

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

4 STEVEN ABOULAFIA,)
5)
6 Plaintiff,)
7 vs.)
8 MORTGAGE ELECTRONIC)
9 REGISTRATION SYSTEMS, INC., et al.,)
10 Defendants.)

Case No.: 2:12-cv-02001-GMN-PAL

ORDER

11 Pending before the Court is the Motion to Dismiss (ECF No. 9) filed by Defendants
12 Mortgage Electronic Registration Systems, Inc. (“MERS”), ReconTrust Company, N.A.
13 (“ReconTrust”), Bank of America, N.A., for itself, as successor by merger to BAC Home
14 Loans Servicing, LP, and as successor in interest to Countrywide Home Loans, Inc. (“Bank of
15 America”), and The Bank of New York Mellon (“BNY Mellon”) (collectively, “Defendants”).
16 Plaintiff Steven Aboulafia filed a Response (ECF No. 17) and Defendants filed a Reply (ECF
17 No. 22). Also before the Court is the Motion for Attorneys’ Fees (ECF No. 12) filed by
18 Defendants, to which Plaintiff filed a Response (ECF No. 23) and Defendants filed a Reply
19 (ECF No. 25).

20 I. **BACKGROUND**

21 As discussed by the Court in its previous Order (ECF No. 9) denying Plaintiff’s request
22 for an injunction, Plaintiff has now appeared six times before the District of Nevada for claims
23 arising from foreclosure proceedings initiated against different properties. See Aboulafia v.
24 Mortgage Electronic Registration Systems, Inc., No. 2:12-cv-00385-KJD-GWF (D. Nev. 2012)
25 (dismissed for failure to oppose defendants’ motion to dismiss; relating to the property located

1 at 6751 Bison Creek St., Las Vegas, NV, 89148, APN # 176-06-611-011; removed from Eighth
2
3 Judicial District Court Case No. A-11-643688-C); Aboulafia v. Mortgage Electronic
4 Registration Systems, Inc., No. 2:12-cv-00389-JCM-PAL (D. Nev. 2012) (dismissed for failure
5 to oppose defendants' motion to dismiss; relating to the property located at 152 Judy Lane,
6 Henderson, NV, 89015, APN # 179-17-210-002; removed from Eighth Judicial District Court
7 Case No. A-11-643687-C); Aboulafia v. Mortgage Electronic Registration Systems, Inc., No.
8 2:12-cv-00390-MMD-CWH (D. Nev. 2012) (dismissed for failure to oppose defendants'
9 motion to dismiss; relating to the property located at 544 Albacate St., Henderson, NV, 89015,
10 APN # 179-21-119-076; removed from Eighth Judicial District Court Case No. A-12-654836-
11 C); Aboulafia v. Mortgage Electronic Registration Systems, Inc., No. 2:12-cv-00391-GMN-
12 CWH (D. Nev. 2012) (dismissed for failure to oppose defendants' motion to dismiss; relating
13 to the property located at 539 Moses Lake Court, Henderson, Nevada, 89015, APN # 179-28-
14 213-053; removed from Eighth Judicial District Court Case No. A-12-655721-C); Aboulafia v.
15 Mortgage Electronic Registration Systems, Inc., No. 2:12-cv-01552-JCM-VCF (D. Nev. 2012)
16 (voluntarily dismissed; relating to the property located at 518 Big Lake St., Henderson, NV,
17 89002, APN #179-28-212-008; removed from Eighth Judicial District Court Case No. A-11-
18 650395-C); see also Eighth Judicial District Court of Nevada cases A-11-641482-C; A-11-
19 642262-C; A-11-644796-C; A-11-645191-C; and A-11-648208-C.

20 In each case, he was represented by the same attorney, James S. Kent, Nevada Bar No.
21 5034, and the same Defendants were named. See *id.* In each case, the action was dismissed
22 after Plaintiff failed to oppose the defendants' motion to dismiss, or in one case, voluntarily
23 dismissed the action. See *id.*

24 Here, the property in question is located at 518 Big Lake St., Henderson, NV, 89002,
25 APN #179-28-212-008, the same property at issue in the one case previously dismissed

1 voluntarily by Plaintiff, at *Aboulafia v. Mortgage Electronic Registration Systems, Inc.*, No.
2 2:12-cv-01552-JCM-VCF (D. Nev. 2012). Plaintiff's six¹ causes of action are: (1) Void Notice
3 of Breach; (2) Wrongful Foreclosure; (3) Fraud/Slander of Title; (4) Chain of Title/Real Party
4 in Interest; (5) Quiet Title; (6) Injunctive Relief.

5 In 2006, Plaintiff obtained a loan from Countrywide Bank, N.A., secured by a Deed of
6 Trust on the property, naming ReconTrust Company, N.A. as Trustee, and MERS as
7 beneficiary solely as nominee for the Lender and the Lender's successors and assigns. (Ex. A to
8 Defs.' Opp. to Mot. for Prelim. Inj., ECF No. 6.) The beneficial interest in the Deed of Trust
9 was transferred to "BAC Home Loans Servicing, LP, FKA Countrywide Home Loans
10 Servicing LP" on May 31, 2011, as shown in the Assignment recorded June 1, 2011 by MERS.
11 (Id. at Ex. B.) On June 1, 2011, Defendant ReconTrust recorded a Notice of Default as Trustee
12 for the beneficiary, and on the same day, a Certificate from the State of Nevada Foreclosure
13 Mediation Program was issued, authorizing the beneficiary to proceed with the foreclosure
14 process. (Id. at Exs. C-D.) Later, on January 26, 2012, the beneficial interest was transferred to
15 BNY Mellon by an Assignment recorded January 30, 2012 by "Bank of America, N.A.,
16 successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans
17 Servicing, LP." (Id. at Ex. H.) Four Notices of Trustee's Sale were recorded by ReconTrust, on
18 October 1, 2011, January 27, 2012, May 10, 2012 and on August 28, 2012. (Id. at Exs. E, G, I.)

19 In the Motion to Dismiss (ECF No. 11), Defendants request that Plaintiff's Complaint be
20 dismissed with prejudice for failure to state a claim upon which relief may be granted. In the
21 Motion for Attorneys' Fees (ECF No.12), Defendants request that the Court award attorneys'
22 fees and costs pursuant to 28 U.S.C. § 1927, arguing that Plaintiff's filing of the action and
23 subsequent motions were conducted in bad faith, as shown by Plaintiff's prior litigation history

24
25 ¹ Plaintiff's causes of action appear to be incorrectly enumerated in the Complaint, representing that Plaintiff is claiming ten causes of action instead of the six that are listed.

1 and the arguments presented in this action.

2 **II. DISCUSSION**

3 As discussed below, the Court finds that Plaintiff’s Complaint fails to state a claim upon
4 which relief may be granted, and should be dismissed with prejudice. Also, the Court finds that
5 attorneys’ fees are merited in this case.

6 **A. Motion to Dismiss**

7 **1. Legal Standard**

8 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
9 that fails to state a claim upon which relief can be granted. *See North Star Int’l v. Ariz. Corp.*
10 *Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule
11 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not
12 give the defendant fair notice of a legally cognizable claim and the grounds on which it rests.
13 See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the
14 complaint is sufficient to state a claim, the Court will take all material allegations as true and
15 construe them in the light most favorable to the plaintiff. See *NL Indus., Inc. v. Kaplan*, 792
16 F.2d 896, 898 (9th Cir. 1986).

17 The Court, however, is not required to accept as true allegations that are merely
18 conclusory, unwarranted deductions of fact, or unreasonable inferences. See *Sprewell v. Golden*
19 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
20 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a
21 violation is plausible, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing
22 *Twombly*, 550 U.S. at 555) (emphasis added).

23 “Generally, a district court may not consider any material beyond the pleadings in ruling
24 on a Rule 12(b)(6) motion However, material which is properly submitted as part of the
25 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard*

1 Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly,
2 “documents whose contents are alleged in a complaint and whose authenticity no party
3 questions, but which are not physically attached to the pleading, may be considered in ruling on
4 a Rule 12(b)(6) motion to dismiss” without converting the motion to dismiss into a motion for
5 summary judgment. Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule
6 of Evidence 201, a court may take judicial notice of “matters of public record.” Mack v. S. Bay
7 Beer Distrib., 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers
8 materials outside of the pleadings, the motion to dismiss is converted into a motion for
9 summary judgment. See Fed. R. Civ. P. 12(d); Arpin v. Santa Clara Valley Transp. Agency, 261
10 F.3d 912, 925 (9th Cir. 2001).

11 If the court grants a motion to dismiss, it must then decide whether to grant leave to
12 amend. Pursuant to Rule 15(a), the court should “freely” give leave to amend “when justice so
13 requires,” and in the absence of a reason such as “undue delay, bad faith or dilatory motive on
14 the part of the movant, repeated failure to cure deficiencies by amendments previously allowed,
15 undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the
16 amendment, etc.” Foman v. Davis, 371 U.S. 178, 182 (1962). Generally, leave to amend is
17 only denied when it is clear that the deficiencies of the complaint cannot be cured by
18 amendment. See DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992).

19 **2. Analysis**

20 a. Void Notice of Breach

21 Plaintiff’s first cause of action for “Void Notice of Breach” alleges violation of Nevada
22 Revised Statutes 107.028, which did not exist and was therefore not effective until October 1,
23 2011. As discussed in the Court’s previous Order (ECF No. 9), Plaintiff’s argument that the
24 Notice of Default is nevertheless subject to statutory requirements enacted after it was recorded
25 has no legal basis and is therefore unpersuasive to this Court. Furthermore, Plaintiff provides

1 no legal or statutory basis for the Court to construe section 107.028 as applying to subsequently
2 recorded foreclosure documents arising from the June 1, 2011, Notice of Default. Accordingly,
3 because the challenged Notice of Default was recorded June 1, 2011, this statute cannot apply
4 and this cause of action must be dismissed with prejudice.

5 b. Wrongful Foreclosure

6 Plaintiff's second cause of action for "Wrongful Foreclosure" must also fail, and
7 Plaintiff's attempts to re-title this cause of action as "Illegal Foreclosure," "Not Allowed
8 Foreclosure" or "Prohibited Foreclosure" (see Resp. to Mot. to Dismiss, 5:9-11, ECF No. 17)
9 do not cure the deficiencies identified previously by the Court.

10 In Nevada, the common law tort of wrongful foreclosure requires a plaintiff to "establish
11 that at the time the power of sale was exercised or the foreclosure occurred, no breach of
12 condition or failure of performance existed on the mortgagor's or trustor's part which would
13 have authorized the foreclosure or exercise of the power of sale." *Collins v. Union Fed. Sav. &*
14 *Loan Ass'n*, 662 P.2d 610, 623 (Nev. 1983). Plaintiff has conceded that he is not current in his
15 payments. (See Pl.'s Reply to Mot. for Prelim. Inj., 7:4-5, ECF No. 7.)

16 Furthermore, as of the date of the instant Notice of Default, June 1, 2011, Nevada
17 statutes do not require parties such as Defendants initiating foreclosure to first provide proof
18 that they are the holder and owner of the mortgage and note. Securitization of a loan note does
19 not bar a party from initiating foreclosure proceedings. See Nev. Rev. Stat. § 107.080; *Chavez*
20 *v. California Reconveyance Co.*, No. 2:10-cv-00325-RLH-LRL, 2010 WL 2545006, at *2 (D.
21 Nev. June 18, 2010) ("NRS 107.080 does not forbid the securitization of a loan."). Plaintiff's
22 citations and arguments to *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034 (9th
23 Cir. 2011), a Ninth Circuit Court of Appeals decision applying Arizona law, are also
24 unpersuasive as to Nevada law. This argument is particularly unpersuasive where, as here,
25 Nevada statutes and case law provide sufficient and controlling authority on the issues before

1 the Court. Accordingly, this cause of action must be dismissed with prejudice.

2 c. Fraud/Slander of Title

3 Plaintiff's third cause of action for "Fraud/Slander of Title" is premised on Plaintiff's
4 allegations that Defendants violated Nevada's statutory requirements for foreclosure
5 proceedings. As discussed above, the Court finds that these allegations have no merit.

6 To state a claim for fraud or intentional misrepresentation, a plaintiff must allege that:
7 (1) a false representation by the defendant was made with either knowledge or belief that it was
8 false or without sufficient foundation; (2) with an intent to induce another's reliance; and
9 (3) that damages resulted from this reliance. See *Nelson v. Heer*, 163 P.3d 420, 426 (Nev.
10 2007). Furthermore, a claim of "fraud or mistake" must be alleged "with particularity." Fed. R.
11 Civ. P. 9(b). A complaint alleging fraud or mistake must include allegations of the time, place,
12 and specific content of the alleged false representations and the identities of the parties
13 involved. See *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007). Finally, Rule 9(b) does
14 not allow a complaint to merely lump multiple defendants together but requires plaintiffs to
15 differentiate their allegations when suing more than one defendant and inform each defendant
16 separately of the allegations surrounding his alleged participation in the fraud." *Id.*

17 To state a claim for slander of title, a plaintiff must allege that a defendant made (1) false
18 and malicious communications; (2) disparaging to one's title in land; (3) that cause special
19 damages. *Higgins v. Higgens*, 744 P.2d 530, 531 (Nev. 1987) (per curiam).

20 Plaintiff hasn't alleged facts showing that Defendants made any false representation or
21 communication, the threshold requirement to state a claim for fraud or slander of title. In the
22 Response to the Motion to Dismiss, Plaintiff requests leave to amend this cause of action, and
23 argues that the pleading deficiencies can be cured, but does not provide factual details to
24 support this argument, particularly as to any existing but as-yet-unstated facts that might
25 support allegations as to "the time, place, and specific content of the alleged false

1 representations and the identities of the parties involved.” Furthermore, Plaintiff states that
2 “[i]f the factual assertions of lack of authority, as provided within the first two causes of action,
3 are accepted, then the remaining requirements for fraud/slander of title can be met.” (Resp. to
4 Mot. to Dismiss, 8:7-9.) As discussed above, the factual assertions provided in the first two
5 causes of action are not sufficient to state a cause of action, and therefore the Court has no
6 grounds to find that Plaintiff may be able to cure the deficiencies in his third cause of action on
7 this basis. Because Plaintiff provides no other support for the argument that facts exist which
8 may satisfy the Rule 9(b) pleading requirements, after Plaintiff’s multiple opportunities to do
9 so, it is clear that any amendment would be futile, and therefore the Court cannot find that leave
10 to amend is justified. Accordingly, this cause of action must be dismissed with prejudice.

11 d. Chain of Title / Real Party in Interest

12 Plaintiff’s fourth cause of action, styled “Chain of Title / Real Party in Interest,” is based
13 on the allegation that “prior to foreclosing upon the residence, the Defendants must show
14 proper chain of title to establish that they in fact are the true holders in due course of the note
15 and deed of trust.” (Compl., 6:¶56.) However, as discussed above, there is no statutory
16 requirement or common law requirement that these Defendants must show proper chain of title
17 in order to initiate foreclosure proceedings. In the Response, Plaintiff argues that this cause of
18 action is “substantiate[d] . . . with the same arguments as made within the second cause of
19 action above.” (Resp. to Mot. to Dismiss, 8:15-17.) However, for the reasons already stated by
20 the Court, the second cause of action fails, and therefore this cause of action must also be
21 dismissed with prejudice.

22 e. Quiet Title

23 Plaintiff’s fifth cause of action, for “Quiet Title,” alleges that “the note in this instance is
24 not owned by the beneficiary,” that “the note cannot be reunited with the deed of trust,” and
25 that “if there can never be a reunification, the deed of trust is simply an unenforceable lien with

1 no deb [sic] tied to it.” (Compl., 6:¶62 – 7:¶64.) Furthermore, Plaintiff alleges that “[s]ince the
2 note cannot be reunified with the deed of trust, the deed of trust, which gained its secured
3 interest in the property by virtue of the note, lost its legal standing as a secured lien against the
4 property.” (Id. at 7:¶65.)

5 In the Response, Plaintiff “accepts the dismissal of his cause of action for Quiet Title.”
6 (Resp. to Mot. to Dismiss, 8:26-27.) Accordingly, and for the reasons discussed in the Court’s
7 previous Order (ECF No. 9)², this cause of action is dismissed with prejudice.

8 f. Injunctive Relief

9 Plaintiff’s sixth cause of action for injunctive relief is not a recognized cause of action,
10 and is instead a form of relief that a court may grant where a party has met its burden. Also,
11 Plaintiff “concede[s] the dismissal of this cause of action.” (Resp. to Mot. to Dismiss, 9:2.)
12 Accordingly, this claim is dismissed with prejudice.

13 **B. Motion for Attorneys’ Fees**

14 **1. Legal Standard**

15 By statute, a court may impose liability on a party “admitted to conduct cases in any
16 court of the United States . . . who so multiplies the proceedings in any case unreasonably and
17 vexatiously” that “excess costs, expenses, and attorneys’ fees” were “reasonably incurred
18 because of such conduct.” 28 U.S.C. § 1927. “Recklessness or bad faith is required to support
19 a fee award under § 1927.” *Cline v. Ind. Maint. Eng. & Contracting Co.*, 200 F.3d 1223, 1236
20 (9th Cir. 2000) (citing *U.S. v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983)). “Bad faith is
21 present when an attorney knowingly or recklessly raises a frivolous argument, or argues a
22 meritorious claim for the purpose of harassing an opponent.” *Estate of Blas v. Winkler*, 792

23
24 ² For a quiet title action, Nevada statutes provide that “[a]n action may be brought by any person against another
25 who claims an estate or interest in real property, adverse to the person bringing the action, for the purpose of
determining such adverse claim.” Nev. Rev. Stat. § 40.010. “In a quiet title action, the burden of proof rests with
the plaintiff to prove good title in himself.” *Breliant v. Preferred Equities Corp.*, 918 P.2d 314, 318 (Nev. 1996).
“Moreover, there is a presumption in favor of the record titleholder.” *Id.*

1 F.2d 858, 860 (9th Cir. 1986).

2 **2. Analysis**

3 Pursuant to 28 U.S.C. § 1927, Defendants request that “the Court order plaintiff’s
4 counsel to pay defendants’ attorneys’ fees and costs in an amount to be proven after the hearing
5 on this matter.” (Mot. Attorneys’ Fees, 7:4-5, ECF No. 12.) The Court agrees with Defendants
6 that Plaintiff’s claims in the Complaint and in his subsequent motions and arguments, when
7 considered with Plaintiff’s previously abandoned litigation in *Aboulafia v. Mortgage Electronic*
8 *Registration Systems, Inc.*, No. 2:12-cv-01552-JCM-VCF (D. Nev. 2012) on apparently the
9 same issues, supports a finding that at the very least, Plaintiff’s arguments were brought
10 recklessly, and possibly for the purpose of harassing an opponent. As discussed by the Court in
11 this Order, its previous Order (ECF No. 9), and at the hearing, Plaintiff’s prior experience in
12 virtually identical litigation for his other properties³ and the existence of contradictory statutory
13 language and case law directly on point, is enough to support a finding that Plaintiff’s conduct
14 in this action was in bad faith. Accordingly, having considered Plaintiff’s arguments in the
15 Response (ECF No. 17) and finding them unpersuasive, and for the reasons discussed here, in
16 the Court’s previous Order (ECF No. 9), at the hearing, and in Defendants’ briefs, the Court

17
18 ³ See *Aboulafia v. Mortgage Electronic Registration Systems, Inc.*, No. 2:12-cv-00385-KJD-GWF (D. Nev.
19 2012) (dismissed for failure to oppose defendants’ motion to dismiss; relating to the property located at 6751
20 Bison Creek St., Las Vegas, NV, 89148, APN # 176-06-611-011; removed from Eighth Judicial District Court
21 Case No. A-11-643688-C); *Aboulafia v. Mortgage Electronic Registration Systems, Inc.*, No. 2:12-cv-00389-
22 JCM-PAL (D. Nev. 2012) (dismissed for failure to oppose defendants’ motion to dismiss; relating to the property
23 located at 152 Judy Lane, Henderson, NV, 89015, APN # 179-17-210-002; removed from Eighth Judicial
24 District Court Case No. A-11-643687-C); *Aboulafia v. Mortgage Electronic Registration Systems, Inc.*, No.
25 2:12-cv-00390-MMD-CWH (D. Nev. 2012) (dismissed for failure to oppose defendants’ motion to dismiss;
relating to the property located at 544 Albacate St., Henderson, NV, 89015, APN # 179-21-119-076; removed
from Eighth Judicial District Court Case No. A-12-654836-C); *Aboulafia v. Mortgage Electronic Registration*
Systems, Inc., No. 2:12-cv-00391-GMN-CWH (D. Nev. 2012) (dismissed for failure to oppose defendants’
motion to dismiss; relating to the property located at 539 Moses Lake Court, Henderson, Nevada, 89015, APN #
179-28-213-053; removed from Eighth Judicial District Court Case No. A-12-655721-C); *Aboulafia v. Mortgage*
Electronic Registration Systems, Inc., No. 2:12-cv-01552-JCM-VCF (D. Nev. 2012) (voluntarily dismissed;
relating to the property located at 518 Big Lake St., Henderson, NV, 89002, APN #179-28-212-008; removed
from Eighth Judicial District Court Case No. A-11-650395-C); see also Eighth Judicial District Court of Nevada
cases A-11-641482-C; A-11-642262-C; A-11-644796-C; A-11-645191-C; and A-11-648208-C.

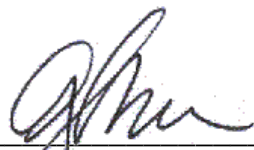
1 finds that an award of attorneys' fees and costs is appropriate in an amount sufficient to deter
2 future bad faith conduct. The Court will grant Defendants' Motion for Attorneys' Fees (ECF
3 No. 12) pursuant to 28 U.S.C. § 1927, and directs Defendants to submit briefing as to the
4 appropriate amount that should be awarded, pursuant to Rule 54(d)(2) of the Federal Rules of
5 Civil Procedure and Rule II.54-16(b) of the Local Rules of Civil Practice for the United States
6 District Court for the District of Nevada. If Plaintiff wishes to oppose the amounts requested
7 by Defendants, Plaintiff must submit an opposition in writing within fourteen days of
8 Defendants' brief, consistent with the requirements of the Federal Rules of Civil Procedure and
9 Local Rule II.54-16(e). No reply brief is necessary on the part of Defendants, and the Court
10 will consider the request submitted on the briefs, unless the Court later determines that oral
11 argument is necessary.

12 **III. CONCLUSION**

13 **IT IS HEREBY ORDERED** that the Motion to Dismiss (ECF No. 11) is **GRANTED**.
14 Plaintiff's Complaint is **DISMISSED with prejudice**. The Clerk shall enter judgment
15 accordingly.

16 **IT IS FURTHER ORDERED** that the Motion for Attorneys' Fees (ECF No. 12) is
17 **GRANTED**. Defendants shall submit briefing as to the appropriate amount that should be
18 awarded, pursuant to Rule 54(d)(2) of the Federal Rules of Civil Procedure and Rule II.54-
19 16(b) of the Local Rules of Civil Practice for the United States District Court for the District of
20 Nevada.

21 **DATED** this 8th day of June, 2013.

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Gloria M. Navarro
United States District Judge