

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

KINGMAN HOLDINGS LLC,

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Civil Action No. 4:11-cv-00033

PLAINTIFF,

VS.

BANK OF AMERICA, N.A.

JURY TRIAL DEMANDED

DEFENDANT.

**PLAINTIFFS’ RESPONSE TO DEFENDANT’S
12(B)(6) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff Kingman Holdings LLC, (“Kingman” or “Plaintiff”) and files this, its Response to Defendant Bank of America, N.A.’s “Motion to Dismiss for Failure to State a Claim,” and in support of the same, would respectfully show the Court as follows:

I.

FACTUAL AND PROCEDURAL BACKGROUND

In June, 2010, Plaintiff Kingman Holdings LLC obtained fee simple title to the real property at issue in this lawsuit. *See* Plaintiff’s Original Petition at Page 3. Plaintiff obtained its deed in a homeowner’s association foreclosure sale in a proceeding specifically authorized by the Texas legislature within Title 11 of the Texas Property Code (Chapter 209).

Because Plaintiff obtained its ownership interest via foreclosure of a homeowner’s association assessment lien, there exists the possibility that Plaintiff’s interest may be subject to a purchase money mortgage deed of trust. *See* Plaintiff’s Original Petition at Page 5. However, there are several discrepancies in the publicly recorded documents regarding the subject Property including, but not limited to, a “lien release” issued to a complete stranger to

title (Wells Fargo) and a second deed of trust issued in favor of an entity (Countrywide) that, upon information and belief, no longer exists. *See* Plaintiff's Original Petition at page 3. Furthermore, although Defendant has, through its Motion to Dismiss, confirmed a claim of interest in the subject property, the Defendant is also a stranger to the chain of title. *See* Plaintiff's Original Petition at page 4, paragraph 14 and 16.

In an attempt to obtain the status of the Countrywide deed of trust – including ownership status, Plaintiff issued correspondence in November, 2010. The letter notified Countrywide (and Defendant) of Plaintiff's ownership interest and also provided notification of Plaintiff's intention to seek assert the equity of redemption in any valid and subsisting superior lien still affecting the property. *See* Plaintiff's Original Petition at Page 4. At the time the letter was written, Plaintiff had no information regarding (1) the status of the Countrywide deed of trust; (2) the claimed owner of the Countrywide deed of trust; (3) the owner or the whereabouts of the promissory note allegedly secured by the Countrywide deed of trust; or (4) the alleged balance owed on the loan. *See* Plaintiff's Original Petition at Page 4. The letter of inquiry received no response.

Left with no other choice, Plaintiff filed this lawsuit in the District Courts of Denton County, Texas in December, 2010. Defendant removed the lawsuit to Federal Court in January 2011 based upon diversity jurisdiction. Thereafter, on or about February 6, 2011, counsel for Defendant sought Plaintiff's agreement to extend the date to Answer the lawsuit (filing its Motion the following day). Following that initial contact, Defendant took no action to confirm its interest in the property, to provide the status of the deed of trust or an assignment indicating Defendant's interest, or to provide information regarding the alleged loan payoff amount.

Instead, Defendant filed the instant Motion to Dismiss Plaintiff's Petition for Failure to State a Claim. There, and for the first time, Defendant confirmed it is claiming an interest in the subject property – although it has provided explanation as to why Defendant maintains an interest where the documents relied upon do not expressly grant said authority to this Defendant. Furthermore, in arguing on behalf of the Motion, Defendant (1) improperly challenges Plaintiff's well pled facts; and (2) ignores Texas legal authority confirming the appropriateness of Plaintiff's well settled causes of action. Finally, Defendant's Motion and Proposed order improperly seek dismissal with prejudice, rather than offer leave to amend. As set forth more fully below, the Court should deny the Defendant's Motion in its entirety.

II.

ISSUES PRESENTED IN DEFENDANT'S MOTION TO DISMISS AND SHORT RESPONSE

Defendant's Motion to Dismiss Plaintiff's Petition for Failure to State a Claim is based upon two legal arguments. First, Defendant claims that Plaintiff is precluded from seeking judicial declarations to determine open questions of lien superiority. In doing so, Defendant ignores both Texas statute and numerous legal opinions issued by the various Courts of Appeal for the State of Texas in which this cause of action has been expressly approved. *See e.g.* TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a) (West 2008); *Chase Home Finance, L.L.C. v. Cal Western Reconveyance Corp.*, 309 S.W.3d 619, 633-34 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *Red Rock Properties 2005, Ltd. v. Chase Home Finance, L.L.C.*, No. 14-08-00352-CV, 2009 Tex. App. LEXIS 4783, 2009 WL 1795037, at *5-6 (Tex. App.—Houston [14th Dist.] June 25, 2009, no pet.) mem. op.)(Unpublished); and *Aqueduct, L.L.C. v. McElhenie*, 116 S.W.3d 438, 444-45 (Tex.

App.—Houston [14th Dist.] 2003, no pet.)(*Aqueduct* holding that disputes regarding lien superiority are a proper subject for declaratory judgment.)

Second, Defendant argues that Plaintiff’s declaratory judgment on the issue of the equity of redemption cannot stand because (Defendant claims) there is no justiciable controversy. However, Defendant’s own Motion demonstrates the falsity of the argument where Defendant urges a procedure for asserting the equity of redemption that is (1) not recognized by Texas law; and (2) presupposes that Defendant has legal capacity to act on a questionable security instrument that does not bear the Defendant’s name.

Defendant cannot use this Motion to Dismiss to challenge Plaintiff’s well pled facts. In the meantime, these unresolved questions regarding the alleged security instrument; the whereabouts of the underlying note, and Defendant’s capacity to assert a claim under either have ripened the seeds of this controversy because Plaintiff has no duty to assert an equity of redemption on a security instrument that is not valid, subsisting and “bona fide.”

III.

OBJECTION TO DEFENDANT’S EXHIBITS

Plaintiff objects to Exhibits 1 and 2 to Defendants’ Motion to Dismiss. Generally, a Defendant should not attach affidavits or evidence to a Motion to Dismiss. Instead, the Motion should be considered based upon the allegations in the Plaintiff’s complaint. *See* F.R.C.P. 12(d). Plaintiff concedes that documents that a defendant attaches to a motion to dismiss may be considered part of the pleadings if (1) they are referred to in the plaintiff’s complaint; and (2) “*are central to [the] claim.*” *Casey v. Sewell Cadillac-Chevrolet*, 394 F.3d 285, 288 (5th Cir. 2004)(emphasis added).

Plaintiff's Original Petition makes reference to Exhibit 1 and also refers to certain declarations that provided for the assessment lien foreclosure sale. However, these documents are not central to the Plaintiff's claims in this lawsuit which instead challenges this Defendant's has legal capacity to act on a questionable (validity) security instrument that does not bear the Defendant's name (*See Exhibit 3 to Defendant's Motion*).

Further, the "centrality" of Exhibit 1 cannot adequately be considered by the Court without viewing it in context to the "Release of Lien" referenced in Plaintiff's Petition, but not attached to Defendant's Motion. Similarly, Defendant did not offer Exhibit 2 as a complete document and, unlike Exhibits 1, 3 and 4 to Defendant's Motion, Exhibit 2 does not bear a seal of certification.

Finally, Defendant has, for unexplained reasons, chosen to redact information which, upon information and belief, is not redacted in the original copies of the publicly recorded documents. Without explanation for the basis of these redactions, or the information being redacted, questions of authenticity and relevance of these proposed Exhibits persist.¹

IV.

ARGUMENTS AND AUTHORITIES

A. F.R.C.P. 12(b)(6) Legal Standard

When considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must accept as true all well-pleaded allegations in the complaint, and must liberally construe the complaint in a light most favorable to the plaintiff. *Scanlan v. Texas A&M Univ.*, 343 F.3d

¹ Although similar, unexplained redactions may be found in Exhibits 3 and 4, Plaintiff does not object to these documents being attached to the Defendant's Motion for the limited purpose of establishing Plaintiff's unequivocal ownership interest in the subject Property (Exhibit 4) and also establishing that Defendant is not named in the Second Deed of Trust (Exhibit 3).

533, 536 (5th Cir. 2003); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000).

A Rule 12(b)(6) motion does not serve to question a plaintiff's well-pled facts, but rather tests the legal foundation of the plaintiff's claims. *See Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand L.L.P.*, 322 F.3d 147, 158 (2nd Cir. 2003). Thus, unlike a motion for summary judgment, a motion to dismiss should only be granted when it appears *without a doubt* that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)(emphasis added); see also *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994).

Indeed, the Fifth Circuit has cautioned that dismissal for failure to state a claim *is disfavored and will be appropriate only in rare circumstances*. *See Collins*, 224 F.3d at 498; *Mahone v. Addicks Util. Dist. of Harris County*, 836 F.2d 921, 926 (5th Cir. 1988)(emphasis added).

B. The Defendant's Rule 12(b)(6) Motion Is Improper

As set forth above, Defendant's motion to dismiss for failure to state a claim upon which relief can be granted cannot be used to resolve factual issues or the merits of the case. A motion to dismiss under Rule 12(b)(6) is not appropriate unless the plaintiff's pleadings on their face show, beyond doubt, that the plaintiff cannot prove any set of facts that would entitle the plaintiff to relief. *See Tuchman*, 14 F.3d at 1067.

The Plaintiff's Original Petition (filed in Texas State Court in December, 2010) clearly contains enough facts that, if proven, would entitle Plaintiff to the relief requested from a jury. Indeed, in order to state a claim under Texas law, a plaintiff need only provide

sufficient allegations to plead each element of the claim and provide sufficient facts to give defendant “fair notice” of the claim. *See Horizon/CMS Healthcare Corp. v. Auld* 34 S.W. 3d 887, 896 (Tex. 2000). This “fair notice” inquiry looks to whether the party can ascertain the nature and basic issues of the controversy from the pleading, and what testimony may be relevant. *Id.*

Similarly, the general rules of pleading established by F.R.C.P. Rule 8 requires Plaintiff’s Original Complaint to contain a short, plain statement of the claim showing that the pleader is entitled to the relief sought and a demand the relief sought. *Id.* at F.R.C.P. 8(a)(2) and (3). The demand for relief may include alternative or different types. *Id.*

Apparently disregarding this low pleading threshold and the 5th Circuit’s general disfavor of a Motion to Dismiss brought under F.R.C.P. 12(b)(6), Defendant is asking the Court to ignore well settled causes of action and dismiss Plaintiff’s claims. Defendant forwards this Motion in spite of a detailed recitation of the facts supporting them. Furthermore, in support of its Motion Defendants directly (and improperly) challenges the Plaintiff’s well pled facts. For instance, Plaintiff’s Original Petition has alleged that:

- a. a second deed of trust relating to the Property and issued in favor of (non-party) Countrywide Bank FSB was executed on January 18, 2008 and approximately one month later; a non-party referred to as MERS purported to release the first deed of trust relating to the Property. *See* Petition at Page 3;
- b. the “release” appeared to affect another non-party to this lawsuit that appears nowhere in the recorded chain of title to the subject Property at issue in this lawsuit. *See* Petition at Page 3;

- c. there is nothing in the recorded chain of title to confirm that Defendant is the successor or assign of the Second Deed of Trust (which only identifies non-party Countrywide within the document). *See* Petition at Page 3; *see also* Exhibit 3 to Defendant's Motion (at page 1 of 8);
- d. there is no recorded evidence of a valid assignment of the promissory note or the Countrywide deed of trust to this Defendant. *See* Petition at Page 6; and
- e. upon information and belief, Defendant is not in possession of the original promissory note as would be required in order to enforce any security interest upon it. *See e.g. Nicholson vs. Washington Mutual*, 2001 WL 1002418 at *3 (Tex.App.-Corpus Christi, 2001 - unpublished); *see also Texas Nat'l Corp. v. United Sys. International*, 493 S.W.2d. 738 (Tex. 1973). Averred in Plaintiff's Petition at Page 6.

In short, Plaintiff's Original Petition is replete with allegations that Defendant Bank of American N.A. is a complete stranger to title, without any claim of superior interest in the subject Property. Additionally, and as set forth more fully below, these allegations directly support Plaintiff's claim that Defendant's alleged, but unrecorded interest is subordinate to Plaintiff's, or that the claimed interest is otherwise unenforceable. Finally, Plaintiff's allegations go directly to the second element of an action to assert the equity of redemption (an obligation to prove that Plaintiff is willing to pay off *valid and subsisting liens*).

Defendant's only response to these specific averments is to challenge their veracity by claiming – without evidentiary support – that the security instrument is Defendant's. This improper and unauthenticated challenge to Plaintiff's well pled facts is made at least fifteen separate times within Defendant's Motion to Dismiss and includes (but is not limited to) unsupported claims that "Plaintiff purchased real property *subject to Defendant Bank of*

America's lien” (Motion to Dismiss at Page 1, Line 1); and that “there is no disputing that *BANA's lien*, recorded on January 29, 2008, was recorder prior to [the association lien under which Plaintiff acquired fee simple title]” Motion to Dismiss at Page 8 citing to the *Countrywide Deed of Trust* attached as Exhibit 3 to Defendant's Motion (emphasis added).

The standard guiding a Motion to Dismiss under F.R.C.P. is clear and specific: the Motion does not serve to question Plaintiff's well pled facts. Rather, the Court must accept as true all well-pleaded allegations in the complaint, and must liberally construe the complaint in a light most favorable to the plaintiff. *See Scanlan*, 343 F.3d at 536.

Examining the Plaintiff's Original Petition under these guidelines, the only question is whether Plaintiff has pled colorable causes of action. As set forth below, the causes of action upon which Plaintiff's claims are based, and the statute under which they are brought (Chapter 37 of the Texas Civil Practice and Remedies Code) are well established under Texas legal authority.

C. Plaintiff's Counts 1 and 2 –Declaratory Judgment for Accounting and Opportunity to Service and to Enforce Equity of Redemption are well pled.

Defendant's legal briefing in support of the Motion to Dismiss Count One and Two of Plaintiff's Petition sets forth two, independent issues that warrant preliminary discussion. First: as owner in fee simple of a property potentially capable of being proven subordinate to a superior lien, Defendant acknowledges Plaintiff's general right to assert its equity of redemption of any ***valid, subsisting, and superior*** lien.² See Motion to Dismiss at Page 10.

² As those concepts are defined by Texas legal authority. *See e.g. Houston v. Shear*, 210 S.W. 976, 981 (Tex. Civ. App., writ dism'd). Defendant refers to such a lien as being “bona fide”. *See e.g.* Motion to Dismiss at page 2.

Second, Defendant argues that Count 1 and 2 are “virtually the same.” Defendant’s point on this subject is valid. However, while Counts One and Two are similar and potentially derivative of each other, the Plaintiff’s potential redundancy is necessitated by the multiple, open questions regarding Defendant’s unrecorded, and unverifiable claim of interest in the property. Furthermore, it should be noted that while Plaintiff issued correspondence in November 2010 asking whether Defendant was claiming any interest in the subject Property, Plaintiff’s correspondence received no response and so the first time that Defendant’s claim of entitlement was confirmed was in the Motion to Dismiss.

These issues having been addressed, the only open questions pertaining to Counts One and Two are (1) whether Plaintiff has pled recognized cause of actions; and (2) whether Plaintiff has averred facts necessary to support the causes of action.

The elements of a claim to enforce/assert an equity of redemption are well established in Texas. Specifically, the Plaintiff must plead and prove (1) that he has a legal or equitable interest in the property subject to the mortgage; (2) that he is “ready, able or willing to redeem the properties in controversy by paying off the amount of valid and subsisting liens to which the property is subject; and (3) that he assert the claim before a foreclosure sale. *See Scott v. Schneider Estate Trust*, 783 S.W. 2d 26, 28 (Tex. App.—Austin 1990, no writ).³

Defendant has acknowledge Plaintiff’s standing under element 1 and there is no dispute that this action was initiated prior to any foreclosure proceeding (element 3). Indeed, Plaintiff attempted to resolve this issue via correspondence. Instead, the focus of Defendant’s Motion to Dismiss is based upon its perceived defects in the manner of pleading element 2. Specifically, Defendant argues that Plaintiff failed to allege that it attempted to

³ Declaratory Judgment in Equity of Redemption Cause of Action: *Conversion Properties LLC v. Kessler*, 994 S.W.2d 810, Tex.App.—Dallas 1999, pet denied.

exercise its right of equitable redemption. *See* Motion to Dismiss at Page 11. Further, Defendant insists that Element 2 of a cause of action to enforce the equity of redemption requires an allegation that Kingman [attempted] to “tender a full pay-off to BANA, but that BANA rejected the payment.

In fact, Plaintiff has alleged a specific attempt to assert its right of equitable redemption via correspondence in a case where the validity and subsistence of Defendant’s claimed lien is very much in question. Furthermore, Defendant’s argument that Plaintiff was required to “tender full pay-off to BANA” is made without citation to any legal authority to support such a contention and is contradictory to the express requirement of element 2: that Plaintiff be *willing* to redeem any *valid and subsisting* lien. *See Scott*, 783 S.W. 2d at 28.

Moreover, Defendant’s claim of entitlement to a tender of full payment directly challenges Plaintiff’s well pled allegations that Defendant’s interest in the property is (1) unrecorded; (2) unverifiable; and (3) not clearly established. Furthermore, the Defendant’s argument overlooks the fact that, as of the time of the correspondence issued by Plaintiff in November 2010, the loan payoff amount was not known and such information was specifically requested. *See* Petition at Page 4.

Defendant has also argued that the Plaintiff’s Suit for Declaratory Judgment on Counts One and Two is subject to dismissal because Plaintiff’s Petition does not present a justiciable controversy that require a court’s judicial determinations. Defendant’s argument on this point is manifestly incorrect where Plaintiff has alleged facts capable of establishing its efforts to determine whether Defendant claimed an interest in the Property, as well as establishing its efforts to determine a loan payoff amount of any *valid and subsisting* lien.

In addition, Plaintiff has issued well pled allegations capable of raising a fact question as to whether Defendant has any valid claim of interest in the property that is capable of being declared superior/bona fide to Plaintiff's ownership interest and, Plaintiff has alleged that official property records affirmatively demonstrate that Defendant is a complete stranger to title in a chain that has one or more suspected defects. See e.g. Exhibit 3 to Defendant's Motion to Dismiss. Having pled facts to support the recognized causes of action, Defendants' Motion to Dismiss Counts 1 and 2 of Plaintiff's Petition should be dismissed.

D. Judicial Declarations Regarding Issues of Lien Superiority are Recognized and Proper and Do Not Implicate the Trespass to Try Title Statutes

Count 3 of Plaintiff's Original Petition seeks Declaratory Judgment to Declare Plaintiff's Lien Superiority. In fact, this title is somewhat of a misnomer and the undersigned counsel of record admits the claim might be misleading because Plaintiff does not have a lien. Rather, Plaintiff is owner in fee simple having taken title from the foreclosure of a homeowners' association assessment lien.

This slight misnomer in labeling notwithstanding, Plaintiff's Third Count satisfies Texas "fair notice" pleading requirement as well as the requirements of F.R.C.P. 8. Specifically, Plaintiff alleges that it seeks judicial declaration regarding the construction and validity of certain instruments including: (1) the first deed of trust; (2) a purported lien release; (3) a second deed of trust; and (4) the underlying promissory note to the second deed of trust.

Plaintiff also alleges the non-existence of prior assignments that should appear in the public records based upon the content of those documents that have been recorded. A just one example, it would be expected that Defendant would have recorded some indication of

ownership in the subject property. However, Exhibit 3 names only a defunct entity as the “Lender”.

In short, Plaintiff has provided concise allegation giving Defendant fair notice that there is nothing in the public record that would tend to indicate that Defendant has a valid or subsisting lien that might be considered a superior interest to that of Plaintiff’s ownership. *See* Original Petition at Paragraph 27.

As recently as February 3, 2011, the 14th District Court of Appeals for the State of Texas addressed the question of whether questions of lien superiority may be made by declaratory judgment. In the matter of *Deutsche Bank Nat'l Trust Co. v. Stockdick Land Co.*, 2011 Tex. App. LEXIS 783 (Tex. App.—Houston [14th Dist.] 2011, no writ)(Unpublished Opinion), a bank sought declaratory judgment as to whether the bank’s lien was still a valid lien on the property. *Id* at *31. As is one of the issues here, the *Stockdick* Court expressly noted that these issues involved construction of the deed. *Id*. Ultimately, the *Stockdick* Court held that the substance of the bank’s suit was not to quiet title or to resolve a boundary dispute and held that the bank was within its right to seek declaratory relief and ***was not required to pursue a trespass to try title action.***

In reaching this decision, the *Stockdick* Court cited to a long list of opinions with similar issues and outcomes including: *Cal Western Reconveyance Corp.*, 309 S.W.3d at 633-34; *Red Rock Properties 2005, Ltd.*, 2009 Tex. App. LEXIS 4783, at *5-6; and *Aqueduct, L.L.C.* 116 S.W.3d at 444-45.

Defendant’s Motion makes no attempt to bring this lineage of cases to the attention of the Court, or to attempt to distinguish them. Rather, Defendant cites briefly to the matter of *Kennessaw Life & Accident Ins. Co. v. Gross*, 694 S.W.2s 115, 117 (Tex. App.—

Houston[14th Dist.] 1985, writ ref'd n.r.e.) for the proposition that Plaintiff cannot maintain a declaratory judgment action in this case and then devotes the remainder of its briefing on the issue as to why a trespass to try title claim is not appropriate in this case.

However, *Kennesaw* is completely distinguishable to the instant lawsuit and stands merely for the proposition that the declaratory judgment statute is not an appropriate tool for the assessment of attorney's fees against a Defendant who had (1) previously renounced all interest in the subject matter property; and (2) would not have been a proper party under the trespass to try title statutes codified under the Texas Property Code. *Id.* at Page 118. The central holding to *Kennesaw* was that a person who was not a proper party under the Property Code sections relating to that case, was not subject to attorney's fees under the UDJA.⁴

Where Texas legal authority is clear that issues of lien validity and superiority are proper subjects for the declaratory judgment statute, and where Plaintiff has alleged facts to support its claim for superior title, Defendant's Motion to Dismiss Count Three of Plaintiff's Original Petition should be dismissed.

CONCLUSION:

As briefed more fully above, the facts plead by Plaintiff fall within the fair notice requirements required of lawsuits initiated in Texas Courts, as well as F.R.C.P. 8. Plaintiff alleges legal title to the property, an equitable interest in the property, the potential existence of a senior lien, and its willingness to service any valid and subsisting amounts due and significant questions relating to defects in the Defendant's purported lien that would affect both the validity of the lien and this Defendant's capacity to act upon it. Therefore, the allegations are sufficient to state a cause of action under the applicable Texas authorities and

⁴ In the meantime, even if *Kennesaw* did apply in this case, Plaintiff's Petition would still be well pled because Defendant has no observable interest in the property based upon the recorded chain of title.

the Motion to Dismiss should be, in all things, DENIED. Alternatively, should this Court identify any defects in Plaintiff's Petition, Plaintiff should be afforded leave to amend its causes of action.

PRAYER

WHEREFORE, PREMISES CONSIDERED, based upon the authorities, and for the reasons discussed above, Plaintiff respectfully prays that the Court to deny Defendants' Motion to Dismiss, or alternatively, to afford leave to amend Plaintiff's pleading; and for all other relief, whether in law or in equity, to which Plaintiff may be entitled.

Respectfully submitted,
LAW OFFICES OF
TRAVIS DAXON HOWARD RICHARD

By: /S/ Travis Daxon Richard

Travis Daxon Richard
State Bar No. 24037356

6623 Del Norte Lane
Dallas, Texas 75225
p. 214.234.0500
f. 214.613.1007

**ATTORNEY FOR PLAINTIFF
KINGMAN HOLDINGS L.L.C.**

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on all counsel of record via First Class Mail in accordance with F.R.Civ.Pro. Rule 4, on this the 18th day of March 2011.

By: /S/ Travis Daxon Richard