

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Tudor Chirila, Administrator, THE ESTATE
OF HOW TZU HUANG,

Plaintiff,

vs.

BANK OF AMERICA, N.A.; RECONTRUST
COMPANY, N.A.; and DOES I-V; and ROE
ENTITIES I-X, jointly and severally,

Defendants.

3:11-cv-00005-RCJ-WGC

ORDER

This foreclosure case concerns, among other things, Defendant Bank of America’s allegedly wrongful payment of forged checks. Pending before the Court are cross-motions for summary judgment, (ECF Nos. 51, 52), and Plaintiff’s motion for leave to file a sur-reply, (ECF No. 59). For the reasons stated herein, the motions for summary judgment are denied, and the motion for leave to file is granted.

I. FACTS AND PROCEDURAL HISTORY

In April 2006, decedent How Tzu Huang (“Huang”) granted a mortgage on her home, the real property located at 4832 Meadow Springs Dr., Reno, NV 89509, to Defendant Bank of America. (Deed of Trust, ECF No. 37-3). Huang also held personal deposit accounts with Bank of America, from which the mortgage payments were automatically withdrawn. (Account Statements, ECF No. 51-2, at 4–7).

On December 23, 2008, Huang passed away while taking a shower in an upstairs bathroom, causing water damage to the property. (Baker Letter, ECF No. 32-5). Huang’s estate

1 (the “Estate” or “Plaintiff”) obtained several checks for the property damage from the insurer of
2 the property (the “insurance checks”). (Id.). The checks listed both Bank of America and the
3 administrator of the estate (the “Administrator”) as payees. (Id.). Accordingly, they could not be
4 negotiated without Bank of America’s endorsement. (Id.). Due to a dispute over the use of the
5 proceeds, however, Bank of America refused to endorse the checks. (Id.). On August 12, 2009,
6 Counsel for the Estate sent a letter to Bank of America, contending that he was unaware of an
7 enforceable limitation on the use of the proceeds. (Id.).
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9 In January 2009, one of Huang’s relatives, Chen-Hon Lu, allegedly wrote two checks
10 from Huang’s checkbook to himself in the amounts of \$10,000 and \$13,000 respectively (the
11 “forged checks”). (Checks, ECF No. 57-5). Bank of America cashed the forged checks from
12 Huang’s account. (Account Statements, ECF No. 51-2, at 4–7).
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14 The Estate defaulted on the loan in May 2009. (Notice of Default and Election to Sell,
15 ECF No. 32-2). On July 13, 2010, Defendant ReconTrust Company, N.A. (“ReconTrust”)
16 recorded a Notice of Default/Election to Sell. (Id.).
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18 On December 1, 2010, the Estate filed a complaint in the Second Judicial District Court
19 of the State of Nevada (the “State Court”). (Compl., ECF No. 1-2). On December 15, 2010, the
20 State Court issued a preliminary injunction, prohibiting Defendants from commencing a trustee’s
21 sale or otherwise foreclosing on the property. (Notice of Entry of Order, ECF No. 4-2). The State
22 Court further ordered Bank of America to endorse the insurance checks and deposit the funds in
23 the Estate’s deposit account. (Id.).
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25 On January 3, 2011, Defendants removed the case to this Court, (ECF No. 1), and
26 promptly moved to dismiss, (ECF No. 5). The Court granted the motion to dismiss with leave to
27 file a renewed motion to file an amended complaint. (ECF No. 12). On March 1, 2011, Plaintiff
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1 moved to amend its complaint, (ECF No. 13), and the Court granted the motion with respect to
2 the proposed causes of action for (1) wrongful payment of checks with forged endorsement; (2)
3 breach of contract; and (3) breach of the implied covenant of good faith and fair dealing. (Order,
4 ECF No. 20). The Court denied leave to amend to include claims for wrongful foreclosure and
5 unauthorized debt collection. (Id.). The Court also ordered the Parties to file points and
6 authorities regarding the status of the State Court order. (Id.). The Parties complied.
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8 On June 27, 2012, Defendants filed a motion to dismiss for failure to prosecute, (ECF
9 No. 31), a motion for summary judgment and dissolution of the preliminary injunction, (ECF No.
10 32), and a motion to expunge lis pendens, (ECF No. 33). In an order entered on January 25,
11 2013, this Court granted in part and denied in part the motion for summary judgment and
12 dissolution of the preliminary injunction. Specifically, the Court granted summary judgment as
13 to the contract claims arising out of the insurance checks and denied the motion as to the claim
14 for wrongful payment and the claim for breach of the implied covenant of good faith and fair
15 dealing based on the forged checks. The Court declined to dissolve the preliminary injunction
16 and denied each of Defendants' other motions.
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19 The Parties have now filed cross-motions for summary judgment on the wrongful
20 payment claim, and Defendants again seek dissolution of the preliminary injunction. (ECF Nos.
21 51, 52). Plaintiff has also moved for leave to file a sur-reply to the reply filed in support of
22 Defendants' pending motion to dismiss. (ECF No. 59).
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24 **II. CROSS-MOTIONS FOR SUMMARY JUDGMENT**

25 **a. Legal Standard**

26 In reviewing a motion for summary judgment, the court construes the evidence in the
27 light most favorable to the nonmoving party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.
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1 1996). Pursuant to Federal Rule of Civil Procedure 56, a court will grant summary judgment “if
2 the movant shows that there is no genuine dispute as to any material fact and the movant is
3 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are “facts that
4 might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*,
5 477 U.S. 242, 248 (1986). A material fact is “genuine” if the evidence is such that a reasonable
6 jury could return a verdict for the nonmoving party. *Id.*

8 The moving party bears the initial burden of identifying the portions of the pleadings and
9 evidence that the party believes to demonstrate the absence of any genuine issue of material fact.
10 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A party asserting that a fact cannot be or is
11 genuinely disputed must support the assertion by “citing to particular parts of materials in the
12 record, including depositions, documents, electronically stored information, affidavits or
13 declarations, stipulations (including those made for purposes of the motion only), admissions,
14 interrogatory answers, or other materials” or “showing that the materials cited do not establish
15 the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible
16 evidence to support the fact.” Fed. R. Civ. P. 56(c)(1)(A)-(B). Once the moving party has
17 properly supported the motion, the burden shifts to the nonmoving party to come forward with
18 specific facts showing that a genuine issue for trial exists. *Matsushita Elec. Indus. Co. v. Zenith*
19 *Radio Corp.*, 475 U.S. 574, 587 (1986). “The mere existence of a scintilla of evidence in support
20 of the plaintiff’s position will be insufficient; there must be evidence on which the jury could
21 reasonably find for the plaintiff.” *Anderson*, 477 U.S. at 252. The nonmoving party cannot defeat
22 a motion for summary judgment “by relying solely on conclusory allegations unsupported by
23 factual data.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). “Where the record taken as a
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1 whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine
2 issue for trial.” Matsushita, 475 U.S. at 587.

3 **b. Wrongful Payment of Forged Checks**

4 Numerous material issues of fact preclude the grant of summary judgment, for either
5 party, on the wrongful payment claim. Defendants argue that any action on the forged checks is
6 time-barred and therefore fails as a matter of law. The Parties do not dispute that Huang’s Bank
7 of America checking account is governed by the Deposit Agreement and Disclosures (“the
8 Agreement”). The Agreement provides the following with respect to forged checks:
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10 Reviewing Your Account Statements

11 Your review of your statements, checks and other items is one of the best ways to
12 help prevent the wrongful use of your account. You agree:

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- 14 • to review your statements, checks, and other items and reconcile them as soon
15 as they are made available to you;
 - 16 • that our statements provide sufficient information to determine the identity
17 and authenticity of any transaction including without limit, whether any are
18 forged, altered or unauthorized if the statement includes the item number,
19 amount and the date the item posted to your account;
 - 20 • to report any problems or unauthorized transactions as soon as possible; and
 - 21 • that 60 days after we send a statement and any accompanying items (or
22 otherwise make them available) is the maximum reasonable amount of time
23 for you to review your statement or items and report any problem or
24 unauthorized transaction related to a matter shown on the statement or items.
25 There are exceptions to this 60-day period. For forged, unauthorized or
26 missing endorsements, you must notify us within the period specified by the
27 state law applicable to your account. For substitute checks, you must notify us
28 within 40 days to qualify for an expedited recredit.

(Agreement, ECF No. 37-2, at 16 (emphasis added)). The Agreement further provides that if the
account holder fails to notify Bank of America, in writing, of suspected problems or
unauthorized transactions, within sixty days after the bank has made the applicable bank
statement available, the account holder may not assert a claim related to the unreported problems
or unauthorized transactions, “regardless of the care or lack of care [the bank] may have

1 exercised in handling [the] account.” (Id.). Where the sixty-day limit applies, the account holder
2 may not assert any legal action related to the unauthorized transactions against the bank. (Id.).

3 As evidenced by the pending cross-motions for summary judgment, the Parties have
4 failed to resolve several issues of material fact that preclude the Court from summarily applying
5 the sixty-day limit to the instant dispute. The Court identified many of these factual issues, in
6 great detail, in its earlier Order denying summary judgment on this claim:
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8 Plaintiff alleges that after Huang’s death, Huang’s relative Chen-Hon Lu
9 drafted two checks on Huang’s checking account with Bank of America in the
10 amounts of \$10,000 and \$13,000. Huang’s January 2009 account statement for the
11 period of December 19, 2008 through January 20, 2009 identifies that a check for
12 \$10,000 was drawn on Huang’s account on January 12, 2009. (Mot. Summ. J. Ex.
13 H, ECF No. 32-8). The February 2009 account statement for the period of January
14 21, 2009 through February 17, 2009 identifies that a check for \$13,000 was drawn
15 on Huang’s account on January 28, 2009. (Mot. Summ. J. Ex. I, ECF No. 32-9).
16 The declaration, dated March 17, 2011, of Greg Lyles, a manager at Bank of
17 America’s Check Fraud Center, is attached as part of Exhibit F, and provides that
18 Bank of America sends account statements to its account customers each month
19 within two or three business days following the statement date as part of a routine
20 and regularly conducted business activity. (Mot. Summ. J. Ex. F, ECF No. 32-6).
21 Lyles states that the following exhibits contain true and correct copies of Huang’s
22 signature, the Agreement, Huang’s January 2009 monthly account statement, and
23 February 2009 account statement. (Id.). Lyles also declares that there were no
24 reports filed by the Estate regarding checks drawn with forged signatures. (Id.).

25 Nevada law provides that if a bank sends or makes available an account
26 statement, the customer must promptly notify the bank if the customer should
27 reasonably have discovered an unauthorized payment because of a purported
28 signature on behalf of the customer. Nev. Rev. Stat. § 104.4406. In addition,
“without regard to care or lack of care of either the customer or the bank” a
customer who does not report his or her unauthorized signature within one year
after a bank statement is made available to the customer may not assert against the
bank the unauthorized signature. Nev. Rev. Stat. § 104.4406. Generally, the
statute of limitations is three years for actions related to forged signatures on
checks. Nev. Rev. Stat. § 104.4111. However, the statute of limitations and the
required reporting period may be varied by agreement. Nev. Rev. Stat. §
104.4103. That section provides: “The effect of the provisions of this article may
be varied by agreement, but the parties to the agreement cannot disclaim a bank’s
responsibility for its own lack of good faith or failure to exercise ordinary care or
limit the measure of damages for the lack of failure.” (Id.). Under the Agreement,
Plaintiff had sixty days to notify Bank of America in writing of the checks bearing

1 allegedly forged drawer's signatures. While a Nevada court has not ruled that a
2 shortened statute of limitations is valid in these circumstances, Nevada law
3 expressly provides that the three-year statute of limitations may be varied by
4 agreement, and courts in other jurisdictions have approved agreements providing
5 similar, or even shorter, statutes of limitations. See, e.g., *Parent Teacher Ass'n,*
6 *Public School 72 v. Mfrs. Hanover Trust Co.*, 524 N.Y.S.2d 336, 340 (N.Y. Civ.
7 Ct. 1988). In *Parent Teacher Ass'n*, the court considered an agreement shortening
8 the statute of limitations to fourteen days of the delivery of an account statement.
9 The court noted that the agreement does not absolve the bank of its duty to use
10 good faith and ordinary care, or absolutely bar the account holder from suit or
11 excuse future liability. *Id.* Such agreements encourage "investigation and
12 preservation of evidence" and "vigilance by both parties to a deposit contract,
13 thus making continued fraud or wrongdoing less likely." *Id.* The court found that
14 the agreement to shorten the statute of limitations was valid, enforceable, and
15 binding on the parties. *Id.*

16 We likewise find that the three-year statute of limitations on actions
17 against a bank to recover amounts drawn by forged checks may be varied by
18 agreements such as the Agreement in this case because Nevada law expressly
19 provides for such agreements. Plaintiff claims that the Estate notified the Bank of
20 America in June 2009 via the Bank of America's employee and agent Paula Cobb,
21 and that the Estate worked with Ms. Cobb to investigate the forged checks. (Baker
22 Aff., ECF No. 37-4). In an affidavit, William A. Baker, probate counsel for the
23 Estate, declared that he worked with Paula Cobb in June, July and August of 2009
24 to investigate fraudulent checks and withdrawals against Huang's bank account
25 after her death. (*Id.*). Defendants point out, however, that even assuming this is
26 true, Plaintiff failed to make a report in writing, and June 2009 is not within the
27 60-day period required under the Agreement in any case if the period began to run
28 once the account statements were delivered. Furthermore, Defendants provide
evidence that Ms. Cobb was not employed by Bank of America during the dates
Baker allegedly worked with Ms. Cobb to investigate the fraud. Ms. Cobb was
laid off on April 3, 2009, and was not re-employed by the bank until August 17,
2009. (Reply, Ex. B, ECF No. 41-2).

While the statute of limitations would normally begin to run when the
statement is delivered, there is some question as to whom these statements were
delivered to and how soon the Estate was able to examine the account statements.
In a California case, the California Court of Appeal noted that "it is not too great a
burden in cases where the customer has died to delay the start of the notification
period until a statement becomes available to a successor account holder." *Mac v.*
Bank of America, 90 Cal. Rptr. 2d 476, 481 (Cal. Ct. App. 1999). Plaintiff argues
that Ms. Cobb was a neighbor of Huang and that she retrieved Huang's mail after
her death. Plaintiff also acknowledges that the Bank mailed the account
statements, but disputes whether the retrieval of Huang's mail by Ms. Cobb began
the running of the time period to report the forged checks. Therefore, the issue of
when the bank made the account statements "available" to the Estate is

1 indeterminate at this time, prior to discovery. What is clear, however, is that the
2 Estate became aware of the allegedly forged checks at least by June 2009, when it
3 allegedly investigated the issue with Ms. Cobb.

4 There is no dispute that the Estate failed to notify the bank in writing of
5 the fraud within sixty days of becoming aware of the forged checks. The Estate
6 claims that it notified, and worked with, an employee of the Bank of America,
7 Ms. Cobb, to investigate the forged checks in June, July, and August 2009. Bank
8 of America claims that Ms. Cobb was not an employee at the time of such
9 investigation, and thus, there is a dispute over whether the Bank received even
10 verbal notice of the forged checks within sixty days of the Estate's discovery of
11 the forged checks. While it is undeniable that written notice was not given, there
12 is some dispute over whether the Bank had actual notice of the forged checks
13 despite the lack of a written report. In some cases, the requirement of written
14 notice has been considered waived or an inessential part of an agreement when
15 there is evidence that the parties had actual notice. See, e.g., *Gollihue v. Nat'l.*
16 *City Bank*, 969 N.E.2d 1233, 1238–39 (Ohio Ct. App. 2011). In *Gollihue*, the
17 court acknowledged that although courts generally should give effect to the plain
18 meaning of the parties' contracts, in some circumstances, courts will not strictly
19 enforce language requiring written notice. *Id.* at 1238. If the Estate duly notified
20 the Bank within sixty days of the account statements showing forged checks
21 becoming available to it, and the Bank failed to indicate that a written report must
22 be submitted, and failed to act on the verbal notice, there may be question as to
23 whether the Bank exercised reasonable care under the circumstances and whether
24 actual notice to the Bank is sufficient to allow the Estate to proceed on the forged
25 checks claim.

26 Several disputes of material fact regarding the forged checks remain at this
27 time, as the Motion for Summary Judgment (ECF No. 32) was filed before
28 discovery concluded. For that reason, summary judgment on the forged checks
claim shall be denied at this time

(Order, ECF No. 49, at 6–9).

21 Instead of resolving these factual issues, it appears that discovery has only amplified
22 them. Indeed, the instant cross-motions appear to entirely ignore the Court's earlier analysis.
23 Most significantly, "the [factual] issue of when the bank made the account statements
24 'available,'" (*Id.* at 8), not only remains, it is even more muddied by evidentiary disagreement.
25 For example, while Plaintiff's probate counsel, William Baker, initially stated that he met with
26 Huang's neighbor, and Vice President of Huang's Bank of America branch, Paula Cobb, in June,
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1 July, or August 2009, to discuss the alleged forgery, (Baker Aff., April 4, 2011, ECF No. 37-4),
2 he now confirms that the meetings did not occur until August and September of 2009—over six
3 months after the last applicable bank statement was mailed to Huang’s residence. (Baker Aff.,
4 Aug. 20, 2013, ECF No. 51-1; see also Pl.’s Answers to Interrogs., ECF 52-1, at 14). This, of
5 course, raises questions as to why Baker waited so long to review, or even attempt to locate,
6 Huang’s missing mail or otherwise obtain copies of the bank statements. It likewise raises
7 questions as to why Cobb, who was apparently quite familiar with the dispute between the Estate
8 and the bank over the insurance proceeds, (see, e.g., Baker Aff., April 4, 2011, ECF No. 37-4, at
9 2), failed to timely return Huang’s mail, which she apparently obtained in violation of a federal
10 criminal statute,¹ to the Estate. These questions are only compounded by, among other things,
11 Defendants’ new, and arguably substantiated, claim that the Estate knew about the forgeries, the
12 forger’s identity, and his motives, as early as March 2009, when it apparently relied on this
13 information to justify the emergency appointment of the Administrator. (See Reply, Oct 3, 2013,
14 ECF No. 58, at 4 (citing Verified Pet. for Appointment of Administrator, ECF No. 58-1)).

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18 Stated simply, Defendants contend that, at the very latest, the statements were made
19 available on March 17, 2009, the date that the Administrator was appointed. Specifically,
20 Defendants argue that as of this date the Estate unquestionably knew about the forgeries and, as a
21 Bank of America customer, had access to Huang’s account statements. (Id.). Plaintiff forcefully
22 disagrees, contending that the Administrator “did not know details concerting [sic] the bank
23 accounts and transactions therein,” (Sur-reply, ECF No. 60, at 2) (emphasis in the original), and
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¹ See 18 U.S.C. § 1708 (“Whoever steals, takes, or abstracts . . . from or out of any . . . letter box,
mail receptacle, or any mail route or other authorized depository for mail matter . . . any letter . .
or mail . . . [s]hall be fined under this title or imprisoned not more than five years, or both.”).

1 that the statements were not made available until Baker received them from Cobb in August
2 2009. (See, e.g., Pl.'s Mot. Summ. J., ECF No. 51, at 6.). Because the evidence in the record does
3 not require either conclusion, the Court simply cannot find that there is no genuine issue of fact
4 as to the date that the sixty-day limit began to run. With this predicate factual issue left
5 unresolved, the Court cannot determine whether the bank received adequate notice of the
6 forgeries prior to the expiration of the sixty-day limit. Therefore, the wrongful payment claim is
7 unfit for summary judgment, and the pending cross-motions are denied.
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9 **a. Preliminary Injunction**

10 In its prior Order, the Court denied a similar request to dissolve the preliminary
11 injunction, reasoning:
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13 The State Court's preliminary injunction preventing Defendants from conducting
14 a trustee's sale or otherwise transferring ownership of the Property shall not be
15 dissolved at this time. While claims expressly dealing with the foreclosure and the
16 mortgage have been dismissed, claims based on the forged checks remain. There
17 is a question of material fact over whether the default could have been prevented
18 had the forged checks not depleted the Estate's account. Until that question has
19 been resolved, the Court declines to dissolve the preliminary injunction.

20 (Order, ECF No. 49, at 11). Defendants now characterize these factual questions as "lame,"
21 contending that the Estate presently holds unencumbered real estate valued at over \$2,000,000
22 and that as of March 2012 it held \$103,500 in cash. (Reply, ECF No. 58). This, however, does
23 not show the absence of an issue of material fact. Specifically, Defendants have not refuted the
24 Estate's claim that the Bank of America account represented the Estate's only available liquid
25 assets, and that Huang's property taxes quickly depleted those funds, such that the \$23,000 loss
26 resulting from the fraudulent checks significantly hindered the Estate's ability to pay the
27 mortgage. (Opp'n Mot. Summ. J., ECF No. 55, at 3). Therefore, there remains a question of
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1 material fact with respect to whether the wrongful payment contributed to the default.

2 Accordingly, the Court again declines to dissolve the preliminary injunction.

3 **III. PLAINTIFF’S MOTION FOR LEAVE TO FILE A SUR-REPLY**

4 Local Rule 7-2(a)(c) allows a motion, a response, and a reply. No provision exists for
5 filing a sur-reply. Thus, a party must obtain leave from the Court before filing a sur-reply. “A
6 sur-reply may only be filed by leave of court, and only to address new matters raised in a reply
7 to which a party would otherwise be unable to respond.” *Kanvick v. City of Reno*, No. 3:06-CV-
8 00058, 2008 WL 873085, at *1, n.1 (D. Nev. March 27, 2008) (emphasis in original). Further,
9 sur-replies “are highly disfavored, as they usually are a strategic effort by the nonmovant to have
10 the last word on a matter.” *Lacher v. W.*, 147 F. Supp. 2d 538, 539 (N.D. Tex. 2001).
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13 Here, the Court acknowledges that Defendants, in their reply brief, offer new arguments
14 and evidence tending to show that the Administrator knew about the forgeries in March 2009.
15 (ECF No. 58, at 4). Such evidence is, of course, highly relevant to the instant dispute, and the
16 Court is therefore inclined to consider it. Accordingly, Plaintiff is entitled to respond, and the
17 motion for leave to file (ECF No. 59) is granted. The Court has considered the arguments
18 presented in the sur-reply, (ECF No. 60), and concludes that they only further demonstrate the
19 existence of a genuine factual issue as to the date that the statements were made available.
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CONCLUSION

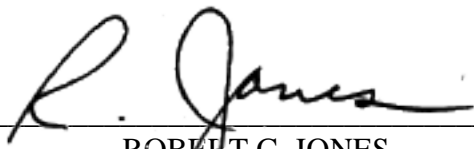
IT IS HEREBY ORDERED that Plaintiff's motion for summary judgment (ECF No. 51) is DENIED.

IT IS FURTHER ORDERED that Defendants' motion for summary judgment (ECF No. 52) is DENIED.

IT IS FURTHER ORDERED that Plaintiff's motion for leave to file a sur-reply (ECF No. 59) is GRANTED.

IT IS SO ORDERED.

Dated: February 14, 2014



ROBERT C. JONES
United States District Judge