District Court, County of Boulder, State of Colorado 1777 Sixth Street, Boulder, Colorado 80306-4249	
IN THE MATTER OF: THE APPLICATION OF BANK ONE, N.A., SUCCESSOR BY MERGER TO BANK ONE, COLORADO, N.A., FOR AN ORDER AUTHORIZING THE PUBLIC TRUSTEE OF THE COUNTY OF BOULDER, STATE OF COLORADO, TO SELL CERTAIN REAL AND/OR REAL PERSONAL PROPERTY UNDER A POWER OF SALE CONTAINED IN A DEED OF TRUST GRANTED BY ARTHUR JAY ZWICKY AND CHRISTINE MARIE ZWICKY.	▲ COURT USE ONLY ▲ Case Number: 04 CV 167 Division: J
CC: Steven Abelman Christian Hendrickson Eric Schunk	

RULING AND ORDER

Appearances: Steven Abelman, Christian Hendrickson for Plaintiff Bank One;
Eric Schunk, for Intervenors Metropolitan Title Agency and
James Trienan

This matter comes before the Court on the Verified Motion of Bank One, N.A., for an Order Authorizing Sale Under Rule 120. Having considered the parties' pleadings together with the applicable law and the arguments and exhibits presented at a hearing on this matter held on March 24, 2004, the Court enters the following Ruling and Order.

I. FACTS

This case arises out of the ownership and subsequent sale of a home located at 1552 E. Riverbend Street, in Superior, Boulder County, Colorado (*hereinafter* "the home"). Specifically, Arthur Jay Zwicky and Christine Marie Zwicky (*hereinafter* "the Zwickys") purchased the home prior to October 1998. On October 13, 1998, they took out an equity line of credit secured by a second mortgage on the home (*hereinafter* credit line mortgage) with Bank One, Colorado, N.A., now Bank One, N.A., (*hereinafter*,

collectively, Bank One)[1] for a 5-year renewable term. Under the agreement between Bank One and the Zwickys for the line of credit (*hereinafter* "the Agreement"), the Zwickys had a revolving credit line with a limit in the amount of $31,400. The Agreement required that the Zwickys notify Bank One in writing if they were to "cancel [their] right to credit advances" thereunder.

In January 2000, the Zwickys sold the home to James J. Treinen. As part of the sale, the credit line mortgage was paid down from its existing balance of $32,089.78 to $0 via a check issued by Mr. Treinen's title company, Metropolitan Title Agency (*hereinafter* Metropolitan). Prior to issuing the check, Metropolitan requested and received from Bank One a payoff statement for the credit line mortgage with a payment deadline of January 14, 2000. The check sent to Bank One by Metropolitan in response was accompanied by a statement listing the names of the buyer and sellers of the home, as well as a document entitled "Final Payoff Letter" requesting that the check be accepted as a final payoff for the credit line mortgage. The check was negotiated by Bank One on January 14, 2000. Bank One did not, however, release the deed of trust signed by the Zwickys granting the home as security for the credit line mortgage, and Metropolitan did not specifically request that Bank One do so.

After the sale of the home to Mr. Treinen, and unbeknownst to him, the Zwickys again began to borrow against the line of credit. The Zwickys subsequently defaulted on the repayment terms detailed in the Agreement.

On February 3, 2004, Bank One filed a motion under Rule 120, requesting that this Court issue an order authorizing the sale of the home as security for the credit line mortgage. Metropolitan and Mr. Treinen responded, arguing that Bank One is not authorized to foreclose because its lien on the home was rendered invalid upon negotiation of the check tendered by Metropolitan at the time of the sale.[2] Bank One replied by arguing that the claim of Metropolitan and Mr. Treinen is beyond the scope of a Rule 120 hearing and, as such, must be stricken or, in the alternative, that Bank One's contractual duties under the Agreement, coupled with Metropolitan's failure to ensure that the Zwickys acted in accordance with the Agreement so as to relieve Bank One of said duties, prevent Metropolitan from prevailing in this matter.[3]

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[1] Bank One, N.A., is the successor by merger to Bank One, Colorado, N.A. *See* Verified Motion for Order Authorizing Sale under Rule 120 at 1.

[2] The Court notes that Metropolitan and Mr. Treinen also made an argument in support of their cause under § 38-35-124.5 (incorrectly referred to in their briefs as § 38-25-124.5). As the cited statute was not enacted until 2002 and did not become effective until July 1 of that year, the argument has no merit.

[3] Metropolitan and Mr. Treinen later filed a document in response to Bank One's Rule 120 and alternative arguments. Though leave to file such document was not requested, the Court accepts the document, and grants the implied request of Metropolitan and Mr. Treinen for leave to do so. Metropolitan and Mr. Treinen also filed a post-hearing brief in support of their position on the scope of Rule 120. Though leave to file such brief was not requested, the Court accepts the document, and grants the implied request of Metropolitan and Mr. Treinen to do so.

II. STANDARD OF REVIEW

C.R.C.P. Rule 120 was designed to determine only the "existence of a default or other circumstances authorizing, under the terms of the instrument described in the motion, exercise of a power of sale contained therein, and such other issues required by the Soldiers' and Sailors' Civil Relief Act of 1940, as amended" (*hereinafter* SSCRA). C.R.C.P. Rule 120(d). On motion, the Court must make a finding as to whether there exists "a reasonable probability that such default or other circumstance has occurred, and whether an order authorizing sale is otherwise proper" under SSCRA. *Id.* On such findings, and in accordance therewith, the Court shall summarily grant or deny the motion. *Id.* The Court's ruling on the motion is not appealable and does not prejudice the right of any person aggrieved to seek injunctive or other relief in a court of competent jurisdiction, or any right or remedy of the moving party. *Id.* Accordingly, a determination as to the existence of default is not a final adjudication of the matter. *Plymouth Capital Co., Inc. v. District Court*, 955 P.2d 1014, 1017 (Colo. 1998).

The scope of inquiry at a hearing under Rule 120 is very narrow. *Id.* Such a hearing "is not the proper forum for addressing the various and complex issues that can arise in some foreclosures." *Id.* Rather, the rule was designed to "streamline the public trustee foreclosure system" by addressing, "in summary fashion, issues related specifically to the existence of a default." *Id.* at 1016-1017. The test to be used by the Court is "whether 'considering all relevant evidence, there is a reasonable probability that a default exists.'" *Id.* at 1017 (citations omitted). "Relevant evidence is evidence tending to show that no default exists." *Id.* Thus, an inquiry into whether a party has a right to enforce the power of sale contained in the instrument on which the Rule 120 proceeding is based is properly made within the scope of the rule. *See Goodwin v. District Court*, 779 P.2d 837, 841 (Colo. 1989).

III. MERITS

There is a dearth of case law interpreting C.R.C.P. Rule 120 that is directly relevant to resolving the issues raised in this case. The Court suspects that such lack of case law is a result of the fact that judicial orders issued under the rule are not appealable. *See* C.R.C.P. Rule 120(d). As a result of that dearth of directly applicable case law, the Court has resorted to other sources of authority where applicable.

A. Propriety of Rule 120 Hearing for Arguments Raised by Metropolitan and Mr. Treinen

As a preliminary matter, the Court must decide whether the arguments raised by Metropolitan and Mr. Treinen with respect to the validity of the Deed of Trust related to the credit line mortgage are properly heard at a Rule 120 hearing.

Upon examination of the applicable law, detailed in ¶ II., *supra*, this Court finds that the instrument described in Bank One's motion containing the authorization for the exercise of a power of sale on the home in the event of default is the Deed of Trust

associated with the credit line mortgage (*hereinafter* Deed of Trust). Verified Motion at 1, Exhibit A. In addition, the Court finds that Bank One has alleged default under sections (b) and (c) of the "Default" provision of the Deed of Trust; specifically, that the Zwickys did not meet the terms of the Agreement by failing to make payments on the credit line mortgage, and that the Zwickys' action in transferring the home adversely affected the collateral for the Agreement or Bank One's rights therein. Verified Motion at ¶ 2; Deed of Trust at 3.

The Court initiates its analysis of this issue by examining the latter basis for default asserted by Bank One. Bank One's Verified Motion states that default has occurred as a result of the Zwickys' transfer of the property "*without the prior written consent of [Bank One]*." Verified Motion at 3 (emphasis added). The language of the Deed of Trust, however, states that default occurs, at Bank One's option, on "transfer of title or sale of the [home]." Deed of Trust at 3. As there exists no evidence that the Zwickys and Bank One modified the language of the Deed of Trust relevant to default to that reflected in the Verified Motion, this Court must look to the language contained in the Deed of Trust in order to determine if there exists a reasonable probability that a default has occurred.

Examining said language of the Deed of Trust, then, this Court notes the broad swath of the text purporting to make the "transfer of title or sale of the [home]" a potential event of default. Taken literally, this text would make *any* transfer or sale of the home an occurrence that would constitute default at any time the lender chose to exercise its option to declare the occurrence as such. Given that default is "[t]he omission or failure to perform a legal or contractual duty . . .," the Deed of Trust, as written, attempts to make transfer or sale of the home under any circumstances a breach of duty on the part of the Zwickys. *See* Black's Law Dictionary 428 (7th ed. 1999). *The Deed of Trust purports to make the simple act of transfer or sale of the home a breach of the Zwickys' duty not to do so* and, as such, unequivocally contains a restraint on alienation.

That said, it is important to note that not all restraints on alienation are invalid. *Perry v. Brundage*, 614 P.2d 362, 366-367 (Colo. 1980); *Malouff v. Midland Fed. Sav. & Loan*, 509 P.2d 1240, 1243 (Colo. 1973). Only *unreasonable* restraints on alienation are prohibited in Colorado. *Id.* The validity of such a restraint "depends upon its reasonableness in view of the justifiable interests of the parties." *Id.* at 367 (quoting *Malouff* at 1243). Here, while Bank One certainly has a justifiable interest in protecting its security for the credit line mortgage or its rights in that security, it could adequately have done so with a more limited restraint, such as by appropriately limiting the circumstances of transfer or sale that would constitute default or including a valid "Due on Sale" provision in the Deed of Trust.[4] *See. e.g., Malouff* at 1244; *Krause v. Columbia Sav. and Loan Ass'n*, 661 P.2d 265, 266-267 (Colo. 1983).

[4] The Court notes that Bank One's Deed of Trust does, indeed, include a "Due on Sale" clause. Deed of Trust at 2. The Court does not herein address the validity of such clause as it is not an issue relevant to determining whether there is a reasonable probability of default and, therefore not properly addressed under Rule 120. *See* C.R.C.P. Rule 120(d). For the same reason, the Court does not address the validity of any limitations on circumstances of property transfer or sale with respect to default. *See id.*

Taking into account the totality of the circumstances of this case, including: (1) the interests of the parties in entering into the Deed of Trust and, specifically, in providing for the possibility of default in said Deed of Trust and (2), the nature and duration of the restraint set up to protect those interests in the event the home was transferred or sold, this Court finds that the text stating that "transfer of title or sale of the [home]" is a potential event of default constitutes an *unreasonable* restraint on alienation of the home. *Perry v. Brundage*, 614 P.2d 362, 367 (Colo. 1980); *Malouff* at 1243. As such, the text is invalid, and it cannot serve as a basis for default under the Deed of Trust.[5] *Malouff* at 1243. This Court therefore finds that there is no reasonable probability that default has occurred as a result of the Zwickys' sale of the home to Mr. Treinen. *See* C.R.C.P. Rule 120(d).

The Court now focuses on Bank One's assertion that default occurred when the Zwickys failed to make payments on the credit line mortgage. In response, Metropolitan and Mr. Treinen have argued, and presented evidence to show, that there is no default on this basis, as the Deed of Trust, at the time the Zwickys failed to make payments on the credit line mortgage, had ceased to be valid. *See generally* Response to Verified Motion. As the Court *must* consider evidence tending to show that no default exists in making its determination as to the reasonable probability thereof, and because the Court is jurisdictionally limited by the rule to alleged defaults on valid instruments, consideration of evidence purporting to show the invalidity of such an instrument would be proper under the rule. *Plymouth Capital Co.* at 1017; C.R.C.P. Rule 120(d). *See also Goodwin* at 841.

Rule 120 requires the Court to determine whether there exists a reasonable probability that default has occurred. It cannot do so in this case absent the relevant evidence presented by Metropolitan and Mr. Treinen with respect to the validity of the Deed of Trust. The consideration of such evidence is, therefore, proper under the rule and will be considered by this Court.[6] *Plymouth Capital Co.* at 1017; C.R.C.P. Rule 120(d); *Goodwin* at 841.

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[5] The Court notes that the striking of such restraint as invalid is in accordance with the principle of contract law providing that terms of a contract which violate public policy "may be declared void and unenforceable." *See Peterman v. State Farm Mut. Auto. Ins. Co.*, 961 P.2d 487, 492 (Colo. 1998).

[6] While the law requiring courts to consider evidence tending to show that no default exists under Rule 120 is abundantly clear, this Court takes special note that such law fully comports with the principles of equity as applied to the facts of this case. Specifically, if consideration of such evidence was *not* proper under the rule, then Mr. Treinen's only options to save his home would be to purchase the home at the foreclosure sale or to file an action and a Notice of *lis pendens* under C.R.C.P. Rule 105. In the former situation, Mr. Treinen would have no guarantee that he would be able to keep the home as he may or may not prove to be the highest bidder at the foreclosure sale.

In the latter situation, Mr. Treinen would have no guarantee that the filing of a Notice of *lis pendens* would stay action on the foreclosure until title could be quieted. *See American Roofing Supply of Colorado Springs, Inc. v. Capps*, 890 P.2d 133, 136 (Colo. Ct. App. 1994). In addition, and most important to the mind of this Court, under Rule 105, Mr. Treinen would bear the burden of proof as to his rights in the property. That is, instead of Bank One bearing the burden to show a reasonable probability of default on the Deed of Trust, as would be the case at a hearing under Rule 120, under Rule 105, Mr. Treinen would bear the burden to show by a preponderance of the evidence his entitlement to the property.

B. Validity of Deed of Trust

Considering the evidence presented by Metropolitan and Mr. Treinen at the Rule 120 hearing, this Court must now determine whether or not there exists a reasonable probability that a valid lien existed on which default occurred.

Metropolitan and Mr. Treinen argue that, under C.R.S. § 38-35-124, Bank One was obligated to discharge the lien within 90 days of January 14, 2000—the day Bank One negotiated the check paying off the credit line mortgage. Bank One argues, in part, that § 38-35-124 does not apply to the credit line mortgage and cites, in support of that argument, an opinion issued by the Denver District Court in 02 CV 6909, *Beneficial Mortgage Co. of Colo. v. Kirk R. Naulls et al*, (October 2, 2003) (unpublished). In examining that opinion, the Court first notes that rulings and orders issued by a district court in Colorado are merely persuasive authority in the district courts of other counties and, therefore, not binding thereon. The Court also notes that the facts of that case distinguish it from the case at bar in a number of ways.

First, there are no indications that the entity paying off the credit line mortgage in *Beneficial* either: (1) requested a payoff statement for that mortgage or (2), paid off that mortgage with a check accompanied by either a document listing pertinent information related to the refinancing or a document indicating that the payment was to be a "final payoff" of the mortgage. *See generally Beneficial.* Second, the Deed of Trust in *Beneficial* was governed by federal law as well as the laws of the States of Colorado and Ohio, and the Denver District Court specifically relied on Ohio law in reaching its conclusions. *Id.* at 2-4. Such is not the situation here. In the case at bar, the facts related to the payoff of the credit line mortgage are markedly different, and the Deed of Trust is governed solely by Colorado law.[7] *See* ¶ I, *supra*; Deed of Trust at 3.[8]

Finally, this Court questions the analysis of and conclusion reached by the Denver District Court in *Beneficial.* Had that matter been before this Court, special note would have been taken of the facts that (1) the new loan agreement in *Beneficial* was entered

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As the innocent third-party buyer of the home, Mr. Treinen is the *only* party either involved with the Zwicky-Treinen sale and purchase of the home and/or party to this case who in no way can be said to have contributed to the events leading to this action. As such, equity dictates that he not be left with either no guarantee as to a remedy or with the burden of proof to show that the home belongs to him.

[7] Though not stated therein, this Court recognizes that federal law may be applicable to certain provisions of the Deed of Trust. That said, the Court notes that federal law does not factor into any of the issues raised in this case.

[8] The Court also notes that the fact that the new loan in *Beneficial* resulted from a refinance agreement differentiates that case from the one at bar. While not pertinent to the holding of *Beneficial* cited by Bank One—that § 38-35-124 does not apply to revolving lines of credit such as credit line mortgages—this Court takes care to point out that the individuals who ran up and defaulted on the credit line mortgage in that case after the new loan was effective also *owned* the home at the time they did so. Put another way, the dispute in *Beneficial* was essentially about which entity had the first lien position on the property—that is, *which entity had the right to foreclose as the primary lienholder.* No one in that case doubted the fact that foreclosure against the homeowners would or should occur. Here, the dispute is about whether the entity seeking foreclosure against the innocent third-party buyers has the right to foreclose *at all.*

into for the purpose of refinancing, in part, the credit line mortgage on the owners' home and (2), the term "refinancing," by definition, means "an exchange of an old debt for a new debt." *See Beneficial* at 1; Black's Law Dictionary 1285 (7th ed. 1999). In analyzing the case, this Court would have endeavored to discover information regarding the lienholder's knowledge about and acquiescence to the refinancing—or exchange—of the credit line mortgage, and considered that information when reaching a conclusion about whether the indebtedness on the mortgage was satisfied for the purposes of § 38-35-124.

This Court agrees that the "open-ended" nature of a revolving line of credit generally makes it such that payment down to a $0 balance, in and of itself, without a payoff request and payment or other clear indication of refinancing activity, would not serve to satisfy the indebtedness thereon. However, this Court rejects the overbroad conclusion of the Denver District Court in *Beneficial* that § 38-35-124 does not apply to revolving lines of credit under any circumstances. Noting that the purpose of Title 38, Article 35, is to "render titles to real property and every interest therein more secure and marketable," this Court finds that the application of § 38-35-124 to credit line mortgages would serve to meet that purpose, and, therefore, would be appropriate and just. *See* C.R.S. § 38-34-101. Given the foregoing, and having heard no other reason for why § 38-35-124 should not apply, this Court affirmatively concludes that § 38-35-124 does, in fact, apply to credit line mortgages such as the one at issue in this case.

Having determined that § 38-35-124 applies to the matter at bar, the Court now examines its text, which provides, in pertinent part, that:

> when all indebtedness . . . secured by a lien on real property has been satisfied, unless the debtor requests in writing that the lien not be released, the creditor or holder of the indebtedness shall[, in the case of an indebtedness secured by a deed of trust to a public trustee], within ninety days after the satisfaction of the indebtedness and receipt from the debtor of the reasonable costs of procuring and recording the release documents, . . . file with the public trustee the [necessary] documents required for a release . . . .

C.R.S. § 38-35-124.[9]

Parsing this language, and noting that there exists no evidence indicating that the Zwickys requested in writing that the lien on the home not be released, it is clear that the only occurrence necessary to trigger action by Bank One to release the lien at issue is satisfaction of the indebtedness on the credit line mortgage. As previously indicated, Metropolitan and Mr. Treinen argue that the indebtedness on the credit line mortgage was satisfied on Bank One's January 14, 2000, negotiation of the check paying the balance of the mortgage down to $0. Bank One makes two arguments in response: that the indebtedness was not satisfied upon payment down to $0 because: (1) Bank One had a

[9] The Court notes that, in the case of a lien associated with an "open-ended" mortgage, the legislature's placement of a burden on the debtor to request that the lien not be released after payoff protects the lienholder as much as it does the debtor. That is, such placement provides the lienholder with the opportunity to reassess, upon the request of the debtor, the level of risk associated with maintaining an interest in a particular property as security for the loan.

contractual duty with the Zwickys to keep the line of credit open until, in accordance with the terms of the contract, they closed it via notification to the bank in writing and (2), this Court should find in accordance with courts in other jurisdictions that, under similar circumstances, have found in favor of banks leaving their lines of credit open when they are paid down, but not "properly" closed.

This Court finds no merit in Bank One's argument that it had a contractual duty to keep the line of credit open. While the Agreement does require the Zwickys to "notify [Bank One] in writing and return all [account] access devices" if the Zwickys wished to cancel their right to credit advances thereunder,[10] it also provides that "transfer of title or sale of the [home]" by the Zwickys is an event which affords Bank One the option to terminate the Agreement.[11] Agreement at 3. Bank One was provided with notice of the sale of the home (even before the sale occurred) via Metropolitan's (1) request for a payoff statement on the credit line mortgage and (2), check written in response thereto, which was sent together with a statement listing the names of the buyer and sellers of the home and a document entitled "Final Payoff Letter" requesting that the check be accepted as a final payoff for the credit line mortgage. *See* Petitioner Bank One's Hearing Exhibits 3-4, 6. As such, not only was Bank One relieved of any contractual obligation to keep the credit line mortgage open upon the sale of the home to Mr. Treinen, it was also *clearly* placed on notice of the sale and, therefore, had every opportunity to exercise its option to terminate the Agreement at the time the sale occurred.[12]

The Court also disagrees with Bank One's second argument that this Court should find in accordance with courts of other jurisdictions that, under similar circumstances, have found in favor of banks leaving their lines of credit open when they are paid down

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[10] As part of its "contractual duty" argument, Bank One states that it "provided the Zwickys with the forms for terminating . . . the Line of Credit and the Zwickys declined to exercise that option." Reply at ¶10. The exhibits presented to this Court both as part of the pleadings and at the March 24, 2004 hearing, however, show that the "forms" allegedly provided by Bank One to "the Zwickys" actually consisted of a single fill-in-the-blank paragraph on the bottom of the payoff statement provided by Bank One to Metropolitan. *See* Petitioner Bank One's Hearing Exhibit 3. Interestingly, such paragraph did not address in any way the "return [of] all [account] access devices" required under the terms of the Agreement, and completion of that fill-in-the-blank paragraph would not have provided Bank One with such return.

[11] The Court notes that the provision in the Agreement affording Bank One the option to terminate the credit line account on transfer of title or sale of the home merely protects its rights in the security for the line of credit, and does not restrict the transfer or sale of the property in any way. Thus, such provision is *not* a restraint on alienability. *See* Agreement at 3. The Court also notes that the Agreement contains language making transfer of title or sale of the home an event of default. See Agreement at 3. For the reasons stated in ¶ III.A., *supra*, this language *is* an unreasonable restraint on alienation and is, therefore, void.

[12] Given the foregoing, the arguments made by Bank One related to Metropolitan's sophisticated nature and alleged duties to determine how to properly close the line of credit are irrelevant to the issue of Bank One's alleged contractual duty to keep the line of credit open and, thus, irrelevant to whether default has occurred, and the Court does not address them herein. The Court notes, however, that Bank One is equally as sophisticated as Metropolitan and knew or should have known that a request from a title company for the payoff balance of a loan secured by the home and subsequent check paying off that balance accompanied by a statement listing the buyer and sellers of the home was due to the sale of the home. This is especially true given that the check at issue was processed at Bank One by hand—that is; the account number was handwritten on the check, and it appears to have been endorsed via hand stamp on the reverse. *See* Petitioner Bank One's Hearing Exhibits 6-7.

but not "properly" closed. First, it is important to note that rulings and orders issued by courts in other states are merely persuasive authority in the courts of Colorado and, therefore not binding thereon. Second, the cases cited by Bank One are easily distinguished from the one at bar.

In *Huntington Nat'l Bank v. McCallister*, 1997 WL 67714 (Ohio Ct. App. Feb. 18, 1997) (unpublished), the Ohio Court of Appeals affirmed a lower court decision concluding that it was the responsibility of the refinancing lender to "ensure that the [revolving] credit line was closed before [it] loaned [refinancing] money to the [homeowners]. *Huntington* at *2. This Court does not have the benefit of being able to review the terms of either the loan agreement or the deed of trust associated with the credit line mortgage in that case. The Court does, however, have before it facts which make the *Huntington* case markedly different from that at bar. First, in *Huntington*, the parties stipulated that no one had ever instructed the lienholder to terminate the credit line. *Id.* at *1, n.4. Second, the dispute over the credit line mortgage in *Huntington* arose as the result of a refinancing. Finally, in addressing an argument that the lender bank knew that the entity paying down the mortgage intended to discharge the credit line lien and, thus, the paying entity should be equitably subrogated to the lending bank's lien, the *Huntington* court stated that there existed a "lack of any evidence of injustice by [the lender bank] that warrant[ed] recompense." Such is not the case here.

First, in the final payoff letter sent with its check and statement listing the buyer and sellers of the home, Metropolitan requested that the check be accepted "as a final payoff" for the credit line mortgage. *See* Petitioner Bank One's Hearing Exhibit 4. In the view of the Court, this was an instruction to Bank One to terminate the credit line. Second, the dispute over the credit line mortgage in this case arose as the result of an outright sale, not a refinancing.[13] That is, the "post-new loan" borrowers, the Zwickys, no longer owned the home and, as non-owners, they had no justifiable right to take out loans secured by the property.[14] Finally, as noted above, Bank One was clearly placed on notice of the sale of the home to Mr. Treinen and, therefore, had every opportunity to exercise its option to terminate the Agreement with the Zwickys. In this Court's view, Bank One's actions in allowing the Zwickys to borrow against a line of credit purportedly secured by a home that it knew they no longer owned was tantamount to allowing the Zwickys to incur charges on a stolen credit card.[15] As such, while either the new loan itself or payoff of the credit line mortgage might have been made contingent on termination of the line of credit, such fact does not vitiate the wrongful acts of Bank One in allowing the "post-new loan" borrowing to occur[16] such that recompense is not warranted.

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[13] *See* Note 8, *supra.*

[14] The Court notes that Bank One appears to recognize this principle as well. *See* Agreement at 1 (requiring as security for the line of credit that the Zwickys grant a deed of trust in property which they occupy *as their principal residence*); Deed of Trust at 2 (requiring the Zwickys to warrant that they hold *good and marketable title* of record to the home). Had the Zwickys not owned and occupied the home at the time they wished to take out the line of credit, Bank One would have never allowed them to do so.

[15] The Court also notes that no evidence was presented to show that Bank One received notice from Mr. Treinen authorizing the Zwickys to so borrow.

[16] *Injuria non excusat injuriam.* ("A wrong does not excuse a wrong.")

The other out-of-state cases cited by Bank One suffer, to varying degrees, from the same or similar infirmities as *Huntington*. *See generally Bank of New York v. Fifth Third Bank of Central Ohio*, 2002 WL 121925 (Ohio Ct. App. Jan. 30, 2002) (unpublished); *Liberty Mortgage Corp. v. Nat'l City Bank*, 755 N.E. 2d 639 (Ind. Ct. App. 2001); *First Union Nat'l Bank v. Nelkin*, 808 A.2d 856 (N.J. Super. Ct. 2002). In addition, this Court notes that it specifically disagrees with the *Liberty Mortgage* court's conclusion that the new lender in that case was "culpably negligent" in failing to procure a signed statement from the borrowers requesting that the account be closed as directed by the credit line lender and, as such, was not entitled to equitable subrogation. From the facts of that case—especially that the new loan was apparently either a refinancing or consolidation loan[17]—this Court does not believe that such failure on the part of the new lender constituted anything more than "mere inadvertence, mistake or ignorance" and, as such, the new lender should have been entitled to equitable subrogation. *See Liberty* at 642. This Court also notes that the *Liberty* court's conclusion that the credit line lender was not also "culpably negligent" cannot be applied to this case as such conclusion was based on the fact that the credit line lender in *Liberty* was contractually obligated to provide the line of credit for a period of years. *Liberty* at 643. While the Agreement for the line of credit in this case also stated that it was for a period of years, as previously pointed out, Bank One was relieved of any contractual obligation to keep the credit line mortgage open upon the sale of the home to Mr. Treinen.

Furthermore, in the *Bank of New York* case, it is important to note that the Ohio Court of Appeals based its decision in large part on Ohio statutes requiring that certain specific notice be given to holders of open-ended mortgages and governing how an open-ended loan may be terminated when the balance thereon is $0. *See Bank of New York* at *1-*4 (citing Ohio Rev. Code §§ 5301.232(B) and (D) and § 1321.58(F)). No such Colorado statute exists or applies.

Finally, this Court further distinguishes *First Union* on the basis that the New Jersey Superior Court's decision in that case rested primarily on a local rule of law stating that equitable subrogation is not available to a new lender whose proceeds are used to pay off an older mortgage if the new lender possesses actual knowledge of the prior encumbrance. *See First Union* at 861. Such is not the rule of law in Colorado.[18]

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[17] In the case of either a refinancing or consolidation loan, an old debt would be paid off and closed in exchange for a new debt. *See* Black's Law Dictionary 847, 1285 (7th ed. 1999).

[18] In Colorado, equitable subrogation is not a separate claim for relief but, rather, a theory of unjust enrichment. *Cedar Lane Investments v. American Roofing Supply of Colo. Springs, Inc.*, 919 P.2d 879, 885 (Colo. Ct. App. 1996. For recovery under a theory of unjust enrichment in Colorado, the following elements must be met: "(1) at plaintiff's expense, (2) defendant received a benefit, (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying." *DCB Constr. Co. v. Central City Dev. Co.*, 965 P.2d 115, 119 (Colo. 1998) (*en banc*). In the view of this Court, it is entirely possible that the record holder of the first lien position on a property could benefit from that position at the expense of the record holder of the second lien position on the same property under circumstances which would make it would make it unjust for the record first lienholder to retain the benefit without paying. This is true even if the record second lienholder knew of the record first lienholder's encumbrance at the time that proceeds belonging to the record second lienholder were used to pay off the loan underlying the record first lienholder's encumbrance on the property.

The Court also notes its disagreement with the New Jersey court's determination that the credit line lender was not unjustly enriched simply because it was not receiving a double payment.[19]

Accordingly, the Court finds the out-of state cases cited by Bank One to be uncompelling and inapplicable to the matter at hand.[20]

Having analyzed Bank One's responses to the argument of Metropolitan and Mr. Treinen, this Court is now left to determine whether the indebtedness on the credit line mortgage in the case at bar was satisfied such that Bank One had an obligation to release its lien on the home. *See* C.R.S. § 38-35-124. Neither Colorado statutes nor case law provide a specific definition of the term "satisfaction" as it is used in § 38-35-124 with respect to open-ended loans.[21] When a phrase is not defined and does not have a plain and unambiguous meaning, as here, the Court may explore other sources. *See City of Colorado Springs v. Powell*, 48 P.3d 561, 564 (Colo. 2002); *Sullivan v. Industrial Claims Appeals Office*, 22 P.3d 535, 538 (Colo. Ct. App. 2000). "Satisfaction" is "[t]he fulfillment of an obligation[, especially] the payment in full of a debt," or "[t]he giving of something with the intention, express or implied, that it is to extinguish some existing legal or moral obligation." Black's Law Dictionary 1343 (7th ed. 1999). As previously noted, the "open-ended" nature of a revolving line of credit such as a credit line mortgage generally makes it such that "payment in full" alone would not serve to satisfy the indebtedness thereon. Looking to the latter definition, then, along with principles of equity, this Court concludes that payment in full, combined with "the giving of something with the intention, express or implied, that it is to extinguish" an existing obligation, *and acceptance thereof*, is sufficient to satisfy the indebtedness on a credit line mortgage for the purposes of § 38-35-124.[22]

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[19] In addition, it is also important to note that, as of July 1, 1997, New Jersey lenders providing open-ended lines of credit in exchange for a second mortgage on a home are not required to close such credit line accounts *except* upon notification in writing by the borrower. *See* N.J. Stat. §§ 17:11C-2, 17:11C-30.

[20] The Court notes that Metropolitan and Mr. Treinen have not argued that Mr. Treinen's lien on the home should be equitably subrogated to Bank One's "valid" lien but, rather, that Bank One's lien is invalid due to Metropolitan's satisfaction of the indebtedness on the credit line mortgage at the time Mr. Treinen purchased the home.

[21] The Court notes the existence of several Colorado cases which discuss "satisfaction" of a debt with respect to closed-ended loans. *See generally Crown Bank v. Crowder Mortgage Corp.*, 5 P.3d 954 (Colo. Ct. App. 2000); *Hohn v. Morrison*, 870 P.2d 513 (Colo. Ct. App. 1993); *Imperial Mortgage Corp. v. Travelers Indem. Co.*, 599 P.2d 276 (Colo. Ct. App. 1979).

[22] While the indebtedness could clearly have been satisfied according to the terms of the Agreement—specifically, notice of cancellation in writing, return of account access devices and payment of all amounts due—this was not accomplished. *See* Agreement at 3. It is important to note, however, that the Agreement does not state that the cancellation terms therein are the *only* way to satisfy the indebtedness. *See generally* Agreement. Indeed, this Court is convinced that such a limitation on satisfaction, even if it had been included therein, would not be valid. In this Court's view, § 38-35-124 entitles lenders and other entities participating in real estate transactions—that is, entities facilitating the alienability of property—to rely on the language therein compelling the release of a lien upon satisfaction of indebtedness. That is, facilitating entities should not be forced to read, follow and interpret the specific terms of every deed of trust encountered in the course of business. To conclude otherwise would have a negative effect on the alienability of property by increasing the costs to homeowners on transfer or sale, restricting the availability of financing available to homeowners and placing facilitating entities in positions of increased legal risk. Indeed, it is conceivable that, if the language of individual deeds of trust were permitted to control over the

Applying the facts of this case to the foregoing definition, it is clear that payment on the credit line mortgage was made in full by Metropolitan at the time of the sale. Petitioner Bank One's Hearing Exhibits 6, 7. In addition, along with such payment, Metropolitan gave both a statement indicating the buyer and sellers of the home and a "Final Payoff Letter" requesting that the check be accepted "as a final payoff" for the credit line mortgage. Petitioner Bank One's Hearing Exhibits 4, 6. From these items, Bank One knew or should have known that: (1) the home was to be sold to a new and different owner and (2) Metropolitan intended that the credit line mortgage be paid off and *extinguished* as part of the sale. Bank One accepted those terms by negotiating the check on January 14, 2000 and, as a result, was obligated pursuant to § 38-35-124 to release the lien associated with the credit line mortgage that it held on the home. The lien once held by Bank One on the home now owned by Mr. Treinen became invalid on satisfaction of the indebtedness on the credit line mortgage on January 14, 2000. [23] As such, there can be no default on the Deed of Trust associated with that lien.

Accordingly, after January 14, 2000, there could be no default on the Deed of Trust entitling Bank One to foreclose thereon via a Rule 120 proceeding. As the events serving as the basis for Bank One's claim of default occurred after January 14, 2000, this Court finds that there is no reasonable probability that default has occurred on the Deed of Trust at issue in this case as alleged by Bank One. C.R.C.P. Rule 120(d).

C. Other Matters

Given that the Court has found no existence of a default or other circumstances authorizing, under the terms of the Deed of Trust, exercise of a power of sale contained therein, there is no need for it to address whether an order authorizing sale under the SSCRA is otherwise proper. C.R.C.P. Rule 120(d).

In addition, the Court notes that it cannot address the various other claims and requests for relief made by Intervenor/Respondents in their pleadings as such claims and requests are beyond the scope of a Rule 120 hearing. *Plymouth Capital* at 1017.

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statute, such language could be so draconian that no entity would be willing to facilitate a transfer. *Jus publicum privatorum pactis mutari non potest.* (A public right cannot be changed by agreements of private parties.)

[23] To be clear, any loan monies advanced to the Zwickys by Bank One on the line of credit after satisfaction of the indebtedness on the credit line mortgage on January 14, 2000, were not secured by the home.

IV. CONCLUSION

For the aforementioned reasons, Petitioner's Motion for Order Authorizing Sale Under Rule 120 is DENIED. In addition, Intervenor/Respondents' requests for fees and costs and other relief are DENIED, without prejudice, as outside the bounds of a Rule 120 hearing.

Done this 29th day of April, 2004.

BY THE COURT:

Lisa Hamilton-Fieldman
District Court Magistrate

DATED THIS «Day» DAY OF «Month», 2002.

BY THE COURT:

Original Signature on File with Court

Lisa D. Hamilton-Fieldman
District Court Magistrate

CERTIFICATE OF SERVICE: I certify that I electronically served the foregoing via the JusticeLink Efile service, or via First-Class Postage Mail.

Date: «DateEfile»

Original Signature on File with Court