

1 Timothy M. Hogan, AZ Bar No. 004567  
Joy Herr-Cardillo, AZ Bar No. 009718  
2 Arizona Center for Law in the Public Interest  
202 East McDowell Road, Suite 153  
3 Phoenix, Arizona 85004  
(602) 258-8850  
thogan@aclpi.org

4 Ellen S. Katz, AZ Bar No. 012214  
5 William E. Morris Institute for Justice  
202 East McDowell Road, Suite 257  
6 Phoenix, Arizona 85004  
(602) 252-3432  
7 eskatz@qwestoffice.net

8 Attorneys for Plaintiffs

9 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
10 IN AND FOR THE COUNTY OF MARICOPA

11 JOSEPH MORONES and ELVIRA  
HERNANDEZ,

12 Plaintiffs,

13 v.

14 TOM HORNE, in his capacity as Attorney  
15 General; and DOUG DUCEY, in his  
capacity as Arizona Treasurer,

16 Defendants.

**COPY**

MAY 24 2012



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No. CV2012 008573

**PLAINTIFFS' MOTION FOR  
TEMPORARY RESTRAINING  
ORDER AND PRELIMINARY  
INJUNCTION**

18 **I. INTRODUCTION.**

19 Arizona currently has the highest foreclosure rate in the country. In March 2012,  
20 there were 9,497 foreclosure filings, the equivalent of 1 in every 300 housing units. See  
21 Declaration of Valerie A. Iverson ("Iverson Decl.") ¶6, attached as Exhibit A. Arizona,  
22 along with Nevada, has the highest rate of distressed property transactions in the country.  
23 For example, in December 2011, 61% of the total sales transactions in Arizona and  
24 Nevada were either short sales or properties that the bank took back and owned. *Id.* at ¶7.  
25 Arizona home prices continue to decline. The Federal Housing Finance Agency's State-

1 Level Seasonally Adjusted House Price Index for Arizona has decreased every quarter  
2 since the 2<sup>nd</sup> quarter of 2007. The current House Price Index is equivalent to 2<sup>nd</sup> quarter  
3 2002 values. *Id.* at ¶8. Almost half of Arizona homeowners are underwater, meaning  
4 they owe more on their mortgages than their homes are worth. As an example, in the  
5 fourth quarter of 2011, Arizona had the second highest negative equity percentage in the  
6 country with 48% of all mortgaged properties underwater. This equates to 631,126  
7 underwater homeowners. *Id.* at ¶9.

8 The impacts of this foreclosure crisis expand beyond the individual property  
9 owners facing the threat of foreclosure. The high rate of foreclosures negatively impact  
10 Arizona's communities. Foreclosed homes drag down nearby home values by 1-3%.  
11 Crime rates in neighborhoods with vacant, bank-owned houses increase over 5%. *Id.* at  
12 ¶12. Children who experience the loss of their homes often fall behind academically if  
13 they are forced to move and switch schools. Arizona has the third highest percentage of  
14 children affected by foreclosure with 15% of its children, or 218,000 children, affected.  
15 *Id.* at ¶13.

16 As part of a National Mortgage Foreclosure Settlement, the Arizona Attorney  
17 General's office is slated to receive approximately \$98 million to help ameliorate this  
18 dismal situation. See Exhibit B2 to Wells Fargo Consent Judgment which is included in  
19 the attached Exhibit B. However, before even a penny of that money could be used to  
20 assist the people who have borne the brunt of this crisis, the Arizona legislature passed  
21 legislation purporting to order the Attorney General to transfer more than half of the \$98  
22 million to the state general fund to support general government operations. Ariz. Sess. L.  
23 ch. 294 (2012)(hereinafter "SB 1523"). As the following demonstrates, such a use was  
24 never intended for these funds, and the legislature's attempt to confiscate the settlement  
25 proceeds from the victims of the crisis is unlawful.

1 **II. STATEMENT OF FACTS.**

2 **A. Events Giving Rise to Plaintiffs' Claims.**

3 Over the past several years, as a result of the collapse of the housing "bubble,"  
4 Arizona has had one of the highest rates of foreclosure in the country. In response to this  
5 crisis, the Arizona Attorney General, Tom Horne, joined with attorneys general from  
6 forty-eight other states and the United States government to bring a civil action against  
7 Ally/GMAC Mortgage, Bank of America, CitiMortgage, JP Morgan Chase and Wells  
8 Fargo, the five largest loan servicers in the United States ("Defendant Banks"). The  
9 plaintiffs in that litigation filed a complaint in federal district court in the District of  
10 Columbia that alleged that the Defendant Banks had violated numerous federal and state  
11 laws in the manner in which they originated and serviced single family residential  
12 mortgages. See Complaint, Case 1:12-cv-00361-RMC, U. S. District Court for the  
13 District of Columbia, available at [https://d9klfgibkcqc.cloudfront.net/Complaint\\_](https://d9klfgibkcqc.cloudfront.net/Complaint_Corrected_2012-03-14.pdf)  
14 [Corrected\\_2012-03-14.pdf](https://d9klfgibkcqc.cloudfront.net/Complaint_Corrected_2012-03-14.pdf) (last accessed 5/23/2012).

15 Shortly after the action was filed, a national settlement was successfully negotiated  
16 by the parties and on April 4, 2012, a Consent Judgment that memorialized and  
17 documented the terms of that settlement was entered by the district court.<sup>1</sup> The Consent  
18 Judgment explicitly stated that the intent of the plaintiffs in effecting the settlement was  
19 "to remediate harms allegedly resulting from the alleged unlawful conduct of the  
20 Defendant[s]." Page 2 of Consent Judgment. One part of the settlement was called the  
21 "Direct Payment Settlement Amount." Paragraph 3 of the Consent Judgment; Exhibit B

22  
23 <sup>1</sup> Although five separate judgments were entered, one for each defendant, they were  
24 identical in all respects except for the amount of money that each defendant would pay  
25 under the negotiated agreement. Therefore, for purposes of this Motion, the five  
judgments will collectively be referred to as the "Consent Judgment." Relevant excerpts  
from the Wells Fargo Consent Judgment are attached as Exhibit B. All five consent  
judgments in their entirety are available at [www.nationalmortgagesettlement.com](http://www.nationalmortgagesettlement.com).

1 to Consent Judgment. And a portion of the direct payment settlement amount went to  
2 each plaintiff-state. According to the terms of the Consent Judgment, Arizona's direct  
3 payment settlement amount is to be sent to the Arizona Attorney General.

4 Section I(b)(1) of Exhibit B to the Consent Judgment provides:

5 i. Each State Attorney General shall designate the uses of the  
6 funds set forth in the attached Exhibit B-1. To the extent  
7 practicable, such funds shall be used for purposes intended to avoid  
8 preventable foreclosures, to ameliorate the effects of the foreclosure  
9 crisis, to enhance law enforcement efforts to prevent and prosecute  
10 financial fraud, or unfair or deceptive acts or practices and to  
11 compensate the States for costs resulting from the alleged unlawful  
12 conduct of the Defendants. Such permissible purposes for allocation  
13 of the funds include, but are not limited to, supplementing the  
14 amounts paid to state homeowners under the Borrower Payment  
15 Fund, funding for housing counselors, state and local foreclosure  
16 assistance hotlines, state and local foreclosure mediation programs,  
17 legal assistance, housing remediation and anti-blight projects,  
18 funding for training and staffing of financial fraud or consumer  
19 protection enforcement efforts, and civil penalties. Accordingly,  
20 each Attorney General has set forth general instructions for the funds  
21 in the attached Exhibit B-2.

15 Consent Judgment, Exhibit B, p. B-3 §1(b)(i). The Consent Judgment further provides  
16 that no more than 10% of the aggregate amount paid to the state parties may be  
17 designated as a civil penalty, fine, or similar payment. *Id.* at (ii).

18 Pursuant to Exhibit B1 of the Consent Judgment, the Arizona Attorney General is  
19 to receive \$97,784,204 in settlement funds ("Settlement Funds"). Exhibit B2 of the  
20 Consent Judgment sets forth the agreed upon uses of the Settlement Funds for Arizona  
21 and provides in relevant part:

22 1. State Payment Settlement Amounts, Consent Judgment  
23 Ex. B, Paragraph 1(b)(i)

24 Arizona's share of the State Payment Settlement Amounts  
25 ('Funds') provided under this Consent Judgment, and any  
interest thereon, shall be made payable to the Office of the  
Arizona Attorney General. The Attorney General shall direct

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the use of the Funds in Arizona. The Funds shall be used for purposes intended to avoid preventable foreclosures, to ameliorate the effects of the foreclosure crisis, to enhance law enforcement efforts to prevent and prosecute financial fraud, or unfair or deceptive acts or practices and to compensate the State for costs resulting from the alleged unlawful conduct of Defendants. Such permissible purposes for allocation of the funds include, but are not limited to, supplementing the amounts paid to state homeowners under the Borrower Payment Fund, funding for housing counselors, state and local foreclosure assistance hotlines, state and local foreclosure mediation programs, legal assistance, housing remediation and anti-blight projects, funding for training and staffing of financial fraud or consumer protection enforcement efforts, and civil penalties.

**The Attorney General shall deposit the Funds with the State Treasurer and the Funds shall be held in a separate Court Ordered Trust Fund account and all interest thereon deposited into that account and used only for the purposes set forth herein. (emphasis added).**

Exhibit B2, p. 1. Thus, the Consent Judgment sets forth the allowable uses of the funds and states that the Attorney General as trustee “shall” deposit the funds with the State Treasurer and the funds “shall” be held in a separate “Court Ordered Trust Fund.” *Id.*

On May 1, 2012, the Arizona Legislature passed the general appropriation bill for fiscal year 2012, SB 1523, which Governor Brewer signed on May 7, 2012. Section 128 of SB 1523 provides:

Sec. 128. Fund transfer; mortgage settlement; fiscal year 2012-2013; intent

A. Notwithstanding any other law, on or before June 30, 2013, the attorney general shall direct a total of \$50,000,000 received pursuant to the consent judgments in the National Mortgage Settlement to the state general fund to compensate the state for costs resulting from the alleged unlawful conduct of the defendants.

1 B. It is the intent of the legislature that the monies  
2 deposited into the state general fund pursuant to subsection A  
3 of this section be used in current state general fund efforts in  
4 areas covered by the National Mortgage Settlement, including  
5 agencies such as the state real estate department, department  
of insurance and attorney general – department of law, and  
for other areas impacted by the alleged unlawful conduct of  
the defendants in the National Mortgage Settlement.

6 On May 8, 2012, counsel for plaintiffs sent a letter to the Arizona Attorney General  
7 advising him that any attempt to transfer the Settlement Funds to the general fund would  
8 be an illegal payment of public monies under A.R.S. §35-211. A copy of the letter is  
9 attached as Exhibit C. The Attorney General has not responded to plaintiffs' letter, but  
10 has made public statements that he intends to transfer the funds. *See, e.g.* Mary Jo Pitzel,  
11 *Horne Ignores Lawsuit Threat Over Mortgage Funds*, Arizona Republic (May 8, 2012)  
12 available at [http://www.azcentral.com/arizonarepublic/local/articles/2012/05/08/](http://www.azcentral.com/arizonarepublic/local/articles/2012/05/08/20120508_horne-ignores-lawsuit-threat-mortgage-funds.html)  
13 [20120508\\_horne-ignores-lawsuit-threat-mortgage-funds.html](http://www.azcentral.com/arizonarepublic/local/articles/2012/05/08/20120508_horne-ignores-lawsuit-threat-mortgage-funds.html) (last accessed 5/23/2012).

14 **B. Plaintiffs' Standing to Seek Relief from this Court.**

15 The plaintiffs are Arizona residents and taxpayers who are among those harmed by  
16 the actions of the Defendant Banks and would directly benefit from the lawful  
17 distribution and expenditure of the Settlement Funds.

18 **1. Joseph Morones<sup>2</sup>**

19 Mr. Morones is a homeowner who lives in Mesa, Arizona with his minor son. He  
20 is an Arizona taxpayer who pays state and federal income taxes, property taxes and state  
21 sales taxes. Mr. Morones bought his home in 2003 and obtained a mortgage through  
22 Countrywide. In 2006, he refinanced his house and the current mortgage holder is Bank  
23 of America. In 2008, Mr. Morones lost his job and was unemployed for approximately  
24 two years. Before his unemployment, he was current on his mortgage, which has a  
25 balance of about \$260,000, and able to afford his monthly payment of \$2074. When he

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<sup>2</sup> A copy of Mr. Morones Declaration is attached as Exhibit D.

1 lost his job, he initially attempted to obtain a mortgage modification, but was told that he  
2 could not obtain one unless he was behind on his payments. Consequently, he used all of  
3 his savings and dipped into his retirement account in order to keep his payments current.  
4 Although he was able to obtain new employment in 2010, his salary is significantly less  
5 (about half) in the new job.

6 After repeatedly asking Bank of America to work with him to reduce his interest  
7 rate and principal, he was finally given a trial plan for six months. The initial trial plan  
8 was succeeded by two additional trial plans of three months each. During the trial plans,  
9 he was allowed to make reduced mortgage payments, which he did. Yet, even though he  
10 complied with the requirements of the trial plan, he received two foreclosure notices and  
11 multiple telephone calls from Bank of America employees who claim that he is behind in  
12 his payments and threaten him with foreclosure. He has had to make multiple calls to  
13 straighten things out, and still is not entirely clear of his status.

14 Frustrated with the lack of certainty from Bank of America, he contacted the  
15 Attorney General's office for assistance. He was referred to the Housing Our  
16 Communities program, and has received some assistance from that program. However, it  
17 is still not clear whether the bank is going to foreclose on his home. If the Settlement  
18 Funds are used as intended under the Consent Judgment, there will be significant funding  
19 to support debt counseling, mediation services, legal services and to provide homeowners  
20 with supplemental funds, all of which would benefit Mr. Morenos. If the \$50 million is  
21 diverted to the general fund, some or all of those services may not be available to Mr.  
22 Morenos and other homeowners like him.

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1                                    2.     **Elvira Hernandez**<sup>3</sup>

2                    Elvira Hernandez is a homeowner who lives in Chandler, Arizona with her  
3 disabled son, her daughter and her three minor grandchildren. She is a 71 year old widow  
4 and taxpayer. She pays state and federal income taxes, property taxes and state sales  
5 taxes. Mrs. Hernandez and her husband bought their house in 1971. In 1999, they  
6 refinanced their mortgage with Household Finance. The interest rate on her mortgage is  
7 16%. Before her husband died, they made monthly mortgage payments of \$1185. After  
8 her husband died, there was a problem with his retirement, and she did not receive the  
9 monthly payments for about 3 months. As a result, she fell behind on her mortgage. She  
10 asked Household Finance if she could make partial payments and was told "no."

11                    She went to Newtown Community Development to get help. They recommended  
12 that she obtain a mortgage modification and hardship exception, but Household Finance  
13 kept telling her that they had not received the paperwork. When Newtown Community  
14 Development inquired about the status, Household Finance told them that they were  
15 working on it. The balance on her mortgage is \$62,000.

16                    Ms. Hernandez is worried that she will not be able to stay in her home. If the  
17 Settlement Funds are used as intended under the Consent Judgment, there will be  
18 significant funding to support debt counseling, mediation services, legal services and to  
19 provide homeowners with supplemental funds, all of which would benefit Mrs.  
20 Hernandez. If the \$50 million is diverted to the general fund, some or all of those  
21 services may not be available to her or other homeowners like her. Mrs. Hernandez's  
22 situation is urgent and she needs help as soon as possible. The longer the current  
23 situation continues, the further behind on her payments she gets.

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<sup>3</sup> A copy of Mrs. Hernandez's Declaration is attached as Exhibit E.



1 **III. LEGAL ARGUMENT.**

2 **A. Standard for Preliminary Injunction.**

3 A party seeking a preliminary injunction traditionally must establish four criteria:  
4 (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury if  
5 the requested relief is not granted, (3) a balance of hardships favoring that party, and (4)  
6 public policy favoring a grant of the injunction. *Shoen v. Shoen*, 167 Ariz. 58, 63, 804  
7 P.2d 787, 792 (App. 1990). A court applying this standard may apply a “sliding scale.”  
8 *Smith v. Ariz. Citizens Clean Elections Comm’n*, 212 Ariz. 407, 410, P 10, 132 P.3d  
9 1187, 1190 (2006). In other words, “the moving party may establish either 1) probable  
10 success on the merits and the possibility of irreparable injury; or 2) the presence of  
11 serious questions and [that] ‘the balance of hardships tip[s] sharply’ in favor of the  
12 moving party.” *Id.* at 411, P 10, 132 P.3d at 1191 (citing *Shoen*, 167 Ariz. at 63, 804 P.2d  
13 at 792). *See also* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal*  
14 *Practice & Procedure* § 2948.3 (West 2009) (“All courts agree that plaintiff must present  
15 a prima facie case but need not show that he is certain to win.”).

16 Each of these requirements is addressed below.

17 **B. The Plaintiffs Are Likely to Succeed on the Merits.**

18 Because the legislation ordering the transfer of the Settlement Funds to the general  
19 fund was unlawful on numerous grounds, the plaintiffs are likely to succeed on the  
20 merits.

21 **1. Section 128 of SB 1523 Is Unconstitutional Because it is Not an**  
22 **Appropriation and, Therefore, Cannot Be Included in the**  
23 **General Appropriation Bill.**

24 First and foremost, the legislature’s attempt to transfer the mortgage settlement  
25 funds in SB 1523 is void because it violates the Arizona Constitution’s restrictions on the  
permitted scope of the general appropriation bill. The Arizona Constitution clearly

1 provides that “the general appropriation bill shall embrace nothing but appropriations. . .  
2 .” Ariz. Const., Art. IV, Part 2, §20. Applying this constitutional limitation, the Arizona  
3 Supreme Court has long held that:

4       The general appropriation bill can contain nothing but the appropriation of  
5 money for specific purposes, and such other matters as are merely  
6 incidental and necessary to seeing that the money is expended for that  
7 purpose only. *Any attempt at any other legislation in the bill is void.*

7 *State v. Angle*, 54 Ariz. 13, 21, 91 P.2d 705, 708 (1939) (emphasis supplied).

8       The Supreme Court recently affirmed this principle in *League of Arizona Cities v.*  
9 *Martin*, 219 Ariz. 556, 561, 201 P. 3d 517, 522 (2009) (citing *Angle*). That case involved  
10 a provision in the State’s general appropriations bill for the 2008-2009 fiscal year (Ariz.  
11 Sess. Law Ch. 285, § 47 (2009)) which required Arizona municipalities to transfer \$18  
12 million to the State general fund to help address the State’s budget crisis. The League of  
13 Cities objected and challenged the transfer as a violation of Article IV, Part 2, Section 20  
14 of the Arizona Constitution, on the ground that the purported transfer was not an  
15 “appropriation” and, therefore, could not be included in the general appropriations bill.  
16 The Supreme Court agreed with the League and held the transfer unconstitutional.

17       Specifically, the Court held that in order to comply with the Arizona Constitution,  
18 such a legislative transfer “back” to the general fund of monies previously dedicated to  
19 another use must itself meet the criteria for an “appropriation” if it is to be included in an  
20 appropriations bill. Specifically, in order to comply with Ariz. Const., Art. IV, Part 2, §  
21 20, which “strictly limits the contents of general appropriation bills,” any such transfer  
22 must specify an “identified prior appropriation” of funds which “must be reduced to  
23 make the payment demanded” by the Legislature. *Id.* The transfer in *League of Arizona*  
24 *Cities* failed this test because the municipalities were simply ordered to transfer  
25 approximately \$18 million, without any specification of which, if any, of various prior

1 fundings or grants to the municipalities was to be reduced to permit the transfer: “[t]he  
2 Legislature did not expressly attach the assessed amount to any public revenue that it had  
3 previously set aside for the cities and towns.” *Id.*

4 Here, there is no question that the funds in the Court Ordered Trust Fund were not  
5 a prior appropriation by the Arizona legislature. The source of the funds is the Defendant  
6 Banks in the national mortgage litigation and the funds were never a part of the general  
7 fund. Therefore, as the Court’s holding in *League of Cities and Town* makes clear, any  
8 attempt by the legislature to order the transfer of the funds in an appropriations bill like  
9 SB 1523 is unconstitutional and void.

10 **2. Even if the Transfer Were Not Improperly Included in the**  
11 **Appropriation Bill, It Would Still Be Unlawful Because the**  
12 **Settlement Funds are Held in Trust and the Legislature Does**  
13 **Not Have the Authority to Take Them.**

14 Even if the attempted transfer did not violate the appropriation clause of the  
15 Arizona Constitution, it would still be unlawful because the legislature does not have the  
16 legal authority to order the transfer of the Settlement Funds. Although the legislature has  
17 broad powers to decide how state funds are prioritized and used, not all funds paid into  
18 the state treasury are state funds subject to appropriation. *Navajo Tribe v. Arizona Dept.*  
19 *of Admin.*, 111 Ariz. 279, 280-81, 528 P.2d 623, 624 (1974). For example, custodial  
20 funds are not state monies. *Id.* at 281, 528 P. 2d at 625. *See also* Ariz. Const. Art. IX,  
21 §17(2)(b)(iii)(“State revenues” do not include “any amounts . . . received by the State in  
the capacity of trustee, custodian or agent.”)

22 The Arizona Supreme Court has held that the legislature does not have unlimited  
23 authority over funds held by the state that, although technically public funds, are actually  
24 owned by or held subject to the claims of third parties. *Navajo Tribe v. Ariz. Dep’t of*  
25 *Admin.*, 111 Ariz. 279, 528 P. 2d 623 (1974). In *Navajo Tribe*, federal funds received

1 pursuant to a federal contract were placed into the state's general fund for particular  
2 purposes relating to job training and employment projects. A dispute arose over whether  
3 these funds could be expended without specific legislative approval. The Arizona  
4 Supreme Court explained:

5       Payment of funds into the state treasury does not necessarily vest the state  
6 with title to those funds. Only monies raised by the operation of some  
7 general law become public funds. Custodial funds are not state monies. The  
8 term "public funds" refers to funds belonging to the state and does not  
9 apply to funds for the benefit of contributors for which the state is a mere  
custodian or conduit. . . It is within the power of the legislature to make  
appropriations relating to state funds, but funds from a purely federal  
source are not subject to the appropriative power of the legislature.

10 *Id.* at 280-81, 528 P.2d at 624-25 (citations omitted).

11       The legislature's lack of authority to transfer or appropriate funds held in trust was  
12 recently recognized by the Arizona Court of Appeals in *Arizona Farm Bureau Fed'n v.*  
13 *Brewer*, 226 Ariz. 16, 20, 243 P. 3d 619, 623 (App. 2010). In *Farm Bureau*, the  
14 legislature had ordered the transfer of assets from several special funds, each established  
15 for the purpose of the promotion of agriculture in the state. While the court held that the  
16 legislature could lawfully transfer the funds involved in that case, it reached that  
17 conclusion only after it determined that the funds were not held in trust or in a custodial  
18 capacity. *Id.* at 20, 243 P. 3d at 623; *see also Arpaio v. Maricopa County Bd. of*  
19 *Supervisors*, 225 Ariz. 358, 363, 238 P. 3d 626, 631 (App.2010)(held where funds at  
20 issue were not held by counties on behalf of a third party, legislature could order transfer  
21 to the general fund).

22       Here, the situation is similar to the facts of *Navajo Tribe* and completely contrary  
23 to the situation presented in *Farm Bureau*. In this case, the source of the funds was not  
24 the state but the Defendant Banks in a national lawsuit. Moreover, the payment of the  
25 funds was conditioned upon their placement in a "separate Court Ordered Trust Fund

1 account” and “all interest thereon deposited into that account and used only for the  
2 purposes set forth herein.” Consent Judgment, Exhibit B2, p.1. The Consent Judgment  
3 also specifies the purposes for which the funds may be used: “purposes intended to avoid  
4 preventable foreclosures, to ameliorate the effects of the foreclosure crisis, to enhance  
5 law enforcement efforts to prevent and prosecute financial fraud, or unfair or deceptive  
6 acts or practices and to compensate the State for costs resulting from the alleged unlawful  
7 conduct of the Defendants.” *Id.* In sum, the Settlement Funds, like the federal funds in  
8 *Navajo Tribe*, are funds paid by an outside party to a state official as trustee to be used  
9 for specific purposes. They are not part of the state’s “public funds” and, therefore, the  
10 legislature has no legal authority to transfer or appropriate them.

11 **3. The Legislature’s Directive to Attorney General is a Violation of**  
12 **the Separation of Powers Doctrine.**

13 Section 128 of SB 1523 also violates the separation of powers under Arizona law  
14 because in enacting it the legislature has encroached upon the powers and duties of the  
15 Attorney General, a member of the Executive Branch. The Arizona Constitution includes  
16 a specific provision establishing the separation of powers and precluding any department  
17 of government from exercising the powers of any other department. Article III provides:

18 The powers of the government of the State of Arizona shall be divided into  
19 three separate departments, the Legislative, the Executive, and the Judicial;  
20 and, except as provided in this Constitution, such departments shall be  
separate and distinct, and no one of such departments shall exercise the  
powers properly belonging to either of the others.

21 Ariz. Const. art. III. Thus, the roles of each branch of government in Arizona are  
22 separate and distinct. “The legislature has the exclusive power to declare what the law  
23 shall be.” *State v. Prentiss*, 163 Ariz. 81, 85, 786 P.2d 932, 936 (1990). However, the  
24 executive branch has the duty to carry out the policies and purposes declared by the  
25 Legislature. *See Pioneer Trust Co. v. Pima County*, 168 Ariz. 61, 65, 811 P.2d 22, 26

1 (1991) (citing *Lincoln Property Co. No. 41 v. Law*, 45 Cal. App. 3d 230, 119 Cal. Rptr.  
2 292, 294 (App. 1975)). The Arizona Supreme Court has emphasized that separation of  
3 power between the branches of government requires that “those who make the law be  
4 different from those who execute and apply it.” *Matter of Walker*, 153 Ariz. 307, 310,  
5 736 P. 2d 790, 793 (1987).

6 The Arizona Supreme Court has identified a four part test to determine whether  
7 there is a violation of the separation of powers. *State ex rel. Woods v. Block*, 189 Ariz.  
8 269, 276, 942 P. 2d 428, 435 (1997)( adopting test set forth in *J.W. Hancock Enterprises*  
9 *v. Arizona State Registrar of Contractors*, 142 Ariz. 400, 405-06, 690 P. 2d 119, 124-25  
10 (App. 1984)). Under the *Hancock* test, the four factors are: 1) the “essential nature” of  
11 the powers being exercised; 2) the “degree of control by the legislative department in the  
12 exercise of the power”; 3) the objective of the legislature; and 4) the practical  
13 consequences of the action. *Hancock*, 142 Ariz. at 406, 690 P. 2d at 125. This test  
14 provides “the necessary flexibility to government,” yet “preserves the essential goal of  
15 the separation of powers theory,” to prevent “the concentration of the whole power of  
16 two or more branches in one body.” *Woods*, 189 Ariz. at 276, 942 P. 2d at 435. When the  
17 *Hancock* test is applied to the facts presented in this case, it is clear that the legislature  
18 has encroached upon the duties and powers entrusted to the Attorney General as a  
19 member of the executive branch.

20 **a. The Nature of the Power Being Exercised.**

21 First, the power being exercised is clearly an executive power. As the Arizona  
22 statutes establish, the Attorney General is in the executive department and is the chief  
23 legal officer of the state. A. R.S. §41-192(A). As such, he is expressly authorized to  
24 compromise or settle any action or claim brought by the state. A.R.S. § 41-192(B)(4). In  
25 executing the Consent Judgment on behalf of the state and agreeing to its terms,

1 including the responsibility to serve as trustee of the Court Ordered Trust Fund, the  
2 Attorney General was exercising his executive and administrative powers.

3 **b. The Degree of Legislative Control in the Exercise of That**  
4 **Power.**

5 The degree of control asserted by the legislature in this case is overwhelming.  
6 Under this prong of the four part test, the inquiry is “whether the Legislature’s  
7 involvement is a cooperative venture or a coercive influence.” *Hancock*, 142 Ariz. at  
8 405, 690 P. 2d at 124. Here, it is unquestionably coercive. Through SB 1523, the  
9 legislature has overridden the discretion granted to the Attorney General both under state  
10 statute and under the Consent Judgment that he negotiated pursuant to that statutory  
11 authority. The Consent Judgment that established the Attorney General as trustee of the  
12 Court Ordered Trust Fund directed him to distribute the Settlement Funds in accordance  
13 with the terms of the Consent Judgment. However, the legislature has completely  
14 disregarded that provision of the Consent Judgment and has *ordered* the Attorney  
15 General to transfer more than half of the Settlement Funds (over which the legislature has  
16 no authority) to the state’s general fund. The legislature’s action here is clearly not a  
17 “cooperative venture.”

18 **c. The Legislature’s Objective.**

19 As for the third prong, the legislature’s objective, here again the heavy-handedness  
20 of its action reveals its intent to intrude upon the executive branch. The court of appeals  
21 has said that the question to be answered under the third prong is whether it “[is] the  
22 intent of the Legislature to cooperate with the executive by furnishing some special  
23 expertise of one or more of its members or is the objective of the Legislature obviously  
24 one of establishing its superiority over the executive department in an area essentially  
25 executive in nature?” *Id.* Here, it is clear that the legislature’s objective is to substitute

1 its judgment regarding the best use of the Settlement Funds (to wit: to help balance the  
2 budget) for that of the Attorney General and the other parties to the Consent Judgment,  
3 who, in resolving the claims asserted in the action, had determined that the settlement  
4 should be structured so that homeowners harmed by the actions of the Defendant Banks  
5 would receive some form of relief. This prong, like the first two, weighs heavily in favor  
6 of finding a separation of powers violation.

7 **d. The Practical Consequences of the Legislature's Action.**

8 As for the final prong of the four part test, the practical consequence of the  
9 legislature's action is that the homeowners intended to directly benefit from the  
10 settlement, by way of credit counseling, legal representation or advocacy, or  
11 supplemental payments to offset their losses, will be denied those benefits which were  
12 negotiated by the Attorney General on their behalf. Instead of being used as intended  
13 under the Consent Judgment, more than half of the Settlement Funds will be deposited  
14 into the general fund.

15 Thus, when the four part test is applied, it is apparent that the legislature's  
16 overreach was a blatant intrusion upon the powers and duties of the executive branch and  
17 a clear violation of the separation of powers clause.

18 **4. Transferring the Settlement Funds from the Court Ordered**  
19 **Trust Fund to the State's General Fund Would be a Breach of**  
20 **the Trustee's Fiduciary Duty.**

21 Whether the Settlement Funds are transferred to the general fund by legislation or  
22 voluntarily by the Attorney General, such a transfer would be a breach of the trustee's  
23 fiduciary duty under the trust created by the Consent Judgment. According to the  
24 Restatement, a trust is, "a fiduciary relationship with respect to property, subjecting the  
25 person by whom the title to the property is held to equitable duties to deal with the  
property for the benefit of another person, which arises as a result of a manifestation of



1 an intention to create it.” Restatement (Second) of Trusts §2. In order to create a trust,  
2 the settler or settlers must manifest an intention to create the trust either orally or in  
3 writing. See Restatement (Second) of Trusts, §24(1) (necessary manifestation of  
4 intention to create a trust may be made by written words); see also A.R.S. §14-10402.

5 In Arizona, a trustee has the duty to “administer a trust...in accordance with the  
6 terms of the trust...” A.R.S. §14-10801 (“On acceptance of a trusteeship, the trustee  
7 shall administer the trust in good faith, in accordance with its terms and purposes and the  
8 interests of the beneficiaries and in accordance with this chapter.”) A trustee breaches his  
9 fiduciary duty as trustee when he delegates responsibilities that he reasonably can be  
10 expected personally to perform. *Shriners Hospital for Crippled Children v. Gardiner*,  
11 152 Ariz. 527; 733 P.2d 1110 (1987). In *Shriners*, the Arizona Supreme Court held that a  
12 trustee had breached her fiduciary duty when she delegated all of the investment  
13 decisions to a stockbroker, who subsequently embezzled more than \$300,000 from the  
14 trust. *Id.* The Court relied upon the Restatement for the proposition that although a  
15 trustee can enlist the assistance of experts, responsibility for the ultimate decisions must  
16 remain with the trustee. *Id.* at 528, 733 P 2d at 1111 citing Restatement (Second) of  
17 Trusts §227.

18 Here, the Consent Judgment expresses a clear intent to create a trust. It provides  
19 for the payment of a discrete amount of funds to the Attorney General to be used for  
20 specific purposes to benefit individual homeowners who were harmed by the Defendant  
21 Banks’ fraudulent practices. Further, the Consent Agreement expressly provides that  
22 “the Funds shall be held in a separate *Court Ordered Trust Fund account* and all interest  
23 thereon deposited into that account and used only for the purposes set forth herein.”  
24 Consent Judgment, Exhibit B1, p.1 (emphasis added).

1           The payment of these funds into the General Fund would be a breach of the  
2 Attorney General's fiduciary duty in at least two ways. First, payment into the general  
3 fund is not one of the enumerated purposes of the trust. The trust provides that "[t]he  
4 Funds shall be used for purposes intended to avoid preventable foreclosures, to  
5 ameliorate the effects of the foreclosure crisis, to enhance law enforcement efforts to  
6 prevent and prosecute financial fraud, or unfair or deceptive acts or practices and to  
7 compensate the State for costs resulting from the alleged unlawful conduct of  
8 Defendants." *Id.* A deposit into the general fund, where the trust monies would be  
9 comingled with public funds and used to generally fund state government is not a use that  
10 is in accordance with the terms and purposes of the trust or in the interests of the trust  
11 beneficiaries.

12           Moreover, even if an argument could be made that the ultimate use of the funds, as  
13 designated by the legislature's appropriation of the general fund, was somehow consistent  
14 with the purpose of the trust, by paying the funds over to the legislature and allowing it to  
15 make the decisions regarding their use, the Attorney General has improperly delegated  
16 his responsibilities as trustee. In agreeing to the Consent Judgment, the Attorney General  
17 accepted the responsibility of ensuring that the funds were used for their intended  
18 purpose. He cannot avoid that responsibility by simply deferring to the legislature's  
19 unlawful demand that he turn over \$50 million intended to benefit the victims of the  
20 Defendant Banks' illegal practices.

21           In sum, as the foregoing analysis establishes, the ordered transfer of the Settlement  
22 Funds from the Court Ordered Trust Fund is unlawful for several reasons, and it is likely  
23 that the plaintiffs will succeed on the merits.

24           **C.     A Transfer of the Trust Funds Would Cause Irreparable Injury.**

25           A transfer of the trust funds would cause irreparable injury to the plaintiffs and

1 other beneficiaries in two ways. First, the Court Ordered Trust Fund could help tens of  
2 thousands of distressed homeowners through services that are designated in the trust.  
3 Homeowners can be assisted and supported in a variety of ways through the measures  
4 identified in the trust. One permissible application of the trust funds is to provide  
5 distressed homeowners with comprehensive housing counseling, mediation services and  
6 legal assistance. A statewide outreach and education campaign could connect distressed  
7 homeowners to resources, counseling and mediation. Trust funds can even be used to  
8 provide supplemental payments directly to homeowners to help them with their  
9 mortgages. If \$50 million is transferred out of the trust fund, then roughly 50% of the  
10 assistance that could have been provided to homeowners will simply be used to pay  
11 general expenses of the state. With the reduction in the trust funds by virtue of the  
12 transfer to the state's general fund, distressed homeowners will be forced to deal with the  
13 five largest banks on their own, without the help and expertise of housing counselors,  
14 mediators and lawyers. Large numbers of foreclosures that could be avoided with the  
15 assistance that the trust fund promises to provide, will go forward at a great loss to the  
16 intended beneficiaries of the trust. See Exhibit A, Iverson Decl. ¶11.

17 The damage is both irrevocable and enduring. As the law has long recognized,  
18 real property is unique, and a home lost is, by definition, irreplaceable. Further, an  
19 increase in foreclosures will have a negative impact on other homeowners throughout  
20 Arizona. Foreclosed homes reduce nearby home values by 1-3%. Crime rates in  
21 neighborhoods with vacant, bank owned houses increase over 5%. *Id.* at 12.

22 Second, aside from being deprived of the timely and necessary direct assistance  
23 that the Settlement Funds could provide, Arizona homeowners will also be irrevocably  
24 harmed by the fact that once the \$50 million is transferred, it will be nearly impossible to  
25 recover the funds. Once the Attorney General transfers the trust funds into the state

1 general fund, it would take a separate action against the state to recover the \$50 million.  
2 Even if the plaintiffs in such a case were to prevail, the challenge would be enforcing that  
3 judgment-- forcing the legislature to appropriate the necessary amount for repayment to  
4 the trust fund. It is unlikely the legislature would do so without a court order requiring  
5 the transfer which, in and of itself, creates separation of powers questions.

6 The irreparable injury to the plaintiffs and the other beneficiaries of the Court  
7 Ordered Trust Fund is clear. Thousands upon thousands of homeowners will not be able  
8 to take advantage of the mediation, counseling, legal assistance and direct payments that  
9 the trust fund was created to provide. Once the money is transferred into the general  
10 fund, it will basically be impossible to recover. As the next section demonstrates, this  
11 irreparable injury dwarfs the nonexistent hardship that a preliminary injunction would  
12 pose for the state.

13 **D. Balance of Hardships Tips in Favor of Plaintiffs.**

14 The harm to the plaintiffs and the other intended beneficiaries of the trust is severe  
15 and enduring. That is in sharp contrast to the impact on the state resulting from a  
16 preliminary injunction. First, as noted above, SB 1523 does not require the Attorney  
17 General to transfer \$50 million until June 30, 2013. Therefore, the state cannot possibly  
18 claim immediate harm from the issuance of a preliminary injunction.

19 Second, the state does not have an immediate need for the funds. The budget  
20 process is more of an art than a science. For this past fiscal year, actual revenues  
21 exceeded the estimates used to develop the budget by approximately \$200 million. The  
22 only time that the \$50 million that the legislature has ordered the Attorney General to  
23 transfer would become relevant is later in the fiscal year if actual revenues are  
24 insufficient to support budgeted expenditures. Even then, the legislature could withdraw  
25 any amount necessary to cover any shortfall from the rainy day fund. The budget enacted

1 by the legislature this session that becomes effective on July 1, 2012, deposits \$425  
2 million into the state's rainy day fund.<sup>4</sup>

3 In any event, it is clear that the \$50 million that the legislature has ordered  
4 transferred from the Court Ordered Trust Fund is not immediately necessary to support  
5 state government operations. That being the case, the issuance of a preliminary  
6 injunction enjoining the transfer will have no impact on the state in the immediate future  
7 and perhaps even over the longer term depending on the pace of economic recovery  
8 within Arizona. Of course, it does not help the economic recovery when funds intended  
9 to assist homeowners in foreclosure are misdirected for other purposes.

10 **E. Public Policy Favors Injunctive Relief.**

11 Finally, public policy surely favors the application of trust funds for their intended  
12 purpose. In this case, the Settlement Funds are the subject of Consent Judgment  
13 approved by a federal judge who ordered that they be held in a Court Ordered Trust  
14 Fund. Allowing those funds to be used in a manner that is not consistent with the  
15 Consent Judgment's intended purpose would frustrate public policy, not promote it.  
16 Notably, the legislature itself could not appropriate these funds. That is why it required  
17 the Attorney General to transfer the funds to the general fund, which is subject to  
18 legislative appropriation. But it is Arizona legislators, not the plaintiffs, who are  
19 interfering with the orderly administration of the Court Ordered Trust Fund. Public  
20 policy not only favors but requires that this Court respect the terms of the Consent  
21 Judgment and the Court Ordered Trust Fund with the issuance of a preliminary injunction  
22 enjoining any indirect appropriation of those funds by the Arizona legislature.

23

24

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25 <sup>4</sup> Of course, the legislature could have decided that it would not unlawfully require a transfer of the \$50 million from the Court Ordered Trust Fund and instead reduce the rainy day deposit to \$375 million.

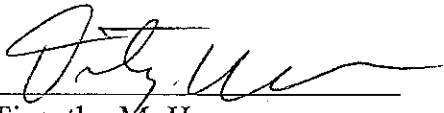
1 **IV. CONCLUSION.**

2 For all of the foregoing reasons, the plaintiffs respectfully request that this Court  
3 grant their Motion and issue a temporary restraining order and a preliminary injunction  
4 enjoining the transfer of \$50 million from the Court Ordered Trust Fund to the Arizona  
5 general fund. Plaintiffs further request that this Court award them attorneys' fees  
6 pursuant to A.R.S. §35-213(C) and the private attorney general doctrine.

7 RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of May 2012.

8 ARIZONA CENTER FOR LAW IN THE  
9 PUBLIC INTEREST

10 WILLIAM E. MORRIS INSTITUTE FOR JUSTICE

11 By   
12 Timothy M. Hogan

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# EXHIBIT A

1 Timothy M. Hogan, AZ Bar No. 004567  
Joy Herr-Cardillo, AZ Bar No. 009718  
2 Arizona Center for Law in the Public Interest  
202 East McDowell Road, Suite 153  
3 Phoenix, Arizona 85004  
(602) 258-8850  
4 thogan@aclpi.org

5 Ellen Sue Katz, AZ Bar No. 012214  
William E. Morris Institute for Justice  
6 202 East McDowell Road, Suite 257  
Phoenix, Arizona 85004  
7 (602) 252-3432  
eskatz@qwestoffice.net

8 Attorneys for Plaintiffs

9  
10 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

11 IN AND FOR THE COUNTY OF MARICOPA

12 JOSEPH MORONES; and ELVIRA  
HERNANDEZ,

13 Plaintiffs,

14 v.

15 TOM HORNE, in his capacity as Attorney  
General; and DOUG DUCEY, in his  
16 capacity as Arizona Treasurer,

17 Defendants.

No.

**DECLARATION OF  
VALERIE A. IVERSON IN SUPPORT  
OF PLAINTIFFS' MOTION FOR  
TEMPORARY RESTRAINING  
ORDER AND PRELIMINARY  
INJUNCTION**

18  
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22 I, Valerie A. Iverson, declare the following:

23 1. I am the Executive Director of the Arizona Housing Alliance and live in  
24 Phoenix, Arizona.

25 2. The Housing Alliance is a statewide organization that supports and  
26 advocates for quality housing that Arizonans can afford. The Housing Alliance works to  
27 expand sustainable housing opportunities for low and moderate income people through  
28 education, advocacy, and networking for those in the affordable housing field.



1           3.     I have been the director of the Housing Alliance for three years. My  
2 responsibilities are to support operations, fiscal management, and administration of the  
3 organization, promote and expand active and broad participation by members, deliver  
4 educational programs and services, and serve as a public advocate, aware of and involved  
5 with issues relevant to the mission.

6           4.     I have worked in the affordable housing and community development field  
7 for 25 years. I have an MBA from Syracuse University and a Master of Applied  
8 Geography from New Mexico State University. As part of my work for the Housing  
9 Alliance I work closely with housing counseling agencies, legal aid, and other  
10 organizations providing foreclosure prevention and mitigation services to homeowners  
11 facing foreclosure. I also act as a clearinghouse for information related to affordable  
12 housing in Arizona. I am very familiar with the mortgage foreclosure crisis in Arizona.

13          5.     I also followed closely the National Mortgage Settlement case. I have read  
14 the agreement and understand that the Arizona Attorney General is to receive over 97  
15 million dollars to be put in a Court Ordered Trust Fund and to only use the funds for  
16 designated purposes. I understand that the legislature recently passed a budget bill that  
17 requires the Arizona Attorney General to transfer 50 million dollars from the Court  
18 Ordered Trust Fund to the State Treasurer to put into the state general fund.

19          6.     Arizona currently has the highest foreclosure rate in the country. As an  
20 example, in March 2012, there were 9,497 foreclosure filings, the equivalent of 1 in every  
21 300 housing units. RealtyTrac Foreclosure Rate Heat Map at [www.RealtyTrac.com](http://www.RealtyTrac.com).

22          7.     Currently, Arizona and Nevada have the highest rate of distressed property  
23 transactions in the country. As an example, in December 2011, 61% of the total sales  
24 transactions in Arizona and Nevada were either short sales or properties that the bank  
25 took back and owned. Federal Reserve Bank of San Francisco 12<sup>th</sup> District Presentations  
26 on Local Housing and Mortgage Market Trends at [www.frbsf.org](http://www.frbsf.org).

27          8.     Arizona home prices continue to decline. The Federal Housing Finance  
28 Agency's State-Level Seasonally Adjusted House Price Index for Arizona has decreased

1 every quarter since the 2<sup>nd</sup> quarter of 2007. The current House Price Index is equivalent  
2 to 2<sup>nd</sup> quarter 2002 values. Federal Housing Finance Agency, Seasonally Adjusted House  
3 Price Index at [www.fhfa.gov](http://www.fhfa.gov).

4 9. Almost half of Arizona homeowners are underwater, meaning they owe  
5 more on their mortgages than their homes are worth. As an example, in the fourth quarter  
6 of 2011, Arizona had the second highest negative equity percentage in the country with  
7 48% of all mortgaged properties underwater. This equates to 631,126 underwater  
8 homeowners. CoreLogic Reports negative Equity Increase in Q4 2011 at  
9 [www.corelogic.com](http://www.corelogic.com).

10 10. The Housing Alliance estimates that the \$97 million could help tens of  
11 thousands of distressed homeowners through services that are designated in the Court  
12 Ordered Trust Fund. One option is to assist homeowners through a statewide outreach  
13 and education campaign, connecting them to resources, counseling and mediation as  
14 needed. Another option is to provide distressed homeowners with comprehensive  
15 housing counseling, mediation services and legal assistance. A statewide assistance  
16 campaign could include a hotline, outreach materials, community based workshops, web  
17 based seminars, a central web portal for all resource information, an automated reporting  
18 infrastructure, and other sophisticated marketing tools and techniques. Other options  
19 could be to use some of the funds to directly affect the amounts owed on the mortgages.  
20 There are many designated uses of the Court Ordered Trust Funds that could materially  
21 assist distressed homeowners. These are just examples.

22 11. The \$97 million flowing directly to the Arizona Attorney General in the  
23 form of the Court Ordered Trust Fund is critical to distressed homeowners and  
24 communities. Without this funding most distressed homeowners will never know about  
25 the resources that are available to them and that they are entitled to receive. Without this  
26 funding, distressed homeowners will have to go up against the five largest banks and  
27 other institutions and their bureaucracies on their own, without the help and expertise of  
28 housing counselors, mediators and lawyers. Without such information and assistance,

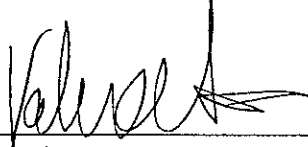
1 we have seen large numbers of foreclosures that could have been avoided.

2 12. Without this funding, foreclosures will continue to negatively impact our  
3 communities. Foreclosed homes drag down nearby home values by 1-3%. Crime rates in  
4 neighborhoods with vacant, bank-owned houses increase over 5%. National Foreclosure  
5 Settlement Update, Brennan Center for Justice at New York University School of Law at  
6 [www.brennancenter.org](http://www.brennancenter.org).

7 13. Without this funding, children face the loss of their homes as well as risk  
8 losing friends and falling behind academically if they are forced to move and switch  
9 schools. Arizona has the third highest percentage of children affected by foreclosure with  
10 15% of its children, or 218,000 children, affected. The Ongoing Impact of Foreclosures  
11 on Children, First Focus/Brookings Institute, April 2012.

12 I declare under penalty of perjury that the foregoing is true and correct.

13 Executed this 21st day of May 2012 at Phoenix, Arizona.

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16 \_\_\_\_\_  
Valerie A. Iverson

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# EXHIBIT B

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**FILED**

APR 4 2012

Clerk, U.S. District & Bankruptcy  
Courts for the District of Columbia

UNITED STATES OF AMERICA,  
*et al.*,

Plaintiffs,

v.

BANK OF AMERICA CORP. *et al.*,

Defendants.

12 0361

Civil Action No. \_\_\_\_\_

**CONSENT JUDGMENT**

WHEREAS, Plaintiffs, the United States of America and the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming, the Commonwealths of Kentucky, Massachusetts, Pennsylvania and Virginia, and the District of Columbia filed their complaint on March 12, 2012, alleging that Wells Fargo & Company and Wells Fargo Bank, N.A. (collectively, "Defendant") violated, among other laws, the Unfair and Deceptive Acts and Practices laws of the Plaintiff States, the False Claims Act, the Financial

Institutions Reform, Recovery, and Enforcement Act of 1989, the Servicemembers Civil Relief Act, and the Bankruptcy Code and Federal Rules of Bankruptcy Procedure;

WHEREAS, the parties have agreed to resolve their claims without the need for litigation;

WHEREAS, Defendant, by its attorneys, has consented to entry of this Consent Judgment without trial or adjudication of any issue of fact or law and to waive any appeal if the Consent Judgment is entered as submitted by the parties;

WHEREAS, Defendant, by entering into this Consent Judgment, does not admit the allegations of the Complaint other than those facts deemed necessary to the jurisdiction of this Court;

WHEREAS, the intention of the United States and the States in effecting this settlement is to remediate harms allegedly resulting from the alleged unlawful conduct of the Defendant;

AND WHEREAS, Defendant has agreed to waive service of the complaint and summons and hereby acknowledges the same;

NOW THEREFORE, without trial or adjudication of issue of fact or law, without this Consent Judgment constituting evidence against Defendant, and upon consent of Defendant, the Court finds that there is good and sufficient cause to enter this Consent Judgment, and that it is therefore ORDERED, ADJUDGED, AND DECREED:

#### I. JURISDICTION

I. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345, 1355(a), and 1367, and under 31 U.S.C. § 3732(a) and (b), and over Defendant. The Complaint states a claim upon which relief may be granted against Defendant. Venue is appropriate in this District pursuant to 28 U.S.C. § 1391(b)(2) and 31 U.S.C. § 3732(a).

## II. SERVICING STANDARDS

2. Defendant shall comply with the Servicing Standards, attached hereto as Exhibit A, in accordance with their terms and Section A of Exhibit E, attached hereto.

## III. FINANCIAL TERMS

3. *Payment Settlement Amounts.* Defendant shall pay into an interest bearing escrow account to be established for this purpose the sum of \$1,005,233.716, which sum shall be added to funds being paid by other institutions resolving claims in this litigation (which sum shall be known as the "Direct Payment Settlement Amount") and which sum shall be distributed in the manner and for the purposes specified in Exhibit B. Defendant's payment shall be made by electronic funds transfer no later than seven days after the Effective Date of this Consent Judgment, pursuant to written instructions to be provided by the United States Department of Justice. After Defendant has made the required payment, Defendant shall no longer have any property right, title, interest or other legal claim in any funds held in escrow. The interest bearing escrow account established by this Paragraph 3 is intended to be a Qualified Settlement Fund within the meaning of Treasury Regulation Section 1.468B-1 of the U.S. Internal Revenue Code of 1986, as amended. The Monitoring Committee established in Paragraph 8 shall, in its sole discretion, appoint an escrow agent ("Escrow Agent") who shall hold and distribute funds as provided herein. All costs and expenses of the Escrow Agent, including taxes, if any, shall be paid from the funds under its control, including any interest earned on the funds.

4. *Payments to Foreclosed Borrowers.* In accordance with written instructions from the State members of the Monitoring Committee, for the purposes set forth in Exhibit C, the Escrow Agent shall transfer from the escrow account to the Administrator appointed under

Exhibit C \$1,489,813.925.00 (the "Borrower Payment Amount") to enable the Administrator to provide cash payments to borrowers whose homes were finally sold or taken in foreclosure between and including January 1, 2008 and December 31, 2011; who submit claims for harm allegedly arising from the Covered Conduct (as that term is defined in Exhibit G hereto); and who otherwise meet criteria set forth by the State members of the Monitoring Committee. The Borrower Payment Amount and any other funds provided to the Administrator for these purposes shall be administered in accordance with the terms set forth in Exhibit C.

5. *Consumer Relief.* Defendant shall provide \$3,434,000,000 of relief to consumers who meet the eligibility criteria in the forms and amounts described in Paragraphs 1-8 of Exhibit D, and \$903,000,000 of refinancing relief to consumers who meet the eligibility criteria in the forms and amounts described in Paragraph 9 of Exhibit D, to remediate harms allegedly caused by the alleged unlawful conduct of Defendant. Defendant shall receive credit towards such obligation as described in Exhibit D.

#### IV. ENFORCEMENT

6. The Servicing Standards and Consumer Relief Requirements, attached as Exhibits A and D, are incorporated herein as the judgment of this Court and shall be enforced in accordance with the authorities provided in the Enforcement Terms, attached hereto as Exhibit E.

7. The Parties agree that Joseph A. Smith, Jr. shall be the Monitor and shall have the authorities and perform the duties described in the Enforcement Terms, attached hereto as Exhibit E.

8. Within fifteen (15) days of the Effective Date of this Consent Judgment, the participating state and federal agencies shall designate an Administration and Monitoring Committee (the "Monitoring Committee") as described in the Enforcement Terms. The



Monitoring Committee shall serve as the representative of the participating state and federal agencies in the administration of all aspects of this and all similar Consent Judgments and the monitoring of compliance with it by the Defendant.

#### **V. RELEASES**

9. The United States and Defendant have agreed, in consideration for the terms provided herein, for the release of certain claims, and remedies, as provided in the Federal Release, attached hereto as Exhibit F. The United States and Defendant have also agreed that certain claims, and remedies are not released, as provided in Paragraph 11 of Exhibit F. The releases contained in Exhibit F shall become effective upon payment of the Direct Payment Settlement Amount by Defendant.

10. The State Parties and Defendant have agreed, in consideration for the terms provided herein, for the release of certain claims, and remedies, as provided in the State Release, attached hereto as Exhibit G. The State Parties and Defendant have also agreed that certain claims, and remedies are not released, as provided in Part IV of Exhibit G. The releases contained in Exhibit G shall become effective upon payment of the Direct Payment Settlement Amount by Defendant.

#### **VI. SERVICEMEMBERS CIVIL RELIEF ACT**

11. The United States and Defendant have agreed to resolve certain claims arising under the Servicemembers Civil Relief Act ("SCRA") in accordance with the terms provided in Exhibit H. Any obligations undertaken pursuant to the terms provided in Exhibit H, including any obligation to provide monetary compensation to servicemembers, are in addition to the obligations undertaken pursuant to the other terms of this Consent Judgment. Only a payment to

an individual for a wrongful foreclosure pursuant to the terms of Exhibit H shall be reduced by the amount of any payment from the Borrower Payment Amount.

#### VII. OTHER TERMS

12. The United States and any State Party may withdraw from the Consent Judgment and declare it null and void with respect to that party if the Defendant does not make the Consumer Relief Payments (as that term is defined in Exhibit F (Federal Release)) required under this Consent Judgment and fails to cure such non-payment within thirty days of written notice by the party.

13. This Court retains jurisdiction for the duration of this Consent Judgment to enforce its terms. The parties may jointly seek to modify the terms of this Consent Judgment, subject to the approval of this Court. This Consent Judgment may be modified only by order of this Court.

14. The Effective Date of this Consent Judgment shall be the date on which the Consent Judgment has been entered by the Court and has become final and non-appealable. An order entering the Consent Judgment shall be deemed final and non-appealable for this purpose if there is no party with a right to appeal the order on the day it is entered.

15. This Consent Judgment shall remain in full force and effect for three and one-half years from the date it is entered ("the Term"), at which time the Defendants' obligations under the Consent Judgment shall expire, except that, pursuant to Exhibit E, Defendants shall submit a final Quarterly Report for the last quarter or portion thereof falling within the Term and cooperate with the Monitor's review of said report, which shall be concluded no later than six months after the end of the Term. Defendant shall have no further obligations under this Consent Judgment six months after the expiration of the Term, but the Court shall retain

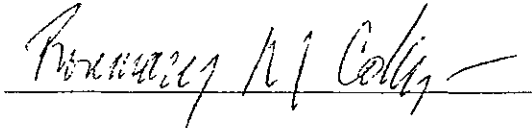
jurisdiction for purposes of enforcing or remedying any outstanding violations that are identified in the final Monitor Report and that have occurred but not been cured during the Term.

16. Except as otherwise agreed in Exhibit B, each party to this litigation will bear its own costs and attorneys' fees associated with this litigation.

17. Nothing in this Consent Judgment shall relieve Defendant of its obligation to comply with applicable state and federal law.

18. The sum and substance of the parties' agreement and of this Consent Judgment are reflected herein and in the Exhibits attached hereto. In the event of a conflict between the terms of the Exhibits and paragraphs 1-18 of this summary document, the terms of the Exhibits shall govern.

SO ORDERED this 4 day of April, 2012

  
\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

# **EXHIBIT B**

## DISTRIBUTION OF FUNDS

1. Any amount of the Direct Payment Settlement Amount that is not distributed pursuant to Paragraph 2 shall be distributed as follows.
  - a. *Federal Payment Settlement Amount.* The Escrow Agent shall distribute \$911,777,917.00 (the "Federal Payment Settlement Amount") to the United States in accordance with instructions to be provided by the United States.
    - i. Of the Federal Payment Settlement Amount, \$684,090,417.00 shall, following payment of any amounts owed as a result of resolutions pursuant to 31 U.S.C. § 3730(d), and subject to 28 U.S.C. § 527 (Note), be deposited for losses incurred into FHA's Capital Reserve Account, the Veterans Housing Benefit Program Fund (pursuant to 38 U.S.C. § 3722(c)(3), as being incident to housing loan operations) or as otherwise directed by the Department of Veterans Affairs, and as directed by Rural Housing Service, Department of Agriculture, in accordance with instructions from the United States. The United States intends that such deposits conform with the Miscellaneous Receipts Act and other law.
    - ii. The Federal Payment Settlement Amount includes resolution of the following qui tam actions: (i) \$75,000,000 from the claims in United States ex rel. Lagow v. Countrywide Financial Corp., et al., Civil Action No. CV-09-2040 (E.D.N.Y.); (ii) \$45,000,000 from those claims in United States ex rel. Bibby et al. v. JPMorgan Chase et al., No. 2:11-cv-00535-RHL-RJJ (N.D. Ga.) that are expressly released by the United States in this litigation; (iii) \$95,000,000 from those claims in United States ex rel. Szymoniak v.

[SEALED], Civ No. 0:10-cv-01465 (D.S.C.) and in United States ex rel. Szymoniak v. [SEALED], Civ No. 3:10-cv-575 (W.D.N.C.) that are expressly released by the United States in this litigation; (iv) \$6,500,000 from the claims in United States ex rel. Mackler v. Bank of America, N.A., et al., 11-CV-3270 (SLT) (E.D.N.Y.); and (v) \$6,187,500 from the claims in United States ex rel. Harris v. J.P. Morgan Chase & Co., et al., Civil Action No. 10-10068-GAO (D. Mass). Following payment of any amounts owed as a result of resolutions pursuant to 31 U.S.C. § 3730(d), and subject to 28 U.S.C. § 527 (Note), these amounts shall be deposited into FHA's Capital Reserve Account and the Veterans Housing Benefit Program Fund (pursuant to 38 U.S.C. § 3722(c)(3), as being incident to housing loan operations) or as otherwise directed by the Department of Veterans Affairs, in accordance with instructions from the United States. The United States intends that such deposits conform with the Miscellaneous Receipts Act and other law.

- b. *State Payment Settlement Amounts.* In accordance with written instructions from each State Attorney General, the Escrow Agent shall distribute cash payments in the total amounts set forth in the attached Exhibit B-1.
  - i. Each State Attorney General shall designate the uses of the funds set forth in the attached Exhibit B-1. To the extent practicable, such funds shall be used for purposes intended to avoid preventable foreclosures, to ameliorate the effects of the

foreclosure crisis, to enhance law enforcement efforts to prevent and prosecute financial fraud, or unfair or deceptive acts or practices and to compensate the States for costs resulting from the alleged unlawful conduct of the Defendants. Such permissible purposes for allocation of the funds include, but are not limited to, supplementing the amounts paid to state homeowners under the Borrower Payment Fund, funding for housing counselors, state and local foreclosure assistance hotlines, state and local foreclosure mediation programs, legal assistance, housing remediation and anti-blight projects, funding for training and staffing of financial fraud or consumer protection enforcement efforts, and civil penalties. Accordingly, each Attorney General has set forth general instructions for the funds in the attached Exhibit B-2.

- ii. No more than ten percent of the aggregate amount paid to the State Parties under this paragraph 1(b) may be designated as a civil penalty, fine, or similar payment. The remainder of the payments is intended to remediate the harms to the States and their communities resulting from the alleged unlawful conduct of the Defendant and to facilitate the implementation of the Borrower Payment Fund and consumer relief.

2. Of the Direct Payment Settlement Amount, \$1,579,813,925.00 shall be distributed as follows:

- a.- In accordance with written instructions from the State members of the Monitoring Committee, the Escrow Agent shall make available \$1,489,813,925.00 to the Administrator to provide cash payments to borrowers whose homes were finally sold or taken in foreclosure between and including January 1, 2008 and December 31, 2011; who submit claims arising from the Covered Conduct; and who otherwise meet criteria set forth by the State members of the Monitoring Committee. Any amounts made available hereunder remain a part of the Qualified Settlement Fund until distributed to borrowers and shall be administered in accordance with the terms set forth in Exhibit C.
- b. In accordance with written instructions from the State members of the Monitoring Committee, the Escrow Agent shall distribute \$15,000,000.00 to the National Association of Attorneys General (NAAG) to create and administer the “Financial Services and Consumer Protection Enforcement, Education and Training Fund.” Such Fund shall be used to pay for expenses and training relating to the investigation and prosecution of cases involving fraud, unfair and deceptive acts and practices, and other illegal conduct related to financial services or state consumer protection laws. Illustrative examples include, but are not limited to, travel costs associated with investigation, litigation, or settlement of financial services or consumer protection cases; expert witness and consulting fees, training programs, NAAG Consumer Protection Conferences, information



exchanges, public education campaigns, and other uses. The State members of the Monitoring Committee shall develop rules and regulations governing the Financial Services and Consumer Protection Enforcement, Education and Training Fund in a separate memorandum of understanding after this Consent Judgment has been entered.

- c. In accordance with written instructions from the State members of the Monitoring Committee, the Escrow Agent shall distribute a total of \$10,000,000.00 to the members of the Executive Committee and the Amerquest Financial Services Fund ("AMFSF") for reimbursement of costs and attorneys fees incurred during the investigation of this case and the settlement negotiations and for subsequent expenditures as authorized by each Attorney General. Such payments shall be made as designated by the Iowa Attorney General as the Chairman of the Executive Committee, and shall be made to the State Attorneys General of Arizona, California, Colorado, Connecticut, Delaware, Florida, Illinois, Iowa, Massachusetts, North Carolina, Ohio, Tennessee, Texas, and Washington and the Maryland Department of Labor, Licensing and Regulation and the Amerquest Financial Services Fund. The authorized representatives of each state attorney general, the Maryland Department of Labor, Licensing and Regulation and the AMFSF will provide a letter to the Escrow Agent directing how each separate payment should be made.

- d. In accordance with written instructions from the State members of the Monitoring Committee, the Escrow Agent shall distribute \$65,000,000.00 to the Conference of State Bank Supervisors (CSBS). CSBS shall use \$15,000,000 to establish the "State Financial Regulation Fund," a fund to be managed and used by CSBS to support and improve state financial regulation and supervision. From the balance, CSBS shall transfer \$1,000,000 per state to the state financial regulators who have signed this Consent Judgment. Where multiple agencies within a single state claim regulatory jurisdiction, CSBS shall transfer that state's funds as provided in an agreement between or among those regulatory agencies. In addition, state financial regulators may, at their discretion, enter into an agreement with CSBS for the management and disbursement of all or a portion of the funds paid to them. If, for any reason, a state financial regulator elects to forego receipt of their transfer payment or in the case of a participating state where the state financial regulator declines to sign this Consent Judgment, such funds shall revert to the State Financial Regulation Fund.
3. Any interest earned on funds held by the Escrow Agent may be used, at the discretion of the State members of the Monitoring Committee, to pay the costs and expenses of the escrow or the costs and expenses of administration, including taxes, or for any other housing related purpose.

4. Notwithstanding any implication to the contrary in any of the provisions of Exhibit B-2, all instructions therein shall be subject to the provisions of paragraph 1.b(i) and 1.b(ii) of this Exhibit B. If and to the extent any amounts are paid into a fund or escrow account established by a State Party that is not an integral part of the government of such State, it is intended that such fund or account be deemed a Qualified Settlement Fund within the meaning of Treasury Regulation Section 1.468B-1 of the U.S. Internal Revenue Code of 1986, as amended. To the extent that any state designates any payments hereunder as a civil penalty, such state shall provide the Defendant(s), upon request, such information as is reasonably necessary for tax reporting purposes with respect to such civil penalty.

# EXHIBIT B1

## EXHIBIT B1

STATE	DOLLAR ALLOCATION
AK	\$3,286,839
AL	\$25,305,692
AR	\$12,830,241
AZ	\$97,784,204
CA	\$410,576,996
CO	\$50,170,188
CT	\$26,102,142
DC	\$4,433,081
DE	\$7,913,923
FL	\$334,073,974
GA	\$99,365,105
HI	\$7,911,883
IA	\$14,651,922
ID	\$13,305,209
IL	\$105,806,405
IN	\$43,803,419
KS	\$13,778,401
KY	\$19,198,220
LA	\$21,741,560
MA	\$44,450,668
MD	\$59,697,470
ME	\$6,907,023
MI	\$97,209,465
MN	\$41,536,169
MO	\$39,583,212

STATE	DOLLAR ALLOCATION
MS	\$13,580,374
MT	\$4,858,276
NC	\$60,852,159
ND	\$1,947,666
NE	\$8,422,528
NH	\$9,575,447
NJ	\$72,110,727
NM	\$11,174,579
NV	\$57,368,430
NY	\$107,642,490
OH	\$92,783,033
OR	\$29,253,190
PA	\$66,527,978
RI	\$8,500,755
SC	\$31,344,349
SD	\$2,886,824
TN	\$41,207,810
TX	\$134,628,489
UT	\$21,951,641
VA	\$66,525,233
VT	\$2,552,240
WA	\$54,242,749
WI	\$30,191,806
WV	\$5,748,915
WY	\$2,614,515

# EXHIBIT B2

**EXHIBIT B2**

**ALABAMA**

The Court awards the State of Alabama a judgment in the amount of \$25,305,692, which shall be paid by electronic transfer to the Office of the Attorney General. Of this amount, the Court awards \$2,530,569 dollars in civil penalties (or 10% of the total) as defined by and in accordance with Code of Alabama, 1975, §8-19-11 for misconduct relating to the banks' robo-signing in violation of Alabama's Deceptive Trade Practices Act. The remaining amount shall be used by the Attorney General, at his sole discretion, for costs of investigation and litigation, for law enforcement efforts to prevent and prosecute financial fraud, and/or for public protection purposes, such as to defray the operating cost of any function of the Attorney General's Office that protects citizens, whether through investigation, representation, regulation, mediation, prosecution, victims' assistance, or consumer education concerning consumer-related financial or other crimes, or, at the sole discretion of the Attorney General, to be used for housing programs, housing counseling, legal assistance, foreclosure prevention hotlines, foreclosure mediation and investigation of financial fraud or other wrongdoing overseen by any division of the Attorney General's Office.

In addition, the Attorney General may distribute any amount from the funds, at his sole discretion, to other governmental entities or charitable organizations whose eleemosynary purposes benefit those affected by the aforementioned misconduct

**ALASKA**

Alaska's payment of \$3,286,839.00 shall be to the State of Alaska and delivered to the Office of the Attorney General, 1031 West 4th Avenue, Suite 200, Anchorage, Alaska 99501.

**ARIZONA**

1: State Payment Settlement Amounts, Consent Judgment Ex. B, Paragraph 1(b)(i) Arizona's share of the State Payment Settlement Amounts ("Funds") provided under this Consent Judgment, and any interest thereon, shall be made payable to the Office of the Arizona Attorney General. The Attorney General shall direct the use of the Funds in Arizona. The Funds shall be used for purposes intended to avoid preventable foreclosures, to ameliorate the effects of the foreclosure crisis, to enhance law enforcement efforts to prevent and prosecute financial fraud, or unfair or deceptive acts or practices and to compensate the State for costs resulting from the alleged unlawful conduct of the Defendants. Such permissible purposes for allocation of the funds include, but are not limited to, supplementing the amounts paid to state homeowners under the Borrower Payment Fund, funding for housing counselors, state and local foreclosure assistance hotlines, state and local foreclosure mediation programs, legal assistance, housing remediation and anti-blight projects, funding for training and staffing of financial fraud or consumer protection enforcement efforts, and civil penalties.

The Attorney General shall deposit the Funds with the State Treasurer and the Funds shall be held in a separate Court Ordered Trust Fund account and all interest thereon deposited into that account and used only for the purposes set forth herein.

2. Executive Committee Payment, Consent Judgment Ex. B, Paragraph 2(c)  
Any funds paid to the Office of the Arizona Attorney General as reimbursement for attorneys fees and costs for serving on the Executive Committee, and any interest thereon, shall be deposited into the consumer fraud revolving fund pursuant to A.R.S. § 44-1531.01 and used for the purposes set forth therein.

### ARKANSAS

For the payment to the State of Arkansas as provided in Paragraph III (3) of the Consent Judgment, and in accordance with the provisions of Paragraph 1. (b) of Exhibit B to the Consent Judgment, Attorney General Dustin McDaniel directs that the total anticipated sum of Twelve Million, Eight Hundred Thirty Thousand, two hundred and forty-one dollars (\$12,830,241) be paid to the State of Arkansas Office of the Attorney General (and delivered to Carol Thompson, Chief Financial Officer) to then be distributed by the Attorney General to the following entities for the following purposes:

1. To the Arkansas Development Finance Authority to fund programs that provide to Arkansas residents down payment assistance, financial literacy and mortgage and foreclosure counseling, tax credit assistance, rental assistance, low-interest financing, land acquisition, new construction, rehabilitation construction, and reconstruction, the sum of Nine Million dollars (\$9,000,000.00);
2. To the Arkansas Access to Justice Commission to provide equal access to justice to Arkansas residents affected by the mortgage and foreclosure crisis, the sum of Two Million dollars (\$2,000,000.00);
3. To the University of Arkansas School of Law to support its legal aid clinic, which provides legal representation to low-income Arkansans, the sum of Five Hundred Thousand dollars (\$500,000.00);
4. To the University of Arkansas at Little Rock School of Law to support its legal aid clinic, which provides legal representation to low-income Arkansans, the sum of Five Hundred Thousand dollars (\$500,000.00);

And, to the Arkansas Treasury the remaining funds for fees, costs, and the costs of investigation and pursuit of this matter, the sum of Eight Hundred Thirty Thousand, two hundred and forty-one dollars (\$830,241.00).



# EXHIBIT C



May 8, 2012

Tom Horne  
Arizona Attorney General  
1275 West Washington Street  
Phoenix, Arizona 85007

Re: Request to Refrain from Unlawfully Transferring Court Ordered Trust  
Fund Monies into the General Fund

Dear Attorney General Horne:

The undersigned represent Joseph Morones, an Arizona taxpayer. This letter is submitted to you pursuant to A.R.S. § 35-211 *et. seq.*

The legislature recently enacted SB 1523 which was transmitted to the Governor on May 1, 2012. Section 128 of that legislation requires that the Attorney General direct a total of \$50 million received pursuant to the Consent Judgment in the National Mortgage Settlement to the state general fund to compensate the state for costs resulting from the alleged unlawful conduct of the Defendants. The purpose of this letter is to request that you refrain from transferring the funds because Section 128 of SB 1523 is unconstitutional on a number of grounds and, therefore, does not constitute a valid or binding obligation of the Attorney General. Moreover, a transfer of the funds would violate your duties as trustee under the Consent Judgment and also constitute an unlawful expenditure of funds.

Pursuant to the Consent Judgment you executed in the National Mortgage Settlement, you are the trustee of the Court Ordered Trust Fund consisting of \$97.7 million. According to the provisions of the Consent Judgment, you are to "direct the use of funds in Arizona." The funds "shall be used for purposes intended to avoid preventable disclosures, to ameliorate the effects of the foreclosure crisis, to enhance law enforcement efforts or to prevent and prosecute financial fraud, or unfair or deceptive acts or practices and to compensate the state for costs resulting from the alleged unlawful conduct of the Defendants." The Consent Judgment identifies permissible purposes for allocation of the funds to include supplementing the amounts paid to state homeowners under the borrower payment fund, funding for housing counselors, state and local foreclosure assistance hotlines, state and local foreclosure mediation programs, legal assistance, housing remediation, funding for training and staffing of financial fraud or consumer protection efforts, and civil penalties.

Tom Horne  
May 8, 2012  
Page 2

Section 128 of SB 1523 is unconstitutional on several grounds. First, it violates Arizona's constitutional provision regarding separation of powers among the branches of state government. The legislature lacks the authority to direct funds under the control of a constitutional executive officer and that are not otherwise subject to appropriation. These funds are not available for appropriation by the legislature because they have been established in the separate Court Ordered Trust Fund pursuant to the explicit terms of the Consent Judgment.

Additionally, SB 1523 violates the single subject rule of the Arizona Constitution. Article 4, Part 2, Section 13 of the Arizona Constitution provides that "[e]very act shall embrace but one subject in matters properly connected therewith..." Article 4, Part 2, Section 20 addresses appropriations bills specifically and provides that "[t]he general appropriation bill shall embrace nothing but appropriations for the different departments of the state, for state institutions, for public schools, and for interest on the public debt. All other appropriations shall be made by separate bills, each embracing but one subject." SB 1523 purports to be an appropriation bill and the majority of the legislation in it sets forth appropriations for the different departments of the state; however, Section 128 of SB 1523 which directs the Attorney General to transfer monies from the Court Ordered Trust Fund to the general fund is not an appropriation. *See Rios v. Symington*, 172 Ariz. 3, 833 P.2d 20 (1992). Therefore, Section 128 violates Sections 13 and 20 of Part 2 of Article 4 of the Arizona Constitution.

In any event, and regardless of whether SB 1523 constitutes a binding requirement on the Attorney General, you are prohibited as trustee from transferring funds if it would violate your duties as trustee. Under the conditions attached to the Court Ordered Trust Fund, one permissible use of the trust fund monies is to "compensate the state for costs resulting from the alleged unlawful conduct of the Defendants." There are five Defendants in the National Mortgage Settlement. They are Wells Fargo, Bank of America, Ally/GMAC, Citibank and J.P. Morgan Chase. We are unaware of any costs incurred by the state of Arizona for the alleged unlawful conduct of the five Defendants. It is important to distinguish between costs incurred by the state which represent direct expenses actually paid by the state and other damages that the state may claim that its economy has suffered as a result of the mortgage crisis. The two are vastly different and unless you have specific evidence regarding the actual costs of the state attributable to the wrongful conduct of the Defendants, any transfer of trust monies to the general fund would violate your duties as trustee.

Ordinarily, under A.R.S. § 35-212, we would ask you to enjoin the illegal payment of public monies pursuant to SB 1523. Instead, we are making the equivalent request under A.R.S. § 35-212 for you to affirmatively represent that you will not transfer \$50 million out of the court ordered trust fund as directed by the legislature in Section 128 of

Tom Horne  
May 8, 2012  
Page 3

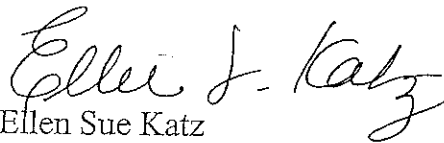
SB 1523. If you decline to provide that affirmative representation, we will take appropriate legal action to enjoin you from making the transfer and in the event that you do transfer the funds, we will take appropriate action to impose liability on you for the amount transferred pursuant to A.R.S. § 35-211.

Thank you for your consideration of this request. Even if you determine that you have authority to transfer the funds, we would appreciate advance notice of the transfer so that we can seek immediate judicial relief. As previously stated, if the transfer is made without legal authority and is determined by a court to be unlawful, the liability for that payment will be your responsibility. A judicial determination prior to any such transfer would serve the best interests of all parties and particularly the distressed homeowners on whose behalf you successfully secured these funds.

Sincerely,



Timothy M. Hogan  
Arizona Center for Law in the Public  
Interest



Ellen Sue Katz  
William E. Morris Institute for Justice

# EXHIBIT D

1 Timothy M. Hogan, AZ Bar No. 004567  
Joy Herr-Cardillo, AZ Bar No. 009718  
2 Arizona Center for Law in the Public Interest  
202 East McDowell Road, Suite 153  
3 Phoenix, Arizona 85004  
(602) 258-8850  
4 thogan@aclpi.org

5 Ellen Sue Katz, AZ Bar No. 012214  
William E. Morris Institute for Justice  
6 202 East McDowell Road, Suite 257  
Phoenix, Arizona 85004  
7 (602) 252-3432  
eskatz@qwestoffice.net

8 Attorneys for Plaintiffs

9  
10 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
11 IN AND FOR THE COUNTY OF MARICOPA

12 JOSEPH MORONES; and ELVIRA  
13 HERNANDEZ,

14 Plaintiffs,

15 v.

16 TOM HORNE, in his capacity as Attorney  
General; and DOUG DUCEY, in his  
17 capacity as Arizona Treasurer,

18 Defendants.

No.

**DECLARATION OF JOSEPH  
MORONES IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
TEMPORARY RESTRAINING  
ORDER AND PRELIMINARY  
INJUNCTION**

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24 I, Joseph Morones, declare the following:

- 25 1. I am a homeowner and live in Mesa, Arizona, with my minor son.
- 26 2. I am a taxpayer. I pay state and federal income taxes, property taxes and
- 27 sales taxes.
- 28 2. I bought my house in 2003. My mortgage initially was through

1 Countrywide. In 2006 I refinanced my mortgage. A few years ago, Bank of America  
2 took over my mortgage.

3 3. In 2008, I lost my job. I was unemployed for about two years. Prior to  
4 when I lost my job I could afford my mortgage payments of approximately \$2074 per  
5 month and made all of my mortgage payments.

6 4. When I was unemployed, I tried to get a mortgage modification. I was told  
7 I could not get a modification unless I was behind on my mortgage payments.

8 5. Because I thought I could not get a modification, I used all my savings and  
9 dipped into my 401 retirement account to continue to pay the mortgage. I got another  
10 job in 2010 but it pays about half what I was making before.

11 6. I kept asking Bank of America to reduce my interest, reduce my principal  
12 and reduce my payments. I owe about \$260,00 on my home.

13 7. Finally, I was given a trial plan for 6 months. I then got 2 other trial plans  
14 of 3 months each. During the trial plans, I was supposed to pay a reduced mortgage  
15 payment instead of the original full payment. I made all the reduced payments.

16 8. Even though I was making the payments, I got 2 foreclosure notices and 2  
17 foreclosure sale dates in the last year.

18 9. Every couple of months, I get telephone calls from Bank of America  
19 employees claiming that I am behind in my payments and that my house will be put up  
20 for sale. Each time, I have to call several persons to get my mortgage account corrected.  
21 I have been told that there is a "separate ledger" and I owe \$20,000 now. I do not know  
22 what is going to happen next. I am very worried that my home will be put up for sale.

23 9. I felt I was getting the run around from Bank of America. I contacted the  
24 Arizona Attorney General's office for assistance. They referred me to the Housing Our  
25 Communities program. They contacted Bank of America on my behalf and some of my  
26 questions started to get answered. But no one has been able to tell me if the bank is  
27 going to go ahead with the foreclosure.

28 10. I want to stay in my home. It is very important to me and my son that we

1 continue to live in our home.

2 11. I understand that there was a Mortgage Foreclosure Settlement of a lawsuit  
3 brought against Bank of America and other banks. One part of the settlement is that the  
4 Arizona Attorney General will receive over \$97 million to be used to help homeowners  
5 who are in foreclosure to stay in their homes. The Legislature wants to use \$50 million  
6 of the settlement for general state expenses.

7 12. I have not received a letter from Bank of America that I may qualify for the  
8 Borrower Payment Fund. But even if I do qualify, I will need supplemental funds.

9 13. I also need help with my mortgage including counseling, mediation  
10 services and legal services. If I do not get the help through the mortgage settlement, I  
11 fear I will lose my home.

12 14. I need help now. The longer I go without additional assistance, the further  
13 behind in my payments I will be.

14 I declare under penalty of perjury that the foregoing is true and correct.

15 Executed this 14th day of May 2012, at Mesa, Arizona.

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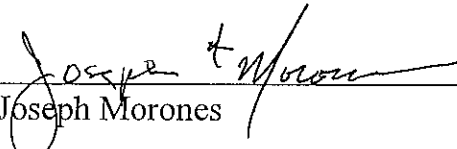
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\_\_\_\_\_  
Joseph Morones



# EXHIBIT E

1 Timothy M. Hogan, AZ Bar No. 004567  
Joy Herr-Cardillo, AZ Bar No. 009718  
2 Arizona Center for Law in the Public Interest  
202 East McDowell Road, Suite 153  
3 Phoenix, Arizona 85004  
(602) 258-8850  
4 thogan@aclpi.org

5 Ellen Sue Katz, AZ Bar No. 012214  
William E. Morris Institute for Justice  
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8 Attorneys for Plaintiffs

9  
10 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
11 IN AND FOR THE COUNTY OF MARICOPA

12 JOSEPH MORONES: and ELVIRA  
HERNANDEZ,

13 Plaintiffs,

14 v.

15 TOM HORNE, in his capacity as Attorney  
General; and DOUG DUCEY, in his  
16 capacity as Arizona Treasurer,

17 Defendants.

No.

**DECLARATION OF ELVIRA  
HERNANDEZ IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
TEMPORARY RESTRAINING  
ORDER AND PRELIMINARY  
INJUNCTION**

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23 I, Elvira Hernandez, declare the following:

24 1. I am a homeowner and live in Chandler, Arizona, with my disabled son, my  
25 daughter and her three minor children. I also lived with my husband until he died in  
26 August 2011. I am 71 years old.

27 2. I am a taxpayer. I pay state and federal income taxes, property taxes and  
28 sales taxes.

1           2.     My husband and I bought our house in 1971. We refinanced our mortgage  
2 in 1999 with Household Finance. My understanding is that the interest rate on the  
3 mortgage is 16%.

4           3.     Before my husband died we paid approximately \$1185 in mortgage  
5 payments per month. After my husband died, there was a problem with his retirement  
6 payments and I did not get the retirement payments for about 3 months. Because I did  
7 not have the retirement payments, I could not make the mortgage payments and fell  
8 behind. I asked Household Finance if I could make partial payments and was told "no."

9           4.     I went to Newtown Community Development to get help. They suggested  
10 that I ask for a mortgage modification. Three different times I sent in all the paperwork  
11 for a mortgage modification and hardship exception but Household Finance kept telling  
12 me that they had not received the documents.

13          6.     After my husband died my income was reduced. It would be difficult for  
14 me to pay the \$1185 mortgage payments. Also my interest rate is very high. After all  
15 these years, I still owe \$62,000 on my home. I would like my mortgage interest rate  
16 reduced and a lower payment. I would also like the principal on my mortgage reduced.

17          5.     Initially Household Finance offered to pay me \$1,000 to move out and sell  
18 my home at a short sale. I refused because my home is the only thing I have. It is the  
19 only place my children and grandchildren have to live. I have lived in this house for 40  
20 years and do not want to move.

21          6.     Several months ago, a Household Finance employee told me they would  
22 process my application for a mortgage modification. I never got anything in writing and  
23 have not heard anything from them since then. Newtown Community Development tried  
24 to contact Household Finance to find out what is going on with the modification but was  
25 only told that Household Finance was working on it..

26          7.     I am very worried that I will not be able to stay in my home. I want to stay  
27 in my home. It is very important to me and my family that we stay here.

28          11.    I understand that there was a Mortgage Foreclosure Settlement of a lawsuit

1 brought against Bank of America and other banks. One part of the settlement is that the  
2 Arizona Attorney General will receive over \$97 million to be used to help homeowners  
3 who are in foreclosure or behind in their mortgage payments to stay in their homes. The  
4 Legislature wants to use \$50 million of the settlement for general state expenses.

5 12. I have not received a letter that I may qualify for the Borrower Payment  
6 Fund. But even if I do qualify, I will need supplemental funds.

7 13. I also need help with my mortgage including counseling, mediation  
8 services and legal services. If I do not get the help through the mortgage settlement, I  
9 worry that will lose my home.

10 14. I need help now. The longer I go without additional assistance, the further  
11 behind in my mortgage payments I will be.

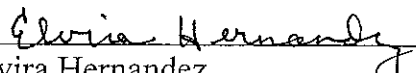
12 I declare under penalty of perjury that the foregoing is true and correct.

13 Executed this 14<sup>th</sup> day of May 2012, at Chandler, Arizona.

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Elvira Hernandez

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