IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

JEFFREY S. SMALL, as Clerk of Circuit Court of City of Fredericksburg, Virginia, individually and on behalf of All others similarly situated,	)	
Plaintiff,	)	
v.	)	Civil Action No. 3:12CV487–HEH
FEDERAL NATIONAL MORTGAGE ASSOCIATION a/k/a FANNIE MAE, *et al.*,	)	
Defendants.	)	

ORDER OF CERTIFICATION
(Certifying Question of Law to the Supreme Court of Virginia)

THIS MATTER is before the Court *sua sponte* to CERTIFY a significant and unsettled issue of Virginia law to the Supreme Court of Virginia. In accordance with Rule 5:40 of the Supreme Court of Virginia, this Court sets forth the following:

I. QUESTION CERTIFIED

In this case, the Clerk of Court for the City of Fredericksburg challenges Defendants' claim to a federal exemption from Virginia's recordation tax. On January 29, 2013, this Court Ordered supplemental briefs to address whether Plaintiff—as Clerk of Court for the City of Fredericksburg, Virginia—possesses statutory standing[1] to bring this lawsuit, as he appears to have no authority to enforce the non-payment of the real

[1] Statutory standing is the authority of a particular plaintiff to assert a legislatively-created cause of action. *See CGM, LLC v. BellSouth Telecomm., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011) (citation omitted).

estate transfer tax at issue. Moreover, it is unclear whether Virginia law authorizes a Clerk of Court to serve as class representative in a class action filed in his official capacity. Upon review of the supplemental submissions, and finding no binding precedent on the issue, the Court has concluded that the issue may have broad application to the powers of state constitutional officers throughout the Commonwealth of Virginia. Accordingly, out of respect for Virginia's sovereignty and in deference to the Supreme Court of Virginia's supervisory role over the Commonwealth's court system, the Court requests the Supreme Court of Virginia to exercise its discretion to answer the following questions:

1.) Under Virginia law, does a clerk of court possess statutory standing to initiate a lawsuit, in his official capacity, to enforce the real estate transfer tax on the recording of instruments?

2.) If a clerk of court does possess authority to bring suit in his official capacity as described in Certified Question No. 1, does Virginia law authorize him to do so as a class representative on behalf of all clerks of court throughout the Commonwealth?

The Court acknowledges that the Supreme Court of Virginia may restate these questions. *See* Va. Sup. Ct. R. 5:40(d). Moreover, the Court recognizes that the Supreme Court of Virginia need not reach the second question if it answers the first question in the negative.

II. NATURE OF THE CONTROVERSY AND STATEMENT OF RELEVANT FACTS

As it currently stands, neither Federal Home Loan Mortgage Corporation ("Freddie Mac") nor Federal National Mortgage Association ("Fannie Mae") pay the state recordation tax imposed by Section 58.1-801 of the Code of Virginia, claiming

exemption pursuant to 12 U.S.C. §§ 1452(e), 1723a(c)(2), 4617(j)(2). In relevant part, those federal statutes provide that Fannie Mae and Freddie Mac "shall be exempt from all taxation . . . imposed by any . . . State, county, municipality, or local taxing authority" except that their real property may be taxed "to the same extent . . . as other real property is taxed." *Id.*

In his official capacity as Clerk of Circuit Court of the City of Fredericksburg, Virginia, Plaintiff Jeffrey S. Small brought this putative class action against Freddie Mac and Fannie Mae.[2] On behalf of the putative class, he seeks to enforce the state recordation tax imposed by Section 58.1-801 of the Code of Virginia against Defendants. He also asserts a claim for unjust enrichment based on Defendants' failure to pay the tax and he seeks a declaratory judgment that Defendants are not exempt therefrom. At its core, the merits of the case turn on whether Virginia's recordation tax is a tax on real property—in which case the exemption does not apply—or an excise tax.

Defendants moved to dismiss, arguing primarily that the statutory exemption applies to the recordation tax as a matter of law. As an additional basis for relief, Defendants questioned whether a clerk of court is authorized under Virginia law to bring such a lawsuit in the first place—an issue of statutory standing. (Defs.' Mem. Supp. Mot. Dismiss at 26 n.16, ECF No. 16.) Finding the statutory standing issue potentially

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[2] Rather than litigate in league with the Virginia Attorney General's Office and the Virginia Department of Taxation, Plaintiff has engaged an array of private law firms from around the country to pursue what he perceives to be a claim for back taxes due. Although the Department of Taxation has not appeared in the proceeding, it has previously issued a ruling on a similar federal exemption, reaching a very different conclusion than that offered by Plaintiff in this case. Va. Dep't of Tax., Re: Ruling Request: Recordation Tax, § 58.1-811 Exemptions, 1990 WL 323991 (Aug. 29, 1990).

dispositive, the Court ordered the parties to submit supplemental briefs to address the point. (Order of Jan. 29, 2013, ECF No. 31.) Having now reviewed those submissions, the Court concludes that there is no controlling authority on the issue. Given the potentially broad implications that the issue may have on constitutional officers in Virginia, the question is more appropriately left for the Supreme Court of Virginia to answer.

III. LEGAL DISCUSSION AND RELEVANT CASE LAW

Statutory standing is distinct from Article III and prudential standing. *CGM*, 664 F.3d at 52. While Article III and prudential standing implicate subject matter jurisdiction, "'[a] dismissal for lack of statutory standing is effectively the same as a dismissal for failure to state a claim.'" *Id.* (citing *Baldwin v. Univ. of Pittsburgh Med. Ctr.*, 363 F.3d 69, 73 (3d Cir. 2011). It "'applies only to legislatively-created causes of action' and concerns 'whether a statute creating a private right of action authorizes a particular plaintiff to avail [himself] of that right of action.'" *Id.* (citation omitted). Thus, whether a particular plaintiff may bring suit under a statute is a matter of statutory interpretation. *Id.* (citing *Graden v. Conexant Sys., Inc.*, 496 F.3d 291, 295 (3d Cir. 2007)).

In drafting the Virginia Recordation Tax Act, the General Assembly created a collection scheme that imposes the duty to assess and collect the tax initially on the clerks of court. Specifically, Va. Code § 58.1-812 states that the tax "shall be determined and collected by the clerk in whose office the instrument is first offered for recordation." When the clerk first records the instrument, he must affix a certification to the instrument,

indicating that the recordation tax has been paid. Va. Code § 58.1-802(A)(ii). "No such deed, instrument or other writing shall be admitted" without the certification. Va. Code § 58.1-802(A). If the tax is unpaid for thirty days, the Virginia Department of Taxation is then authorized to collect the tax "in the same manner and by the same methods used for the collection of any state tax administered by the Department." Va. Code § 58.1-813.[3]

The position of clerk of court is established by Va. Const. Art. VII, § 4, which provides that "[t]he duties and compensation of such officers shall be prescribed by general law or special act." The Attorney General of Virginia has opined that clerks of court have no inherent powers of their own. 2012 Va. Op. Att'y Gen. 8 (Mar. 16, 2012) ("If a particular action does not fall within the express statutory authority, the clerk has no authority to perform that action."); 2003 Va. Op. Att'y Gen. 59 (Aug. 14, 2003) ("As a general rule, circuit court clerks have no inherent powers, and the scope of their powers must be determined by reference to applicable statutes."); *see also Mendez v. Commonwealth*, 255 S.E.2d 533, 535 (Va. 1979) (stating that "authority of a clerk of court to administer an oath or take an affidavit is purely a creature of statute"); *Harvey v. Chesapeake & Potomac Tel. Co.*, 93 S.E.2d 309, 313 (Va. 1956) (noting that clerk's

[3] Regardless of whether the Plaintiff has statutory standing in the present suit, it appears that a clerk could effectively challenge Defendants' exemption by refusing to certify and record an instrument pursuant to Va. Code § 58.1-802(A). Thus, contrary to Plaintiff's suggestion, he is not without recourse if he lacks statutory standing. (*See* Pl.'s Suppl. Br. at 7, ECF No. 32 ("[T]here is no authority giving Mr. Small the ability to force the Department [of Taxation] or any other to bring this suit to protect his interests.").) He could refuse to record a deed on behalf of the Defendants, for which they did not pay the recordation tax, forcing them to seek mandamus. Plaintiff could then raise the merits of his claim in a defensive posture. This is not to suggest that such action has merit, but merely to demonstrate that Plaintiff has alternative courses of action available to him.

duties are ministerial such that "[h]e is not concerned with the legal effect of such papers."). Thus, "[i]f a particular action does not fall within [his] express statutory authority, the clerk has no authority to perform that action." 2012 Va. Op. Att'y Gen. 8 (Mar. 16, 2012). To reach this conclusion, the Attorney General has relied principally on two Supreme Court of Virginia opinions: *Mendez v. Commonwealth* and *Harvey v. Chesapeake & Potomac Tel. Co.* Neither opinion completely resolves doubts surrounding a clerk of court's authority, though both are consistent with the Attorney General's opinions.

In *Mendez*, the Court held that the clerk lacked authority to administer oaths unless such an oath is "required by law." 255 S.E.2d at 536. From this statement, the Attorney General has broadly concluded that "circuit court clerks have no inherent powers." 2003 Va. Op. Att'y Gen. 59 (Aug. 14, 2003). It is not clear whether the Court's decision in *Mendez* yields the generally-applicable rule articulated by the Attorney General, as the issue before the Court was limited to a specific statutory power.

The Court's holding in *Harvey* lends additional support to the Attorney General's view, but again, the Court's holding was not quite as broad as the Attorney General's opinion suggests. In that case, a litigant filed a motion to set aside a verdict on the twenty-first day after the verdict was rendered—the final day before the trial court lost jurisdiction. *Harvey*, 93 S.E.2d at 218. The trial court denied the motion, concluding that it was untimely. In affirming, the Supreme Court of Virginia held that merely filing a document with the clerk could not extend the jurisdictional period, explaining:

> [O]nly the court, by proper order entered within the twenty-one days, was authorized to change or modify the final judgment. *The clerk has no such authority. His duties are ministerial.* He receives and notes on the papers the dates they are lodged with him. *He is not concerned with the legal effect of such papers.*

Id. (emphasis added).

Plaintiff's argument paints a very different picture of a clerk of court's authority, suggesting much broader powers than those explicitly prescribed by statute or recognized by any court of Virginia. He merges a city's authority with that of a constitutional officer, suggesting that the "broad grant of authority to localities to sue" likewise authorizes him to sue Defendants here. (Pl.'s Reply Defs.'s Suppl. Br. at 2.) He further suggests that a clerk of court is due significant deference when interpreting his own powers. (*Id.* at 4.)

Clearly, a clerk of court is vested with the ministerial duty to assess and collect Virginia's recordation tax whenever he records a deed. But, he is not explicitly authorized to initiate an enforcement action under Virginia law. While the Attorney General's opinions suggest that the clerk's duties end at the ministerial task of assessing and collecting the tax, those opinions are merely persuasive authority. *Diggs v. Commonwealth*, 369 S.E.2d 199, 201 (Va. App. 1988). This Court has found no controlling authority interpreting the applicable statutes, one way or the other.

IV. CERTIFIED QUESTION DETERMINES THIS PROCEEDING

The Court may properly dispose of a case on statutory standing as a threshold matter. *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (noting that statutory standing is a threshold matter that may properly be addressed before

jurisdictional issues). If the Supreme Court of Virginia determines that a clerk of court is not authorized to bring this suit, then the matter will be dismissed without further addressing the merits of the case. Only if the Supreme Court concludes that Plaintiff is acting within the bounds of his authority as a constitutional officer will this Court entertain the action.

V. PARTIES AND THEIR COUNSEL

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The Defendants are the Federal National Mortgage Association, a/k/a "Fannie Mae," and the Federal Home Loan Mortgage Corporation, a/k/a "Freddie Mac." Fannie Mae is represented by:

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As conservator for these entities, the Federal Housing Finance Agency has joined the case as Intervenor-Defendant. It is represented by:

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VI. CONCLUSION

Pursuant to the privilege made available by Virginia Supreme Court Rule 5:40, the Court respectfully:

1.) CERTIFIES the questions stated in Part I of this Order of Certification to the Supreme Court of Virginia for resolution;

2.) DIRECTS the Clerk of this Court to forward to the Supreme Court of Virginia, under the official seal of this Court, a copy of this Order of Certification; and,

3.) ORDERS that any request for all or part of the record be fulfilled by the Clerk of this Court simply upon notification from the Clerk of the Supreme Court of Virginia.

The Clerk is DIRECTED to send a copy of this Order to all counsel of record.

It is so ORDERED.

/s/
Henry E. Hudson
United States District Judge

Date: Feb 20, 2013
Richmond, Virginia