



**In The Circuit Court of Jackson County, Missouri
AT KANSAS CITY**

JOHN and JEANETTE SCHWARTZ,)	
et al.,)	
)	
<i>Plaintiffs,</i>)	Case No's: 00 CV 226639
)	00 CV 226639-01
v.)	00 CV 226639-02
)	00 CV 226639-03
BANN-COR MORTGAGE, et al.,)	
)	Division 14
<i>Defendants.</i>)	

**SPECIAL MASTER’S ORDER ON PLAINTIFFS’ MOTION FOR
PARTIAL SUMMARY JUDGMENT – VIOLATION OF MSMLA**

In accordance with the Order Appointing Special Master, I issue my report on Plaintiffs’ Motion for Partial Summary Judgment. Before drafting this report, I have considered the following:

- 1) Plaintiffs’ Motion for Partial Summary Judgment – Violation of MSMLA, filed January 26, 2009;
- 2) Suggestions in Support of Plaintiffs’ Motion for Partial Summary Judgment – Violation of MSMLA, filed January 26, 2009;
- 3) Plaintiffs’ Statement of Uncontroverted Material Facts, filed January 26, 2009;
- 4) HomeEq Defendants’ Response to Plaintiffs’ Statement of Uncontroverted Material Facts, filed February 25, 2009;
- 5) HomeEq Defendants’ Suggestions in Opposition to Plaintiffs’ Motion for Partial Summary Judgment – Violation of MSMLA, filed February 25, 2009;
- 6) Plaintiffs’ Response to the TMS Defendants’ Statement of Additional Material “Facts” and Plaintiffs’ Rule 74.04(c)(3) Statement of Additional Material Facts, filed March 13, 2009;
- 7) Reply Memorandum Explaining Why Plaintiffs’ Motion for Partial Summary Judgment Should Be Granted, filed March 13, 2009.
- 8) Plaintiffs’ Proposed Special Masters Report forwarded on April 3, 2009.

9) Defendants' Proposed Special Master Report received April 8, 2009

I have also studied the exhibits submitted by counsel. In addition, I have researched and reviewed the applicable law.

OVERVIEW

In this class action lawsuit, Plaintiffs allege that Defendants contracted for, charged and received closing costs or settlement fees allegedly prohibited under the Missouri Second Mortgage Act ("MSMLA"), §§ 408.231 RSMo *et seq.* Here, the Plaintiffs are requesting the Special Master to grant summary judgment holding that:

1. The 51 junior or "second" mortgage loans that the named Plaintiffs and each of the class members obtained from Bann-Cor were subject to the Missouri Second Mortgage Loan Act.
2. Bann-Cor violated the MSMLA, § 408.233.1 RSMo, when it made the named Plaintiffs' second mortgage loan by directly or indirectly "charging", "contracting for" and/or "receiving" any one or more of the following fees or settlement charges in connection with the loan:
 - a. The \$75.00 Inspection Fee disclosed on line 805 of the Settlement Statement.
 - b. The \$500.00 Underwriting Fee disclosed on line 810 of the Settlement Statement.
 - c. The \$595.00 CJ Processing Fee disclosed on line 808 of the Settlement Statement.
 - d. The \$171.00 Settlement or Closing Fee disclosed on line 1101 of the Settlement Statement.
3. Defendant The Money Store also violated the MSMLA, § 408.233.1 RSMo, when the named Plaintiffs' loan was made by "directly or

indirectly” “charging,” “contracting for” and/or “receiving” the following fee or settlement charge in connection with the loan:

- a. The \$75.00 Inspection Fee disclosed on line 805 of the Settlement Statement.

The Special Master is by this report, rejecting the plaintiffs’ request for oral argument because of the proximity of the trial date, May 11, 2009.

Plaintiffs now request that the Court to enter partial summary judgment in their favor and to hold that: (1) The MSMLA applies to the named Plaintiffs’ second mortgage loan and each of the 51 other Missouri second mortgage loans that were made during the relevant period using the same Missouri-form loan documents; (2) Bann-Cor violated the MSMLA, § 408.233.1 RSMo, by directly or indirectly “charging”, “contracting for” and/or “receiving” any one or more of four (4) different loan fees in connection with the Named Plaintiffs’ loan, and the loans of all similarly situated members of the Class; and (3) the TMS Defendants¹ violated the MSMLA, § 408.233.1 RSMo, by directly or indirectly “charging”, “contracting for” and/or “receiving” the \$75.00 Inspection Fee in connection with the loans.

DISCUSSION

I. Standard for Summary Judgment

Pursuant to V.A.M.R. § 74.04, summary judgment is appropriate “if” the motion, the response, the reply and the sur-reply show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter

¹ The TMS Defendants are: (1) TMS Mortgage, Inc. (a/k/a as HomEq Servicing Corporation, n/k/a Wachovia Equity Servicing, LLC); and (2) The Money Store, LLC (f/k/a The Money Store, Inc.) The TMS Defendants are referred to individually and collective in this brief as the “TMS Defendants,” or simply, “TMS.”

of law” V.A.M.R. § 74.04, *see also ITT Commercial Federal Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. En Banc 1993). The purpose of summary judgment under Missouri law is to identify cases in which there is no genuine dispute as to the facts and facts as admitted show legal right to judgment for movant. Claimant seeking summary judgment must establish that there is no genuine dispute as to material facts upon which “claimant” would have the burden of persuasion at trial. *See ITT Commercial*, 854 S.W.2d, at 371. *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253-54 (1986), *Matsushita Elec. Ind. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

Plaintiffs contend that the 52 loans made by Defendant Bann-Cor to the named Plaintiffs and the other members of the certified class were “Second Mortgage Loans” under the MSMLA and were governed thereby. With regard to the Schwartzes’ loan, Plaintiffs further contend that Bann-Cor violated the MSMLA in “charging”, “contracting for” and/or “receiving” the following fees as reflected by HUD-1A Settlement Statement:

- (1) a \$75.00 Inspection Fee;
- (2) a \$595.00 Processing Fee;
- (3) a \$500.00 Underwriting Fee; and
- (4) a \$171.00 Settlement or Closing Fee.

Plaintiffs contend that such fees cannot be charged, contracted for, or received, because such fees do not fall within the list of permissible charges enumerated in § 408.233.1 RSMo.

Plaintiffs further assert in their motion for partial summary judgment that the TMS Defendants independently violated the MSMLA, § 408.233.1, by indirectly or directly “charging”, “contracting for” and/or “receiving” the \$75.00 Inspection Fee. Although Plaintiffs contend that the TMS Defendants independently violated MSMLA § 408.233.1 RSMo by directly or indirectly “charging”, “contracting for” and/or “receiving” one or more loan fees or settlement charges not enumerated in § 408.233.1 RSMo. Plaintiffs have only moved for summary judgment as to the TMS Defendants’ direct or indirect violation with respect to the Inspection Fee. Again, Plaintiffs contend that the Inspection Fee cannot be “charged”, “contracted for” and/or “received”, because it does not fall within the list of permissible charges enumerated in § 408.233.1.

While the TMS Defendants do not contest Plaintiffs’ contention that the 52 loans made to the Schwartzes and the other members of the TMS Class are Second Mortgage Loans under the MSMLA (*see HomEq Defendants’ Suggestions in Opposition to Plaintiffs Motion for Partial Summary Judgment – Violation of MSMLA, p.5 fn. 2*), the TMS Defendants contend that partial summary judgment in favor of Plaintiffs is not warranted. The TMS Defendants argue that Plaintiffs’ Motion for Partial Summary Judgment – Violation of MSMLA should be denied for several reasons.

First, the TMS Defendants contend that the MSMLA permits fees beyond those specifically enumerated by § 408.233.1(3). Second, the TMS Defendants further contend that Plaintiffs, in relying upon one of the Schwartzes’ HUD-1A Settlement Statements, have not provided evidence that any of the Plaintiffs’ loans violated the MSMLA. As part of this particular argument, the TMS Defendants

contend the following: (1) the HUD-1A Settlement Statement relied upon by the Schwartzes is one of three different HUD-1A Settlement Statements produced in this lawsuit and that there is an issue of fact as to which of the three HUD-1A Settlement Statements is the actual HUD-1A Settlement Statement for the loan; (2) the Schwartzes have failed to provide competent evidence showing the types of challenged fees allegedly charged to each member of the class, the services rendered in exchange for each challenged fee, and whether or not the challenged fees were paid to a third-party, because the Court must conduct a detailed factual analysis of each fee charged to each class member in order to determine a class-wide violation of the MSMLA; (3) the Schwartzes have failed to provide evidence that the challenged fees were not “bona fide” and not “paid to third parties” since the MSMLA permits the charging of fees that are “bona fide” and “paid to third parties”; and (4) the HUD-1A Settlement Statement constitutes inadmissible hearsay. Third, the TMS Defendants contend that they did not directly or indirectly “charge”, “contract for” and/or “receive” any of the challenged fees. Fourth, the TMS Defendants contend that the voluntary payment doctrine precludes the entry of partial summary judgment. Fifth, the TMS Defendants contend that they are holders in due course and cannot be held liable for Bann-Cor’s violations of the MSMLA on any non-HOEPA loans.

The MSMLA is a consumer protection statute. *Avila v. Community Bank of Northern Virginia*, 143 S.W.3d 1, 4 (Mo. App. 2003). The statute must be liberally construed to protect the consumer. The purpose of the MSMLA is to permit a lender to charge an exceptionally high rate of interest that would otherwise be usurious. § 408.232. However, the MSMLA prohibits any entity from directly or indirectly

“charging”, “contracting for” and/or “receiving” any fee except those permitted by the statute.

II. Plaintiffs junior or “second” mortgage loans that the named Plaintiffs and each of the Class members obtained from Bann-Cor were subject to the Missouri Second Mortgage Loans Act.

The material facts of this case, in addition to Defendants’ recent Supplemental Responses to Plaintiffs’ Request for Admissions demonstrate that the loans at issue in this suit are most certainly loans that qualify as “second” mortgage loans under the MSMLA. As this issue is effectively unchallenged by the Supplemental Responses to Plaintiffs’ Request for Admissions, no further analysis is required for the Special Master to determine that as a matter of law, Plaintiffs are entitled to the conclusion that the loans made to Plaintiffs are loans under the MSMLA to which the MSMLA applies.

III. The loans made by Bann-Cor were “Consumer” loans as defined by § 408.015(2) RSMo.

Plaintiffs are entitled to a finding that the loans made by Bann-Cor were “consumer” loans as defined by § 408.015(2) RSMo. Plaintiffs, in their Motion, set forth arguments evidencing that Bann-Cor’s compliance with the Real Estate Settlement Procedures Act (“RESPA”) and that Bann-Cor and The Money Store made only “consumer” loans in Missouri. Defendants’ Response to the Motion for Summary Judgment did not challenge this assertion. Therefore, given the evidence and arguments by Plaintiff and Defendants’ choice not to provide argument on the matter, Plaintiffs are entitled to a determination that their loan was a “consumer” loan as defined by § 408.015(2) RSMo.

IV. Bann-Cor violated the MSMLA when it “charged”, “contracted for” and/or “received” certain fees in connection with the named Plaintiffs’ second mortgage loan.

The material facts and law set forth by Plaintiffs set forth that they are entitled to judgment as a matter of law on the issue of whether certain Bann-Cor fees “charged”, “contracted for” and/or “received” in connection with their second mortgage loan violated the MSMLA. Section 408.233 RSMo of the Missouri Second Mortgage Loans Act states in pertinent part

1. *No charge other than that permitted by section 408.232 shall be directly or indirectly “charged”, “contracted for” and/or “received” in connection with any second mortgage loan, except as provided in this section;*

(1) Fees and charges prescribed by law actually and necessarily paid to public officials for perfecting, releasing, or satisfying a security interest related to the second mortgage loan;

(2) Taxes;

(3) *Bona fide closing costs paid to third parties, which shall include:*

(a) Fees or premiums for title examination, title insurance or similar purposes including survey;

(b) Fees for preparation of a deed, settlement statement, or other documents;

(c) Fees for notarizing deeds and other documents;

(d) Appraisal fees; and

(e) Fees for credit reports;

(4) Charges for insurance as described in subsection 2 of this section;

(5) A nonrefundable origination fee not to exceed five percent of the principal which may be used by the lender to reduce the rate on a second mortgage loan;

(6) Any amounts paid to the lender by any person, corporation or entity, other than the borrower, to reduce the rate on a second mortgage loan or to assist the borrower in qualifying for the loan;

(7) For revolving loans, an annual fee not to exceed fifty dollars may be assessed.

(Emphasis added)

Plaintiffs claim that four of the fees collected by Bann-Cor are specifically disallowed under the MSMLA. Defendant Bann-Cor², however, argues that the MSMLA, while specifically enumerating certain fees that can be collected in conjunction with a second mortgage, does not limit collection of fees only to those specifically identified.

In order to resolve the dispute as to what fees can and cannot be collected under the MSMLA one must look to the plain language of the statute. Courts may not "read into a statute a legislative intent contrary to the intent made evident by the plain language" *Keeney v. Hereford Concrete Prods., Inc.*, 911 S.W.2d 622 (Mo. banc 1995). When statutory language is clear, courts must give effect to the language as written. "*M.A.B. v. Nicely*, 909 S.W.2d 669, 672 (Mo. banc 1995). The Court cannot look to rules of construction if the statute contains no ambiguity. *Bosworth v. Sewell*, 918 S.W.2d 773, 777 (Mo. banc 1996).

Bann-Cor attacks Plaintiffs interpretation of § 408.233, especially their position that the only fees that can be collected are specifically enumerated by the statute. Bann-Cor argues that the term "include" is one of enlargement, not one of limitation as claimed by Plaintiffs. Bann-Cor unfortunately chose to completely misrepresent a holding in a recent Missouri Court of Appeal case. Bann-Cor argues that *State of Missouri ex rel Nixon v. Estes* stands for the proposition that "the term 'include' is used by the legislature as a 'term of enlargement, rather than of limitation.'" 108 S.W.3d 795, 800 (Mo.App. 2003). Unfortunately, Bann-Cor decided to remove a few rather important words from the Court's holding in *Nixon*,

² Bann-Cor properly asserts that that three similar cases (*McClellan*, *Mitchell* and *Towsley*) cited by Plaintiffs in their Motion for Partial Summary Judgment are not binding upon this Court, consequently, the Special Master has not considered the facts and holdings in those cases.

the complete holding of the Court is “while the plain meaning of the word ‘include’ may vary according to its context in a statute, it is ordinarily used as a term of enlargement, rather than a term of limitation. (Emphasis added). *Id.* While “include” may ordinarily be used as a work of enlargement, it most certainly can be a term of limitation, especially when immediately prefaced with the mandatory term “shall.”

The plain and ordinary language of the statute most certainly sets out, with specificity, what fees can be charged to consumers in connection with a loan within the MSMLA. If the legislature intended the list of fees to not be exhaustive, it could have added “but not limited to” after the word “include” or “may” before “include.” The statutory language is clear that only the five specific “closing costs” are permitted; any other type of loan fee is per se illegal. Avila, 143 S.W. 3d at 4 (§ 408.233.1) limits the types and amounts of additional fees that can be charged in connection with a high-interest second mortgage loan. See also e.g., *Geary vs., Missouri’s Omnibus Credit Reform Bill*, 35J.Mo.Bar 376, 478 (September, 1979)

V. The Money Store violated § 408.233.1(3) by charging an un-enumerated “Inspection” fee.

Plaintiffs are entitled to an entry of summary judgment on the issue of whether The Money Store (“TMS”) violated § 408.233.1(3) by charging an “Inspection” fee. The evidence demonstrates that there are no genuine issues of material fact such that Plaintiffs are entitled to judgment as a matter of law.

The reasoning for an entry of summary judgment on Plaintiffs’ claim is identical to that which supports a finding of summary judgment regarding the Bann-Cor fees, therefore, the Special Master adopts and applies the discussion in

subsection “IV” in support of his finding that The Money Store violated MSMLA by charging the “Inspection” fee.

The TMS Defendants’ contend that the legislature’s use of “include” demonstrates its intent to make the enumerated list of permissible “closing costs” non-exclusive. The TMS Defendants’ position would render meaningless the legislature’s decision to specifically identify only five “closing costs” that are permitted by the statute. *State v. Sho-Me Power Co-op*, 191 S.W.2d 971, 977 (Mo. banc 1946) (the statutory “enumeration [of activities] is rendered meaningless and useless if it was not intended to qualify and limit the scope of [the defined term]”). Further, it is relevant to note that the phrase chosen by the legislature is “shall include,” not “may include” or “could include” – such chosen language was a deliberate choice by the legislature and indicates its intent that the specific list was an exclusive list. Otherwise, there would be no purpose in listing certain closing costs as permissible if the list was not intended to be exclusive.

Further, this interpretation is consistent with the purpose of the MSMLA. The Missouri legislature wanted to encourage lenders to make second mortgage loans but recognized that such loans present a real potential for abuse. To protect consumers from abuse, the legislature imposed “stringent limitations” on the loan fees that a lender, direct or indirect, can permissibly “charge”, “contract for” and/or “receive” in connection with a second mortgage loan. *Geary* article, *supra*. By restricting the type and amount of “additional fees” to the limited few that are listed, the General Assembly sought to ensure that a lender could **not** charge whatever fees it thought it could get away with, including those fees that are not necessary to make a second mortgage loan, but which many unscrupulous lenders nevertheless tell

their customers and correspondents they must charge. A lender, instead, can only charge the “additional fees” that are specifically listed in § 408.233.1. *Avila*, 143 S.W.3d at 4 (“MSMLA ... limits the types and amounts of “additional fees” that can be charged in connection with a high-interest second mortgage loans... [and] lender may be subject to a civil action or criminal penalties for charging any fees other than those permitted by § 408.233”).

Plaintiffs were charged by Bann-Cor the following fees that do not appear anywhere within the fees allowed under that statute: inspection fee; underwriting fee; processing fee; and settlement or closing fee. On their face, these fees violate the MSMLA such that summary judgment is warranted.

Bann-Cor does present several novel defenses in an effort to cast aside its obvious violation of the MSMLA. Defendant argues that the only evidence presented by the Plaintiffs is their HUD-1A Settlement Statement.

The TMS Defendants contend that the Schwartzes’ HUD-1A Settlement Statement constitute inadmissible hearsay that cannot support Plaintiffs’ Motion for Partial Summary Judgment. For the following reasons, the TMS Defendants’ argument fails.

First, the HUD-1A Settlement Statements are not hearsay under the “res gestae” or “verbal acts” rule. The HUD-1As, together with the Notes, Deeds of Trust, and other loan documents that were executed to create the written loan agreements, are admissible in evidence under the “verbal acts” rule. “Verbal Acts” are “statements, whether oral or written, which have independent legal significance or legal effect, or which give character to an otherwise ambiguous act, or which are made contemporaneously with or immediately preparatory to an act which is

material to the matter being litigated and whose significance lies not in the truth of any assertions that they may contain, but rather in the fact that they were made.” 22A Mo. Prac., Missouri Evidence § 800.1 (2d ed.). The HUD-1As and other loan documents came into evidence as acts having independent legal significance or legal effect. The documents were either part of the written loan agreements or, if not, were executed contemporaneously with the matter being litigated (i.e., the loan agreements). As such, the HUD-1As are admissible to establish the nature and amount and payees of the loan fees that were “charged”, “contracted for” and/or “received” in connection with the loans.

Moreover, the HUD-1A Settlement Statements are also admissible under the business records exception to the hearsay rule. § 490.680 RSMo sets forth the requirements for a document to be admitted under the business records exception to the hearsay rule:

A record of an act, condition or event, shall, insofar as relevant, be competent evidence [1] if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and [2] if it was made in the regular course of business, at or near the time of the act, condition or event, and [3] if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

§ 490.680 RSMo.

Each of the statutory requirements is met. The “mode” by which the HUD-1As were prepared and exchanged has been established and is itself a matter of federal law. 24 C.F.R. Pt. 3500, App. A. In addition, the HUD-1As Settlement Statements were made and used by Bann-Cor and the TMS Defendants in the regular course of their respective businesses at or near the time of the act, condition or event recorded (*viz.*, the closing and assignment of the loans). Finally, the

sources of information and the method and time of preparation of the HUD-1As and other loan documents were such as to justify their admission. “A trial court is afforded broad discretion in determining whether the parties complied with [§ 490.680 RSMo].” *Alberswerth v. Alberswerth*, 184 S.W.3d 81, 101-02 (Mo. App. WD 2006).

“‘The bottom line’ regarding the admissibility of business records is the discretionary determination by the trial court of their trustworthiness.” *Davolt v. Highland*, 119 S.W.3d 118, 134 (Mo. App. WD 2003). As explained in *Davolt*:

[The business records rule] is designed to facilitate the admission of documents *which experience has demonstrated to be trustworthy*. The focus is on the character of the records with consideration for certain earmarks of reliability. Until shown otherwise, the qualified business records are assumed to be accurate because they reflect entries systematically and routinely made by those with a self-interest to ensure accuracy to allow reliance on the records in the regular conduct of business.

Id.; *State ex rel. Fischer v. Sanders*, 80 S.W.3d 1, 4 (Mo. App. WD 2002)

(“admission [of documents] is justified where the court is satisfied ‘that the sources of information and mode and time of preparation indicate trustworthiness’”).

The TMS Defendants cannot credibly dispute that the HUD-1A Settlement Statements are anything but trustworthy. Both Bann-Cor and the TMS Defendants are required by federal law to ensure that the HUD-1A Settlement Statements are accurate. Further, Bann-Cor and the TMS Defendants relied on the HUD-1A disclosures in the course of their businesses. TMS knew that Bann-Cor prepared the HUD-1As pursuant to RESPA and would provide the originals to them pursuant to the loan-purchase agreement. TMS received, accepted, used and actually integrated the HUD-1As into their own business records. This is sufficient to lay the foundation for the admissibility of the HUD-1As as business records. *See Piva v.*

General American Life Ins. Co., 647 S.W.2d 866, 877 (Mo. App. WD 1983) (“knowledge of the procedure by which the records are kept suffices to establish the mode of preparation”).

I further note that the TMS Defendants produced all of the HUD-1As on which the Schwartzes rely. The fifty-two (52) HUD-1As that are before the Court came from the TMS Defendants’ own loan files. Defendants are the keepers and custodians of these files and records as required by federal law. 24 C.F.R. § 3500.10(e).³ Although Bann-Cor may have initially prepared the HUD-1As, Bann-Cor was required, both by law and by its agreement with TMS, to convey the original HUD-1As to the TMS Defendants. The TMS Defendants required and wanted the HUD-1As so that they could review, double-check, incorporate and use the information disclosed on the HUD-1As as their own. The TMS Defendants used, relied on, integrated and accepted the HUD-1As as an accurate reflection of the type and amount of loan fees that had been charged. As the purchaser-assignee of the very loans for which the HUD-1As were completed, and as entities that relied on, used and adopted the HUD-1As as their own, the TMS Defendants cannot credibly dispute the accuracy of what the HUD-1As and other loan documents reveal. *See, e.g., Bank of New York v. Mann*, 2004 WL 1878293, at *2 n.2 (N.D. Ill. 2004) (HUD-1 in possession of assignee is assignee’s business record).

³ “Recordkeeping. The lender shall retain each completed HUD-1 or HUD-1A and related documents for five years after settlement, unless the lender disposes of its interest in the mortgage and does not service the mortgage. In that case, **the lender shall provide its copy of the HUD-1 or HUD-1A to the owner or servicer of the mortgage as a part of the transfer of the loan file.** Such owner or servicer shall retain the HUD-1 or HUD-1A for the remainder of the five-year period. The Secretary shall have the right to inspect or require copies of records covered by this paragraph (e).”

The HUD-1A Settlement Statements are also not hearsay because they constitute an admission against interest. An admission against interest is: (1) a conscious or voluntary acknowledgement by a party-opponent [or one in privity with the party-opponent] of the existence of certain facts; (2) the matter acknowledged must be relevant to the cause of the party offering the admission; and (3) the matter acknowledged must be unfavorable to, or inconsistent with, the position now taken by the party-opponent [or one in privity with the party-opponent].” *Nettie's Flower Garden, Inc. v. SIS, Inc.*, 869 S.W.2d 226, 229 (Mo. Ct. App. ED 1993).

The HUD-1A Settlement Statements were generated by Bann-Cor in connection with each of its Missouri loans. The TMS Defendants, by their own admission, are in privity with Bann-Cor, having purchased, taken an assignment of, and assumed a number of the Missouri second mortgage loans that Bann-Cor made. The TMS Defendants required and received the HUD-1A Settlement Statements from Bann-Cor as a part of their agreement and pursuant to federal law. 24 C.F.R. § 3500.10(e). As parties in privity with Bann-Cor, the TMS Defendants are bound by the HUD-1A Settlement Statements too. *See, e.g., State Farm Mutual Ins. Co. v. Allen*, 744 S.W.2d 782 (Mo. banc 1988) (parties in privity with non-party insured are bound by non-party’s admissions in action against them); *McMullin v. Borgers*, 806 S.W.2d 724 (Mo. App. ED 1991) (contract assignee stands in the shoes of assignor and any admissions against interest made by the assignor are admissible as against the assignee).

The TMS Defendants are also estopped from denying the accuracy of the HUD-1A Settlement Statements. By accepting the benefits of the loans, the TMS

Defendants adopted the loan documents as their own and are now “estopped from questioning the existence, validity and effect of [what the documents show].” *See Netco, Inc. v. Dunn*, 194 S.W.3d 353, 360 (Mo. 2006); *Dubail v. Medical West Building Corp.*, 372 S.W.2d 128, 132 (Mo. 1963).

Finally, the TMS Defendants have waived any potential hearsay objection by asserting a holder in due course defense. In order to assert such a defense, the TMS Defendants must rely upon the disclosures of the settlement charges made to the borrowers in the HUD-1As and the Itemizations of Amount Financed. 15 U.S.C. § 1641(d)(1) and 12 C.F.R. § 226.32. By asserting the defense, the TMS Defendants have waived whatever hearsay objections they wish to make. The Special Master has considered the evidence contained in the HUD-1A Settlement Statement.

Defendants argue that they did not directly or indirectly “charge”, “contract for”, and/or “receive” any of the disallowed fees. Defendants rest their argument on the fact that they were “purchasers” of the loan(s) and didn’t directly charge the fees to the Plaintiffs. This argument is backed with faulty logic as § 408.233.1 RSMo clearly states that fees cannot be directly or indirectly “charged”, “contracted for” and/or “received” in connection with a loan under the MSMLA. Defendant HomEq is the indirect recipient of the benefit of the fees that were collected in violation of the MSMLA. Defendants also proffered the defense of voluntary payment. Plaintiffs, however, correctly identified that this particular defense is inapplicable to a MSMLA claim under the Missouri Supreme Court’s recent holding in *Eisel v. Midwest Bank Centre*, 230 S.W.3d 355 (Mo. 2007).

The TMS Defendants contend that partial summary judgment is not appropriate given that Plaintiffs voluntarily paid the illegal loan fees and interests

that they were charged. This voluntary payment doctrine, however, is not applicable to this case, especially in light of recent authority from the Missouri Supreme Court, and in light of the purpose behind the MSMLA.

Where a contract “is prohibited by a positive statute,” enacted to protect one party as against the other, “the parties are not *in pari delicto*” and “the person for whose protection the statute was enacted [is] permitted to recover the money or property parted with by him.” *Lawson v. First Union Mortgage Co.*, 786 N.E.2d 279, 284 (Ind. Ct. App. 2003) (“voluntary payment rule does not apply” where borrower paid mortgage corporation unlawful document fee); *Pratt v. Smart Corporation*, 968 S.W.2d 868, 872 (Tenn. Ct. App. 1998) (voluntary payment rule “presents no impediment” to cause of action for excessive medical record copying charges assessed in violation of state statute).

The Missouri Supreme Court recently discussed the applicability of the voluntary payment defense to a statutory claim in *Eisel v. Midwest Bank Centre*, 230 S.W.3d 335 (Mo. 2007). In *Eisel*, the Supreme Court confirmed that a mortgage lender cannot avoid liability for charging illegal fees in connection with a loan on the grounds that the borrower “voluntarily” paid the illegal fees. The borrowers in *Eisel* paid the fee without objection when they obtained their loan. When sued, the defendant argued that the voluntary payment doctrine should bar the borrowers’ claims. The Supreme Court disagreed, holding that it would be “illogical and inequitable” to nullify the borrower’s cause of action based on the “voluntary” payment of a statutorily prohibited and illegal fee. *Id.* at 339-40. The decision in *Eisel* is consistent with established Missouri law. See, e.g., *Twiehaus v. Rosner*, 245 S.W.2d 107, 111-13 (Mo. 1952) (tenant would have right to sue and recover

excessive rent payments voluntarily made in violation of Emergency Price Control Act of 1942 given landlord's "superior position" and legislative intent to treat tenant "who paid more than the authorized rental amount as having committed no wrong"); *Interstate Agri Services, Inc. v. Bank Midwest, N.A.*, 982 S.W.2d 796 (Mo. App. WD 1998) (paying off promissory note did not preclude maker of note from recovering usurious interest paid); *cf. Gardine v. Cottey*, 230 S.W. 731, 740 (Mo. 1950) ("where sound public policy will be better promoted by granting than by denying relief., an exception to the general rule applies and relief will be afforded a party to an illegal contract to recover... thereunder, particularly so, where the parties are not *in pari delicto*").

The MSMLA is a "consumer protection" statute enacted to benefit and protect the consumer-borrowers of this state from unscrupulous mortgage lenders. The MSMLA impose a duty on the lender – not the borrower – to avoid the assessment of unlawful fees in the first instance. §§ 408.233.1, 408.240, 408.562 RSMo. The MSMLA provides aggrieved borrowers, as well as the State, with an express right of redress. § 408.562 RSMo. Both Bann-Cor and the TMS Defendants violated Missouri law in making the subject loans. The voluntary payment defense does not apply in the face of such illegal conduct.

Lastly, Defendants argue that TMS Mortgage, as a holder-in-due course cannot be liable for Bann-Cor's violations of MSMLA on any non-HOEPA loans. TMS Mortgage, despite Defendants' best arguments, is not a holder-in-due course as it does not meet the requirements of § 400.3-302 RSMo in that it did not take the instrument in "good faith" and it did not take the instrument "with notice that any party has a defense...described in § 400.3-305(a)." Simply put, TMS Mortgage's

failure to inspect the loans issued by Bann-Cor cannot be used as a shield to the liability that necessarily attaches to loans that violate the MSMLA.

Based on the foregoing, Plaintiffs have demonstrated that the material facts and law set forth in their Motion for Summary Judgment clearly show they are entitled to judgment as a matter of law on the issue of whether certain Bann-Cor fees “charged”, “contracted for” and/or “received” in connection with their second mortgage loan violated the MSMLA. Given that there are no material facts at issue for trial, Plaintiffs are entitled to judgment as a matter of law on this issue.

CONCLUSION

The undisputed facts, in conjunction with the TMS Defendants’ own admissions, establish that the Schwartzes’ loan, as well as the other 51 loans of the TMS class members are Second Mortgage Loans under the MSMLA and are consumer loans governed by the MSMLA. Accordingly, the provisions and protection afforded by the MSMLA applies to every one of the 52 loans in this class action.

Further, the undisputed facts establish that, with respect to the Schwartzes’ loan, Bann-Cor “charged”, “contracted for” and/or “received”: (1) an Inspection Fee; (2) a Processing Fee; (3) an Underwriting Fee; and (4) a Settlement or Closing Fee. These fees are not included among the exclusive list of permissible fees that § 408.233.1(3) allows. Accordingly, such fees are *per se* illegal, thus establishing that Bann-Cor violated the MSMLA.

Further, the undisputed facts establish that, with respect to the Schwartzes’ loan, and 47 other loans of the TMS Class loans, TMS “charged”, “contracted for” and/or “received” a \$75.00 Inspection Fee. Again, this fee is not included among

the exclusive list of permissible fees that § 408.233.1(3) allows. Accordingly, the inspection fee is *per se* illegal, thus establishing that TMS violated the MSMLA as to the Schwartzes' loan and the other 47 similarly situated TMS class loans.

Any of the same fact issues that the TMS Defendants have attempted to assert do not raise a genuine issue of material fact that precludes the entry of partial summary judgment; rather, these issues are not material or relevant to the issues, and in some instances are not “factual” issues at all. The TMS Defendants have also raised several of the same legal arguments. Those arguments are without merit.

Accordingly, I recommend that the Court enter partial summary judgment in favor of Plaintiffs, holding that:

1. The MSMLA applies to the named Plaintiffs', Schwartzes', second mortgage loan and each of the other 51 Missouri second mortgage loans in the TMS Class that Bann-Cor made during the relevant period using the same Missouri-form loan documents;

2. Bann-Cor violated the MSMLA, § 408.233.1 RSMo, by directly or indirectly “charging”, “contracting for” and/or “receiving” any one or more of the above-listed fees in connection with the Schwartzes' loan, and the loans of all of the 51 other similarly situated members of the TMS Class; and

3. The TMS Defendants violated the MSMLA, § 408.233.1 RSMo, by directly or indirectly “charging”, “contracting for” and/or “receiving” the \$75.00 Inspection Fee in connection with the Schwartzes' loan and the loans of the 47 other similarly situated members of the TMS Class.

IT IS So RECOMMENDED.

Date

William F. Mauer
Special Master

On April ____, 2009, this Special Master's Report was submitted to

The Honorable John M. Torrence
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