The court then held as follows:

> We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent

> authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.

Id. at 400.

The Defendants assert that prior to the appointment of FHFA as a conservator for Fannie Mae, it was indisputable that Fannie Mae was not a government actor under the Lebron test. The Defendants do not contest that Fannie Mae was created by special legislation, nor do they contest that Fannie Mae was created to further certain governmental objectives. Instead, the Defendants focus on the third element of Lebron, which requires permanent governmental control over the entity. Citing H.R. Rep. No. 90-1585, at 65-66 (1968) and 12 U.S.C. § 1717(a)(2), the Defendants note that "[i]n 1968, Congress established Fannie Mae as a 'private corporation' that, while chartered by the federal government, would be 'entirely privately owned.'" (Defs.' Br. at 6-7, docket no. 20.) Therefore, because Fannie Mae is a private entity, over which the government has not retained permanent authority to appoint a majority of directors, the third requirement under Lebron is not met and Fannie Mae is not a government actor under Lebron for purposes of constitutional claims.

In further support of their assertion that Fannie Mae is not a government actor, the Defendants cite two other cases. The first case, American Bankers Mortgage Corp. v. Federal Home Loan Mortgage Corp., 75 F.3d 1401 (9th Cir. 1996), held that "upon an application of *Lebron* principles," Freddie Mac (a government sponsored enterprise substantially identical in all material respects to Fannie Mae) "is not a government agency subject to the Fifth Amendment's Due Process Clause." Id. at 1409. The second case is Herron v. Fannie Mae, 857 F. Supp. 2d 87 (D.D.C. 2012). Herron involved constitutional claims brought against Fannie Mae after the FHFA appointment as conservator. Before turning to the effect of the conservatorship upon Fannie Mae, the Herron court first stated that "[i]t is well-settled that pre-conservatorship, Fannie Mae was a private actor." Id. at 92.

The Debtor's response to the Defendants' motion only briefly discusses Lebron. The Debtor does not seem to quarrel with the Defendants' contention that pre-conservatorship, Fannie Mae was not considered to be a government actor under Lebron. However, the Debtor does argue that the appointment of FHFA as conservator, and the actions taken by FHFA as conservator, now provide the requisite level of permanent control over Fannie Mae to make it a government actor under Lebron. Putting Lebron aside, the Debtor then discusses extensively what he describes as the "seminal" case of Northrip v. Federal National Mortgage Association, 527 F.2d 23 (6th Cir. 1975).

Northrip dealt with an action by a property owner against Fannie Mae alleging due process and other constitutional violations based upon Fannie Mae's foreclosure of a mortgage on the plaintiff's property under Michigan's non-judicial foreclosure statute. The Sixth Circuit reviewed the legislation that created Fannie Mae and the legislative history explaining the congressional intent. The court noted that "[t]here is some, and perhaps even significant, government involvement in, and regulation of, the workings of [Fannie Mae]." Id. at 31. However, the court ultimately held that there was not sufficient government involvement implicated in Fannie Mae's mortgage foreclosure to permit the plaintiff to bring an action for constitutional violations against Fannie Mae. Id. at 32. The Northrip analysis focused heavily on the specific conduct involved in implementing the remedy of a non-judicial foreclosure in Michigan and whether that conduct sufficiently implicated government action.

Although the Debtor acknowledges that Northrip's holding does not help him, the Debtor tries to avoid its holding by arguing that if Northrip were decided today, the Sixth Circuit would come to a different result. In support of this argument, the Debtor's response to the motion to dismiss points to many facts about Fannie Mae that the Debtor says have changed since Northrip was decided. For example, the Debtor's response generally discusses changes in the secondary mortgage market, adverse trends in the mortgage industry, deterioration of property values and the heightened prevalence of Fannie Mae in the secondary mortgage market. The Debtor also discusses various federal government initiatives to encourage loan modifications and statements made by congressional leaders about Fannie Mae. Although none of these facts are alleged in the Debtor's complaint, the Debtor argues that the Sixth Circuit would decide Northrip differently today based upon these changed facts and would hold Fannie Mae to be a government actor for purposes of constitutional claims. The Debtor concludes by citing numerous cases that were either decided prior to Lebron or that address instances where Fannie Mae has been or may be considered to be a part of the federal government for purposes other than liability for constitutional claims.

In considering whether Fannie Mae is a government actor for purposes of constitutional claims, the first question to resolve is what is the appropriate test for the Court to apply. As noted, the Defendants argue that the Lebron test governs. The Debtor asserts that various other tests are available that have been used for purposes other than constitutional claims (e.g., determining eligibility for exemptions from transfer taxes for real property). However, the Debtor does not explain why those tests, and not Lebron, govern the question of whether Fannie Mae is a government actor for purposes of liability for constitutional claims. Nor does the Debtor discuss a Sixth Circuit case that has addressed which test to apply to determine whether a private corporation is a government actor for constitutional claims.

Parrett v. Southeastern Boll Weevil Eradication Foundation, Inc., 155 Fed. Appx. 188 (6th Cir. Nov. 15, 2005), involved a wrongful termination action brought by a former employee against Southeastern Boll Weevil Eradication Foundation, Inc. ("Southeastern"). Id. at 189. Southeastern filed a motion to dismiss, arguing that although it was a non-profit corporation formed under Alabama law, it was formed for the purpose of carrying out programs sponsored or recommended by the United States Department of Agriculture to eradicate the boll weevil. Because of this, Southeastern argued that it was entitled to sovereign immunity because it was an arm of the federal government. Id. at 189-90. In considering what was the proper test to apply to determine whether state sovereign immunity is applicable, the Sixth Circuit noted that the test for determining whether a corporation may invoke sovereign immunity is different than the test for determining whether a corporation is a government actor for purposes of constitutional claims, even though those tests may overlap. Id. at 192. Turning to the question of whether a corporation is an arm of the federal government for purposes of constitutional claims, the Sixth Circuit explained as follows:

> The leading case in this area of law is *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995), where the Supreme Court analyzed whether Amtrak could be sued for a First Amendment violation. *Lebron* identifies three major questions necessary to determine whether a private corporation is an arm of the federal government for purposes of federal constitutional challenges: (1) Creation: Did the government create the corporation by a special law? (2) Objectives: Was the corporation created for the furtherance of governmental objectives? (3) Control: Did the government retain for itself permanent authority to appoint a majority of the directors of the corporation? . . . *Lebron* itself suggests that the inquiry over sovereign immunity differs from the inquiry over whether an organization may be subject to constitutional claims: Although holding that Amtrak was subject to First Amendment claims, the Court noted in *dicta* that Amtrak would not be entitled to sovereign immunity because the statute creating the organization specifically states that Amtrak is not an agency of the federal government.

Id. at 191-92 (citing Lebron, 513 U.S. at 392, 400).

The Debtor is correct that there are multiple other tests that may be used for determining whether Fannie Mae should be treated as a government instrumentality for some purposes. However, the Court concludes that the controlling test for whether Fannie Mae is a government actor for purposes of liability for constitutional claims is the test set forth in Lebron, which Parrett describes as "[t]he leading case in this area of the law." Id. at 191. The Debtor concedes that under the Lebron test, Fannie Mae was not treated as a government actor for purposes of constitutional claims against it prior to the appointment of FHFA as conservator for it. However, as noted earlier, the Debtor argues that whatever the law may have been regarding Fannie Mae *prior* to the appointment of FHFA as a conservator, that appointment was a "game changer."

The effect of the appointment of FHFA as conservator for Fannie Mae upon the question of whether Fannie Mae is a government actor for purposes of constitutional claims was considered in three opinions that the parties cite to the Court. First, Herron v. Fannie Mae involved an action brought by a former employee of Fannie Mae for wrongful discharge, civil conspiracy to terminate employment, tortious interference with prospective contractual relations, and First Amendment violations. 857 F. Supp. 2d 87, 88 (D.D.C. 2012). Similar to this case, FHFA intervened in Herron as conservator for Fannie Mae. FHFA then moved to dismiss the constitutional claims under the First Amendment. The District Court for the District of Columbia reviewed the history of Fannie Mae up to the date of the appointment of FHFA as conservator. Id. at 89-90. The court noted that in Lebron, "the Supreme Court defined what type of entity constitutes a federal actor for the purpose of a constitutional claim." Id. at 92. The court reviewed the legislation creating Fannie Mae, how the purposes of Fannie Mae further certain governmental objectives, and noted that when Fannie Mae was created by Congress, the government did not retain the permanent authority to appoint the majority of its directors. The Herron court then stated that "[p]re-conservatorship Fannie Mae . . . was a non-governmental entity under the reasoning set forth in Lebron." Id. at 93. In support of this statement, Herron observed in a footnote that "[b]efore Lebron, courts regularly determined that Fannie Mae was not a federal actor subject to the Fifth Amendment due process clause." Id. at n.7 (citing Northrip, 527 F.2d at 30, and Roberts v. Cameron-Brown Co., 556 F.2d 356 (5th Cir. 1997)). The court also noted that the Ninth Circuit held that pre-conservatorship Freddie Mac, a similar entity, was not a government actor under Lebron. Id. at 93 (citing American Bankers Mortgage Corp. v. Federal Home Loan Mortgage Corp., 75 F.3d 1401, 1405 (9th Cir. 1996)). The Herron court then pointed out that "[s]ince Lebron, no other court has been presented with the issue of whether pre-conservatorship Fannie Mae was a federal actor." Id.

Having established that pre-conservatorship Fannie Mae was not a government actor under Lebron, the Herron court then reviewed the following traits of the conservatorship to determine whether the appointment of FHFA as conservator for Fannie Mae changed this result. In a federal conservatorship, the conservator "takes over the day-to-day operations and assumes the powers of shareholders, board of directors, and management." Id. at 93. "The purpose of the conservator . . . is to restore the entity to fiscal feasibility or to liquidate and distribute its assets." Id. at 93-94. To accomplish this, "[t]he conservator . . . steps in to the private status of the entity" and "take[s] over its assets and the operation" of its business "in order to preserve and conserve the assets and property of [the institution]." Id. at 94. Herron then concluded that the appointment of FHFA as conservator for a private corporation such as Fannie Mae did not transform that corporation into a government actor. Id.

In reaching its conclusion, the Herron explained that the FHFA conservatorship does not retain for the government the permanent authority to appoint a majority of Fannie Mae's directors. Id. at 95. Nor does the appointment "establish *permanent* government authority to control Fannie Mae." Id. The fact that FHFA, as conservator, has control over Fannie Mae's business does not mean that this is a permanent condition. A "conservatorship is temporary by its nature," and "Fannie Mae remains a private corporation," albeit it one that is under the supervision of a conservator. Id. at 96. The Herron court summarized its holding as follows:

> As described above, a conservator or receiver steps into the shoes of the private entity—it assumes the private status of the entity. Fannie Mae was a private entity; when FHFA took over as conservator of Fannie Mae, it stepped into Fannie Mae's private role. In sum, FHFA as conservator of Fannie Mae is not a government actor[.]

Id. at 96 (citations omitted).

The Defendants cite two other decisions consistent with Herron supporting their contention that the appointment of FHFA as conservator of Fannie Mae did not transform Fannie Mae into a government actor for purposes of constitutional claims. Both of these decisions are unreported. See Syriani v. Freddie Mac Multiclass Certificates Series 3365, et al., No. 12-3035-JFW (C.D. Cal. July 10, 2012) (Defs.' Reply Br., Ex. A, docket no. 43) (quoting extensively from Herron, and holding that "Freddie Mac does not become a governmental actor for Fifth Amendment purposes merely because it is placed into conservatorship" and that the "Federal Housing Finance Agency's 'control' is merely the same control that Freddie Mac had before the conservatorship"); and Federal Home Loan Mortgage Corp. v. Kelly, case no. 12-1734 LT (55th Dist. Mich., July 15, 2012) (Defs.' Reply Br., Ex. B, docket no. 43) (citing Lebron, American Bankers Mortgage Corp., and Herron and holding that Freddie Mac is not a government entity liable for constitutional claims). In addition, since this matter was heard, another court has ruled consistent with Herron. See Rubin v. Fannie Mae, No. 12-cv-12832, 2012 WL 6000572, at *2-3 (E.D. Mich. Nov. 30, 2012) (finding "that Fannie Mae is not a federal actor and dismiss[ing the plaintiff's] constitutional claims" based on Northrip, Lebron and Herron).

The Debtor acknowledges that there are no reported decisions accepting his argument that the appointment of FHFA is a "game changer." Further, the Debtor concedes that the very same arguments that he makes in this case were expressly rejected by Herron. Nonetheless, the Debtor suggests that Herron is distinguishable from his case because the constitutional claims alleged by the plaintiff in Herron (i.e., first amendment) are different than the constitutional claims alleged by the Debtor against Fannie Mae (i.e., due process and equal protection).

After reviewing all of the cases cited by the parties, the Court holds that the Defendants are entitled to dismissal of not just counts III and IV, but of the entire complaint because the Debtor has failed to plead any facts that plausibly suggest an entitlement to relief against Fannie Mae. First, despite the fact that the Defendants do not rely upon Northrip, and that it was the Debtor who cited Northrip, the Debtor offers no reason why Northrip does not control this case other than the Debtor's belief that it would be decided differently today. The Court is not persuaded that there are any facts alleged in the Debtor's complaint that would change the result in Northrip if it were decided today. Northrip holds that "[m]ortgage foreclosures through power of sale agreements are not powers of a government nature." 527 F.2d 23, 31 (6th Cir. 1975). Northrip further holds that there is not "a sufficiently close nexus" between the government and the challenged act of foreclosure so that the action of the latter may fairly be treated as that of the government. Id. at 32.[2]

Second, all of the claims in the Debtor's complaint, including the foreclosure sale claims governed by Northrip, allege constitutional violations by Fannie Mae. As explained above, Lebron governs the question of whether Fannie Mae is a government actor for purposes of liability for constitutional claims as the Sixth Circuit's opinion in Parrett expressly stated. To be a government actor for this purpose, Lebron requires a showing that the government has retained for itself permanent authority to appoint a majority of the board of directors. The Debtor's complaint does not allege any facts to meet this showing other than the appointment of FHFA as conservator for Fannie Mae. Nor does the Debtor cite to any reported or unreported decision holding Fannie Mae to be a government actor for purposes of liability for constitutional claims. The sole fact pleaded by the Debtor in his complaint upon which the Debtor alleges that Fannie Mae is a government actor is the fact that the FHFA was appointed as conservator for Fannie Mae on September 7, 2008 (¶ 7 of complaint). The Court disagrees with the Debtor that this fact is a "game changer," and instead agrees with the analysis of this fact by the Herron court and the other cases cited by the Defendants. A review of the statute that authorized the conservatorship also supports this analysis.

Although not mentioned in either the Debtor's complaint or the Debtor's brief, the statute under which FHFA was appointed as conservator, 12 U.S.C. § 4617, specifies the powers and duties

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[2] If anything, the Debtor's case is weaker than Northrip. Although the Debtor's complaint is imprecise, the Debtor does not even allege that Fannie Mae conducted the foreclosure sale. Instead, paragraph 12 of the complaint alleges that "the property was sold to Bank of America, the seller servicer," and then later deeded to Fannie Mae. Even if this language could be read as alleging that Fannie Mae had some role in the foreclosure process, Northrip controls and requires dismissal of any claim by the Debtor against Fannie Mae regarding the foreclosure sale process.

of the FHFA as conservator. There is nothing in the statute that makes the conservatorship permanent. In § 4617(a)(2), the FHFA may "be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs" of Fannie Mae. Section 4617(a)(5) authorizes judicial review by the United States District Court upon the request of Fannie Mae to have the FHFA remove itself as conservator. Section 4617(a)(4)(D) provides that the appointment of FHFA as receiver terminates the conservatorship. Section 4617(b) sets forth the powers and duties of the FHFA as conservator. Although the powers of the conservator authorize it to step into the shoes of Fannie Mae with respect to the assets and operations of Fannie Mae, there is no provision in the statute that retains for the federal government any permanent control over Fannie Mae.

Nor does the one exhibit attached to the Debtor's complaint in any way suggest that the appointment of FHFA as conservator is "game changer" for purposes of Lebron. The Congressional Research Service Report that is attached as Exhibit A to the Debtor's complaint summarizes the reasons for the appointment of FHFA as conservator for Fannie Mae and the powers that FHFA has over Fannie Mae as conservator. It contains only one statement even arguably relevant to the length of time of the conservatorship, and whether the government has retained permanent control over Fannie Mae by means of the conservatorship. Page 3 of the report states: "The conservatorship will end when the FHFA finds that a safe and solvent condition has been restored." However, the fact that the conservatorship may be of an indefinite period of time to accomplish the purposes of the conservatorship does not equate to a finding that the conservatorship implements permanent control over Fannie Mae. Although the Debtor's response to the Defendants' motion to dismiss contains many pages of other factual allegations about Fannie Mae and FHFA, none of those allegations are set forth in the Debtor's complaint. There is no allegation either in the Debtor's complaint or incorporated by reference in the complaint by the Congressional Research Service Report attached as Exhibit A that alleges any facts that plausibly suggest that the federal government permanently retains control over Fannie Mae, which is one of the requirements in order to make Fannie Mae a government actor under the Lebron test.

Third, the Debtor's attempt to distinguish Herron is unpersuasive. It is irrelevant what the specific constitutional violations may be for purposes of determining whether an entity is a government actor under Lebron. The Lebron test applies without regard to whether the specific alleged constitutional violation relates to the first amendment, as in Herron, or the fifth and fourteenth amendments, as alleged by the Debtor. For purposes of Lebron, this is a distinction without a difference.

The sole fact that the Debtor has pleaded in the complaint in support of his claim that Fannie Mae is a government actor is that the FHFA was appointed as conservator for Fannie Mae. This fact does not change Fannie Mae's status under the Lebron test, nor does it make Fannie Mae liable for any of the claims in the complaint, under Lebron, Northrip, or the analysis in Herron. This fact does not plausibly suggest an entitlement to relief against Fannie Mae. The Debtor's complaint does not contain any other factual content for the Court to conclude that the Debtor is plausibly entitled to a determination that Fannie Mae is a government actor. Therefore, the Debtor's complaint must be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Conclusion

As noted above, the Defendants have moved for dismissal on two additional grounds, res judicata and standing. It is unnecessary for the Court to reach those alternative grounds for dismissal. For the reasons explained above, the Court concludes that the Rooker-Feldman doctrine precludes the Debtor from attacking the foreclosure sale and the State Court Judgment and requires dismissal of counts I and II. The Debtor lost in the State Court Lawsuit, and Fannie Mae was awarded the State Court Judgment. The only claims asserted by the Debtor in his complaint in this adversary proceeding that survive a Rooker-Feldman analysis are those claims asserted in counts III and IV based upon facts alleged in paragraphs 17, 19, 26, 33, 34 and 40 of the Debtor's complaint. But any relief in favor of the Debtor and against Fannie Mae because of those factual allegations and counts can only be awarded if Fannie Mae is a government actor. For the reasons explained above, the Court concludes that under the Lebron test, Fannie Mae is not a government actor, and did not become a government actor when FHFA was appointed as conservator. As a result, all of the Debtor's claims set forth in the complaint must be dismissed. The Court expresses no view about the Defendants' alternative grounds for dismissal based upon res judicata and standing.[3]

The Court will enter an order consistent with this opinion.

Signed on December 14, 2012

/s/ Phillip J. Shefferly
Phillip J. Shefferly
United States Bankruptcy Judge

[3] Although not raised by the Defendants, there is another problem with the Debtor's complaint that is worth mentioning. The Debtor is in Chapter 7. As such, all of the claims that the Debtor may have against Fannie Mae based upon Fannie Mae's pre-petition conduct are property of the Debtor's bankruptcy estate under § 541(a)(1) of the Bankruptcy Code. To the extent any such claims exist (and the Debtor's schedule B does not list any such claims), it is the Chapter 7 Trustee, and not the Debtor, who has the sole right to bring such claims against Fannie Mae. The Debtor has no standing to pursue such claims. Auday v. Wet Seal Retail, Inc., 698 F.3d 902, 904 (6th Cir. 2012).

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROWLAND J. MARTIN,	
Plaintiff,	
v.	**Civil Action No. 12-1281 (KBJ)**
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.,	
Defendants.	

MEMORANDUM OPINION AND ORDER

Presently before the Court are defendants G&A Outsourcing IV, LLC, ("G&A") and TALX Corporation's ("TALX") motions for reconsideration of the Court's decision to permit the *pro se* plaintiff in this employment discrimination action to file a second supplemental complaint.[1] Approximately four months after service of the original complaint in this case, plaintiff filed a second supplemental complaint along with a request for leave to file the new pleading. Second Suppl. Compl. (ECF No. 28); Pl.'s Mot. (ECF No. 25), at 5.[2] The Court summarily granted plaintiff leave to file this second supplemental complaint, *see* Minute Order dated April 24, 2013 ("Let this be filed"), and defendants G&A and TALX now object to the filing on the grounds that the new pleading "contains no factual allegations relevant to

[1] *See* Minute Order of Apr. 24, 2013 (construing defendants' responses in opposition to plaintiff's ECF No. 25 as motions for reconsideration of the Court's grant of leave to file a supplemental complaint).

[2] Neither of these pleadings has a descriptive title. Plaintiff's second supplemental complaint is formally titled "Supplement (Corrected) to the Amended Complaint." Plaintiff's request for leave to file a second supplemental complaint is formally titled "Plaintiff's Objections to Defendant Equal Employment Opportunity Commission's Affidavit Evidence and 'Statement of Undisputed Material Facts' and Rule 56(f) Motion to Deny Summary Judgment"). For the reader's convenience, these documents are hereinafter referenced and cited as "Second Suppl. Compl." and "Pl.'s Mot.," respectively.

Exhibit E

[plaintiff's] claims that occurred after his Original Complaint was filed on July 30, 2012, or after his first Supplemental Complaint was filed on December 12, 2012." Defs.' Mots. at 3-4.[3] Moreover, the defendants argue that, to the extent the plaintiff's second supplemental complaint was intended to be filed as an "amended" complaint, the plaintiff did not file "a proper pleading with the Court nor has he explained to the Court any legal or factual basis for [amendment]." Defs.' Mots. at 3-4. The Court recognizes that the second supplemental complaint varies from the original in the some of the facts and counts alleged, and also that the second supplemental complaint is largely based upon facts that predate the original complaint. Nevertheless, the Court is not persuaded to reverse its "let this be filed" determination.

Under Federal Rule of Civil Procedure 54(b), an interlocutory judgment—such as the grant of leave to file the second supplemental complaint in this case—may be reconsidered "as justice requires." *DeGeorge v. United States*, 521 F. Supp. 2d 35, 39 (D.D.C. 2007); *Cobell v. Norton*, 355 F. Supp. 2d 531, 539 (D.D.C. 2005). It is well established that "asking 'what justice requires' amounts to determining, within the Court's discretion, whether reconsideration is necessary under the relevant circumstances." *Cobell*, 355 F. Supp. 2d at 539.

Nothing in the defendants' submissions establishes that reconsideration is necessary in this case. For example, the defendants do not contend that, in granting leave to file, the Court misunderstood the plaintiff's request or made a decision beyond the adversarial issues presented. *See DeGeorge*, 521 F. Supp. 2d at 39. Nor do the defendants make any assertion that the law has changed or that they will be harmed in any way as a result of the filing of the supplemental pleading. *See DeGeorge*, 521 F. Supp. 2d at 39. Indeed, to the contrary, the defendants argue that most of the additional facts alleged in the second supplemental complaint are "based on

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[3] The briefs filed by defendants G&A and TALX (ECF Nos. 29, 30) are identical in substance. They are hereinafter referenced and cited as "Defs.' Mots."

precisely the same transactions, occurrence, and events" as were set forth in the initial complaint. Defs.' Mots. at 3. This means, of course, that the defendants were already on notice of the events alleged in the new complaint, and that granting leave to file the second supplemental complaint has not harmed defendants due to surprise, inability to defend, or any other reason.

It is also significant that a grant of leave to supplemental or amend a pleading is purely discretionary, and that such leave is ordinarily "freely given." *Wildearth Guardians v. Kempthorne*, 592 F. Supp. 2d 18, 23 (D.D.C. 2008) (citing *Willoughby v. Potomac Elec. Power Co.*, 100 F.3d 999, 1003 (D.C. Cir. 1996)). Thus, any contention that the court applied the wrong legal standard, or that the grant of leave to file a second supplemental complaint was itself improper, is meritless. *See DeGeorge*, 521 F. Supp. 2d at 41 (leave to amend is proper when an amended complaint cures deficiencies or alleges new facts or arguments that would give rise to a cognizable cause of action). Moreover, when one views the grant of leave to file the second supplemental complaint in this case in light of the fact that the plaintiff is a *pro se* litigant, the propriety of the court's exercise of its discretion to permit the filing here becomes even more evident. *See Stephenson v. Langston*, 205 F.R.D. 21, 23 (D.D.C. 2001) (citing *Moore v. Agency for Int'l Dev.*, 994 F.2d 874 (D.C. Cir. 1993)); *see also Wyant v. Crittendon*, 113 F.2d 170, 175 (D.C. Cir. 1940) (leave to amend the complaint is particular appropriate when a plaintiff proceeds *pro se*).

For these reasons, the Court hereby DENIES both defendants' requests for reconsideration of the Court's grant of leave to file the second supplemental complaint (ECF Nos. 29 and 30), and the plaintiff's second supplemental complaint (ECF No. 28) shall stand. Any defendant who wishes to file a responsive pleading, or to supplement a responsive pleading

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already filed in this matter, shall do so within 21 days of the issuance of this opinion (*e.g.*, by July 1, 2013).

SO ORDERED.

Date: June 10, 2013

/s/
KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

OP THERAPY, LLC,

Plaintiff,

v.

Civil Action 2:10-cv-00635
Judge Algenon L. Marbley
Magistrate Judge E.A. Preston Deavers

BRYANT HEALTH CENTER, INC., *et al.*,

Defendants.

OPINION AND ORDER

This matter is before the Court for consideration of Plaintiff's Motion for Leave to Amend Complaint. (ECF No. 39.) Plaintiff seeks to amend the Complaint in order to add six new Defendants to this action, as well as a new claim against all Defendants. The Court also consider the parties' fifth request for an extension of time to complete discovery and file dispositive motions. (ECF No. 52.) For the reasons that follow, Plaintiff's Motion to Amend is **DENIED**. The parties' Joint Motion to Extend Discovery Deadlines is **GRANTED IN PART**.

I.

Plaintiff, OP Therapy, LLC, brought this action on July 15, 2010 against Defendants Byrant Health Center, Inc., Samaritan Care Center, Inc., The Sanctuary at Whispering Meadows, Inc., and Ominlife Health Care Systems, Inc. In its original Complaint, Plaintiff alleges that these Defendants failed to pay for services it provided. Plaintiff raises various claims including breach of contract and unjust enrichment.

On October 7, 2010, the Court held a pretrial conference and issued a Preliminary Pretrial Order. The Order provided "[m]otions or stipulations addressing the parties or pleadings, if any,

Exhibit F

must be field on or before November 7, 2010." (Prelim. Pretrial Order 2, ECF No. 22.) This deadline was based on the parties recommendation within their Rule 26(f) Report. In the Preliminary Pretrial Order, the Court also stated that all discovery must be completed by April 15, 2011 and that case-dispositive motions must be filed by May 20, 2011.

Based on various joint motions from the parties, the Court has granted four extensions to the discovery and dispositive motion deadlines. The Court granted the last of these extensions on November 9, 2011, requiring the parties to complete all discovery by January 16, 2012 and to file case-dispositive motions on or before February 29, 2012. (Order, ECF No. 42.) The Court cautioned the parties that no further extensions to these deadlines would be granted. Neither party has requested, and the Court has not granted, an extension to the deadline for amendments to the pleadings and joinder of parties.

On October 12, 2011, Plaintiff filed its current Motion for Leave to Amend Complaint. Plaintiff seeks to add Dr. Robert Banasik, Lawrence Ohio Investors, LTD., Medina Ohio Investors, LTD., Dayton Investors, LLC, Windsong Investments, LLC, and Equity Management, Inc. as Defendants in this action. Additionally, Plaintiff seeks to add a claim for fraudulent conveyance against all Defendants. Plaintiff asserts that discovery has revealed that the proposed new Defendants have engaged in activity resulting in the siphoning of money from the original Defendants to the detriment of unrelated creditors. Plaintiff attached the purported First Amended Complaint to its Motion for Leave.

The current Defendants oppose the Motion for Leave to Amend Complaint on futility grounds. This matter became ripe on December 9, 2011 when Plaintiff filed its Reply, after requesting and receiving two extensions to file it.

II.

Plaintiff's cite Federal Rule of Civil Procedure 15(a) in support of their Motion for Leave to Amend. Although Rule 15(a) governs amendments to the pleadings, when a motion to amend is brought after the deadline set within the Court's scheduling order, a party must satisfy the standards of both Federal Rules of Civil Procedure 15(a) and 16(b). *Korn v. Paul Revere Life Ins. Co.*, 382 F. App'x 443, 449 (6th Cir. 2010) (citing *Leary v. Daeschner*, 349 F.3d 888, 905–09 (6th Cir. 2003)). The Court has considerable discretion in deciding whether to allow amendments to the pleadings and whether to adjust its case schedule. *See, e.g.*, *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615 (6th Cir. 2010); *Bentkowski v. Scene Magazine*, 637 F.3d 689, 697 (6th Cir. 2011).

Pursuant to Rule 15(a), the Court should freely grant a party leave to amend his or her pleadings when justice so requires. Fed. R. Civ. P. 15(a). Rule 15(a) sets forth "a liberal policy of permitting amendments to ensure the determination of claims on their merits." *Oleson v. United States*, 27 Fed. Appx. 566, 569 (6th Cir. 2001) (internal quotations omitted). As the United States Court of Appeals for the Sixth Circuit has noted, "[f]actors that may affect [a Rule 15(a)] determination include undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendment, undue prejudice to the opposing party, and futility of the amendment." *Seals v. Gen. Motors Corp.*, 546 F.3d 766, 770 (6th Cir. 2008).

Under Rule 16(b)(4), however, the Court will modify a case scheduling "only for good cause . . . ." Fed. R. Civ. P. 16(b)(4). The party seeking modification of the case schedule has the "obligation to demonstrate 'good cause' for failing to comply with the district court's scheduling order . . . ." *Pittman ex rel. Sykes v. Franklin*, 282 F App'x 418, 425 n.5 (6th Cir. 2008). In determining whether good cause exists, the primary consideration "is the moving party's diligence in attempting to meet the case management order's requirements." *Commerce Benefits Group, Inc. v. McKesson Corp.*, 326 F. App'x 369, 377 (6th Cir. 2009) (internal quotations omitted); *see also Leary*, 349 F.3d at 906 ("But a court choosing to modify the schedule upon a showing of good cause, may do so only 'if it cannot reasonably be met despite the diligence of the party seeking the extension.'") (citing 1983 advisory committee notes to Fed. R. Civ. P. 16). Finally, the Court must also consider "potential prejudice to the nonmovant . . . ." *Leary*, 349 F.3d at 909. Even if amendment would not prejudice the nonmoving party, Plaintiff must still provide good cause for failing to move to amend by the Court's deadline. *Korn*, 382 F. App'x at 450; *see also Wagner v. Mastiffs*, Nos. 2:08-cv-431, 2:09-cv-0172, 2011 WL 124226, at *4 (S.D. Ohio Jan. 14, 2011) ("[T]he absence of prejudice to the opposing party is not equivalent to a showing of good cause.").

III.

In this case, the parties' briefing focuses on the issue of whether or not Plaintiff's purported amendments would be futile. The Court, however, finds no need to reach the potential merits of Plaintiff's amendments, because Plaintiff has failed to satisfy its obligation of showing good cause for the modification of the case schedule.

Specifically, Plaintiff has failed to demonstrate that it acted with proper diligence. Plaintiff filed its Motion for Leave to Amend on October 12, 2011, over eleventh months after the Court's November 7, 2010 deadline for amendments to the pleadings. Additionally, Plaintiff brought its Motion for Leave to Amend late in the Court's case schedule.[1] Within the Motion, the only explanation Plaintiff provides is essentially that discovery has revealed the involvement of other parties. This limited information does not demonstrate that Plaintiff has acted in a diligent fashion in seeking to amend the complaint outside of the Court's case schedule. Even assuming that Plaintiff could not have reasonably met the scheduled November 7, 2010 deadline, Plaintiff has not provided the Court with sufficient information to justify its significant delay in bringing this issue to the Court's attention.

Additionally, the Court finds it likely that an extension would result in prejudice to the existing Defendants in the case, and most certainly to the new putative Defendants. This case has been pending since July 2010. Under the current schedule, dispositive motions are due in less than two months. The Court has already granted several extensions to the parties' discovery and dispositive motion deadlines. The addition of six new Defendants, as well as an additional claim, would lead to significant delay to the case schedule. After all, the new Defendants would have an interest in, and would no doubt require, time to engage in discovery and to prepare their defenses. The current Defendants, as well as this Court, have an interest in reaching an ultimate resolution to this action. A significant delay in the current case schedule would prejudice this interest. *Cf. Commerce Benefits*, 326 F. App'x at 377-78 (affirming denial of case-schedule extension in part because "any further delay in discovery would have resulted in additional time and expense incurred by both the parties and the court").

[1] At the time Plaintiff filed its Motion to Amend the final discovery deadline was approximately one month away. The case-dispositive motion deadline was two months away. Although the Court later granted one final extension to these deadlines, these circumstances suggest a lack of diligence.

Finally, while the Court has broad discretion in modifying its pretrial deadlines, and will often do so, such deadlines still serve important purposes. *See Wagner*, 2011 WL 124226, at *4 ("[I]t must be remembered that adherence to reasonable deadlines is . . . critical to maintaining integrity in court proceedings . . . and that pretrial scheduling orders are the essential mechanism for cases becoming trial-ready in an efficient, just, and certain manner.") (internal citation and quotations omitted). Deadlines as to amendments to the pleadings, in particular, allow for finality in the pleading process. Ultimately, under the circumstances of this case, Plaintiff has failed to demonstrate good cause.

IV.

In addition to Plaintiff's Motion to Amend, the parties again move the Court for an extension of time to complete discovery and file dispositive motions. In this fifth request, the parties provide the following as grounds for the extension:

> As the Court is aware, two of the attorneys representing Plaintiff, Ms. Ford and Ms. Ferreri, were on maternity leave after November 14, 2011. . . . Ms. Stinnett, who took over for Ms. Ford and Ms. Ferreri as Plaintiff's counsel, then had a family emergency that took her out of the office for the majority of December 2011. Once Plaintiff's counsel returned and became aware of the volume of documents produced by Defendants – which number in the millions, as well as the multiple locations of such documents, it became obvious that additional time was going to be needed. . . .

(Joint Mot. to Extend, ECF No. 52, at p.1.)[2] The Court makes several observations regarding this request. First, besides Ms. Ford and Ms. Ferreri, Plaintiff has at least one additional trial counsel and a local attorney representing it, as reflected on the docket of this case. Ms. Stinnett, however, is not listed as counsel and has not moved for admission *pro hac vice* with this Court.

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[2] The parties also justify their request for an extension based on the pendency of Plaintiff's Motion to Amend. That basis has been obviated by this Opinion and Order.

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In any event, the Court finds it difficult to fathom that a party who has been represented by no fewer five attorneys over the course of the eighteen months this case has been pending seeks an additional sixty days to complete discovery, particularly when the parties indicated to the Court as early as May 10, 2011 that they were aware of new sources of discoverable information (ECF No. 30) and that additional documents from subsequent requests for production were due from Defendants on November 15, 2011. (ECF No. 41.).[3] Finally, the Court specifically notified the parties that it would grant no further extensions.

Nevertheless, the Court is not insensitive to the representations of counsel that she had a family emergency.[4] The Court finds that sixty days, however, is excessive in light of the circumstances and this Opinion and Order denying Plaintiff's Motion to Amend. Accordingly, all discovery must be completed by **FEBRUARY 17, 2012.** Case dispositive motions must be filed on or before **MARCH 30, 2012.** And, needless to say, the parties may be assured that these dates will not be extended.

V.

For the above reasons, Plaintiff's Motion to Amend is **DENIED**. (ECF No. 39.)

IT IS SO ORDERED.

Date: January 18, 2012

/s/ *Elizabeth A. Preston Deavers*
Elizabeth A. Preston Deavers
United States Magistrate Judge

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[3] For this reason, the Court granted the parties an additional sixty days from this date to complete discovery.

[4] Given that the Court is granting a limited extension based on counsel's predicament, Ms. Stinnett is **DIRECTED** to move for leave to appear *pro hac vice* within **SEVEN (7) DAYS** of the date of this Order.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RUSSELL DUSEK, MARSHA PESHKIN, DAVID ABEL, CAROL DIFAZIO, as TIC, BEN HELLER, WARREN M. HELLER, NORMA HILL, JABA ASSOCIATES, CAROL KAMENSTEIN, DAVID KAMENSTEIN, PETER KAMENSTEIN, TRACY KAMENSTEIN, PEERSTATE EQUITY FUND, LP, Robert Getz, RAR ENTREPRENEURIAL FUND, LTD., JUDITH RECHLER, SAGE ASSOCIATES, JEFFREY SHANKMAN, LORI SIROTKIN, STONY BROOK FOUNDATION, YESOD TRUST, MELVIN H. AND LEONA GALE JOINT REVOCABLE LIVING TRUST, FREDERICK AND SUSAN KONIGSBERG JTWROS, EDYNE GORDON AS EXECUTRIX OF THE ESTATE OF ALLEN GORDON, JOEL BUSEL REVOCABLE TRUST, SANDRA BUSEL REVOCABLE TRUST, ROBERT YAFFE, PALMER FAMILY TRUST, MARTIN LIFTON, MARLENE KRAUSS, SLOAN KAMENSTEIN, SYLVAN ASSOCIATES LIMITED PARTNERSHIP, JOAN ROMAN, WILENITZ TRUST U/ART FOURTH O/W/O ISRAEL WILENITZ, ROBERT ROMAN, JEROME GOODMAN, FRANK & CAROL DIFAZIO AS TIC, EUGENE KISSINGER TRUST U/A/D 12/6/99, and NANCY DVER-COHEN REV TST DTD 11/20/00, NANCY DVER-COHEN AND RALPH H. COHEN TSTEES,

Plaintiffs,

v. Case No: 2:14-cv-184-FtM-29CM

Exhibit G

JP MORGAN CHASE & CO., JP MORGAN CHASE BANK N.A., J.P. MORGAN SECURITIES LLC, J.P. MORGAN SECURITIES, LTD., JOHN HOGAN, and RICHARD CASSA,

Defendants.

OPINION AND ORDER

This matter comes before the Court on defendants' Motion to Transfer Venue to the Southern District of New York (Doc. #27), supported by the Declaration of Carlos J. Canino (Doc. #28) and the Declaration of Helen Vaysman (Doc. #29), all filed on August 14, 2014. Plaintiffs' Memorandum of Law in Opposition (Doc. #34) was filed on August 28, 2014, and Defendants' Reply (Doc. #47) was filed on September 19, 2014. Defendants argue that the case was improperly filed in the Middle District of Florida and should be transferred to the Southern District of New York. Alternatively, if the case was properly filed in the Middle District of Florida, defendants assert it should nonetheless be transferred to the Southern District of New York based upon convenience factors.

I.

In the absence of a more specific venue statute, venue is generally governed by 28 U.S.C. § 1391. Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Court for W. Dist. Of Texas, 134 S. Ct. 568, 577 (2013). Section 1391 provides in part that "[a] civil action may be brought in—(1) a judicial district in which any

EXHIBIT 1

defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action." 28 U.S.C. § 1391(b)(1)-(3). "When venue is challenged, the court must determine whether the case falls within one of the three categories set out in § 1391(b). If it does, venue is proper; if it does not, venue is improper, and the case must be dismissed or transferred under [28 U.S.C.] § 1406(a)." Atlantic Marine Constr., 134 S. Ct. at 577. The Court may consider only the factors set forth in § 1391 in making this determination. Id. at 577-79.

The only portion of § 1391 upon which plaintiffs rely is §1391(b)(2). Plaintiffs assert that the Middle District of Florida is "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." (Doc. #34, p. 16.) Perhaps more importantly, plaintiffs rely upon two more specific statutes which provide for venue in securities cases in any district in which defendant "is

EXHIBIT 1

found or . . . transacts business," 15 U.S.C. § 78aa(a), and venue in RICO cases in any district in which the defendant "is found or . . . transacts his affairs." 18 U.S.C. § 1965(a). The First Amended Complaint alleges in part that "[d]efendants and their agents can be found in this district and they transact business and affairs in this district." (Doc. #7, ¶ 29.) The Court concludes that venue in the Middle District of Florida is proper, and therefore the motion to transfer pursuant to 28 U.S.C. § 1406 is denied.

II.

While proper in the Middle District of Florida, venue may still be transferred pursuant to 28 U.S.C. § 1404. "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." 28 U.S.C. § 1404(a). "Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness." Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988) (quotation omitted). Plaintiff's choice of forum, however, should not be disturbed unless it is clearly outweighed by other considerations, and a transfer that would only shift inconvenience does not outweigh the plaintiff's choice for

EXHIBIT 1

Section 1404(a) purposes. Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253, 260 (11th Cir. 1996) (quotation marks omitted). Factors considered by the court include "(1) the convenience of the witnesses; (2) the location of relevant documents and the relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) a forum's familiarity with the governing law; (8) the weight accorded a plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances." Manuel v. Convergys Corp., 430 F.3d 1132, 1135 n.1 (11th Cir. 2005). "It is the movant's burden to persuade the court that a transfer should be granted." Perlman v. Delisfort-Theodule, 451 F. App'x 846, 848 (11th Cir. 2012).

The parties analyze these factors and, not surprisingly, come to differing conclusions. The Court finds that the factors do not predominate in favor of transfer, and do not convince the Court that it should exercise its discretion and transfer the case to New York. There is no district which will not inconvenience some of the parties and witnesses. Roughly half of the plaintiffs reside in New York, eleven reside in Florida (but only one in the Middle District of Florida), and the others reside in other districts. There does not seem to be any difference concerning the availability of process to compel unwilling witnesses. The relative means of the parties clearly favors honoring the choice of venue selected by plaintiffs. Some of the claims involve issues of Florida law, which presumably will give a Florida judge a leg-up. The relevant documents seem to be located in New York, where the corporate headquarters are located, but document location in today's electronic age seems to have decreasing significance. The locus of operative facts is clearly the New York area, although the injury for at least some of the counts/plaintiffs is alleged to have occurred in Florida. Trial efficiency and the interests of justice are certainly not diminished in plaintiffs' choice of venue. The Court finds that defendants have not established that plaintiffs' choice of venue is clearly outweighed by other relevant considerations.

Accordingly, it is hereby

ORDERED:

Defendants' Motion to Transfer Venue to the Southern District of New York (Doc. #27) is **DENIED.**

DONE and ORDERED at Fort Myers, Florida, this 16th day of January, 2015.

JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

Copies:
Counsel of Record

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JACOB BARRETT,

Plaintiff,

No. 6:11-cv-06358-HZ

OPINION & ORDER

v.

MAX WILLIAMS, et al.,

Defendants,

Jacob Barrett
#C07320
FLORIDA STATE PRISON
7819 NW 228th Street
Raiford, FL 32026

Pro se Plaintiff

Shannon M. Vincent

Exhibit H

OREGON DEPARTMENT OF JUSTICE
Trial Division, CLS
1162 Court Street, NE
Salem, OR 97301-0346

Attorney for Defendants

HERNANDEZ, District Judge:

Jacob Barrett, pro se, is an inmate of the Oregon Department of Corrections ("ODOC") and is currently in the custody of the Florida Department of Corrections. Plaintiff was previously in the custody of the New Mexico Corrections Department and while there, sent an envelope to his cousin, an inmate at the Oregon State Penitentiary ("OSP"). On the outside of the envelope was a picture that Plaintiff had drawn. Because of the picture, the letter was returned to Plaintiff. Plaintiff alleges that (1) Max Williams, the former Director of ODOC; (2) Jeff Premo, the Superintendent at OSP; (3) Michelle Whitney Dodson, the Supervising Executive Assistant to Premo; and (4) "Jane Doe", a mailroom administrator at OSP violated his First Amendment free speech and his Fourteenth Amendment due process rights.

Defendants filed a motion for summary judgment and a motion for stay of discovery. Having failed to receive any response by Plaintiff, this Court granted Defendants' motion for summary judgment, denied Defendants' motion for stay of discovery as moot, and entered a judgment dismissing this case. Now before me is Plaintiff's Motion to Reopen Case, Reconsideration and Extension of Time (#76). For the reasons that follow, Plaintiff's motion is GRANTED.

STANDARD

Rule 60(b) provides that a "court may relieve a party or its legal representative from a final judgment, order, or proceeding." Fed R. Civ. P. 60(b). Rule 60(b)(1) provides relief from judgment due to "mistake, inadvertence, surprise or excusable neglect." Fed. R. Civ. P. 60(b)(1). In evaluating whether there is "excusable neglect," a court's determination should be "an equitable one, taking account of all relevant circumstances surrounding the party's omission." Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993). To that end, four factors are particularly helpful in making this determination: (1) the danger of prejudice; (2) the length of delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the moving party acted in good faith. Id.

A court may also relieve a party from a final judgment "for any other reason which justifies relief." Fed. R. Civ. P. 60(b)(6). For a party to be entitled to relief, he "must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with . . . the action in a proper fashion." Latshaw v. Trainer Wortham & Co., Inc., 452 F.3d 1097, 1103 (9th Cir. 2006) (quoting Cmty. Dental Servs. v. Tani, 282 F.3d 1164, 1168 (9th Cir. 2002)). Rule 60(b)(6) is meant to be used "sparingly as an equitable remedy to prevent manifest injustice and . . . where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." United States v. Washington, 394 F.3d 1152, 1157 (9th Cir. 2005).

DISCUSSION

Defendants argue that Plaintiff unduly delayed in responding to their motion for summary judgment and accordingly, his request for relief should be denied. I disagree.

Here, Plaintiff establishes that circumstances beyond his control prevented him from timely filing his response to Defendants' motion for summary judgment. Specifically, Plaintiff represents that his delay was reasonable because prior to the deadline for filing his response, he was transferred from the New Mexico Corrections Department to the Florida Department of

Corrections. Pl.'s Mot. to Reopen Case ("Pl.'s Mot."), p. 1. Plaintiff represents that during that time, he had no access to his files and was unable to notify the Court of his status until well after the filing deadline. Id.

In addition, Plaintiff states that he had completed his response prior to being transferred and was waiting for the "New Mexico legal officer[s]" to "pick it up and mail it", but before that could happen, Defendants moved him and packed up his response with his other belongings for shipment to Florida. Reply., p. 1-2. In fact, Plaintiff states that "Florida [Department of Corrections] is still in possession [of his property.]" Id.

Finally, Plaintiff maintains that during his transition to the Florida Department of Corrections and prior to his filing deadline of February 1, 2013, he requested the Court's address on numerous occasions, but was told that the Court's address "was not available." Id., p. 1. According to Plaintiff, it was not until he was placed in a "permanent facility" on February 5, 2013, that he was allowed to make a written request for the Court's address, which he asserts explains why the evidence shows that he had not requested the Court's address until February 5, 2013. Id.; Pl.'s Mot., Attach. 2.

In sum, the record before me shows that Plaintiff's transfer to the Florida Department of Corrections was beyond his control and interfered with his ability to timely respond to Defendants' motion. Under the circumstances here, Plaintiff is entitled to the relief he seeks under Rule 60(b).[2]

/ / /

[2] Defendants argue that granting Plaintiff's motion will be prejudicial. Defendants, however, fail to elaborate on how or what prejudice will result. Suffice it to say, I am not persuaded by Defendants' argument. Defendants also assert that Plaintiff's motion should be denied because he cannot establish a genuine issue of material fact with regard to their motion for summary judgment. Such a determination, however, is premature at this juncture of the proceedings.

CONCLUSION

For the reasons above, Plaintiff's motion (#76) is GRANTED. The Clerk is ordered to reopen the case.

IT IS SO ORDERED.

Dated this 27 day of May, 2013.

Marco Hernandez

MARCO A. HERNANDEZ
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

JACOB BARRETT,

Plaintiff,

Case No. 6:11-cv-06358-HZ

OPINION & ORDER

v.

MAX WILLIAMS, et al.,

Defendants.

Jacob Barrett
72237
North 3A-Q-107
Penitentiary of New Mexico
PO Box 1059

Pro se Plaintiff

Shannon M. Vincent
OREGON DEPARTMENT OF JUSTICE
Trial Division, CLS
1162 Court Street, NE
Salem, OR 97301-0346

Attorney for Defendants

Exhibit I

HERNANDEZ, District Judge:

Jacob Barrett is an inmate of the Oregon Department of Corrections ("ODOC") and is currently in the custody of the New Mexico Corrections Department. While in custody at the New Mexico Corrections Department, plaintiff sent an envelope to his cousin, an inmate at the Oregon State Penitentiary ("OSP"). On the outside of the envelope was a picture that plaintiff had drawn. Because of the picture, the letter was returned to plaintiff.

Plaintiff alleges that (1) Max Williams, the former Director of ODOC; (2) Jeff Premo, the Superintendent at OSP; (3) Michelle Whitney Dodson, the Supervising Executive Assistant to Premo; and (4) "Jane Doe", a mailroom administrator at OSP violated his First Amendment free speech rights and his Fourteenth Amendment due process rights. Plaintiff also alleges that defendants rejected his mailing in retaliation for lawsuits he has pending against the New Mexico Corrections Department.

Defendants filed a motion for summary judgment and motion for stay of discovery. Plaintiff, however, failed to file any response to defendants' motions–even after being granted three extensions of time. For the reasons that follow, defendants' motion for summary judgment (doc. #48) is GRANTED, and defendants' motion for stay of discovery (doc. #55) is DENIED as moot.

STANDARD

Summary judgment is proper if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. E.g., Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The moving party need only demonstrate that there is an absence of evidence to support the non-moving party's case. Id. at 325.

Once the moving party has met its burden, the burden shifts to the non-moving party to "set out 'specific facts showing a genuine issue for trial.'" Id. at 324 (quotation omitted). To carry this burden, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). "The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

In deciding a summary judgment motion, the court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in its favor. Id. at 255. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment ." Id. However, conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. See Thornhill Publ'n Co., Inc. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979).

DISCUSSION

I. First Amendment Free Speech Rights

Prisoners enjoy a "First Amendment right to send and receive mail." Witherow v. Paff, 52 F.3d 264, 265 (9th Cir. 1995) (citing Thornburgh v. Abbott, 490 U.S. 401, 407 (1989)). A prisoner's First Amendment rights, however, are "subject to substantial limitations and restrictions in order to allow prison officials to achieve legitimate correctional goals and maintain institutional security." Walker v. Sumner, 917 F.2d 382, 385 (9th Cir. 1990) (citations omitted). "Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities." Turner v. Safley, 482 U.S. 78, 85 (1987) (citation omitted).

To determine whether a correctional institution's regulation that "impinges on inmates' constitutional rights" is valid, the court must determine whether that regulation "is reasonably related to legitimate penological interests." Id. at 89. Legitimate penological interests include "security, order, and rehabilitation." Procunier v. Martinez, 416 U.S. 396, 413 (1974) (overruled on other grounds by Thornburgh, 490 U.S. at 413-14). To "guide[] courts in determining whether a challenged regulation passes constitutional muster", the Ninth Circuit applies the four-pronged test set forth in Turner. Frost v. Symington, 197 F.3d 348, 354 (9th Cir. 1999). Under this test, courts must determine:

> (1) whether the regulation is rationally related to a legitimate and neutral governmental objective; (2) whether there are alternative avenues that remain open to the inmates to exercise the right; (3) the impact that accommodating the asserted right will have on other guards and prisoners, and on the allocation of prison resources; and (4) whether the existence of easy and obvious alternatives indicates that the regulation is an exaggerated response by prison officials.

Prison Legal News v. Cook, 238 F.3d 1145, 1149 (9th Cir. 2001) (citing Turner, 482 U.S. at 89-90).

A. The First Turner Factor

The first Turner factor has two sub factors. First, there must be "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." Id., 482 U.S. at 90 (citation and quotation marks omitted). A regulation cannot be sustained where the "logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational". Id. at 90-91 (citation omitted). Second, the "governmental objective must be . . . legitimate and neutral". Id. The correctional institution may demonstrate a rational relationship by showing "an intuitive, common[-]sense connection between the state's policy and its objectives." Frost, 197 F.3d at 356.

Defendants maintain that they satisfy the first Turner factor. Defendants contend that the ODOC mail rules prohibit the placement of any drawings on the outside of envelopes, citing Oregon Administrative Rule ("OAR") 291-131-0025(1). OAR 291-131-0025(1) provides that all "[i]ncoming mail shall require the sender's name and return address on the front of the envelope and shall be addressed to the inmate using only his/her committed name and SID number." Defendants assert that pursuant to OAR 291-131-0025(1), only names, applicable state identification ("SID") numbers, and addresses of senders and intended recipients may be placed on the outside of envelopes.

Plaintiff concedes that he "drew a picture" on the envelope he sent to his cousin and concedes that his letter was rejected pursuant to OAR 291-131-0025 because of the picture he had drawn. Second Am. Compl., ¶¶ VI(1)-(2), (6). Plaintiff, however, alleges that the drawing constitutes "art", and therefore the rejection of his letter violated his First Amendment right to free speech. Id. ¶¶ VI(1)-(2), VII(1)-(2). Plaintiff further alleges that defendants' "blanket ban" on "envelope art" is not rationally related to a legitimate penological objective, that defendants' rejection of his letter was an "unreasonable application of the ODOC mail prohibition rules" not "rationally related to any legitimate security concerns", and that the ODOC rules under which his letter was rejected is "overbroad". Id. ¶¶ VII(A)(1)-(5). I disagree with plaintiff's allegations.

1. Rational Connection

Defendants establish an intuitive, common-sense connection between ODOC's mail regulations and the government's objectives of efficiently processing all incoming mail and maintaining a safe and secure environment within OSP. With regard to efficiency, defendants present evidence showing that OSP processes "as much as 5,000 pieces of mail daily" and that allowing mailroom staff to reject mail not satisfying the "technical requirements" of ODOC's mail rules increases efficiency and saves money. See Declaration of Randy Geer ("Geer Decl."), ¶¶ 8, 9 12-15. They also present evidence showing that allowing OSP mail staff to return mail violating "technical portion[s]" of the ODOC mail rules saves time and money because it permits mail staff to return mail "without opening [mail] and without cost" to ODOC. Id., ¶ 8.

With respect to security, defendants present evidence showing that restricting what may be placed on the outside of mailings helps to maintain a safe and secure environment. Defendants present evidence showing that all mail received may pose some threat of "criminal activity or discussion of past criminal acts" or may "illuminate[] the workings of criminal networks." Id. ¶ 12. They contend that even a "drawing as innocuous as a fish or a tree on the outside of the envelope could alert [an] . . . inmate recipient to something special in the content of the letter" or "could be used to trigger another to act on same pre-arranged instruction." Id. ¶ 14.

Based on the uncontroverted evidence before me, I conclude that ODOC's mail regulations are rationally connected with legitimate government interests–namely, maintaining the safety and security of OSP's inmates and staff and promoting the efficient use of OSP's limited resources. See Thornburgh, 490 U.S. at 415 ("protecting prison security . . . is central to all other corrections goals") (citation and quotation marks omitted); Freeman v. Tex. Dep't of Criminal Justice, 369 F.3d 854, 861 (5th Cir. 2004) ("staff and space limitations, as well as financial burdens, are valid penological interests") (citation omitted).

2. Neutrality

The record before me also establishes that the mail regulations and the actions taken by defendants operated in a neutral fashion without regard to the content of plaintiff's drawing. Defendants proffer declarations by Geer, the Chief of Inmate Services at ODOC, and Dodson which state that plaintiff's letter was rejected because a drawing had been placed on the envelope, not because of the contents of the drawing. See Geer Decl., ¶¶ 1, 13; Dodson Decl., ¶ 10. The ODOC mail regulations themselves meet the neutrality criterion in Turner because they prohibit the placement of all drawings on the outside of envelopes, regardless of the contents of the drawings.

In sum, the ODOC mail regulations to which plaintiff objects are rationally related to legitimate and neutral governmental objectives. Accordingly, I conclude that the first Turner factor weighs in favor of defendants.

B. The Second Turner Factor

The second Turner factor examines "whether there are alternative means of exercising the right that remain open to prison inmates." Id., 482 U.S. at 89-90. The record here does not establish that plaintiff or any other inmate at OSP are foreclosed from exercising their free speech rights. To the contrary, the record demonstrates that inmates at OSP retain the right to engage in free expression so long as they do not make such expressions on the outside of envelopes. Indeed, plaintiff does not argue, and nothing in the record shows, that plaintiff was or remains precluded from sending the same drawing he placed on the outside of the envelope within the contents of a mailing. In light of the above, I conclude that the second Turner factor weighs in defendants' favor.

C. The Third Turner Factor

The third Turner factor considers the impact that the "accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." Id. at 90. "When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." Id. (citation omitted). Here, the undisputed facts demonstrate that accommodating plaintiff's right to include drawings on the outside of mailings would have a significant adverse impact on the prison as a whole because as noted above, it would adversely affect the efficiency in which OSP processes mail and the safety and security of OSP. Geer Decl., ¶¶ 8-9, 12, 14. Accordingly, I find that the third Turner factor weighs in favor of defendants.

D. The Fourth Turner Factor

The fourth and final Turner factor considers the absence and existence of alternatives. See id., 482 U.S. at 91. The "absence of ready alternatives is evidence of the reasonableness of a prison regulation" whereas the "existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an exaggerated response to prison concerns." Id. (citation and quotation marks omitted). If a "claimant can point to an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." Id. The Ninth Circuit, however, has made clear that "[t]his is not a least restrictive alternative test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." Id. at 91-92 (citation and quotation marks omitted).

The record before me is devoid of any obvious or easy alternative to the ODOC mail regulations. Notably, Plaintiff does not point to a single alternative that would fully accommodate his rights at de minimis cost to the government's valid penoligical interests, but rather simply seeks the elimination of the ODOC regulations that restrict drawings on envelopes in their entirety. See Second Am. Compl., ¶ VIII(B)(1)-(2). Because the ODOC mail regulations at issue here do not amount to an "exaggerated response" and because no obvious, easy alternative is readily available, I conclude that the fourth Turner factor weighs in favor of defendants.

In sum, the ODOC mail regulations which plaintiff challenges do not violate his First Amendment rights. Defendants' motion for summary judgment as to plaintiff's first claim for relief is therefore granted.

II. Fourteenth Amendment Due Process Rights

Plaintiff alleges that Premo and Dodson violated his due process rights when they failed to provide him with a "reasonable and fair opportunity to object to [his mail] violation." Id. ¶ (7)(B)(1)-(3), (5). Plaintiff further alleges that Dodson violated his due process rights by "refus[ing] to review [his] objections" and by refusing to "reasonably or fairly consider [his] appeal". Id. ¶ (7)(B)(1)-(4).

It is well settled that "withhold[ing] delivery of [inmate mail] must be accompanied by minimum procedural safeguards." Sorrels v. McKee, 290 F.3d 965, 972 (9th Cir. 2002) (citation omitted). Constitutional due process requires that an inmate whose mail is rejected receive notice of the rejections and that any complaint be referred to a prison official other than the person who originally disapproved the correspondence. See Procunier, 416 U.S. at 417-19 (overruled on other grounds by Thornburgh, 490 U.S. at 413-14); see also Krug v. Lutz, 329 F.3d 692, 697-98 (9th Cir. 2003) (withholding delivery of inmate mail must be accompanied by the "notice to the prisoner" and "the right to appeal the exclusion of incoming publications to a prison official other than the one who made the initial exclusion decision").

The undisputed evidence here demonstrates that plaintiff was provided the requisite due process notice and right to appeal. Specifically, the record shows that plaintiff received notice by OSP that his mailing had been rejected because it contained a drawing on the outside. Second Am. Compl., ¶ VI(3); Dodson Decl., ¶ 4; Id., Attach. 2, p. 1. The record further shows that plaintiff appealed the rejection of his letter to Premo, and that Premo responded by informing him that his mailing violated OAR 291-131-0025(1). Second Am. Compl., ¶¶ V, VI(5)-(6); Dodson Decl., ¶¶ 6-7; Id., Attach. 2, pp. 1-3. The evidence also shows that plaintiff requested an administrative review of Premo's decision, but was informed by Dodson that his request for review had been denied. Second Am. Compl., ¶ VI(7); Dodson Decl., ¶ 8-10; Id., Attach. 2, pp. 4, 6. Although plaintiff disagrees with the rejection of his letter and the denial of his grievances, it is apparent that plaintiff was provided the minimal procedural safeguards. Accordingly, defendants' motion for summary judgment as to plaintiff's due process claim is granted.

III. Retaliation

Lastly, plaintiff alleges that the rejection of his letter was in retaliation "for having pending civil actions against the [New Mexico Corrections Department]". Second Am. Compl., ¶ VII(H)(2). "A prisoner suing prison officials under section 1983 for retaliation must allege that he was retaliated against for exercising his constitutional rights and that the retaliatory action does not advance legitimate penological goals, such as preserving institutional order and discipline." Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994) (citing Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985)). "Of fundamental import to prisoners are their First Amendment right[s] to file prison grievances and to pursue civil rights litigation in the courts." Rhodes v. Robinson, 408 F.3d 559, 567 (9th Cir.2005) (citations and quotation marks omitted). "Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." Id. at 567-568 (citations omitted).

Plaintiff makes no argument and presents no evidence supporting his retaliation claim. As discussed above, the record shows that defendants' act of rejecting plaintiff's letter advances legitimate penological goals. In addition, there is no showing in the record of a connection between the rejection of plaintiff's letter and the alleged lawsuits he had against the New Mexico Corrections Department. In fact, plaintiff presents no evidence showing that he had any pending lawsuit against the New Mexico Corrections Department. Even if plaintiff were able to show that he had a pending lawsuit against the New Mexico Corrections Department, his claim would still fail because he presents no facts showing that defendants knew or had reason to know of any of his lawsuits. Plaintiff's bare allegations by themselves are simply insufficient to create a triable issue of fact as to his retaliation claim. Defendants' motion for summary judgment as to plaintiff's retaliation claim is therefore granted.[1]

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[1] Having concluded that all of plaintiff's claims against defendants must be dismissed, I decline to address whether defendants are entitled to qualified immunity.

CONCLUSION

For the reasons stated above, defendants' motion for summary judgment (doc. #48) is GRANTED, and defendants' motion for stay of discovery (doc. #55) is DENIED as moot.

IT IS SO ORDERED.

Dated this 22 day of FEB, 2013.

Marco Hernandez

MARCO A. HERNANDEZ
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CHS, Inc., Plaintiff, v. Freeborn County Co-op Oil Co., Defendant.	Civil No. 10-166 (RHK/AJB) **CONSENT DECREE AND ORDER OF DISMISSAL WITH PREJUDICE**

The above-entitled matter having been fully compromised and settled between the parties, the following Consent Decree and Order is made and entered by the undersigned, the Honorable Richard H. Kyle, Judge of the United States District Court for the District of Minnesota, pursuant to the Stipulation of the parties hereto and their respective counsel and the written Settlement Agreement between the parties.

The parties hereto have **STIPULATED** as follows:

A. CHS, Inc. ("CHS") is the owner of the following federal trademark registrations, among others (hereinafter referred to collectively as the "Registered Marks"):

(1) CENEX®, Reg. No.'s 0,652,618, 1,590,170 and 3,520,211;

(2) QWIKLIFT®, Reg. No. 0,678,328;

(3) HTB®, Reg. No. 2,515,190;

(4) SUPERLUBE TMS®, Reg. No. 2,768,021; and

(5) The CENEX N® design, Federally registered in Reg. No.'s 1,070,076, 1,029,631, and 1,591,300 registered on December 18, 2001.

B. True and correct copies of the online records of the United States Patent and Trademark Office concerning the aforementioned marks are attached hereto as Exhibits A – I, respectively.

C. CHS and its affiliates are also the owners of common law trademark rights in the marks "CENEX," the "CENEX N" design, "QWIKLIFT," "HTB," and "SUPERLUBE TMS," including among other things, and without limitation rights regarding retail store service featuring agricultural products and supplies; oils, fuels, alternative fuels and lubricants, motor fuels, lubrication oils and greases for vehicles and machines; hydraulic oil; heating fuels for homes and buildings; and gasoline station services, as well as common law rights in their respective corporate and trade names (these common law rights and the Registered Marks will be referred to collectively hereinafter as the "CHS Marks").

D. The CHS Marks have become, by virtue of long-standing use and acceptance in the market by consumers, strong and distinctive marks.

E. Plaintiff CHS is engaged in the provision of services, the sale of goods, and other commercial activities throughout the United States using the CHS Marks, among others.

F. Defendant Freeborn County Co-op Oil Co. ("FCCO") has engaged in the business of offering for sale, selling, and delivering lubricants, including bulk lubricants offered for sale, sold, and delivered using the CHS Marks.

G. In this action CHS has alleged, *inter alia*, that Defendant FCCO has infringed upon the CHS Marks, causing confusion among consumers.

H. Defendant FCCO denies the allegations in the Complaint.

I. The parties hereto have agreed to settle and resolve the Trademark Dispute and the issues between them.

NOW, THEREFORE, IT IS HEREBY ORDERED AND DECREED as follows:

1. Plaintiff CHS and their affiliated companies are the sole owners of and have the exclusive rights to use the CHS Marks, whether alone or in conjunction with other words or designs, as their trademarks, service marks, and trade names, on or in connection with the

provision, marketing and sale of any services, or any goods, or the conduct of any commercial activities, which are, or which may hereafter become, covered by or within the scope of the CHS Marks, throughout the United States. The CHS Marks and Federal registrations are valid and subsisting. The CHS Marks have become, by virtue of long-standing use and acceptance in the market by consumers, strong and distinctive marks. Defendant FCCO has not and will not hereafter contest the validity or ownership of any of the CHS Marks, or the validity or ownership of any of said registrations, or oppose any application by Plaintiff CHS, or their affiliates, or any of them, for federal registrations, or take any action against registration in the various states, of additional trademarks or service marks incorporating the terms "CENEX," "QWIKLIFT," "HTB," or "SUPERLUBE TMS" with a design as a part thereof.

2. On or before October 1, 2010, Defendant FCCO shall do the following:

(a) Remove any and all CHS Marks from any website or domain name registration controlled or used by Defendant FCCO, including any metatags, keyword advertising, or embedded code in or for any such website;

(b) Contact any telephone directory, yellow pages directory, or business directory listings of any kind (including without limitation Internet listings) in which Defendant FCCO has a paid advertisement or listing, which advertises or lists FCCO as offering for sale, selling or delivering any products or services under any of the CHS Marks or as being authorized to sell CHS or “Cenex” products, to cancel such advertisement or listing or to have such advertisement or listing changed to one which does not include any of the CHS Marks or any confusingly similar name, mark or term. For any telephone directory, yellow pages directory, or business directory listings of any kind (including without limitation Internet listings) which lists FCCO as offering for sale, selling or delivering any products or services under any of the CHS Marks or as being authorized to sell CHS or “Cenex” products, or as being in any way affiliated with CHS or “Cenex,” but where such listing is not paid for by or on behalf of FCCO, FCCO has authorized CHS to contact such telephone directory, yellow pages directory, or business directory listing to cancel such the listing of FCCO or to have such listing changed to one which does not include any of the CHS Marks or any confusingly similar name, mark or term. FCCO shall cooperate as necessary with CHS to correct or eliminate any such unpaid listings.

(c) On or before September 28, 2010, FCCO shall deliver and turn over to Plaintiff CHS for destruction, any and all labels, signage, advertising, or containers bearing, containing, or comprising the CHS Marks, including, by way of example and without limitation, any and all letterhead, business cards, marketing brochures, signs, fencing, forms (such as invoices, purchase orders, note cards, or similar materials), packaging, envelopes, and any templates, macros, or other articles used to print or create such materials.

(d) On or before October 15, 2010, Defendant FCCO shall provide counsel for Plaintiff CHS written certification that the requirements of paragraphs 2 & 3 of this Consent Decree have been fulfilled, stating in detail and with particularity all of the steps taken to fulfill such requirements. The certification shall be provided by sending it via Federal Express to:

John B. Lunseth II
Briggs and Morgan, P.A.
2200 IDS Center
80 South 8th Street
Minneapolis, MN 55402

3. On or before September 28, 2010, FCCO shall tender to CHS all lubricants in the possession or under the control of FCCO, pursuant to the terms of the parties Settlement Agreement.

4. Defendant FCCO shall cease and permanently refrain from using or employing any of the CHS Marks, or any confusingly similar name or term, whether alone or in conjunction with other words or designs, in any manner for, or related to, the offering for sale, selling, or delivering of any products or services by Defendant FCCO or of any other company affiliated with or related to Defendant FCCO, including without limitation using any of the CHS Marks for promotional, marketing or advertising purposes or in any other way, except as may be permitted by CHS expressly in writing.

5. Defendant FCCO shall not expressly or impliedly represent itself or any of its products or services as being affiliated in any manner with Plaintiff CHS, or of any other company or person related to or affiliated with Plaintiff CHS, or as authorized, sponsored or endorsed by or otherwise connected with Plaintiff CHS.

6. Defendant FCCO shall not engage in any conduct which will cause or is likely to cause confusion, mistake or misunderstanding as to the source, affiliation, connection, or association of any of its products, services, or commercial activities with Plaintiff CHS, or of any

other company or person related to or affiliated with Plaintiff CHS, or any of CHS's respective services or goods, or with any of the CHS Marks.

7. Defendant FCCO shall not hereafter seek to obtain state or federal trademark or service mark registration or domain name registration of any the CHS Marks, or of any word, mark, name or design confusingly similar to any of the CHS Marks, whether alone or in conjunction with other words or designs, for use on or in connection with the products or services Defendant FCCO or of any other related or affiliated company or enterprise.

8. Defendant FCCO shall require that its affiliated companies, and each of its owners, members, managers, directors, officers, attorneys, agents, representatives and employees, successors and assigns shall comply with all terms of this Consent Decree the same as if they were parties hereto.

9. It is understood that Defendant FCCO has a joint ownership interest in WFS-FCCO, L.L.C. together with Watonwan Farm Services Company ("WFSC"), and that WFSC is at the present time an authorized CHS dealer. It is further understood that for the purposes of paragraphs 4 through 8 of this Consent Decree only, WFSC and WFS-FCCO, L.L.C. are not "affiliates" of FCCO to the extent the activities of WFSC and/or WFS-FCCO, L.L.C. are conducted by WFSC under and pursuant to the terms of its Agreements with CHS, and provided, further, that this paragraph 9 does not authorize and shall not be construed as authorizing any conduct, activities or statements which are likely to cause any person to believe or understand that there is any connection, sponsorship, or affiliation between CHS and FCCO, or the products, goods, services, or marks of CHS and FCCO.

10. Defendant FCCO shall not disparage, whether orally or in writing, Plaintiff CHS' rights to their names or to the CHS Marks, or the manner in which such rights were acquired, nor shall they libel or disparage Plaintiff CHS' efforts to enforce or police the CHS Marks in

connection with this or any other matter. Defendant FCCO shall use their reasonable best efforts to resolve any confusion that comes to their attention regarding any incorrectly perceived connection between Defendant FCCO on the one hand and Plaintiff CHS on the other hand.

11. The above-entitled matter shall be and the same hereby is **DISMISSED WITH PREJUDICE**, each party to bear its own costs and attorneys' fees. This Court shall retain jurisdiction solely for the purpose of enforcing the present Consent Decree and the Settlement Agreement between the parties concerning this matter.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: November 4, 2010

s/Richard H. Kyle
RICHARD H. KYLE
United States District Judge