NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

February 19, 2021

Ms. Frances C. Wilburn
Offit Kurman, P.C.
7501 Wisconsin Avenue, Suite 1000W
Bethesda, MD 20814
Counsel for Plaintiff

Ms. Devon Ferguson
Ferguson Holdings, LLC
120 Lakeside Drive
Colonial Heights, VA 23834
Defendants Pro Se

Mr. Bruce A. Levine
Holley & Levine, PC
10513 Judicial Drive, Suite 202
Fairfax, VA 22030
Guardian ad Litem for Defendant Devon Ferguson

Re: *Walnut Street Finance, LLC v. Ferguson Holdings, LLC, et al.*
Case No. CL-2020-9144

Dear Counsel and Ms. Ferguson:

This matter came before the Court for default judgment proceedings against the Defendants, Ferguson Holdings, LLC, and Devon Ferguson.[1] This case presents three

[1] Attorney Bruce A. Levine was appointed guardian ad litem for Defendant Devon Ferguson at the expense of Plaintiff, as required by 50 U.S.C. § 3931(b)(2) when the defendant is in the military service of the United States.

OPINION LETTER

specific questions for the Court: A) whether this Plaintiff has standing to enforce the entirety of the Promissory Note against the Defendants; B) whether a valid power of attorney requires that the grantee bringing the suit proceed in the grantor's name, rather than in the grantee's name; and C) regardless of the answer to the previous question, if both grantor and grantee hold an interest in the outcome of a suit, whether both parties should be named and/or joined as necessary and indispensable parties in interest. The Court finds the following: 1) Plaintiff, on its own, cannot sue on the Note to collect that interest which Plaintiff has assigned to a third party; 2) when a power of attorney merely delegates the power to sue and does not assign all of the grantor's interest, the attorney-in-fact does not have standing to bring an action in their own name; and 3) because this Plaintiff and the grantor of the Power of Attorney both have an interest in the outcome of this suit, both parties must be named so full justice can be done and this whole controversy ended.

Therefore, the Court holds that Plaintiff cannot continue to pursue judgment on its own in this matter and that 1Sharpe Opportunity Intermediate Trust must be joined as a plaintiff pursuant to Virginia Code §§ 8.01-5 and 8.01-7.

BACKGROUND

The Promissory Note that lies at the center of this case was entered into by Plaintiff Walnut Street Finance LLC ("Plaintiff") and Defendant Ferguson Holdings, LLC. Defendant Devon Ferguson signed the Promissory Note as the guarantor. The Note was also secured by real estate located in Norfolk, Virginia. Shortly thereafter, Plaintiff signed an Allonge to the Promissory Note, designating that payments on the Note were due to

1Sharpe Opportunity Intermediate Trust ("1Sharpe"). However, Plaintiff retained for itself "an undivided 7.6923% beneficial interest in the foregoing Note and all payments, benefits, and rights arising therefrom." In May 2020, 1Sharpe executed a Limited Power of Attorney ("Power of Attorney"), wherein it designated Plaintiff as its Attorney-in-Fact, able to "demand, sue for, recover, collect and receive each and every sum of money, debt, account and interest . . . belonging to or claimed by [1Sharpe]." The Power of Attorney states that "all actions taken by [Plaintiff] pursuant to this Limited Power of Attorney must be in accordance with Federal, State and local laws and procedures, as applicable."

Plaintiff filed this action against Defendants Ferguson Holdings, LLC, and Devon Ferguson, to collect on the unpaid Promissory Note. Plaintiff alleged in its complaint that the Defendants entered into the Commercial Promissory Note payable to the order of Plaintiff, but that the Note was later made payable to 1Sharpe pursuant to the Allonge attached to the Note. Plaintiff alleged in its complaint that it was the agent for 1Sharpe, pursuant to the Power of Attorney attached to the Complaint as Exhibit 2.

Defendants did not respond to the suit after being served and Plaintiff moved for default judgment. On October 13, 2020, this Court entered an order finding Defendant Ferguson Holdings, LLC in default, and, on January 8, 2021, this Court entered a second order finding Defendant Devon Ferguson in default. At the damages hearing on January 22, 2021, Plaintiff moved into evidence the Note and its attached Allonge and the Power of Attorney, at which time the undersigned Judge continued proceedings to determine whether Plaintiff is properly the sole named party in interest, as opposed to needing to add 1Sharpe. Plaintiff filed a supplemental memorandum of points and authorities,

wherein Plaintiff argued that it is entitled to bring this action because it was the assignor of the Note; because the plain language of the Note demonstrates that Plaintiff retained a beneficial interest in the Note and all payments, benefits, and rights arising therefrom; and because the Power of Attorney provides that Plaintiff can sue for, recover, and collect the amounts due under the Note.

ANALYSIS

1. Plaintiff's Partial Assignment of the Promissory Note Divests Plaintiff of the Right to Sue for the 92.3077% of the Promissory Note Assigned to 1Sharpe

When an assignor purports to transfer less than an entire instrument, the transfer does not constitute negotiation, and the assignee obtains only the rights of a partial assignee. Va. Code Ann. § 8.3A-203(d). The official comment to this section, promulgated by the Uniform Law Commission, states that

> The cause of action on an instrument cannot be split. . . . An indorsement purporting to convey less than the entire instrument does, however, operate as a partial assignment of the cause of action. Subsection (d) makes no attempt to state the legal effect of such assignment, which is left to other law. A partial assignee of an instrument has rights only to the extent the applicable law gives rights, either at law or in equity, to a partial assignee.

Va. Code Ann. § 8.3A-203, cmt. 5. As a result, the rights of a partial assignee are left up to the individual jurisdictions.

In Virginia, an action brought under a partial assignment by an assignee must be in the name of the assignor, so the claims are unified into one suit and the entire matter is litigated only once. *Newton v. White*, 115 Va. 844, 850 (1914) (citing *Phillips v. Portsmouth*, 112 Va. 164, 166 (1911)). While the litigation must be in the name of the assignor, nothing across Virginia jurisprudence indicates that the assignor can bring the

suit on behalf of his assignees. To the contrary, courts have repeatedly held that an assignor, having assigned away certain rights, cannot appear in court, asserting those rights as a basis for relief. *See Nigh v. Koons Buick Pontiac GMC, Inc.*, 2001 U.S. Dist. LEXIS 26274, at *9-11 (E.D. Va. Aug. 15, 2001) ("Koons could not sue for the installment payments because it assigned the right to demand payment on the contract to HAFC."); *see also Vance v. Maytag Sales Corp.*, 159 Va. 373 (1932) (indicating that the action had to be brought by the assignee, who was the real party in interest, and, therefore, the assignor could not sue).

The plain language of the Allonge which Plaintiff and 1Sharpe executed states that Plaintiff assigned 92.3077% of the Promissory Note to 1Sharpe. As such, Plaintiff is the assignor and 1Sharpe is the partial assignee, as Plaintiff retained a 7.6923% interest in the Promissory Note. Plaintiff also retained for itself a beneficial interest in the 7.6923% of the Note, and all payments, benefits, and rights arising out of that retained interest. Pursuant to the Allonge, then, Plaintiff cannot assert an interest in the 92.3077% of the Note which was assigned to 1Sharpe. Conversely, had 1Sharpe brought this entire action itself, 1Sharpe would have had to likewise proceed with Plaintiff also named pursuant to *Newton v. White* and *Phillips v. Portsmouth*.

Plaintiff asserts that *Carozza v. Boxley* allows the assignor to bring an action in its own name. *See* 203 F. 673, 676-77 (4th Cir. 1913) (stating that an assignee may bring an action "in one of three ways -- in the name of the original obligee or payee, in his name for the use of the assignee, or in the name of the assignee alone.") However, Plaintiff misconstrues the law of *Carozza*—the Fourth Circuit was not stating that *an assignor* could bring an action in its own name for that which was assigned, but rather stated that

the assignee could bring the action in the assignor's name or in the assignee's own name.[2] "In the name of the assignor" and "by the assignor" are two very different concepts which Plaintiff has confused in support of its position that Plaintiff has standing to bring the entirety of this action on its own.[3]

Plaintiff's second argument asserts that Plaintiff can bring this action on its own because the language of the Allonge demonstrates that Plaintiff retained a beneficial interest in the Note and all payments, benefits, and rights arising therefrom. However, the exact language of the Allonge states that the Note was payable to the order of 1Sharpe, provided that Plaintiff retained "for itself an undivided 7.6923% beneficial interest in the foregoing Note and all payments, benefits and rights arising therefrom." Compl. at Ex. 1. This language thus only states that Plaintiff retained for itself a 7.6923% interest in the Note and all payments, benefits, and rights arising from that 7.6923% interest—not that Plaintiff retained the right to receive payments or assert the benefits and rights to the entirety of the Note, especially when the Court considers the Note itself was payable to the order of 1Sharpe, not Plaintiff. As a result, Plaintiff retaining the payments, benefits, and rights of a 7.6923% interest in the Note does not allow Plaintiff to assert a right to the entirety of the Note on its own.

Therefore, because Plaintiff assigned most of the Promissory Note to 1Sharpe and because Plaintiff's retained interest only allows Plaintiff to assert a right to 7.6923% of the

---

[2] The *Newton* case, which dictates that actions on a partial assignment must be brought in the name of the assignor, was decided after *Carozza v. Boxley*. As such, the Court considers the *Newton* holding to be the binding rule.

[3] For example, under Virginia Code § 8.01-8, minors cannot bring suit themselves, but only may sue by a next friend.

Note, Plaintiff as the assignor of the Note cannot bring suit in its own name for the entirety of the Note.

2. A Power of Attorney That Merely Grants the Right to Sue and Does Not Completely Assign a Party's Interest Does Not Enable the Attorney-in-Fact to Bring Suit in Its Own Name

Plaintiff next asserts that the Power of Attorney, granting Plaintiff the ability to sue for, recover, and collect the amounts due under the Note, allows the Plaintiff to bring this suit in its own name.

No court in Virginia has opined on the issue of whether a power of attorney granting the power to sue is sufficient to allow a party to bring suit in their own name. Virginia Code § 64.2-1633 discusses the grant of authority under a power of attorney for the attorney to pursue claims and litigation, but the statute is silent on the method by which the attorney-in-fact must do so. However, multiple other jurisdictions have explicitly found that a power of attorney alone does not allow an attorney-in-fact to bring suit in his or her own name. *See Whitehead v. BBVA Compass Bank*, 2019 U.S. Dist. LEXIS 51553 at *10-11 (S.D. Ala. Mar. 27, 2019) ("W. Whitehead, as power of attorney, must bring this suit in the name of his father, i.e., the party with a personal interest in the outcome of the action"); *Loveland v. State Farm Fire and Cas. Co.*, 2013 U.S. Dist. LEXIS 46805 at *4-5 (S.D. Fla. Apr. 1, 2013) ("[A] power of attorney is insufficient to give a plaintiff standing to pursue an action in *his or her own name*."); *Falin v. Condominium Ass'n of La Mer Estates*, 2011 U.S. Dist. LEXIS 129927 at *5 (S.D. Fla. Nov. 9, 2011) ("[A] person holding a power of attorney does not have the right to sue in his or her own name."). The Supreme Court of the United States, too, concluded that a power of attorney that does not assign title or

interest does not enable an attorney-in-fact to maintain a suit in his or her own name. *Titus v. Wallick*, 306 U.S. 282, 289 (1939) (citing *Spencer v. Standard Chemicals & Metals Corp.*, 237 N.Y. 479, 481-82 (1924)).

While these cases are not binding law for this Court to follow, this Court nevertheless finds the reasoning persuasive. In Virginia, a party has standing to bring a cause of action when demonstrating a substantial legal right to assert. *Deerfield v. City of Hampton*, 283 Va. 759, 764 (2012). Put another way, standing requires that "a party who asserts a particular position has the legal right to do so and that his rights will be affected by the disposition of the case." *Tackett v. Arlington Cnty. Dep't of Human Services*, 62 Va. App 296, 325 (2013). Furthermore, as a general rule in Virginia, one cannot raise third party rights. *Tackett*, 62 Va. App. at 325. The exceptions to this rule are very narrow, and include only certain challenges under the First Amendment, and situations "where individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves." *Id.* Plaintiff has certainly established a substantial legal interest in the outcome of 7.6923% of the outcome of this matter, but has not yet asserted an actual right or interest in the remaining 92.3077% of the Promissory Note. This case also does not meet the bar for Plaintiff to be able to assert the rights of the third party, 1Sharpe. Nothing has been presented to the Court as to any reason how or why 1Sharpe would have no effective avenue of preserving its own rights.

Looking to the Power of Attorney before the Court, the Plaintiff has not been granted a right or interest in the Promissory Note under the plain language of the Power of Attorney. The law in Virginia is that a power of attorney will be strictly construed. *See Bank of Marion v. Spence*, 155 Va. 51, 53 (1930); *Hotchkiss v. Middlekauf*, 96 Va. 649,

653 (1899). The plain language of the Power of Attorney does not purport to assign 1Sharpe's interest in any loan to the Plaintiff. As a result, this Court will not read into the Power of Attorney any implicit assignment of this Promissory Note from 1Sharpe to Plaintiff. As the Power of Attorney does not assign Plaintiff any interest or right in the Promissory Note, the Court determines that Plaintiff does not have the right to assert an interest in the 92.3077% of the Promissory Note belonging to 1Sharpe.

This concept is enshrined in *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100 (2d Cir. 2008), wherein the court stated that "a mere power-of-attorney—i.e., an instrument that authorizes the grantee to act as an agent or an attorney-in-fact for the grantor . . . —does not confer standing to sue in the holder's own right because a power-of-attorney does not confer an ownership interest in the claim." *W.R. Huff*, 549 F.3d at 108. The Second Circuit then recognized that assignment of claims confers title and/or ownership of those claims, allowing a purported plaintiff to then assert injury in fact. *Id.* (citing *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 17-18 (1997)); *see also Sprint Communs. Co., L.P. v. APCC Servs.*, 554 U.S. 269 (2008) (upholding a verdict where the injured parties executed powers of attorney and assigned their interests to the Plaintiff, so the Plaintiff was validly a party in interest before the Court).

If the Power of Attorney in this case also assigned 1Sharpe's interest in the Note to Plaintiff, this Court would certainly conclude that Plaintiff is the proper party to sue on the entirety of the Promissory Note. Because the Power of Attorney in no manner assigns 1Sharpe's interest to Plaintiff, the Court concludes that Plaintiff is not the proper party to sue for 1Sharpe's share of the Promissory Note.

3. Because 1Sharpe's Interest in the Promissory Note Is Not Properly Before This Court, 1Sharpe Must Be Added as a Plaintiff to This Action So the Ends of Justice May Be Met

Having determined that Plaintiff is not the proper party to assert 1Sharpe's 92.3077% interest in the Promissory Note, the Court concludes that 1Sharpe must be added as a necessary and indispensable party to this action. Currently, 1Sharpe's interest in the outstanding Promissory Note is not properly before the Court.

The action itself is not defeated by Plaintiff's failure to properly bring 1Sharpe as a plaintiff to this action. Rather "new parties may be added and parties misjoined may be dropped by order of the court at any time as the ends of justice may require." Va. Code Ann. § 8.01-5. Moreover, Virginia Code § 8.01-7 allows the Court to add a party on its own motion:

> In any case in which full justice cannot be done, or the whole controversy ended, without the presence of new parties to the suit, the court, by order, may direct the clerk to issue the proper process against such new parties, and, upon the maturing of the case as to them, proceed to make such orders or decrees as would have been proper if the new parties had been made parties at the commencement of the suit.

The Court concludes that full justice cannot be done if 1Sharpe's interest in the Promissory Note remains unrepresented in this matter. Therefore, 1Sharpe Opportunity Intermediate Trust must be added to this action as a plaintiff, at which point Plaintiff may act under its Power of Attorney to assert 1Sharpe's rights and interests.

CONCLUSION

The Court has considered the entirety of the record in this action, including the complaint and its attachments, and the supplemental memorandum of points and

authorities Plaintiff filed following the hearing on January 22, 2021. The Court considered whether Plaintiff, as the assignor of 92.3077% of a Promissory Note, could bring an action asserting a right in that assigned interest. The Court also evaluated whether a power of attorney alone empowered Plaintiff to bring this action in its own name. In consideration thereof, the Court holds as follows: 1) Plaintiff cannot sue on the Promissory Note to collect the interest which Plaintiff assigned to a third party; 2) the power of attorney at issue did not assign any interests or right to Plaintiff, thereby Plaintiff cannot sue in its own name by virtue of the Power of Attorney; and 3) because 1Sharpe's interest in the Promissory Note is not properly before this Court, 1Sharpe must be added as a necessary and indispensable plaintiff for the ends of justice to be met.

Consequently, this Court directs that 1Sharpe must be added as a plaintiff to this action before judgment may be pursued by Plaintiff and that this case be continued for such reasonable time as required for 1Sharpe to make an appearance before the Court.

The Court shall enter a separate order incorporating the ruling herein, and this cause continues.

Sincerely,

David Bernhard
Judge, Fairfax Circuit Court