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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF HAWAII

In re AMANDA D. TUCKER, Debtor. *Note: The Bankruptcy Court Will Assign A Hearing Date After This Motion Is Filed.*	*CASE NO. 12-02052 RJF (Chapter 7)* [RELATED TO DOCKET NOS. 151 AND 154] DEBTOR'S MOTION (1) TO SET ASIDE AND VACATE MAY 23, 2013 "ORDER GRANTING TRUSTEE'S MOTION TO APPROVE SETTLEMENT AND RELEASE AGREEMENT WITH LCP-MAUI, LLC," (2) TO SET ASIDE AND VACATE MAY 24, 2013 "STIPULATED ORDER TERMINATING THE AUTOMATIC STAY (PROPERTY OF THE ESTATE)," (3) TO REIMPOSE STAY, ENJOINING THE FORECLOSURE PROCEEDINGS IN CIVIL NO. 12-1-0462(3) IN THE CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAII, AND (4) FOR AN ORDER DIRECTING THE STATE COURT-APPOINTED RECEIVER TO TURN OVER TO THE ESTATE TRUSTEE FUNDS OF THE ESTATE, BASED ON BANKRUPTCY FRAUD WAGED AGAINST THE COURT, THE ESTATE TRUSTEE, AND THE DEBTOR; (5) FOR LEAVE TO CONDUCT FURTHER DISCOVERY; AND (6) FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

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COMES NOW Debtor AMANDA DAWN TUCKER, by and through her undersigned attorneys, and hereby moves this Honorable Court for the above-referenced Rule 9024/Rule 60(b)/18 U.S.C. § 152 relief, for the reasons set forth in the accompanying Memorandum in Support of Motion, supported by the accompanying Declaration of Gary Victor Dubin, and the Exhibits thereto (their contents incorporated herein by this reference), and the records and files in this case.

This Motion is made pursuant Bankruptcy Rules 5005 and 9024, 18 U.S.C. § 152, and 28 U.S.C. § 2075, and the record and files in this action.

DATED: Honolulu, Hawaii, December 19, 2013.

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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF HAWAII

In re AMANDA D. TUCKER, Debtor.	CASE NO. 12-02052 RJF (Chapter 7) MEMORANDUM IN SUPPORT OF MOTION (1) TO SET ASIDE AND VACATE MAY 23, 2013 "ORDER GRANTING TRUSTEE'S MOTION TO APPROVE SETTLEMENT AND RELEASE AGREEMENT WITH LCP-MAUI, LLC," (2) TO SET ASIDE AND VACATE MAY 24, 2013 "STIPULATED ORDER TERMINATING THE AUTOMATIC STAY (PROPERTY OF THE ESTATE)," (3) TO REIMPOSE STAY, ENJOINING THE FORECLOSURE PROCEEDINGS IN CIVIL NO. 12-1-0462(3) IN THE CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAII, AND (4) FOR AN ORDER DIRECTING THE STATE COURT-APPOINTED RECEIVER TO TURN OVER TO THE ESTATE TRUSTEE FUNDS OF THE ESTATE, BASED ON BANKRUPTCY FRAUD WAGED AGAINST THE COURT, THE ESTATE TRUSTEE, AND THE DEBTOR; (5) FOR LEAVE TO CONDUCT FURTHER DISCOVERY; AND (6) FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

MEMORANDUM IN SUPPORT OF MOTION (1) TO SET ASIDE AND VACATE MAY 23, 2013 "ORDER GRANTING TRUSTEE'S MOTION TO APPROVE SETTLEMENT AND RELEASE AGREEMENT WITH LCP-MAUI, LLC," (2) TO SET ASIDE AND VACATE MAY 24, 2013 "STIPULATED ORDER TERMINATING THE AUTOMATIC STAY (PROPERTY OF THE ESTATE)," (3) TO REIMPOSE STAY, ENJOINING THE FORECLOSURE PROCEEDINGS IN CIVIL NO. 12-1-0462(3) IN THE CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAII, AND (4) FOR AN ORDER DIRECTING THE STATE COURT- APPOINTED RECEIVER TO TURN OVER TO THE ESTATE TRUSTEE FUNDS OF THE ESTATE, BASED ON BANKRUPTCY FRAUD WAGED AGAINST THE COURT, THE ESTATE TRUSTEE, AND THE DEBTOR; (5) FOR LEAVE TO CONDUCT FURTHER DISCOVERY; AND (6) FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

A. Background

This Voluntary Chapter 7 Bankruptcy was filed on October 17, 2012. The Debtor's principal assets constitute several parcels of real property located on the Island of Maui, with mortgage indebtedness claimed to now exceed $7,000,000 and purportedly in arrears, accruing interest for several years at a default rate of 14%, otherwise possessing potentially substantial equity unless sold at a foreclosure forced sale.

The Debtor's lender was The Bank of Lincolnwood, which failed and was taken over by the F.D.I.C. on June 5, 2009, within months of the Debtor's alleged payment defaults.

Subsequently, an entity entitled "2010-2 SFR Venture LLC ('SFR')," claiming to be the assignee of the F.D.I.C. as to the Debtor's subject loans, filed a foreclosure action against the Debtor on May 4, 2012 in the Circuit Court of the Second Circuit ("Foreclosure Case"), halted several months later by the Debtor's Chapter 7 Petition filed in this Bankruptcy Court.

Thereafter, an entity entitled "LCP-Maui, LLC ('LCP')," claiming in turn to be the assignee of SFR, through the sworn Declaration of its purported representative of LCP, Mr. Jacob Mutz, set forth in Exhibit 1, purporting in turn to be the Manager of the Manager of LCP entitled "AGFLEP Lending LLC ('AGFLEP')," represented to this Court "under penalty of perjury" that:

1. "LCP is the mortgagee and creditor" of the Debtor (Mutz Declaration, paragraph 3; and

2. "Debtor is in default from February 1, 2009, in payment of amounts owed under the First Note and Second Note and Mortgages" (Mutz Declaration, paragraph 10.

Relying upon these two sworn representations of Mr. Mutz, this Court on May 23, 2013 granted the Trustee's Motion To Approve Settlement And Release Agreement With LCP-Maui, LLC," as set forth in Exhibit 2, and that same day, also on reliance thereon, approved the "Stipulated Order Terminating The Automatic Stay (Property Of The Estate)," as set forth in Exhibit 3, thus returning the Debtor to the Second Circuit Court Foreclosure Case.

B. Reasons Why This Court's May 23, 2013 Orders Should Be Set Aside

1. LCP Lied To This Court When It Claimed To Be The Debtor's Mortgagee.

During the Foreclosure Case it has now been proven, *albeit* blatantly admitted, that Mr. Mutz's two sworn representations to this Court were false and were known by him to have been false when made, as not only was and is LCP not the Debtor's mortgagee, notwithstanding the submission of falsified recorded mortgages to the contrary, but the Debtor was not even in default at the time that a default was declared.

The unraveling of this elaborate bankruptcy fraud upon this Court, upon the Estate Trustee, and upon the Debtor first began when correspondence between the Debtor and LCP and later between the Debtor and a "Resolution and Receivership Specialist" in the "Division of Resolutions and Receiverships" of the F.D.I.C. surfaced.

The Debtor, after being told by LCP by letter on December 12, 2012 that it was merely the "servicer" of her loans (Exhibit 4), she inquired of the F.D.I.C. as to who actually owned her mortgage loans, and on August 12, 2013, which was after LCP swore to this Court that it owned her mortgage loans, the answer in writing came back from the F.D.I.C. that an entity called "Turning Point Asset Management, L.P. (TPAM')" was her mortgagee – none of which was ever disclosed to this Court.

These revelations led to the Debtor's newly appearing attorneys in the Foreclosure Case to research who TPAM was or is, and the result was more than illuminating, for it was discovered that the F.D.I.C. had "partnered" with several investor groups "to sell large numbers of distress assets" taken over in receivership (see Exhibit 6).

One such F.D.I.C. 50/50 partner was TPAM (called the "Private Owner") as Manager for an LLC (called the "Initial Member") named "SFR" (called "the Company") that had been transferred various mortgage loans of 18 failed banking institutions, including "The Bank of Lincolnwood" and including the Debtor's mortgage loans, all sold to SFR for only $2,750,000(!), with such a steep discount not being first made available to mortgagors such as the Debtor, just another little known federal government financial scandal to which the Justice Department seems oblivious, within the recent mortgage meltdown, enriching selected "investors," as shown in the actual agreement between

TPAM and the F.D.I.C. located on the F.D.I.C. Website, entitled "Limited Liability Company Interest Sale And Assignment Agreement" dated June 25, 2010 (Exhibit 7).

As for LCP, it is merely a loan servicer hired by SFR with no ownership rights and certainly not and never was the Debtor's mortgagee, for not only is SFR, contrary to what it represented to this Court, prohibited from assigning its interest to anyone, as set forth in Exhibit 7, Paragraph 6, for "the Private Owner may not assign this Agreement or any of its rights, interests or obligations hereunder," or otherwise "any purported assignment or delegation in violation of this Agreement shall be null and void."

Indeed, the Florida Department of Corporation Records show that LCP was not even incorporated until December 3, 2012 (Exhibit 8), yet Mr. Mutz in his Declaration (Exhibit 1, paragraph 8) thought nothing to swearing before this Court under oath that the Debtor's mortgages "were assigned by SFR to LCP by eight separate Corporate Assignment of Mortgage documents, all dated October 31, 2012."

LCP's fraud completely unraveled in the Foreclosure Case, its lawyers there recently admitting, arrogantly or inadvertently, that LCP never owned the Debtor's mortgages in the first place, when they filed a Declaration on October 11, 2013 authenticating an official "FDIC Structured Transaction Fact Sheet," attempting to explain how the handling of the Debtor's mortgage loans worked, set forth in Exhibit 9.

And in that Fact Sheet it is explained clearly that "the Private Owner [TPAM] acts as the managing member of the LLC [SFR] and is responsible for the management and servicing of the assets [the Debtor's mortgage loans] conveyed to the LLC [SFR]. The managing member is obligated to enter into a Servicing Agreement with a qualified

servicer [AGFLEP whose manager is LCP] to service the assets in a manner consistent with industry standards and to maximize their value to the LLC [SFR]."

Are we to believe that lying to federal and state courts is consistent with industry standards? There is, of course, mounting evidence that that is true based on the many recent revelations in the media involving billion dollar lender settlements with State Attorneys General and the U.S. Justice Department.

2. The Debtor's Loans Were Not In Default When Acquired By The FDIC.

On October 4, 2013 the oral deposition of Clyde Engle was taken by Defendant Tucker and cross-examined by opposing counsel, during which examination and cross-examination Mr. Engle stated that he was the Chairman and Chief Executive Officer of LincoInwood Bank at the time the Debtor's refinancing occurred and he personally acknowledged telling the Debtor to sign the refinancing papers even though she objected because the terms were different from what he promised her on behalf of the Bank, and telling her she need not make monthly payments until her loan could be "fixed," yet he never got around to fixing the terms as he was too preoccupied with saving the Bank from federal regulators.

Mr. Engle's admissions under oath, specifically that the Debtor in effect was not in default but merely stopped making payments at his instructions while he worked to correct the terms of her refinance, are set forth in the transcript of his oral deposition set forth in Exhibit 10, the relevant parts yellow-highlights and incorporated herein by this reference, specifically on page 6 (lines 15-16), page 7 (lines 16-19), pages 9-11 (lines 10-25, 1-25, and 1-23) respectively, page 18 (lines 3-24), page 22 (lines 24-25), page 23 (lines 2-3), page 25 (lines 13-17), page 26 (lines 17-21), and page 45 (lines 9-23).

The effect of such admissions, whether the admitted "bait and switch" conduct was negligent, reckless, or intentional, committed by her Bank, the F.D.I.C., TPAM, AGFLEP, SFR, LCP, Engle, and/or Mutz, the failure to now acknowledge that the Debtor's loans were not in default is controlled as a matter of state law by the decision of the Hawaii Supreme Court in Hawaii Community Federal Credit Union v. Keka, 94 Haw. 213, 11 P.3d 1 (2000), a copy of which is set forth in Exhibit 11 for the convenience of the Court, holding that such bait-and-switch loan situations nevertheless attempted to be enforced constitute both unfair and deceptive business practices as well as common law fraud.

A unanimous Hawaii Supreme Court explained the stringent requirements of Hawaii's unfair and deceptive practice laws in Keka, 94 Haw. 213, 16-17, 11 P.3d 1 (2000), as follows:

> "HRS Section 480-2, as its federal counterpart in the FTC Act, was constructed in broad language in order to constitute a flexible tool to stop and prevent fraudulent, unfair or deceptive business practices for the protection of both consumers and honest business [persons]." *Ai v. Frank Huff Agency, Ltd.*, 61 Haw. 607, 616, 607 P.2d 1304, 1311 (1980) (footnote omitted).
>
> "[A] practice is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Rosa* [*v. Johnston*] 3 Haw. App. at 427, 651 P.2d at 1234. . . .
>
> Our consumer protection statute is remedial in nature and must be liberally construed in order to accomplish the purpose for which it was enacted.

The relevant parts of the Keka decision are set forth, yellow-highlighted, in Exhibit 11, pages 14-18.

Chief Judge Mollway of our District Court similarly recognized in Kajitani v .Downey Savings and Loan Association, F.A., 647 F. Supp. 2d 1208, 1219 (2008), that Keka is controlling in UDAP mortgage situations, accepting the simple definition of "common law fraud" set forth in Keka, 94 Haw. at 230, embedded and to be applied in such UDAP bait-and-switch schemes, as fully met here:

> A claim of common law fraud under Hawaii law requires: "(1) a representation of a material fact, (2) made for the purpose of inducing the other party to act, (3) known to be false but reasonable believed true by the other party, and (4) upon which the other party relies to [his or her] damage."

Pursuant to Section 480-2 of the Hawaii Revised Statutes, "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful."

And a deceptive act or practice is defined as "(1) a representation, omission, or practice that (2) is likely to mislead consumers acting reasonably under the circumstances where (3) the representation, omission, or practice is material." Courbat v. Dahana Ranch, Inc., 111 Hawaii 254, 262, 141 P.3d 427, 435 (2006) (citation and original brackets omitted).

The situation here is even worse, as the fraud here has continued and combined with the deception as to ownership of the Debtor's mortgage loans has been also perpetrated against this Court.

Courts, both state and federal, have inherent power to punish contempt of court committed in its presence and to regulate attorneys who come before it.

The documented fraud committed on this Court requires the relief requested in this Motion as well as sanctions, Kawamata Farms v. United Agri Products, 86 Haw.

214, 256-257, 948 P.2d 1055 (1997) ("fraud, misrepresentation, and circumvention used to obtain a judgment are generally regarded as sufficient cause for the opening or vacating of the judgment," quoting approvingly from Southwest Slopes, Inc. v. Lum, 81 Haw. 501, 511, 918 P.2d 1157 (App. 1996), and in Matsuura v. E.I. du Pont de Nemours and Co., 102 Haw. 149, 157-158, 73 P.3d 687 (2003) ("HRCP Rule 60(b)(3) . . . reflects this court's preference for judgments on the merits over finality of judgments procured through fraud"); Dwight v. Ichiyama, 24 Haw. 193, 195 (1918) ("courts should be prompt to set aside a verdict which has been secured by corrupt or improper acts of the successful party, and this, not only in the interest of an honest and proper administration of justice, but also by way of punishment to the wrongdoer").

The need for redressing such "fraud upon the court" was succinctly explained by Justice Black in Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944), a case similarly involving false representations to a federal court: "[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public."

3. Additional Mistakes In This Court's 2013 Orders Also Requires Correction.

A Trustee is entitled to use a defense to its fullest extent, without preventing the Debtor from raising the same defense however if later sued on the same claim, 11 U.S.C. § 558, yet this Court's May 23, 2013 approval of the settlement with LCP (Exhibit 2, Section 2.2), nevertheless makes it appear that "all claims, defenses and causes of action of the Trustee and Debtor's Estate against the Lender" are settled, making it

appear that the Debtor in the Foreclosure Case cannot assert any of her defenses to foreclosure, such as lack of Plaintiff's standing or not having been in default or fraud.

The Trustee's right to assert the Debtor's defenses differs from the debtor's causes of action as a matter of federal law. A cause of action is an asset of the estate to be used as the Trustee sees fit. But defenses can be raised by both the Debtor and the Trustee. Nothing that may have occurred in the Debtor's bankruptcy case, including any settlement of her claims, bars her from using her defenses to foreclosure in State Court, including the D'Oench, Duhme doctrine.

See, e.g., the summaries of federal bankruptcy law and applicable Hawaii case law set forth in Exhibits 12 through 17, yellow-highlighted for the convenience of the Court, as the Debtor seeks to have her mortgage loans declared unenforceable as a defense to foreclosure, without the ambiguous language this Court's Order precluding any such defenses.

It is, moreover, no bar to suggest that since the F.D.I.C. took over the Bank of Lincolnwood, the Debtor has in that way nevertheless lost her defenses to foreclosure as she would supposedly have to exhaust her federal administrative remedies first pursuant to the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA").

In Bolduc v. Beal Bank, SSB, 994 F. Supp. 82 (D.C. N.H. 1998), *remanded on other grounds*, Bolduc v. Beal Bank, SSB, 167 F.3d 667 (1st Cir. 1998), for instance, the First Circuit Court of Appeals joined four other Courts of Appeals in holding that affirmative defenses are not subject to the F.D.I.C.'s administrative exhaustion requirements where the claim is instituted in defense of foreclosure, a result that earlier

and to this day has also been the controlling position of our Ninth Circuit Court of Appeals, Resolution Trust Corporation v. Midwest Federal Savings Bank of Minot, 36 F.3d 785, 793 (9th Cir. 1994):

> RTC argues the district court lacked subject matter jurisdiction to adjudicate Orangegate's "counterclaim" for reformation. Specifically, RTC contends Orangegate should have exhausted its administrative remedies under 12 U.S.C. § 1821(d) prior to bringing its counterclaim in federal district court. The existence of subject matter jurisdiction is a question of law we review de novo. *DeNieva v. Reyes,* 966 F.2d 480, 482 n. 1 (9th Cir. 1992).
>
> Section 1823(d)(13)(D) provides:
>
> Limitation on judicial review. Except as otherwise provided in this subsection, no courts shall have jurisdiction over-
>
> (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation *791 has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or
>
> (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.
>
> 12 U.S.C. § 1823(d)(13)(D).
>
> This section was enacted as part of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821(d). FIRREA clearly applies to the RTC: "the RTC has 'the same powers and rights to carry out its duties with respect to [depository institutions insured by the FSLIC] as the [FDIC] has under ... [12 U.S.C.A. §§ 1821, 1822, and 1823]....' (12 U.S.C. § 1441a[b] [4])." *Circle Indus. v. City Federal Savings Bank,* 749 F.Supp. 447, 451 (E.D.N.Y. 1990), *aff'd,* 931 F.2d 7 (2d Cir. 1991).
>
> FIRREA "grants the [RTC], as receiver, broad powers to determine claims asserted against failed banks. 12 U.S.C. § 1821(d)(3)(A)." *Henderson v. Bank of New England,* 986 F.2d 319, 320 (9th Cir. 1993). As part of this claims process, claims against the failed financial institutions must be filed first with the receiver, in this case the RTC. *Id.* "If the claim is disallowed, or if the 180 days expire without a determination by the [RTC], then the claimant may request further administrative consideration of the claim, or seek judicial review. 12 U.S.C. § 1821(d)(6)." *Id.*

FIRREA not only created this claims procedure, but also required its exhaustion prior to granting jurisdiction to the district courts over those claims. *Abbott Bldg. Corp., Inc. v. United States,* 951 F.2d 191, 194 n. 3 (9th Cir. 1991). The Ninth Circuit recently explained the jurisdictional limitations created by FIRREA:

> [FIRREA] contains no provision granting federal jurisdiction to claims filed after a receiver is appointed but before administrative exhaustion. Section 1821(d)(13)(D) strips all courts of jurisdiction over claims made outside the administrative procedures of section 1821....
>
> A claimant must therefore first complete the claims process before seeking judicial review. The statute bars judicial review of any non-exhausted claim, monetary or nonmonetary, which is "susceptible of resolution through the claims procedure."
>
> *Henderson,* 986 F.2d at 320-21. (citations and quotations omitted).

Under *Henderson,* therefore, claims against a failed savings and loan first must be presented to the RTC through the administrative procedures established in FIRREA. Nevertheless, Orangegate contends the district court did have subject matter jurisdiction over its counterclaim for reformation, because a counterclaim for reformation is not the type of claim for monetary relief envisioned by the administrative review procedures set forth in FIRREA. Having reviewed both § 1821(d)(13)(D) and the nature of Orangegate's counterclaim, we agree the district court properly exercised subject matter jurisdiction in this case.

First, we note the fact that Orangegate's response to RTC's complaint was labeled a "Counterclaim." We agree, however, with other courts that § 1821(d)(13)(D) divests the district courts of jurisdiction over both claims and counterclaims against the RTC until the claimants have exhausted the administrative procedures created by FIRREA. *See, e.g., RTC v. Mustang Partners,* 946 F.2d 103, 106 (10th Cir. 1991). Therefore, the fact that the pleading was labeled a counterclaim does not avoid the jurisdictional limitations imposed by FIRREA.

Although Orangegate's response is labeled as a "counterclaim," we conclude a better description of the reformation claim is "affirmative defense." Here, Orangegate is attempting to defend itself from personal liability on the note by asserting the defense of mutual mistake. Mutual mistake consistently has been recognized as an affirmative defense, *see Local Joint Exec. Bd. of Spokane v. Spokane Lodge No. 228,* 443 F.2d 403, 404 (9th Cir. 1971), one

which is waived if not included in a party's first response to an opponent's pleading. Fed.R.Civ.P. 8(c); *see Landmark Bank of St. Charles County v. Saettele,* 784 F.Supp. 1434, 1440 (E.D.Mo. 1992) (holding defendant waived his defense of mutual mistake by failing to raise that *792 affirmative defense in answer to complaint). We further note that Fed.R.Civ.P. 8(c) allows the court to treat the pleading as an affirmative defense rather than a counterclaim "if justice so desires." We conclude that in this case justice requires us to treat Orangegate's "Counterclaim" as an affirmative defense of mutual mistake.

In many courts, labelling Orangegate's claim for reformation as an affirmative defense rather than a counterclaim would not change the outcome. These courts have held § 1821(d)(13)(D) divests courts of jurisdiction over both counterclaims and affirmative defenses asserted in response to a complaint brought by RTC until the appropriate administrative remedies are exhausted. For example, in *RTC v. Youngblood,* 807 F.Supp. 765 (N.D.Ga. 1992), the district court refused to exercise jurisdiction over the affirmative defenses of indemnification and set-off:

[T]hese affirmative defenses are in reality claims against the assets of the failed financial institution and therefore come under the language of 12 U.S.C. § 1821(d)(13)(D), which removes such claims from the jurisdiction of the court until such time as the administrative claims process has been completed. As the administrative process has not been completed, the court lacks jurisdiction to hear these issues, regardless of whether they are couched in terms of counterclaim or affirmative defense.

Youngblood, 807 F.Supp. at 770. *See also RTC v. Scaletty,* 810 F.Supp. 1505 (D.Kan. 1992); *Talmo v. FDIC,* 782 F.Supp. 1538, 1542 (S.D.Fla. 1991).

Other courts, however, have distinguished between counterclaims and affirmative defenses, and have exercised jurisdiction over affirmative defenses even though the proper administrative procedures had not yet been exhausted. *See RTC v. Conner,* 817 F.Supp. 98 (W.D.Okla. 1993); *RTC v. Ryan,* 801 F.Supp. 1545, 1555-56 (S.D.Miss. 1992); *FDIC v. Vernon Real Estate Invs., Ltd.,* 798 F.Supp. 1009, 1014 (S.D.N.Y. 1992). The district court in *Conner* provides particularly persuasive reasoning behind its holding that § 1821(d)(13)(D) does not divest the district court of jurisdiction over affirmative defenses:

> This Court's review of the provisions in Section 1821(d) governing the administrative claims process and the apparent relationship between that procedure and the divestiture of

jurisdiction in Section 1821(d)(13)(D) enriches and reinforces this Court's understanding of the terms "claim" and "action" as used in Section 1821(d)(13)(D). Although "claim" and "action" are not defined in Section 1812(d) or elsewhere in FIRREA, Section 1821(d) does make reference to *creditors* of the depository institution, claims by creditors and claims of security, preference or priority. *See* 12 U.S.C. 1821(d)(3)(B) & (C); 12 U.S.C. § 1821(d)(5)(D). Nowhere is the term "defense" or "potential defense" used. Indeed, the usage of the terms "claim" and "action" in other provisions of Section 1821(d) negates any inference that those terms as used therein include and encompass "defenses." The receiver is not required to publish or mail any notices for presentment of claims except to *creditors* of the depository institution. 12 U.S.C. § 1821(d)(3)(B) & (C).

The interpretation of Section 1821(d)(13)(D) urged by the RTC and adopted by [other courts] would require parties such as Defendants who are not creditors of a failed depository institution and do not receive statutory notice of the requirement of and deadline for filing claims, who have no independent basis for bringing an action against the RTC and against whom the RTC has not brought suit, to present to the RTC as receiver any potential defenses that they might have to claims that the RTC as receiver or in its corporate capacity might one day assert against them, which are as yet unknown, and proof thereof. In summary, the rest of subsection d of Section 1821 gives the Court no reason to think that Section 1821(d)(13)(D) does not mean what it says. In fact, it so underscores what the Court finds is the plain meaning of § 1821(d)(13)(D) that if § 1821(d)(13)(D) were determined to be ambiguous, reference to the statute as a whole would nevertheless compel the conclusion that "claim" *793 and "action" as used therein do not encompass affirmative defenses. Finally, the Court's consideration of subsection d of Section 1821 in its entirety leads the Court to conclude that even if the plain language of § 1821(d)(13)(D) were read or understood to include affirmative defenses, an exception to the plain meaning rule of statutory construction would apply because such a literal application of the statute would produce a result demonstrably at odds with the intention of the drafters evidenced in the remainder of Section 1821(d), and would lead to the "patently absurd consequence" of requiring presentment and proof to the RTC of all potential affirmative defenses that might be asserted in response to unknown and unasserted claims or actions by the RTC.

Conner, 817 F.Supp. at 101-02 (footnote and citations omitted).

> Having reviewed the reasoning behind the holdings on both side of the debate, we are persuaded that § 1821(d)(13)(D) does not divest a district court of jurisdiction over an affirmative defense such as mutual mistake. Therefore, we adopt the reasoning in *Conner,* and hold that a district court has subject matter jurisdiction over affirmative defenses raised by a defendant who, prior to being sued by the RTC, was not a creditor of the RTC and who had no independent basis for filing a claim against the RTC, even though the defendant had not exhausted the administrative procedures established by FIRREA.
>
> Applying this rule to the instant case, we conclude Orangegate was not a creditor of MFS and had no independent basis for bringing an action against the RTC. Therefore, we hold the district court did have subject matter jurisdiction over Orangegate's affirmative defense of mutual mistake. By so holding, we avoid the "patently absurd consequence" of requiring Orangegate to file as administrative claims all potential affirmative defenses which might be asserted in response to unknown and unasserted claims by the RTC.

Otherwise, this Bankruptcy Court would be enforcing state foreclosure laws that state law considered to be void, producing a contradictory and ridiculous result.

4. Lender's Attorneys Should Be Held Accountable For Ownership Mistakes.

As a result of widely publicized and eventually openly admitted lender abuses in mortgage foreclosure cases nationwide, and in particular the widespread submission of false notes, mortgages, and mortgage assignments in state and federal courts, fraudulently claiming ownership of loans, the Hawaii State Legislature last year joined the vast majority of jurisdictions in the United States with the passage of HRS Section 667-17 effecting all ongoing judicial foreclosure cases, requiring "Attorney Affirmations" of loan ownership upon personal firsthand knowledge be filed in all mortgage cases before summary judgment can be granted, explaining such need in these explicit terms, *ibid*:

> During and after August 2010, numerous and widespread insufficiencies in foreclosure filings in various courts around the nation were reported by major mortgage lenders and other authorities, including failure to review documents and files to establish standing and other foreclosure requisites; filing of notarized affidavits that falsely attest to such review and to other critical facts in the foreclosure process; and "robosignature" of documents.

See also HRS Section 667-18: "An attorney who files a complaint in a mortgage foreclosure action shall affirm in writing, under penalty of perjury, that to the best of the attorney's knowledge, information, and belief the allegations contained in the complaint are warranted by existing law and have evidentiary support."

Lender's counsel both here and in the Foreclosure Case affirmed LCP's erroneous ownership rights providing merely hearsay that that is what they were told by their client's representative, but their client's representative, Jacob Mutz, reportedly of LCP-Maui, LLC, had and has absolutely no personal knowledge of any of the transactions between the Bank of Lincolnwood and the Debtor, including their execution and their notarization, and can hardly verify therefore the accuracy of the Debtor's alleged default, for instance, as they nor LCP were even involved in the subject loans or a party thereto when consummated or administered.

This Bankruptcy Court, it is respectfully submitted, needs urgently to place similar responsibility upon lender's attorneys appearing before it as has been imposed in State Court, requiring lender's attorneys to authenticate the chain of title of mortgages and notes before turning our Courts into collection agencies for crooks.

C. Conclusion

For all of the above reasons, this Court should grant Debtor's Motion (1) To Set Aside And Vacate May 23, 2013 "Order Granting Trustee's Motion To Approve Settlement And Release Agreement With LCP-Maui, LLC," (2) To Set Aside And Vacate May 24, 2013 "Stipulated Order Terminating The Automatic Stay (Property Of The Estate)," (3) To Reimpose Stay, Enjoining The Foreclosure Proceedings In Civil No. 12-1-0462(3) In The Circuit Court Of The Second Circuit, State Of Hawaii, and (4) For An Order Directing The State Court-Appointed Receiver To Turn Over To The Estate Trustee Funds Of The Estate, Based On Bankruptcy Fraud Waged Against The Court, The Estate Trustee, And The Debtor; (5) For Leave To Conduct Further Discovery; and (6) For An Award Of Attorneys' Fees And Costs In Its Entirety.

The relief requested is urgently needed, as the Honorable Joseph E. Cardoza on Wednesday, December 18, 2013, orally granted LCP's motion for summary judgment in the Foreclosure Action based upon this Bankruptcy Court's earlier erroneous findings procured by LCP's earlier fraudulent filings here.

DATED: Honolulu, Hawaii, December 19, 2013.

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Appearing Attorneys for
Debtor Amanda Dawn Tucker

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF HAWAII

In re AMANDA D. TUCKER, Debtor.	CASE NO. 12-02052 RJF (Chapter 7) DECLARATION OF COUNSEL IN SUPPORT OF MOTION (1) TO SET ASIDE AND VACATE MAY 23, 2013 "ORDER GRANTING TRUSTEE'S MOTION TO APPROVE SETTLEMENT AND RELEASE AGREEMENT WITH LCP-MAUI, LLC," (2) TO SET ASIDE AND VACATE MAY 24, 2013 "STIPULATED ORDER TERMINATING THE AUTOMATIC STAY (PROPERTY OF THE ESTATE)," (3) TO REIMPOSE STAY, ENJOINING THE FORECLOSURE PROCEEDINGS IN CIVIL NO. 12-1-0462(3) IN THE CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAII, AND (4) FOR AN ORDER DIRECTING THE STATE COURT-APPOINTED RECEIVER TO TURN OVER TO THE ESTATE TRUSTEE FUNDS OF THE ESTATE, BASED ON BANKRUPTCY FRAUD WAGED AGAINST THE COURT, THE ESTATE TRUSTEE, AND THE DEBTOR; (5) FOR LEAVE TO CONDUCT FURTHER DISCOVERY; AND (6) FOR AN AWARD OF ATTORNEYS' FEES AND COSTS; EXHIBITS 1 THROUGH 17

DECLARATION OF COUNSEL IN SUPPORT OF MOTION (1) TO SET ASIDE AND VACATE MAY 23, 2013 "ORDER GRANTING TRUSTEE'S MOTION TO APPROVE SETTLEMENT AND RELEASE AGREEMENT WITH LCP-MAUI, LLC," (2) TO SET ASIDE AND VACATE MAY 24, 2013 "STIPULATED ORDER TERMINATING THE AUTOMATIC STAY (PROPERTY OF THE ESTATE)," (3) TO REIMPOSE STAY, ENJOINING THE FORECLOSURE PROCEEDINGS IN CIVIL NO. 12-1-0462(3) IN THE CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAII, AND (4) FOR AN ORDER DIRECTING THE STATE COURT- APPOINTED RECEIVER TO TURN OVER TO THE ESTATE TRUSTEE FUNDS OF THE ESTATE, BASED ON BANKRUPTCY FRAUD WAGED AGAINST THE COURT, THE ESTATE TRUSTEE, AND THE DEBTOR; (5) FOR LEAVE TO CONDUCT FURTHER DISCOVERY; AND (6) FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

I, GARY VICTOR DUBIN, DECLARE:

1. I am admitted to practice law in the Bankruptcy Court for the District of Hawaii, and I make the within statements based upon my own personal firsthand knowledge.

2. My law firm represents Defendant Amanda Dawn Tucker, the principal borrower Defendant in a related foreclosure action in the Second Circuit Court, Civil No. 12-1-0462(3) ("Foreclosure Case"), and is now entering its appearance as counsel for Debtor Amanda Dawn Tucker in these proceedings for the purpose of bringing this Motion.

3. Exhibits 1 through 3 attached hereto contain true and correct copies of documents filed in this case as noted therein, of which this Court may take judicial notice.

4. Exhibits 4 and 5 attached hereto (yellow-highlighted) respectively contain correspondence between the Debtor and LCP and the F.D.I.C. (Craig Weatherwax) that has been authenticated in the Foreclosure Case.

5. Exhibits 6 through 8 attached hereto (yellow-highlighted) contain screenshots which I took myself on my office computer which each accurately reflect the content and

image of the pages on my office computer from which the printouts were made and are admissible as evidence in federal courts in the Ninth Circuit and elsewhere:

a. Federal courts allow screenshots to be authenticated by accurate eye-witness representations of what was downloaded, Ksolo, Inc. v. Catona, 2008 WL 4906115 (C.D. Cal.).

b. A proper foundation is laid for screen shots where there is an authenticating declaration attesting to its origin based on personal knowledge stating that the printout accurately reflects content and image of the page on the computer from which the printout was made, Toytrackerz LLC v. Koehler, 2008 WL 2591329 (D. Kan.).

c. With regard to computer printouts, only a *prima facie* showing of authenticity is required by sufficient proof that a reasonable trier of fact could find in favor of authenticity or identification, whereas any question as to the accuracy of the printouts would affect only the weight of the printouts and not their admissibility, U.S. v. Tank, 200 F.3d 627 (9th Cir. 2000); and

d. Evidence Rule 901(b)(4) permits authentication of electronic communications based on content and circumstances, the burden of proof for such authentication being slight; *see* Griffin v. Maryland, 192 Md. App. 518, 995 A.2d 791 (2010).

6. Exhibit 9 attached hereto contains a judicial admission by LCP-Maui, LLC, explaining how the F.D.I.C. subs out receivership property, proving that LCP-Maui, LLC has fraudulently misrepresent itself under oath to this Court and that it is a mere servicer with no ownership rights except for sham mortgage assignments.

7. On July 8, 2013, I personally took the deposition of Mr. Engle, a true and correct copy of the official transcript of which is set forth in Exhibit 10 attached hereto (yellow-highlighted).

8. The balance of the Exhibits – Exhibits 11 through 17 – are true and correct copies of pages from authoritative treatises and judicial opinions (yellow-highlighted), referenced in these motion papers and attached hereto for the convenience of the Court.

9. The relief requested is urgently needed, as the Honorable Joseph E. Cardoza on Wednesday, December 18, 2013, orally granted LCP's motion for summary judgment in the Foreclosure Action based upon this Bankruptcy Court's earlier erroneous findings procured by LCP's earlier fraudulent filings here.

I declare under penalty of law that the foregoing is true and correct. Executed at Honolulu, Hawaii, on December 19, 2013.

GARY VICTOR DUBIN