

**FILED IN CHAMBERS**  
U.S.D.C. Atlanta

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

**DEC 13 2011**

By: *James W. Hester, Clerk*  
*Amcauer*  
Deputy Clerk

RICHARD PHILLIP and FIONA PHILLIP, :

Plaintiffs :

v. :

DUCAT 2008, L.P. and MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS, :

Defendants :

CIVIL ACTION FILE NO.  
1:11-CV-2017-ODE-CCH


ORDER

This civil action is before the Court on the Report and Recommendation of United States Magistrate Judge C. Christopher Hagy filed November 18, 2011 [Doc. 14] ("R&R"). No objections have been filed.

In the R&R, Magistrate Judge Hagy recommends that Defendants' Motion to Dismiss be granted, and that all of Plaintiffs' claims be dismissed.

The Court having read and considered the Report and Recommendation and noting the absence of any objections, it is hereby ADOPTED as the opinion and order of the Court. Accordingly, Defendants' Motion to Dismiss [Doc. 3] is GRANTED and this action is hereby DISMISSED.

SO ORDERED, this 13 day of December, 2011.

  
ORINDA D. EVANS  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

|  |   |                      |
|--|---|----------------------|
| RICHARD PHILLIP AND FIONA<br>PHILLIP,                                | : |                      |
|  | : |                      |
|  | : |                      |
| Plaintiffs,  | : |                      |
|  | : |                      |
| v.   | : | CIVIL ACTION NO.     |
|  | : | 1:11-CV-2017-ODE-CCH |
|  | : |                      |
| DUCAT 2008, L.P. AND<br>MORTGAGE ELECTRONIC<br>REGISTRATION SYSTEMS, | : |                      |
|  | : |                      |
|  | : |                      |
| Defendants.  | : |                      |

**ORDER**

Attached is the report and recommendation of the United States Magistrate Judge in this action in accordance with 28 U.S.C. § 636(b)(1) and this Court's Civil Local Rule 72.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the report and recommendation within fourteen (14) days of service of this Order. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing

for review by the District Court. If no objections are filed, the report and recommendation may be adopted as the opinion and order of the District Court and any appellate review of factual findings will be limited to a plain error review. *United States v. Slay*, 714 F.2d 1093 (11th Cir. 1983).

The Clerk is directed to submit the report and recommendation with objections, if any, to the District Court after expiration of the above time period.

IT IS SO ORDERED this 18th day of November, 2011.



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C. CHRISTOPHER HAGY  
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

|                           |   |                                 |
|---------------------------|---|---------------------------------|
| RICHARD PHILLIP AND FIONA | : | CIVIL ACTION NO.                |
| PHILLIP,                  | : | 1:11-CV-2017-ODE-CCH            |
|                           | : |                                 |
| Plaintiffs,               | : |                                 |
|                           | : |                                 |
| v.                        | : |                                 |
|                           | : |                                 |
| DUCAT 2008, L.P. AND      | : |                                 |
| MORTGAGE ELECTRONIC       | : |                                 |
| REGISTRATION SYSTEMS,     | : | <b>FINAL REPORT AND</b>         |
|                           | : | <b>RECOMMENDATION ON A</b>      |
| Defendants.               | : | <b><u>MOTION TO DISMISS</u></b> |

Plaintiffs Richard Phillip and Fiona Phillip filed the above-captioned action on March 2, 2011 in the Superior Court of Henry County. *See* Complaint, attached to Notice of Removal [1]. On June 21, 2011, Defendants removed the action to this Court on the basis of federal question jurisdiction. *See* Notice of Removal [1]. Plaintiffs allege that Defendants violated the Fair Debt Collection Practices Act (“FDCPA” or the “Act”), 15 U.S.C. §§ 1692–1692p, and engaged in mortgage fraud and wrongful foreclosure. *See* Complaint.

The action is before the Court on the Defendants’ Motion to Dismiss [3]. Defendants argue that Plaintiffs’ claims should be dismissed for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons

discussed below, **RECOMMENDS** that Defendants' Motion to Dismiss [3] be **GRANTED** and that all of Plaintiffs' claims be **DISMISSED**.

## **I. BACKGROUND**

In their Complaint, Plaintiffs allege that on November 30, 2006, they obtained a residential mortgage loan through New Century Mortgage, Inc. which was secured by property at located at 1044 Battersea Place, Locust Grove, Georgia 30248. Compl. ¶¶ 2, 8. The security deed identifies Defendant Mortgage Electronic Registration Systems ("MERS") as the nominee for New Century Mortgage and its successors and assigns. Compl. ¶ 9. The security deed states that, "if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any and all of those interests, including but not limited to, releasing and canceling this Security Instrument." Compl. ¶ 14.

On April 2, 2007, New Century Mortgage filed for bankruptcy, and its assets, including the promissory note in this case, became the assets of the bankruptcy trustee. Compl. ¶ 8. On an unspecified date prior to the nonjudicial foreclosure sale of Plaintiffs' property, Plaintiffs allege that MERS assigned the note and security deed to Defendant Ducat 2008, L.P. ("Ducat"). Compl. ¶ 24. Plaintiffs assert that MERS

failed to obtain consent from the bankruptcy trustee to act as nominee for New Century Mortgage before assigning the note and security deed to Ducat. Compl. ¶ 24. Plaintiffs also claim that MERS could not hold legal title to the subject property as a “nominee,” or that if it did hold legal title, then MERS was improperly acting as a corporate fiduciary and its assignment to Ducat was invalid. Compl. ¶¶ 22, 24, 27, 38, 44–46.

The terms of the security deed require that, prior to accelerating the debt, the lender “shall give the borrower notice of the default, the action required to cure the default and a date not less than thirty (30) days from the date the notices is given to the borrower, by which the default must be cured.” Compl. ¶ 30. Plaintiffs assert that the security deed also required such notice to “state [that] the failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by the security instrument and sale of the property” and to “further inform the borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale.” Compl. ¶ 31.

Plaintiffs appear to claim that on an unspecified date Ducat sent them a notice of default. Compl. ¶¶ 56–57. Plaintiffs allege that this notice was deficient because

Ducat was not the “Lender” and therefore the notice did not comply with the requirements of the security deed, and because Ducat sent the notice to the incorrect address. Compl. ¶¶ 57, 59–62. Though it is not clear from Plaintiffs’ allegations, it appears that Ducat subsequently foreclosed on, seized, and conducted a foreclosure sale of Plaintiffs’ property. Compl. ¶¶ 50, 56, 63.

On those allegations, Plaintiffs assert several claims. First, Plaintiffs seek a judgment declaring that MERS is not registered as a corporate fiduciary with the State of Georgia, that Ducat is not licensed as a mortgage lender with the State of Georgia, that the security deed, assignment, promissory note, and foreclosure deed are void, and that Plaintiffs are the legal and equitable owners of the property at issue. Compl. ¶ 40. Next, Plaintiffs claim that Ducat violated the FDCPA by taking or threatening to take Plaintiffs’ property without a present right to possession. Compl. ¶ 50. Third, Plaintiffs allege that Defendants’ actions constitute mortgage fraud and wrongful foreclosure by violating O.C.G.A. §§ 7-1-242, 23-2-114, and 44-14-162.2(a), as well as the requirements of the security deed. Compl. ¶¶ 52–63. Plaintiffs seek actual and statutory damages along with punitive damages and attorneys’ fees. Compl. ¶¶ 64–67.

Defendants jointly filed a Motion to Dismiss [3] on June 21, 2011, on the ground that dismissal is appropriate under Fed. R. Civ. P. 12(b)(6). Defendants argue that Plaintiffs have failed to state a claim because Plaintiffs' claims are meritless, frivolous, and contrary to settled law. Def. Br. [3] at 8–12, 14–15, 17–22. Defendants also argue that Plaintiffs lack standing to challenge the validity of the assignment and are not entitled to declaratory relief because they have not paid or tendered the amount due on the loan. Def. Br. [3] at 13–17.

## II. DISCUSSION

### A. *Standard of Review*

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint may be dismissed when it fails to “state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). When evaluating a motion to dismiss under Rule 12(b)(6), the Court cannot consider matters outside of the pleadings, and must accept the allegations of the non-movant’s pleadings as true. But “[t]o 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*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).



Moreover, “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (citations omitted).

In addition, Rule 9(b) of the Federal Rules of Civil Procedure requires that fraud claims must be pled with particularity. Courts in this District have held that Rule 9(b) “requires that a fraud claimant supply basic information about the allegedly false representation” including “precisely what statements were made, when, and by whom,” “the manner in which they misled [Plaintiff],” and “what [Defendants] obtained as a consequence of the fraud.” *Am. Gen. Life & Acc. Ins. Co. v. Ward*, 530 F. Supp. 2d 1306, 1309–10 (N.D. Ga. 2008) (Carnes, J.).

B. *Exercise of Jurisdiction*

In their Response to Defendants' Motion to Dismiss [11], Plaintiffs abandon their FDCPA claim, the lone federal cause of action in this case and the basis upon which Defendants removed this action to federal court. *See* Notice of Removal [1] at ¶ 2. Because Plaintiffs' remaining claims present only questions of state law, this Court has discretion to exercise supplemental jurisdiction and rule on Defendants' Motion to Dismiss [3] or remand the case. *See* 28 U.S.C. § 1441(c); 28 U.S.C. § 1367(c)(3). In the interests of efficiency and judicial economy, and because the facts giving rise to Plaintiffs' abandoned FDCPA claim mirror those that support Plaintiffs' state law claims, the Court will consider Plaintiffs' remaining claims.

C. *Plaintiffs' Claims*

The thrust of Plaintiffs' Complaint is twofold: first, that MERS acted as an illegal trust company under the security deed, making all contracts arising out of the relationship, including the security deed and the assignment, void; and second, that MERS lacked authority as merely a "nominee" to assign the security deed, invalidating the assignment to Ducat and rendering Ducat's subsequent enforcement of its rights under the security deed unlawful.

1. MERS is Not an Illegal Corporate Fiduciary

Plaintiffs argue that “MERS is acting in a fiduciary capacity in the case at bar for the note holder that has contracted with MERS to hold the security for it’s [sic] loan.” Compl. ¶ 15. Plaintiffs claim that “Plaintiff ‘settlor’ conveyed legal title to the ‘trust property’ to MERS as ‘trustee’ for New Century and its successors and assigns, the trust ‘beneficiaries.’” Compl. ¶ 20. Plaintiffs claim that this relationship is illegal, because Georgia law requires prior authorization for a corporation to act as a fiduciary. Compl. ¶¶ 15, 18–22. Plaintiffs point to O.C.G.A § 7-1-242(b) which, in relevant part, includes “[a]ccepting or executing trusts or otherwise acting as a trustee” and “[a]dministering[, possessing, purchasing, selling, leasing, insuring, safekeeping, managing, or otherwise overseeing] real or tangible personal property located in Georgia or elsewhere” as conduct constituting acts of a fiduciary. Compl. ¶ 17.

Defendants counter by pointing out that transferring the rights and interests in a security deed by way of assignment does not fall within the range of activities of a fiduciary contemplated by O.C.G.A. § 7-1-242. *See* Def. Rep. Br. [13] at 3–4. Defendants also assert that Plaintiffs were well aware of MERS’s role as nominee at the time of the loan closing and still elected to receive the proceeds from the loan, and that the Georgia Supreme Court as well as several federal courts have recognized

MERS's legal function and purpose as a centralized registration system allowing for efficient electronic sale or assignment transactions to be carried out by the original lender and by subsequent successors or assigns. Def. Br. [3].

The Court agrees with Defendants and finds that Plaintiffs' argument that MERS formed an illegal trust is unfounded. The security deed clearly identifies MERS as the "nominee" and expressly anticipates that MERS may assign the security deed to another party, stating that "Borrower does hereby grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) *and the successor and assigns of MERS*, with power of sale, the following described property located in the County of Henry . . . ." See Security Deed, attached to Motion to Dismiss [3] at 3 (emphasis added). In addition, several courts, including the Supreme Court of Georgia, have approvingly noted the efficiencies created by allowing MERS to act as a conduit for electronic transfers of mortgage loans. See *Taylor, Bean & Whitaker Mortg. Corp. v. Brown*, 583 S.E.2d 844, 845 n.1 (Ga. 2003); *Mortg. Elec. Registration Sys., Inc. v. Revoredo*, 955 So.2d 33, 34 (Fla. Dist. Ct. App. 2007). Moreover, Plaintiffs' statutory argument that MERS acted as an illegal trust company is a nonstarter, since the statute cited by Plaintiffs does not purport to define any corporation that "administer[s] real or tangible property" as a fiduciary, but merely

includes those actions within the range of activities that a corporate fiduciary may undertake. Further, Plaintiffs have pointed to no authority which says that MERS “administer[ed] real or tangible property” merely by transferring the rights and interests in a promissory note and security deed to Ducat.

Accordingly, Plaintiffs’ allegation that MERS was an illegal fiduciary fails to state an actionable claim for relief.

2. The Assignment from MERS to Ducat is Valid

Plaintiffs next argue that the assignment of the rights and interests in the security deed by MERS to Ducat is void and invalid. Plaintiffs contend that because MERS is an illegal trust, the security deed and the assignment are void ab initio. Compl. ¶¶ 24, 27, 38, 45. Plaintiffs also claim that because MERS is only a “nominee,” it had no authority to assign the security deed to Ducat, and that because the previous lender, New Century Mortgage, was in bankruptcy, MERS could not have assigned the rights and interests in the security deed without the bankruptcy trustee’s permission. Compl. ¶¶ 24, 46, 48.

Defendants argue that Plaintiffs lack standing to challenge the assignment, since they are not parties to the assignment between MERS and Ducat. Def. Br. [3] at

13–14. Defendants further assert that the security deed itself acknowledges that it is freely assignable, and that Georgia law recognizes the free assignability of contracts, including promissory notes and security deeds. Def. Br. [3] at 13–14. Defendants also urge this Court to take judicial notice of documents from the relevant bankruptcy proceedings which reflect that MERS was permitted to assign the rights in the security deed at issue. Def. Rep. Br. [13] at 11–12.

The Court finds Defendants’ arguments convincing and Plaintiffs’ claims unsupportable. For the reasons discussed above, MERS’s assignment of the security deed to Ducat was not void due to any illegal activity as a fiduciary by MERS. In addition, Defendants properly assert that Plaintiffs lack standing to challenge the assignment between MERS and Ducat. Plaintiffs do not dispute that they are not a party to the assignment contract. Georgia law provides that “an action on a contract . . . shall be brought in the name of the party in whom the legal interest in the contract is vested, and against the party who made it in person or by agent.” O.C.G.A. § 9-2-20(a). Thus, Plaintiffs “are strangers to the assignment contract” and accordingly “have no standing to challenge its validity.” *Breus v. McGriff*, 413 S.E.2d 538, 539 (Ga. Ct. App. 1991).

In addition, Plaintiffs' position conflicts with the express language of the security deed permitting its assignment and with longstanding public policy favoring the free transferability of contracts.<sup>1</sup> *See* Security Deed, attached to Motion to Dismiss [3] at 3.

Moreover, by taking judicial notice of the Order dated September 3, 2008 in the bankruptcy proceedings involving the original lender to Plaintiffs' loan, New Century Mortgage, the Court finds that Plaintiffs' claim that MERS improperly assigned the rights and interests in the security deed without the consent of the bankruptcy trustee is without merit. *See* Order dated September 3, 2008 at ¶ 2, *In re New Century TRS Holdings, Inc., et al.*, Case No. 07-10416-KJC, *et seq.* (Bankr. D. Del.). On September 3, 2008—several months before MERS, as the nominee for New Century Mortgage, assigned the rights and interests in the security deed to Ducat in July 2009—the bankruptcy court lifted the bankruptcy stay, held that “[a]ny party is hereby permitted to exercise its rights, if any, under applicable non-bankruptcy law against any Real Property,” and ordered that “[a]ny party seeking to exercise its non-bankruptcy rights and remedies against Real Property shall not file a motion for relief

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<sup>1</sup> In fact, Georgia law specifically provides a mechanism for the transferability of security deeds. *See* O.C.G.A. § 44-14-64.

from the automatic stay.” *Id.* at ¶¶ 2, 6. Further still, Plaintiffs lack standing to challenge the propriety of MERS’s assignment of the security deed while New Century Mortgage was in bankruptcy, since it is New Century’s creditors, not Plaintiffs, who would have an actionable interest in the transfer of New Century’s rights and interests in the security deed.

Finally, to the extent Plaintiffs intended to claim that the assignment by MERS to Ducat constituted “residential mortgage fraud,” *see* Compl. ¶ 46, the Court finds that Plaintiffs have utterly failed to satisfy the heightened pleading standard for fraud claims set out in Federal Rule of Civil Procedure 9(b). Accordingly, Plaintiffs’ claims that the assignment to Ducat was void, invalid, or fraudulent must be dismissed.

### 3. Ducat Properly Asserted its Rights in the Security Deed

Next, Plaintiffs claim that because Ducat has no rights in the security deed, its efforts to foreclose on the property were improper. Plaintiffs claim that Ducat is not a secured creditor and that therefore any notice of default sent by Ducat prior to the foreclosure sale of Plaintiffs’ property was insufficient and unlawful. Compl. ¶¶ 27–32, 56. Plaintiffs also allege that Ducat sent the notice of default to the wrong address. Compl. ¶ 57.



Defendants respond that Plaintiffs' position that Ducat is not the secured creditor is based upon their demonstrably false arguments that MERS was acting as an illegal fiduciary and that MERS's assignment to Ducat was void or invalid. Def. Br. [3] at 20–21. Defendants also assert that Plaintiffs have failed to allege what “incorrect address” the notice was sent to or state what the proper address was. Def. Br. [3] at 20–21.

The Court again agrees with Defendants' contentions. Plaintiffs' claim that Ducat was not the secured creditor is founded on several theories which the Court has already rejected. Thus, Plaintiffs' assertion that the notice of default was improper merely because it was sent by Ducat is simply incorrect.

In addition, the security deed provides that:

[a]ny notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means . . . . The notice address shall be the Property Address unless Borrower has designated a substitute notice address

....

Security Deed, attached to Motion to Dismiss [3] at ¶ 22. Plaintiffs' claim that Ducat failed to comply with the terms of the security deed and with Georgia law fails for

multiple reasons. First, Plaintiffs have not alleged that Ducat failed to send the notice to the “Property Address” (1044 Battersea Place) or to any substitute address Plaintiffs had designated. And second, Plaintiffs’ contention that they “did not receive the notice” is immaterial to their claim that Ducat failed to properly give notice prior to the foreclosure sale of their property, since both the terms of the security deed and the Georgia Code provide that notice is deemed to have been given at the time the notice is mailed by the secured creditor, not upon receipt of the notice by the debtor. *See id.* at ¶ 22 (the notice “shall be deemed to have been given to Borrower when mailed by first class mail”); O.C.G.A. § 44-14-162.2 (“The notice required by this Code section shall be deemed given on the official postmark day or day on which it is received for delivery by a commercial delivery firm.”). Thus, the central allegation of Plaintiffs’ claim that Ducat sent the notice of default to the incorrect address—that Plaintiffs never *received* the notice—is insufficient to state a claim that Ducat did not *send* the notice to the proper address.

Accordingly, the Court finds that Plaintiffs have failed to state a claim for wrongful foreclosure based upon the theory that Ducat improperly notified them of default prior to foreclosing on their property.

4. Plaintiffs Are Not Entitled to Declaratory Relief

Finally, Plaintiffs seek equitable relief, requesting that the Court declare that MERS is not registered as a corporate fiduciary with the State of Georgia, that Ducat is not licensed as a mortgage lender with the State of Georgia, that the security deed, assignment, promissory note, and foreclosure deed are void, and that Plaintiffs are the legal and equitable owners of the property at issue. Compl. ¶¶ 33–40.

Defendants argue that Plaintiff is not entitled to a declaratory judgment. In addition to relying on their other arguments as to why Plaintiffs' claims are invalid, Defendants assert that Plaintiffs, by failing to make timely loan payments, lack clean hands and cannot avail themselves of a remedy in equity. Def. Br. [3] at 15–17.

The Court finds that Plaintiff's claim for declaratory relief must fail. For one thing, the Court has roundly rejected all of the arguments underlying the declarations that Plaintiffs seek the Court issue. For another thing, declaratory relief is only appropriate as a prospective measure. As the Georgia Court of Appeals has noted,

Declaratory judgment relief looks to the future. 'The object of the declaratory judgment is to permit determination of a controversy before obligations are repudiated or rights are violated.' 'To proceed under a declaratory judgment a party must establish that it is necessary to relieve himself of the risk of taking some future action that, without direction, would jeopardize his interests.

*A & H Sod, Inc. v. Johnson*, 630 S.E.2d 851, 852 (Ga. Ct. App. 2006). In this case, Plaintiffs' allegations make clear that the subject property has already been foreclosed upon and sold. Plaintiffs' rights and interests in the property have already been terminated. Thus, a declaratory judgment in this instance would provide no prospective relief nor determine any future controversy before rights are violated, and therefore it is not available.

Instead of declaratory relief, Plaintiffs may actually be seeking rescission of their original mortgage and reversal of the foreclosure process that has already been carried out. That remedy would be one in equity, yet Plaintiffs have failed to demonstrate that they are entitled to equitable relief. "Pursuant to O.C.G.A. § 23-1-10, 'it has frequently been held that a plaintiff can not come into equity without first paying or tendering any amount admitted to be due' and that 'equity will not decree the cancellation of an instrument where anything of value has been received until repaying is either made or tendered.'" *Taylor, Bean & Whitaker Mortg. Corp. v. Brown*, 583 S.E.2d 844, 850 (Ga. 2003). Plaintiffs do not deny that their property was being foreclosed upon because they were in default on the mortgage loan secured by their property. Nor do Plaintiffs assert that they have paid or tendered the amount due on the loan. Without such payment or tender, Plaintiffs cannot use equity to obtain

a cancellation of the security deed or promissory note or a declaration that they are the legal and equitable owners of the property. *See id.* at 850.

Accordingly, the Court finds that Plaintiffs are not entitled to declaratory relief or rescission based on the allegations in their Complaint.

**III. RECOMMENDATION**

For the reasons discussed above, the undersigned **RECOMMENDS** that Defendants' Motion to Dismiss [3] be **GRANTED** and that all of Plaintiff's claims be **DISMISSED**.

As this is a Final Report and Recommendation, there is nothing further in this action pending before the undersigned. Accordingly, the Clerk is **DIRECTED** to terminate the reference of this matter to the undersigned.

IT IS SO RECOMMENDED this 18th day of November, 2011.

  
C. CHRISTOPHER HAGY  
UNITED STATES MAGISTRATE JUDGE