



DEFENDING FORECLOSURES

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DEFENDING FORECLOSURES



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A WEALTH OF JUSTICE FOR THOSE WHO HAVE NEITHER

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Disclaimer: This manual is meant to be an informational guide. It is not intended to be an exhaustive, definitive or an all inclusive document.

Defenses To A Foreclosure:

Fraud: To sustain an action for fraud it must be proven that a **material representation of fact** was made which was untrue and known to be untrue by the party making it or else recklessly made and that another party did in fact **rely** on it and was **induced thereby to act to his detriment**.

When parties to a contract have a prior understanding about the contract's terms and the party responsible for drafting the contract includes contrary terms and then allows the other party to sign it without informing him of changes, the drafter's conduct is fraudulent. Peoples Trust & Savings Bank v. Humphrey 451 N.E. 1104 (1983)

The general rule is that where a competent, literate person signs or accepts a formal contract affecting his pecuniary interests, it is their duty to read and notice its contents will be imputed for negligent failure to do so. This rule only applies if nothing has been said or done to mislead person sought to be charged or to put a person of reasonable business prudence off guard. First Chapter National Bank v. Ross 617 A.2d 909 (1992).

Duress: Unjustified pressure to sign a mortgage, particularly in a home improvement or solicitation setting or upon a refinancing could provide equitable defenses and counterclaims based on **economic oppression**.

Unconscionability: The common law contract defense of unconscionability may be applied to stop a foreclosure, when either the mortgage terms are unreasonably favorable to the lender and/or other aspects of the transaction render it unconscionable. **Substantive unconscionability** deals with the terms of the contract. **Procedural unconscionability** concerns the process of making the contract. Both must be proven.

Unconscionability references **outrageous tactics** and business practices that **abuse, violate and victimize consumers** and involves **deceitful conduct** and bad acts that result in **excessive price, oppressive terms, coercion** and **a lack of bargaining power**. All **shocking to the conscience**. Upon finding unconscionability, **the court has the power to refuse to enforce the entire contract or just the unconscionable provision**. The Court can restrict the operation of the terms of the contract to avoid an unconscionable result. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) is the starter case on unconscionability.

Alternatives to Foreclosure

- What is the value of the property and the benefits of delay?
- Consumer Loan Restructuring/Special Forbearance

- Loss Mitigation/Loan Modifications
- Are there opportunities to reinstate?
- Is there a possibility of refinancing?
- Will the lender accept a discounted payoff?
- Can a resale prevent the loss of equity?
- Should a deed in lieu of foreclosure be considered? If so, the lender should waive any deficiency.
- Bankruptcy - A **Chapter 13 Wage Earner Plan** is an opportunity for the debtor to cure a default over an extended period of time by making regular mortgage payments and monthly payments on the arrears. At the very least bankruptcy will delay the foreclosure giving the mortgagor time to sell the property and possibly avoid losing equity. The Petition for bankruptcy **must be filed prior to the sale** and it automatically stops the foreclosure from proceeding (unless there are prior bankruptcy filings). A **Suggestion of Bankruptcy** should be filed in the foreclosure action giving notice of the filing of the bankruptcy petition. The lender can pursue adequate protection or relief from the bankruptcy stay to pursue the foreclosure.

Taxes and 1099s

Forgiveness of the debt is not income. The rationale for taxing forgiveness of debt as income is that there is some initial benefit to the borrower, which is not taxed.

Second, this is a bargained-for exchange, and not a gift. Borrower is giving up her right to continue legal action in exchange for the debt forgiveness. Her surrender of that right is something of value, which suggests that the debt has not so much been forgiven as redeemed.

Third, the code specifically excludes forgiveness of debt income where the debtor is insolvent or the fair market value of assets is less than liabilities. 26 U.S.C. § 108(a)(1)(B) and (d)(3). The homestead value of the assets is also excluded. See Fifth Avenue-Fourteenth St. Corp. v. Commissioner, 147 F. 2d 453 (2d Cir. 1944).

Legal arguments to lender against issuing a 1099 for discharge of indebtedness income:

1. There is no cancellation of indebtedness income pursuant to 26 U.S.C. § 5060P, but settlement of a contested liability.
2. There is no discharge of indebtedness income but a nontaxable purchase price reduction.
3. There is no requirement to issue a 1099 if the borrower is insolvent. 26 U.S.C. §108(a)(1)(B)
4. Lenders only have an obligation to issue a 1099 to report “cancellation of indebtedness,” pursuant to 26 U.S.C. § 5060P. The “cancellation of indebtedness” doctrine originated in the case of United States v. Kirby Lumber Co., 284 U.S. 1 (1931).

5. There is no discharge of indebtedness but a nontaxable purchase price reduction if the debt is reduced because of "infirmities" in the original sale, like "the seller's inducement of a higher purchase price by misrepresentation of a material fact or by fraud." Rev. Ruling 92-99, affirming *Commissioner v. Sherman*, 135 F.2d 70.
6. No benefit to the borrower. The borrower is not enriched by the settlement.
7. There is no penalty in the Internal Revenue Code "with respect to any failure" to issue an information return "if it is shown that such failure is due to reasonable cause and not to willful neglect." See 26 U.S.C. § 6724(a).

Mortgage Forgiveness Debt Relief Act of 2007 : Congress retroactively added a new §108 exclusion (§ 108(a)(1)(E)) to the cancellation of debt income. The stated purpose of the act is to increase the incentives for borrowers and lenders to work together to refinance loans and allow American families to secure lower mortgage payments without facing higher taxes:

1. Three year window:
 - a. The Act is effective for discharges of indebtedness occurring on or after January 1, 2007 and before December 31, 2009 and excludes from a taxpayer's gross income any discharge, in whole or in part, of qualified principal residence indebtedness (new term found in § 108(a)(1)(E))
2. Recourse v. Nonrecourse debt
 - a. If a debt is recourse, the debtor is personally liable for the debt
 - b. If a debt is nonrecourse, the debt is only secured by the property and the debtor is not personally liable for the balance
 - c. Non-recourse loans forgiven in foreclosure are treated as the sales price of the property. Thus no cancellation of debt income occurs.
 - d. On the other hand, for recourse debt, the debt is only satisfied up to the fair market value of the property. There is a sale up to that amount. If the lender forgives the balance of the mortgage, there has been a cancellation of debt income, which is taxed as ordinary income.
 - e. Therefore, the Act's effect is to protect homeowners with recourse financing from cancellation of debt income.
3. Must qualify as principal residence
 - a. For the purposes of the Act, the term "principal residence" has the same meaning as under § 121.
 - b. Must consider all the facts and circumstances related to determining whether it is a primary residence:
4. Must be "Qualified Principal Residence Indebtedness"
 - a. Qualified principal residence indebtedness means acquisition indebtedness within the meaning of § 163(h)(3)(b)
 - i. Acquisition indebtedness with respect to principal residence generally means indebtedness which is incurred in the acquisition,

construction, or substantial improvements of the principal residence (as defined in § 121) of the individual and secured by the residence.

- ii. It also includes refinancing of such indebtedness to the extent the refinancing does not exceed the original amount of indebtedness.
 - iii. It does not include borrowing used for personal purposes
 - b. There is a dollar limit of 2 million (1 million in the case of a separate return)
 - c. Qualified principal indebtedness does not mean home equity indebtedness
 - d. If only a portion of the discharged debt qualifies as principal residence indebtedness, the exclusion only applies to that amount of the debt which exceeds the portion of the debt which does not qualify.
 - e. Insolvent taxpayers may elect the exclusion under the Act or the present-law exclusion found in § 108(a)(1)(B).
5. Short Sales
- a. A short sale is the selling of a home for less than the mortgage balance and then trying to get the lender to forgive the unpaid balance.
 - b. A reason for debtors to consider a short sale instead of foreclosure is to try to protect their credit history.
 - c. Short sales are taxed under the same rules as foreclosure and have similar tax consequences as described above.

Quick Checklist for Exclusion or Cancellation of Home Mortgage Indebtedness
Must be principal residence as defined by § 121
Must be acquisition indebtedness as defined by § 163
➤ Original or refinanced debt ➤ Secured by the principal residence ➤ Recourse debt ➤ Under 2 million of acquisition debt ➤ Not borrowed for personal purposes
Homeowner has not filed bankruptcy
Insolvent homeowner may use this provision or § 108(a)(1)(B)
Cancellation is not for personal services rendered

Use form 982, Reduction of Tax Attributes Due to Discharge of Indebtedness to report the exclusion and the basis reduction.

Real Estate Settlement Procedures Act (RESPA)

RESPA initially applied to loans subject to a first lien on residential property of one to four units. In 1992, it was amended to apply to subordinate loans on such

property as well. The implementing regulations are contained in **Regulation X, 24 C.F.R. § 3500, as well as in Regulation Z, 12 C.F.R. § 226.19.**

RESPA requires **good faith estimates** of Truth In Lending Act disclosures before consummation or within three business days after the creditor receives the consumer's written application, whichever occurs earlier. Re-disclosure is required no later than consummation or settlement. According to § 226.19(b), when dealing with variable-rate loans a booklet on adjustable rate mortgages must be provided along with other detailed disclosures specified in the regulations.

RESPA **prohibits** mortgage transaction servicers from giving and creditors from accepting "any portion, **split or percentage**" of any charge made or received for settlement services "other than for services actually performed. 12 U.S.C. § 2607(b). **High and unearned fees** that are not actionable under RESPA, are still subject to challenge as unconscionable and that it is an unfair and deceptive practice to represent a charge as for a specific purpose, when the actual cost of that item is much less.

RESPA also requires servicers of covered mortgages to respond **to written requests from the borrower or the borrower's agent** for information or disputes concerning the servicing of the loan, and to either make appropriate corrections or, after investigation, explain why the account is correct. Failure to comply with the response requirements gives rise to liability for actual damages, statutory damages up to \$1000 in case of a pattern or practice of noncompliance and attorneys' fees and costs, with special class action provisions.

The provisions of RESPA which deal with mortgage servicing are generally found in either **12 U.S.C. § 2605 or § 2609**. Section 2605, known as the "Servicer Act," requires servicers to respond to borrower requests for information and to correct account errors (referred to as "**qualified written requests**"), § 2605(e); disclose information relating to the transfer of servicing operations, §§ 2605(a) and (b); and make timely payments out of **escrow accounts**. § 2605(g); Section 2609 deals exclusively with escrow accounts and limits the amount servicers can demand to be deposited in an escrow account and requires an escrow analysis be conducted to determine the proper escrow payment. § 2609(a); It also requires servicers to provide an annual escrow statement § 2609(c) and a notice of escrow shortages or deficiencies. § 2609(b)

There is one requirement imposed by § 2605 that does not **apply if the borrower is behind on payments**. Section 2505(g) requires a servicer to make **payments** from an escrow account **for taxes, insurance and other charges** "in a timely manner as such payments become due." As long as the borrower's mortgage payment is **not more than thirty days late**, the servicer must pay escrow items such as taxes and insurance in a timely manner even if there are not sufficient funds in the escrow account to cover the items. Reg. X, 24 C.F.R. § 3500.17(k)(2). RESPA creates an express right of action for a servicer's failure to make payments from an escrow account for taxes, insurance and other charges "in a timely manner as such payments

become due." 12 U.S.C. § 2605(g). Regulation X provides that this obligation to make timely disbursements out of escrow does not apply when the "borrower's payment is more than 30 days overdue." Reg. X, 24 C.F.R. § 3500.17(k)(1), (2) The regulation has no explanation of this limitation. It could be interpreted to mean that a servicer has no obligation to timely disburse payments for taxes and insurance or other charges whenever the home owner's mortgage payment is more than thirty days late at the time the disbursement becomes due, even if there are sufficient funds in the escrow account to cover the disbursement.

The regulation should not give an exemption to a servicer who wrongly claimed that the borrower was late with payments at the time the disbursement was required, or if timely payments are being made under a forbearance or repayment agreement. If the exemption does not apply, the servicer must pay escrow items such as taxes and insurance timely even if there are not sufficient funds in the escrow account to cover the items.[Reg. X, 24 C.F.R. § 3500.17(k)(2) The application of the regulation denies a servicer an opportunity to force-placed insurance from another carrier in this situation. The servicer is required to pay the insurance premium on the borrower's policy when due by advancing funds. Any escrow deficiency resulting from the advance is paid by the borrower through an adjustment to future escrow payments following an escrow account analysis.

RESPA - provides a private cause of action for violation of its prohibitions against **misuse of escrowed funds, kickbacks** from companies providing settlement services, and **steering** borrowers to title insurance companies. Either treble or statutory damages plus attorney's fees are available for violations. RESPA also requires advance disclosures (Good Faith Estimate), and disclosure at settlement of settlement costs in real estate transactions. While the statute does not create a private cause of action for disclosure violations, analyzing the disclosures often reveals Truth in Lending and HOEPA violations.

The bankruptcy mentors say that to avoid the Reg X 30-day default exception, an argument can be made that the exception does not apply after confirmation of the plan. The reason is that the confirmation designates the account as reinstated. In re Jones, 2007 WL 1112047 (Bankr.E.D.La. Apr 13, 2007)(plan confirmation "recalibrates" the amounts due as of the petition date); In re Wines, 239 B.R. 703 (Bankr. D.N.J. 1999) (post-petition mortgage debt treated like a current mortgage and consists of those payments which come due after the bankruptcy petition is filed. Ongoing postpetition payments, including escrow amounts and timely disbursements, should be treated under the terms of the note and mortgage as if no default exist. The Fannie Mae/Freddie Mac Single-Family Uniform Instrument for a mortgage or deed of trust (Section 3, entitled "Funds for Escrow Items"), requires the servicer to maintain the escrow account in compliance with RESPA. A provision in the plan can require the servicer to comply with the RESPA escrow account requirements during the administration of the plan.

The general RESPA preemption provision provides that state laws are preempted only to the extent of their inconsistency with RESPA. 12 U.S.C. § 2616. State laws providing greater protections to borrowers than RESPA that are not inconsistent with RESPA are not preempted.

Citation: 12 U.S.C. §2601, et seq.
24 C.F.R. Part 3500 (Regulation X) 64 Fed. Reg. 10079
(HUD Policy Statement on lender paid broker fees)

Liable Parties: Lender
Broker, if not exclusive agent or lender
Servicer
Title Company

Actionable Wrongs: Failure to give Good Faith Estimate,
disclose other credit-related information and give
HUD-1 Settlement Statement and servicing
statements
Payment or acceptance of kickbacks or referral
fees
Making charges for which no identifiable services are
provided
Improper servicing of loan

Remedies: Three times amount of illegal charges
Attorney fees

Limitations: 1 year to bring an affirmative claim
No limit if raised by way of recoupment

Hirsch v. Bank of America, 328 F. 3d 1306 (11th Cir. 2003). (provides a two-part test in analyzing RESPA kickback violations involving a mortgage broker. First, the court must "determine whether the broker has provided goods or services of the kind typically associated with a mortgage transaction." Then, the court must "determine whether the total compensation paid to the broker is reasonably related to the total value of the goods or services actually provided."

Recently followed by: Culpepper v. Irwin Mortg. Corp., 20 Fla. L. Weekly Fed. C 824 (11th Cir. Ala. July 2, 2007) (applying two part test)

§ 203.508 Providing information.

(a) Mortgagees shall provide loan information to mortgagors and arrange for individual loan consultation on request. The mortgagee must establish written procedures and controls to assure prompt responses to inquiries.

(c) Within thirty days after the end of each calendar year, the mortgagee shall furnish to the mortgagor a statement of the interest paid, and of the taxes disbursed from the escrow account during the preceding year. At the mortgagor's request, the mortgagee shall furnish a statement of the escrow account sufficient to enable the mortgagor to reconcile the account.

(d) Mortgagees must respond to HUD requests for information concerning individual accounts.

(e) Each servicer of a mortgage shall deliver to the mortgagor a written notice of any assignment, sale, or transfer of the servicing of the mortgage. The notice must be sent in accordance with the provisions of § 3500.21(e)(1) of this title and shall contain the information required by § 3500.21(e)(2) of this title. Servicers must respond to mortgagor inquiries pertaining to the transfer of servicing in accordance with § 3500.21(f) of this title.

§ 203.550 Escrow accounts.

It is the mortgagee's responsibility to make escrow disbursements before bills become delinquent. Mortgagees must establish controls to insure that bills payable from the escrow fund or the information needed to pay such bills is obtained on a timely basis. Penalties for late payments for items payable from the escrow account must not be charged to the mortgagor unless it can be shown that the penalty was the direct result of the mortgagor's error or omission. The mortgagee shall use the procedures set forth in § 3500.17 of this title, implementing Section 10 of the Real Estate Settlement Procedures Act ([12 U.S.C. 2609](#)), to compute the amount of the escrow, the methods of collection and accounting, and the payment of the bills for which the money has been escrowed.

In the case of escrow accounts created for purposes of § 203.52 or § 234.64 of this chapter, mortgagees may estimate escrow requirements based on the best information available as to probable payments that will be required to be made from the account on a periodic basis throughout the period during which the account is maintained.

The mortgagee shall not institute foreclosure when the only default of the mortgagor occupant is a present inability to pay a substantial escrow shortage, resulting from an adjustment pursuant to this section, in a lump sum.

When the contract of mortgage insurance is terminated voluntarily or because of prepayment in full, sums in the escrow account to pay the mortgage insurance premiums shall be remitted to HUD with a form approved by the Secretary for reporting the voluntary termination of prepayment. Upon prepayment in full sums held in escrow for taxes and hazard insurance shall be released to the mortgagor promptly.

FAIR DEBT COLLECTION PRACTICES ACT

The Fair Debt Collection Practices Act (FDCPA) provides two ways to stop a debt collector from calling a consumer:

1. If the consumer notifies the debt collector in writing that the consumer refuses to pay the debt or that the consumer wishes the collector to stop calling, the collector must cease calling after one final communication. 15 USC § 1692c(c).

2. If a debt collector knows that the consumer is represented by an attorney and knows or can readily ascertain the attorney's name and address, the debt collector may not communicate with the consumer unless the attorney fails to respond to communications within a reasonable time. § 1692c(a)(2).

The FDCPA cannot be used to stop direct collections from creditors because it is applicable **only to third-party debt collectors**.

The FDCPA does not apply to creditors collecting debts on their own behalf, except if they use a name other than their own to do so. "Debt collector" is defined in § 1692a(6) as a person who is "collecting on behalf of another" and who "regularly" collects or attempts to collect debts. Lawyers often come under this definition of debt collector. The Supreme Court in *Heintz v. Jenkins*, 514 U.S. 291 (1995), held that an attorney who regularly uses litigation to collect consumer debts on behalf of a client is a debt collector, subject to the FDCPA. Therefore, **lawyers who bring suits on behalf of clients against consumers, seeking payment of debts, need to adopt practices that comply with the FDCPA and this includes "appearance" attorneys.**

Section 1692g requires that a debt collector send a **written "validation" notice** along with the debt collector's initial communication to the consumer. The notice must contain the following:

- the amount of the debt;
- the name of the creditor;
- a statement that unless the consumer disputes the validity of the debt within 30 days of receipt of the notice it will be assumed to be valid, and
- information that verification of the debt will be obtained if the consumer disputes it.

Debt collectors must convey the validation notice in a legible manner that will be noticed.

Any debt collector that fails to comply with any FDCPA provisions is liable to the consumer for any **actual damages and for up to \$1000 in statutory damages. 15 U.S.C. § 1692k(a)(1)-(2)**. The consumer may recover the costs of the action and a reasonable attorney's fee as determined by the court. Actual damages include compensation for emotional distress. **State law requirements for recovery of negligent or intentional infliction of emotional distress are inapplicable.** See *Maxwell v. Fairbanks Capital Corp.*, 281 B.R. 101 at 118 (noting that the appropriate standard for judging unfairness of debt collection practices is from the perspective of "the least sophisticated debtor," suggesting that damages for subjectively-experienced emotional distress could be recoverable even if that distress is greater than what an ordinary debtor might experience).

A debt collector is, "any person who uses an instrument of interstate commerce or mails in any business the principal purpose of which is the **collection of**

any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C. § 1692a(6). Repossession and the sale of personal property is not a debt collection activity under the FDCPA. Likewise, with respect to non-judicial foreclosure of security interests in houses. See, *Bergs v. Hoover, Bax & Slovacek, LLP*, 2003 U.S. Dist. LEXIS 16827, at 1 (N.D. Tex. Sept. 24, 2003); *Beadle v. Haughey*, 2005 WL 300060, 4 (D.N.H. Feb. 9, 2005) It is not clear whether foreclosing on a mortgage constitutes debt collecting activity under the FDCPA. *Id.* at 4. However, the most recent case to discuss whether proceeding *in rem* is debt collecting and subject to the FDCPA seems to suggest it is. *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227 (3d Cir. 2005). In *Piper*, the law firm subjected itself to the FDCPA by attempting to collect a personal liability and requesting payment to be made directly to the firm instead of to the city. Accordingly, the court stated that “the issue for decision is whether PLA’s communications to Piper were communications by a ‘debt collector’ with a ‘consumer’ in ‘connection with the collection of a [debt].’” *Id.* at 232.

The Seventh Circuit determined that a loan servicer was not a debt collector under the FDCPA because it was seeking payment currently due under a superseding agreement. *Bailey v. Security Nat’l Servicing Corp.*, 154 F.3d 384 (7th Cir. 1998).

The Truth in Lending Act (TILA) SUBJECT TO UPDATE ATTACHED SEPARATELY

Under TILA, a debtor has a right of **rescission** as to **nonpurchase** residential mortgages that lasts for **three days** after completion of the transaction or delivery of the disclosure, which ever occurs later. It is required that **each debtor** receives **two copies** of the **notice of their right of rescission**. According to *Rodriguez v. U.S. Bank (In re Rodriguez)*, 278 B.R. 683 (Bankr. D.R.I. 2002), the date of the expiration of the right of rescission must be filled in. **If the notices are not given or other material disclosures are not made, the rescission right is extended from three days to three years from the completion of the transaction.** See *In re Lombardi*, 195 B.R. 569 (Bankr. D.R.I. 1996).

Any extension of the right of rescission beyond the three-year period provided by TILA must come from state law. The Supreme Court in *Beach v. Ocwen Fed. Bank*, 523 U.S. 410 (1998), held that federal law does not provide an extension of more than three years, and that equitable tolling does not apply because the three year limit is a statute of repose, not a statute of limitations. Some states allow rescission in recoupment beyond the TILA’s three-year extension period. See, *Fidler v. Cent. Coop. Bank*, 336 B.R. 734 (Bankr. D. Mass. 1998)

TILA §1635(b) provides a three-step rescission process:

1. The debtor must first give notice of the rescission. By invoking rescission, the debtor is relieved of liability for any finance or other charge, and the security interest becomes void.

2. The creditor must return any money paid or property given, including the down payment.
3. The debtor must tender any property received or the value of it.

Courts have considerable discretion concerning the three-step process, and are able to circumvent the process if they see fit. See, *Williams v. BankOne, N.A. (In re Williams)*, 291 B.R. 636 (Bankr. E.D. Pa. 2003); *Bell v. Parkway Mortgage, Inc. (In re Bell)*, 309 B.R. 139, 167 (Bankr. E.D. Pa. 2004).

In the event a court requires that the principal debt be repaid in **Chapter 13 bankruptcy**, the rescinding borrower/debtor still receives a considerable benefit. In this case, the creditor must reduce the obligation by the amount the borrower has paid through any down payment, closing costs, insurance premiums and by the amount of the finance charges. The obligation to repay only the principal over the life of a Chapter 13 plan is an unsecured claim.

TILA § 1640(a) provides for **damage actions** for violations of its requirements. In an individual action relating to a closed-end credit transaction secured by real estate or a dwelling, statutory damages of not less than \$200 and not greater than \$2000 are recoverable. Damages can also be recovered where rescission is available. In cases dealing with personal property loans, although rescission is not available, the statutory damages are twice the finance charge, with a minimum of \$100 and a maximum of \$1000. See, *Koons Buick Pontiac GMC, Inc. v. Nigh*, 125 S. Ct. 460 (2004).

TILA § 1640(e) actions for actual and statutory damages are subject to a **one-year statute of limitations**, measured from the occurrence of the violation. This section also states it, “does not bar a person from asserting a violation of this title in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by **recoupment or set-off in such action**, except as otherwise provided by State Law.”

Courts recognize that debtors in bankruptcy can assert damages in recoupment by objecting to a creditor's proof of claim. See, *In re Coxson*, 43 F.3d 189 (5th Cir. 1995); *Roberson v. Cityscape Corp.*, 262 B.R. 312 (Bankr. E.D. Pa. 2001). Unlike the three-year right of rescission, the statute of limitations for TILA damage actions can be equitably tolled. Fraudulent concealment of a TILA violation is a basis for tolling the one-year statute of limitations, however, mere failure to make disclosures is not enough. The consumer must prove the creditor concealed the violation and that the consumer exercised due diligence to discover the facts giving rise to the claim. See, *Evans v. Rudy-Luther Toyota, Inc.*, 39 F. Supp. 2d 1177 (D. Minn. 1999).

The Truth in Lending Act requires disclosure of credit terms, applies to most extensions of consumer credit and frequently apply to restructured loans that meet the definition of a refinancing under the Act and Regulation Z. The Truth in Lending Act offers actual damages, statutory damages for some violations, and attorney's fees. For

second mortgage, home equity loans, and some other transactions secured by home, rescission may be available.

- Citation:** 15 U.S.C. §1601, *et seq.*
12 C.F.R- Part 226 (Regulation Z)
- Liable Parties:** Creditor (generally the original lender)
Assignee, if violation "apparent on face" of documents
- Actionable Wrongs:** Failure to disclose credit information or cancellation rights
- Remedies:** Rescission, unless transaction was for purchase or construction of home
Actual damages
Statutory damages up to \$2,000 (SEE UPDATE PER SUPPLEMENT)
Attorney fees
- Limitations:** 1 year to rescind under TILA, though limit does not apply to recoupment under state law
1 year to bring damages claim
3 year limitation if used defensively by way of recoupment, unless effectively brought as a DUTPA claim

Matthews v. New Century Mortgage Corp., 185 F. Supp. 2d 874 (S.D. OH 2002). (An opinion which includes the facts and claims for a typical predatory lending case involving elderly homeowners. Claims include descriptions of TILA, HOEPA, Equitable Tolling, FHA, ECOA, Conspiracy, Fraud, Unconscionability, and Ohio's Rico Statute.)

Anderson v. Frye, 2007 U.S. Dist. LEXIS 20935. Plaintiff must show each of the following: (1) that she is a member of a protected class; (2) that she applied for and was qualified for loans; (3) that the loans were given on grossly unfavorable terms; and (4) that the lender continues to provide loans to other applicants with similar qualifications, but on significantly more favorable terms. *Citing Matthews*,.

In re Nat'l Century Fin. Enters., Inv. Litig., Fed. Sec. L. Rep. (CCH) P94,314 (May 2007) "[W]hile Plaintiff is required to prove the existence of some unlawful act independent of the civil conspiracy itself, that unlawful act does not need to be committed by each of the alleged co-conspirators." *Citing Matthews*,.

Regulation Z Sec. 226.20 Subsequent disclosure requirements.

(a) **Refinancings.** A refinancing occurs when an existing obligation that was subject to this subpart is satisfied and replaced by a new obligation undertaken by the same consumer. A refinancing is a new transaction requiring new disclosures to the consumer. The new finance charge shall include any unearned portion of the old finance charge that is not credited to the existing obligation. The following shall not be treated as a refinancing:

- (1) A renewal of a single payment obligation with no change in the original terms.

(2) A reduction in the annual percentage rate with a corresponding change in the payment schedule.

(3) An agreement involving a court proceeding.

(4) A change in the payment schedule or a change in collateral requirements as a result of the consumer's default or delinquency, unless the rate is increased, or the new amount financed exceeds the unpaid balance plus earned finance charge and premiums for continuation of insurance of the types described in Sec. 226.4(d).

(5) The renewal of optional insurance purchased by the consumer and added to an existing transaction, if disclosures relating to the initial purchase were provided as required by this subpart.

Commentary to Section 226.20 Subsequent Disclosure Requirements

Paragraph 20(a) Refinancings.

1. **Definition.** A refinancing is a new transaction requiring a complete new set of disclosures. Whether a refinancing has occurred is determined by reference to whether the original obligation has been satisfied or extinguished and replaced by a new obligation, based on the parties' contract and applicable law. The refinancing may involve the consolidation of several existing obligations, disbursement of new money to the consumer or on the consumer's behalf, or the rescheduling of payments under an existing obligation. In any form, the new obligation must completely replace the prior one.

- Changes in the terms of an existing obligation, such as the deferral of individual installments, will not constitute a refinancing unless accomplished by the cancellation of that obligation and the substitution of a new obligation.

- A substitution of agreements that meets the refinancing definition will require new disclosures, even if the substitution does not substantially alter the prior credit terms.

1. Annual percentage rate reduction. A reduction in the annual percentage rate with a corresponding change in the payment schedule is not a refinancing. If the annual percentage rate is subsequently increased (even though it remains below its original level) and the increase is effected in such a way that the old obligation is satisfied and replaced, new disclosures must then be made.

2. Corresponding change. A corresponding change in the payment schedule to implement a lower annual percentage rate would be a shortening of the maturity, or a reduction in the payment amount or the number of payments of an obligation. The exception in §226.20(a)(2) does not apply if the maturity is lengthened, or if the payment amount or number of payments is increased beyond that remaining on the existing transaction.

Court agreements. This exception includes, for example, agreements such as reaffirmations of debts discharged in bankruptcy, settlement agreements, and post-

judgment agreements. (See the commentary to §226.2(a)(14) for a discussion of court-approved agreements that are not considered “credit.”)

Workout agreements. A workout agreement is not a refinancing unless the annual percentage rate is increased or additional credit is advanced beyond amounts already accrued plus insurance premiums.

Insurance renewal. The renewal of optional insurance added to an existing credit transaction is not a refinancing, assuming that appropriate Truth in Lending disclosures were provided for the initial purchase of the insurance.

This regulation limits refinancings to transactions in which the entire original obligation is extinguished and replaced by a new one. Redisclosure is no longer required for deferrals or extensions.

Racketeer Influenced and Corrupt Organizations Act (RICO)

Citation:	18 U.S.C. §1961, <i>et seq</i>
Liable Parties:	Persons (broadly defined) conducting RICO enterprise
Actionable Wrongs:	Pattern of “racketeering activity” as defined in 18 U.S.C. §1961 (a long list of actionable wrongs, but this is a very complex statute in application)
Remedies:	Three times actual damages Attorney fees
Limitations:	Four years to bring damages claim under federal law Five years to bring damages claim under state law

OCC Guidelines Establishing Standards for Residential Mortgage Lending Practices

The OCC issues the Guidelines pursuant to Section 39 of the FDIA, which provides that, “each appropriate Federal banking agency” may proscribe “such other operational and managerial standards” as it determines to be appropriate.

The guidelines describe terms and practices that are conducive to predatory or deceptive lending and therefore require a heightened degree of care by lender. 12 CFR 30.3, 30.4, and 30.5. If the OCC determines a national bank has failed to meet the standards set forth in the Guidelines the OCC may request, through a supervisory letter or in a report of examination, that the national bank submit a compliance plan. The request is known as a Notice of Deficiency.

National banks and their subsidiaries are required to comply with the regulations and Guidelines governing appraisals of residential mortgage loans, as well as, appraiser independence. These regulations and Guidelines can be found at 12 CFR part 34, subpart C, and in the OCC advisory letter dated October 28, 2003

Proposed Statement on subprime Lending: [Docket No. 2007-3005]

(<http://www.federalreserve.gov/BoardDocs/press/bcreg/2007/20070302/attachment.pdf>)

Proposed Statement on Subprime Mortgage Lending (Statement) discusses criteria and factors, including payment shock, that an institution should assess in determining a borrower's ability to repay a subprime loan. The Statement also discusses consumer protection issues and practices, including reminders about some of the existing statutes, regulations, and guidance intended to protect consumers from unfair, deceptive, and other predatory practices. Finally, the Statement discusses the need for policies, procedures, and systems to assure that institutions' subprime mortgage lending is conducted in a safe and sound manner.

The Agencies are concerned that subprime borrowers may not fully understand the risks and consequences of obtaining certain adjustable-rate mortgage (ARM) products. In particular, the Agencies are concerned with ARM products marketed to subprime borrowers with the following characteristics:

- Offering low initial payments based on a fixed introductory or "teaser" rate that expires after a short initial period then adjusts to a variable index rate plus a margin for the remaining term of the loan;
- Approving borrowers without considering appropriate documentation of their income;
- Setting very high or no limits on how much the payment amount or the interest rate may increase ("payment or rate caps") at reset periods, potentially causing a substantial increase in the monthly payment amount "payment shock"
- Containing product features likely to result in frequent refinancing to maintain an affordable monthly payment;
- Including substantial prepayment penalties and/or prepayment penalties that extend beyond the initial interest rate adjustment period; and/or
- Providing borrowers with inadequate information relative to product features, material loan terms and product risks, prepayment penalties, and the borrower's obligations for property taxes and insurance.

The consequences to subprime borrowers could include: being unable to afford the monthly payments after the initial rate adjustment because of payment shock; experiencing difficulty in paying real estate taxes and homeowners insurance that were not escrowed; incurring expensive refinancing fees frequently due to closing costs and prepayment penalties, especially if the prepayment penalty period extends beyond the rate adjustment date; and losing their home. The Agencies also are concerned about the elevated credit risk that is inherent in these products.

Risk Management Practices

Predatory Lending Considerations

Institutions marketing subprime mortgage loans should ensure that they do not engage in the type of predatory lending practices discussed in the *Expanded Subprime Guidance*. Typically, predatory lending involves at least one, and perhaps all three, of the following elements:

- Making mortgage loans based predominantly on the foreclosure or liquidation value of a borrower's collateral rather than on the borrower's ability to repay the mortgage according to its terms;
- Inducing a borrower to repeatedly refinance a loan in order to charge high points and fees each time the loan is refinanced ("loan flipping"); or
- Engaging in fraud or deception to conceal the true nature of the mortgage loan obligation, or ancillary products, from an unsuspecting or unsophisticated borrower. Institutions marketing mortgage loans such as these carry an elevated risk that their conduct will violate Section 5 of the Federal Trade Commission Act (FTC Act), which prohibits unfair or deceptive acts or practices.

Underwriting Standards

Institutions should refer to the *Real Estate Guidelines*, which provide underwriting standards for all real estate loans. The *Real Estate Guidelines* state that prudently underwritten real estate loans should reflect all relevant credit factors, including the capacity of the borrower to adequately service the debt. The 2006 *NTM Guidance* details similar criteria for qualifying borrowers for products that may result in payment shock.

Prudent qualifying standards recognize the potential effect of payment shock in evaluating a borrower's ability to service debt. An institution's analysis of a borrower's repayment capacity should include an evaluation of the borrower's ability to repay the debt by its final maturity at the fully indexed rate, assuming a fully amortizing repayment schedule. One widely accepted approach in the mortgage industry is to quantify a borrower's repayment capacity by a debt-to-income (DTI) ratio. An institution's DTI analysis should assess a borrower's total monthly housing-related payments (e.g., principal, interest, taxes, and insurance, or "PITI") as a percentage of gross monthly income.

This assessment is particularly important if the institution relies upon reduced documentation or allows other forms of risk layering. Risk-layering features in a subprime mortgage loan may significantly increase the risks to both the institution and the borrower. Therefore, an institution should have clear policies governing the use of risk-layered features, such as reduced documentation loans or simultaneous-second lien mortgages. When risk-layering features are combined with a mortgage loan, an institution should demonstrate the existence of effective mitigating factors that support the underwriting decision and the borrower's repayment capacity.

The higher a loan's risk, either from loan features or borrower characteristics, the more important it is to verify the borrower's income, assets, and liabilities. When underwriting higher risk loans, stated income and reduced documentation should be accepted only if there are mitigating factors that clearly minimize the need for direct verification of repayment capacity. For many borrowers, institutions should be able to readily document income using recent W-2 statements, pay stubs or tax returns. A higher interest rate is not considered an acceptable mitigating factor.

Consumer Protection Principles

Fundamental consumer protection principles relevant to the underwriting and marketing of mortgage loans include:

- Approving loans based on the borrower's ability to repay the loan according to its terms, and
- Providing information that enables consumers to understand material terms, costs, and risks of loan products at a time that will help the consumer select products and choose among payment options.

When applying these principles to ARMs marketed to subprime borrowers described in this document, communications with consumers, including advertisements, oral statements, and promotional materials should provide clear and balanced information about the relative benefits and risks of the products. This information should be provided in a timely manner to assist consumers in the product selection process, not just upon submission of an application or at consummation of the loan. Institutions should not use such communications to steer consumers to these products to the exclusion of other products offered by the institution for which the consumer may qualify.

Information provided to consumers should clearly explain the risk of payment shock and the ramifications of prepayment penalties, balloon payments, and the lack of escrow for taxes and insurance, as applicable. The Agencies strongly encourage institutions that impose prepayment penalties to structure them in such a way that they do not extend beyond the initial reset period and, further, provide borrowers a sufficient window of time immediately prior to the reset date to refinance without penalty.

Similarly, if borrowers do not understand that their monthly mortgage payments do not include taxes and insurance, and they have not budgeted for these essential homeownership expenses, they may be faced with the need for significant additional funds on short notice. Mortgage product descriptions and advertisements should provide clear, detailed information about all of the costs, terms, features, and risks of the loan to the borrower. Consumers should be informed of:

- **Payment Shock.** Potential payment increases, including how the new payment will be calculated when the introductory fixed rate expires.
- **Prepayment Penalties.** The existence of any prepayment penalty, how it will be calculated, and when it may be imposed.
- * **Balloon Payments.** The existence of any balloon payment.
- **Cost of Reduced Documentation Loans.** Whether there is a pricing premium attached to a reduced documentation or stated income program.
- **Responsibility for Taxes and Insurance.** The requirement to make payments for real estate taxes and insurance in addition to their loan payments, if not escrowed, and the fact that taxes and insurance costs can be substantial.

Control Systems

Institutions should develop strong control systems to monitor whether actual practices are consistent with their policies and procedures. Systems should address compliance and consumer information concerns, as well as safety and soundness, and encompass both institution personnel and applicable third parties, such as mortgage brokers or correspondents.

Important controls include establishing appropriate criteria for hiring and training loan personnel, entering into and maintaining relationships with third parties, and conducting initial and ongoing due diligence with third parties. Institutions also should design

compensation programs that avoid providing incentives for originations inconsistent with sound underwriting and consumer protection principles, and that do not steer consumers to these products to the exclusion of other products for which the consumer may qualify.

Institutions should have procedures and systems in place to monitor compliance with appropriate laws and regulations, applicable third-party agreements and internal policies. An institution's controls also should include appropriate corrective actions in the event of failure to comply with applicable laws, regulations, third-party agreements or internal policies. In addition, institutions should initiate procedures to review consumer complaints to identify potential compliance problems or other negative trends.

FAIR HOUSING ACT, 42 U.S.C. §3601, et seq., This is often a reverse redlining claim.

The homeowner must be: 1) a member of a protected class, 2) they must have attempted to engage in a real estate related transaction and qualified to do so, 3) the lender/servicer must have refused to transact with them on fair terms, and 4) the lender/servicer must have continued to make loans/servicing available to others with similar qualifications as the homeowner. However, if the lender/servicer initiates contact with the homeowner, the final requirement might not be necessary

LOSS MITIGATION DEFENSES

Consumers have special protections available to them if they fall behind in their monthly mortgage payments for reasons beyond their control. Borrowers holding FHA, VA, and other insured loans have special protections available to them if they become delinquent in their payments. Fannie Mae and Freddie Mac owned and/or underwritten home loans also have specialized regular and default loan servicing protocols. Generally, borrowers must be given an opportunity to resolve the delinquency in their mortgage payments through special accommodations. The consumer must be allowed to participate in this process in a meaningful way as a contractual and/or statutory precondition to the filing or pursuit of a mortgage foreclosure.

FHA Loans

1. Mortgagee must comply with the payment forbearance, mortgage modification, and other foreclosure prevention loan servicing requirements imposed pursuant to the National Housing Act, 12 U.S.C. § 1710(a) and the form FHA mortgage.

2. Mortgagee must pursue effective foreclosure prevention strategies and evaluate the particular circumstances surrounding the default; determine the borrower's capacity to pay the monthly payment amount or a modified payment amount; ascertain the reason for the default, and the extent of the borrower's interest in keeping the subject property. 24 C.F.R. §203.604.

3. Mortgagee must manage the mortgage as required by FHA's special foreclosure prevention workout programs which can include and allow for the restructuring of the loan to allow the borrower to pay out delinquent installments, for advances to bring the mortgage current or the temporary reduction or suspension of monthly payment to allow recovery from the specified hardship.

4. Mortgagee is required under federal law to adapt its collection and loan servicing practices to the borrower's individual circumstances and to re-evaluate these techniques each month after default. 24 C.F.R. §203.605.

5. Mortgagee must make a reasonable effort to arrange a face-to-face meeting with the borrower before three full monthly installments are unpaid. 24 C.F.R. §203.604.

6. The requirements must be followed before a mortgagee may commence foreclosure. 24 C.F.R. Part 203(C).

FHA/HUD FEDERAL REGULATIONS (2007)

24 C.F.R.

§ 203.500 Mortgage servicing generally.

This subpart identifies servicing practices of lending institutions that HUD considers acceptable for mortgages insured by HUD. Failure to comply with this subpart shall not be a basis for denial of insurance benefits, but failure to comply will be cause for imposition of a civil money penalty, including a penalty under § 30.35(c)(2), or withdrawal of HUD's approval of a mortgagee. It is the intent of the Department that no mortgagee shall commence foreclosure or acquire title to a property until the requirements of this subpart have been followed.

§ 203.501 Loss mitigation.

Mortgagees must consider the comparative effects of their elective servicing actions, and must take those appropriate actions which can reasonably be expected to generate the smallest financial loss to the Department. Such actions include, but are not limited to, deeds in lieu of foreclosure under § 203.357, pre-foreclosure sales under § 203.370, partial claims under § 203.414, assumptions under § 203.512, special forbearance under §§ 203.471 and 203.614, and recasting of mortgages under § 203.616.

§ 203.600 Mortgage collection action.

Subject to the requirements of this subpart, mortgagees shall take prompt action to collect amounts due from mortgagors to minimize the number of accounts in a delinquent or default status. **Collection techniques must be adapted to individual differences in mortgagors and take account of the circumstances peculiar to each mortgagor.**

§ 203.602 Delinquency notice to mortgagor.

The mortgagee shall give notice to each mortgagor in default on a form supplied by the Secretary or, if the mortgagee wishes to use its own form, on a form approved by the Secretary, **no later than the end of the second month of any delinquency in**

payments under the mortgage. If an account is reinstated and again becomes delinquent, the delinquency notice shall be sent to the mortgagor again, except that the mortgagee is not required to send a second delinquency notice to the same mortgagor more often than once each six months. The mortgagee may issue additional or more frequent notices of delinquency at its option.

§ 203.604 Contact with the mortgagor.

(b) The mortgagee must have a **face-to-face interview** with the mortgagor, or make a reasonable effort to arrange such a meeting, **before three full monthly installments due on the mortgage are unpaid**. If default occurs in a repayment plan arranged other than during a personal interview, the mortgagee must have a face-to-face meeting with the mortgagor, or make a reasonable attempt to arrange such a meeting within 30 days after such default and at least 30 days before foreclosure is commenced

(c) A face-to-face meeting is not required if:

- (1) The mortgagor does not reside in the mortgaged property,
- (2) **The mortgaged property is not within 200 miles of the mortgagee, its servicer, or a branch office of either,**
- (3) The mortgagor has clearly indicated that he will not cooperate in the interview,
- (4) A repayment plan consistent with the mortgagor's circumstances is entered into to bring the mortgagor's account current thus making a meeting unnecessary, and payments thereunder are current, or
- (5) A reasonable effort to arrange a meeting is unsuccessful.

(d) A reasonable effort to arrange a face-to-face meeting with the mortgagor shall consist at a minimum of one letter sent to the mortgagor certified by the Postal Service as having been dispatched. Such a reasonable effort to arrange a face-to-face meeting shall also include at least one trip to see the mortgagor at the mortgaged property, unless the mortgaged property is more than 200 miles from the mortgagee, its servicer, or a branch office of either, or it is known that the mortgagor is not residing in the mortgaged property.

The mortgagee may appoint an agent to perform its responsibilities under this paragraph.

(2) The mortgagee must also:

- (i) Inform the mortgagor that HUD will make information regarding the status and payment history of the mortgagor's loan available to local credit bureaus and prospective creditors;
- (ii) Inform the mortgagor of other available assistance, if any;
- (iii) Notify the mortgagor that if the mortgage remains in default for more than 90 days, the mortgagee shall request the Secretary to accept an assignment of the mortgage;
- (iv) Notify the mortgagor of the qualifications for forbearance relief from the mortgage, if any, and that forbearance relief may be available from the Secretary if the mortgage is assigned; and
- (v) Inform the mortgagor of the names and addresses of HUD officials to whom further communications may be addressed.

§ 203.605 Loss mitigation performance.

(a) **Duty to mitigate.** Before four full monthly installments due on the mortgage have become unpaid, the mortgagee shall evaluate on a monthly basis all of the loss mitigation techniques provided at § 203.501 to determine which is appropriate. Based upon such evaluations, the mortgagee shall take the appropriate loss mitigation action. Documentation must be maintained for the initial and all subsequent evaluations and resulting loss mitigation actions. Should a claim for mortgage insurance benefits later be filed, the mortgagee shall maintain this documentation in the claim review file under the requirements of § 203.365(c).

§ 203.606 Pre-foreclosure review.

(a) Before initiating foreclosure, the mortgagee must ensure that all servicing requirements of this subpart have been met.

§ 203.610 Relief for mortgagor in military service.

The mortgagee shall specifically give consideration to affording the mortgagor the benefit of relief authorized by §§ 203.345 and 203.346, if the mortgagor is person in the military service as that term is defined in the Soldiers and Sailors Civil Relief Act of 1940, as amended.

§ 203.614 Special forbearance.

If the mortgagee finds that a default is due to circumstances beyond the mortgagor's control, as defined by HUD, the mortgagee may grant special forbearance relief to the mortgagor in accordance with the conditions prescribed by HUD.

§ 203.616 Mortgage modification.

The mortgagee may modify a mortgage for the purpose of changing the amortization provisions by recasting the total unpaid amount due for a term not exceeding 360 months. The mortgagee must notify HUD of such modification in a format prescribed by HUD within 30 days of the execution of the modification agreement.

12 USCS § 1710 Payment of insurance

(A) **Assignment of mortgage.** The Secretary may pay insurance benefits whenever a mortgage has been in a monetary default for not less than 3 full monthly installments or whenever the mortgagee is entitled to foreclosure for a nonmonetary default.

(2) **Payment for loss mitigation.** The Secretary may pay insurance benefits to the mortgagee to recompense the mortgagee for all or part of any costs of the mortgagee for taking loss mitigation actions that provide an alternative to foreclosure of a mortgage that is in default (including but not limited to actions such as special forbearance, loan modification, and deeds in lieu of foreclosure, but not including assignment of mortgages to the Secretary under section 204(a)(1)(A) [subsec. (a)(1)(A) of this section

(4) **Servicing of assigned mortgages.** If a mortgage is assigned to the Secretary under paragraph (1)(A), the Secretary may permit the assigning mortgagee or its

servicer to continue to service the mortgage for reasonable compensation and on terms and conditions determined by the Secretary.

(6) Forbearance and recasting after default. The mortgagee may, upon such terms and conditions as the Secretary may prescribe--

(A) extend the time for the curing of the default and the time for commencing foreclosure proceedings or for otherwise acquiring title to the mortgaged property, to such time as the mortgagee determines is necessary and desirable to enable the mortgagor to complete the mortgage payments, including an extension of time beyond the stated maturity of the mortgage, and in the event of a subsequent foreclosure or acquisition of the property by other means the Secretary may include in the amount of insurance benefits an amount equal to any unpaid mortgage interest; or

(B) provide for a modification of the terms of the mortgage for the purpose of recasting, over the remaining term of the mortgage or over such longer period pursuant to guidelines as may be prescribed by the Secretary, the total unpaid amount then due, with the modification to become effective currently or to become effective upon the termination of an agreed-upon extension of the period for curing the default; and the principal amount of the mortgage, as modified, shall be considered the 'original principal obligation of the mortgage' for purposes of paragraph (5).

12 USCS § 1715u Authority to assist mortgagors in default

(a) Loss mitigation. Upon default of any mortgage insured under this title, mortgagees shall engage in loss mitigation actions for the purpose of providing an alternative to foreclosure (including but not limited to actions such as special forbearance, loss modification, and deeds in lieu of foreclosure, but not including assignment of mortgages to the Secretary under section 204(a)(1)(A) [12 USCS § 1710(a)(1)(A)]) as provided in regulations by the Secretary.

(b) Payment of partial claim. The Secretary may establish a program for payment of a partial claim to a mortgagee that agrees to apply the claim amount to payment of a mortgage on a 1- to 4-family residence that is in default

(1) the amount of the payment shall be in an amount determined by the Secretary, not to exceed an amount equivalent to 12 of the monthly mortgage payments and any costs related to the default that are approved by the Secretary; and

(2) the mortgagor shall agree to repay the amount of the insurance claim to the Secretary upon terms and conditions acceptable to the Secretary.

The Secretary may pay the mortgagee, from the appropriate insurance fund, in connection with any activities that the mortgagee is required to undertake concerning repayment by the mortgagor of the amount owed to the Secretary.

Mortgagor bears burden of proving that he or she meets conditions to qualify for HUD's assignment program (which provides relief from foreclosure to low income homeowners who, because of temporary financial crisis, default on mortgages insured by HUD under National Housing Act). *Pozzie v United States Dep't of Hous. & Urban Dev.* (1995, CA7 Ill) 48 F3d 1026.

Circumstances beyond control of mortgagor

Mortgagor who was fired from her job for excessive tardiness and unauthorized overtime work was not eligible for HUD's assignment program, because mortgagor could not prove that her default on mortgage was caused by circumstances beyond her control. *Pozzie v United States Dep't of Hous. & Urban Dev.* (1995, CA7 Ill) 48 F3d 1026.

Homeownership counseling

Trustee's sale of HUD program participant's home is preliminarily enjoined, where mortgagor, disabled and suffering from inguinal hernia, will irretrievably lose home and his equity in it if sale takes place, because mortgagor states facially valid claim that HUD did not perform its statutory duty under 12 USCS § 1715u(d) to provide homeownership counseling to mortgagor in need of help and potential relief through HUD "assignment" program. *Cronkhite v Kemp* (1989, ED Wash) 741 F Supp 822.

Regulations

Failure to comply with servicing regulations which are mandatory and have force and effect of law can be raised in foreclosure proceeding as affirmative defense; HUD rules requiring that no mortgagee commence foreclosure until arrangement of face to face interview with mortgagor or reasonable effort to arrange such meeting before 3 full monthly installments are unpaid set forth violations which may be raised as affirmative defense in foreclosure action. *Bankers Life Co. v Denton* (1983, 3d Dist) 120 Ill App 3d 576, 76 Ill Dec 64, 458 NE2d 203.

WHAT IS A "Federally related mortgage loan"?

Pursuant to HUD Regulation X reported at 24 CFR Part 3500 and specifically Section 3500.2(b), "Federally related mortgage loan" or mortgage loan means as follows:

(1) Any loan (other than temporary financing, such as a construction loan):

(i) That is secured by a first or subordinate lien on residential real property, including a refinancing of any secured loan on residential real property upon which there is either:

(A) Located or, following settlement, will be constructed using proceeds of the loan, a structure or structures designed principally for occupancy of from one to four families (including individual units of condominiums and cooperatives and including any related interests, such as a share in the cooperative or right to occupancy of the unit); or

(B) Located or, following settlement, will be placed using proceeds of the loan, a manufactured home; and

(ii) For which one of the following paragraphs applies. The loan:

(A) Is made in whole or in part by any lender that is either regulated by or whose deposits or accounts are insured by any agency of the Federal Government;

(B) Is made in whole or in part, or is insured, guaranteed, supplemented, or assisted in any way:

(1) By the Secretary or any other officer or agency of the Federal Government; or

(2) Under or in connection with a housing or urban development program administered by the Secretary or a housing or related program administered by any other officer or agency of the Federal Government;

(C) Is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation (or its successors), or a financial institution from which the loan is to be purchased by the Federal Home Loan Mortgage Corporation (or its successors);

(D) Is made in whole or in part by a "creditor", as defined in section 103(f) of the Consumer Credit Protection Act (15 U.S.C. 1602(f)), that makes or invests in residential real estate loans aggregating more than \$1,000,000 per year. For purposes of this definition, the term "creditor" does not include any agency or instrumentality of any State, and the term "residential real estate loan" means any loan secured by residential real property, including single-family and multifamily residential property;

(E) Is the subject of a home equity conversion mortgage, also frequently called a "reverse mortgage," issued by any maker of mortgage loans specified in paragraphs (1)(ii) (A) through (D) of this definition.

(2) Any installment sales contract, land contract, or contract for deed on otherwise qualifying residential property is a federally related mortgage loan if the contract is funded in whole or in part by proceeds of a loan made by any maker of mortgage loans specified in paragraphs (1)(ii) (A) through (D) of this definition.

VA Loans

1. Mortgage must extend to borrower all reasonable means of forbearance, including an opportunity to apply for a mortgage foreclosure avoidance workout and a consideration of a temporary suspension of borrower's payments or extension of the loan. 38 U.S.C. 36.4300 to 36.4393

2. The purpose of the VA Housing Loan Program is to enable veterans to obtain home loans and to minimize the risk of foreclosure and the loss of home ownership. U.S. v. Shimer, 367 U.S. 374, 383 (1961);

3. 38 U.S.C. 36.4346(a) and the VA Handbook H26-94-1 requires Mortgagees to establish a delinquent loan servicing program which, among other things, provides a process to:

- a. have a collection staff trained in techniques of loan servicing and counseling delinquent borrowers, including the pursuit of alternatives to foreclosure available to counsel borrowers in their status as delinquent;
- b. have guidelines for individual analysis of delinquent borrowers;
- c. establish timely, helpful and responsive telephone contact with the delinquent borrowers to determine why payments were not made on the mortgage; alternatively, arrange a face-to-face interview with the delinquent borrower to solicit information to evaluate the prospects for curing the mortgage default including determining whether the granting of forbearance or other such relief would be appropriate to assist the borrower in avoiding foreclosure and avoiding the loss of home ownership by a veteran and that veteran's family;
- d. make a reasonable effort to determine the reason for the borrower's default and whether such reason is temporary or permanent, the income of the borrower and their monthly household and debt expenses and obligations leading to a realistic and mutually satisfactory arrangement for curing the default;
- e. employ collection techniques flexible to adapt to delinquent borrower's circumstances.

The Veterans Administration published a "Lender's Handbook" detailing the policies and procedures to be followed by lending institutions participating in government insured VA loans. The provisions of the VA Handbook create an "equitable obligation" on the part of the lender to provide the servicing functions described in the handbook. The consideration for this lender obligation is their ability to participate in the profits and guarantees of the government-insured loan program. *Union National Bank of Little Rock v. Cobbs*, 389 Pa. Super. 509, 567 A.2d 719 (1989).

The Veterans Administration Lender's Handbook Part I Section F.1.c. provides the following:

Extent of Servicing The VA does not prescribe in detail the manner in which loans should be serviced. However, holders are expected to follow or to require their servicing agents to follow accepted standards of loan servicing, such as are employed by prudent lenders generally in servicing their portfolios of similar type conventional loans. Good judgment must be exercised in each case, according to particular facts and circumstances. In almost every case, this must be accomplished by direct contact (i.e., telephone conversation or personal visit) with the borrower, so that the reasons for the default can be discussed frankly and the possible alternatives for curing the default can be explored thoroughly ...

The guaranty or insurance of a loan by the VA is based upon the agreement that adequate loan servicing will be performed.

Forbearance. It is the policy of the VA, consistent with the beneficial nature of the law, to encourage holders to extend all reasonable forbearance in the event a borrower becomes unable to meet the terms of a loan ... Accordingly, the regulations give the holder broad discretion in extending or recasting the terms of repayment in order to cure a default or to avoid imminent default VA Handbook at page 47

Minimizing Losses. When it becomes apparent during the course of servicing a defaulted loan that the situation is hopeless, every effort should be made to minimize the ultimate loss of all parties concerned. Borrowers in such cases should be urged to sell their property in order to realize any equity and to avoid termination of loans. A number of cases may be thus resolved without the necessity of filing a claim or forcing liquidation of the security... VA Handbook Section F.1.c

Mortgagees who participate in the VA insured program are directed by regulations to follow specific VA servicing guidelines in dealing with mortgagors. These servicing regulations appear at 38 C.F.R. §36.4201. Based on these regulations, the VA issued VA Pamphlet 26-7 dated September 15, 1977. See VA Pamphlet 26-7, "Lender's Handbook" *Union National Bank v. Cobbs*, 389 Pa. Super. 510, 511 567 A.2d 719,720.

Fannie Mae, Freddie Mac <http://www.allregs.com>

1. Prior to foreclosure, the mortgagee must provide access to debt management and relief to borrowers facing temporary financial problems. Such relief must include, among other things, temporary indulgence, a liquidating plan, and special forbearance designed to avoid residential foreclosure of single family loans secured by and/or underwritten by Fannie Mae/Freddie Mac.

2. Mortgagee must pursue effective foreclosure prevention strategies by evaluating the particular circumstances surrounding the borrower's default; the borrower's capacity to pay the monthly payment amount or a modified payment amount; ascertain the reason for the borrower's default, and the extent of the borrower's interest in keeping the property.

3. Mortgagee must contact the borrower before the 30th day of the delinquency to evaluate foreclosure prevention strategies and must inform the borrower in writing about the applicable foreclosure alternatives in a timely fashion;

4. Fannie Mae's special foreclosure prevention workout programs can include and allows for a restructuring of the loan allowing the borrower to pay out delinquent installments or advances to bring the mortgage current or to reduce or suspend the monthly mortgage payments for a specific period to allow the borrower time to recover from a financial hardship.

Conventional loans The National Housing Act, 12 U.S.C. 1701x(c)(5) requires Mortgagees to advise borrowers of any home ownership counseling the Mortgagee

offers together with information about counseling offered by the U.S. Department of Housing and Urban Development.

2. Mortgagee cannot legally pursue foreclosure unless and until the Mortgagee demonstrates compliance with 12 U.S.C. 1701x(c)(5) which creates an affirmative legal duty on the part of the Mortgagee to comply with these regulations pre-litigation. Non-compliance is an actionable event that affects Mortgagee's ability to carry out this foreclosure.

12 USCS § 1701x Assistance with respect to housing for low-and moderate income families

(5) Notification of availability of homeownership counseling.

(A) (i) Requirement. Except as provided in subparagraph (C), the creditor of a loan (or proposed creditor) shall provide notice under clause (ii) to (I) any eligible homeowner who fails to pay any amount by the date the amount is due under a home loan, and (II) any applicant for a mortgage described in paragraph (4).

(ii) Content. Notification under this subparagraph shall--

(I) notify the homeowner or mortgage applicant of the availability of any homeownership counseling offered by the creditor (or proposed creditor);

(III) notify the homeowner or mortgage applicant of the availability of homeownership counseling provided by nonprofit organizations approved by the Secretary and experienced in the provision of homeownership counseling, or provide **the toll-free telephone number** described in subparagraph (D)(i); and

(IV) notify the homeowner by a statement or notice, written in plain English by the Secretary of Housing and Urban Development, in consultation with the Secretary of Defense and the Secretary of the Treasury, explaining the mortgage and foreclosure rights of **servicemembers, and the dependents of such servicemembers, under the Servicemembers Civil Relief Act (50 U.S.C. App. 501 et seq.), including the toll-free military one source number to call if servicemembers, or the dependents of such servicemembers, require further assistance.**

(B) Deadline for notification. The notification required in subparagraph (A) shall be made--

(i) in a manner approved by the Secretary; and

(ii) before the expiration of the 45-day period beginning on the date on which the failure referred to in such subparagraph occurs.

(C) Notification. Notification under subparagraph (A) shall not be required with respect to any loan for which the eligible homeowner pays the amount overdue before the expiration of the 45-day period under subparagraph (B)(ii).

(6) Definitions. For purposes of this subsection:

(A) The term "**creditor**" means a person or entity that is servicing a home loan on behalf of itself or another person or entity.

(B) The term "**eligible homeowner**" means a homeowner eligible for counseling under paragraph (4).

(C) The term "**home loan**" means a loan secured by a mortgage or lien on residential property.

(D) The term "**homeowner**" means a person who is obligated under a home loan.

(E) The term "**residential property**" means a 1-family residence, including a 1-family unit in a condominium project, a membership interest and occupancy agreement in a cooperative housing project, and a manufactured home and the lot on which the home is situated.

(7) Regulations. The Secretary shall issue any regulations that are necessary to carry out this subsection.

Homeownership Counseling Act¹

Introduction

Section 106(c)(5) of the Housing and Urban Development Act of 1968 (the Act) (12 U.S.C. 1701x (c)(5)) provides for homeownership counseling notification by creditors to eligible homeowners. The Act has been amended at various times, with the most recent amendment on November 26, 2001, when the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 2002 (Pub. L. 107-73) was enacted. Section 205 of that Act repealed the previous sunset provision.

Statutory Overview

Applicability

All creditors that service loans secured by a mortgage or lien on a one-family residence (home loans) are subject to the homeownership counseling notification requirements. Home loans include conventional mortgage loans and loans insured by the Department of Housing and Urban Development (HUD).

Requirements

Notice Requirements²

A creditor must provide notification of the availability of homeownership counseling to a homeowner, eligible for counseling, who fails to pay any amount by the due date under the terms of the home loan.

Eligibility

A homeowner is eligible for counseling if:

- The loan is secured by the homeowner's principal residence;
- The home loan is not assisted by the Farmers Home Administration; and
- The homeowner is, or is expected to be, unable to make payments, correct a home loan delinquency within a reasonable time, or resume full home loan payments due to a reduction in the homeowner's income because of:
 - An involuntary loss of, or reduction in, the homeowner's employment, the homeowner's

self-employment, or income from the pursuit of the homeowner's occupation; or

- Any similar loss or reduction experienced by any person who contributes to the homeowner's income.

Contents of Notice

The notice must:

- notify the homeowner of the availability of any homeownership counseling offered by the creditor; and
- provide either a list of HUD-approved nonprofit homeownership counseling organizations or the toll-free number³ HUD has established through which a list of such organizations may be obtained.

Timing of Notice

The notice must be given to a delinquent homeowner borrower no later than 45 days after the date on which the homeowner becomes delinquent. If, within the 45-day period, the borrower brings the loan current again, no notification is required.

Definitions

For purposes of these requirements, the following definitions apply:

"Creditor" means a person or entity that is servicing a home loan on behalf of itself or another person or entity.

"Home loan" means a loan secured by a mortgage or lien on residential property.

"Homeowner" means a person who is obligated under a home loan.

"Residential property" means a 1-family residence, including a 1-family unit in a condominium project, a membership interest and occupancy agreement in a cooperative housing project, and a manufactured home and the lot on which the home is situated.

Examination Objective

The examination objective is to determine whether the financial institution has established procedures regarding homeownership counseling notification to ensure that it complies with the provisions of §106(c)(5) of the Housing and Urban Development Act of 1968.

Examination Procedures

Determine if the financial institution is informing eligible homeowners, within 45 days of initial loan default, of:

- the availability of any homeownership counseling offered by the creditor; and

³ The number is 1-800-569-4287.

¹ This section fully incorporates the examination procedures issued under DSC RD Memo 03-047: Revised Interagency Examination Procedures for the Homeownership Counseling Notification.

² The FFIEC Consumer Compliance Task Force has requested clarification from HUD on HUD's current position regarding notice requirements to first-time homebuyers. These interagency examination procedures are currently limited to determining compliance with the Act's notice provisions related to delinquent borrowers. However, should a response from HUD to the Task Force indicate that notices to first-time homebuyers should be provided under the Act, the agencies will expand these examination procedures to cover notices to first-time homebuyers.

- the availability of any homeownership counseling by nonprofit organizations approved by HUD or the toll-free telephone number through which the homeowner can obtain a list of such organizations.

Examination Checklist

Does the financial institution notify eligible homeowners, within 45 days of initial loan default, of any homeownership counseling the institution (creditor) provides?

Does the financial institution provide eligible homeowners with the names of nonprofit organizations approved by HUD or the toll-free telephone number to obtain a list of such organizations?

References

The Housing and Urban Development Act of 1968 (12 USC 1701x(c)(5)), §106(c).

There are no regulations relating to this requirement.

FIL 43-2002: Homeownership Counseling Notification Requirements

<http://www.fdic.gov/news/news/financial/2002/fil0243.html>

DSC RD Memo 03-047: FFIEC Examination Procedures

<http://fdic01/division/dsc/memos/memos/6000/03-047.pdf>

The HUD toll-free number to locate an approved housing counselor is: 1-800-569-4287.

The HUD internet site to locate a list of counselors is:

<http://www.hud.gov/offices/hsg/sfh/hcc/hccprof14.cfm>

Community
Developments
Insights June 2007

Community Affairs

Department

Comptroller of the Currency
Administrator of National Banks
US Department of the Treasury

Foreclosure Prevention:

Improving Contact with Borrowers

Door knockers

Some servicers hire staff to go door-to-door to contact late-paying borrowers. These individuals are trained to explain repayment options to borrowers and provide a brochure explaining these options. The “door knockers” carry cell phones so they can contact the loss mitigation and collections departments at the bank when they have reached a delinquent borrower. This method can result in the door knocker putting the borrower in direct contact with the servicer’s loss mitigation staff. They generally attempt to make contact with the borrower well before the loan is 90 days delinquent.

¹² See 15 USC 1692a *et seq.* Servicers making direct contact with delinquent borrowers and any counseling agencies acting on behalf of servicers should consider the applicability of the requirements of the Fair Debt Collection Practices Act.

SERVICEMEMBERS CIVIL RELIEF ACT (SCRA)

50 U.S.C. App. §§501-596

Effective December 19, 2003

Purposes of the SCRA:

(1) to provide for, strengthen, and expedite the national defense through protection extended by this Act to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and

(2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.

Alters conventional contracts

Prevents default judgment except in accordance with its provisions

Reduces interest rates on some obligations to 6%

Gives consumers anticipatory relief option without filing bankruptcy

WHO IS PROTECTED?

All active duty military members

All Reserve and National Guard members

2004 TECHNICAL AMENDMENTS

Judgment defined: “Any judgment, decree, order or ruling, final or temporary.”

Waivers of SCRA protections must be in separate writing, not less than 12 point type

Stay provisions (Sec. 522) apply to both plaintiffs and defendants

Default judgments and stays --§§521, 522, 524, 525

Fines & Penalties in contracts - §523
Statutes of Limitation --§526
Maximum rate of interest - §527

Title III (§§531-538)

Substantive protections against evictions, termination of installment contracts, foreclosure on mortgages and termination of leases by lessees, protection to dependents

DEFINITIONS -- §511

Servicemember Active Duty Military of 5 services -
includes Reserves and Guard under Title 10

National Guard under 32 U.S.C. §502(f)

Public Health Service Officers

National Oceanic & Atmospheric Officers

Dependents

SM's spouse or child

Person that SM provided more than 1/2 support for 180 days preceding application for relief under act

Court includes

All Courts -- including bankruptcy

All Administrative Agencies whether or not of record

SCRA applies to all courts & administrative agencies – federal, state and

SCRA applies to civil cases only

PERSONS SECONDARILY LIABLE -- §513

If court grants relief (stay, postponement, suspension of obligation) to servicemember, the relief may also be granted to persons primarily or secondarily liable with the SM

Members of Reserve component entitled to protection of SCRA from receipt of mobilization orders

WAIVER OF RIGHTS -- §517

Member may waive protections

Waiver must be in a separate writing

Mortgage, trust, deed, lien, other security

Repossession, retention, foreclosure, sale, forfeiture, taking possession of property

Must be made during or after period of service

NON-DISCRIMINATION -- §518

Claiming rights under SCRA cannot be basis for:

Determination by lender that the member is unable to pay

Denial or revocation of credit

Change in terms of existing credit arrangement

Refusal to grant credit to the member
Adverse credit report
Refusal by insurer to insure member
Identifying SM as member of NG or Reserve
Changing the conditions or terms of insurance

LEGAL REPRESENTATIVES --§519

An attorney acting on the behalf of a Servicemember; or
An individual possessing a power of attorney
Legal representative can take the same actions as a Servicemember

EXTENSION OF PROTECTION

§514 - Citizens of the U.S. serving with allied forces if service similar to “military service”

§538 - Dependents of SM if dependent’s ability to comply is materially affected by SM’s military service they may apply for the protections

If unable to determine status - court may require plaintiff to post bond

If defendant is a military member, court cannot enter default judgment until attorney is appointed to represent military member

STAY PROVISION OF §521

If defendant is in military, court SHALL stay proceedings

Minimum 90 Days on application of counsel or court’s own motion

Court must determine that there may be a defense that cannot be presented without presence of defendant; or after due diligence counsel has been unable to contact defendant or otherwise determine if a meritorious defense exists

If Real Party in Interest is Not the Servicemember = No Stay

Court SHALL reopen a default judgment entered while SM on active duty or within 60 days thereafter, when SM applies while on active duty or within 90 days thereafter, and shows material affect, plus meritorious defense

BONA FIDE purchasers protected

Temporary delay in civil actions until servicemember can appear during period of service plus 90 days

Automatic 90 day stay if: SM shows military duty materially affects ability to appear, and date when can appear

Commanding officer writes letter stating duty prevents appearance and leave not authorized

Application for a stay under §522 does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense (including a defense relating to lack of personal jurisdiction)

SM may apply for additional stay based on continuing material affect of military duty on SM’s ability to participate in the litigation

FINES & PENALTIES -- §523

NO penalties under a contract if performance stayed by Court, and if no stay --
Court may reduce or waive fine or penalty if
SM was in military service at time of fine/penalty
Performance materially affected by military service

STAY OR VACATION OF JUDGMENTS -- §524

If military service materially affects compliance with judgment or order:
Court SHALL on application of SM Stay execution;
Court may also act on its own motion

DURATION OF STAYS --§525

May be for the period of service plus 90 days, or any part thereof
Court may set the terms and amounts of any installment payments
Plaintiff may proceed against any codefendants not in military service with court approval

STATUTE OF LIMITATIONS--§526

Period of Military Service NOT included: In any period limited by law, regulation or order to bring any action or proceeding (including redemption of real property) by or against SM or heirs or assigns
Does not apply to IRS

MAXIMUM RATE OF INTEREST--§527

PRE-SERVICE loans incurred by SM, or SM and spouse jointly
Cap of 6% per annum; all excess FORGIVEN
Have to recompute payments at 6% rate
Cap rescinded if creditor shows no material affect
SM must give written notice w/copy of orders
Private right of action – Cathey v. First Republic Bank

ENFORCE 6% CAP

Notify Lender - See Section 527(b)(1) Notice
Moll v. Ford Consumer Finance and Cathey v. First Republic Bank

EVICCTIONS & DISTRESS--§531

Can ONLY evict upon court order: no self-help
Applies to SM or dependents
Ability to pay materially affected by service
Court SHALL stay for minimum 90 days, or
Adjust the obligations
Criminal sanctions for violation
Dependents have right to invoke

INSTALLMENT CONTRACTS FOR PURCHASE OR LEASE --§532

In event of breach of contract, no termination or repossession of property without court order

Applies to pre-service obligation

Purchase, lease, or bailment of real or personal property

Payment or deposit made prior to service

Misdemeanor offense for violation

After hearing, a court may order repayment to SM to terminate contract, or

SHALL stay the proceeding if SM's ability to comply is materially affected

Length of stay determined by Court

May stay on court's own motion

TAXES RESPECTING PERSONAL & REAL PROPERTY -- §561

Tax or assessment falls due and is unpaid which arose before or during military service on Real Property occupied by SM, dependents, or employees before entry into military service, and during period of service tax remains unpaid

Court can order sale only if no material affect

Court may stay for period of service plus 180 days

SM has right to redeem for service plus 180 days

ANTICIPATORY RELIEF-- §591

Anticipatory relief available for: pre-service obligations; or taxes or assessments arising during period of service

Contract for purchase of real property or secured by mortgage

Court can stay enforcement of obligation during military service plus period equal to period of military service plus remaining period of obligation

Deferred payments must be paid over "extension period" plus new payments as they accrue

Must show material affect

Apply during service or within 180 days after

No penalties may be imposed for claiming protections of SCRA

Liberal construction is the rule

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

ASSISTANT SECRETARY FOR HOUSING-FEDERAL HOUSING COMMISSIONER

November 20, 2006

Mortgagee Letter 2006-28

TO: ALL APPROVED MORTGAGEES

ATTENTION: Single Family Servicing Managers

SUBJECT: Mortgage and Foreclosure Rights of Servicemembers under the Servicemembers Civil Relief Act (SCRA)

This Mortgagee Letter provides information regarding a new legal requirement to notify homeowners in default of the mortgage and foreclosure rights of servicemembers and their dependents under the Servicemembers Civil Relief Act (SCRA). It also provides guidance regarding the implementation of SCRA requirements in servicing FHA-insured

mortgages. This guidance supersedes prior Mortgagee letters ML 2003-04, Soldiers and Sailors Civil Relief Act and ML 01-22, The Effect of the Soldiers and Sailors Civil Relief Act of 1940 on FHA Insured Mortgages. However, the guidance provided in ML 91-20, Effect of the Soldiers and Sailors Civil Relief Act of 1940 on FHA Insured Mortgages remains valid with respect to the calculation of Section 235 subsidy...

To read this mortgagee letter in its entirety, please visit: <http://www.hud.gov/offices/hsg/mltrmenu.cfm> select 2006 letters and click on the letter of your choice.

AFFIRMATIVE DEFENSES

1. **FAILURE TO STATE CAUSE OF ACTION; PLAINTIFF DOES NOT HAVE STANDING PLAINTIFF IS NOT REAL PARTY IN INTEREST** : The exhibits attached to Plaintiffs' second amended complaint are inconsistent with Plaintiffs' allegations as to ownership of the subject promissory note and mortgage on the date this foreclosure action was commenced. Plaintiffs have failed to establish that plaintiffs are real parties in interest and have failed to state a cause of action.

a. The HUD insured promissory note that is the subject of this foreclosure action is not a negotiable instrument and therefore is not subject to transfer by endorsement because the note directly and specifically incorporates and directly references and applies federal regulations issued by HUD that limit the Lender's rights of acceleration, collection and foreclosure in the case of a borrower's default. The application, incorporation and reference to the HUD federal regulations which set out specific default loan servicing and loss mitigation requirements imposed on the lender renders the note nonnegotiable under the Uniform Commercial Code.

b. The HUD insured promissory note has a boxed FHA case number and states, in pertinent part, under the section on borrower's failure to pay:

"If Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by regulations of the Secretary in the case of payment defaults, require immediate payment...This Note does not authorize acceleration when not permitted by HUD regulations. As used in this Note, 'Secretary' means the Secretary of Housing and Urban Development..."

c. It is plain on the face of the HUD insured promissory note at issue in this foreclosure that is attached to the plaintiffs' second amended complaint that the note does not contain just an unconditional promise to pay. The resulting uncertainty presented by the terms of the note that specifically apply, incorporate and reference the HUD regulations defeat any argument that the note is a negotiable instrument subject to transfer via endorsement.

d. Therefore, the Uniform Commercial Code, F.S.Chapter 673 does not apply to transfer or enforce the promissory note at issue in this foreclosure action. Nagel v. Cronebaugh, 782 So. 2d 436 (Fla. 5th DCA 2001), citing United Nat'l Bank of Miami v. Airport Plaza Ltd. Partnership, 537 So. 2d 608,609 (Fla. 3d DCA 1988); Thompson v. First Union National Bank, 643 So.2d 1179 (Fla. 5th DCA 1994); See also, Bankers Trust v. 236 Beltway Investment, Inc., 865 F. Supp. 1186 (E.D. Va. 1994).

e. The HUD insured promissory note is conditional because it is subject to and governed by the HUD default loan servicing and loss mitigation regulations. The court

cannot determine the obligations required of the person promising to pay or the person requiring payment without reference to the HUD regulations. As a result, the note is not an unconditional promise, is not a negotiable instrument and is not subject to transfer by endorsement. Fla. Stat. § 673.1041.

f. Under Section 3-106(a) of the Uniform Commercial Code “a promise or order is [conditional if it] is subject to or governed by another record, or [the] rights or obligations with respect to the promise or order are stated in another record. Fla. Stat. § 673.1061.

g. “To determine whether an instrument meets negotiable instrument definition of Uniform Commercial Code, only [the] instrument itself may be looked to, not other documents, even when other documents are referred to in instrument.” First State Bank at Gallup v. Clark, 570 P.2d 1144 (N.M. 1977); Amberboy v. Societe de Banque Privee, 831 S.W.2d 793, 794 (Tex. 1992); Walls v. Morris Chevrolet, Inc., 515 P.2d 1405, 1407 (Okla. App. 1973).

h. “No instrument can be negotiable which (1) is subject to another agreement, (2) refers to another agreement for the rights of the parties, or (3) incorporates another agreement.” Hawklund, Uniform Commercial Code Services § 3-105:2. See also, Holly Hill Acres, Ltd. v. Charter Bank of Gainesville, 314 So. 2d 209, 210-11 (Fla. 2nd DCA 1975) (holding that the incorporation of the terms of a separate writing makes the promissory note a non-negotiable, conditional promise to pay); Hawklund, Uniform Commercial Code Services § 3-105:2; Dzikowski v. Moreno (In re V.O.C. Analytical Labs., Inc.) 263 B.R. 156, 160-61 (S.D. Fla. 2001); (The phrase “subject to” or words to that effect are fatal to negotiability, regardless of the actual provisions of the other document.) Hawklund, Uniform Commercial Code Services § 3-105:2; 28; (“An order or promise is conditional if either the instrument states that the rights or obligations of the parties are defined or stated in another writing or that the rights or obligations of the parties are subject to the terms of another writing.”) Anderson, Uniform Commercial Code § 3-106:8 [Rev].

**2. FAILURE TO COMPLY WITH APPLICABLE HUD SINGLE FAMILY
DEFAULT LOAN SERVICING REQUIREMENTS/ FAILURE TO COMPLY WITH
CONDITIONS PRECEDENT:**

Both the HUD insured promissory note and mortgage that are the subject of this foreclosure action directly and specifically apply, incorporate and refer to federal regulations issued by HUD that directly limit the plaintiff’s rights to accelerate and foreclose in the case of a borrower’s default. The provisions in both the note and the mortgage direct the plaintiff to engage in special default loan servicing and loss mitigation in its efforts to collect this debt to avoid foreclosure.

a. The mortgage has on its face a boxed FHA Case number and states:

“9. Grounds for Acceleration of Debt.

(a) Default: Lender may, except as limited by regulations issued by the Secretary in the case of payment defaults, require immediate payment...

(d) Regulations of HUD Secretary. In many circumstances regulations issued by the Secretary will limit Lender’s rights in the case of payment defaults to require immediate payment in full and foreclose if not paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary.”

b. Defendant affirmatively defends this foreclosure based on the Plaintiffs' failure to comply with the forbearance, mortgage modification, and other foreclosure prevention loan servicing requirements imposed on Plaintiffs and the subject FHA mortgage by federal regulations promulgated by HUD, pursuant to the National Housing Act, 12 U.S.C. 1710(a). As a result, Plaintiffs have failed to establish compliance with a statutory and contractual condition precedent to this foreclosure because of Plaintiffs' failure to comply with the federal regulations, as set out herein:

1.. Defendant defaulted on this FHA insured residential mortgage which is the subject of this cause due to reasons beyond her control.

2. Defendant suffered severe a severe financial hardship as a result of her ex-husband illegally entering her home on November 8, 2002 and causing extensive physical damage to the subject property.

3. Defendant was forced to move out of her home as a result of the damage, but she continued to make her mortgage payments for six months while repairs were under way.

4. Defendant suffered another economic setback and hardship in January 2004 when her car was stolen by her ex-husband.

5. Defendant had to pay for the extraordinary repairs to her vehicle.

6. These circumstances caused the defendant to suffer severe financial problems.

7. At all times defendant informed and notified the servicer of the subject mortgage loan about her financial hardship and circumstances.

8. Defendant was in frequent contact with plaintiffs' agents, representatives and employees through Homesavers USA and she informed all parties, through her contacts and communications with the servicer of her loan of her financial hardship, her requests for loss mitigation and acceptable terms by which defendant could reinstate her mortgage.

9. Plaintiffs failed to offer any reasonable offer for or accommodation of loss mitigation in light of the defendant's severe economic circumstances.

10. Defendant timely informed plaintiffs of her extreme hardships, the nature of dependency on her income, and necessity that plaintiffs not demand excessive payments in order to work out a modification.

11. Defendant made it clear to the servicer of her home loan that she could not afford to pay if the plaintiffs' demanded hefty increases in her monthly payment amount in a loan workout.

12. This defendant was taken advantage of by Homesavers, who was acting at all times as an agent, employee and/or representative of the plaintiffs in the servicing of the defendant's home loan.

13. The interaction between the defendant and Homesavers is not fairly or accurately characterized as "working with" because of the failure of Homesavers to follow the applicable default loan servicing obligations imposed on the plaintiffs.

14. Plaintiffs failed to properly service the defendant's federally insured home loan under the troubled loan servicing regulations imposed on this HUD insured loan because Plaintiffs failed to offer this defendant any reasonable opportunity for loss mitigation in light of the defendant's severe economic hardships which were not of her making or under her control.

15. Defendant informed plaintiffs of her financial circumstances and extreme economic hardship and the need to be able to access a loan workout that was based on her actual financial circumstances.

16. Instead of providing this defendant with realistic and reasonable loss mitigation designed to avoid foreclosure, plaintiffs just demanded that defendant agree to pay excessive payments in order to avoid foreclosure and the loss of her home.

17. Defendant made it clear to the servicer of her home loan that she could not afford to pay hefty increase in her monthly payment amount that the plaintiffs were demanding in a loan workout.

18. The plaintiffs did not evaluate the loan for purposes of modification pursuant to the applicable and controlling federal servicing regulations, but instead, plaintiffs failed and refused to provide this defendant with access to a modification or workout of the subject mortgage reasonably as required by federal law.

19. The plaintiffs knew that the payment demands that the plaintiffs made on the defendant during this difficult time were financially impossible for the defendant to meet and that such demands were threatening, harassing, completely unreasonable and totally beyond the defendant's means.

20. The plaintiffs did not properly evaluate this defendant's troubled loan for purposes of foreclosure avoidance because when the Defendant defaulted on her loan due to reasons beyond her control, the plaintiffs failed to adapt their collection and loan servicing practices to this Defendant's individual circumstances.

21. The Plaintiffs also did not make a reasonable effort as required by federal law to arrange a face to face meeting with the Defendant before three full monthly installments were unpaid as required by 24 C.F.R. 203.604.

22. The Plaintiffs failed to evaluate all available loss mitigation techniques and failed to re-evaluate these techniques each month after the defendant missed payments as required by 24 C.F.R. 203.605.

23. The plaintiffs failed to properly evaluate this defendant's loan for troubled loan servicing and failed to provide defendant with proper access to evaluation for a loan modification or for forbearance by the act of filing this foreclosure before offering Defendant any of the federally required foreclosure avoidance options.

24. Plaintiffs ignored their obligation to provide the defendant access to her legal right to receive to default loan servicing pursuant to the controlling federal laws and regulations that govern her HUD insured home loan.

25. Plaintiffs denied this defendant her right to receive forbearance, mortgage modification, and other foreclosure prevention loan services before the initiation of this foreclosure action.

26. Plaintiffs failed and refused to provide this defendant with access to reasonable forbearance during the time she was forced out of her home due to destruction.

27. Defendant made it clear to plaintiffs that she needed all the financial reprieve that she could gain under the troubled loan servicing protocol set out in the federal law and regulations that apply to her federally insured home loan.

28. The documents that the plaintiffs sent to this defendant were unfairly and deceptively characterized as a loan modification.

29. The plaintiffs failed to offer a loan modification to the defendant that followed the applicable default loan servicing requirements; failed to take into account this defendant's financial circumstances; failed to address or deal with the legitimate disputes and issues this defendant has raised concerning the balance due under the terms of the subject mortgage loan.

30. The documents that the plaintiffs sent to this defendant in response to her request for special troubled loan services is evidence of the plaintiffs' illegal and wrongful failure to comply with the servicing obligations imposed under federal law.

31. The plaintiffs failed to offer defendant access to a loan modification, forbearance, workout, loss mitigation or other relief that complied with the HUD default loan servicing requirements.

32. The Defendant made every reasonable attempt to get back on track in regards to the payment of her mortgage taking into account her financial difficulties and hardship which were due to reasons beyond her control.

c. The Plaintiffs were required under federal law to adapt its collection and loan servicing practices to Defendant's individual circumstances and failed to do so.

d. The Plaintiffs did not make a reasonable effort as required by federal law to arrange a face to face meeting with Defendant before three full monthly installments were unpaid. 24 C.F.R. 203.604.

e. The Plaintiffs were required by federal law to evaluate all available loss mitigation techniques and to re-evaluate these techniques each month after default and failed to do so. 24 C.F.R. 203.605.

f. HUD has determined that the requirements of 24 C.F.R. Part 203(C) are to be followed before any mortgagee commences foreclosure.

g. Plaintiffs have no valid cause of action for foreclosure against defendant unless and until Plaintiffs can demonstrate compliance with the regulations in 24 C.F.R. Part 203(C).

h. As a result, Defendant was denied access to the foreclosure prevention services and the mortgage servicing options that the plaintiffs are obligated to follow in servicing this federally insured home loan which are designed to avoid foreclosure of this HUD insured mortgage.

i. Defendant did everything she could to keep up with her monthly mortgage payments.

j. Defendant was initially sued in September, 2004 when the defendant was less than 6 months behind on her mortgage and after defendant had made every reasonable effort to access forbearance and loan modification based reduced payments.

k. This entire foreclosure and all the extra costs and fees associated therewith were supposed to be avoided by and through the good faith and timely provision of default loan servicing and loss mitigation assistance which the defendant was entitled to receive and which the plaintiffs were obligated to provide under federal law and under the specific terms of the subject mortgage and note.

l. Plaintiffs denied this defendant any opportunity to access a legitimate HUD required process to avoid this foreclosure.

3. **UNCLEAN HANDS/ESTOPPEL**: The Plaintiffs come to Court with unclean hands and are prohibited by reason thereof from obtaining the equitable relief of foreclosure from this Court as set forth in the defendant's statement of facts contained

in affirmative defense no. 2 incorporated herein. The Plaintiffs' unclean hands result from the Plaintiffs intentional and reckless failure to properly service this mortgage pursuant to the applicable federal regulations and the contract between the parties before filing this foreclosure action. Plaintiffs intentionally failed to offer Defendant access to the special default loan servicing for financially troubled borrowers that the applicable federal law and the contract between the parties require including moratorium, forbearance and loan modification. As a matter of equity, this Court should refuse to foreclose this mortgage because acceleration of the note would be inequitable, unjust, and the circumstances of this case render acceleration unconscionable. This Court should refuse the acceleration and deny foreclosure because Plaintiffs have waived the right to acceleration or are estopped from doing so because of intentionally misleading and reckless conduct and unfulfilled conditions.

WHEREFORE, Defendant requests the Court dismiss the Plaintiffs' second amended Complaint with prejudice, and for all other relief to which this Defendant proves herself entitled including an award of reasonable attorney's fees and costs in this action.

4. **FAILURE OF GOOD FAITH AND FAIR DEALING: UNFAIR AND UNACCEPTABLE LOAN SERVICING:** Plaintiffs intentionally failed to act in good faith or to deal fairly with this Defendant by failing to follow the requirements of the HUD mandated standards of residential single family mortgage lending and servicing as described in these Affirmative Defenses thereby denying this Defendant access to the residential mortgage servicing protocols applicable to the subject note and mortgage.

5. **ILLEGAL CHARGES ADDED TO BALANCE:** Plaintiffs have charged and/or collected payments from Defendant for attorney fees, legal fees, foreclosure costs, advances, and other fees and charges that are not authorized by or in conformity with the terms of the subject note and mortgage. Plaintiffs wrongfully added and continue to unilaterally add these illegal charges to the balance that the Plaintiffs claim is due and owing under the subject note and mortgage.

Counterclaims

Count I - Declaratory and Injunctive Relief

1. This is Defendant's action for declaratory and injunctive relief against the Plaintiff.

2. Defendant reasserts and alleges, as her statement of facts, Affirmative Defense No. 2 and 5 as stated above.

3. Defendant contends that the Plaintiffs have no right to pursue this foreclosure because the Plaintiffs have failed to first provide the defendant with the special troubled home loan servicing of this FHA insured residential mortgage in accordance with the terms of the note and mortgage and the applicable federal regulations at 24 C.F.R. Part 203 Subpart C prior to filing this foreclosure action.

4. Defendant contends that she has a right to receive forbearance, mortgage modification, and other foreclosure prevention loan services from the Plaintiffs pursuant to and in accordance with the federal regulations before the commencement or initiation of this foreclosure action.

5. Defendant is in doubt as to her rights and status as a borrower under the National Housing Act and the above described federal regulations made applicable to and incorporated in the subject mortgage as a result of the Plaintiffs' failure to service

the subject loan pursuant to the contract and the applicable federal law and because the Defendant is now being subjected to this foreclosure action, all of which the Defendant contends are illegal acts and omissions of Plaintiffs.

6. Defendant is being denied and deprived by Plaintiffs of her right to access the special troubled mortgage servicing required under the federal statute and regulations and the subject note and mortgage. Defendant is being illegally subjected to this foreclosure action, being forced to defend same, being charged illegal and predatory court costs and related fees and attorney fees, and is having her credit slandered and negatively affected, all of which constitute irreparable harm to this Defendant for the purpose of injunctive relief.

7. As a proximate result of the Plaintiff's unlawful actions, Defendant continues to suffer the irreparable harm described above for which monetary compensation is inadequate.

8. Defendant has a right to access the special troubled home loan servicing prescribed by the federal regulations and the contract which is being denied by the Plaintiffs.

9. There is a substantial likelihood that Defendant will prevail on the merits of her counterclaim.

WHEREFORE, Defendant requests the Court dismiss the Plaintiffs' second amended Complaint with prejudice, enter a judgment pursuant to Fla. Stat. 86 declaring that the Plaintiffs provide Defendant with access to the special servicing provided in the applicable federal regulations and required by the contract and enjoining the Plaintiffs from charging foreclosure fees and costs and from commencing or pursuing this foreclosure until such servicing is provided and for all other relief to which this Defendant proves herself entitled including an award of reasonable attorney's fees and costs in this action.

Count II - Consumer Collections Act Violation

Defendant reasserts and alleges, as her statement of facts, Affirmative Defense No. 2 and 5 as stated above.

10. Defendant is a consumer and the obligation between the parties which is the debt owed pursuant to the subject note and mortgage is a consumer debt as defined in Fla. Stat. Section 559.55(1).

11. Fla. Stat. Section 559.72(9) provides: Prohibited Practices generally:
In collecting consumer debts, no person shall:
(9) claim, attempt, or threaten to enforce a debt
when such person knows that the debt is not legitimate
or assert the existence of some other legal right when such
person knows that the right does not exist.

12. Plaintiffs engaged and continues to engage in consumer collection conduct which violates Fla. Stat. Section 559.72(g) in the following and other particulars:

a. Plaintiffs continue to enforce this debt and pursue this foreclosure action even though the Plaintiffs know that no such right exists and this foreclosure action is threatening and premature because the Plaintiffs have not serviced this federally insured home loan pursuant to or in compliance with the special foreclosure prevention loan servicing federal regulations.

b. The Plaintiffs continue to claim, attempt, and threaten to enforce this debt through acceleration and foreclosure when the Plaintiffs know that such conduct is premature and in bad faith because such right does not yet exist as Plaintiffs have failed to meet the contractual and statutory conditions precedent to asserting their right to collect this home loan debt through foreclosure contained in the subject mortgage and in 12 U.S.C. 1710(a) and 24 C.F.R. Part 203 Subpart C.

13. Defendant, as a proximate result of Plaintiffs' acts and conduct described above, has sustained economic damage for which the Defendant is entitled to compensation from the Plaintiffs pursuant to Fla. Stat. Section 559.77.

WHEREFORE, Defendant requests this Court dismiss the Plaintiffs' second amended complaint with prejudice and award this Defendant actual or statutory damages, whichever is greater, attorney's fees and costs, and for all other relief to which this Court finds Defendant entitled.

COUNT III: Breach of Fiduciary Duty

Defendant asserts and alleges her second and fifth affirmative defenses and paragraph 12 of her counterclaims set forth hereinabove as her Statement of Facts herein.

14. Plaintiffs owed Defendant a fiduciary duty and obligation under the subject note and mortgage to, among other things, act in good faith and in the best interest of Defendant by providing the defendant with the special troubled home loan servicing of this FHA insured residential mortgage in accordance with the terms of the note and mortgage and the applicable federal regulations at 24 C.F.R. Part 203 Subpart C prior to filing this foreclosure action.

15. Plaintiffs failed, refused and/or neglected to carry out their fiduciary obligations owed to Defendant in connection with the servicing of the subject federally insured home loan.

16. As a result of the plaintiffs' breach of fiduciary duty, Defendant has sustained monetary damage which includes having to defend this foreclosure and being charged illegal and predatory servicing charges, court costs and related fees and attorney's fees, having her credit slandered and negatively affected.

WHEREFORE, Defendant requests this Court dismiss the Plaintiffs' second amended complaint with prejudice and award this defendant judgment against the plaintiffs for her damages, for an award of attorney's fees and for all other relief as the Court deems proper.

COUNT IV: Breach of Obligations of Good Faith and Fair Dealing

Defendant asserts and alleges her second and fifth affirmative defense and paragraph 12 of her counterclaims set forth hereinabove as her Statement of Facts herein.

17. Plaintiffs owe defendant a duty implied in the note and mortgage to act in good faith and to deal fairly with defendant by providing the defendant with the special troubled home loan servicing of this FHA insured residential mortgage in accordance with the terms of the note and mortgage and the applicable federal regulations at 24 C.F.R. Part 203 Subpart C prior to filing this foreclosure action.

18. Plaintiffs materially breached their duties of good faith and fair dealing as described hereinabove proximately resulting in damage to defendant as described hereinabove.

WHEREFORE, Defendant requests this Court dismiss the Plaintiffs' second amended complaint with prejudice and award this defendant judgment against the plaintiffs for her damages, for an award of attorney's fees and for all other relief as the Court deems proper.

COUNT V: Breach of Contract

Defendant asserts and alleges her second and fifth affirmative defense and paragraph 12 of her counterclaims set forth hereinabove as her Statement of Facts herein.

WHEREFORE, Defendant requests this Court dismiss the Plaintiffs' second amended complaint with prejudice and award this defendant judgment against the plaintiff for her damages, for an award of attorney's fees and for all other relief as the Court deems proper.

DEMAND FOR TRIAL BY JURY

Defendant hereby demands trial by jury.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
THE BANK OF NEW YORK, NOT FINAL UNTIL TIME EXPIRES TO
acting solely in its capacity as FILE MOTION FOR REHEARING AND
trustee for EQUICREDIT DISPOSITION THEREOF IF FILED.
CORPORATION TRUST 2001-2,
Appellant,
v. CASE NO.: 1D07-2626
PAULETTE WILLIAMS, et al.,
Appellees.

_____ /

DEFENDANT'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1: All documents in Plaintiff's possession or available to Plaintiff that establish the plaintiff's standing to bring this foreclosure action, including but not limited to:

A. Copies of all contracts, documents, agreements and other disclosure forms, written communications, notes, memoranda and records concerning the note and mortgage that are the subject of this action, including attorney fee contracts.

B. Copies of all receipts for payments made by or to and/or received by the plaintiff concerning the note and mortgage that are the subject of this foreclosure action.

REQUEST NO. 2: All documents in Plaintiff's possession or available to Plaintiff that establish that the plaintiff is the legal, beneficial or equitable owner of the promissory note that is the subject of this foreclosure action.

REQUEST NO. 3: All documents in Plaintiff's possession or available to Plaintiff that establish the plaintiff is the servicer of the loan that is the subject of this foreclosure action.

REQUEST NO. 4: All documents in Plaintiff's possession or available to Plaintiff that identify what entity or entities are the beneficial owner of the subject promissory note that is the subject of this foreclosure action.

REQUEST NO. 5: Copies of any communications and/or documents evidencing instructions and/or directions that the Plaintiff has received concerning the filing of this foreclosure action.

REQUEST NO. 6: Copies of all internal memoranda, instructional or operational memoranda, training materials and any other materials or documents created or distributed by Plaintiff and/or in the plaintiff's possession relating to the filing of the subject foreclosure action by the Plaintiff.

REQUEST NO. 7: Copies of any other communication, notice, records, notes, internal memoranda, or other documents relating to the filing of this foreclosure action by the Plaintiff.

REQUEST NO. 8: All contracts between you and any person or entity responsible for servicing the Mortgage and/or the Note.

REQUEST NO. 9: All documents in Plaintiff's possession or available to Plaintiff that establish what entity, if not the plaintiff, that is the servicer of the loan that is the subject of this foreclosure action.

INTEROGATORY NO. 1. State the name and address of all parties answering or assisting in providing answers to these interrogatories.

INTEROGATORY NO. 2. Please state whether you claim to possess legal or beneficial interest, or both interests, in the note or mortgage or both the note and mortgage, and if so, explain why you so claim identifying any document(s) and clauses therein which gives you the interest(s) you claim and specifying whether you claim rights as an owner or holder of the note or both, and specifying any other rights claimed. If you do not claim any such interest(s) or rights please explain why you do not claim such interest(s).

INTEROGATORY NO. 3. Please state whether you claim to possess the authority or power to file and pursue foreclosure of this note or mortgage or both, and if so, explain why you so claim identifying any document(s) and clauses therein which gives you the authority or power you claim. If you do not claim any such authority or power please explain why you do not claim such authority or power.

INTEROGATORY NO. 4. Please state from what person or entity (“assignor”) you took assignment of the note and/or mortgage specifying the contact name, full legal name, address, and phone number of the assignor together with the date you took assignment, and state the same information for any person or entity to which the Loan was ever assigned.

INTEROGATORY NO. 5. Please state the date, amount and nature of and fully describe the consideration or value given in exchange for each and every assignment of the note and/or mortgage and identify from and to what person or entity such consideration or value was given providing the contact name, full legal name, address, and phone number of each such person or entity.

INTEROGATORY NO. 6. Please state all parties that took assignment of the note and/or mortgage between the making of same and your taking assignment of same and provide the contact name, full legal name, address, and phone number of each such party.

INTEROGATORY NO. 7. Please state whether between the time of making the Loan and the time of your taking assignment of the note and/or mortgage the original lender maintained ownership of the Loan.

INTEROGATORY NO. 8. Please state whether and on what date the plaintiff owned the note and/or mortgage, took assignment of the note and/or mortgage, made an assignment of the note and/or mortgage, or had any interest in the note and/or mortgage and specify the nature of the interest had on that date.

INTEROGATORY NO. 9. Please state if the note and/or mortgage was ever subject to or included in a “mortgage loan purchase agreement” or similar agreement and if so, please specify the name to the agreement, the date of the agreement and any amendments, and the parties to the agreement.

INTEROGATORY NO. 10. Please state whether the note and/or mortgage was ever repurchased or reassigned from the buyer or assignee back to the original seller or assignor or to any predecessor of the buyer or assignee and if so state the dates of such and the parties involved.

INTEROGATORY NO. 11. Please explain and describe, for the subject mortgage loan, the relationships among parties (including you, the original lender, any servicer, any custodian, any depository, any Special Purpose Vehicle or Special Purpose Entity etc. etc.), the structure of the securities offered (including the flow of funds or any subordination features) and any other material features of any transaction concerning the sale, transfer or assignment of the mortgage loan at any time between the making of same and your filing of the action at issue herein.

INTEROGATORY NO. 12. Please identify each and every document which contains an obligation or option to repurchase the subject mortgage loan and explain fully the terms, conditions, costs to be incurred or paid by each party upon

repurchase and whether and by whom, and from whom, the mortgage loan were ever repurchased.

INTEROGATORY NO. 13. Please state, for the note and mortgage, whether and as of what date you secured the originals thereof and from whom providing the contact name, full legal name, address, and phone number of each such party.

INTEROGATORY NO. 14. Please identify each and every document you obtained or reviewed in connection with your taking assignment of the note and/or mortgage and specify for each such document whether you maintain the original or a copy thereof.

INTEROGATORY NO. 15. Please state all parties who have provided servicing of the mortgage loan and provide the contact name, full legal name, address, and phone number of each such party and the dates each began servicing the Loan.

INTEROGATORY NO. 16. Please state for the history of the mortgage loan, the persons or entity who at any time collected mortgage payments specifying the applicable dates each such person or entity did so collect and specifying the full legal name, address, and phone number of each such party.

INTEROGATORY NO. 17. Please state for the history of the mortgage loan, on whose behalf mortgage payments were collected specifying the applicable dates collection was made for each such person or entity and specifying the full legal name, address, and phone number of each such party.

INTEROGATORY NO. 18. Please state for the history of the mortgage loan, a full description of the disposition of collected mortgage payments specifying any person or entity to which mortgage payments were delivered, transferred, or paid, the applicable dates each such person or entity received the payments and further specify the full legal name, address, and phone number of each such party.

INTEROGATORY NO. 19. Please identify a representative of Plaintiff with knowledge of the facts necessary to respond to each of the interrogatories contained herein or if more than one, identify each such representative providing the name, address and telephone number for each with a brief summary of each representative's knowledge in this matter.

Dear Ms. Foreclosure Lawyer:

This firm represents Ms. M in the above referenced matter. Please be advised that Ms. M disputes the amount of this debt because of miscellaneous charges added to the payoff figures. On her behalf I request verification of the debt per the Fair Debt Collection Practices Act including a written itemized transaction account history.

Should you have any questions or concerns, I can be reached at. Sincerely,

Dear Ms. Foreclosure Lawyer:

I am in receipt of your notice of filing of November 21, 200 of Plaintiff's Proof of Debt pursuant to the FDCPA. Your notice of filing fails to meet the obligations of the plaintiff under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §1692g in responding to the demand for verification of the amount of the subject consumer debt which the defendant disputes. As the plaintiff has not yet complied with the FDCPA, the plaintiff is obligated to cease all collection efforts until complete verification of the disputed amount of the debt is provided pursuant to 15 U.S.C. 1692g(a)(4) & (b).

In support of the defendant's position that the plaintiff is obligated under the Act to provide a complete and itemized loan transaction history, please consider that the House Report issued at the time of the passage of this part of the Act specified that the verification requirements are satisfied if: "the debt collector obtained from the creditor a statement which includes an itemization of the amount of the debt, and the name of the creditor, a statement that the debt has not been paid, and a statement that the creditor (to whom the debt was originally owed), in consideration of the consumer's debt, had either delivered a merchantable product or properly rendered a service." H.R. Rep. No. 131, 95th Cong., 1st Sess. 5 (1977).

In Graziano v. Harrison, 763 F.Supp.1269, 1281 (Dist. Ct. N.J. 1990) the court accepted computerized printouts instead of "hard copies" of past billing information as sufficient for verification of the debt because "hard copies" were no longer kept by creditors, finding that the "type of computer printouts supplied by [the bill collector] as verifications are routinely accepted by insurers to verify claims and are accepted by them as the basis for making payments." The Third Circuit Court of Appeals upheld the District Court's reasoning holding that computerized printouts provided to the consumer were sufficient to verify the debts because they provided the consumer with " [1] amounts of his debts, [2] the services provided, and [3] the dates on which the debts were incurred." Graziano v. Harrison, 950 F.2d 107, 113 (3d Cir.1991).

In Chaudhry v. Gallerizzo, 174 F.3d 394, 406 (4th Cir.1999), the fourth circuit held that a copy of the bank's computerized summary of the Chaudhry's loan transactions, which included: "[1] a running account of the debt amount, [2] a description of every transaction, and [3] the date on which the transaction occurred" was sufficient to satisfy the §1692g verification requirement.

In Clark v. Capital Credit and Collection Servs., Inc., 460 F.3d 1162, 1173-74 (9th Cir. Aug. 24, 2006), the ninth circuit adopted the fourth circuit's ruling in Chaudhry and held that an itemized statement provided to the consumer was sufficient to fulfill the creditor's §1692g verification requirement.

Likewise, in Stonehart v. Rosenthal, 2001 U.S. Dist. Lexis 11566 (S.D.N.Y.) the district court held that a computer printout sent by a bill collector satisfied the §1692g verification requirement because it contained (1) the services provided, (2) the dates the charges were incurred, and (3) the amount of the debts., citing to the third circuit's decision in Graziano in support of its opinion.

In Recker v. Central Collection Bureau, Inc., 2005 U.S. Dist. Lexis 24780 (S.D.IND.), the district court held that a copy of the executed contract, along with computerized printouts can be sufficient verification if they "inform the [p]laintiff of the debt amount, the services provided, and the dates the debts were incurred."). The court determined that the computer printout that was provided listed the total amount of the

debt as well as itemized totals of the principal, interest, and court costs and that this level of verification of the debt was acceptable under the Act.

The defendant is entitled to a complete itemized transaction history under the federal statute. The defendant is unable to resolve the dispute as to the balance claimed due by the plaintiff without the life of loan history. Recently, Judge Cole denied the plaintiff's motion for a protective order in another foreclosure action finding in favor of the defendant's entitlement to obtain a complete loan history in discovery where the amount of the debt as alleged by the plaintiff was in dispute.

Please advise when I can anticipate receiving the complete and itemized loan history as demanded by the defendant pursuant to the Fair Debt Collection Practices Act. Sincerely,

STANDING/FRAUD ON THE COURT:

The Ohio federal cases: In Re Foreclosure Cases, Case No. 1:07-CV-2282, et al., U.S. Dist. Ct., Southern Dist. of Ohio, Eastern Div. (Oct. 31, 2007 Judge Boyko); In Re Foreclosure Cases, Case No. 3:07-CV-043 et al., U.S. Dist. Ct., Southern Dist. of Ohio, Western Div. (Nov. 15, 2007 Judge Rose); In Re Foreclosure Actions, Case No. 1:07-CV-1007, U.S. Dist. Ct., Northern Dist. of Ohio, Eastern Div. (Nov. 14, 2007 Judge O'Malley); Deutsche Bank Natl. Trust Co. v. McCarthy, Case No. 1:07-CV-3071, U.S. Dist. Ct., Northern Dist. of Ohio, Eastern Div. (Oct. 30, 2007 Judge Dowd, Jr.); In Re Foreclosure Cases, Case No. 07-CV-166, et al., U.S. Dist. Ct., Southern Dist. of Ohio, Eastern Div. (Dec. 27, 2007 Judge Holschuh); Deutsche Bank National Trust Co. v. Flachbart, Case No. 1:07-CV-2559, U.S. Dist. Ct., Northern Dist. of Ohio (Nov. 29, 2007 Judge Gwin).

The Ohio state court decisions: Winafeld v. Mainsource Bank, 2007-Ohio-6117 (5th Appellate Dist. 2007)(affirming sanctions against plaintiff for filing foreclosure complaint without standing); Wells Fargo Bank, NA v. Byrd, Case No. A0700643 (CCP Hamilton Co. Dec. 12, 2007)(dismissing complaint and requiring counsel to file documentation showing that their client is the real party in interest in all future cases filed by plaintiff's counsel); Manufacturer's Trader's Trust v. White, Case No. 02CV-7179 (CCP Franklin Co. April 17, 2003)(denying plaintiff's motion for summary judgment and dismissing complaint); Wells Fargo Bank v. Heiskell, Case No. 02CVE-10-11149 (CCP Franklin Co. Jan. 28, 2003)(same).

Cases in other jurisdictions: holding that the plaintiff in a foreclosure action must have standing at the very date the foreclosure action is commenced. The concept of relation back does not apply to standing. *E.g.* Progressive Express Ins. Co. v. McGrath Community Chiropractic, 913 S.2d 1281 (Fla. 2nd DCA 2005); In Re Maisel, 2007 WL 4029094 (Bankr.D.Mass. Nov. 15, 2007)(financial institution did not have standing where, at the time motion was filed, it had not yet obtained assignment from original mortgage lender).

In re Stewart, Not Reported, (Bkrtcy E.D. La 2008)

The court may award monetary damages due to

- 1) abusive imposition of unwarranted fees and charges (late fees, inspection costs)
- 2) illegal imposition of fees disguised as costs (BPO charges)
- 3) negligent imposition of fees, costs not due (legal charges, deposit reimbursed)
- 4) the improper calculation of escrow payments
- 5) the misapplication of payments contrary to the terms of the Note and Mortgage
- 6) the failure to notify Debtor of fees and charges on the account
- 7) the improper payment of unnoticed fees and charge during pending bankruptcies

The court ordered sanctions

- 1) for presenting a consent adequate protection order to the court which did not reflect the agreement between the parties
- 2) for filing erroneous proof of claim and misrepresenting the costs
- 3) to offset the debtors attorneys fees

The court ordered

- 1) wells fargo (bank) to file an amended proof of claim in accordance with the findings in the Opinion
- 2) Wells Fargo (bank) conduct an audit of all proofs of claim filed on its behalf in this District for cases still pending and provide a complete loan history on every accounting
- 3) The loan histories shall be filed into the claims register
- 4) Proof of claims already filed must comply with the principle in Jones or be amended
- 5) Wells Fargo (bank) is to deliver to Debtor, Debtors counsel and trustee copy of accounting

from the court's order:

"In order to rectify this problem in the future, the Court orders Wells Fargo to audit every proof of claim it has filed in this District in any case pending on or filed after April 13, 2007, and to provide a complete loan history on every account. For every debtor with a case still pending in the District, the loan histories shall be filed into the claims register and Wells Fargo is ordered to amend, where necessary, the proofs of claim already on file to comply with the principles established in this case and Jones. For closed cases, Wells Fargo is ordered to deliver to Debtor, Debtor's counsel and Trustee a copy of the accounting.

The Court will enter an administrative order for the review of these accountings and proofs of claim. The Court reserves the right, if warranted after an initial review of the accountings, proofs of claim and any amended claims filed of record, to appoint experts, at Wells Fargo's expense, to review each accounting and submit recommendations to the Court for further adjustments based on the principles set forth in this Memorandum Opinion and Jones."

New Orleans, La, April 10, 2008. Hon. Elizabeth W. Magner U.S. Bankruptcy Judge

Schuessler v Chase Home Finance LLC, Bk.SDNY, April 10, 2008

FORECLOSURE AND FORFEITURE

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FORECLOSURE AND FORFEITURE

INTRODUCTION

In Iowa, real property is generally bought by borrowing the money for the purchase and giving the lender a mortgage which secures a promissory note. Under common law, a mortgage was considered a conditional conveyance of land. *Mitchell v. Burnham*, 44 Me. 299. However, in many states in modern times, it is considered to be a lien only. This is the case in Iowa. *Fitzgerald v. Flannagan*, 125 N.W. 995 (Iowa 1910).

On the other hand, a deed of trust or trust deed is a conveyance of the legal title of property which is owned by the obligor to one who holds it in trust to secure the repayment of a sum of money or the performance of some other obligation. *Blacks Law Dictionary* at page 503 (Rev. 4th Ed. West Pub. Co. 1968). In Iowa, this instrument is considered to be a mortgage as long as the intent is to create a lien on the real property and it must also be foreclosed. Iowa Code §654.2.

When an obligor defaults upon an obligation secured by a mortgage or deed of trust, the mortgagee initiates a foreclosure suit which is a judicial proceeding "for the legal determination of the existence of a lien, ascertainment of its extent, and subjection to sale of the real estate pledged for its satisfaction . . ." *Blacks Law Dictionary*, at page 775.

"Foreclosure is exclusively a statutory remedy and the statute must be strictly followed." *Silver v. Whitfield Farms*, 209 Iowa 856, 227 N.W. 97 (1929). Federal agencies such as HUD, FmHA, and the VA, often make or insure home mortgage loans. Whether state law continues to apply, or whether federal laws or federal common law applies, is beyond the scope of this study.

There are essentially three stages in foreclosure cases. The first stage is the period of time beginning on the date the borrower first makes contact with the lender about obtaining a mortgage loan, up to the time the foreclosure petition is filed. The second stage is from the filing of the Petition to the entry of judgment of foreclosure. The last stage is the period of time from entry of the judgment to the time when the interest of the obligor in the property is finally terminated. The following outline is organized under 3 sections that correspond to these stages. Section IV deals with the related topic, contract forfeitures.

I. CREATION OF INTEREST TO FILING OF PETITION

A. Creating the Interest

Mortgages, or interests that must be foreclosed, are created in a number of ways. This outline will be dealing generally with the situation where an individual has borrowed money to purchase real property and has given a mortgage to secure a promissory note.

Since a mortgage is given as security for an obligation, it is part of the consideration supporting a contract. Therefore contract defenses apply if the obligee undertakes to foreclose the mortgage. Reviewing the events leading up to the giving of the mortgage, or of the conversations about the default, can sometimes lead to the discovery that there were circumstances involved which will give rise to a defense to foreclosure. *Griswold State Bank v. Milne*, 416 N.W.2d 109 (Iowa App. 1987); *Peoples Bank & Trust Co. of Cedar Rapids v. Lala*, 392 N.W.2d 179 (Iowa App. 1986); *Citizens State Bank v.*

Wilde, 512 N.W.2d 799 (Iowa App. 1993); See discussion on defenses, *infra*.

Iowa Code §654.12B gives a purchase money mortgage seniority and priority over "preexisting judgments against the purchaser and any other right, title, interest or lien arising either directly or indirectly by, through or under the purchaser." The section also defines a purchase money mortgage. *Maquoketa State Bank v. Hayes (In re Hayes Bankruptcy)*, 220 B.R. 57 (N.D. Iowa 1998)

B. Default

Default is a failure to perform under the terms of the mortgage or promissory note. Most commonly, the default will consist of a failure to repay a monetary obligation. But it may be that the default consists of a breach of some other covenant.

1. Due on Sale Clause

Some mortgages contain a provision which prohibits a conveyance of the property to a third party. This is called a due on sale clause. Consequently, a sale of the property is a default which can trigger acceleration and foreclosure.

2. Other Defaults

a. Notice and Right to Cure

Prior to 1987 legislation, it was unnecessary for the mortgagee to give any notice of default whatsoever to the mortgagor before filing a foreclosure action. *Collins v. Nagel*, 200 Iowa 562, 203 N.W. 702 (1925). Since 1987, however, foreclosure in Iowa cannot be started until after the creditor has given the borrower notice of the default and a notice that there is a right to cure the default.

b. Agricultural Property

Where agricultural land is involved, the notice requirements are found in Iowa Code §654.2A. The borrower has 45 days to cure the default, but no notice of right to cure must be given if the lender has given a proper notice of a right to cure on two prior occasions, or if a proper notice has been given with regard to a prior default within 12 months prior to the current alleged default. Iowa Code §654.2A(3).

c. Mediation

If the agricultural property is subject to a debt of \$20,000 or more, no action to foreclose may be initiated until after the creditor has obtained a mediation release pursuant to Iowa Code §654.2C, or unless a court determines after notice and hearing that the delay required for mediation would cause the lender irreparable harm.

A question that had been of interest was whether the creditor must mediate in good faith. Decisions rendered in *Travelers Insurance Co. v. Tritsch*, 438 N.W.2d 863 (Iowa App. 1989) and *Graham v. Baker*, 447 N.W.2d 397 (Iowa 1989) indicate that attending the mediation session is all that is required. These cases were overruled by an amendment to Iowa Code § 654A.11(3)(b) which requires that the creditor must "personally attend and participate in all mediation meetings". Further note that "Title to . . . agricultural property is not affected by failure of any creditor to receive a mediation release, regardless of its validity." Iowa Code §654.2C. NOTE: Recent legislation added Iowa Code §654.2D (10) defining "creditor" to include a person acting on behalf of a creditor.

d. Non-Agricultural Property

For non-agricultural property, the borrower has only 30 days to cure the alleged default and the right to cure is not available if the creditor has given a proper notice of right to cure for a prior default occurring within 365 days of the present alleged default. Iowa Code §654.2D(7). Further, there is no notice that must be given if the creditor is an individual or individuals, or if the mortgaged property is other than a one-family or two-family dwelling used as a residence by the mortgagor. Iowa Code §654.2D(8).

e. Requirements of the Notice

Generally the notices required under Iowa Code §§654.2A and 654.2D must conform to the language in Iowa Code §654.2B: The notice of right to cure shall be in writing and shall conspicuously state the name, address, and telephone number of the creditor to which payment is to be made, a brief identification of the obligation secured by the deed of trust or mortgage and of the borrower's right to cure the default, a statement of the nature of the right to cure the default, a statement of the nature of the alleged default, a statement of the total payment, including an itemization of any delinquency or deferral charges, or other performance necessary to cure the alleged default, and the exact date by which the amount must be paid or performance tendered and a statement that if the borrower does not cure the alleged default, the creditor is entitled to initiate a foreclosure action or procedure.

3. Governmentally Made Loans or Insured Loans

Often a mortgage has been given to a governmental agency or is insured by such an agency. In the case of farm real estate, it is usually the Farmers Home Administration (FmHA), now known as Rural Housing and Community Development Service (RHCDS). But FmHA also has a program to loan money to nonfarm borrowers under a rural home loan program. Other agencies such as HUD (FHA) and the Veterans Administration (VA) also insure mortgages made by private lenders. The lenders are governed by a host of federal regulations. The State of Iowa, through the Iowa Finance Authority (IFA) both makes and insures home loans. Such loans are also regulated in addition to the requirements of Chapter 654. The nature of those additional requirements is beyond the scope of this article.

Many times, government agencies delay for quite some time between accelerating the loan after default and instituting foreclosure proceedings. Under 28 U.S.C. 2415 (a), government agencies are barred after six years from seeking money judgements. However, in a case, not binding in the Eighth Circuit, the Eleventh Circuit Court of Appeals indicated this is no bar to foreclosure which is an action in rem. *United States v. Alvarado*, 5 F. 3d 1425 (11th Cir.1993).

4. Consumer Credit

It is not unusual to encounter a situation where a mortgage has been given to secure payment of a consumer credit transaction. While obviated in most cases by Iowa Code §654.2D, it is still worth noting that Iowa Code §537.5110 also requires a borrower be given 20 days written notice of a right to cure any default prior to an action on the part of the lender to collect a debt. This may be important in cases where no right to cure is otherwise required under §654.2D because of previous defaults.

5. Status After the Default is Cured

If the borrower or mortgagor is able to cure the default within the time allowed, the rights of the borrower under the mortgage are restored except as noted above with regard to Iowa Code §§654.2A(3) and 654.2D(7).

C. Acceleration

The event of a default does not automatically accelerate the due date of the note, but merely gives the mortgagee the right to do so. *Federal Land Bank v. Willmarth*, 218 Iowa 339, 252 N.W.2d 507, 94 ALR 1338 (1934). The mortgage instrument must allow acceleration. *McKee v. Stewart*, 211 Iowa 1185, 235 N.W.2d 286 (1931). Since foreclosure is an equitable proceeding, not every default may be considered egregious enough to support acceleration. *Beason v. Johnson*, 194 Iowa 1100, 191 N.W. 311 (1922). Generally, the default must be the type of default contemplated by the mortgage. *Martin v. Peoples Mutual Savings & Loan Association*, 319 N.W.2d 220 (Iowa 1982). Further, it must be clear that the lender has accelerated the balance of the indebtedness. *McKee*, *supra*.

D. Alternatives to Judicial Foreclosure

1. Deed in Lieu of Foreclosure

It may happen that the best result for the borrower may be achieved by a voluntary relinquishment of the borrower's rights to the property. Typically, the borrower will "trade" the property to the mortgage holder in return for a cancellation of any remaining debt. This transaction, known as a deed in lieu of foreclosure, is recognized as acceptable to comply with Iowa Title Standards. See Iowa Title Standard 4.3. However, it must be clear the borrower retains no interest whatsoever in the property. An exception is made in the case of agricultural property actually used for farming. In lieu of a foreclosure action in court due to default on a recorded mortgage or deed of trust of real property, if the subject property is agricultural land used for farming, as defined in Iowa Code §172C.1, the parties may enter into an agreement in which the mortgagor agrees to transfer the agricultural land to the mortgagee in satisfaction of all or part of the mortgage obligation as agreed upon by the parties. The agreement may grant the mortgagor a right to purchase the agricultural land for a period not to exceed 5 years, and may entitle the mortgagor to lease the agricultural land. The agreement shall be recorded with the deed transferring title to the mortgagee. A transfer of title and agreement pursuant to this section does not constitute an equitable mortgage. Iowa Code §654.19.

2. Non-Judicial Foreclosure

One piece of real estate may be subject to several mortgages or liens. A foreclosure action is the usual method by which the foreclosing lien holder establishes its priority vis a vis junior lien holders and extinguishes their interests in the property thereby obtaining a clear title. However, since 1985, Iowa law has provided a method whereby the junior liens may be extinguished even in cases where the borrower is allowed to give the property back to the lender in full satisfaction of the debt. This procedure is set forth in Iowa Code §654.18.

The borrower and lender must enter into a written agreement. The mortgagor must convey the property to the lender and the lender must agree to waive any deficiency or other claim against the property. The parties must file the jointly executed agreement with the recorder in the county where the property is located. The mortgagee sends a notice to the junior lien holders telling them the procedure has been elected and the junior lien holders have 30 days to redeem. The mortgagor, by utilizing this procedure, gives up any right to redeem the property.

The statute also requires the mortgagee to provide the mortgagor with a "Disclosure and Notice of Cancellation" form which is set forth in Iowa Code §654.18(1)(f). The notice sets forth the terms of the agreement as outlined above and provides the mortgagor can cancel the agreement within five business days. The Federal District Court for the Northern District of Iowa, has held the holder of a mechanics

lien not reduced to judgement may not utilize this procedure. The Court did not reach the issue as to what would be the case if the mechanics lien had been reduced to judgement. *Olympus Aluminum Prods. v. Kehm Enters.*, 930 F. Supp. 1295 (S.D.Iowa 1996)

3. Non-Judicial Foreclosure of Non-Agricultural Mortgages, Iowa Code §655A

WARNING: Do not confuse this procedure with the alternative non-judicial voluntary foreclosure proceeding at Iowa Code §654.18. Time is of the essence if your client is involved in a proceeding under this chapter. An amendment in 2006 attempted to remove from this process one and two family dwellings which at the time of the initiation of the foreclosure were occupied by equitable titleholders. Iowa Code §655A.9. The extent of this change is in dispute but should be argued to apply to contract purchasers as well as mortgagors.

This procedure allows a mortgage holder to effectuate a foreclosure in 30 days - start to finish - without going to court. The mortgagee must serve a notice on the mortgagor, person in possession, and junior lien holders which reasonably identifies the mortgage and accurately describes the real estate covered. It must specify the terms of the mortgage with which the mortgagor has not complied. The term shall not include any obligation which arose from an acceleration of the indebtedness secured by the mortgage. The notice shall also contain the following language:

Within thirty days after your receipt of this notice, you must either cure the defaults described in this notice or file with the recorder of the county where the mortgaged property is located, a rejection of this notice and serve a copy of your rejection on the mortgagee in the manner provided by the rules of civil procedure for service of original notices. If you wish to reject this notice you should consult an attorney as to the proper manner to make the rejection.

If you do not take either of the actions described above within the thirty day period, the foreclosure will be complete and you will lose title to the mortgaged property. After the foreclosure is complete, the debt secured by the mortgaged property will be extinguished.

Iowa Code §655A.3(2).

If the mortgagor or a junior lien holder performs within 30 days of completed service of notice then the right to foreclose for that breach is terminated.

If within 30 days a rejection of the notice which reasonably identifies the notice which is being rejected together with a proof of service that the rejection has been served on the mortgagee is filed with the recorder, the notice served pursuant to Iowa Code §655A.3 upon the mortgagor is of no force or effect. Iowa Code §655A.6.

However, if the terms and conditions as to which there is default are not performed within the 30 days, the party serving the notice shall file for record in the office of the county recorder a copy of the notice with proofs of service attached or endorsed or (in case of service by publication) a personal affidavit that personal service could not be made within the state. When those documents are filed and recorded the record is constructive notice to all parties of the foreclosure of the mortgage. Iowa Code §655A.7. Upon completion of the filings required under Iowa Code §655A.7, and if no rejection of the notice has been filed, then without further act or deed: (1) the mortgagee acquires and succeeds to all interest of the mortgagor in the real estate, (2) all liens which are inferior to the lien of the foreclosed mortgage are extinguished; and (3) the indebtedness secured by the foreclosed mortgage is extinguished. NOTE: It has been held the lender has no obligation to obtain service under I.R.C.P 1.305 even if the lender knows one of the borrowers is incompetent. *Putensen v. Hawkeye Bank*, 564

N.W.2d 404 (Iowa 1997)

NOTE: Since redemption is a statutory right under Chapter 628 and is triggered by execution sale, no redemption rights accrue under this procedure.

This procedure does not apply to real estate used for an agricultural purpose as defined in Iowa Code §535.13.

An amendment in 2006 attempted to remove from this process one or two family dwellings which at the time of the initiation of the foreclosure were occupied by the buyers. Iowa Code §655A.9. The extent of this change may be disputed but it should be argued to apply to all equitable titleholders, both mortgagors and buyers on contract.

II. FILING OF THE PETITION TO ENTRY OF JUDGMENT

A. Petition

The Petition should accurately describe the real estate and name as defendants all parties whose interests the foreclosing party wants to extinguish. If the parties are not named, their interests are not affected. *Chase v. Abbott*, 20 Iowa 154 (1866). The Petition must contain statements sufficient to make out a cause of action. These would be: the contract, the breach by the mortgagee, that the mortgagor is damaged, etc. The Petition should probably also state that the mortgage provides for acceleration and that the mortgagor has elected to foreclose. See *McKee*, 211 Iowa 1185, 235 N.W. 286 (1931); Section I.C., *supra*, p. 6-58.

The Petition must be filed in: "the county in which the property to be affected, or some part thereof, is situated." Iowa Code §654.3.

NOTE: The mortgagee may elect to sue on the note itself and not foreclose the mortgage. If the mortgagee brings a separate suit on the note at the same time as a foreclosure suit is pending, one or the other must be dismissed. Iowa Code §654.4; *Northwestern National Bank of Sioux City v. Verschoor*, 230 N.W.2d 505 (1975). In *Federal Land Bank v. Faught Brothers*, 468 N.W.2d 793 (Iowa 1991), the court held that a creditor who obtained a judgment in rem could not obtain an execution to satisfy a deficiency owing to the election of remedies principal where a separate suit on the note had been brought but dismissed.

1. Foreclosure Without Redemption

Besides the usual foreclosure proceeding, there is also a newer procedure under Iowa law whereby the mortgagor can seek foreclosure without redemption. Iowa Code §654.20. The election is only effective if the first page of the Petition contains a statutorily prescribed notice in capital letters of the same type or print size as the rest of the Petition. The notice must explain that the mortgagee has elected foreclosure without redemption and further explain the sale of the property will occur promptly after entry of judgment unless the mortgagee files a document called a "demand for delay of sale." *West Des Moines State Bank v. Pameco, Inc.*, 501 N.W. 2d 555 (Iowa App. 1993).

If the demand is filed, the sale will be delayed for a period of 12 months from the date of judgment unless the Petition includes a waiver of deficiency judgment. If the Petition does include a waiver, the sale will be delayed for only six months. The delay is only two months if the property is not the residence of the mortgagor or if it is the mortgagor's residence, but not a one or two family dwelling. Iowa Code §654.20. CAVEAT: The notice does not explain that the "demand for delay of sale" must

be filed before judgment is entered. Iowa Code §654.21.

If the Petition does not include a waiver of deficiency judgment, the notice is to include additional explanations that indicate: "If a demand for delay of sale is made, a deficiency may be entered, and if no demand for delay of sale is made, a deficiency may not be entered." The notice further explains if the property is not the mortgagor's residence or a one or two family dwelling, a deficiency may be entered whether a demand for delay of sale is filed or not.

There has been little litigation as yet with regard to this provision. The Iowa Court of Appeals held that the failure of the Petition to specifically cite the warning required by the statute if plaintiff did not include waiver of deficiency language was a "mere irregularity" because of Iowa Code §654.26. *MorrisPlan of Iowa, Inc. v. Bruner*, 458 N.W.2d 853 (Iowa App. 1990).

B. Answer

As in any lawsuit, one is entitled to challenge the allegations contained in the Petition. One may allege counterclaims, set-offs, affirmative defenses, etc. Foreclosure cases are very amenable to motions for summary judgment by the plaintiff, because it usually is a matter of the mortgagor not having made payments. However, if the defendant is able to assert counterclaims or affirmative defenses supported by affidavits, this will probably generate genuine issues of material fact such that summary judgment will not be appropriate.

As with any lawsuit, all compulsory counterclaims must be raised or be forever barred. I.R.C.P. 1.241.

C. Defenses

It has already been noted the events leading up to the giving of the mortgage may give rise to defenses. See, i.e., *Griswold*, 416 N.W.2d at 109 (fraudulent misrepresentation, lack of consideration); *Lala*, 392 N.W.2d at 179 (lender's failure to disclose mortgage effected termination of homestead exemption rights was a breach of fiduciary duty and the mortgage cannot be foreclosed).

NOTE: The transaction at issue in *Lala* took place prior to the enactment of Iowa Code §561.22. A contract affecting agricultural land as defined in §172C.1 must contain bold faced waiver language. Iowa Code §561.22. *West Des Moines State Bank v. Mills*, 482 N.W.2d 432 (Iowa 1992) held the limitation to agricultural property was valid. ALSO NOTE: Federal forfeiture lawsuit superseded Iowa homestead exemption and thus Defendants' residence was not exempted from forfeiture. *U.S. v. Curtis*, 965 F.2d 610 (8th Cir. 1992).

1. Contract Defenses

Since the mortgage is a contract, all the usual contract defenses are available: lack of consideration or capacity, mutual mistake, accord and satisfaction, etc. *Panama Savings Bank v. Arkfeld*, 228 Iowa 313, 291 N.W. 182 (1940); *DePenning v. Bedell*, 242 Iowa 102, 44 N.W.2d 385 (1950); *Barendregt v. VanDenBrink*, 186 N.W. 449 (Iowa 1922).

2. Equitable Defenses

Since foreclosure is an equitable proceeding, equitable defenses such as waiver, laches, estoppel, and unconscionability may be raised in appropriate cases. *Witmer v. Gibbs*, 234 Iowa 725, 13 N.W.2d 802 (1944); *Merriam v. Leeper*, 192 Iowa 587, 185 N.W. 134 (1921).

It has already been mentioned that where there is a governmental lender or insurer, there may be additional equitable defenses. Programs under which these loans were made or insured are generally programs in place because of public policy decisions at the federal or state level to make funds available to low-income individuals for the purchase of housing. See, e.g., 42 U.S.C. §1441 et. seq. The Iowa Finance Authority has similar programs and will not be discussed at any length separately.

Each of these programs is governed by federal regulation. (Iowa Administrative Code for Iowa Finance Authority). Each program has also developed policy manuals or servicing handbooks which "guide" the lender in handling the loans. It should be observed that in some cases the agency making the loan will hire a servicing agent (servicer) to administer the actual account and do the bookkeeping chores. These servicers are subject to the requirements of the regulations and manuals just as are the lenders and the agencies themselves.

It is very likely, if not probable, that the lender or servicer has not used any of the various available options. Most often, the mortgagor is merely asked to make extra payments to try to catch up. In such cases, it may be possible to make out a reasonable showing that if a specific servicing option had been utilized, foreclosure could have been avoided. The failure of the agency, lender or servicer to offer or most likely, even consider, these options can be asserted as an equitable defense.

It is possible that the court will not be familiar with these programs. In any case, arguments should stress that the purpose of these programs is to further a policy that led to the program through which these clients got their loans. Personalize the client showing the court that the program would have helped in that particular individual's circumstances. Lastly, cite the available precedents that would show the court that other courts have accepted these arguments.

3. Moratorium

Even where there are no readily discoverable defenses, there is a possibility in a limited number of cases that summary judgment can be avoided and the property saved. Where the property is a farm or small business, Iowa law grants the opportunity for owners to gain a continuance of a foreclosure action for a year with the right to seek an extension for an additional year. Iowa Code §654.15(1). The owner must enter an appearance and file an answer which admits there is some indebtedness and that the contract has been breached. These admissions cannot later be denied or withdrawn. The only grounds for the application are that the default has been caused by or is mainly due to drought, flood, heat, hail, storm, or other climatic conditions or infestation of pests. If the court finds the application in good faith, it may grant the continuance. The court must appoint a receiver to take charge of the property and the owner or person in possession shall be given preference in the occupancy of the property and may even be appointed the receiver. Iowa Code §654.15(1)(d).

Since the owner must admit the breach and indebtedness and since the admissions cannot be withdrawn, the decision to apply for the moratorium is generally made only in extremis. The purpose of the act was to "afford mortgagors the opportunity to refinance or pay up indebtedness and save his farm within moratorium period." *Prudential Insurance Co. of America v. Hinton*, 225 Iowa 1008, 282 N.W. 722 (1939). The burden is on the mortgagee to establish the absence of good cause to grant the continuance. *Mudra v. Brown*, 219 Iowa 867, 259 N.W. 773 (1936). The granting of the continuance of foreclosure actions is the rule, and continuance is granted unless good cause is shown to the contrary. *Prudential Insurance Co. of America v. Redmond*, 225 Iowa 166, 279 N.W. 392 (1938).

If, at the end of the continuance, the mortgagor is able to refinance or somehow cure the default by other means, the moratorium has served its purpose. If, however, the foreclosure is entered, the

mortgagor still has redemption rights as discussed below.

D. Receivership and Homestead

During the pendency of a foreclosure action, especially if the property is income producing, the mortgagee will often seek a receiver. Receivers are statutorily regulated by Iowa Code §680.

Under early caselaw, in order to obtain a receiver in a foreclosure action, the mortgagee had to show the mortgage by its terms gave the mortgagee a right of possession before sale or the expiration of the time for redemption, or pledged the rents and revenues accruing from the property. *American Investments Co. v. Farrar*, 87 Iowa 437, 54 N.W. 361 (1893); *Iowa State Bank of Hull v. Rons*, 203 Iowa 15, 212 N.W. 362 (1927). However, it developed over time that a receiver could be appointed, absent a pledge of rents and profits, if the mortgagor was insolvent and it was necessary to preserve the security. *Young v. Stewart*, 201 Iowa 301, 207 N.W. 401 (1926).

Since most mortgages now contain boiler plate language pledging rents and profits etc., defenses to a receivership essentially go to whether there is a likelihood that the security is impaired or endangered. *McBride v. Conley*, 204 Iowa 622, 215 N.W. 16 (1927); *Young v. Stewart*, 201 Iowa 301, 207 N.W. 401. (receiver may be appointed where mortgagor is insolvent).

Where the mortgaged property is a farm or a small business, it is readily seen that a mortgagee might want to take possession to collect rents and profits and make sure the property is well managed. Where the property consists solely of a family home, however, there has always been a conflict between the rights of the borrower and the lender that has generally been resolved in favor of the mortgagor.

The homestead must embrace the house used as a home by the owner, and if the owner has two or more houses thus used, the owner may select which the owner will retain. Iowa Code §561.1. If within a city plat, it must not exceed one half acre in extent, otherwise it must not contain in the aggregate more than 40 acres, but if, in either case, its value is less than \$500, it may be enlarged until it reaches that amount.

The homestead of every person is exempt from judicial sale where there is no special declaration of statute to the contrary. Iowa Code §561.16. Section 561.21 provides: The homestead may be sold to satisfy debts of each of the following classes:

1. Those contracted prior to its acquisition but then only to satisfy a deficiency remaining after exhausting the other property of the debtor, liable to execution.
2. Those created by written contract by persons having the power to convey, expressly stipulating that it shall be liable, but then only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt.

The Supreme Court of Iowa held early on that if the mortgagee was found entitled to a receiver, that receiver could not take possession of the homestead until after all the other property was sold and there remained a deficiency judgment. *Sheakley v. Mechler*, 199 Iowa 1390, 203 N.W. 929 (1925).

III. ENTRY OF JUDGMENT AND AFTERWARD

A. Decree

Iowa Code §654.5 provides:

When a mortgage or deed of trust is foreclosed, the court shall render judgment for the entire amount found to be due, and must direct the mortgaged property, or so much thereof as is necessary, to be sold to satisfy the judgment, with interest and costs. A special execution shall issue accordingly, and the sale under the special execution is subject to redemption as in cases of sale under general execution unless the plaintiff has elected foreclosure without redemption under Iowa Code §654.20.

It should also be noted that the decree establishes the rights of the respective lien holders which affects the consequences to the debtor should there be a redemption. *FLB v. Faught Bros*, 468 N.W. 2d 793 (Iowa 1991) addresses election of remedies issues.

B. Sale of Property

Assuming the plaintiff has succeeded in obtaining a decree of foreclosure, it will then begin to proceed to a sale of the property so that it may recover the amount of the debt. The debtor, until recently, was then faced with a significant dilemma. Iowa Code §628.3 allows the debtor to redeem the real property.

But, under old Iowa Code §628.4, a party who had taken an appeal from the District Court or stayed execution on the judgment was not entitled to redeem. The debtor then had to make a difficult choice between attempting to get the judgment overturned (meaning he'd already lost on the facts and the law in the first instance) or give up the appeal in the hope that over the period of the time for redemption he could acquire enough resources to buy back the property. That dilemma was removed in 1987 and §628.4 no longer applies to appeals. It does, however, apply to other stays of execution. Consequently, even though one can now appeal, if the sale is stopped by the filing of a supersedeas bond, the right of redemption may still be lost.

Many farm debtors may well be able to reacquire their property or save it, through a reorganizational bankruptcy. 11 U.S.C. §1201 et. seq. (family farm reorganization). However, it must be remembered that the filing of a bankruptcy results in an automatic stay. 11 U.S.C. §362. Such a stay triggers the operation of Iowa Code §628.4 and defeats the right of the debtor to redeem. *First National Bank of Glidden v. Matt Bauer Farms, Corp.*, 408 N.W.2d 51 (Iowa 1987). *Metropolitan Life v. DeKlotz*, 437 N.W.2d 925 (Iowa 1989). If it appears that a bankruptcy reorganization is a viable way to save the property, it would seem best to file before the decree is entered or after the sheriff's sale has taken place since it is the staying of the sale (execution) that bars the redemption. Iowa Code §628.4.

It should be noted that even though a right of redemption has been lost because of an improvident bankruptcy filing, it is still possible to regain the right to redeem if the creditor agrees or is careless. *Federal Land Bank of Omaha v. Bollin*, 408 N.W.2d 56 (Iowa 1987). The Supreme Court of Iowa held that a bankruptcy stay did extinguish the rights of the Bollins to redeem, but that the parties by agreement could revive the right of redemption through a stipulated order in bankruptcy court lifting the automatic stay.

1. Sale in Parcels or En Masse

After the sale has been scheduled, there are still strategies that, in some cases, may allow the mortgagor to salvage something. It was discussed under the section on receivers that the homestead is generally exempt and may be set off from the rest of the parcel. Failure to do so does not render the homestead liable if it would otherwise not be. Iowa Code §561.4. If it has not been set off at the time of

the levy, "the officer having the execution shall give notice in writing to the owner or owners, if found in the county, to plat and record the same within ten days after service; after which time the officer shall cause the homestead to be platted and recorded and the expense shall be added to the costs in the case." Iowa Code §561.5. Section 526.84 provides:

At any time before 9:00 a.m. on the day of the sale, the debtor may deliver to the officer a plan of division of the land and, in that case, the officer shall sell according to the plan. If no such plan is furnished, the officer may sell without any division.

In some cases, it will clearly be to the advantage of the mortgagor to have the property sold in parcels rather than en masse. This is one way in which it may be possible to save at least the homestead. If there is no plan submitted, the officer may still have to first offer the parcels separately. *Drake v. Brickner*, 180 Iowa 1166, 163 N.W.2d 597 (1917) (sale set aside where it was shown there could have been an advantageous sale of separate parcels); but see *Security Savings Bank of Cedar Rapids v. King*, 198 Iowa 1151, 199 N.W.2d 166 (1924); *Willis v. Farmers State Bank of Lakeview*, 261 Iowa 689, 155 N.W.2d 407 (1968) (sale will not be set aside where debtor made no request to sell in parcels). Iowa Code §654.6 provides that: If the mortgaged property does not sell for sufficient to satisfy the execution, a general execution may be issued against the mortgagor, unless the parties have stipulated otherwise.

2. Separate Redemption of Homestead

In the case of agricultural property used for farming, "the mortgagor may, by a date set by the court, but not later than ten days before sale, designate to the court the portions of the land which the mortgagor claims as a homestead If the homestead is designated, the court shall determine the fair market value of the designated homestead before the Sheriff's sale" Iowa Code §654.16.

Fair market value is to be determined without regard to the accrued taxes. *Federal Land Bank of Omaha v. Sleister*, 444 N.W.2d 504 (Iowa 1989). The mortgagor may redeem the designated homestead by tendering the lesser of either any amount separately bid for the designated homestead at the Sheriff's sale pursuant to procedures set forth in Chapter 628, or the fair market value, as determined pursuant to this section of the designated homestead at any time within one year from the date of the Sheriff's sale, pursuant to the procedures set forth in Chapter 628. Iowa Code §654.16.

3. Mechanics of Sale

Section 626.74 states: "The officer must give four weeks notice of the time and place of selling real property" Additionally, Iowa Code §626.75 provides:

Notice shall be posted in at least three public places in the county, one of which shall be at the county courthouse, in addition to which, in case of the sale of real estate, ...there shall be two weekly publications of such notice in some newspaper printed in the county..., the first at least four weeks in the case of real estate...before the date of sale, and the second at a later time before the date of sale. . . .

If the notice is not given, the officer shall forfeit \$100 to the defendant in execution, in addition to any actual damages sustained, but the validity of the sale is not affected. Iowa Code §626.77; *Bowden v. Hadly*, 138 Iowa 711, 116 N.W. 689 (1908).

However, if the debtor is in actual occupation and possession of any part of the land levied on, the officer having the execution shall, at least 20 days previous to such sale, serve him with written notice, stating that the execution is levied on the land, and mentioning the time and place of sale, which notice shall be served in the manner provided by I.R.C.P. 1.304. Iowa Code §626.78. Any sales made without

this notice may be set aside on motion made within 90 days. Iowa Code §626.79.

The sale must be at public auction between 9:00 a.m. and 4:00 p.m. at the time fixed in the notice. Prior to the sale the Sheriff may accept sealed written bids which will not be opened until the time of the public auction. Iowa Code §626.80.

When there are no bidders, or when the amount offered is grossly inadequate, or when for any cause the sale is prevented from taking place the officer may postpone the sale for not more than three days without being required to give any further notice. Iowa Code §626.81. When the property sells for more than the amount required to be collected the extra money must be paid to the debtor unless there is another execution outstanding in the officer's hands to which that money might be applied or unless there are liens on the property which "ought to be paid therefrom, and the holders thereof make claim to such surplus and demand application thereon, in which case the officer shall pay the same into the hands of the Clerk of the District Court and it shall be applied as ordered by the court." Iowa Code §626.82.

If the property sold is not subject to redemption, the Sheriff must execute a deed to the purchaser, but if subject to redemption, a certificate shall be provided the purchaser containing a description of the property and the amount of money paid by such purchaser, and stating that, unless redemption is made within one year or such other time as may be specifically provided according to law, the purchaser or the purchaser's heirs or assigns will be entitled to a deed. Iowa Code §626.95. If the debtor or the debtor's assignee fails to redeem, the Sheriff must, at the end of the period for redemption provided by law for the particular action, execute a deed to the person who is entitled to the certificate. Iowa Code §626.98.

Anyone, whether a lien holder or not, may bid on the property at the sale. The judgment holder will usually bid on the property to protect the property from being sold for an amount less than its judgment where the property is worth more than that, or for less than its full value if the property is not worth enough to satisfy the judgment. The judgment holder is not usually required to pay cash at the time of the sale. Instead, the judgment holder's bid will probably be in an amount equal to the judgment itself.

C. Redemption

Much has already been stated in earlier sections relating to redemption. The right of redemption from execution sale is purely statutory, and may be exercised only in the manner prescribed by statute. *Howard v. Kelly*, 137 Iowa 76, 114 N.W. 544 (Iowa 1908); *Piece v. White*, 204 Iowa 1116, 216 N.W. 764 (1927). In theory, the mechanics of redemption are very straightforward.

The debtor may redeem real property at any time within one year from the day of the sale, and will, in the meantime, be entitled to possession. For the first six months, the debtor's right of redemption is exclusive. Any real property redeemed by the debtor is free from any liability for any unpaid portion of the judgment under which the real property was sold. Iowa Code §628.3. If no redemption is made by the debtor, anytime within nine months from the day of sale, redemption may be made by a mortgagee or by any creditor whose claim becomes a lien prior to the expiration of the time allowed for redemption. Iowa Code §628.5. The mortgagor and the mortgagee of real property consisting of less than ten acres in size may agree and provide in the mortgage instrument that the period of redemption be reduced to six months, provided the mortgagee waives in the foreclosure action any rights to a deficiency judgment. The debtor will, in the meantime, be entitled to possession of the real property. If the redemption period is so reduced, for the first three months after sale, the right of redemption shall be exclusive to the debtor, and the time periods in Iowa Code §§628.5, 628.15 and 628.16 shall be reduced to four months. Iowa Code §628.26. *Jim White Agency v. Clark*, 489 N.W.2d 26 (Iowa App. 1992).

In *FLB v. Fuoss*, 428 N.W.2d 287 (Iowa 1991) where junior lien holder (FmHA) redeemed from the

Sheriff's sale purchaser, debtor could redeem only by paying the total amount of FmHA's lien, not just the portion attributable to one parcel. If mortgagor had redeemed during six month exclusive period, separate redemption could have been made. Compare §628.28 further reducing the period of redemption for real property that is neither agricultural nor a single or two family dwelling used as a residence of the debtor.

NOTE: Where the United States (i.e. FmHA) has an interest in the subject real estate, the U.S. has one year to redeem. 28 U.S.C. §2410(c).

"The rights of a debtor in relation to redemption are transferrable and the assignee has the like power to redeem." Iowa Code §628.25. The Iowa Supreme Court considered a situation where the debtor had assigned a redemption right to a third party who then redeemed during the first six months when the debtor's right to redeem is exclusive. The case arose when a junior mortgage holder was then allowed to redeem from the assignee. *Farmers Production Credit v. McFarland*, 374 N.W.2d 654 (Iowa 1985). The Iowa Supreme Court ultimately held that the junior mortgage holders could not redeem because of the redemption by the debtor's assignee during the "exclusive" time to redeem. See Iowa Code §628.5 (creditors may redeem if no redemption by debtor). However, the court further held, that because the junior creditors never had a chance to redeem (owing to the debtor's redemption during the exclusive period) their liens were not cut off. Cf. *Paulsen v. Jensen*, 209 Iowa 453, 458, 228 N.W. 357, 359 (1929). The majority's decision contains an extensive discussion of redemption and how the court believes it works. There is in addition a lengthy dissent by Justice Carter in which he explains why he believes the majority's decision is wrong in holding that the junior lien holder's interests are not extinguished.

It should be further noted that while mortgage liens are extinguished by the foreclosure process in the majority of cases (*McFarland* notwithstanding), judgment liens are not. Consequently, judgment liens will reattach when the debtor redeems the property. Iowa Code §624.23(1); *Anderson v. Renschaw*, 229 Iowa 93, 294 N.W. 274 (1940).

1. Pre-Existing Judgment Liens on Homestead

It sometimes happens that there are judgment liens, not enforced, that were obtained before the real estate was declared and platted as a homestead. One instance is where a home buyer who already had a judgment against him before the property was purchased. In such a case, the lien would attach even to homestead property. See Iowa Code §561.21(1); *Wellman Savings Bank v. Roth*, 423 N.W.2d 697 (Iowa App. 1988). These liens, however, may still be cleared.

Iowa Code §624.23 provides that these liens will be extinguished unless execution is levied within 30 days of the time the defendant or the defendant's agent has served written demand on the owner of the judgment. The contents of the demand are described in the statute as is the manner of service. Also see Title Standard 6.7.

2. Waiver of Homestead Rights

The right to exempt the homestead may be waived. However, in a case where a homestead exemption waiver is contained in a written contract affecting agricultural land as defined in Iowa Code §172C.1, or dwellings, buildings, or other appurtenances located on the land, the waiver must be in a form and size of type mandated by Iowa Code §561.22. This is essentially a bold type notice that the borrower understands and accepts the homestead waiver. *CAVEAT: West Des Moines State Bank v. Mills*, 482 N.W.2d 432 (Iowa 1992) held the amendment limiting application of the statute (§561.22) requiring

special notice of homestead exemption waiver's consequence to mortgagors of agricultural land did not cut off homestead rights so as to violate due process; the homestead exemption was consciously given up in mortgage.

It is also sometimes not understood by mortgagors that, while a bankruptcy discharges the underlying debt for which the mortgage has been given as security, it does not discharge the mortgage itself. Likewise, a foreclosure does not affect the debt except to the extent the sale of the property brings enough to cover it.

3. Agreement to Extend the Period of Redemption - Agricultural Land and Right of First Refusal

There has been some reference to a contraction of the redemption periods pursuant to Iowa Code §628.26. There is also, with regard to agricultural property, a statute which extends redemption:

Notwithstanding Iowa Code §628.3, the debtor and the mortgagee of agricultural land after the filing of the foreclosure petition, may enter into a written agreement to extend the debtor's period of redemption up to five years, and may set forth other terms and conditions of the extended redemption as agreed upon by the parties, including allowing the debtor to lease the property. . .

Iowa Code §628.26A

Farmers who have lost their property to foreclosure are afforded a right of first refusal should the property be sold in a transaction other than a public auction. Iowa Code §654.16A. If the grantee intends to sell by public auction, the mortgagor must be given 60 days notice of the date, time, place, and procedure of the auction sale and any minimum terms or limitations imposed upon the auction. The grantee is not required to offer the mortgagor financing for the purchase of the land. Iowa Code §654.16A. In the case of a private sale, the mortgagor has ten business days after receiving the notice in which to exercise the right to repurchase the land by submitting a binding offer to the grantee on the same terms as the proposed sale or other disposition. Iowa Code §654.16A(4). The right of first refusal is not assignable. Iowa Code § 654.16A(5). Notice by certified mail, return receipt requested is held to be sufficient. *Wild v. Buresh*, 533 N.W.2d 565 (Iowa 1995).

D. Special Limitations on Judgments

Iowa Code §§615.1 and 615.2 provide:

A judgment in an action for the foreclosure of a real estate mortgage, deed of trust, or real estate contract upon property which at the time of judgment is either used for an agricultural purpose as defined in section 535.13 or a one-family or two-family dwelling which is the residence of the mortgagor, or in any action on a claim for rent shall be null and void, all liens shall be extinguished, and no execution shall be issued for any purpose other than as a setoff or counterclaim after the expiration of a period of two years, exclusive of any time during which execution on the judgment was stayed pending a bankruptcy action, from the entry thereof. As used in this section, "mortgagor" means a mortgagor or a borrower executing a deed of trust as provided in chapter 654 or a vendee of a real estate contract.

An action or proceedings shall not be brought in any court of this state for the purpose of renewing or extending such judgment. Provided, however, that nothing herein shall prevent the continuance of such judgment in force against the property subject to foreclosure only for a longer period by the voluntary written stipulation of the judgment creditor and the equitable titleholders, filed in the action or proceedings.

Judgments rendered on promissory obligations secured by mortgages, but without foreclosure, shall not be subject to renewal and, after the lapse of two years from the date of the rendition, shall be without force and effect for any purpose whatsoever except as a set-off or counterclaim. Iowa Code §615.3. The dwelling must be the residence of the debtor at the time of the judgment.

The special limitations above shall not be applied to actions which are subject to an agreement entered into pursuant to either Iowa Code §628.26A or §654.19.

The general statute of limitations for actions involving real estate is found in Iowa Code §614.1. A 1997 amendment to §614.1(6) provides:

Judgments of courts of record. Those founded on a judgment of a court of record, whether in this or of any other of the United States, or of the federal courts of the United States within twenty years except that a time period limitation shall not apply to an action to recover a judgment for child support, spousal support, or a judgment of distribution of marital assets.

Joint tenancy interest held by ex-husband's second wife in homestead property prevented ex-wife's judgment lien for child support arrearages from attaching to entire homestead, such that purchaser acquired property free of ex-wife's judgment lien. *Baratta v. Polk County Health Services*, 588 N.W.2d 107 (Iowa 1999).

IV. FORFEITURE

Of course, real estate is not always obtained through the loan/mortgage process. Real estate is sometimes purchased by contract. If there is a default by the vendee (purchaser) in the performance of the contract, the vendor (seller) may be able to utilize the forfeiture remedy to extinguish the interest of the vendee in the property. This can be done quite quickly, and often without the need for court intervention.

A. Disclosure and Recording

Certain contract sellers are required to provide a written contract disclosure statement to the contract purchaser. Iowa Code §558.70. A contract buyer may bring an equitable action within one year of the execution of the contract to rescind the contract or obtain damages if the chapter was violated. Iowa Code §558.71. Additionally, Iowa Code § 558.46 requires that certain installment contracts be recorded.

B. Mechanics - Notice of Forfeiture

In Iowa, contract forfeiture is a purely statutory remedy. Iowa Code § 656.1; *Holeman v. Wahner*, 221 Iowa 1318, 268 N.W. 168 (1936). A proceeding to forfeit a real estate contract is in equity. *Goodale v. Bray*, 546 N.W.2d 212 (Iowa 1996). Thus, any review is de novo. Iowa R. App. P. 6.4.

If the contract does not provide for the remedy of forfeiture, the vendor must use foreclosure to recover the property after a default by the vendee. The forfeiture statute was enacted to limit the rights of the forfeiting vendor, not to grant any powers to vendor or state to deprive the vendee of his property interest. *Jensen v. Schreck*, 275 N.W.2d 374 (Iowa 1979). ALSO NOTE: A vendor who has forfeited a real estate contract can only bring a forcible entry and detainer action to recover possession if the contract creates a landlord-tenant relationship upon forfeiture. *Robinson v. Black*, 607 N.W.2d 676 (Iowa 2000).

If the contract does provide for forfeiture, the mechanics of the process are straightforward and relatively simple. The vendor serves a notice of forfeiture as provided by Iowa Code §§656.2 and 656.3 stating the breach and requiring a cure of the breach within 30 days. The statute specifies all the information which must be in the notice and who must be served. A party in possession is entitled to notice. *Dreeson v. Leckband*, 479 N.W.2d 620 (Iowa App. 1991). *Jamison v. Knosby*, 423 N.W.2d 2 (Iowa 1988). In order for a person to be in "possession" and, therefore, a necessary party that must be served to complete the forfeiture, there must be some conduct which gives notice to the party claiming title to the property. *Pendergast v. Davenport*, 375 N.W.2d 684, 690 (Iowa 1985); *Jamison v. Knosby*, 423 N.W.2d 2 (Iowa 1988) (where vendee's farm-lessee had recorded the lease, there was sufficient conduct to give notice of possession even during the winter when no farming was being carried on.) A wife's status as the vendee's spouse did not, standing alone entitle her to notice of forfeiture of the contract. *Goodale v. Bray*, 546 N.W.2d 212 (Iowa 1996). However, if the spouse is also a contract vendee, she too has a right to notice. *Fairfax v. Oaks Development Company*, 713 N.W.2d 704 (Iowa 2006)(holding that two copies of the forfeiture notice had to be served on one spouse, though both resided in the contracted-for property, to effectuate personal service on the one spouse and substituted service on the other).

In order to be a "successor in interest" who must be served, cases indicate the person must actually have succeeded to the interest, not merely have a chance to succeed to the interest. Consequently, a mortgagee of a vendee is not a successor unless or until the mortgage has been foreclosed and the redemption right of the vendee has expired. *Miles Homes, Inc. of Iowa v. Grant*, 257 Iowa 697, 134 N.W.2d 569 (1965). A potential dower interest does not make a wife a successor who needs to be noticed. *Eastman v. DeFress*, 235 Iowa 488, 17 N.W.2d 104 (1945). However, a person who has a claim against the interest of a vendee need be served only if that person has complied with a requirement in Iowa Code §656.2(2) that he file a request for notice at the recorder's office. This request must be renewed every five years. Service is made personally or by publication. Iowa Code §656.3. Attorney fees for preparation of the notice may be recovered in an amount up to \$50.00 pursuant to Iowa Code §656.7. A vendee need not pay these attorney fees to remedy the alleged default and avoid forfeiture. However, it is necessary to pay the reasonable cost of serving the notice. *Miller v. American Wonderlands, Inc.*, 275 N.W.2d 399 (Iowa 1979).

If the breach is not cured within 30 days of service, the vendor merely files the notice with proof of service attached with the county recorder. While this is not necessary to complete the forfeiture, it serves as notice to all parties that the forfeiture has occurred. Iowa Code §656.5; *Abodeely v. Cadras*, 221 N.W.2d 494 (Iowa 1974).

C. Mediation

Just as in the case of foreclosure, if the real estate is agricultural property and the obligation on the contract is \$20,000 or more, a person cannot initiate a forfeiture until he or she has received a mediation release under Iowa Code §654A.11.

D. Default

Generally, when the vendee defaults, it will be monetary in nature, but the terms of the contract may be breached in other ways. In order to forfeit the contract, the vendor must show the security is really in danger. *Lett v. Grummer*, 300 N.W.2d 147 (Iowa 1981). Unlike in the usual mortgage case, a default does not entitle the vendor to accelerate the amounts due under the contract. Only the default itself must be cured. *Hampton Farmers Co-op Co. v. Fehd*, 257 Iowa 555, 133 N.W.2d 872 (1965).

A vendor can be found to have waived a default. For example, it has been held that, where a vendor accepted partial payment after the notice of forfeiture was served, waited more than a month after the 30 days had run to record the notice, and, during that time, acted as though the contract was still in force, the right to forfeit had been waived for that default. *Babb's, Inc. v. Babb*, 169 N.W.2d 211 (Iowa 1969). Also, where a vendor had accepted payments on dates other than that specified in the contract, the vendor could not forfeit for failure to tender payment of balance on the date specified in the contract. *Westercamp v. Smith*, 239 Iowa 705, 31 N.W.2d 347 (1948). However, the vendor's waiver as to one default may not operate as a waiver on subsequent defaults. *Cassiday v. Adamson*, 208 Iowa 417, 224 N.W. 508 (1929).

E. Defenses

Because the real estate contract is just that - a contract - the usual contract remedies and defenses apply. Equity does not favor forfeitures and, when judicial enforcement of one is sought, the vendor must show that the equities are clearly on his or her side. *Kilpatrick v. Smith*, 236 Iowa 584, 19 N.W. 699 (1945); *In Re Grady*, 202 B.R. 120 (Bkrtcy N.D. Iowa 1996). Also, the vendor has the burden of proving the existence of fact which entitle him to forfeit under the contract. *Keokuk State Bank v. Eckley*, 354 N.W.2d 785 (Iowa App. 1984). The section relating to forfeiture is construed strictly against forfeiture and with liberality toward those opposing it, so one seeking forfeiture must fully and strictly follow the statute's procedure. *Jensen v. Schreck*, 275 N.W.2d 374 (Iowa 1979). Because Iowa Code §656.2 requires the notice to adequately describe the property and the statute is to be strictly construed, failure to adequately describe the property will defeat the forfeiture. *Montgomery v. Beller*, 207 Iowa 278, 222 N.W. 846 (1929). Iowa Code §558.46(3) requires that an installment contract be recorded before forfeiture may be pursued. The fact that forfeitures are not favored does not mean they will never be enforced. *Miller v. American Wonderlands, Inc.*, 275 N.W.2d 399 (Iowa 1979).

Generally, defenses are raised when the vendor tries to reclaim the property by FED pursuant to Iowa Code Chapter 648 or ejectment pursuant to Iowa Code Chapter 646. In one case, however, the vendee took the initiative and filed for declaratory relief pursuant to Iowa R. Civ. P. 1.1101-1.1102. *Ewurs v. Irving*, 344 N.W.2d 273 (Iowa App. 1983). The court held that neither Chapter 648 nor 656 required the vendee to wait until the vendor had initiated an action. For a thorough discussion of the FED procedure, see the section in this chapter on evictions.

F. Homestead

Homestead rights of purchasers are subordinate to the statutory right of forfeiture for nonpayment. *Westerman v. Raid*, 203 Iowa 1270, 212 N.W. 134 (1927).

Foreclosure Intake Checklist

1. Full address of property being foreclosed: _____

2. Description of property (circle one): House Mobile Home Vacant Lot

If property is a mobile home, is the mortgage on the mobile home and the lot? YES NO

3. Is your name on the deed? YES NO If no, then who is _____

4. Is anyone else on the deed with you? YES NO

If yes, state relationship & name _____

5. Do you live on the property? YES NO

If no, why not? _____

6. When did you buy the property? _____

7. How much did you pay for the property? \$_____ Current value (if known)? \$_____

8. Loan Information:

a) Name of Mortgage Company? _____

b) Monthly payment amount? \$_____ Loan balance (if known)? \$_____

c) Number of payments past due? _____ When last payment made? _____

d) Have your payments ever been refused? YES NO

e) Term of mortgage (in months) _____

f) Interest rate _____; Is the interest rate (circle one) fixed adjustable

g) Does the mortgage include escrow for taxes and insurance? YES NO

If no, then are you current on your taxes and homeowner's insurance? YES NO

h) Is this a re-finance? YES NO

If yes, when was the last refinance? _____

Has there been more than one refinance; and, if so, when? _____

If yes, did you get cash out at closing? YES NO How much? \$_____

If you got cash out at closing, what was it used for _____

i) Do you have a second mortgage? YES NO

If yes, are you current on that mortgage? YES NO

j) List all names on mortgages: _____

9. What is the name of the person/company threatening to sue you?

10. Have you been served with legal papers? YES NO

11. If yes, what date did you receive them? _____

12. If served, what date is the answer due? _____

13. Is this the first time you have been sued on this property? YES NO N/A

14. Why are your payments behind? _____

15. Is this the first time you have been behind on your payments? YES NO

16. Has your lender ever accepted late or partial payments? YES NO

17. Do you disagree with the amount claimed to be owed? YES NO

If yes, why? _____

If yes, do you have records of payments made? _____

18. Have you tried to resolve the situation with the mortgage company? YES NO

If yes, how? _____

19. Do you want to keep the property? YES NO

20. Can you now or will you soon be able to make regular payments? YES NO

If yes, what has or will change? _____

21. Is your mortgage insured by: HUD FHA VA NONE
(if yes, please circle)

22. Do you have a copy of all your mortgage documents? _____

23. List the approximate amount of your other debts \$ _____

24. Have you been sued by a creditor before? YES NO

If yes, what creditor? _____ When? _____ / _____
Month Year

25. Do you have any judgments against you? YES NO

If yes, please describe _____

26. Have you ever filed for bankruptcy? YES NO

If yes, when & what happened _____

PLEASE ESTIMATE YOUR MONTHLY EXPENSES (average to reach a monthly amount)

EXPENSES	AMOUNT
Rent or mortgage payments	
Lot rent if you own a mobile home but not the land	
Utilities (electricity, gas, water, sewer)	
Cable/Satellite/Internet	
Telephone, cell phone	
Home security, home maintenance	
Food	
Tobacco, alcohol	
Clothing, laundry, dry cleaning	
Haircuts/nail care/personal grooming	
Medical and dental expenses	
Transportation (gas, oil, repairs, tags, registration)	
Recreation, entertainment, subscriptions	
Charitable contributions	
Property taxes (if not included in mortgage payment)	
Homeowner's insurance (if not included in mortgage)	
Life insurance (not deducted from paycheck)	
Health insurance (not deducted from paycheck)	
Auto insurance	
Other insurance (specify):	
Income taxes (not deducted from paycheck)	
Car payments	
Other installment payments (specify):	
Child care, tuition, children's activities	
Alimony, maintenance and support	
Other expenses (specify)	
Total	

JALA Intake Notes:

	a - FDCPA Basic Definitions
§ 1692 a(3)	Definition of a Consumer as any natural person obligated on or allegedly obligated on a debt
§ 1692 a(5)	Definition of a Debt as an obligation for money, goods, insurance, or services for primarily personal, family, or household purposes
§ 1692 a(6)	Definition of a Debt Collector as collectors, collection agencies, lawyers, forms writers
	b – Contacting Third Parties
§ 1692 b(1)	Contact of Third Party: Failed to identify themselves, or failed to state that collector is confirming or correcting location information
§ 1692 b(2)	Contact of Third Party: Stated that the consumer owes any debt
§ 1692 b(3)	Contact of Third Party: Contacted a person more than once, unless requested to do so
§ 1692 b(4)	Contact of Third Party: Utilized postcards
§ 1692 b(5)	Contact of Third Party: Any language or symbol on any envelope or communication indicating debt collection business
§ 1692 b(6)	Contact of Third Party: After knowing the consumer is represented by an attorney
	c – Prohibited Communications Practices
§ 1692 c(a)(1)	At any unusual time, unusual place, or unusual time or place known to be inconvenient to the consumer, before 8:00 am or after 9:00 pm
§ 1692 c(a)(2)	After it knows the consumer to be represented by an attorney unless attorney consents or is unresponsive
§ 1692 c(a)(3)	At place of employment when knows that the employer prohibits such communications
§ 1692 c(b)	With anyone except consumer, consumer's attorney, or credit bureau concerning the debt
§ 1692 c(c)	After written notification that consumer refuses to pay debt, or that consumer wants collector to cease communication
	d - Harassment or Abuse
§ 1692 d	Any conduct the natural consequence of which is to harass, oppress, or abuse any person
§ 1692 d(1)	Used or threatened the use of violence or other criminal means to harm the consumer or his/her property?
§ 1692 d(2)	Profane language or other abusive language?
§ 1692 d(3)	Published a list of consumers who allegedly refuse to pay debts?
§ 1692 d(4)	Advertised for sale any debts?
§ 1692 d(5)	Caused the phone to ring or engaged any person in telephone conversations repeatedly
§ 1692 d(6)	Placed telephone calls without disclosing his/her identity?
	e - False or Misleading Representations in Communications
§ 1692 e	Any other false, deceptive, or misleading representation or means in connection with the debt collection
§ 1692 e(1)	Affiliated with the United States or any state, including the use of any badge, uniform or facsimile
§ 1692 e(2)	Character, amount, or legal status of the alleged debt
§ 1692 e(3)	Any individual is an attorney or that any communication is from an attorney
§ 1692 e(4)	Nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment
§ 1692 e(5)	Threaten to take any action that cannot legally be taken or that is not intended to be taken
§ 1692 e(6)	Sale or transfer of any interest in the debt will cause the consumer to lose any claim or defense to payment of the debt
§ 1692 e(7)	Consumer committed any crime or other conduct in order to disgrace the consumer
§ 1692 e(8)	Threatens or communicates false credit information, including the failure to communicate that a debt is disputed
§ 1692 e(9)	Represent documents as authorized, issued or approved by any court, official, or agency of the United States or state.
§ 1692 e(10)	Any false representation or deceptive means to collect a debt or obtain information about a consumer
§ 1692 e(11)	Communication fail to contain the mini-Miranda warning: "This is an attempt to collect a debt... communication is from a debt collector."
§ 1692 e(12)	Debt has been turned over to innocent purchasers for value
§ 1692 e(13)	Documents are legal process when they are not
§ 1692 e(14)	Any name other than the true name of the debt collector's business
§ 1692 e(15)	Documents are not legal process forms or do not require action by the consumer
§ 1692 e(16)	Debt collector operates or is employed by a consumer reporting agency
	f - Unfair Practices
§ 1692 f	Any unfair or unconscionable means to collect or attempt to collect the alleged debt
§ 1692 f(1)	Attempt to collect any amount not authorized by the agreement creating the debt or permitted by law
§ 1692 f(2)	Accepted or solicit postdated check by more than 5 days without 3 business days written notice of intent to deposit
§ 1692 f(3)	Accepted or solicited postdated check for purpose of threatening criminal prosecution
§ 1692 f(4)	Depositing or threatening to deposit a post-dated check prior to actual date on the check
§ 1692 f(5)	Caused any charges to be made to the consumer, e.g., collect telephone calls
§ 1692 f(6)	Taken or threatened to unlawfully repossess or disable the consumer's property
§ 1692 f(7)	Communicated with the consumer by postcard
§ 1692 f(8)	Any language or symbol on the envelope that indicates the communication concerns debt collection
	h – Multiple Debts
§ 1692 h	Collector must apply payments on multiple debts in order specified by consumer and cannot apply payments to disputed debts
	g – 30 Day Validation Notice
§ 1692 g	Failure to send the consumer a 30-day validation notice within five days of the initial communication
§ 1692 g(a)(1)	Must state Amount of Debt
§ 1692 g(a)(2)	Must state Name of Creditor to Whom Debt Owed
§ 1692 g(a)(3)	Must state Right to Dispute within 30 Days
§ 1692 g(a)(4)	Must state Right to Have Verification/Judgment Mailed to Consumer
§ 1692 g(a)(5)	Must state Will Provide Name and Address of original Creditor if Different from Current Creditor
§ 1692 g(b)	Collector must cease collection efforts until debt is validated
	i – Legal Actions
§ 1692 i(a)(2)	Brought any legal action in a location other than where contract signed or where consumer resides
	j – Deceptive Forms by Creditor
§ 1692 j	Forms been designed, compiled and/or furnished to create the false belief that a person other than creditor is collecting.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5759-06T1

EWELINA NOWOSLESKA,

Plaintiff-Respondent,

vs.

MARJORIE STEELE, WANDA DORSEY
and DOUGLAS DORSEY,

Defendants-Appellants.

APPROVED FOR PUBLICATION

May 19, 2008

APPELLATE DIVISION

Submitted April 22, 2008 - Decided May 19, 2008

Before Judges Coburn, Grall and Chambers.

On appeal from Superior Court of New Jersey,
Law Division, Somerset County, Docket No.
L-1037-06.

Mauro, Savo, Camerino & Grant, P.A.,
attorneys for appellants (Darren J. Leotti,
of counsel and on the brief).

Andril & Espinosa, L.L.C., attorneys for
respondent (William G. Sanchez, of counsel
and on the brief).

The opinion of the court was delivered by

CHAMBERS, J.A.D.

Defendants face ejectment from the house that has been the
family home for forty-three years. They lost title to the house

through a series of lending transactions that form the basis of this case. They appeal from the denial of their motion to set aside the default judgment awarding possession of the home to plaintiff, who now holds title to the property. Since the loss of the home may have resulted from predatory lending practices, in the interests of justice and due to these extraordinary circumstances, the default judgment should be set aside under Rule 4:50-1(f), so that the dispute can be resolved on the merits, and, if necessary, appropriate legal and equitable adjustments be made.

I

Defendant Marjorie Steele, eighty-three years old, has lived at 103 Spring Street, Somerville for the past forty-three years. It was her marital abode, and thereafter, ownership of the premises was shared with her daughter, defendant Wanda Dorsey, and son-in-law, defendant Douglas Dorsey. In June 2003, defendants obtained a loan of \$95,000, representing monies for repairs and improvements to the premises and the consolidation of bills. The loan was secured by a mortgage. Defendants contend that they defaulted on the mortgage payments due to certain health-related issues that resulted in a loss of income. A judgment of foreclosure was obtained against them, and a sheriff's sale was scheduled for February 7, 2006.

The sheriff's sale was averted when defendants obtained a loan from Property Vestors for the amount of the mortgage delinquency. The promissory note that defendants executed with Property Vestors required them to pay back the principal amount plus interest within thirty days (by February 28, 2006). Apparently, defendants anticipated that they would be able to obtain sufficient monies from their 401(k) accounts to do so. Defendants maintain that they were told that if the monies were not paid, then Property Vestors would foreclose on the property. However, as part of the transaction, they had signed a Deed in Lieu of Foreclosure to Property Vestors as security for the loan. The promissory note provided that if the monies were not paid by February 28, 2006, Property Vestors would pay defendants \$20,000 and, upon payment of an outstanding mortgage, would have all rights to the property.

To avert losing the property to Property Vestors, defendants obtained financing through Lenny Hernandez and Michael Figler of Equity Solutions, L.L.C. In the resulting transaction that took place on February 24, 2006, Figler took title to the property. He paid off the mortgage and liens and judgments on the property, which totaled approximately \$145,000, plus title and closing costs of approximately \$10,000. In addition, Figler included as part of his "purchase price" for

the property the sum of \$50,000 representing a fee to his company, Equity Solutions. Defendants signed a use and occupancy agreement that allowed them to remain on the premises for one year provided they made payments to Figler of \$2,200 a month, and they had an option to buy back the property for \$202,400 within one year (before February 24, 2007).

Defendants maintain that Figler represented that the monthly payments would be only slightly higher than their current \$1,200 mortgage payment and that a portion of their home equity would be used to make these payments. They contend that they signed the documents understanding that they were obtaining a loan and that only later did they discover that they had signed a deed transferring title to the house to Figler. Figler arranged for an attorney to represent defendants for the transaction and maintains that defendants understood the nature of the transaction and agreed to it.

On April 24, 2006, after defendants defaulted on the payments, Figler transferred title to the property to plaintiff Ewelina Nowosleska for \$260,000. Defendants assert that plaintiff is connected with Figler's business.¹ The papers indicate that the property was again transferred to Jean Sidibe

¹ In her complaint, plaintiff states that her address was 331 Chestnut Place, Piscataway, the same address Figler listed as his address on the deed to plaintiff.

for \$405,000, and a mortgage has been recorded against the premises for that sum. Defendants maintain that Sidibe is also associated with Figler. Assuming that \$405,000 represents the value of the property, defendants were thus induced to part with title to property valued at \$405,000 in order to pay off debts totaling \$145,000.

Since defendants made no payments under the use and occupancy agreement, plaintiff commenced this ejectment action. Defendants were served on August 24, 2006, but failed to file an answer. As a result, default was entered, and plaintiff's unopposed motion for a default judgment was granted. The default judgment entered on January 9, 2007, gave plaintiff possession of the premises.

Almost four months later, on April 25, 2007, defendant filed an emergency application to vacate the default judgment. That application was denied on May 11, 2007. Defendants' motion for reconsideration was also denied. This appeal followed. The trial court has issued a stay pending appeal.

II

Rule 4:50-1 sets forth various circumstances in which a party may obtain relief from a final judgment or order, including "(a) mistake, inadvertence, surprise, or excusable neglect; . . . or (f) any other reason justifying relief from

the operation of the judgment or order." The decision on whether to vacate a judgment under the terms of this rule is left to the sound discretion of the trial court and will not be overturned on appeal absent a mistaken exercise of that discretion. Mancini v. EDS, 132 N.J. 330, 334 (1993).

When exercising that discretion on an application to vacate a default judgment, courts must exercise "great liberality" and "should tolerate 'every reasonable ground for indulgence'" with a view to opening default judgments in order "that a just result is reached." Ibid. (quoting Marder v. Realty Constr. Co., 84 N.J. Super. 313, 319 (App. Div.), aff'd, 43 N.J. 508 (1964)). Indeed, New Jersey courts have always had the inherent equitable power to vacate judgments and, with respect to default judgments, have exercised great liberality in doing so in order that cases may be decided on the merits. Loranger v. Alban, 22 N.J. Super. 336, 342 (App. Div. 1952). A court's liberality in vacating default judgments is justified, since a default judgment is based on only one side's presentation of the evidence without due consideration to any countervailing evidence or point of view, and, thus, may not be a fair resolution of the dispute. As a result, on a motion to vacate a default judgment, "[a]ll doubts . . . should be resolved in

favor of the parties seeking relief." Mancini v. EDS, supra, 132 N.J. at 334.

Defendants maintain that they are entitled to relief under subsection (a) of Rule 4:50-1 due to their excusable neglect. However, defendants did not provide any explanation in their certifications submitted below stating why they failed to answer the complaint.²

Defendants also contend that they are entitled to relief under subsection (f) of Rule 4:50-1. Subsection (f) allows a judgment to be set aside in "exceptional situations." Id. at 336. "And in such exceptional cases its boundaries are as expansive as the need to achieve equity and justice." Ibid. (quoting Court Inv. Co. v. Perillo, 48 N.J. 334, 341 (1966)). In determining whether relief is warranted under this section of the rule, courts focus on equitable considerations. Hous. Auth. of Morristown v. Little, 135 N.J. 274, 294 (1994).

Generally, relief under subsection (f) is applied "sparingly, in exceptional situations" to prevent grave injustice. Cnty. Realty Mgmt., Inc. v. Harris, 155 N.J. 212, 237 (1998) (quoting Hous. Auth. of Morristown v. Little, supra, 135 N.J. at 289). Further, the policy in favor of the finality

² Defendants' attorney below claimed excusable neglect because defendants did not know they had any defense due to their unsophistication.

of judgments plays a larger role in applications brought under subsection (f) than the other subsections. First Morris Bank & Trust v. Roland Offset Serv., Inc., 357 N.J. Super. 68, 71 (App. Div.), certif. denied, 176 N.J. 429 (2003). Nonetheless, that interest in repose must be "weighed in the balance with the equally salutary principle that justice should be done in every case." Hodgson v. Applegate, 31 N.J. 29, 43 (1959).

When the application is to vacate a default judgment, subsection (f) is applied more liberally. In Davis v. DND/Fidoreo, Inc., 317 N.J. Super. 92, 100-01 (App. Div. 1998), certif. denied, 158 N.J. 686 (1999), this court stated, in the context of an application to vacate a default judgment, that:

R. 4:50-1(f) calls for the exercise of sound discretion, "guided by equitable principles, and in conformity with the prescription that 'any doubt should be resolved in favor of the application to set aside the judgment to the end of securing a trial upon the merits.'" (quoting Goldfarb v. Roeqer, 54 N.J. Super. 85, 92 (App. Div. 1959) (quoting Loranger v. Alban, supra, 22 N.J. Super. at 342)).

An application for relief from a default judgment under subsection (f) is treated "indulgently." Mancini v. EDS, supra, 132 N.J. at 336.

Allowing the default judgment to stand in this case may result in a grave injustice. These defendants may have been the victims of predatory lending practices. While predatory lending

is a general concept not subject to precise definition,³ one authority has described it as:

a mismatch between the needs and capacity of the borrower . . . In essence, the loan does not fit the borrower, either because the borrower's underlying needs for the loan are not being met or the terms of the loan are so disadvantageous to that particular borrower that there is little likelihood that the borrower has the capability to repay the loan.

[Assocs. Home Equity Servs., Inc. v. Troup, 343 N.J. Super. 254, 267 (App. Div. 2001) (quoting Daniel S. Ehrenberg, If the Loan Don't Fit, Don't Take It: Applying the Suitability Doctrine to the Mortgage Industry to Eliminate Predatory Lending, 10 J. Affordable Housing & Community Dev. L. 117, 119-20 (Winter 2001)).]

³ See HUD-Treasury Task Force on Predatory Lending, Curbing Predatory Home Mortgage Lending 17-24 (June 2000), available at <http://www.huduser.org/Publications/pdf/treasrpt.pdf> (discussing predatory lending in general and the difficulty in providing a definition of predatory lending). Predatory lending includes "the practice of making loans containing interest rates, fees or closing costs that are higher than they should be in light of the borrower's credit and net income, or containing other exploitative terms that the borrower does not comprehend." Henry v. Lehman Commercial Paper, Inc. 471 F.3d 977, 984 (9th Cir. 2006); see also Debra Pogrud Stark, Unmasking the Predatory Loan in Sheep's Clothing: A Legislative Proposal, 21 Harv. BlackLetter L.J. 129, 134 (2005) (stating that "predatory lending is the situation where a mortgage broker or mortgage lender engages in fraudulent, deceptive or sharp practices to induce borrowers (often the elderly or minorities) to enter into 'bad' loans," which would include loans that are overpriced, loans where there is no net economic benefit to the borrower, loans where the borrower cannot afford the payment so the lender is relying on the borrower's equity for payment, and loans with other exploitative terms not understood by the borrower).

The facts suggest that defendants have lost a house valued at \$405,000 in exchange for payment of debts totaling only \$145,000. One of the defendants, an elderly woman, has lived in the house for forty-three years. Defendants seek to assert numerous defenses to this ejectment action including a contention that the transaction was fraudulent. They may also argue that it was unconscionable. Federal and state statutes may provide protection. We note further that defendants' neglect does not appear to be calculated or willful. See Mancini v. EDS, supra, 132 N.J. at 336 (noting, when vacating a default judgment pursuant to subsection (f), that defendant's conduct was neither willful nor calculated). If allowed to stand, the default judgment in this case may result in the kind of grave injustice that subsection (f) is designed to prevent. The default judgment should have been vacated, and the order denying defendants' application to do so is reversed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2007-CA-00852-XXXX-MA
DIVISION: CV-D

DEUTSCHE BANK NATIONAL TRUST COMPANY
Plaintiff,

vs.

ERICO LOGAN, ET AL,
Defendant.
_____ /

DEFENDANTS ERICO LOGAN AND GLORIA BROOK'S ANSWER
AFFIRMATIVE DEFENSES; COUNTERCLAIMS AND DEMAND FOR JURY TRIAL

COME NOW, the separate Defendants and for their answer, affirmative defenses, counterclaims and demand for jury trial, state:

COUNT I

1. Denied that the plaintiff has stated a cause of action to reestablish a promissory note pursuant to F. S. 673.3091.
2. Admit execution of note, deny that the note was executed and delivered in favor of plaintiff or plaintiff's assignor.
3. Denied. The plaintiff has not stated a cause of action to reestablish a promissory note pursuant to F. S. 673.3091.
4. Denied. The plaintiff has not stated a cause of action to reestablish a promissory note pursuant to F. S. 673.3091.
5. Denied. The plaintiff has not stated a cause of action to reestablish a promissory note pursuant to F. S. 673.3091.
6. Denied. The plaintiff has not stated a cause of action to reestablish a promissory note pursuant to F. S. 673.3091.
7. Defendant admits that the plaintiff does not own the mortgage or the note, admits that the plaintiff does not hold the note; however that plaintiff does not have legal possession of and cannot obtain possession of the subject note or determine its whereabouts. The plaintiff has not stated a cause of action to reestablish a promissory note pursuant to F. S. 673.3091.
8. Denied.

9. Denied and move to strike on account of Paragraph 9 of the plaintiff's complaint does not contain a fact allegation.
10. Denied. The plaintiff has not stated a cause of action to foreclose a mortgage.
11. Admit.
12. Denied.
13. Admitted.
14. Denied.
15. Denied.
16. Denied.
17. Denied.
18. Denied.
19. Denied.
20. Denied.
21. Denied.

22. Defendant denies that this plaintiff has stated a cause of action for foreclosure because on the date this lawsuit was filed the plaintiff was not the true owner of the claim sued upon; is not the real party in interest and is not shown to be authorized to bring this foreclosure action.

23. Defendants request the court dismiss this action pursuant to Rules 1.210(a) and 1.140(7) of the Florida Rules of Civil Procedure because it appears on the face of the complaint and the documents attached to the plaintiff's March 12, 2007 notice of filing that a person other than the Plaintiff is the true owner of the claim sued upon on the date this action was commenced and that the Plaintiff was not the real party in interest at the commencement of this action, had no interest in the subject mortgage and note at the date on which the subject complaint for foreclosure was filed and is not shown to be authorized to bring this foreclosure action.

24. This action was commenced on January 29, 2007, but the assignment upon which the plaintiff is relying to support its claims is based on an assignment dated February 5, 2007, which post dates the filing of the complaint.

25. Additionally, the plaintiff has filed a separate assignment that conflicts with the February 5, 2007 assignment because on August 14, 2007, the date of the purported second assignment, the assignor had already transferred its interest in the subject mortgage and note to another entity and further because there was a lack of any consideration for the August 14, 2007 assignment.

26. The filing of these two assignments by the plaintiff, neither of which support the plaintiff's claim of ownership of the subject mortgage on the date this foreclosure was filed, are a sham and a fraud on the court.

27. Plaintiff came into the this court alleging that it owned the subject loan on January 29, 2007, the date this action was commenced when the plaintiff was fully aware that was not true. This is fraud on the court.

28. Fla.R.Civ.P. Rule 1.130(a) requires a Plaintiff to attach copies of all bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought to its complaint.

29. Although the plaintiff alleges in its complaint that it is the owner of the promissory note and the mortgage that are the subject of this foreclosure action, the note and mortgage and assignments attached to the plaintiff's complaint and to the plaintiff's notice of filing conflict with these allegations and therefore the contents of actual mortgage and note cancel out the inconsistent and conflicting assignments and allegations as to the ownership of the note and mortgage at the commencement of this action.

30. When exhibits are inconsistent with the plaintiff's allegations of material fact as to who the real party in interest is, such allegations cancel each other out. *Fladell v. Palm Beach County Canvassing Board*, 772 So.2d 1240 (Fla. 2000); *Greenwald v. Triple D Properties, Inc.*, 424 So. 2d 185, 187 (Fla. 4th DCA 1983); *Costa Bella Development Corp. v. Costa Development Corp.*, 441 So. 2d 1114 (Fla. 3rd DCA 1983).

31. Plaintiff was not the real party in interest on the date this action was commenced and is not shown to be authorized to bring this action.

32. Because the facts revealed by the exhibits attached to the plaintiff's complaint and in the Plaintiff's notice of filing are inconsistent with Plaintiff's

allegations as to ownership of the subject note and mortgage, those allegations are neutralized and Plaintiff's complaint is rendered objectionable. Greenwald v. Triple D Properties, Inc., 424 So.2d 185,187 (Fla. 4th DCA 1983).

AFFIRMATIVE DEFENSES

1. FAILURE OF CONTRACTUAL CONDITION PRECEDENT: NO

NOTICE OF DEFAULT: Plaintiff failed to provide Separate Defendants with a Notice of Default and Intent to Accelerate as required by and/or that complies with Paragraph 22 of the subject mortgage. As a result, Separate Defendants have been denied a good faith opportunity, pursuant to the mortgage and the servicing obligations of the Plaintiff, to avoid acceleration and this foreclosure.

2. NO HUD COUNSELING NOTICE: Plaintiff failed to comply with the foreclosure prevention loan servicing requirement imposed on Plaintiff pursuant to the National Housing Act, 12 U.S.C. 1701x(c)(5) which requires all private lenders servicing non-federally insured home loans, including the Plaintiff, to advise borrowers, including this separate Defendant, of any home ownership counseling Plaintiff offers together with information about counseling offered by the U.S. Department of Housing and Urban Development. The U.S. Department of Housing and Urban Development has determined that 12 U.S.C. 1701x(c)(5) creates an affirmative legal duty on the part of the Plaintiff. Plaintiff's non-compliance with the law's requirements is an actionable event that makes the filing of this foreclosure premature based on a failure of a statutory condition precedent to foreclosure which denies Plaintiff's ability to carry out this foreclosure. Plaintiff cannot legally pursue foreclosure unless and until Plaintiff demonstrates compliance with 12 U.S.C. 1701x(c)(5).

3. PLAINTIFF FAILED TO COMPLY WITH APPLICABLE POOLING

AND SERVICING AGREEMENT LOAN SERVICING REQUIREMENTS:

Plaintiff failed to provide separate Defendants with legitimate and non predatory access to the debt management and relief that must be made available to borrowers, including this Defendant pursuant to and in accordance with the Pooling and Servicing Agreement filed by the plaintiff with the Securities and Exchange Commission that controls and applies to the subject mortgage loan.

Plaintiff's non-compliance with the conditions precedent to foreclosure imposed on the plaintiff pursuant to the applicable pooling and servicing agreement is an actionable event that makes the filing of this foreclosure premature based on a failure of a contractual and/or equitable condition precedent to foreclosure which denies Plaintiff's ability to carry out this foreclosure.

a. Defendants assert that the special default loan servicing requirements contained in the subject pooling and servicing agreement, to be filed in pertinent part and which is on file at: www.secdinfo.com , are incorporated into the terms of the mortgage contract between the parties as if written therein word for word and the defendants are entitled to rely upon the servicing terms set out in that agreement.

b. Alternatively or additionally, the defendants are third party beneficiaries of the Plaintiff's pooling and servicing agreement and entitled to enforce the special default servicing obligations of the plaintiff specified therein.

c. Plaintiff cannot legally pursue foreclosure unless and until Plaintiff demonstrates compliance with the foreclosure prevention servicing imposed by the subject pooling and servicing agreement under which the plaintiff owns the subject mortgage loan.

d. The Plaintiff failed, refused or neglected to comply with prior to the commencement of this action with the servicing obligations specifically imposed on the plaintiff by the PSA in many particulars, including, but not limited to:

1. Plaintiff failed to service and administer the subject mortgage loan in compliance with all applicable federal state and local laws.

2. Plaintiff failed to service and administer the subject loan in accordance with the customary and usual standards of practice of mortgage lenders and servicers.

3. Plaintiff failed to extend to defendants the opportunity and failed to permit a modification, waiver, forbearance or amendment of the terms of the subject loan or to in any way exercise the requisite judgment as is reasonably required pursuant to the PSA.

e. Plaintiff's failure to meet the servicing obligations imposed by the PSA cause the filing by plaintiff of this foreclosure to be in premature, in bad faith and a breach by plaintiff of its obligation to defendants implied in the mortgage contract and as specified in writing in the PSA, to act in good faith and to deal fairly with defendants.

f. Instead, plaintiff's servicing failures as set forth herein render plaintiff's actions in filing this premature foreclosure to be in bad faith and not acceptable loan servicing under the written contracts between the parties which include the mortgage, the PSA incorporated therein or by which defendants are third party beneficiaries thereof and the promissory note.

g. Plaintiff intentionally failed to act in good faith or to deal fairly with these Defendants by failing to follow the applicable standards of residential single family mortgage ***lending and servicing*** as described in these Affirmative Defenses thereby denying these Defendants access to the residential mortgage lending and servicing protocols applicable to the subject note and mortgage.

4. **ILLEGAL CHARGES ADDED TO BALANCE**: Plaintiff has charged and/or collected payments from Defendants for attorney fees, legal fees, foreclosure costs, late charges, property inspection fees, title search expenses, filing fees, broker price opinions, appraisal fees, and other charges and advances, and predatory lending fees and charges that are not authorized by or in conformity with the terms of the subject note and mortgage or the controlling pooling and servicing agreement which specifies the waiver of late payments and other collection charges as part of the forbearance and loan modification default loan servicing. Plaintiff wrongfully added and continues to unilaterally add these illegal charges to the balance Plaintiff claims is due and owing under the subject note and mortgage.

5. **FAILURE OF GOOD FAITH AND FAIR DEALING: UNFAIR AND UNACCEPTABLE LOAN SERVICING**: Plaintiff intentionally failed to act in good faith or to deal fairly with the subject Defendants by failing to follow the applicable standards of residential single family mortgage ***servicing*** as described in these Affirmative Defenses thereby denying Defendant s access to

the residential mortgage servicing protocols applicable to the subject note and mortgage.

6. **UNCLEAN HANDS**: The Plaintiff comes to court with unclean hands and is prohibited by reason thereof from obtaining the equitable relief of foreclosure from this Court. The Plaintiff's unclean hands result from the Plaintiff's improvident and predatory intentional failure to comply with material terms of the mortgage and note; the failure to comply with the default loan servicing requirements that apply to this loan, all as described herein above. As a matter of equity, this Court should refuse to foreclose this mortgage because acceleration of the note would be inequitable, unjust, and the circumstances of this case render acceleration unconscionable. This court should refuse the acceleration and deny foreclosure because Plaintiff has waived the right to acceleration or is estopped from doing so because of misleading conduct and unfulfilled contractual and equitable conditions precedent.

WHEREFORE, Defendants demands the Plaintiff's complaint be dismissed with prejudice and for fraud on the court, and for their attorney's fees and costs and for all other relief to which this Court finds Defendants entitled.

7. **PLAINTIFF LACKS STANDING**: DEUTSCHE BANK NATIONAL TRUST COMPANY is not the true owner of the claim sued upon, is not the real party in interest and is not shown to be authorized to bring this foreclosure action.

COUNTERCLAIMS

COUNT I: DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action for declaratory and injunctive relief against the Plaintiff.
2. Plaintiff failed to provide Separate Defendants with a Notice of Default and Intent to Accelerate as required by and/or that complies with Paragraph 22 of the subject mortgage.
3. Plaintiff failed to comply with the foreclosure prevention loan servicing requirement imposed on Plaintiff pursuant to the National Housing Act, 12 U.S.C. 1701x(c)(5) which requires all private lenders servicing non-federally insured home loans, including the Plaintiff, to advise borrowers, including this separate

Defendant, of any home ownership counseling Plaintiff offers together with information about counseling offered by the U.S. Department of Housing and Urban Development.

4. Plaintiff cannot legally pursue foreclosure unless and until Plaintiff demonstrates compliance with 12 U.S.C. 1701x(c)(5).

5. Plaintiff failed to provide separate Defendants with legitimate and non predatory access to the debt management and relief that must be made available to borrowers, including this Defendant pursuant to and in accordance with the Pooling and Servicing Agreement filed by the plaintiff with the Securities and Exchange Commission that controls and applies to the subject mortgage loan.

6. Plaintiff's non-compliance with the conditions precedent to foreclosure imposed on the plaintiff pursuant to the applicable pooling and servicing agreement is an actionable event that makes the filing of this foreclosure premature based on a failure of a contractual and/or equitable condition precedent to foreclosure which denies Plaintiff's ability to carry out this foreclosure.

7. The special default loan servicing requirements contained in the subject pooling and servicing agreement are incorporated into the terms of the mortgage contract between the parties as if written therein word for word and the defendants are entitled to rely upon the servicing terms set out in that agreement.

8. Defendants are third party beneficiaries of the Plaintiff's pooling and servicing agreement and entitled to enforce the special default servicing obligations of the plaintiff specified therein.

9. Plaintiff cannot legally pursue foreclosure unless and until Plaintiff demonstrates compliance with the foreclosure prevention servicing imposed by the subject pooling and servicing agreement under which the plaintiff owns the subject mortgage loan.

10. The section of the Pooling and Servicing Agreement (PSA) is a public document on file and online at www.secinfo.com and the entire pooling and servicing agreement is incorporated herein.

11. The Plaintiff failed, refused or neglected to comply, prior to the commencement of this action, with the servicing obligations specifically imposed on the plaintiff by the PSA in many particulars, including, but not limited to:

a. Plaintiff failed to service and administer the subject mortgage loan in compliance with all applicable federal state and local laws.

b. Plaintiff failed to service and administer the subject loan in accordance with the customary and usual standards of practice of mortgage lenders and servicers.

c. Plaintiff failed to extend to defendants the opportunity and failed to permit a modification, waiver, forbearance or amendment of the terms of the subject loan or to in any way exercise the requisite judgment as is reasonably required pursuant to the PSA.

12. The Plaintiff has no right to pursue this foreclosure because the Plaintiff has failed to provide servicing of this residential mortgage loan in accordance with the controlling servicing requirements prior to filing this foreclosure action.

13. Defendants have a right to receive foreclosure prevention loan servicing from the Plaintiff before the commencement or initiation of this foreclosure action.

14. Defendants are in doubt regarding their rights and status as borrowers under the National Housing Act and also under the Pooling and Servicing Agreement filed by the plaintiff with the Securities and Exchange Commission. Defendants are now subject to this foreclosure action by reason of the above described illegal acts and omissions of the Plaintiff.

15. Defendants are being denied and deprived by Plaintiff of their right to access the required troubled mortgage loan servicing imposed on the plaintiff and applicable to the subject mortgage loan by the National Housing Act and also under the Pooling and Servicing Agreement filed by the plaintiff with the Securities and Exchange Commission.

16. Defendants are being illegally subjected by the Plaintiff to this foreclosure action, being forced to defend the same and they are being charged

illegal predatory court costs and related fees, and attorney fees. Defendants are having their credit slandered and negatively affected, all of which constitutes irreparable harm to Defendants for the purpose of injunctive relief.

17. As a proximate result of the Plaintiff's unlawful actions set forth herein, Defendants continue to suffer the irreparable harm described above for which monetary compensation is inadequate.

18. Defendants have a right to access the foreclosure prevention servicing prescribed by the National Housing Act and under the Pooling and Servicing Agreement filed by the plaintiff with the Securities and Exchange Commission which right is being denied to them by the Plaintiff.

19. These acts were wrongful and predatory acts by the plaintiff, through its predecessor in interest, and were intentional and deceptive.

20. There is a substantial likelihood that Defendants will prevail on the merits of their counterclaims.

WHEREFORE, Defendants request the Court dismiss the Plaintiff's complaint with prejudice, enter a judgment pursuant to Fla. Stat. 86 declaring that the Plaintiff is legally obligated to provide the Defendants with access to the special troubled loan servicing prescribed by the National Housing Act and under the Pooling and Servicing Agreement filed by the plaintiff with the Securities and Exchange Commission and enjoining the Plaintiff from charging foreclosure fees and costs and from commencing or pursuing this foreclosure until such servicing is provided to this Defendant, for attorney's fees and for all other relief to which Defendant proves themselves entitled.

COUNT II: ILLEGAL CONSUMER COLLECTION

Defendants reassert and reallege, as their Statement of Facts, paragraphs 2 through 20, inclusive as set out in Count I of these counterclaims.

22. Defendants are consumers and the obligation between the parties which is the debt owned pursuant to the subject note and mortgage is a consumer debt as defined in F. S. Section 559.55(1).

23. Plaintiff has engaged in consumer collection conduct which amounts to a violation of F.S. Section 559.72(9) as set out below and Defendants, as a proximate result thereof, have sustained economic damages for which the Defendants are entitled to compensation from the Plaintiff, pursuant to F.S. Section 559.77.

24. Plaintiff's collection activities described herein violated F.S. 559.72(9) in that the Plaintiff is claiming, attempting and threatening to collect and enforce this consumer mortgage debt by this foreclosure action when the Plaintiff knows that the right to pursue foreclosure does not exist.

25. These acts were wrongful and predatory acts by the plaintiff, through its predecessor in interest, and were intentional and deceptive.

26. Additionally, the reason the Plaintiff does not have a legal right to pursue this foreclosure is because the Plaintiff has failed to first comply with the foreclosure prevention loan servicing obligations imposed on Plaintiff prescribed by the National Housing Act and under the Pooling and Servicing Agreement filed by the plaintiff with the Securities and Exchange Commission.

27. These foreclosure prevention loan servicing obligations are imposed on the Plaintiff pursuant to the National Housing Act, 12 U.S.C. Section 1710(a) and the Pooling and Servicing Agreement filed by the plaintiff with the Securities and Exchange Commission.

28. The Plaintiff is claiming, attempting and threatening to collect fees and charges including, but not limited to, attorney fees, legal fees, foreclosure costs, late charges, property inspection fees, title search expenses, filing fees, broker price opinions, appraisal fees, and other charges and advances, and predatory lending fees and charges all of which are not authorized by or in conformity with the terms of the subject note and mortgage.

29. Plaintiff wrongfully added and continues to unilaterally add these illegal charges to the balance Plaintiff claims is due and owing under the subject note and mortgage.

30. Plaintiff continues to claim, attempt, and threaten to enforce this mortgage debt through acceleration and foreclosure when the Plaintiff knows that

such conduct is in bad faith because the Plaintiff has charged and collected money from defendants that they did not owe; forced defendants into deepening indebtedness and then failed to meet the contractual and statutory conditions precedent before filing this action to collect this consumer debt.

31. As a result of the Plaintiff's failure to properly service this mortgage loan before filing this foreclosure action, Defendants have been damaged and Defendants seek to recover their actual or statutory damages from the Plaintiff under F.S. 559.77.

WHEREFORE, Defendants demand the Plaintiff's complaint be dismissed with prejudice, for an award of damages in defendants' favor and against the plaintiff for their actual or statutory damages whichever is greater and for their attorney's fees and costs and for all other relief to which this Court finds Defendants entitled.

DEMAND FOR TRIAL BY JURY

Defendants hereby demands trial by jury.

WHEREFORE, Defendants demand the Plaintiff's complaint be dismissed with prejudice for failure to state a cause of action and for fraud on the court, and for judgment against the plaintiff for their damages, for an award of attorney's fees and costs and for all other relief to which this Court finds Defendants entitled.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this document has been mailed to Sean Moloney and to Linda Chelvam, Law Offices of Marshall C. Watson, P.A. 1800 N.W. 49th Street, Suite 120, Fort Lauderdale, FL 33309, Attorney for Plaintiff this _____.

JACKSONVILLE AREA LEGAL AID, INC.

APRIL CARRIE CHARNEY, Esquire Fla. Bar No.: 310425

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Attorney for Defendants

**IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA**

**CASE NUMBER: 16-2006-CA-005603-XXXX-MA
Div. CV-D**

**BANK OF NEW YORK AS TRUSTEE FOR THE
CERTIFICATEHOLDERS CWABS II, INC. LFT
2005-04 , Plaintiff,**

vs.

ANGELA FOSTER, et. al., Defendants.

**SEPARATE DEFENDANT DONALD RICHARDSON'S ANSWER, AFFIRMATIVE
DEFENSES, COUNTERCLAIMS AND DEMAND FOR JURY TRIAL**

Comes now the separate defendant, Donald Richardson, and for answer, affirmative defenses, counterclaims and demand for trial by jury, states:

ANSWER

1. Admit.
2. Admit the plaintiff's law firm is a debt collector attempting to collect a debt.
3. Deny the amount of the debt is as set forth in the complaint; deny the plaintiff is the creditor or the servicing agent; admit the plaintiff's law firm is engaged in debt collection as a debt collector on behalf of the plaintiff in this litigation; affirmatively states that defendant disputes the amount of this debt as claimed by the plaintiff and demands a written and itemized transaction history of this debt so that he can examine each charge and payment application.
4. Admit execution and delivery of HUD insured promissory note to Fortress Mortgage, Inc.; deny that plaintiff is Fortress' assignor; deny that the subject note is a negotiable instrument; deny that the subject note was assigned to the plaintiff; admit the execution and delivery to Fortress Mortgage, Inc. of the subject mortgage; deny that the plaintiff is the present owner of the subject mortgage or promissory note; deny that the subject note is a negotiable instrument subject to being held in due course and deny that the Uniform Commercial Code apply to the subject loan transaction or the promissory note.
5. Deny the note or the mortgage were assigned from Fortress Mortgage, Inc. to

Countrywide Home Loans, Inc.; deny the contents of the affidavit of lost assignment of mortgage on the basis of, among other things, hearsay outside of any exception; deny that Countrywide had any interest in the subject loan to convey or transfer to the plaintiff; deny that the plaintiff obtained any interest in the subject note or mortgage; and deny the contents and veracity of the corrected assignment of mortgage attached to the plaintiff's third amended complaint.

6. Deny that the plaintiff, a mortgage backed securitized trust organized and operating solely pursuant to specific laws and contracts and with no other authority, has any legal ability or power to obtain an equitable interest in the subject mortgage loan; deny that the plaintiff obtained equitable assignment of the subject mortgage.

7. Deny the property is owned by Angela Foster; admit the property is owned solely by defendant Donald Richardson.

8. Denied.

9. Denied.

10. Denied.

11. Denied.

12. Denied.

13. Denied.

14. Denied.

15. Denied.

16. Denied.

17. Denied.

18. Denied.

19. Denied.

20. Denied.

21. Denied.

AFFIRMATIVE DEFENSES

1. **FAILURE TO STATE CAUSE OF ACTION; PLAINTIFF DOES NOT HAVE STANDING PLAINTIFF IS NOT REAL PARTY IN INTEREST** : The exhibits attached to Plaintiff's third amended complaint are inconsistent with Plaintiff's allegations as to ownership of the subject promissory note and mortgage, Plaintiff has failed to establish itself as the real party in interest and has failed to state a cause of action.

a. The corrected assignment of mortgage attached to the plaintiff's third amended complaint conflicts with the other documents attached to the complaint as the mortgage is in the name of Fortress Mortgage, Inc., and the "corrected assignment of mortgage" references "consideration of the sum of ten dollars...received...***at or before the ensealing and delivery***" which conflicts, on its face with the "effective date of transfer is 2/17/2000" when the date of execution of the subject corrected assignment of mortgage is November 1, 2007.

b. The purported "Corrected Assignment of Mortgage" post dates the commencement and filing of this foreclosure action and fails to correct the infirmities that rendered the plaintiff's two previous complaints filed herein objectionable.

c. The HUD insured promissory note that is the subject of this foreclosure action is not a negotiable instrument and therefore is not subject to transfer by endorsement because the note is not a bearer instrument and because the note directly and specifically incorporates and directly references and applies federal regulations issued by HUD that limit the Lender's rights of acceleration, collection and foreclosure in the case of a borrower's default. The application, incorporation and reference to the HUD federal regulations which set out specific default loan servicing and loss mitigation requirements imposed on the lender renders the note nonnegotiable under the Uniform Commercial Code.

d. The HUD insured promissory note has a boxed FHA case number and states, in pertinent part, under the section on borrower's failure to pay:

"If Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by regulations of the Secretary as in the case of payment defaults, require immediate payment ...This note does not authorize acceleration when not permitted by HUD regulations..."

e. It is plain on the face of the HUD insured promissory note at issue in

this foreclosure that is attached to the plaintiff's third amended complaint that the note does not contain just an unconditional promise to pay. The resulting uncertainty presented by the terms of the note that specifically apply, incorporate and reference the HUD regulations defeat any argument that the note is a negotiable instrument subject to transfer via endorsement.

f. Therefore, the Uniform Commercial Code, F.S.Chapter 673 does not apply to transfer or enforce the promissory note at issue in this foreclosure action. Nagel v. Cronebaugh, 782 So. 2d 436 (Fla. 5th DCA 2001), citing United Nat'l Bank of Miami v. Airport Plaza Ltd. Partnership, 537 So. 2d 608,609 (Fla. 3d DCA 1988); Thompson v. First Union National Bank, 643 So.2d 1179 (Fla. 5th DCA 1994); See also, Bankers Trust v. 236 Beltway Investment, Inc., 865 F. Supp. 1186 (E.D. Va. 1994).

g. The HUD insured promissory note is conditional because it is subject to and governed by the HUD default loan servicing and loss mitigation regulations. The court cannot determine the obligations required of the person promising to pay or the person requiring payment without reference to the HUD regulations. As a result, the note is not an unconditional promise, is not a negotiable instrument and is not subject to transfer by endorsement. Fla. Stat. § 673.1041.

h. Under Section 3-106(a) of the Uniform Commercial Code "a promise or order is [conditional if it] is subject to or governed by another record, or [the] rights or obligations with respect to the promise or order are stated in another record. Fla. Stat. § 673.1061.

i. "To determine whether an instrument meets negotiable instrument definition of Uniform Commercial Code, only [the] instrument itself may be looked to, not other documents, even when other documents are referred to in instrument." First State Bank at Gallup v. Clark, 570 P.2d 1144 (N.M. 1977); Amberboy v. Societe de Banque Privee, 831 S.W.2d 793, 794 (Tex. 1992); Walls v. Morris Chevrolet, Inc., 515 P.2d 1405, 1407 (Okl. App. 1973).

j. "No instrument can be negotiable which (1) is subject to another agreement, (2) refers to another agreement for the rights of the parties, or (3) incorporates another agreement." Hawkland, Uniform Commercial Code Services § 3-

105:2. See also, Holly Hill Acres, Ltd. v. Charter Bank of Gainesville, 314 So. 2d 209, 210-11 (Fla.2nd DCA 1975) (holding that the incorporation of the terms of a separate writing makes the promissory note a non-negotiable, conditional promise to pay); Hawkland, Uniform Commercial Code Services § 3-105:2; Dzikowski v. Moreno (In re V.O.C. Analytical Labs., Inc.) 263 B.R. 156, 160-61 (S.D. Fla. 2001); (The phrase "subject to" or words to that effect are fatal to negotiability, regardless of the actual provisions of the other document.) Hawkland, Uniform Commercial Code Services § 3-105:2; 28; ("An order or promise is conditional if either the instrument states that the rights or obligations of the parties are defined or stated in another writing or that the rights or obligations of the parties are subject to the terms of another writing.") Anderson, Uniform Commercial Code § 3-106:8 [Rev].

2. FAILURE TO COMPLY WITH APPLICABLE HUD SINGLE FAMILY DEFAULT LOAN SERVICING REQUIREMENTS/ FAILURE TO COMPLY WITH CONDITIONS PRECEDENT: Both the HUD insured promissory note and mortgage that are the subject of this foreclosure action directly and specifically apply, incorporate and refer to federal regulations issued by HUD that directly limit the plaintiff's rights to accelerate and foreclose in the case of a borrower's default. The provisions in both the note and the mortgage direct the plaintiff to engage in special default loan servicing and loss mitigation in its efforts to collect this debt to avoid foreclosure.

a. The mortgage has on its face a boxed FHA Case number and states:

"9. Grounds for Acceleration of Debt.

(a) Default: Lender may, except as limited by regulations issued by the Secretary in the case of payment defaults, require immediate payment...

(d) Regulations of HUD Secretary. In many circumstances regulations issued by the Secretary will limit Lender's rights in the case of payment defaults to require immediate payment in full and foreclose if not paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary."

b. Defendant affirmatively defends this foreclosure based on the Plaintiff's failure to comply with the forbearance, mortgage modification, and other foreclosure prevention

loan servicing requirements imposed on Plaintiff and the subject FHA mortgage by federal regulations promulgated by HUD, pursuant to the National Housing Act, 12 U.S.C. 1710(a). As a result, Plaintiff has failed to establish compliance with a statutory and contractual condition precedent to this foreclosure because of Plaintiff's failure to comply with the federal regulations.

c. Defendant Donald Richardson, who is disabled, defaulted on this FHA insured residential mortgage which is the subject of this cause due to reasons beyond his control which include, but are not limited to disabilities and the involuntary loss of household income that proximately caused defendant to be unable to make his regular mortgage payments.

d. The Plaintiff is required under federal law to adapt its collection and loan servicing practices to Defendant's individual circumstances and failed to do so.

e. The Plaintiff did not make a reasonable effort as required by federal law to arrange a face to face meeting with Defendant before three full monthly installments were unpaid. 24 C.F.R. 203.604.

f. The Plaintiff is required by federal law to evaluate all available loss mitigation techniques and to re-evaluate these techniques each month after default and failed to do so. 24 C.F.R. 203.605.

g. HUD has determined that the requirements of 24 C.F.R. Part 203(C) are to be followed before any mortgagee commences foreclosure.

h. Plaintiff has no valid cause of action for foreclosure against defendant unless and until Plaintiff can demonstrate compliance with the regulations in 24 C.F.R. Part 203(C).

i. As a result, Defendant was denied access to the foreclosure prevention services and the mortgage servicing options that the plaintiff is obligated to follow in servicing this federally insured home loan which are designed to avoid foreclosure of this HUD insured mortgage.

j. Defendant did everything he could to keep up with his monthly mortgage payments and with great difficulty was able to keep up with his mortgage payments into 2004 when he became no longer able to make his regular mortgage payments.

k. Defendant was initially sued in June, 2004 in a foreclosure filed by Mortgage

Electronic Registration Systems, Inc. as nominee for Countrywide Home Loans, Inc. when the defendant was less than 5 months behind on his mortgage.

l. This entire foreclosure and all the extra costs and fees associated therewith were supposed to be avoided by and through the good faith and timely provision of default loan servicing and loss mitigation assistance which the defendant was entitled to receive and which the plaintiff was obligated to provide under federal law and under the specific terms of the subject mortgage and note.

m. Plaintiff denied this defendant any opportunity to access a legitimate HUD required process to avoid this foreclosure.

3. **UNCLEAN HANDS/ESTOPPEL**: The Plaintiff comes to Court with unclean hands and is prohibited by reason thereof from obtaining the equitable relief of foreclosure from this Court as set forth in the defendant's statement of facts contained in affirmative defense no. 2 (a) through (m) incorporated herein. The Plaintiff's unclean hands result from the Plaintiff's intentional and reckless failure to properly service this mortgage pursuant to the applicable federal regulations and the contract between the parties before filing this foreclosure action. Plaintiff intentionally failed to offer Defendant access to the special default loan servicing for financially troubled borrowers that the applicable federal law and the contract between the parties require including moratorium, forbearance and loan modification. As a matter of equity, this Court should refuse to foreclose this mortgage because acceleration of the note would be inequitable, unjust, and the circumstances of this case render acceleration unconscionable. This Court should refuse the acceleration and deny foreclosure because Plaintiff has waived the right to acceleration or is estopped from doing so because of intentionally misleading and reckless conduct and unfulfilled conditions.

WHEREFORE, Defendant requests the Court dismiss the Plaintiff's third amended Complaint with prejudice, and for all other relief to which this Defendant proves himself entitled including an award of reasonable attorney's fees and costs in this action.

4. **FAILURE OF GOOD FAITH AND FAIR DEALING: UNFAIR AND UNACCEPTABLE LOAN SERVICING**: Plaintiff intentionally failed to act in good faith or to deal fairly with this Defendant by failing to follow the requirements of the HUD

mandated standards of residential single family mortgage lending and servicing as described in these Affirmative Defenses thereby denying this Defendant access to the residential mortgage servicing protocols applicable to the subject note and mortgage.

5. **ILLEGAL CHARGES ADDED TO BALANCE**: Plaintiff has charged and/or collected payments from Defendant for attorney fees, legal fees, foreclosure costs, advances, other fees and charges, property preservation charges, inspection fees, late fees, and other predatory lending fees and charges that are not authorized by or in conformity with the terms of the subject note and mortgage. Plaintiff wrongfully added and continues to unilaterally add these illegal charges to the balance Plaintiff claims is due and owing under the subject note and mortgage.

Counterclaims

Count I - Declaratory and Injunctive Relief

1. This is Defendant's action for declaratory and injunctive relief against the Plaintiff.

2. Defendant reasserts and alleges, as his statement of facts, Affirmative Defense No. 2 and 5 as stated above.

3. Defendant contends that the Plaintiff has no right to pursue this foreclosure because the Plaintiff has failed to first provide the defendant with the special troubled home loan servicing of this FHA insured residential mortgage in accordance with the terms of the note and mortgage and the applicable federal regulations at 24 C.F.R. Part 203 Subpart C prior to filing this foreclosure action.

4. Defendant contends that he has a right to receive forbearance, mortgage modification, and other foreclosure prevention loan services from the Plaintiff pursuant to and in accordance with the federal regulations before the commencement or initiation of this foreclosure action.

5. Defendant is in doubt as to his rights and status as a borrower under the National Housing Act and the above described federal regulations made applicable to and incorporated in the subject mortgage as a result of the Plaintiff's failure to service the subject loan pursuant to the contract and the applicable federal law and because the Defendant is now being subjected to this foreclosure action, all of which the Defendant contends are illegal acts and omissions of Plaintiff.

6. Defendant is being denied and deprived by Plaintiff of his right to access the special troubled mortgage servicing required under the federal statute and regulations and the subject note and mortgage. Defendant is being illegally subjected to this foreclosure action, being forced to defend same, being charged illegal and predatory court costs and related fees and attorney fees, and is having his credit slandered and negatively affected, all of which constitute irreparable harm to this Defendant for the purpose of injunctive relief.

7. As a proximate result of the Plaintiff's unlawful actions, Defendant continues to suffer the irreparable harm described above for which monetary compensation is inadequate.

8. Defendant has a right to access the special troubled home loan servicing prescribed by the federal regulations and the contract which is being denied by the Plaintiff.

9. There is a substantial likelihood that Defendant will prevail on the merits of his counterclaim.

WHEREFORE, Defendant requests the Court dismiss the Plaintiff's third amended Complaint with prejudice, enter a judgment pursuant to Fla. Stat. 86 declaring that the Plaintiff provide Defendant with access to the special servicing provided in the applicable federal regulations and required by the contract and enjoining the Plaintiff from charging foreclosure fees and costs and from commencing or pursuing this foreclosure until such servicing is provided and for all other relief to which this Defendant proves himself entitled including an award of reasonable attorney's fees and costs in this action.

Count II - Consumer Collections Act Violation

Defendant reasserts and alleges, as his statement of facts, Affirmative Defense No. 2 and 5 as stated above.

10. Defendant is a consumer and the obligation between the parties which is the debt owed pursuant to the subject note and mortgage is a consumer debt as defined in Fla. Stat. Section 559.55(1).

11. Fla. Stat. Section 559.72(9) provides:

559.72 Prohibited Practices generally:

In collecting consumer debts, no person shall:

- (9) claim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate or assert the existence of some other legal right when such person knows that the right does not exist.

12. Plaintiff has engaged and continues to engage in consumer collection conduct which violates Fla. Stat. Section 559.72(g) in the following and other particulars:

a. Plaintiff continues to enforce this debt and pursue this foreclosure action even though the Plaintiff knows no such right exists and this foreclosure action is threatening and premature because the Plaintiff has not serviced this federally insured home loan pursuant to or in compliance with the special foreclosure prevention loan servicing federal regulations.

b. The Plaintiff continues to claim, attempt, and threaten to enforce this debt through acceleration and foreclosure when the Plaintiff knows that such conduct is premature and in bad faith because such right does not yet exist as Plaintiff has failed to meet the contractual and statutory conditions precedent to asserting its right to collect this home loan debt through foreclosure contained in the subject mortgage and in 12 U.S.C. 1710(a) and 24 C.F.R. Part 203 Subpart C.

13. Defendant, as a proximate result of Plaintiff's acts and conduct described above, has sustained economic damage for which the Defendant is entitled to compensation from the Plaintiff pursuant to Fla. Stat. Section 559.77.

WHEREFORE, Defendant requests this Court dismiss the Plaintiff's third amended complaint with prejudice and award this Defendant actual or statutory damages, whichever is greater, attorney's fees and costs, and for all other relief to which this Court finds Defendant entitled.

COUNT III: Breach of Fiduciary Duty

Defendant asserts and alleges his second and fifth affirmative defenses and paragraph 12 of his counterclaims set forth hereinabove as his Statement of Facts herein.

14. Plaintiff owed Defendant a fiduciary duty and obligation under the subject

note and mortgage to, among other things, act in good faith and in the best interest of Defendant by providing the defendant with the special troubled home loan servicing of this FHA insured residential mortgage in accordance with the terms of the note and mortgage and the applicable federal regulations at 24 C.F.R. Part 203 Subpart C prior to filing this foreclosure action.

15. Plaintiff failed, refused and/or neglected to carry out its fiduciary obligations owed to Defendant in connection with the servicing of the subject federally insured home loan.

16. As a result of the plaintiff's breach of fiduciary duty, Defendant has sustained monetary damage which includes having to defend this foreclosure and being charged illegal and predatory servicing charges, court costs and related fees and attorney's fees, having his credit slandered and negatively affected.

WHEREFORE, Defendant requests this Court dismiss the Plaintiff's third amended complaint with prejudice and award this defendant judgment against the plaintiff for his damages, for an award of attorney's fees and for all other relief as the Court deems proper.

COUNT IV: Breach of Obligations of Good Faith and Fair Dealing

Defendant asserts and alleges his second and fifth affirmative defense and paragraph 12 of his counterclaims set forth hereinabove as his Statement of Facts herein.

17. Plaintiff owes defendant a duty implied in the note and mortgage to act in good faith and to deal fairly with defendant by providing the defendant with the special troubled home loan servicing of this FHA insured residential mortgage in accordance with the terms of the note and mortgage and the applicable federal regulations at 24 C.F.R. Part 203 Subpart C prior to filing this foreclosure action.

18. Plaintiff materially breached its duties of good faith and fair dealing as described hereinabove proximately resulting in damage to defendant as described hereinabove.

WHEREFORE, Defendant requests this Court dismiss the Plaintiff's third amended complaint with prejudice and award this defendant judgment against the plaintiff for his damages, for an award of attorney's fees and for all other relief as the

Court deems proper.

COUNT V: Breach of Contract

Defendant asserts and alleges his second and fifth affirmative defense and paragraph 12 of his counterclaims set forth hereinabove as his Statement of Facts herein.

WHEREFORE, Defendant requests this Court dismiss the Plaintiff's third amended complaint with prejudice and award this defendant judgment against the plaintiff for his damages, for an award of attorney's fees and for all other relief as the Court deems proper.

DEMAND FOR TRIAL BY JURY

Defendant hereby demands trial by jury.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this document has been mailed by U.S. Mail to Danielle Parsons, Butler & Hosch, 3185 South Conway Road, Suite E, Orlando, Florida 32812, attorney for Plaintiff, this _____.

JACKSONVILLE AREA LEGAL AID, INC.,

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april.charney@jaxlegalaid.org
Attorneys for Separate Defendant

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

SHANNON LOMBARD and	)	
PATRICK LOMBARD	)	
	)	
PLAINTIFFS,	)	
	)	CIVIL ACTION NO.: CV 07-86
VS.	)	
	)	
U.S. BANK NATIONAL	)	
ASSOCIATION AS TRUSTEE,	)	
	)	
DEFENDANTS.	)	

U.S. BANK NATIONAL	)	
ASSOCIATION AS TRUSTEE,	)	
	)	
PLAINTIFF,	)	
	)	CIVIL ACTION NO: CV 07-900034
VS.	)	
	)	
SHANNON LOMBARD and	)	
PATRICK LOMBARD,	)	
	)	
DEFENDANTS	)	
	)	
VS.	)	
	)	
U.S. BANK NATIONAL	)	
ASSOCIATION AS TRUSTEE	)	
	)	
COUNTER-DEFENDANT	)	
	)	
HOMEQ SERVICING CORPORATION;	)	
PREMIER MORTGAGE FUNDING, INC;	)	
and SHAMEKA MONTGOMERY; A - D,	)	
	)	
THIRD-PARTY DEFENDANTS	)	

**PATRICK LOMBARD AND SHANNON LOMBARD'S AMENDED COUNTERCLAIM
AND THIRD PARTY COMPLAINT**

Comes now, PATRICK LOMBARD AND SHANNON LOMBARD, by and through their

attorneys of record and file their answer to the plaintiff's complaint, and their counterclaim and third party claims pursuant to Rule 13 and 14 of the Alabama Rules of Civil Procedure as follows:

PROCEDURAL MATTERS

The Lombards adopt and reallege all prior paragraphs of any prior responsive pleadings as if set out here in full.

ANSWER

For answer to the plaintiff's complaint, the defendants respond as follows:

AFFIRMATIVE DEFENSES

1. The plaintiff received no title to the defendants' property because the foreclosure was void.
2. The title taken to the property by the plaintiff is of no effect and void because the underlying foreclosure was commenced in violation of law on one or more of the following grounds:
 - a) The foreclosing entity lacked standing to foreclose; that is, it did not own the note and mortgage at the time that it instituted the foreclosure action.
 - b) The foreclosure was taken in violation of law in that the foreclosing entity did not own the property upon which it foreclosed and therefore could pass no legal title to the lands it claimed to foreclose nor could it acquire legal title to the lands that it foreclose upon.
 - c) The foreclosure was taken in violation of law in that the default was exaggerated, inflated and based upon improper and illegal mortgage servicing practices on the part of the foreclosing entity and its agents or employees.
 - d) The foreclosure is voidable in that the foreclosure sale was completed by fraud, deceit or trickery on the part of the foreclosing entity and its agents, employees or servants in that

the foreclosing parties represented that they would delay the foreclosure but then failed to do so.

- e) The foreclosing entity failed to strictly comply with the requirements set out in Alabama law and the contract between the parties, with respect to notice, time and place and other legal provisions thereby rendering the foreclosure void.
- f) The foreclosing entity failed to engage in loss mitigation required by its agreements and federal servicing guidelines which the entity is subject to, and because of the failure of the condition precedent to foreclosure the acceleration and default were invalid and illegal and renders the foreclosure void.

COUNTERCLAIM

Defendants file herewith their counterclaim as follows:

STATEMENT OF THE PARTIES

3. The plaintiff/counter defendant U.S. Bank as trustee as National Trustee in this action is a foreign corporation doing business in Shelby County, Alabama.

4. The Defendants/Lombards in this action are adult residents of Shelby County, Alabama.

5. The new US Bank National Association and Morris, Schneider and Prior replacing those previously unnamed fictitious defendants are as follows:

a). The law firm of Morris, Schneider & Prior, LLC, whose principal place of business is 1587 Northeast Expressway Atlanta, Georgia 30329 and who does business by agent in Shelby County, Alabama.

b) Jonathan Butler, was an associate employee of Morris, Schneider & Prior, LLC and was personally responsible for going forward with the foreclosure on the Lombard's home.

STATEMENT OF THE FACTS

6. On or about January 4, 2007, U.S. Bank as trustee through its agents, employees or servants, Morris, Schneider & Prior and Jonathan Butler alleged that they completed a foreclosure sale on the property owned by the Lombards.

7. Since that time, these defendants together have pursued and received an order ejecting the Lombard's from their home while representing to the Court that their actions were lawful and that U.S. Bank as trustee had the present right, ownership and authority to pursue both foreclosure and eviction.

8. The new 3rd party defendants Morris, Schneider and Prior and Jonathan Butler, appeared before the Court and represented to the Court that they had the right to foreclose and eject on behalf of their client U.S. Bank as trustee.

9. As will be further shown, U.S. Bank as trustee, Morris, Schneider and Prior and Jonathan Butler conspired together to wrongfully foreclose on the Lombards' home and to eject them from the home.

10. The defendants contend and have represented to this Court that U.S. Bank as trustee "as trustee" is the holder of said mortgage and therefore has foreclosed in accordance with Alabama law and their rights under the security agreement.

11. Attached to this third party complaint as exhibit "1" is a letter received from the defendant Morris, Schneider and Prior dated November 29, 2006 which states that U.S. Bank as trustee is the trustee for "Structured Asset Securities Corporation Structured Asset Investment Loan Trust Mortgage Pass Through Certificates Series 2005-HE1".

12. Attached to this third party complaint as exhibit “2” is a copy of an assignment that is filed of record claiming to assign the Lombards’ mortgage first from Argent Mortgage Company to Ameriquest Mortgage Company. This assignment has the following significant information:

- a) The document indicates that it is filed of record at 1/12/2006 at 12:37:10 pm;
- b) It is executed by Argent Mortgage Company, LLC by an individual whose name is Marcia Morgan;
- c) It is claimed that she is an agent of Argent Mortgage Company, LLC
- d) The assignment states that it is executed at Westchester County in New York on January 31, 2005.
- e) The assignment says that Argent’s address is 44 South Broadway 16th Floor White Plains, NY 10604.
- f) The assignment does not bear any evidence that Marcia Morgan is an authorized agent of Argent Mortgage Company LLC or that Argent Mortgage Company LLC authorized her to execute the assignment in question.
- g) The assignment does not bear any authentication in the form of a corporate seal or stamp indicating that anyone at Argent Mortgage Company LLC authorized this signature.
- h) This document is notarized by one Richard Price.
- i) This document has handwritten in the upper right corner the following MSP 0519617AL

13. Attached to this complaint as exhibit “3” is a document that purports to assign the Lombard’s mortgage from Ameriquest Mortgage Company to U.S. Bank National Association as trustee. Said document contains all of the following characteristics:

- a) The document indicates that it is filed of records at 1/12/2006 at 12:37:11 pm;
- b) The document is executed by Ameriquest Mortgage Company by an individual whose name is Marcia Morgan;
- c) It is claimed on the face of the document that she is an agent of Ameriquest Mortgage Company;
- d) The assignment states that it is executed at Westchester County in New York on January 31, 2005.
- e) The address of Ameriquest Mortgage Company on the face of the document is 1100 Town and Country Road, Suite 200, Orange California 92868.
- f) The assignment does not bear any evidence that Marcia Morgan is an authorized agent of Ameriqueset Mortgage Company or that Ameriquest Mortgage Company authorized her to execute the assignment in question.
- g) The assignment does not bear any authentication in the form of a corporate seal or stamp indicating that anyone at Amerquest Mortgage Company authorized this signature.

- h) This document is notarized by one Richard Price.
- i) This document has handwritten in the upper right corner the following
MSP 0519617AL

14. Of particular interest to the finder of fact is that the handwritten information MSP 0519617AL is the file number which is identified in exhibit 1 to this complaint which identifies this loan not as the property of US Bank National Association as trustee but which identifies this property as “U..S. Bank National Association as trustee Structured Asset Securities Corporation Structured Asset Investment Loan Trust Mortgage Pass Through Certificates Series 2005-HE1”.

15. When “Structured Asset Securities Corporation Structured Asset Investment Loan Trust Mortgage Pass Through Certificates Series 2005-HE1” is searched on the SEC database known as the EDGAR database which makes public all filings required by the SEC a party finds certain legal filings required by the SEC to establish a publicly traded “special investment vehicle” or SIV in industry parlance which provide the following information:

- a) That Structured Asset Securities Corporation is the depositor for a trust called the “Structured Asset Investment Loan Trust Mortgage Pass Through Certificates Series 2005-HE1”.
- b) That the issuing entity offering Mortgage backed securities is “Structured Asset Investment Loan Trust Mortgage Pass Through Certificates Series 2005-HE1” and it is a common law trust formed under the laws of New York.

<http://www.secinfo.com/d12atd.z3uf.htm#rdl>

- c) That the trustee is US Bank National Association
<http://www.secinfo.com/d12atd.z3uf.htm#rdl>
- d) That the primary servicer is Homeq
<http://www.secinfo.com/d12atd.z3uf.htm#rdl>
- e) That Finance America LLC and Argent Mortgage LLC and its affiliates are the originators of the mortgages that fund the trust
<http://www.secinfo.com/d12atd.z3uf.htm#rdl>
- f) That the certificates represent ownership interests in a trust fund, the assets of which will consist primarily of conventional, adjustable and fixed rate, fully amortizing and balloon, first and second lien, residential mortgage loans having a total principal balance as of the cut-off date, which is [July 1, 2005](#), of approximately \$1,724,787,930. In addition, the supplemental interest trust will hold an interest rate swap agreement for the benefit of the certificateholders.
<http://www.secinfo.com/d12atd.z3uf.htm#rdl>
- g) That on the closing date, which is expected to be on or about [July 29, 2005](#), the assets of the trust fund will consist primarily of two mortgage pools of conventional, adjustable and fixed rate, fully amortizing and balloon, first and second lien, residential mortgage loans with a total principal balance as of

the cut-off date of approximately \$1,724,787,930.

<http://www.secinfo.com/d12atd.z3uf.htm#rdl>

- h) That violation of various federal, state and local laws may result in losses on the mortgage loans Violations of certain federal, state or local laws and regulations relating to the protection of consumers, unfair and deceptive practices and debt collection practices may limit the ability of the servicer to collect all or part of the principal of or interest on the mortgage loans and, in addition, could subject the trust fund to damages and administrative enforcement.

<http://www.secinfo.com/d12atd.z3uf.htm#rdl>

- i) The following additional information is also found:

The Mortgage Loans will be assigned by the Depositor to the Trustee, together with all principal and interest received with respect to such Mortgage Loans on and after the Cut-off Date (other than Scheduled Payments due on that date). The Trustee will, concurrently with such assignment, authenticate and deliver the Certificates. Each Mortgage Loan will be identified in a schedule appearing as an exhibit to the Trust Agreement which will specify with respect to each Mortgage Loan, among other things, the original principal balance and the Scheduled Principal Balance as of the close of business on the Cut-off Date, the Mortgage Rate, the Scheduled Payment, the maturity date, the Servicer and the Custodian of the mortgage file, whether the Mortgage Loan is covered by an LPMI Policy and the applicable Prepayment Premium provisions, if any.

Deutsche Bank National Trust Company will act as Custodian on behalf of the Trustee, pursuant to the Custodial Agreement. As to each Mortgage Loan, the following documents are generally required to be delivered to the Custodian on behalf of the Trustee in accordance with the Trust Agreement: (1) the related original mortgage note endorsed without recourse to the Trustee or in blank, (2) the original mortgage

with evidence of recording indicated thereon (or, if such original recorded mortgage has not yet been returned by the recording office, a copy thereof certified to be a true and complete copy of such mortgage sent for recording) <http://www.secinfo.com/d12atd.z3uf.htm#6eks>

j) Further the issuing entity can only act as set forth in the trust documents:

The Issuing Entity will not have any employees, officers or directors. The Trustee, the Depositor, the Master Servicer, the Servicer, the Credit Risk Manager and the Custodian will act on behalf of the Issuing Entity, and may only perform those actions on behalf of the Issuing Entity that are specified in the Trust Agreement, the Sale and Assignment Agreement, the Servicing Agreement and the Custodial Agreement. See "[*The Master Servicer*](#)," "[*The Servicer*](#)," "[*Mortgage Loan Servicing*](#)" and "[*The Trust Agreement*](#)." The Trustee, on behalf of the Issuing Entity, is only permitted to take such actions as are specifically provided in the Trust Agreement. Under the Trust Agreement, the Trustee on behalf of the Issuing Entity will not have the power to issue additional certificates representing interests in the Trust Agreement, borrow money on behalf of the Trust Fund or make loans from the assets of the Trust Fund to any person or entity, without the amendment of the Trust Agreement by Certificateholders and the other parties thereto as described under "[*Certain Matters Under the Trust Agreement--Amendment of the Trust Agreement*](#)." <http://www.secinfo.com/d12atd.z3uf.htm#6ap0>

k) The depositor represented to the trust that immediately prior to the transfer and assignment of the Mortgage Loans to the Trustee, the Depositor was the sole owner of record and holder of each Mortgage Loan, and the Depositor had good and marketable title thereto, and had full right to transfer and sell each Mortgage Loan to the Trustee free and clear... section 2.03(a)(vi).

l) Concurrently with the execution and delivery of this Agreement, the Depositor does hereby transfer, assign, set over, deposit with and otherwise convey to the Trustee, without recourse, subject

to Sections 2.02, 2.04, 2.05 and 2.06, in trust, all the right, title and interest of the Depositor in and to the Mortgage Loans.

Such conveyance includes, without limitation, the right to all payments of principal and interest received on or with respect to the Mortgage Loans on and after the Cut-off Date. Section 2.01(a)

- m) According to Section 2.01 the depositor is required to provide in connection with such transfer and assignment, the Depositor does hereby deliver to, and deposit with, or cause to be delivered to and deposited with, the Trustee, and/or the Custodian acting on the Trustee's behalf, the following documents or instruments with respect to each Mortgage Loan (each a "*Mortgage File*") so transferred and assigned: with respect to each Mortgage Loan, the original Mortgage Note endorsed without recourse in proper form to the order of the Trustee, or in blank (in each case, with all necessary intervening endorsements, as applicable) or with respect to any lost Mortgage Note, a lost note affidavit stating that the original Mortgage Note was lost, misplaced or destroyed, together with a copy of the related Mortgage Note; with respect to each Non-MERS Mortgage Loan other than a Cooperative Loan, an original Assignment of Mortgage, in form and

substance acceptable for recording. The Mortgage shall be assigned either (A) in blank, without recourse or (B) to “*U.S. Bank National Association, as Trustee of the Structured Asset Investment Loan Trust, 2005-HE1*,” without recourse; and (vi) if applicable, such original intervening assignments of the Mortgage, notice of transfer or equivalent instrument (each, an “*Intervening Assignment*”), as may be necessary to show a complete chain of assignment from the originator, or, in the case of an Intervening Assignment that has been lost, a written Opinion of Counsel acceptable to the Trustee and any NIMS Insurer that such original Intervening Assignment is not required to enforce the Trustee’s interest in the Mortgage Loan; further under 2.03(c) (i) Assignments of Mortgage with respect to each Non-MERS Mortgage Loan other than a Cooperative Loan shall be recorded; *provided, however*, that such Assignments need not be recorded if, on or prior to the Closing Date, the Depositor delivers, at its own expense, an Opinion of Counsel addressed to the Trustee (which must be Independent counsel) acceptable to the Trustee and the Rating Agencies, to the effect that recording in such states is not required to protect the Trustee’s interest in the related Non-MERS Mortgage Loans; *provided, further*, that

notwithstanding the delivery of any Opinion of Counsel, the Master Servicer shall cause the Servicer to submit each Assignment of Mortgage for recording upon the occurrence of a bankruptcy, insolvency or foreclosure relating to the Mortgagor under the related Mortgage. Subject to the preceding sentence, as soon as practicable after the Closing Date (but in no event more than three months thereafter except to the extent delays are caused by the applicable recording office), the Master Servicer, at the expense of the Depositor and with the cooperation of the Servicer, shall cause to be properly recorded by the Servicer in each public recording office where the related Mortgages are recorded each Assignment of Mortgage referred to in subsection (b)(v) above with respect to each Non-MERS Mortgage Loan.

16. The documents of record in this case tend to show that the mortgage that is the subject of this litigation (which includes the assignments of record) do not convey the subject mortgage to the subject trust which seeks to foreclose on the Lombards' home.

17. In fact, the documents of record indicate that there is an assignment to US Bank National Association as trustee.

18. These purported assignments tend to convey each of the following irregularities rendering the assignments invalid and legally unenforceable:

- a) The documents are each signed by the same individual.
- b) That individual purports to represent two different companies at the same time and place although those companies are separated by thousands of geographical miles.
- c) The documents purport to act with corporate authority but lack the requisite corporate formalities to render them effective.
- d) The documents purport to ultimately convey the mortgage to US Bank National Association. However, the documents from the defendants Morris, Schneider and Prior tend to show the name of a specific trust which claims to own the mortgages.
- e) The documents both contain an MSP file number identical to the one on the attached Morris, Schneider and Prior letter to the Lombards.
- f) If these documents were prepared concurrently with the date they claim to be executed they would have been executed prior to the generation of an MSP file number, providing an inference that these documents were fabricated to support the foreclosure of the defendant Morris Schneider and Prior.
- g) According to the documents created the trust which the defendants contend owns the Lombards' mortgage, the only entity that could convey a mortgage to the trust was Structured Asset Securities Corporation.

- h) Therefore, the assignments of record which purport to assign directly to US Bank National Association as trustee fail to convey the mortgage to the trust which the defendants claim owns the mortgage since the assignors could not go outside the trust documents to convey mortgages directly to the trust nor could the trust go outside of its documents to accept a conveyance that did not comply with the trust agreement's terms.
- i) Also, even though these documents were recorded in 2006, and possibly fabricated. They fail to follow the basic steps for conveyance to the trust in that they are endorsed with recourse instead of without recourse and there is no assignment to the depositor "Structured Asset Securities Corporation."

19. Further, should these defendants be willing to creep even further out onto the proverbial limb and argue that US Bank National Association as trustee is the owner of said loan, the Lombard's would posit only one question: As trustee for whom is US Bank the owner of said loan?

20. As the finder of fact may have now guessed, if the finder of fact is not bored to tears by now, a trustee cannot go beyond his powers set forth in the trust which grants him his powers.

21. US Bank National Association "as trustee" has no power to act beyond the power granted in its trust agreement. If US Bank intends to claim that it is not attempting to foreclose for "Structured Asset Investment Loan Trust Mortgage Pass Through Certificates Series 2005-HE1" then the court should either require US Bank and Morris Schneider and Prior to set forth in specific terms who it claims owns the mortgage in question and who US Bank is serving as trustee for so that the Lombards may have the benefit of

reviewing US Bank's responsibilities and obligations under any alternative trust that it would like to claim owns the Lombards' mortgage or equitably estop these defendants from so claiming based on their prior representations to this Court over nearly a year of litigation.

22. Further, the potential owners are quite numerous should these defendants go out on that proverbial limb even further (and should this Court allow them to do so) as even a cursory glance of SEC filings shows that there are currently no less than 32 active trusts for mortgage backed securities for which US Bank serves as trustee.

23. The Lombards contend that said sale was wrongful, illegal, in violation of law and the documents governing the relationship between the Lombards and the owners of the Lombards mortgage.

24. The Lombards contend that the foreclosing entity lacked standing to initiate a foreclosure and that the foreclosure is void or at least voidable and that no title has passed to US Bank National Association as there was no legal title to pass to it from the foreclosing entity.

25. The Lombards allege that the actions of US Bank National Association, Morris, Schneider and Prior, LLC and their agents, employees and servants were wrongful and tortious.

26. The Lombards allege that the actions of the foreclosing entity were wrongful and tortious.

27. The Lombards allege that the actions of Morris, Schneider and Prior LLC and US Bank National Association in ejecting them from their home and wrongfully foreclosing is a violation of law, wrongful and tortious and that US Bank National Association holds no title to their home or property, and that its actions constitute trespass, negligence, wantonness, abuse of process and slander of title.

28. The Lombards allege that the actions of US Bank National Association coupled with the actions of Morris, Schneider and Prior LLC and their employees, agents and servants were a civil conspiracy to deprive the Lombards of their property. Additionally, US Bank National Association and Morris,

Schneider and Prior LLC are in a joint venture wherein these parties were engaged in a civil conspiracy to falsify legal documents for the purpose of foreclosing on the homes of individuals under a colorable title of right for the purpose of generating profits and income from the act of depriving individuals of their homes and for the purpose of unjustly enriching the participants of the joint venture at the expense of the unsuspecting and unknowing.

29. The Lombards allege that US Bank National Association had the right to choose and control the attorneys who it hired to foreclose on loans and by having such control are liable for the wrongful and tortious conduct of their agents, employees and servants.

30. As a direct result of the acts complained of the Lombards have been caused to suffer great mental anguish, economic and emotional damages and claim from the defendants all damages allowable under the law.

First Claim

(Negligence)

31. The Lombards reallege all prior paragraphs of the pleading as if set out here in full.

32. US Bank National Association and Morris, Schneider and Prior negligently ejected the Lombards from the home they rightfully own since the foreclosure performed by Morris, Schneider and Prior, LLC is void.

33. As a direct result of the US Bank National Association Morris, Schneider and Prior's negligence, the Lombards were injured and damaged as alleged above and have suffered mental anguish, economic injury and all other damages allowed by law.

34. As a result thereof, the plaintiff/counter-defendant is liable for all natural, proximate and consequential damages due to its negligence.

Second Claim for Relief

(Wantonness)

35. The Lombards reallege all prior paragraphs of the pleading as if set out here in full.

36. US Bank National Association and Morris, Schneider and Prior with reckless indifference to the consequences, consciously and intentionally acted to eject the Lombards from the home they rightfully own.

37. US Bank National Association and Morris, Schneider and Prior with reckless indifference to the consequences, consciously and intentionally instituted this action with the knowledge that the home of the Lombards does not belong to US Bank National Association.

38. These actions were taken with reckless indifference to the consequences, consciously and intentionally in an effort to increase profits for the US Bank National Association.

39. As a result thereof, US Bank National Association and Morris, Schneider and Prior are liable for all natural, proximate and consequential damages due to their wantonness as well as punitive damages upon a proper evidentiary showing.

Third Claim for Relief

(Trespass)

40. After wrongfully foreclosing on the Lombards home and ejecting them US Bank National Association and Morris, Schneider and Prior unlawfully entered upon the lands of the Lombards in Shelby County, Alabama.

41. As a proximate result of said trespass the Lombards have been deprived of the peaceful enjoyment of their property.

42. Because of the willful and oppressive nature of these actions, the Lombards claim punitive damages as allowed under the law.

43. As a result of their trespass US Bank National Association and Morris, Schneider and Prior are liable for all natural, proximate and consequential damages due to their trespass as well as punitive damages upon a proper evidentiary showing.

Fourth Claim for Relief

Abuse of Process

44. The Lombards reallege all paragraphs as if set out here in full.

45. Morris Schneider and Prior at the direction and control of US Bank National Association maliciously obtained the issuance of the writ or process of ejectment, from the Circuit Court of Shelby County, Alabama and had it served on the Lombards.

46. Morris Schneider and Prior abused the said writ or process because they ejected the Lombards from their home with the knowledge that they are the rightful owners of their home and that US Bank National Association and Morris, Schneider and Prior had no right to act against them.

47. As the proximate result of Morris, Schneider and Prior's abuse of the said writ or process, the Lombards were caused to suffer injuries and damages, also, reasonable attorney's fees incurred in defending the abusive writ.

48. The Lombards claim all damages allowable under law.

Fifth Claim for Relief

Slander of Title

49. The Lombards reallege all paragraphs as if set out here in full.

50. US Bank National Association and Morris, Schneider and Prior, in filing a foreclosure deed – which is void - has caused a cloud to be placed on the title of the property of the Lombards.

51. As the proximate cause of US Bank National Association and Morris, Schneider and Prior's said slandering of the Lombards' title, the Lombards were caused to suffer injuries and damages and claim all damages allowable under law.

Sixth Claim for Relief

Respondent Superior Liability

52. The Lombards reallege all prior paragraphs as if set out here in full.

53. US Bank National Association hired, directed, or controlled the actions of Morris, Schneider and Prior and its employees and associates.

54. Morris, Schneider and Prior who is a third party defendant in this action, serves at the leisure of both the Trust and Trustee and / or is a part of a joint venture with the Trust and Trustee US Bank National Association. These parties are alleged, upon information and belief, to be engaged in a civil conspiracy to engage in conduct which is unlawful for the purpose of unjustly enriching the members or participants in the joint venture.

55. US Bank National Association is liable in tort for all of the wrongful actions of its agent, employee or servants, Morris, Schneider and Prior, LLC.

56. The Lombards claim all damages allowable under law for these wrongful actions.

Seventh Cause of Action

Negligent or Wanton Hiring, Supervision, Training or Retention

57. The Lombards reallege all prior paragraphs as if set out here in full.

58. US Bank National Associatoin negligently or wantonly hired, trained, supervised or retained the third party defendant, Morris, Schneider and Prior.

59. As a result of this negligence or wantonness, depending on evidence adduced, the Lombards were injured and damaged by the actions of Morris, Schneider and Prior.

60. As a result, US Bank National Association is liable for all damages proximately and directly flowing from these actions by their agent, employee or servant, Morris, Schneider and Prior.

Eighth Cause of Action

Joint Venture Liability

61. The Lombards reallege all prior paragraphs as if set out here in full.

62. US Bank National Association and Morris, Schneider and Prior are part of a joint venture as defined by controlling law.

63. Each member of a joint venture is jointly and severally liable for any tortious act of any member of the joint venture against the Lombards.

64. As a result thereof, the defendants reallege in its entirety the complete third party complaint against US Bank National Association and Morris, Schneider and Prior as grounds for their joint venturer liability.

65. As a result of the actions of the joint venturers, the Lombards have been injured and damaged as heretofore alleged.

66. The Lombards claim all damages as allowed by law for the wrongful acts of the joint venturers against them.

Ninth Claim for Relief
(Wrongful Foreclosure)

67. The Lombards reallege all prior paragraphs of the pleading as if set out here in full.

68. US Bank National Association and Morris, Schneider and Prior have completed a foreclosure proceeding against the Lombards in violation of law.

69. The initiation of the foreclosure proceeding by US Bank National Association and Morris, Schneider and Prior was either negligent or wanton, depending on proof adduced at trial.

70. As a result thereof, US Bank National Association and Morris, Schneider and Prior are liable for all natural, proximate and consequential damages due to their actions including an award of punitive damages upon a proper evidentiary showing.

Tenth Cause of Action
(Unjust Enrichment)

71. The Lombards adopt and reallege all prior paragraphs as if set out here in full.

72. The actions of US Bank National Association and Morris, Schneider and Prior in foreclosing on the home of the Lombards in violation of law resulted in US Bank National Association and Morris, Schneider and Prior being unjustly enriched by the payment of fees, insurance proceeds and equity in the home.

73. As a result of the US Bank National Association and Morris, Schneider and Prior's unjust enrichment, the Lombards have been injured and damaged in that the Lombards

have lost their home and have lost any equity in their home resulting in financial and emotional damages including mental anguish.

74. The Lombards claim all damages allowable under law as a result of the US Bank National Association and Morris, Schneider and Prior' wrongful conduct and unjust enrichment.

ELEVENTH CAUSE OF ACTION

CIVIL CONSPIRACY

75. Lombards adopt and reallege all prior paragraphs as if set out here in full.

76. US Bank National Association and Morris, Schneider and Prior engaged in an unlawful combination and conspiracy to foreclose on home loans against individuals for the purpose of unjustly enriching themselves in violation of law. This unlawful activity had the effect of unjustly enriching the joint venturers and conspirators.

77. As a result of this civil conspiracy, civil wrongs were committed against the Lombards and other consumers. The motivation for the civil conspiracy was third party defendant's greed.

78. As a result of the civil conspiracy the Lombards claim all damages allowed by law.

WHEREFORE, the Lombards, having set forth their claims for relief against US Bank National Association and Morris, Schneider and Prior, respectfully request of the Court as follows:

- A. That the Lombards have and recover against the US Bank National Association and Morris, Schneider and Prior a sum to be determined by a jury of their peers in the form of actual damages;
- B. That the Lombards have and recover against the US Bank National Association and Morris, Schneider and Prior a sum to be determined by a jury of their peers in the form of punitive damages;
- C. That this Court enter an order voiding the foreclosure action of the plaintiffs; and
- D. That the Lombards have such other and further relief as the Court may deem just and proper and equitable given the facts of the case.

DEMAND FOR JURY TRIAL

The Lombards hereby demand a trial by struck jury on all claims so triable before the Court.

/s/ Nick Wooten
Of Counsel

RESPECTFULLY SUBMITTED,

CONSUMER LAW GROUP, LLC

By: /s/ Nick Wooten

Nick Wooten – WOO084

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was served on the all parties in interest either by U.S. First Class mail or electronically through Alafile on this the 15th day of July, 2008.

/s/ Nick Wooten
Of Counsel

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NUMBER: 16-2006-CA-005603-XXXX-MA
Div. CV-D

BANK OF NEW YORK AS TRUSTEE FOR THE
CERTIFICATEHOLDERS CWABS II, INC. LFT
2005-04 , Plaintiff,
vs.
ANGELA FOSTER, et. al., Defendants.

**SEPARATE DEFENDANT DONALD RICHARDSON'S MEMORANDUM
OF LAW IN SUPPORT OF AFFIRMATIVE DEFENSES AND COUNTERCLAIMS**

I. The defendant has stated valid affirmative defenses

The National Housing Act, 12 U.S.C. 1710(a) imposes specific statutory obligations on all creditors across the United States who service federally-insured home loans that requires the creditor to engage in very specialized default loan servicing and loss mitigation to avoid foreclosure when a borrower defaults on a home loan insured by the federal government for reasons beyond their control. The creditor is fully insured in exchange for agreeing to abide by these customer servicing obligations.

The issue before the court in this action on plaintiff's motion to is whether the plaintiff 's alleged failure to comply with these federal obligations before instituting this foreclosure action can be grounds for the court to equitably deny the lender the remedy of a foreclosure.

The allegations as alleged by the defendant for purposes of the plaintiff's motion, are taken as true and the facts, as alleged by the defendant, are supported by the documents submitted by plaintiff.

The Defendant's affirmative defenses and counterclaims are based on the plaintiff's failure to provide legitimate and non predatory access to debt management relief that the defendant claims the plaintiff must make available before filing a foreclosure action. Defendant claims that the forbearance relief the plaintiff is obligated to provide must include special default loan servicing designed to avoid foreclosure of

this loan.

The defendant claims that this loan is subject to specialized default loan servicing made applicable to the plaintiff and the mortgage pursuant to the plaintiff's own servicing policies and practices and also pursuant to and in accordance with the default loan servicing obligations established by federal regulations promulgated by HUD, pursuant to the National Housing Act, 12 U.S.C. 1710(a).

Compliance with the default loan servicing federal regulations promulgated by HUD, pursuant to the National Housing Act, 12 U.S.C. 1710(a) can be held to be a ***contractual condition precedent*** to instituting a foreclosure action and the failure of the plaintiff to implement foreclosure avoidance servicing is an appropriate subject for a counterclaim for declaratory and injunctive relief. See: U.S. v. Trimble, 86 F.R.D. 435 (S.D. Fla. 1980) and Cross v. Federal National Mortgage Association, 359 So. 2d 464, 465 (Fla. 4th DCA 1978): "A mortgage foreclosure is an equitable action and thus equitable defenses are most appropriate [I]t appears to us that given the purpose of ...the recommended efforts to obviate the necessity of foreclosure, any substantial deviation from the recommended norm might be construed by the trial court under the heading of an equitable defense." Id., 359 So. 2d at 465.

Whether and to what extent the plaintiff's obligation to provide specialized default loan servicing under the federal regulations promulgated by HUD, pursuant to the National Housing Act, 12 U.S.C. 1710(a) are issues of fact in dispute between the parties to be determined by the court upon review of the evidence to be produced and the mortgage and note attached to the plaintiff's complaint.

"A ruling on the merits should not be made until after final hearing where the parties have full opportunity to present evidence in support of their respective positions. Id., citing Government Employees Ins. Co. v. Anta, 379 So.2d 1038, 1039 (Fla. 3d DCA 1980)13. The Honorable Bernard Nachman, in denying a similar motion to dismiss in a foreclosure action involving an FHA-insured mortgage, cited Mills v. Ball, 344 So.2d 635,638 (Fla. 1st DCA 1977) and found that:

"A ruling on the merits should not be made until after final hearing where the parties have full opportunity to present evidence in support of their respective positions." See: *Order On Plaintiff's Motion To Strike Amended Affirmative Defenses, Dismiss Amended Counterclaim, And Strike Demand For Jury Trial* entered in Washington

Mutual Bank, F.A. v. McCampbell, Case No. 02-7356, a copy of which is provided to the court.

In a Florida mortgage foreclosure action in which a borrower similarly argued that the Plaintiff failed to comply with a federally-mandated notice provision, the court denied the Plaintiff's motion for judgment of foreclosure based on Plaintiff's failure to provide the required notice to borrower. In U.S. v. Trimble, 86 F.R.D. 435 (S.D. Fla. 1980), the court held that the failure of the mortgagee to comply with the notice requirement contained in the federal regulation is a valid defense to a mortgage foreclosure action. Trimble dealt with a Farmers Home Administration loan, but the holding of that case is premised on the same principle-- compliance with applicable federal laws can be upheld as equitable defense to deny a creditor the judicial remedy of foreclosure. Defendant has properly raised an equitable defense to the plaintiff's claim in this action.

Mortgage foreclosure is an equitable action and the Court must consider equitable defenses in ruling on a complaint for foreclosure. Cross, supra (genuine issues of material fact precluded summary judgment). See also: Family Bank v. Able Realty of America Corp., 702 So.2d 1322 (Fla. 4th DCA 1998) ("court in its discretion may refuse to grant prayer for foreclosure of mortgage for equitable reasons..."mortgage foreclosure is an equitable action and thus equitable defenses are appropriate")

II. The defendant has stated a claim for declaratory relief

This court has jurisdiction pursuant to F.S. 86.011 "to declare rights, status, and other equitable or legal relations of "(a)ny person claiming to be interested or who may be in doubt about his or her rights under a...contract, or other article...or instrument in writing." The court also has the power to declare the rights of any person "whose rights, status or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by...contract,...or other article, memorandum, or instrument in writing..." F.S. 86.021

"No action or procedure is open to objection on the ground that a declaratory judgment is demanded." F.S. 86.011

“The court’s declaration may be either affirmative or negative in form and effect and such declaration has the force and effect of a final judgment. F.S. 86.011

The court has the power to render a declaratory judgment on the existence, or nonexistence of any right or of any fact upon which the existence or nonexistence of such right does or may depend, whether such right exists or will arise in the future. F.S. 86.011

“Any person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent or supplemental relief in the same action.” F.S.86.011(2)

“The existence of another adequate remedy does not preclude a judgment for declaratory relief...The court has power to give as full and complete equitable relief as it would have had if such proceeding had been instituted as an action in chancery.” F.S.86.111 and 86.021

A contract may be construed either before or after there has been a breach. F.S. 86.031

“Further relief based on a declaratory judgment may be granted when necessary or proper...” F.S.86.061

The statute is declared to be “substantive and remedial. Its purpose is to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations and is to be liberally administered and construed.” F.S.86.101

The defendant in this residential foreclosure has sufficiently stated a counterclaim for declaratory relief and this court should declare whether and to what extent the federal regulations promulgated by HUD, pursuant to the National Housing Act, 12 U.S.C. 1710(a) establishing default loan servicing procedures apply and also whether and to what extent the FHA default servicing regulations control the plaintiff’s conduct in the servicing of the defendant’s mortgage in default.

The court should also declare whether and to what extent the federal regulations promulgated by HUD, pursuant to the National Housing Act, 12 U.S.C. 1710(a) default servicing requirements and procedures are incorporated into the mortgage and whether the defendant has a right, as she asserts, to access the special loan servicing prior to

facing a foreclosure on her home.

The Declaratory Judgment statute grants the defendant the right to ask the court to enjoin the plaintiff from foreclosing and to further compel the plaintiff to comply with the FHA default servicing regulations and procedures before instituting a foreclosure action against this defendant.

The court has the power to award such declaratory and other appropriate relief to the defendant.

“Unlike other actions, a motion to dismiss a petition for declaratory judgment does not go to the merits but goes only to the question of whether or not the plaintiff is entitled to a declaration of rights not to whether or not he is entitled to a declaration in his favor.” *Effort Enterprises of Florida, Inc. v. Lexington Insurance Company*, 666 So.2d 930, 932 (Fla. 4th DCA 1995)

“Where a suit has been filed by one party and claims asserted by the others, it cannot be said conclusively that there is not a ‘real and present dispute’ nor that there is not ‘a bona fide, actual, present, and practical need for a declaration’.” *Strachan Shipping Company v. Spigner*, 573 So.2d 926, 928 (Fla. 1st DCA 1991) citing *Stonewall Ins. Co. v. W.W. Gay Mechanical Contractor, Inc.*, 351 So.2d 403 (Fla. 1st DCA 1977) “Under these circumstances, the entry of a dismissal...was in error.” *Id.*

III: The Defendant has stated a claim under the Florida Consumer Collection Practices Act

Defendant claims that the plaintiff has an obligation to comply with the forbearance, mortgage modification and other foreclosure prevention loan servicing requirements of the pooling and servicing agreement.

The Florida Consumer Collection Practices Act (FCCPA) provides stronger protection for consumers than the protection afforded consumers under the Federal Fair Debt Collection Practices Act (FDCPA). F.S. 559.552

For purposes of the plaintiff’s motion to strike, the defendant’s factual claims are taken as true. The FCCPA prohibits the plaintiff from collecting the underlying consumer mortgage debt involved in this action by asserting its right to foreclose when the plaintiff knows that such right does not exist because the plaintiff did not comply with the applicable default servicing obligations and guidelines prior to filing

this foreclosure action.

F.S. 559.72(9) provides (in pertinent part):

Prohibited practices generally.-In collecting consumer debts, no person shall:

(9) Claim, attempt, or threaten to enforce a debt when such person...assert(s) the existence of some other legal right when such person knows that the right does not exist.

The FCCPA applies to anyone attempting to collect a consumer debt unlawfully and F.S. 559.72 “includes all allegedly unlawful attempts at collecting consumer claims.” *Seaton Jackson v. Wells Fargo Homemortgage, Inc.*, 12 Fla. L. Weekly Supp. 188 (Fla. 6th Circuit 2004) citing *Williams v. Streeps Music Co., Inc.*, 333 So.2d 65 (Fla. 4th DCA 1976) See also, *Hart v. GMAC Mortgage Corporation*, 246 B.R. 709 (D. MASS. 2000) (Debtor stated a cause of action under the FDCPA where continuation of foreclosure proceedings amounted to conduct “the natural consequence of which was to harass, oppress, or abuse”)

In the order of Judge Nachman, *supra*, in denying the motion to dismiss a FCCPA counterclaim in the above-referenced foreclosure involving an FHA-insured mortgage, found that:

“Defendant’s allegation that the Plaintiff has pursued a foreclosure when it knew that it did not have the right to foreclosure and is therefore in violation of the FCCPA is sufficient to survive the Plaintiff’s motion to dismiss as it does state a cause of action under the FCCPA.

The defendant has also adequately stated a breach of fiduciary duty, breach of good faith and fair dealing and breach of contract claims based on the plaintiff’s breach by failing to service the loan as required by the federal laws and federal regulations cited by the defendant which control the plaintiff’s course of conduct in servicing this mortgage.

CONCLUSION

The Defendant has sufficiently stated valid and legitimate claims for declaratory relief and for violations of the Florida Consumer Collection Practices Act and for breach of contract and fiduciary duty.. The court should deny the plaintiff’s motion to

strike/dismiss.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this document has been hand delivered to Danielle Parsons, Butler & Hosch, 3185 South Conway Road, Suite E, Orlando, Florida 32812, attorney for Plaintiff, this _____.

JACKSONVILLE AREA LEGAL AID, INC.,

April Carrie Charney, Esquire Fla. Bar. No.: 310425
126 W. Adams Street

Jacksonville, Florida 33202

Telephone: (904) 356-8371, ext. 373

Facsimile: (904) 224-7050

april.charney@jaxlegalaid.org

Attorneys for Separate Defendant

**IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND HERNANDO COUNTY, FLORIDA
A CIVIL ACTION**

CASE NO.: H27-CA-2008-000819

**LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR
CERTIFICATEHOLDERS OF BEAR STEARNS ASSET BACKED
SECURITIES I LLC, ASSET-BACKED CERTIFICATES, SERIES
2006-HE9,**

Plaintiff,

VS.

PATRICK PUENTES; et al.

Defendant(s). _____/

**DEFENDANT PATRICK PUENTES' EMERGENCY MOTION TO STOP FORECLOSURE
SALE, TO VACATE FORECLOSURE COMPLAINT FOR FRAUD ON THE COURT AND
MOTION TO STRIKE FINAL JUDGMENT OF FORECLOSURE AND ORDER SETTING
FORECLOSURE SALE AND MEMORANDUM OF LAW**

COMES NOW, the Defendant PATRICK PUENTES, by and through his undersigned counsel and files this Motion and Memorandum of Law in the above-styled action and as grounds therefore requests the Court to Dismiss this action with prejudice pursuant to Rules 1.100(b), 1.140(b)(1)(6) and (h)(2) and 1.210(a) and 1.540(b) of the Florida Rules of Civil Procedure, and states:

1. The Plaintiff filed their complaint on March 13, 2008, at the time the Plaintiff filed their complaint they did not have standing and made material misrepresentations in their pleadings.
2. Further the Plaintiff is a Trustee and does not and cannot own the mortgage as they are acting on behalf of the investment trust in this case.
3. Several layers of fraud on the Court occurred in this instance and justice requires that the Court set the order setting sale date aside immediately and vacate the Final Judgment of Foreclosure dated December 12, 2008 which has listed a sale date of January 23, 2009.

4. In addition to not having standing, the plaintiff falsely alleged that “the original promissory note was lost or destroyed subsequent to plaintiff’s acquisition thereof” and that “plaintiff was in possession of the promissory note and was entitled to enforce it when loss of possession occurred” when in actuality they did not have an interest in the paper at the time of bringing this lawsuit and a purported assignment occurred after the lawsuit was filed.
5. The March 17, 2008 assignment of mortgage (See Exhibit “A”) from Mortgage Electronic Registration Systems, Incorporated as Nominee for Encore Credit Corporation d/b/a ECC Credit Corporation of Florida (MERS) to Plaintiff Lasalle Bank National Association, as Trustee for Certificateholders of Bear Stearns Asset Backed Securities I LLC, Asset-Backed Certificates, Series 2006-HE9 (“LBNA”) clearly states that the assignment of the mortgage and the promissory note that are the subject of this foreclosure action were later filed after LBNA only as trustee filed a Notice of lis pendens on March 13, 2008 in the Circuit Court of the Fifth Judicial District Court in and for Hernando County, Florida (See Exhibit “B”). LBNA in its suit also does not indicate how it had any right or legal ability to initiate such an action and simultaneously claimed that “they had also lost or destroyed the Mortgage Note” which they did not own—in fact LBNA as nominal trustee for mortgage-backed securities has filed many foreclosure actions throughout the United States under false, deceptive and misleading representations without any legal standing to sue any party and its interest in the debt. These patterns represent a pattern of corrupt and illegal activity.
6. Further, the Assignment itself is objectionable and gives rise to several issues of possible misrepresentation and fraud. (See Exhibit “A”).
7. Liquenda Allotey has executed the assignment as Vice President of MERS but he is not listed as an officer or director of MERS. (See composite Exhibit “C”).

8. Liguenda Allotey has also executed Assignments as Vice President of other banks in the recent past (See Composite Exhibit "D"). Most peculiar, Allotey was Vice President of Washington Mutual in 2006, Vice President of MERS for this case and again on April 30, 2007, and Vice President of Washington Mutual again on May 17, 2007.
9. Allotey, in fact appears to work for FIS-LPS a mortgage collection agency as evidenced by his LinkedIn profile, and the Summit magazine (page 18)(See Composite Exhibit "E").
10. Additionally, as to the March 17, 2008 assignment, it purportedly assigns the mortgage and the promissory note from MERS in its corporate capacity as nominee (agent) directly to LBNA and not to the trust for which plaintiff acts as trustee.
11. LBNA's pattern and practice of seeking and obtaining foreclosure judgments without a duly recorded assignment, without the evidence of a chain of assignment at time of filing suit constitutes a "false, deceptive, or misleading representation or means" in connection with the collection of debt, in violation of the Federal Fair Debt Collection Practices Act, 15 U.S.C. 1692e and that has occurred in this case as well.
12. The plaintiff also fails to attach a copy of the promissory note to its complaint.
13. From the plaintiff's own filings in this foreclosure action, it is established that a person other than the plaintiff LBNA was in fact the true owner of the claim at the time LBNA actually sued upon, and that the plaintiff is not and never was the real party in interest, and is not and cannot be shown to be the proper authorized party to bring this foreclosure action. *In re: Shelter Development Group, Inc.*, 50 B.R. 588 (Bankr.S.D.Fla. 1985)
14. The plaintiff did not own or hold the subject promissory note at the time the plaintiff LBNA filed this foreclosure action on March 13, 2008, and the plaintiff was fully aware of this lack of ownership, and its lack of standing at the time of the commencement of this action. As stated plaintiff LBNA and others like it have done this repeatedly, and even federal courts are striking their predatory tactics for this very same reason as they never had ownership and do not have the notes where they just claim they lost them.

15. The plaintiff LBNA further has failed to establish in any of its papers or filings that it owned or held the mortgage or the promissory note at the commencement of this action. In fact the assignment of the mortgage did not take place until March 17, 2008, several days after the filing of the complaint where they claim to already have “lost or destroyed the mortgage note”.
16. Unlike statutory prerequisites to filing a lawsuit, standing is having a sufficient interest in the outcome of litigation which will warrant a Court’s entertaining it.
17. The plaintiff in this case, still only a TRUSTEE for these securities, never had an interest in the mortgage or the promissory note, and never had standing to bring this action.
18. In this case, the Court is without jurisdiction because the plaintiff LBNA, a trustee, has perpetrated a fraud upon this Court in this action as set out herein.
19. The falseness of the plaintiff’s allegations that it owned, held and possessed the subject mortgage and promissory note is readily apparent from a cursory review of the documents attached to the complaint and the later filed assignment.
20. The defendant seeks a hearing in this matter to obtain an order dismissing this foreclosure action filed by a trustee of a securitized mortgage pool based on a lack of standing; a lack of subject matter jurisdiction; failure to state a cause of action for foreclosure and for fraud on the Court which is also supported by Florida Rule 1.540(b) even at this late date. Also defendant Puentes seeks an order to strike the Final Judgment of foreclosure dated December 12, 2008 and order setting foreclosure sale set for January 23, 2009.
21. The defendant seeks a finding that the plaintiff’s assertions that it was the owner of the mortgage and the promissory note at issue were false and that the plaintiff was fully aware of such false allegations at the time the plaintiff filed this foreclosure action while claiming it had already lost the mortgage note it did not own. Under Florida Rule 1.540(b), there is no time limitation due to fraud and misrepresentation in dismissing a summary judgment.

22. The plaintiff LBNA is not the ‘owner’ of the subject mortgage or the promissory note as the plaintiff alleges to this Court in its complaint and not to grant defendant Puentes relief would be most harmful to him as once the scheduled sale takes place, there is no further recourse while plaintiff LBNA is not damaged as there is no beneficial interest for them to protect where delay would cause them harm.
23. The plaintiff’s allegations that it ‘owned’ ‘held’ and ‘possessed’ the mortgage and promissory note that are the contracts that are the subject of this foreclosure action are false and were made in bad faith as the plaintiff knew said allegations were false. In fact LBNA almost always claims they have lost their notes and cannot find them.
24. The plaintiff LBNA, only as trustee, establishes in its complaint that it was fully aware that its claims to have standing to pursue this foreclosure action were untrue and an impossibility at the time the plaintiff made such allegations to this Court for they had to assign the mortgage note at a later date, being March 17, 2008 (See Exhibit “A”). *Rhea v. Halkney*, 157 So. 190, 193 (Fla. 1934)
25. “A plea is considered ‘sham’ when it is palpably or inherently false, and from the plain or conceded facts in the case, must have been known to the party interposing it to be untrue.” *Rhea v. Halkney*, 157 So. 190, 193 (Fla. 1934); *O’Berry v. Pearson*, 186 So. 430 (1939); *Furst v. Blackman*, 744 So.2d 1222 (Fla. 4th DCA 1999), *Reif Development, Inc. v. Wachovia Mortg. Co.*, 340 So.2d 1267 (Fla. 4th DCA 1976). The plaintiff’s complaint is a “sham”.
26. The integrity of the civil litigation process depends on the truthful disclosure of facts. *Metropolitan Dade County v. Martinson*, 736 So.2d 794 (Fla. 3rd DCA 1999), *Andrews v. Palmas De Majorca Condo*, 898 So.2d 1066 (Fla. 5th DCA 2005). Plaintiffs actions undermine the integrity of this civil litigation process.
27. A trial court has the inherent authority, within the exercise of sound judicial discretion, to dismiss an action and strike an order when a plaintiff has perpetrated a fraud or made

misrepresentations to the Court. *Arzuman v. Suad*, 843 So.2d 950 (Fla. 4th DCA 2003), *Piunno v. R.F. Concrete Constr., Inc.*, 904 So.2d 658 (Fla. 4th DCA 2005)

28. A party guilty of fraud or misconduct in the prosecution of a civil proceeding should not be permitted to continue to employ the judiciary to achieve its ends where defendant asks this court for immediate relief and protection. *Andrews v. Palmas De Majorca Condo*, 898 So.2d 1066 (Fla. 5th DCA 2005)
29. The plaintiff LBNA's lack of ownership of the mortgage and the promissory note in this case goes to the heart of its claim of standing, permeates the entire proceeding and subverts the integrity of the action. *Metropolitan Dade County v. Martinsen*, 736 So.2d 794 (Fla. 3rd DCA 1999)
30. The plaintiff's efforts to misrepresent ownership of the note are a mere pretense set up in bad faith and without color of fact. *Reif Development, Inc v. Wachovia*, supra and *Furst v. Blackman*, supra.
31. It is appropriate for the trial court to dismiss an action based on fraud, where there is a blatant showing of fraud, pretense, collusion, or other similar wrongdoing. *Distefano v. State Farm Mutual Automobile Ins. Co.*, 846 So.2d 572, 574 (Fla. 1st DCA 2003)
32. Rule 1.210(a) of the Florida Rules of Civil Procedure provides in pertinent part:

Every action may be prosecuted in the name of the real party in interest, but a personal representative, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought...

The plaintiff meets none of these standing criteria.
33. Standing requires that the party prosecuting the action have a sufficient stake in the outcome and that the party bringing the claim be recognized in the law as being a real party in interest entitled to bring the claim. This entitlement to prosecute a claim in

Florida courts rest exclusively in those persons granted by substantive law, the power to enforce the claim. *Kumar Corp. v. Nopal Lines, Ltd, et al*, 462 So.2d 1178 (Fla. 3d DCA 1985)

34. No Florida case holds that a separate entity can maintain suit on a note payable to another entity unless the requirements of Rule 1.210(a) of the Florida Rules of Civil Procedure and applicable Florida law are met. *Corcoran v. Brody*, 347 So.2d 689 (Fla. 4th DCA 1977)
35. “The determination of standing to sue concerns a court’s exercise of jurisdiction to hear and decide the cause pled by a particular party.” *Rogers & Ford Constr. Corp. v. Carlandia Corp.*, 626 So.2d 1350, 1352 (Fla. 1993)
36. Defendant Puentes seeks a dismissal of the plaintiff’s complaint on the basis of fraud on the court, making numerous misrepresentations, and under the circumstances of this case, “a formal evidentiary hearing on this motion to dismiss, as well as permissible discovery prior to the hearing, is required.” *Dynasty Express Corp. v. Weiss*, 675 So.2d 235, 239 (Fla. 4th DCA 1996)
37. Recent decisions of many courts from around the country from state courts, federal district courts and bankruptcy courts have caused actions such as the present to be dismissed for failure to state a claim and for failure to assert an injury in fact. Copies of these court orders, to date, can be presented to and filed with the Court and are incorporated herein.
38. As held in the *In re Foreclosure Actions*, the appropriate documentation required to effectuate an equitable assignment and having legal standing to bring a foreclosure action must be through a trust and/or assignment documents executed before the action was commenced, or both as circumstances may require. 2007 WL 4034554 at *1 (N.D. Ohio 2007). A trust cannot be effective until it has been executed so the assignment documents that place property in trust would need to be executed before any action could be taken. Here, the assignment documents were not executed until after the action was brought in

court. This is a fraud upon the court and should be dismissed because the plaintiff's had no legal standing to even bring the action for foreclosure at the time that they did.

39. Where a plaintiff does not own a mortgage or have any interest in the mortgage at the time of filing foreclosure action, the case must be dismissed for failing to comply with statutory requirements of standing. See Davenport v. HSBC Bank, 275 Mich.App. 344, 347-348, 739 N.W.2d 383, 385 (Mich.App.,2007) (Where the defendant did not own the mortgage or an interest in the mortgage at the time in which they commenced foreclosure proceedings. Quite simply, defendant did not yet own the indebtedness that it sought to foreclose. Because defendant lacked the statutory authority to foreclose, the foreclosure proceedings were void *ab initio*). See also Fleet Nat. Bank v. Nazareth, 75 Conn.App. 791, 794-795, 818 A.2d 69, 71 (Conn.App.,2003) (In this case, however, the plaintiff was never the holder of the note. The plaintiff has failed to cite any authority, nor has our research found any, to support its claim that it has standing to foreclose on the mortgage without ever having been assigned the note). See also In re Nosek, 386 B.R. 374, 380 (Bkrcty.D.Mass.,2008) (Holding that those parties who do not hold the note or mortgage and who do not service the mortgage do not have standing to pursue motions for relief or other actions arising from the mortgage obligation. Schwartz, 366 B.R. at 270).
40. Similarly, where action was commenced only a few days before execution of an assignment, courts have held that the Plaintiff has no standing to bring an action in court. So regardless of the amount of time between the action being filed and the execution of the assignment, the assignment must be executed prior to any assignment. See Mortgage Electronic Registration Systems, Inc. v. Thompson, 2002 WL 521704 (Conn.Super., 2002) (Plaintiff had no standing to bring foreclosure action, and thus, court lacked jurisdiction over action, where action was commenced at a time when plaintiff had no interest in mortgage being foreclosed; defendant was served writ, summons and complaint three days before plaintiff was assigned mortgage to be foreclosed, and plaintiff offered court no

evidence as to its legal or equitable right to bring action on or before date of service.

C.G.S.A. § 49-17).

41. Florida Courts have also held in similar cases that an assignment must be executed before a party may file suit. See Progressive Exp. Ins. Co. v. McGrath Community Chiropractic, 913 So.2d 1281, 1287 (Fla.App. 2d DCA 2005)(Where an insurance provider alleged that insurance benefits were assigned to it without producing a written instrument, then amended the claim with a written instrument dated six months after the filing of the suit, held that the provider lacked standing because there was no assignment at the time that the case was filed in court).
42. Courts have held that a party's lack of standing is a defect that cannot be cured by acquiring the right of standing after action has already been filed. See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 69 (1987) (Scalia, J., concurring) ("Subject matter jurisdiction depends on the state of things at the time of the action brought). See Also Progressive Exp. Ins. Co., 913 So.2d 1281. Compare to Dasma Investments, LLC v. Realty Assoc. Fund III, LP, 459 F. Supp. 2d 1294, 1302 (S.D. Fla., 2006)(Party suing on Promissory Note must be in actual possession of the original note to have standing).
43. The plaintiff cannot in good faith deny knowledge of the judicial findings of these many courts around the country, it is now even in newspapers and on television, and these widely publicized issues relate directly to the underlying standing problem that the plaintiff LBNA has in this case and other cases.
44. The plaintiff LBNA is fully aware that the trustee never owns promissory notes as MERS once stated in the case of Mortgage Electronic Registration Systems, Inc. v. Nebraska Department of Banking, where MERS pronounced that as trustee of a pool of mortgage-backed securities, "It does not acquire mortgage loans...because it only holds legal title to members' mortgages in a nominee capacity...and that it does not own the promissory

notes secured by the mortgages and has no right to payments made on the notes.” LBNA as trustee, is just like MERS as explained in the Nebraska case that “it (the trustee) merely immobilizes the mortgage lien while transfers of the promissory notes and servicing rights continue to occur.” *Mortgage Elec. Registration Sys., Inc. v. Nebraska Dept. of Banking*, 704 N.W.2d 784, 787 (Neb. 2005)

45. As a result in the instant case, the plaintiff LBNA knew and was fully aware that it was asserting a right to foreclose as if it was the owner and holder of the subject mortgage and promissory note when the plaintiff knew that such right did not exist and the plaintiff further knew that it was not the owner or the holder of the subject mortgage note at the time the plaintiff filed its complaint herein alleging that it owns and holds and possesses the subject promissory note and mortgage. These allegations are utterly false and were known by the plaintiff to be false at the time the plaintiff filed this action on March 13, 2008. In effect, plaintiff LBNA falsely represented the status of the debt, in particular, that it was due and owing to plaintiff LBNA at the time the suit was filed, and that LBNA was an innocent purchaser for value, when in fact, only an assignment for no value had not been accomplished days later on March 17, 2008. All a total Sham.
46. In Florida, the prosecution of a foreclosure action is by the rightful owner of the mortgage and the holder of the promissory note. At the time of this filing, LBNA has not been shown to have a connection to this matter.
47. It is clear from the mortgage and the assignment later produced and attached hereto, that a person other than the plaintiff is the true owner of the claim sued upon and that the plaintiff is not the real party in interest and is not shown to be authorized to bring this action
48. Florida Rule of Civil; Procedure 1.130(a) requires a plaintiff to attach copies of all bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought to its complaint. Instead, even before the assignment, LBNA was already

claiming to be the rightful owner and that the “mortgage note had either been lost, destroyed, and that plaintiff was unable to state the manner in which this occurred...and after diligent search they were unable to obtain possession of the mortgage note.” LBNA wants this court to believe that this is an isolated case involving the defendant Puentes, but in fact, they never owned the note and in many suits they bring, they make the same claims before the court often going unchallenged as they foreclosed on other’s property.

49. The plaintiff also has failed to attach a copy of any other document or contract upon which this action to prosecute the breach of a promissory note is being brought.
50. Fla. R. Civ. P. Rule 1.310(b) provides that all exhibits attached to a pleading shall be considered a part of the pleading for all purposes. It appears on the face of the plaintiff’s complaint and the documents attached thereto that the plaintiff is not the proper party to bring this action. Because the facts revealed by Plaintiff’s exhibits are inconsistent with Plaintiff’s allegations as to the ownership of the subject mortgage and note, those allegations are neutralized and Plaintiff’s complaint is rendered objectionable. Greenwald v. Triple D Properties, Inc., 424 So.2d 185, 187 (Fla. 4th DCA 1983).
51. When exhibits are inconsistent with the plaintiff’s allegations of material fact as to who the real party in interest is, such allegations cancel each other out. *Fladell v. Palm Beach County Canvassing Board*, 772 So.2d 11240 (Fla. 2000); *Greenwald v. Triple D Properties, Inc.*, 424 So.2d 185, 187 (Fla. 4th DCA 1983); *Costa Bella Development Corp. v. Costa Development Corp.*, 441 So.2d 1114 (Fla. 3d DCA 1983).
52. Lastly, Florida Rule 1.540(b) also gives relief from judgment, decrees or orders if there is merit to the case, which there is in this case. In paragraph (b) on motion and upon such terms that are just, the court may relieve a party or a party’s legal representative from a final judgment, decree, order, or proceeding for the following reasons:
 - i. Mistake, inadvertence, surprise, or excusable neglect;

- ii. Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; and
- iii. Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

The rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court. From the plaintiff's own pleading, it is easy to see where there have been both fraud and misrepresentation in this case and other cases which LBNA and their attorneys are also involved.

WHEREFORE, The Defendant, PATRICK PUENTES, prays that this Honorable Court grant a hearing (if necessary) and dismiss the plaintiff's complaint and this action with prejudice; immediately strike the Final Judgment of Foreclosure and the order scheduling foreclosure sale dated December 12, 2008; award this defendant all other relief to which this defendant proves himself entitled to including but not limited to an award for reasonable and necessary attorney's fees; or in the alternative, issue a temporary restraining order to allow for a hearing on this matter as delay will not cause prejudice to non-standing party plaintiff LBNA but would severely harm defendant Puentes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail and facsimile to Rebecca Nilsen, Esquire, Law Offices of Marshall C. Watson, P.A., 1800 N.W. 49th Street, Suite 120, Fort Lauderdale, Florida 33309 on this 12th day of January, 2009.

Respectfully submitted,

EDWARD C. ROYER, ESQUIRE, P.A.

By: 
EDWARD C. ROYER, ESQUIRE

FBN: 0016229

3111 W. Dr. Martin Luther King Blvd., Suite 100

Tampa, Florida 33607

(813) 418-5254 Telephone

(813) 350-7801 Facsimile

Attorney for Defendant Patrick Puentes

EXHIBIT A

2008028855

LORINDA 2565/1124

OFFICIAL RECORDS

BK: 2565 PG: 1124



LT1-2-2008028855-1



LT2-2565-1124-1

05/23/2008 2:08PM # Pages 1

Filed & Recorded in Official Records of
HERNANDO COUNTY CLERK OF COURT
KAREN NICOLAI

Prepared by: Rebecca Nilsen, Esquire

Record & Return to: Law Office of Marshall C. Watson

1800 NW 49th Street, Suite 120

Fort Lauderdale, Florida 33309

Telephone: (954) 453-0365

Facsimile: (954) 771-6052

**RECORD AND
RETURN TO**

ASSIGNMENT OF MORTGAGE

KNOW ALL MEN BY THESE PRESENTS:

THAT MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INCORPORATED AS NOMINEE FOR
ENCORE CREDIT CORPORATION D/B/A ECC CREDIT CORPORATION OF FLORIDA residing or located
at 1595 Spring Hill Rd #310, Vienna, VA 22182 herein
designated as the assignor, for and in consideration of the sum of \$1.00 Dollar and other good and valuable
consideration, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell, assign, transfer and set
over unto LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CERTIFICATEHOLDERS OF
BEAR STEARNS ASSET BACKED SECURITIES I LLC, ASSET-BACKED CERTIFICATES, SERIES 2006-
HE9 residing or located at: 21000 Big Beaver Rd Troy, MI 48064
herein designated as the assignee, the mortgage executed by PATRICK PUENTES recorded September 5, 2006 in
Hernando County, Florida at Book 2320 and Page 1353 encumbering the property more particularly described as
follows:

LOT 22, BLOCK 47B, OF RIDGE MANOR ESTATES, UNIT 4, ACCORDING TO THE
PLAT THEREOF, AS RECORDED IN PLAT BOOK 11, PAGE(S) 1 THROUGH 22,
INCLUSIVE OF THE PUBLIC RECORDS OF HERNANDO COUNTY, FLORIDA.

together with the note and each and every other obligation described in said mortgage and the money due and to
become due thereon

TO HAVE AND TO HOLD the same unto the said assignee, its successors and assigns forever, but without recourse
on the undersigned, effective as of 03-17-08

In Witness Whereof, the said Assignor has hereunto set his hand and seal or caused these presents to be signed by its
proper corporate officers and its corporate seal to be hereto affixed this 17 day of March
2008

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INCORPORATED AS NOMINEE FOR
ENCORE CREDIT CORPORATION D/B/A ECC
CREDIT CORPORATION OF FLORIDA

ATTEST:

PRINT NAME: Lorinda Allote *AP*

Signed in the presence of:

WITNESS:

Print Name: Shirley Mitchell

WITNESS:

Print Name: Mark Bischoff

STATE OF MN

COUNTY OF Dakota

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the aforesaid county and state, on this
the 17 day of March, within my jurisdiction, the within named who
acknowledged to me that (s)he is Lorinda Allote and that for and on behalf of
Mortgage Electronic Registration Systems, Incorporated As Nominee For Encore Credit Corporation D/B/A
Ecc Credit Corporation Of Florida and as its act and deed (s)he executed the above and foregoing instrument, after
first having been duly authorized by Mortgage Electronic Registration Systems, Incorporated As Nominee For
Encore Credit Corporation D/B/A Ecc Credit Corporation Of Florida to do so.

WITNESS my hand and official seal in the County and State last aforesaid this 17 day of March
2008.



NOTARY PUBLIC

EXHIBIT B

IN THE CIRCUIT COURT OF THE
5TH JUDICIAL CIRCUIT, IN AND FOR
HERNANDO COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: *CA-08-819*

LASALLE BANK NATIONAL
ASSOCIATION, AS TRUSTEE FOR
CERTIFICATEHOLDERS OF BEAR
STEARNS ASSET BACKED
SECURITIES I LLC, ASSET-BACKED
CERTIFICATES, SERIES 2006-HE9,

Plaintiff,

vs.

PATRICK PUENTES; UNKNOWN
SPOUSE OF PATRICK PUENTES; JOHN
DOE; JANE DOE AS UNKNOWN
TENANT (S) IN POSSESSION OF THE
SUBJECT PROPERTY,

Defendants.

NOTICE OF LIS PENDENS

TO THE ABOVE STYLED DEFENDANTS AND ALL OTHERS WHOM IT MAY CONCERN:

YOU ARE HEREBY NOTIFIED of the institution of this action by Plaintiff against you seeking to foreclose a mortgage on the following property in Hernando County, Florida:

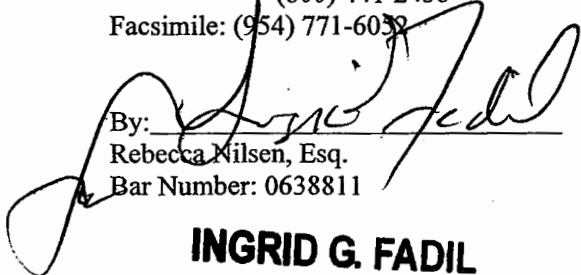
**LOT 22, BLOCK 47B, OF RIDGE MANOR ESTATES, UNIT 4, ACCORDING TO
THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 11, PAGE(S) 1
THROUGH 22, INCLUSIVE OF THE PUBLIC RECORDS OF HERNANDO
COUNTY, FLORIDA.**

including the buildings, appurtenances, and fixtures located thereon.

DATED

March 12, 2008

Law Offices of Marshall C. Watson, P.A.
1800 N.W. 49TH Street, Suite 120
Fort Lauderdale, FL 33309
Telephone: (954) 453-0365
(800) 441-2438
Facsimile: (954) 771-6038

By: 

Rebecca Nilsen, Esq.

Bar Number: 0638811

INGRID G. FADIL
FBN #40977

EXHIBIT C



Tools & Services

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MERS Board of Directors

Name	Title	Company	Location
Ed Albrigo	Senior Vice President, Enterprise Services	Freddie Mac	McLean, VA
R.K. Arnold	President & CEO	MERSCORP, Inc.	Vienna, VA
Barry Bier	Executive Vice President (retired)	GMAC Residential Holding Corp.	Fort Washington, PA
Henry Cunningham	President	Cunningham & Company	Greensboro, NC
S.A. Ibrahim	CEO	Radian Group	Philadelphia, PA
John Johnson	Chairman & CEO	MortgageAmerica, Inc.	Birmingham, AL
Jonathan Kempner	President and Chief Executive Officer	Mortgage Bankers Association	Washington, DC
Leo Knight	CEO (retired)	National City Mortgage	Miamisburg, Ohio
Pat Lamb	President, Mortgage Division (retired)	1st National Bank of Arizona	Scottsdale, AZ
James Maher	Executive Vice President (retired)	American Land Title Association	Washington, DC
Ron McCord	Chairman & CEO	First Mortgage Company, LLC	Oklahoma City, OK
Michael Petrie	President	P/R Mortgage & Investment Corp.	Carmel, IN
Bruce Posey (MERS Subsidiary Director)	President and CEO	Streeter Brothers Mortgage Corp.	Billings, Montana
John Robbins	Managing Director and Special Counsel	Vertice Lending	San Diego, CA
Deborah Schiavo	Executive Director	JP Morgan Chase & Co. Inc.	New York, NY
Marianne Sullivan	Senior Vice President	Fannie Mae	Washington, D.C.
H.G. Waddell	Executive Vice President	United Guaranty Residential Insurance Co.	Greensboro, NC
Michael Young	Chairman of the Board	Cenlar	Ewing, NJ

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Become a Member****MERS Products >**[MERS®
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iSearch](#)[MERS
Fraud Tools](#)[Mass.Gov
Div. of Banks](#)[Home » About Us > Meet Our Executives](#)**MERS Executive Team****R.K. Arnold**
President & CEO

R.K. Arnold serves as President & CEO of MERSCORP, Inc. and its subsidiary, Mortgage Electronic Registration Systems, Inc. He joined MERS at its inception in 1996, and served as Senior Vice President & General Counsel until his promotion to President in 1998. He is a member of the MERS Board of Directors. His team has built MERS into the central electronic registry for the mortgage finance industry.

[- Full Bio -](#)**Dan McLaughlin**
Executive Vice President & Product Division Manager

Dan McLaughlin serves as Executive Vice President and Product Division Manager for MERS. He is responsible for all product development and integration activities for MERS members. Dan was the architect of the MERS® System and designs the business processes and procedures under which MERS operates. He also manages the relationship with EDS, the MERS technology provider.

[- Full Bio -](#)**Bill Hultman**
Senior Vice President & Corporate Division Manager

Bill Hultman serves as Senior Vice President and Corporate Division Manager. He is responsible for law, finance and human resources. He holds the additional corporate titles of Secretary and Treasurer.

[- Full Bio -](#)**Douglas Danko**
Vice President, Customer Group Manager

Douglas Danko serves as Vice President of the Customer Group. He is responsible for sales, marketing and all customer-related activities.

[- Full Bio -](#)[TOP](#)



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No Events No Name History

Detail by Entity Name

Designation of Registered Agent

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

Filing Information

Document Number Q01000000073

FEI Number 541927784

Date Filed 08/13/2001

State DE

Status ACTIVE

Principal Address

1818 LIBRARY ST, STE 300
RESTON VA 20190

Changed 05/27/2008

Mailing Address

1818 LIBRARY ST, STE 300
RESTON VA 20190

Changed 05/27/2008

Registered Agent Name & Address

ELECTRONIC DATA SYSTEMS CORPORATION
3300 SW 34TH AVE
STE 101
OCALA FL 34474 US

Name Changed: 03/26/2008

Address Changed: 03/26/2008

Officer/Director Detail

Name & Address

NONE

Annual Reports

No Annual Reports Filed

Document Images

[03/26/2008 -- Reg. Agent Change](#)

[View image in PDF format](#)

[08/13/2001 -- Designation of Agent](#)

[View image in PDF format](#)

Note: This is not official record. See documents if question or conflict.

[Previous on List](#) [Next on List](#) [Return To List](#)

No Events

No Name History

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COMPOSITE EXHIBIT D

INDEXING INSTRUCTIONS: Lot 2372, Section "F", DeSoto Village Subdivision, in Section 33, Township 1 South, Range 8 West, DeSoto County, Mississippi

SUBSTITUTION OF TRUSTEE

WHEREAS, on May 19, 2006, Ellis Hendricks and Dana Hendricks, executed a Deed of Trust to Arnold M. Weiss, Trustee for the use and benefit of Mortgage Electronic Registration Systems, Inc., acting solely as nominee for HomeComings Financial Network, Inc which Deed of Trust is on file and of record in the office of the Chancery Clerk of De Soto County, 17th Judicial District, Mississippi, in Deed of Trust Record Book 2478, Page 38 thereof; describing the following property:

Lot 2372, Section "F", DeSoto Village Subdivision, in Section 33, Township 1 South, Range 8 West, DeSoto County, Mississippi, as per plat thereof record in Plat Book 13, Page 1-5, in the Office of the Chancery Clerk of DeSoto County, Mississippi, together with the improvements, hereditaments and appurtenances thereunto belonging.

WHEREAS, the undersigned is the present holder and beneficiary of the deed of trust;
and

WHEREAS, under the terms of said Deed of Trust the beneficiary or any assignee is authorized to appoint a Trustee in the place and stead of the original Trustee or any successor Trustee in said Deed of Trust; and

Should the undersigned become the last and highest bidder at the foreclosure sale, the Substitute Trustee is hereby authorized to transfer and assign said bid to convey title to said foreclosed property to the US BANK NA AS TRUSTEE, its successors and assigns. The statement in the Substitute Trustee's Deed that the undersigned has requested the transfer of its bid to Grantee(s) in the Substitute Trustee's Deed shall be binding on the undersigned and conclusive evidence in favor of the assignee or other parties thereby, and that the Substitute Trustee is duly authorized and empowered to execute same.

NOW THEREFORE, the undersigned does hereby appoint and substitute Priority Trustee Services of Mississippi, L.L.C., as Trustee in said Deed of Trust, the said Priority Trustee Services of Mississippi, L.L.C., to have all the rights, powers and privileges of the Trustee named in said Deed of Trust.

IN WITNESS WHEREOF, the undersigned has caused these presents to be signed on this the 30 day of APRIL, 2007.

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.

By: _____

Its _____

Liquenda Allotey
Vice President

STATE OF MINNESOTA
COUNTY OF DAKOTA

PERSONALLY appeared before me, the undersigned authority in and for the jurisdiction aforesaid, Liquenda Allotey, known personally to be the Vice President of the within named, **MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.**, and acknowledged to me that (s)he signed and delivered the above and foregoing Substitution of Trustee on behalf of said corporation, after being first duly authorized to do so.

GIVEN UNDER my hand and official seal, this the 30 day of APRIL, 2007.

Amber Kaiser
NOTARY PUBLIC

My Commission Expires:

1-31-11

Prepared by and Return To:

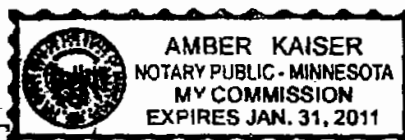
0711050MS

PRIORITY TRUSTEE SERVICES OF MISSISSIPPI, L.L.C.

1587 Northeast Expressway

Atlanta, GA 30329

770-234-9181 ext 1525



FILED IN HENDERSON COUNTY REGISTER OF DEEDS
OFFICE. NEDRA W. MOLES, REGISTER

DATE: 6/6/07 TIME: 3:35 pm ^{WB}

EXCISE TAX STAMP: _____

BOOK: 1321 PAGE: 408

APPOINTMENT OF SUBSTITUTE TRUSTEE

Loan#: 0608585972

DRAWN BY & MAIL TO:

SHAPIRO & INGLE, L.L.P.
8520 Cliff Cameron Drive, Suite 300
Charlotte, NC 28269

07-92567

IN THE GENERAL COURT OF JUSTICE
OF NORTH CAROLINA
SUPERIOR COURT DIVISION
HENDERSON COUNTY

STATE OF NORTH CAROLINA
COUNTY OF HENDERSON

TAKE NOTICE THAT WHEREAS, Thomas W. Sampson and Kathy Hart Sampson aka Kate Hart Sampson executed a Deed of Trust to secure an obligation under a Promissory Note in the amount of 147,200.00 Dollars, payable to Cunningham & Company and to Henry V. Cunningham, Jr., Trustee for said Payee, said Deed of Trust bearing date October 28, 2002, recorded in the Henderson County, North Carolina Public Registry in Book 1176 at Page 255; and

WHEREAS, Washington Mutual Bank is the Owner and Holder of the Note secured by said Deed of Trust and wishes to remove the said Trustee and name as his successor Grady I. Ingle or Elizabeth B. Ells; and

WHEREAS, the said Deed of Trust, provided that the Owner and Holder and its successors and assigns, may for any reason remove the Trustee and appoint a successor;

NOW, THEREFORE, Henry V. Cunningham, Jr. and any and all subsequent substitute trustee, if any, are hereby removed as Trustee and Grady I. Ingle or Elizabeth B. Ells (any of which may act) is hereby named and appointed Substitute Trustee in their place and stead in that Deed of Trust recorded in Book 1176 at Page 255, in the aforesaid Public Registry, and is vested with all of the rights, powers and privileges of the original Trustee.

Should the undersigned become the last and highest bidder at the foreclosure sale, the Substitute Trustee is hereby authorized to transfer and assign said bid and convey title to said foreclosure to whosoever the undersigned shall authorize. The statement in the Substitute Trustee's Deed that the undersigned has requested transfer of its bid to grantee(s) in the Substitute Trustee's Deed shall be binding on the undersigned and conclusive evidence in favor of the assignee or other parties thereto, that the Substitute Trustee was duly authorized and empowered to execute same.

01321 2409

IN WITNESS WHEREOF, Washington Mutual Bank has caused this instrument to be signed in its name by its Assistant Vice President, by proper authority given, this 17th day of May 2007.

Washington Mutual Bank

By: Liguenda Allotey
Assistant Vice President

STATE OF Minnesota)

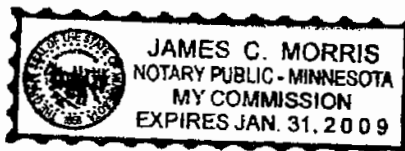
COUNTY OF Dakota)

I, James C. Morris, Notary Public for said County and State, certify that Liguenda Allotey, personally came before me this day and acknowledged that he/she is Assistant Vice President of Washington Mutual Bank, a corporation, and he/she, as Assistant Vice President, being authorized to do so, executed the foregoing on behalf of the corporation.

WITNESS my hand and official stamp or seal, this 17th day of May, 2007.

Notary Public

My Commission Expires: 1/31/09
(Affix Notarial Seal)



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Arapahoe County Clerk & Recorder, Nancy A. Doty
Reception #: B5075283
Receipt #: 5240944
Recording Fee: \$16.00
Pages Recorded: 3
Date Recorded: 5/24/2005 3:30:47 PM
1

WARRANTY DEED

THIS DEED, made this 19 day of April, 2005, between Washington Mutual Bank, F.A., grantor and The Secretary of Housing and Urban Development, His Successors and/or Assigns, whose legal address is 1670 Broadway, Attention: Single-Family Property Disposition Branch, Denver CO 80202-4801, grantee:

1-3

WITNESSETH, that the grantor, for and in consideration of the sum of **Ten Dollars (\$10.00)** and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell convey and confirm, unto the grantee, its heir(s) and assign(s) forever, all the real property, together with improvements, if any, situate, lying and being in Arapahoe County, State of Colorado, described as follows:

See Exhibit "A" attached hereto and incorporated herein by reference, which has the address of 14602 East 2nd Avenue, Unit #C-209, Aurora, CO 80011

TOGETHER with all and singular the hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof and all the estate, right, title interest, claim and demand whatsoever of the grantor, either in law or equity, of, in and to the above-bargained premises, with the hereditaments and appurtenance.

TO HAVE AND TO HOLD the said premises above-bargained and described with the appurtenances unto the grantee, its heir(s) and assigns forever. And the grantor, for itself, and its successor(s), personal representative(s) and assign(s), does/do covenant, grant, bargain and agree to and with the grantee, its successor(s) and assign(s), that at the time of the ensealing and delivery of these presents, they are well seized of the premises above conveyed, has/have good, sure, perfect, absolute and indefeasible estate of inheritance, in law, in fee simple and has/have good right full power and authority to grant, bargain, sell and convey the same in manner and form as aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments encumbrances and restrictions of whatever kind or nature whatsoever, except for general taxes for the year 2004 and subsequent years.

THE GRANTOR(S) shall and will WARRANT AND FOREVER DEFEND the above-bargained premises in the quiet and peaceable possession of the grantee, its successor(s), heir(s) and assign(s), against all and every person or persons lawfully claiming the whole or any part thereof. The singular number shall include the plural, the plural the singular, and the use of any gender shall be applicable to all genders.

IN WITNESS WHEREOF, the grantor(s) has/have caused therein names to be hereunto subscribed, the day and year first above written.

RECEIVED IN THIS COUNTY

Hopp & Shore, LLC
333 W. Hampden Avenue, Suite 500
Englewood, Colorado 80110

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Washington Mutual Bank, F. A., Grantor(s)

O
By: [Signature]
Title Liguenda Allotey Assistant Vice President
State of MINNESOTA
DAKOTA County

The foreclosure instrument was acknowledged before me this 19th day of April, 2005, by Liguenda Allotey, as Assistant Vice President (Title) of Washington Mutual Bank, F. A.

I
Witness my hand and official seal.

My Commission Expires: C

[Signature]
Notary Public

I
Internal Case # 04F614-MRT/Wamu-Rojas

Return to: Hopp & Shore, LLC
333 West Hampden Avenue, Suite 500
Englewood, CO 80110



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1957-2004

EXHIBIT "A"

CONDIMINIUM UNIT NO. 209C, RED SKY CONDOMINIUMS, ACCORDING TO THE
CONDOMINIUM MAP FILED FOR RECORD ON JANUARY 11, 1979 IN PLAT BOOK 36 AT PAGE 86, AND
SUPPLEMENTS THERTO AND AS DEFINED IN THE DECLARATION OF CONDOMINIUM OF RED SKY
RECORDED JANUARY 11, 1979 IN BOOK 2918 AT PAGE 601, RECORDS OF ARAPAHOE COUNTY,
COLORADO, TOGETHER WITH THE EXCLUSIVE RIGHT TO USE STORAGE SPACE 209S, IN BUILDING
C, COUNTY OF ARAPAHOE, STATE OF COLORADO more properly described as CONDOMINIUM UNIT
NO. 209C, RED SKY CONDOMINIUMS, ACCORDING TO THE CONDOMINIUM MAP FILED FOR
RECORD ON JANUARY 11, 1979 IN PLAT BOOK 36 AT PAGE 86, AND SUPPLEMENTS THERETO AND
AS DEFINED IN THE DECLARATION OF CONDOMINIUM OF RED SKY RECORDED JANUARY 11, 1979
IN BOOK 2918 AT PAGE 601, RECORDS OF ARAPAHOE COUNTY, COLORADO, TOGETHER WITH THE
EXCLUSIVE RIGHT TO USE STORAGE SPACE 209S, IN BUILDING C, COUNTY OF ARAPAHOE, STATE
OF COLORADO. Which has the address of 14602 East 2nd Avenue, Unit C-209, Aurora, CO 80011.

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WARRANTY DEED

1-3

THIS DEED, made this 17th day of April, 2006, between Washington Mutual Bank, F.A., grantor and The Secretary of Housing and Urban Development, His Successors and/or Assigns, whose legal address is 1670 Broadway, Attention: Single-Family Property Disposition Branch, Denver CO 80202-4801, grantee:

RECEIVED IN THIS CONDITION

WITNESSETH, that the grantor, for and in consideration of the sum of **Ten Dollars (\$10.00)** and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell convey and confirm, unto the grantee, its heir(s) and assign(s) forever, all the real property, together with improvements, if any, situate, lying and being in Arapahoe County, State of Colorado, described as follows:

SEE EXHIBIT "A" ATTACHED HERETO AND INCORPORATED HEREIN BY REFERENCE which has the address of 58368 East Highway 36, Strasburg, CO 80136

TOGETHER with all and singular the hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof and all the estate, right, title interest, claim and demand whatsoever of the grantor, either in law or equity, of, in and to the above-bargained premises, with the hereditaments and appurtenance.

TO HAVE AND TO HOLD the said premises above-bargained and described with the appurtenances unto the grantee, its heir(s) and assigns forever. And the grantor, for itself, and its successor(s), personal representative(s) and assign(s), does/do covenant, grant, bargain and agree to and with the grantee, its successor(s) and assign(s), that at the time of the ensealing and delivery of these presents, they are well seized of the premises above conveyed, has/have good, sure, perfect, absolute and indefeasible estate of inheritance, in law, in fee simple and has/have good right, full power and authority to grant, bargain, sell and convey the same in manner and form as aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments encumbrances and restrictions of whatever kind or nature whatsoever, except for general taxes for the year 2004 and 2005 and subsequent years.

THE GRANTOR(S) shall and will WARRANT AND FOREVER DEFEND the above-bargained premises in the quiet and peaceable possession of the grantee, its successor(s), heir(s) and assign(s), against all and every person or persons lawfully claiming the whole or any part thereof. The singular number shall include the plural, the plural the singular, and the use of any gender shall be applicable to all genders.

IN WITNESS WHEREOF, the grantor(s) has/have caused therein names to be hereunto subscribed, the day and year first above written.

Washington Mutual Bank, FA, Grantor(s)

After Recording Return to:

Hopp & Shore, LLC
333 W. Hampden Ave., Ste 500
Englewood, CO 80110

Arapahoe County Clerk & Recorder, Nancy A. Doty

Reception #: B6058318

Receipt #: 5278153

Recording Fee: \$16.00

Pages Recorded: 3

Date Recorded: 4/14/2006 4:10:21 PM



Warranty Deed Page 1 of 2

U
N

By:

L S
Liquenda Allotey - Assistant Vice President

State of Minnesota

Dakota County

The foreclosure instrument was acknowledged before me this 7th day of April, 2006, by Liquenda Allotey as Assistant Vice President of Washington Mutual Bank, FA

Witness my hand and official seal.

My Commission Expires: _____

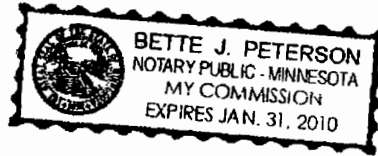
Bette Peterson
Notary Public

Internal Case # 7600.083-LJK/Wamu-Littig, Robert and Littig, Maria D.

Please return this document to:

Hopp & Shore, LLC

Attention: LJK
333 West Hampden Avenue, No. 500
Englewood, CO 80112



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LEGAL DESCRIPTION

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THAT PART OF THE NORTH ONE-HALF OF THE NORTH ONE-
HALF OF THE NORTHEAST QUARTER OF THE NORTHEAST
QUARTER OF SECTION 3, TOWNSHIP 4 SOUTH, RANGE 62 WEST
OF THE 6TH PRINCIPAL MERIDIAN, DESCRIBED AS FOLLOWS:
BEGINNING AT THE NORTHEAST CORNER OF SAID SECTION 3;
THENCE SOUTH 200 FEET TO THE NORTH RIGHT OF WAY LINE OF
UNION PACIFIC RAILROAD; THENCE WEST 700 FEET; THENCE NORTH
200 FEET TO THE NORTH LINE OF SAID SECTION 3; THENCE EAST 700
FEET TO BEGINNING, EXCEPT THAT PART DESCRIBED IN BOOK 318
AT PAGE 4 AND EXCEPT ANY PORTION OF THE ABOVE DESCRIBED
LAND LYING WITHIN UNION PACIFIC RAILROAD RIGHT OF WAY,
COUNTY OF ARAPAHOE, STATE OF COLORADO.

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COMPOSITE EXHIBIT E

Liquenda Allotey

Manager at FIS-LPS

Greater Minneapolis-St. Paul Area

Current • **Manager at FIS-LPS**

Industry Real Estate

Liquenda Allotey's Experience

Manager

FIS-LPS

(Public Company; 1001-5000 employees; Real Estate industry)

Currently holds this position

THE SUMMIT

ENCOURAGING PEAK PERFORMANCE IN THE FIS PARTNERSHIP

December 2007

Volume 3 Issue 4

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DEFAULT SOLUTIONS
A DIVISION OF FIDELITY NATIONAL INFORMATION SERVICES™

BUSINESS OBJECTS

BY MICHAEL CLOIN

VICE PRESIDENT, BUSINESS ANALYTICS / FINANCIAL SUPPORT

The FIS Foreclosure Solutions, Inc. Business Analytics group supports the analysis tools, live reporting environment, and ad-hoc reporting needs of FIS Foreclosure Solutions and its customer base. The Business Analytics team maintains the content available on the FNDS Reports Online Web site, including the Attorney Performance Reports (APR). FNDS Reports Online currently stores more than 800 live Crystal reports and archives over 10,000 static reports (in PDF, Excel, or text files). Each month, there are more than 36,000 views of these reports.

Based on the growth of the FIS Foreclosure Solutions-managed portfolio over the past several years and due to increased reliance on our reporting environment for near real-time data for analysis and decision support, two projects will be completed in 2008 that demonstrate our commitment to customer-focused solutions.

Business Objects Implementation

In the first quarter of 2008, Business Objects will replace FNDS Reports Online as the primary reporting environment. Business Objects is a full-featured environment, providing the infrastructure for housing both live Crystal reports and static documents. In addition, Business Objects provides a wide array of tools that facilitate reporting dashboards, dynamic drill-down reports, interactive maps, and other tools that we can leverage for years to come. Business Objects is currently live for some users and remaining users will be phased in during the first quarter of 2008.

Integrated Security is one of the greatest initial benefits of the Business Objects product. Users will be able to access Business Objects

from the FIS Desktop without maintaining a separate reporting Web site user name and password. This will streamline both user setup and ongoing maintenance.

Performance and stability are two more key benefits of the transition to the Business Objects environment. Business Objects allows for more simultaneous requests on key reports, such as the APR. Additionally, the user-friendly interface makes it easy to locate and find specific reports quickly.

Increased Data Processing Capacity

While moving to a new reporting environment, a new SQL Server 2005 data processing environment was brought online this year. This exponentially improves response time for live reports that are requested through Business Objects. This environment better supports our production of key performance reporting such as the APR, Client Power Rating (CPR), and Monthly Performance Reports (MPR). We have already experienced an 80 percent reduction in nightly processing time for the APR.

FIS Foreclosure Solutions is committed to providing in-depth analysis and user-driven data solutions through the Business Analytics group. The implementation of Business Objects and a new data processing medium is the product of much effort across several teams within our organization. By continuing to raise the bar for ourselves and to partner with our colleagues in the industry to understand the needs for specific tools, we will continue to add value by providing relevant customer-focused solutions to our mortgage servicing clients and to their Attorney Network.

FIS INFORMATION

FIS Foreclosure Solutions, Inc.

A Division of Fidelity National Default Solutions

NAME CHANGES AND URL CHANGES

In conjunction with the rebranding of the FIS Loan Portfolio Solutions' (FIS LPS) technology applications in January 2007 to the FIS Desktop suite of products, the URLs of these applications have been updated to reflect the new names as of December 2, 2007.

In addition to the FIS Desktop changes, Fidelity National Foreclosure Solutions, Inc. also recently changed our name to FIS Foreclosure Solutions, Inc.

<u>Application</u>	<u>Previous URL</u>	<u>New URL</u>
Process Management (<i>f.k.a. NewTrak</i>)	Newtrak.com	pm.fisdesktop.com
Invoice Management (<i>f.k.a. NewInvoice</i>)	Fndsonline.com	im.fisdesktop.com
Document Management (<i>f.k.a. NewImageExpress</i>)	Newimageexpress.com	dmc.fisdesktop.com

FIS Foreclosure Solutions, Inc. provides loan servicers with single-source solutions for managing foreclosures, bankruptcies and related matters on a nationwide basis.

FIS Foreclosure Solutions, Inc. possesses the expertise to help clients manage diverse loan procedures and credit types, enabling clients to realize consistent pricing for default management services and reductions in the cost per loan serviced.

When clients refer a loan to local counsel through FIS Foreclosure Solutions, Inc., the loan timeline is managed until resolution. Clients identify the unique requirements of their portfolios and the loans are processed through FIS Foreclosure Solutions, Inc. to ensure the most efficient outcome. Internal time limitations for key events are set and active monitoring is conducted to minimize the overall timeframe from referral to resolution. The loan-level data is reported to Fidelity National Information Services, Inc. (FIS) partners on a daily basis using FIS Desktop, a Web-based default management technology.

FIS Desktop is an industry-changing proprietary enterprise application that provides users with a single point of contact into technology-driven solutions, enabling clients to streamline their processes and manage document and invoicing needs online. This reduces timelines, mitigates risk and saves resources.

FIS Desktop Process Management (previously NewTrak) allows users to efficiently direct and deliver all relevant information, images and services from one secure, real-time platform. Reconciliation of third-party information is simplified by utilizing a single, Web-based access point

that bridges a client's third-party service providers and FIS. This means quicker processing and cost savings, as well as the virtual elimination of the risk of error.

Document Management (previously NewImage Express), FIS Desktop's end-to-end document imaging solution, essentially omits the need for paper by capturing, indexing, routing, archiving and retrieving documents through secure, Web-based connections. This customized enterprise application manages a document's life cycle, from data extraction and electronic generation through

preset routing protocols, ultimately automating a company's unique document structure.

FIS Desktop Invoice Management (previously NewInvoice) uses real-time, online services with specialized modules to automate every aspect of the billing and invoicing processes. From

presentment and processing to postpayment activities, Invoice Management's automation saves time and eliminates errors.

From referral to invoice, FIS Foreclosure Solutions, Inc. and FIS Desktop provide unique, money-saving solutions for the mortgage community.

FIS' FIVE FUNDAMENTAL PRECEPTS

Autonomy and Entrepreneurship
Bias for Action
Employee Ownership
Minimize Bureaucracy
Close Customer Relationships

FLORIDA OFFICE

601 Riverside Ave.
Building 5, Floor 3
Jacksonville, FL 32204
904.470.7700
904.470.7800 fax

MINNESOTA OFFICE

1270 Northland Drive
Suite 200
Mendota Heights, MN 55120
651.234.3500
651.234.3600 fax

FORECLOSURE SOLUTIONS AND LPS MANAGEMENT

SCOTT BARNES	FIS Foreclosure Solutions President and COO	904.470.7703
LARRY DINGMANN	SVP Division Counsel	651.234.3506
STEVE GERTHS	SVP Business Development	651.234.3504
ED HILL	SVP FIS LPS	281.827.2676
JAMES IREDALE	Chief Technology Officer, FIS LPS	904.470.7704
LAURA MACINTYRE	COO/Sr. Managing Director, FIS Desktop™	651.234.3511
BARB NICKEL	SVP Controller	651.234.3587

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<http://thesummit.fndsportal.com>

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*The opinions expressed by contributing authors are those of the authors and do not necessarily reflect the opinions of FIS Foreclosure Solutions, Inc..

Do you want to be featured in next quarter's issue of *The Summit*? We welcome all articles or comments about your company/firm.** Tell us about changes, improvements, legislation that affects you – whatever you think will be interesting to readers of *The Summit*! The deadline for submissions for the next issue is **January 14**.

We also welcome your photos (digital photos set to the highest resolution are preferred). Send comments, photos and story ideas to:

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**FIS reserves the right to edit submissions for space constraints.

RAMIFICATIONS OF FANNIE MAE CAP ON TITLE COSTS

by January Taylor

MORRIS, SCHNEIDER, PRIOR, JOHNSON & FREEDMAN, LLC

In an effort to decrease the fees and costs of foreclosure, Fannie Mae issued a memorandum in June 2007 (to become effective Aug. 1, 2007) limiting the reimbursement amount of title costs associated with foreclosure for all Fannie Mae insured loans. By capping the reimbursement amount at \$200 per case, Fannie Mae determined it would “better contain their credit losses and make it easier for borrowers to refinance or cure delinquency of their loans.” The reimbursement of costs provided by Fannie Mae will include the initial search and all updates.

Placing a cap on the reimbursement amount for title services during a foreclosure will require vendors to pursue alternative means of obtaining necessary title information. Such alternatives, as suggested by Fannie Mae, would include using title searches or abstracts instead of a title commitment or Trustee Sale Guarantee. In such instances, the resulting title search would be uninsured by a title insurance company provider and a full search may still be required at the REO stage of the process in order for title insurance to be issued at closing.

The benefits of running a full 40-year title search in preparation for foreclosure allows the vendor to identify and cure all title issues prior to exercising the power of sale clause provided in the security instrument (for non-judicial jurisdictions). There are several reasons for running a title search, the most important of which are to identify all parties that are required to be given notice of the foreclosure, confirm that the lender has a valid lien on the subject property, and verify a clear chain of title. Some of these issues can be determined by a limited title search, but there are certain situations where title defects can only be identified

in a full search. While a limited title search characteristically begins at the vesting deed into our borrower and moves forward, most of the more detrimental title defects (including legal description errors, missing ownership/equitable interests, and prior owner liens) are found further back in the chain.

Unresolved title issues identified post-foreclosure can cause significant delays in the resale of the property and even possible liability on the part of the lender. Specifically, a title issue identified during the resale of a property can

cause the lender to lose a prospective buyer while the title issue is being resolved. A delayed notice to a title insurance company of a defect in title can also potentially void a title insurance policy. Certain unresolved title issues can render a foreclosure invalid or wrongful, which may cost the lender significant litigation fees and liabilities.

There are several ways a lender can limit delays and liability. If a lender does not have a lender's title insurance policy, they can order a full search and absorb the title costs that exceed the Fannie Mae cap. Alternatively, if the lender does have a policy, they should provide it to the vendor at the referral stage of a foreclosure. This will confirm that the lender has insurable title up to the point of the recording of the security instrument and should allow a REO attorney to tack off of the existing policy at the resale of the property. Having a title insurance policy readily available to the vendors will also decrease possible delays in REO because the title insurance company can be immediately notified of any title defects and, as a result, initiate the resolution process.

“UNRESOLVED TITLE ISSUES IDENTIFIED POST-FORECLOSURE CAN CAUSE SIGNIFICANT DELAYS IN THE RESALE OF THE PROPERTY AND EVEN POSSIBLE LIABILITY ON THE PART OF THE LENDER.”

January N. Taylor is an Associate Attorney at Morris, Schneider, Prior, Johnson, and Freedman, LLC in Atlanta. Ms. Taylor is a member of both the State Bar of North Carolina and Georgia. Her area of practice is real property with a focus on foreclosure law and related title issues.



CLIENT SPOTLIGHT: FREMONT AND OPTION ONE - CA



OPTION ONE:

Back: Camron Hashemi, Michael Campos, Kathleen DeGrammont, Jim McGraw, Raymond Elmes, Gino Tomasino
Front: Angelica Lopez (FIS), Tracy Solomon, Scarlett Lang, Gaylee Cone, Vicki Tsai, Chrys Houston (FIS), Cindi Ellis, Rosario Brockway, Kim Ecklund



FREMONT INVESTMENT AND LOAN MANAGEMENT:

Scott Walker, Chrys Houston (FIS), Cynthia VanPatten, Angelica Lopez (FIS), Jamie Brander, Richard Power



FREMONT INVESTMENT AND LOAN:

Back: Luis Tena (FIS), Vikki Richards, Kristin Bowles (FIS), Scott Walker
Middle: Angelica Lopez (FIS), Danielle McKeon, Sabrina Olsen (FIS), Zaneathea Murphy, Shelly Tello (FIS), Amber Olivares (FIS), Diana Larrondo(FIS)
Front: Chrys Houston (FIS), Freddy Tierra, Christanya Blackman (FIS), Emma Ramirez (FIS)

EMPLOYEE SPOTLIGHT: CHRYS HOUSTON

by Emily Bruce

Amidst the colorful decorations and gadgets on her desk sits Chrys Houston, phone piece in ear and hands on keyboard. Chrys is the Assistant Vice President of Customer Relations at FIS Foreclosure Solutions, Inc. and her position requires constant communication with clients and FIS associates.

A native of Minneapolis and a University of Minnesota alumna, Chrys started out in the business as a home improvement (second lien) mortgage collector at Green Tree Financial 14 years ago. She then moved into foreclosures and FHA claims and even handled spa and above-ground pool repossessions. While at Green Tree, Chrys worked her way up to supervisor, at which time Conseco Finance bought out the company. When this happened, Chrys decided to leave the brisk weather of her home state to brave the desert heat in Tempe, AZ for two years as a supervisor for Conseco in the FHA claims and Equity Analysis department. Chrys then headed across the country to Jacksonville, as a unit manager over high risk and private investor foreclosures for LOGS/First American. Four years later, Chrys had the opportunity to join the FIS team in the Special Assets department heading up the Document Retrieval area.

Even with the dramatic climate changes, Chrys said the biggest adjustment to living in the south was learning to refer to soft drinks as “soda” rather than “pop.” Growing up in Minnesota, Chrys was active in sports and figure skated for many years. She now enjoys taking her daughters Kayla, 11 and Kori, 6 to the indoor rink on the weekends. She misses the Mall of America, but not the cold weather or snow, and makes sure to fit in a trip when she visits her family back home.

Chrys transferred to her current position in Customer Relations after two years as the manager of the Document Retrieval team. During that time, her team grew from 10 associates to more than 40. As the company expanded, a need for a more streamlined module became apparent. With the immediate impact on her team, Chrys was closely involved in the development of the document module that went live this year. The new module benefits both clients and

firms by improving communication between them and FIS.

“Documents were previously tracked through Issues in Process Management, but we knew we needed a better way as the volume increased,” Chrys said. Tracking document requests through the various events within the document-specific processes has allowed for better tracking, reporting and more thorough and accessible data.

“I really enjoy working with clients and firms and could do so while working in docs through the building of

processes and by providing ongoing training. It’s very rewarding,” she said. In addition to building relationships with clients, Chrys enjoys traveling to client offices, one factor that brought her to Customer Relations.

Chrys is now over a team of three offsite Customer Relations managers. She coordinates visits to client offices and client visits to FIS Foreclosure Solutions offices,

attends client calls daily, and follows up on client requests to ensure escalated items are resolved timely.

“I love the staff. Everyone is on top of their game and works with a sense of urgency when it comes to the client’s needs” she said.

As Chrys settles into her new role at FIS, her spunky personality remains the same. Her strength and zest for life prevailed through two breast cancer diagnoses. Her first, which came at the age of 30 when her daughters were ages five and eight months, brought on a series of surgeries and tests. One year later, her cancer returned. This time, she went through six months of chemotherapy and six weeks of radiation. Although she misses her long curly hair, she received so many compliments on her short cut and decided not to grow it back out after her treatments ended. Chrys has now been cancer-free for three years and looks forward to her future with her family and at FIS.

“I want to build a strong and positive rapport with our clients by making sure we are providing a high level of customer service and delivering results every day.”

“I WANT TO BUILD A STRONG AND POSITIVE RAPPORT WITH OUR CLIENTS BY MAKING SURE WE ARE PROVIDING A HIGH LEVEL OF CUSTOMER SERVICE AND DELIVERING RESULTS...”



THE FUTURE OF FDCPA LAWSUITS

by Larry Zielke and Ryan Krumrie

SHAPIRO, NORDMEYER & ZIELKE, LLP

Judge Richard Kyle, United States District Court for the District of Minnesota, issued an order on Sept. 12, 2007, granting a law firm summary judgment and dismissing all claims brought against it under the Fair Debt Collection Practices Act (15 U.S.C. § 1692 *et. seq.*). In dismissing the case, Judge Kyle rejected the plaintiff's contention that a law firm engaged almost exclusively in the practice of mortgage foreclosures was a "debt collector" for all purposes and was subject to all of the provisions of the FDCPA.

In Plaintiff v. Shapiro, Nordmeyer & Zielke, LLP (D. Minn. Court File No. 06-3103), the law firm had been hired by a mortgage company to initiate a non-judicial foreclosure when the mortgage was in default. The property was "torrens" (registered property) and Shapiro, Nordmeyer & Zielke, LLP confirmed on the title report that the plaintiff was the registered owner of the property. Shapiro, Nordmeyer & Zielke, LLP then published a notice of mortgage foreclosure sale for six consecutive weeks prior to the sale as required under Minnesota law. The plaintiff claimed that the mandatory foreclosure notices published in a legal newspaper violated the FDCPA's prohibition on communicating debt information relating to her finances to third parties.

While recognizing a split in authority on the issue among the circuit courts, Judge Kyle concluded that the

law firm was "an enforcer of a security interest" and that "foreclosing on a mortgage does not constitute debt collecting activity under the FDCPA." Therefore, the law firm was subject only to one provision (15 U.S.C. § 1692(f)) of the FDCPA and was not subject to claims under any of the other provisions of the Act, in particular the third party communication provisions on which the plaintiff's claims were based. Because the plaintiff presented only "a mere conclusory assertion" that the

law firm violated section 1692f(6), Judge Kyle dismissed the entire case with prejudice. The plaintiff's attorney filed a notice of appeal this October after Judge Kyle denied his request to modify the order.

This case represents a chance to have the 8th Circuit rule in favor of foreclosure attorneys. We feel the facts of this case are favorable, and that a published 8th Circuit Court of Appeals decision in our favor will

set the stage for a favorable U.S. Supreme Court decision in the future, if it should ever get to that level. At the very least, it will help those attorneys in the 8th circuit void off frivolous FDCPA lawsuits. If you have any questions regarding this case, they can be directed to Barry O'Neil and Brett Clark of Lommen, Abdo, Cole, King & Stageberg, P.A. who represented the law firm in successfully defending the claims. Contact information can be found at www.lommen.com.

"THIS CASE
REPRESENTS A CHANCE
TO HAVE THE 8TH
CIRCUIT RULE IN
FAVOR OF FORECLOSURE
ATTORNEYS."

Lawrence "Larry" Zielke is the Managing Partner of Shapiro, Nordmeyer & Zielke, LLP. He has been admitted to the Minnesota Bar since 1983, spending the last 17 years concentrating his practice on representing mortgage lenders and Servicers in all Minnesota counties.





ATTORNEY PERFORMANCE RECOGNITION

Each quarter, FIS Foreclosure Solutions, Inc. recognizes the top 20 performing firms in foreclosure and bankruptcy. We would like to congratulate the following firms for their performance during Q3 2007.

Q3 - 2007 BANKRUPTCY

AZ	Malcolm & Cisneros
CA	Malcolm & Cisneros
CO	Janeway Law Firm, PC
IA	Dunakey & Klatt
KS	Kozeny & McCubbin
MA	Ablitt & Charlton
ME	Shapiro & Morley, LLP
MS	Morris and Associates
NC	Nodell, Glass & Haskell
NE	Kozeny & McCubbin
NV	Malcolm & Cisneros
PA	Martha Von Rosenstiel
PA	McCabe Weisberg
PA	Goldbeck McCafferty & McKeever
PA	Zucker, Goldberg & Ackerman
TX	Mann & Stevens
TX	Hughes, Watters & Askanase
TX	Codilis & Stawiarski
TX	Brown & Shapiro, LLP
VT	Lobe & Fortin

Q3 - 2007 FORECLOSURE

AL	Shapiro & Pickett, LLP
AL	Scott J. Humphrey
DC	Rosenberg & Associates, LLC
FL	Gary I. Gassel, PA
IA	Dunakey & Klatt
IN	Bleecker Brodey and Andrews
KY	Manley Deas Kochalski, LLC
MD	The Fisher Law Group, PLLC
ME	Shapiro & Morley, LLP
MS	Morris and Associates
MS	Adams & Edens PA
NC	Roberson, Haworth & Reese
NC	Shapiro & Ingle, LLP
NH	Barron & Stadfeld, PC
NJ	Koury, Tighe, Lapres, Bisulca & Sommers
NY	Jonathan D. Pincus
NY	McCabe Weisberg
TN	Apperson, Crump, Duzane & Maxwell PLC
VA	Sykes, Bourdon, Ahern, & Levy, PC
VA	Rosenberg & Associates, LLC
WI	Vollmar and Huismann, SC



EMPLOYEE ANNIVERSARIES

NOVEMBER

Terri Boyette
Mitch Collingwood
Jason Downing
Juli Ezell
Laurie Faltesek
Andre Friedman

Wesley Frost
Kari Grinnell
Courtney Gullie
Paula Houston
Bobbi Hughes
Xiao Jiang

Brandon Kiel
Shannon Leeber
Bridgette Smith
Mie Woody

ONE YEAR

DECEMBER

Lakesha Adams
Leesa Bardunias
Gregory Biersack
Michael Bowman
Clark Boyesen
Kimberly Derynck
Leena Gomber

Kevin Hamilton
Pangfua Her
Jaqueline Lehman-Meggison
Tara Lindholm
Melinda Loyd
Eric Ogechi
Rachel Onsinyo

Kelly Perrin
Thomas Salkiewicz
Robin Smith
Dragan Spiridonovic
Brian Swanner
Vesna Vujaklija

ONE YEAR

JANUARY

Chalonda Adams
Damein Anderson
Jillian Banaszewski
Carl Chisholm
Desiree Fairchild
Crystal Hawley
Jacqueline Hunter

Faith Hux
Tanya Knoll
Seth Lucas
Alexis McKinnon
Berry Morgan
Tran Pham
Johnnie Timm

Linda Thursam
Krishna Vulisetti
Caitlin Wheelless
Heidi Wilson
Houawa Yang

ONE YEAR

NOVEMBER

5 Chris Anderson
6 John Cody
6 Norma Folley
6 Jackie Notch
7 Greg Whitworth
8 Gina Akdeniz
8 Stacey Rubbelke
11 Karen Froggatte

DECEMBER

6 Scott Topel

JANUARY

5 Elizabeth Anselmo
5 Laura Bondgien
5 Tammy Brooks-Saleh
5 Chuck Henrickson
5 Donna Kalb
5 Rick Wilken
6 Kathleen Milsow

FIVE YEARS
OR MORE

DEPARTMENT SPOTLIGHT: QUALITY CONTROL

by Jennifer Anthony

MANAGER, QUALITY CONTROL

In April 2006, FIS Foreclosure Solutions initiated the creation of a Quality Control (QC) department to audit staff and network firms. Jennifer Anthony, a manager in Foreclosure Attorney Management at the time, was asked to develop and initiate this department.

The department began with two associates auditing staff members in the Foreclosure Attorney Management area and two associates working on reporting for a client. Shortly thereafter, the team expanded to audit staff in Bankruptcy Attorney Management, Special Assets - Title and Litigation, Stop/Holds, Bankruptcy Issue Resolution, Document Retrieval, Bankruptcy Setups and Bankruptcy Closings. A specialized group was later created to audit sales each month.

In addition to auditing internal functions, Jennifer's team developed a random audit program to audit network attorneys on items completed in Process Management.

The Quality Control department hires within FIS Foreclosure Solutions to ensure that each auditor has the background and knowledge of the department they audit. The department is broken down into four areas: internal audits, sales audits, attorney audits, and client reporting.

The internal auditors are specialized within the departments they audit. They are responsible for auditing the FIS staff's daily functions such as re-projections, issues, holds and intercoms.

The sales auditors are responsible for auditing all sales that are out of compliance each month by the end of the month. They review files from referral to sale held and add any allowable holds that were missed by the attorneys or clients. They also review for any

unnecessary holds that may have been added in error.

Attorney auditors are responsible for auditing all APR-eligible stages ensuring the attorneys are providing accurate data within Process Management. A random selection process is used to identify events to be audited.

The client reporting staff handles several client-specific reports, some of which are handled daily, weekly or monthly.

The internal audit area holds meetings with the managers of each department on a monthly basis to talk about trends and training opportunities within FIS.

The sale auditors keep tabs on the most current timelines provided by FNMA and FHLMC and also provide feedback on trends within the different

states so they can work with the attorneys on their performance. With these sale audits, the department is able to provide the data to clients to identify trending within the different states and attorney offices regarding sales performance.

All attorney audits are based on the information provided in the attorney expectation document. The attorney auditors are able to assist with the updates on the attorney expectation document that is provided to the FIS attorney network. When trends are identified within the audits, QC discusses the finding with the firm. With this, the auditors are able to make sure all attorneys are on the same page when updating Process Management so the APR data stays consistent.

Strong and open lines of communication within the

"WHEN TRENDS ARE IDENTIFIED WITHIN THE AUDITS, QC DISCUSSES THE FINDING WITH THE FIRM."



Jennifer Anthony
Manager

department are vital to our success. The QC team has an open door policy for all areas and the team uses each other to bounce questions, concerns and issues off one another.

Some future goals for this area are to audit all departments within the operations at FIS Foreclosure Solutions and to start using a new reporting method within the internal audit area. Additionally, the knowledgeable staff in the department may assist with advanced training for employees.

With all of the growth in her area, Jennifer finds satisfaction in knowing that her area is beneficial to the overall performance of the company.



Elizabeth Anselmo
Staff Auditor



Katy Grotjohn
Staff Auditor



Mary Kriesel
Staff Auditor



Mary Stenson
Staff Auditor



Tanya Lindback
Sales Auditor



Tara McGraw
Sales Auditor



Deana Acosta
Attorney Auditor



Lynn Doyscher
Attorney Auditor



Anne Neal
Sales Auditor



Jackie Notch
Sales Auditor



Dava Dawson
Client Reports



Valestine Hughes
Client Reports



Traci Petsche
Sales Auditor



Rebecca Verdeja
Sales Auditor



Jennifer Wersal
Sales/Staff Auditor



Wendi Wilde
Sales Auditor

FIRM SPOTLIGHT: HUGHES WATTERS & ASKANASE

by Carolyn Taylor

MANAGER, HUGHES WATTERS & ASKANASE

HughesWattersAskana (HWA) provides guidance and solutions for mortgage servicers caught in the throes of the subprime mortgage crisis and credit crunch. A full-service law firm based in Houston, HWA is ideally positioned to take on the broad ranging and complex issues faced by mortgage servicers and lenders in the current environment. HWA's representation of lenders and servicers provides it with a unique perspective on the issues currently plaguing the mortgage industry.

Carolyn Taylor, manager of HWA's default servicing group, was a critical component in the evolution of the firm from a specialized boutique to a full-service commercial firm. Prior to her arrival, HWA focused primarily on real estate and trustee/debtor bankruptcy representation. The establishment and growth of Carolyn's mortgage servicing practice exposed HWA first-hand to the myriad of issues faced by mortgage servicers, leading the firm to expand its capabilities to confront these issues.

Today, HWA has wide-ranging expertise and experience in six interrelated areas of particular

importance to the mortgage servicing industry: bankruptcy, business planning and strategy, commercial finance, real estate, consumer financial services, and litigation. This model enables Carolyn and HWA to provide cost-effective and comprehensive advice and representation to mortgage servicers from payment disputes to class action defense.

Carolyn established the firm's default servicing group when she joined HWA in January 1994. On individual, firm and client levels, Carolyn fosters the development of leadership qualities, a cooperative spirit, and pride and self-sufficiency in work performance.

To develop these attributes, emphasis is placed on independent thinking while imposing a strong sense of responsibility and accountability among employees.

Carolyn also provides her team with constant feedback as to their progress and accomplishments. At the same time, Carolyn and the section managers maintain an "open door" policy, ensuring they are always available to assist employees with challenging questions and issues. Finally, Carolyn utilizes a "buddy system" under

"HWA's representation of lenders and servicers provides it with a unique perspective on the issues currently plaguing the mortgage industry."

L TO R: CAROLYN TAYLOR AND DOMINIQUE VARNER are partners at HWA. Carolyn is also the manager of firm's default servicing group.



which each team member is paired with a “back-up buddy” who has been trained to provide additional support when needed and fill in when the primary member is out of the office.

To develop these attributes on the client level, work is assigned to team members based on client and matter type rather than task. Carolyn also encourages open communication between the HWA team and clients. This enables team members to develop personal relationships and partnerships with Fidelity and client representatives. That philosophy and collective team work culminated in the selection of HWA to participate in the Freddie Mac Designated Counsel Program (Texas).

The firm’s partnership with FIS Foreclosure Solutions, which began in October 2004, continues to develop and prosper to meet the demands of the expanding client base. The Texas FIS Foreclosure Solutions specialists and management team have always been willing to go the extra mile to resolve issues and provide the utmost in service for our mutual clients. This hard work and dedication made it possible for HWA to receive the Service Excellence Award (2005-2006) and the Summit Award (2006-2007) at FIS Foreclosure Solutions’ Annual Attorney Summit.

The emphasis on strong moral and ethical practices, coupled with prompt client communication and timely results, are the foundations for HWA’s unparalleled services and its stellar reputation with clients, colleagues, and members of the judiciary.

As a member of FIS Foreclosure Solutions’ Attorney Roundtable, HWA will continue to work with the FIS management team to address current industry challenges.



FRONT ROW: Theresa Medrano, Tiana Santos, Niayana Goonie, Janice Vessella, Capri Savage, Carolyn Taylor, Valeria Bertolini, Tiffany Bazaldua, Shameeza Alli,

SECOND ROW: Steve Bedinghaus, Cassie Riner, Jarusha Harris Gena Mayss, Gail Sheridan, Emily Corriden, Melinda Pieper, Robert Vasquez, Catherine Zeis

THIRD ROW: Kelly Sarabok, Brendetta Scott, Dominique Varner, Trish Corriden, Karen Dockens, Tina Pavlock

LOOKING BEYOND THE HEADLINES

by Marlon Bates

SCALLEY READING BATES HANSEN & RASMUSSEN, P.C.

Pick up a newspaper and the headlines will jump out at you: “Foreclosures Skyrocketing!” Turn on the television and you will be bombarded by reports on how the financial sky is falling with property values dropping, lenders running out of money to lend, and foreclosures running rampant. A barrage of gloomy financial reports has diminished the public’s confidence in the housing and lending markets. As a result, most people believe the loan delinquency problem affects the entire nation.

Truthfully, the mortgage default problem is limited to certain types of loans and certain geographical areas. As professionals in the mortgage industry, we should look beyond the headlines to fully understand the problem.

Without a doubt, the delinquency rate for residential mortgage loans is on the rise. The Mortgage Bankers Association recently calculated that delinquent mortgage loans (excluding loans in foreclosure) are currently 5.12 percent of all mortgage loans. This is an increase from 4.39 percent a year ago. Foreclosures rates have also risen. The percentage of mortgage loans in foreclosure is currently 1.40 percent of all mortgage loans. A year ago, the foreclosure rate was 0.99 percent.

However, national averages hide the real story about these statistics. The increase in national foreclosure rates is currently caused by only four states: California, Florida, Nevada and Arizona. If these four states were excluded from the calculation, the national foreclosure rate would actually be declining. In reality, 34 states are showing a decline in foreclosure rates, 12 states are showing modest increases and only four states are showing substantial increases. The newspaper headlines should exclaim that two-thirds of all states show declining foreclosure rates.

The delinquency problems in California, Florida, Nevada and Arizona are exacerbated by declining home values, high inventories of houses, and a much higher percentage of “investor loans” where the borrower is not living in the house. For example, in Nevada, 32 percent of mortgages in foreclosure are investor loans. In Arizona, the rate is 26 percent. Florida’s rate is 25 percent and California’s rate is 21 percent. The national average is only 13 percent.

“THE INCREASE IN NATIONAL FORECLOSURE RATES IS CURRENTLY CAUSED BY ONLY FOUR STATES: CALIFORNIA, FLORIDA, NEVADA AND ARIZONA.”

In addition to geography, the type of mortgage loan is a key determiner in the likelihood of default. Contrary to popular opinion, the division is not between prime and subprime loans. The division is between fixed and adjustable rate loans. The delinquency rate of prime fixed rate loans has stayed current, with subprime fixed rate loans decreasing in delinquency. On

the other hand, the rate of delinquency is increasing moderately for prime adjustable rate loans and it is increasing dramatically for subprime adjustable rate loans.

When mortgage loan professionals understand the true nature of the current delinquency problem, they can make better decisions regarding loss mitigation. On a national scale, one size does not fit all. A fixed rate loan default in Utah, for example, should be administered differently than an adjustable rate loan in default in Nevada.

Extraordinary loss mitigation measures should be reserved for adjustable rate loan defaults or defaults in those very few states where foreclosures are truly skyrocketing.

Marlon Bates is the managing partner of Scalley Reading Bates Hansen & Rasmussen, P.C. in Salt Lake City. The primary focus of his practice is lender support, including foreclosures, bankruptcy, evictions, loan workouts, loan documentation, and litigation.



STATE YOUR CASE

In the last issue of *The Summit*, we asked our attorney network to submit answers to the following question:

Because of increases in foreclosure volumes, some servicers are pursuing loss mitigation efforts as alternatives to foreclosure. In what loss mitigation efforts by servicers has your firm taken part?

“Probably the biggest area where we are assisting the client in the loss mitigation area is in the preparation of modification agreements. We are receiving a huge volume of requests for these. We work directly with the loss mitigation department to hammer out the terms of the mod, quickly prepare it, then express the mod to the customer. In Florida, there is no requirement that these modifications be recorded in the public records. We have also stepped up letter writing campaigns both before and during the foreclosure. We have found this to be a very effective way of beginning communications and possible workouts.”

- Dan Consuegra

Law Offices of Daniel C. Consuegra (Fla.)

“Our group has a pre-foreclosure loss mit program in both our judicial and non-judicial states. We have a Chapter 7 Motion For Relief/First Meeting of Creditors Program, a program for judicial foreclosures in Cleveland rather than the backlogs and delays in Cuyahoga County Common Pleas Court, and a program that includes a Notice of Loss Mitigation in every judicial foreclosure our firm files. We have designed these programs so that there is no cost or expense back to the lender or servicer.”

- Frank J. Veneziano

Weltman, Weinberg and Reis Co., L.P.A. (Ill., Mich., Ohio, Pa.)

“We have drafted a letter that outlines loss mitigation opportunities for homeowners who truly want to remain in their homes. This letter is either mailed to the homeowner the day the complaint is filed or some servicers have us send the letter along with the complaint and same is served by a private process server. When a borrower calls because of the letter or otherwise, we provide the borrower with a toll-free loss mitigation number and offer to transfer the borrower (hot transfer) to a loss mitigation account manager who interacts with the borrower to determine whether or not that individual is a candidate for any loss mitigation programs. When a borrower calls this firm, we immediately provide the servicer with a way to contact the borrower.”

- Dennis V. Ferguson

Reisenfeld & Associates (Ind., Ky., Ohio)

“Virginia is a trustee state, and the trustee has fiduciary duties to both the noteholder and borrower. Thus, it is very difficult to negotiate terms of loss mitigation plans without the risk of being subject to a complaint alleging violation of those duties by favoring the noteholder’s interests should a loss mitigation plan later fail. However, we do support loss mitigation efforts by drafting forbearance plans, loan modification documents, and deeds in lieu of foreclosure in accordance with the terms negotiated by the noteholder or servicer.”

- Richard Knee

Glasser and Glasser, P.L.C. (Va.)



As the mortgage industry continues to evolve with new business styles, strategies, and industry standards, we would like to readers to share their thoughts on these changes. In order to accomplish this, we pose a mortgage industry question in *The Summit* newsletter to obtain feedback on a particular topic. The question for this issue is:

Is your firm aware of any pending legislation in specific states that could affect foreclosure rates (such as state-imposed moratoriums or other interventions)?

Please submit responses to this topic to attyfeedback@fnfs.net with subject line, “State Your Case.”



NOTICE THE NETWORK

FIS Foreclosure Solutions staff would like to thank the following firms/individuals for their consistent efforts to increase the success of our partnerships:

“I would like to recognize Sue Forder of **Moss Codilis**. She is good to work with and is always looking to help shorten timelines with her proactive approach.”

- Andrew Fuerstenberger, Special Assets manager

“Over the past few months, I have worked closely with the litigation group at the **Ben Ezra Law Firm**. The entire litigation staff has been very responsive and helpful and has made great efforts in streamlining how a specific client’s loans are handled. Managing attorney David Rodstein took the time to contact both the client and FIS Foreclosure Solutions to determine what information was needed and when it was needed to ensure the client and FIS were able to make a quick decision on how to proceed with litigated matters. This determination and interest, shared by the entire litigation team at Ben Ezra’s office, has made a significant difference in the timeline of litigated files.”

- Keri Gaber, Special Assets lead

“Andrew Goldberg of **Rosicki, Rosicki & Associates** provides immediate response times. Any time I send a request to Andrew regarding a client’s edit project, whether it’s additional instructions for an amended POC or a request to amend a form in Process Management, he usually responds within the hour to advise that the issue is being taken care of and it is always successfully completed.”

- Brian Swanner, Reporting specialist

“**Shapiro & Ingle** is thorough with explanations, quick in responses and has assisted numerous times with the retrieval of POC’s for aged cases and processes that were not assigned to their firm. This firm, specifically Shela Dickey and Denetra Oot, always goes above and beyond to provide exceptional communication to service our company, teams and clients. Their guidance and support, on a daily basis, is very much appreciated.”

- Chalonda Brinson, Bankruptcy specialist

“**Zucker, Goldberg & Ackerman** responds to intercoms and emails quickly and makes sure the job is done at the end of the day. I would like to especially recognize Tina Saggio, who is a big asset to both the attorney’s office and FIS. She is a conscientious worker who takes the time to make great comments in Process Management along with making sure the Core is complete everyday. She is also very friendly and cares about her work.”

- Donna Kalb, Foreclosure Attorney Management representative

“I would like to recognize Alex Maltez from **Bierman, Geesing & Ward, LLC**. He has been an incredible resource. When I contact this firm, Alex is always available and provides consistent, reliable information to aid the client.”

- Jason Starkey, Bankruptcy specialist

ATTORNEY PERFORMANCE REPORT

by Lindsey Lesch

Since its initial release in 2004, the Attorney Performance Report (APR) has proven beneficial to FIS Foreclosure Solutions network firms and clients alike, creating a valuable marketing tool for firms and reducing loss severity for clients. Changes to the APR model have been limited to only one or two releases each year to maintain the stability of the report. Enhancements since the original model include the introduction of data normalization, weighting adjustments, allowable delay adjustments, a client-specific data section, and the addition of the color-coding section and corresponding tenure and volume requirements. The Attorney Roundtable, established in 2005, has helped FIS' reporting department prioritize changes to the model.

In 2007, FIS proposed additional enhancements to the Attorney Roundtable members for review and feedback. The proposed enhancements included changes to the stages within the Motion for Relief (MFR) scorecard, separation of Chapter seven and Chapter 13 files within the MFR scorecard, and inclusion of inherited files on stages in which the first event of the stage occurs after the date of transfer. Based on the feedback received from network firms and through continued discussion with the roundtable members, additional changes were requested for the next APR enhancement release.

FIS Foreclosure Solutions is please to announce the next set of APR enhancements scheduled for release in Q1 2008:

MFR APR Scorecard stage and weighting adjustments:

In addition to weighting adjustments for current stages on the MFR scorecard, proposed changes include the addition of an "Agreed Order Submitted to Court" event in Process Management and an increase in the APR scoring period from 90 days to 120 days.

New stages and weighting for the MFR scorecard include:

MFR Referred to MFR Filed	35 percent
MFR Filed to Hearing/Objection Date	5 percent
Hearing/Obj. Date to Hearing/Obj. Results	5 percent
MFR Referred to Results	25 percent
AO Results to AO Submitted	10 percent
MFR Referred to Order Entered	5 percent
MFR Referred to Received	3 percent
Event Completion Percentage	4 percent
Approved Reprojection	4 percent
Reprojection Completion Percentage	4 percent

Initial Stage Measurement: The initial stage measurement on both the Foreclosure and MFR scorecards will be changed from "File Received" to "File Referred."

Illustration of Chapter seven and Chapter 13 distribution:

The distribution of Chapter seven and Chapter 13 files will be shown in the State Attorney Section of the APR.

Inherited Files Stage Update: Stages for which the completion of the first event of the stage occurs after the date of transfer will be included in the APR for inherited files.

To ensure firms understand the changes that will go into effect, updated APR guides and a network announcement outlining the changes will be released prior to the effective date of these changes. Notes from the roundtable meetings during which these changes were discussed are available on the Attorney Roundtable Notes Web site at: <http://fndsportal.com/attorneyroundtable/>

For questions related to these changes, please contact attyfeedback@fnfs.net.

ATTORNEY GUEST SEMINARS

FIS Foreclosure Solutions, Inc.

A Division of Fidelity National Default Solutions



GRAY & ASSOCIATES

(L to R): John Cody (FIS), Nate Miller (FIS), Steven Zablocki, Colleen Quirk, Liquenda Allotey (FIS), Jay Pitner



LERNER, SAMPSON & ROTHFUSS

BACK (L TO R): Drew Boyles, Stephanie Hafer, Bill Purtell, Lindsey Lesch (FIS)

FRONT (L TO R): Lakesha Adams (FIS), Polina Belinskaya (FIS)



REINER, REINER & BENDETT

(L TO R): Adam Bendett and Randy McHugh



PLUESE, BECKER & SALTZMAN

(L TO R): Lindsey Lesch (FIS), Lakesha Adams (FIS), Rob Saltzman, Polina Belinskaya (FIS), Sandy Becker



LAURITO & LAURITO

(L TO R): Erin Laurito, September Hall, Jinni Bougie (FIS)



DOONAN, GRAVES & LONGORIA

(L TO R): Janice Geier, Donna Small, John Doonan, Stefanie Landry, Reneau Longoria

NEW TO THE FIS PARTNERSHIP

FIS Foreclosure Solutions welcomes the following clients and firms to the FIS partnership from September, October, November and December.

CLIENTS

FIS Desktop	Avelo Mortgage
FIS Desktop	EMC Bankruptcy
FIS Desktop	Carrington Mortgage Services
FIS Desktop	Home Loan Services
FNFS	Marix Mortgage
FNFS	PHH Mortgage

FIRMS

AL	Albertelli Law
CA/NV	Aztec Foreclosure Corp
CA	Old Republic Default Management Services
CA	Solomon Grindle Silverman & Spinella
CT/DC/MD/VA	McCabe, Weisberg and Conway
DC/VA	Curran & O'Sullivan, PC
FL	Phillips, Flynn, Dareneau
GA	Moore & Associates
GA	Shuping, Morse & Ross
KY	Reynolds & Thompson, LLP
LA	Foreclosure Law Firm, LLC
MN	Elizabeth Mason, PC
NJ/PA	Stern & Eisenberg, LLP
NY	Ziccardi & Rella PC
OH	Luper, Neidenthal and Logan
OK	Lamun, Mock, Cunyngnam & Davis
SC	Riley Pope & Laney
WV	Law Office of D. Kevin Moffatt

EMPLOYEE ACTIVITIES

This Halloween, FIS Foreclosure Solutions in Jacksonville held a candy drive to benefit the Clara White Mission, a non-profit organization that provides housing, training, food and more to the needy in Jacksonville. We are proud to announce that the JAX office donated 3,202 pieces of candy to the CWM. Team members also competed in a cube decorating contest. Kevin Stoutenburg's bidding instructions team took first place (see photo below).

The Minnesota office participated in a pumpkin carving contest and a costume contest. The winning pumpkin was a "FIShark" created by the Bankruptcy Attorney Management team.



(ABOVE)
PUMPKIN CARVING
CONTEST:
"FIShark" by BK
Atty Management.



(RIGHT)
CUBE DECORATING
CONTEST: Kevin
Stoutenburg's team's
winning team cube.



(LEFT)
COSTUME CONTEST
L TO R: Chuck
Henrickson,
Rebecca Conrin,
Sarah French

PEAK PERFORMANCE AWARD WINNERS

The Peak Performance Award program was created to recognize superior employee performance at FIS Foreclosure Solutions. Employees are nominated for noteworthy performance, customer praise, suggestions or improvements, or completion of additional tasks. Peak Performance Award winners have taken it upon themselves to improve our company through their exceptional work ethic, creativity, and customer service.



BARBARA WINN

A network firm contacted Barbara's manager saying, "She has been unbelievably helpful to everyone she deals with here. I have employees every day tell me how truly great she is." Barbara is a BK attorney management associate in MN.



LEO STANFIELD

Leo, a financial support supervisor in Jacksonville, was recognized for resolving a client's timing issue. The client said, "Leo did a great job stepping up on this issue to get it working for us. I called him ... he took it and just made it happen."



MICHAEL REAP

Mike, a financial support specialist in Jacksonville, consistently goes beyond his job duties. His supervisor said, "Mike takes great pride in being able to fully resolve any disputes or complaints and assist all parties in making a well-informed decision."



KATHY GIDDINGS

A client recently contacted Kathy's manager to say, "I wanted to let you know how appreciative I am of Kathy's promptness and attention to a given matter. She is a reliable contact for me and I can always depend on her giving her best effort."



ANDY MORCOMB

Andy contributed to the Mail team's success in working a client's mail diligently to bring their number down to zero. Their focus and dedication was greatly appreciated by the client and FIS Foreclosure Solutions staff.



LAYLA WEIDE

Layla worked with her Mail team members to clear a client's mail queue. The client said, "Thank you all so much for all of your hard work on this mail bin. I am thrilled to see it at zero again."



BRIAN SWANNER

Brian's manager and a client praised him and Dameyan Barrett for their dedication to complete that client's POC edit project. Brian is a member of the BK POC/Plan Review team in Jacksonville.



RACHEL ONSINYO

A client recently expressed how impressed they are with Rachel's work on exception reports and her manager shared in their praise. Rachel is a client reconciliation specialist.



NANCY DUNCAN

Nancy's supervisor and manager shared in their praise for her. "When she finishes her work, she will go around the department to see who needs help and she dives right in." Nancy is a FC attorney management associate in Jacksonville.



LUCILLE BLESSING

A FIS Foreclosure Solutions manager contacted Lou, a FC attorney management associate, and was "wowed by her friendly nature." Lou's manager noted that she always has a great attitude and work ethic.



BRENT REICHOW

A client contacted Brent's manager and said, "I deal with complicated issues day in and day out and hit many brick walls. That was until I met Brent. He truly is a great team player." Brent is a title management associate in MN.



BETHANY HOOD

Bethany, a supervisor on the Mail team in MN, and two of her team members successfully got a client's mail bin down to zero. They cleared out the queue earlier than expected because of their dedication to the project.



DAMEYAN BARRETT

Dameyan, on the BK POC/Plan Review team in Jacksonville, took on a client's POC edit project. He and Brian Swanner successfully handled this extensive project while keeping up with their daily duties.

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NUMBER: 16-2006-CA-1863-XXXX-MA
Div. CV-D

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR LONG BEACH MORTGAGE
LOAN TRUST 2005-WL3, Plaintiff,
vs.

SHAWN E. JORDAN, et. al., Defendants.

MOTION TO DISMISS/ABATE ACTION

Comes now the defendant, by and through counsel, and for his motion to dismiss/abate action, states:

1. Plaintiff Deutsche Bank National Trust Company, AS TRUSTEE filed and prosecuted this and tens of thousands of other foreclosure actions in the State of Florida without complying with applicable Florida law governing the activities of trust companies conducting trust business in the state.

2. The Defendant believes and therefore alleges based on information provided by the Florida Department of Financial Regulation that Deutsche Bank National Trust Company has no security on deposit with the Chief Financial Officer and is not in compliance with Florida Statute § 660.27, titled: **Deposit of securities with Chief Financial Officer** which provides, in pertinent part:

(1) Before transacting any trust business in this state, every trust company and every state or national bank or state or federal association having trust powers shall give satisfactory security by the deposit or pledge of security of the kind or type provided in this section having at all times a market value in an amount equal to 25 percent of the issued and outstanding capital stock of such trust company, bank, or state or federal stock association or, in the case of a federal mutual association, an equivalent amount determined by the office, or the sum of \$ 25,000, whichever is greater. However, the value of the security deposited or pledged pursuant to the provisions of this section shall not be required to exceed \$ 500,000. Any notes, mortgages, bonds, or other securities, other than shares of stock, eligible for investment by a state bank, state association, or state trust company, or eligible for investment by fiduciaries, shall be accepted as satisfactory security for the purposes of this section.

3. The Defendant also believes and therefore alleges that Deutsche Bank National Trust Company has also filed to comply with Florida Statute § 660.27(2)(a), which requires the Bank to provide to Florida's Chief Financial Officer the full legal name of the trust, its federal employer identification number; principal place of business; amount of capital stock; and amount of collateral required to be deposited by the trust.

4. Deutsche Bank National Trust Company is, upon information and belief, a corporation with its principal place of business in Irvine, California. Deutsche Bank National Trust Company is a separate but wholly owned subsidiary of Deutsche Bank and upon information and belief purports to have assets in excess of \$1 trillion (US).

5. Although Deutsche Bank National Trust Company used to be registered to do business in the State of Florida as a mortgage company, that license lapsed in 2004.

6. The Defendant alleges that Deutsche Bank National Trust Company is subject to the Florida registration and reporting statutes:

(a) Florida Statute 658.12(20) defines "trust business" as "the business of acting as a fiduciary when such business is conducted by a bank, state or federal association, or a trust company, and also when conducted by any other business organization as its sole or principal business.

(b) Florida Statute 658.12(8) defines "fiduciary" as "a trustee; committee, guardian, custodian, conservator, or other personal representative of a person, property, or an estate; registrar or transfer agent of, or in connection with, evidences of indebtedness of every kind and of stocks and bonds and other securities; fiscal or financial agent; investment adviser; receiver; trustee in bankruptcy; assignee for creditors; or holder of any similar representative position or any other position of trust, including a person acting in any or all the capacities and performing any or all the functions enumerated in F.S. 660.34.

7. Florida Statute 660.34(1) grants Deutsche Bank National Trust Company and every trust company "the right and power to act, alone or jointly with any other person, in any and every fiduciary capacity for or in connection with any and all fiduciary accounts of or pertaining to any business organization or other person, and any government, governmental body or other governmental entity or officer or body politic, and to engage in and conduct a general trust business."

8. Florida Statute 660.34(2) grants Deutsche Bank National Trust Company and every trust company "all the rights, privileges, and immunities, and all the duties

and obligations, appertaining to any fiduciary capacity assigned to or assumed by it and to fiduciaries generally.”

9. Florida Statute 660.34(3) grants Deutsche Bank National Trust Company and every trust company “the right and the power to effectuate, exercise, carry out, and otherwise implement, in any lawful manner, any and all its lawful duties, obligations, rights, privileges, and immunities in connection with any fiduciary capacity assigned to or assumed by it and in connection with the conduct of its trust business...”

10. Deutsche Bank National Trust Company is transacting trust business in the State of Florida which includes, but is not limited to the following: the acquiring, holding and transferring mortgages on property in Florida; receiving assignments of promissory notes; receiving payments from Florida consumers on mortgage notes; enforcing notes by filing and prosecuting this and other foreclosure actions; foreclosing on mortgages; purchasing foreclosed properties at judicial sales; and owning and selling properties acquired at judicial sales..

Wherefore, the defendant requests the court dismiss this action with prejudice on account of Deutsche Bank National Trust Company’s failure to comply with the deposit obligation imposed by Florida Statute § 660.27(1) before filing this foreclosure action, for an award of attorney’s fees incurred herein and for all other relief to which defendant proves himself entitled.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this document has been mailed by U.S. Mail to Jeff Gano, Florida Default Law Group, P.O.Box 25018, Tampa, Florid 33622-5018, attorney for Plaintiff, this _____.

JACKSONVILLE AREA LEGAL AID, INC.,

April Carrie Charney, Esquire
Fla. Bar. No.: 310425
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Attorneys for Separate Defendant

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
NASSAU COUNTY, FLORIDA

CASE NO: 45-2008-CA-000172

TAYLOR, BEAN & WHITAKER
MORTGAGE COMPANY,
Plaintiff,

vs.

MEGAN L. WRIGHT, JOSEPH M.
WRIGHT, *et al.*
Defendant

VERIFIED MOTION TO SET ASIDE DEFAULT, FORECLOSURE
FINAL JUDGMENT AND CANCEL SALE DATE
AND FOR LEAVE TO FILE AN AMENDED RESPONSE

Comes now, Defendants, Megan L. Wright and Joseph M. Wright (“Defendants,” “the Wrights,” “Mr. Wright” and “Ms. Wright”), pursuant to Rules 1.190(a) and (e), 1.500(d), 1.540(b)(1) and (3), *Fla.R.Civ.P.* moves this Court to set aside the default entered herein again Joseph M. Wright, to set aside the foreclosure final judgment entered on August 28, 2008, to cancel the sale date established therein for September 30, 2008 and for leave to file an amended response and states:

1. As is more particularly set forth below there have been several instances of either mistake, misrepresentation or other misconduct which occurred in this case leading up to the entry of the August 28, 2008 final judgment, including but not limited to

Plaintiff’s failure to file the response submitted by the Wrights;

Plaintiff’s seeking a default against Mr. Wright without notice to him
despite receipt of a response from the Wrights;

Plaintiff's representation to the Court that a default should be entered against Mr. Wright without notifying the Court that a response was served upon Plaintiff;

Plaintiff's seeking a foreclosure summary judgment without notifying the Court it received a response from the Wrights which raised factual issues not addressed in the form summary judgment motion;

Plaintiff's seeking a foreclosure summary judgment without proper proof of ownership of the mortgage and mortgage note; and

Plaintiff's seeking a foreclosure summary judgment against property that was not properly security for the mortgage.

2. The Wrights have meritorious defenses and have a basis for questioning this Court's subject matter jurisdiction as is more particularly described below.

Motion to dismiss for lack of subject matter jurisdiction

3. Rule 1.140(h)(2), Fla.R.Civ.P. provides that the defense of lack of jurisdiction of the subject matter may be raised at any time. Maynard v. The Florida Board of Education, 2008 Fla. App. LEXIS 5890; 33 Fla. L. Weekly D 1110 (Fla. 2nd DCA 2008) (Standing may be raised even after a verdict is entered as long as it is preserved at the trial court).

4. The subject mortgage is payable to Taylor, Bean, Whitaker and dated January 25, 2006. Plaintiff, Taylor, Bean & Whitaker Mortgage Company ("TBW") also filed an Assignment of Mortgage dated March 24, 2008 executed by Eria Carter-Shaw, Vice President of Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Taylor, Bean and Whitaker Mortgage Corporation "residing or located at 1595 Spring Hill Road, Suite 310, Vienna, Virginia." Ms. Carter-Shaw's signature was notarized in Marion County, Florida on March 24, 2008. MERS has no offices in Marion County, Florida.

5. Further, the assignment from MERS to TBW was dated subsequent to the filing of

this lawsuit and does not contain an effective date.

6. In Florida, the prosecution of a residential mortgage foreclosure action must be by the owner and holder of the mortgage and the note. Plaintiff is not entitled to maintain an action if it does not own and hold the note which is purportedly secured by the subject mortgage. Your Construction Center, Inc. v. Gross, 316 So. 2d 596 (Fl. 4th DCA 1975) Greenwald v. Triple D Properties, Inc., 424 So. 2d 185, 187 (Fla. 4th DCA 1983). (However, the Second and Third District Courts of Appeal have ruled that merely being the holder of the note provides standing to seek enforcement in a foreclosure action if the holder is acting for the real party in interest.) Mortgage Electronic Registration Systems, Inc. v. Revoredo, 955 So. 2d 33 (Fl. 3d DCA 2007); Mortgage Electronic Registration Systems, In. v. Azize, 2007 Fla. App. LEXIS 2418 (Fla. 2d DCA Case no. 2D05-4544, opinion filed, February 21, 2007).

7. Rule 1.210(a) of the Florida Rules of Civil Procedure provides, in pertinent part:

Every action may be prosecuted in the name of the real party in interest, but a personal representative, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought...

8. Standing requires that the party prosecuting the action have a sufficient stake in the outcome and that the party bringing the claim be recognized in the law as being a real party in interest entitled to bring the claim. This entitlement to prosecute a claim in Florida courts rests exclusively in those persons granted by substantive law, the power to enforce the claim. Kumar Corp. v Nopal Lines, Ltd, et al, 462 So. 2d 1178, (Fla. 3d DCA1985). A plaintiff's lack of standing at the commencement of a case is a fault that cannot be cured by gaining standing after

the case has been filed. Progressive Express Ins. Co. v. McGrath Community Chiropractic, 913 So. 2d 1281, 1285 (Fla. 2d DCA 2005). See also, Maynard, *supra.*.

9. Parties may rely on the "relation back" rule when asserting standing. Progressive, *supra.* When applying the "relation back" rule the party who did not have standing at the time the action was filed may amend their statement of claim to show that they acquired standing that "related back to the original statement of claim." *Id.* at 1285-1286; Fla.R.Civ.P. 1.190(c). However, this rule does not allow a party to establish the right to maintain an action retroactively by acquiring standing after the fact. Progressive, 913 So. 2d at 1285; Livingston, 774 So. 2d 716 at 717. If the party was without standing when the suit was filed then a new lawsuit must be filed. Progressive, 913 So. 2d at 1285 (citing Jeff-Ray Corp. v. Jacobson, 566 So. 2d 885, 886 (Fla. 4th DCA 1990) (finding that "the assignee of a mortgage could not maintain the mortgage foreclosure action because the assignment was dated four months after the action was filed, if the plaintiff wished to proceed on the assignment, it must file a new complaint."))

10. As a result, although TBW claims to be the owner of the mortgage note and mortgage, the assignment which is the basis for this ownership claim has no "effective" date and the "vice-president" signing the assignment for MERS was located in a different part of the country than MERS. Lastly, the assignment has no effective date and was not signed until after the filing of the subject foreclosure.

Plaintiff Failed to File Wright's Answer with the Court

11. Plaintiff filed this case on or about March 18, 2008. The Wrights were served on or about March 24, 2008. On or about April 8, 2008, Ms. Wright served an answer upon counsel for Plaintiff. According to the return receipt the answer was received by Plaintiff on

April 11, 2008. In their response, the Wrights raised issues relating to TBW's switching them from a fixed rate mortgage into an adjustable rate mortgage with unfavorable terms at closing when it was too late to refuse to sign and TBW's failure to properly respond to the Wrights when they attempted to offer money to reinstate the loan and a general plan to cure any and all delinquencies.

12. Plaintiff, TBW received this answer and did not file it with the Court. Instead, Plaintiff's counsel requested and obtained a default against Defendant, Mr. Wright without providing he with notice of its intention to seek a default. Plaintiff then scheduled and attended a hearing on a motion for summary judgment without presenting the Wright's answer to the Court and without acknowledging the factual issues raised in their answer. The summary judgment was improper because of the factual issues raised in the Wrights' response which was not provided to the Court. See Delandro v. America's Mortgage Servicing, Inc., 674 So. 2d 184, 186 (Fla. 3d DCA 1996) (summary judgment set aside when borrower's pro se answer raised tender defense and illegal late charges rendering lender's conclusory motion for summary judgment which failed to address the borrower's defense insufficient to show there were no disputed issues of material fact with respect to the defenses put forward by the borrower). See Campbell v. Sands, 404 So. 2d 402, 403 (Fla. 5th DCA 1981) (not necessary for borrower to file an affidavit in opposition to motion for summary judgment).

Factual Issues Raised by Wrights' Answer

13. One of the factual issues raised by the Wrights in their answer was TBW's failure to comply with the federal regulations requiring it to provide pre-foreclosure loss mitigation or loss avoidance options to the Wright as required by federal regulations and their

subject FHA mortgage.

14. In August, 2006, the Wrights first missed payment because Mr. Wright became temporarily unemployed. They continued to make monthly payments, however, each payment was one month behind. TBW accepted each of these payments. In July, 2007, the Wrights were going to be two months behind so Ms. Wright called TBW and was told the only option they had was to make a payment, plus \$200.00 each month to catch up the delinquency. TBW did not look at or consider the Wrights financial circumstances or give them any other options. The Wrights made one payment and could no longer make the increased payment.

15. In January, 2008, Ms. Wright called to make a payment and was told she could not take advantage of the loss mitigation opportunities until she was three months behind, she was given the impression it was in her best interest not to make a payment.

16. When Ms. Wright called in February, 2008 to discuss their loss mitigation options, she was told to send in financial information and documentation needed for this process. She had previously mailed this information and documents to Plaintiff in October, 2007 but agreed to send them again. She had sent this financial information and documentation to Plaintiff four times between October, 2007 and February, 2008. She never heard anything from anyone in loss mitigation. The Wrights had saved up money and had a \$6,000 lump sum to pay toward reinstatement.

17. TBW never responded to the loss mitigation documentation and requests and then commenced the litigation process. She had been trying to speak with employees with TBW from October, 2007 until March, 2008. She could not get anyone to respond to numerous telephone calls and email transmissions.

18. Because the Wrights' loan is an FHA-insured loan, Plaintiff was required to comply with the payment forbearance, mortgage modification, and other foreclosure prevention loan servicing or collection requirements imposed on Plaintiff and the subject FHA mortgage by federal regulations promulgated by HUD, pursuant to the National Housing Act, 12 U.S.C. §1710(a). These requirements must be followed before a mortgagee may commence foreclosure. 24 C.F.R. Part 203(C), Servicing Responsibilities Mortgagee Action and Forbearance and Paragraph 9(a) of the subject mortgage. (Lender may, except as limited by regulations issued by the Secretary in the case of payment default....")

19. Plaintiff is required by HUD regulation to ensure that all of the servicing requirements of 24 C.F.R. Part 203(C) have been met before initiating foreclosure. 24 C.F.R. §203.606, published August 2, 1982, 47 FR 33252.

20. Plaintiff failed to carry out its federally-imposed duties which are owed to the Wrights prior to filing this instant foreclosure lawsuit, failed to file the Wrights' answer which raised factual issues relating to these failures and did not file the pages of the mortgage which refer Plaintiff's obligations relating to the FHA loan. According to the regulations and mortgage Plaintiff is required to adapt effective collection techniques designed to meet the Wrights' individual differences and take account of their peculiar circumstances to minimize the default in their mortgage payments as required by 24 C.F.R. §203.600.

21. Plaintiff failed to make any reasonable efforts as required by federal regulation to arrange a face to face meeting with the Wrights before three full monthly installments were unpaid to discuss his circumstances and possible foreclosure avoidance. 24 C.F.R. § 203.604, published June 16, 1986, 51 FR 21866.

22. Plaintiff failed to inform the Wrights that it would make loan status and payment information available to local credit bureaus and prospective creditors, failed to inform the Wrights of other assistance, and failed to inform them of the names and addresses of HUD officials to whom further communication could be addressed as required by federal law. 24 C.F.R. § 203.604.

23. Plaintiff is required under federal law to adapt its collection and loan servicing practices to the Wrights' individual circumstances and to re-evaluate these techniques each month after default and Plaintiff failed to do this also. 24 C.F.R. § 203.605, effective August 2, 1996.

24. Plaintiff failed to perform its servicing duty to the Wrights to manage the subject mortgage as required by FHA's special foreclosure prevention workout programs which must include and allow for the restructuring of the loan whereby the borrower pays out the delinquency in installments or advances to bring the mortgage current.

25. Plaintiff further denied the Wrights access to repayment plan or special forbearance in the form of a written agreement that would reduce or suspend their monthly mortgage payments for a specific period to allow them time to recover from the financial hardship they were suffering through no fault of their own. Such a plan can involve changing one or more terms of the subject mortgage in order to help the Wrights bring the claimed default current thereby preventing foreclosure.

26. Plaintiff's failure to comply with the FHA repayment plan or special forbearance workout programs denied the Wrights the required access to explore alternatives to avoid foreclosure prior to the addition of additional foreclosure fees and costs.

27. The Wrights requested that Plaintiff provide them with options to help them save their home. Plaintiff was non-responsive and only answered with threats to foreclose if reinstatement in full with all claimed fees and costs was not paid right away.

28. Plaintiff failed to comply with its mortgage servicing responsibilities and the terms of the subject mortgage and as a proximate result, the Wrights' delinquency has been improperly inflated by mortgage foreclosure filing, service and other fees and inspections in the minimum amount of \$832.00 and by foreclosure attorneys fees in the minimum amount of \$1,200.00, amounts the Wrights can not afford to pay. Therefore, the Wrights remain at the risk of losing their home.

29. The Wrights are indigent and did not know they had the option of contacting an attorney. They only learned of this option after hearing about a free mortgage foreclosure pro bono clinic held at the Nassau County Area Agency on Aging the day of the final judgment hearing. They have acted as quickly as possible once they learned of this option and are not filing this motion for purposes of delay.

WHEREFORE, the Wrights respectfully requests this court to set aside the default entered herein against Joseph M. Wright, set aside the foreclosure final judgment in this case, to cancel the foreclosure sale scheduled for September 30, 2008 and for leave to file an amended response and for such other and further relief and this Court deems equitable.

JACKSONVILLE AREA LEGAL AID, INC.
Counsel for the Wrights

By: _____
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We have read the foregoing motion and swear and affirm the factual statements in the foregoing motion are true and correct based upon our personal knowledge.

Executed at Jacksonville, Florida on this _____ day of September 5, 2008.

Megan Wright

Joseph Wright

STATE OF FLORIDA
COUNTY OF DUVAL

I hereby Certify that on this day, before me, an officer duly authorized to administer oaths and take acknowledgments, personally appeared Megan Wright and Joseph Wright, who produced Florida Drivers' Licenses as identification, and who are the persons described in and who executed the foregoing instrument and who acknowledged before me that they executed the same, and that an oath was taken.

Witness my hand official seal in the County and State last aforesaid this _____ day of September, A.D., 2008.

Notary Signature

Printed Notary Signature

Seal

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded by U.S. Mail and facsimile to Jessica Cabrera, Esquire, Law Offices of Marshall C. Watson, P.A., 1800 N.W. 49th Street, Suite 120, Fort Lauderdale, Florida 33309 and Wesley R. Poole, Esquire, Poole & Poole, P.O. Box 1280, Fernandina Beach, Florida 32035-1280 this 5th day of September, 2008.

Attorney

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
NASSAU COUNTY, FLORIDA

CASE NO: 45-2008-CA-000172

TAYLOR, BEAN & WHITAKER
MORTGAGE COMPANY,
Plaintiff,

vs.

MEGAN L. WRIGHT, JOSEPH M.
WRIGHT, *et al.*
Defendant

ORDER GRANTING DEFENDANTS' VERIFIED MOTION TO SET
ASIDE DEFAULT, FORECLOSURE FINAL JUDGMENT AND CANCEL
SALE DATE AND FOR LEAVE TO FILE AN AMENDED RESPONSE

This matter came before the Court on the Defendants' motion to set aside the default, motion to set aside the final judgment and cancel the foreclosure sale set forth therein and for leave to file an amended response and Plaintiff's *ore tenus* motion to continue the hearing on these motions. The Court having heard argument of counsel, reviewed the file and being otherwise advised in the premises finds as follows:

1. Plaintiff filed this case on or about March 18, 2008. The Wrights were served on or about March 24, 2008. On or about April 8, 2008, Ms. Wright served an answer upon counsel for Plaintiff. According to the United States Postal Service return receipt filed in this case, the answer was received by Plaintiff on April 11, 2008. In their *pro se* response, the Wrights raised factual issues relating to the origination of the subject mortgage and Plaintiff's failure to comply with the HUD pre-foreclosure servicing regulations also contained in Paragraph 9(a) of the Wrights' FHA mortgage. *See e.g.* The National Housing Act, 12 U.S.C. §1710(a), 24 C.F.R. Part

203(C), Servicing Responsibilities Mortgagee Action and Forbearance, 24 C.F.R. §203.606, 24 C.F.R. §203.600, 24 C.F.R. § 203.604, 24 C.F.R. § 203.605.

2. Plaintiff failed to file the Wrights' *pro se* response with the Court and filed a standard, form motion for summary judgment which did not address the issues raised by the Wrights' response. Subsequently, the Wrights' filed a proposed amended answer, affirmative defenses and counterclaims which also raised issues relating to Plaintiff's standing to bring this case as a result of assignment deficiencies.

3. There has been several instances of either mistake, misrepresentation or other misconduct which occurred in this case leading up to the entry of the August 28, 2008 final judgment, including but not limited to

Plaintiff's failure to file the response submitted by the Wrights;

Plaintiff's seeking a default against Mr. Wright without notice to him despite receipt of a response from the Wrights;

Plaintiff's representation to the Court that a default should be entered against Mr. Wright without notifying the Court that a response was served upon Plaintiff;

Plaintiff's seeking a foreclosure summary judgment without notifying the Court it received a response from the Wrights which raised factual issues not addressed in the form summary judgment motion;

Plaintiff's seeking a foreclosure summary judgment without proper proof of ownership of the mortgage and mortgage note; and

Plaintiff's seeking a foreclosure summary judgment against property that was not properly security for the mortgage.

4. The Wrights have meritorious claims and defenses which should be addressed by the Court in this case.

E. Defendants' motions were served on counsel of record on September 5, 2008.

Therefore, Plaintiff's counsel of record had sufficient time to prepare for this hearing. Despite this knowledge, counsel of record did not retain local counsel until the morning of the hearing and did not give local counsel an opportunity to prepare.

It is therefore, ORDERED:

A. Plaintiff's *ore tenus* motion to continue is denied as Plaintiff's counsel of record had reasonable notice of Defendants' motion, however, did not timely act to address the motion.

B. Defendants' motion to set aside the default is granted.

C. Defendants' motion to set aside the foreclosure final judgment dated August 28, 2008 is granted. Delandro v. America's Mortgage Servicing, Inc., 674 So. 2d 184, 186 (Fla. 3d DCA 1996) (summary judgment set aside when borrower's pro se answer raised tender defense and illegal late charges rendering lender's conclusory motion for summary judgment which failed to address the borrower's defense insufficient to show there were no disputed issues of material fact with respect to the defenses put forward by the borrower); Campbell v. Sands, 404 So. 2d 402, 403 (Fla. 5th DCA 1981) (not necessary for borrower to file an affidavit in opposition to motion for summary judgment).

D. Defendants' motion to cancel the foreclosure sale scheduled for September 30, 2008 is granted.

E. Defendants' motion for leave to file amended pleadings is granted and the amended answer, affirmative defenses and counterclaim served on counsel of record for Plaintiff on September 19, 2008 are deemed filed herein.

F. Plaintiff shall have twenty (20) days from the date of this order to file a response to the amended pleadings.

DONE AND ORDERED in Duval County, Florida, this _____ day of September, 2008.

BRIAN J. DAVIS
CIRCUIT COURT JUDGE

Copies furnished to:

Jessica Cabrera, Attorney for Plaintiff
Price Poole, Esquire
John C. Taylor, Jr., Attorney for Defendant
Daniel I. McCranie, Attorney for Defendant
Lynn Drysdale, Attorney for Defendant

H

City First Mortg. Corp. v. Barton

Fla.App. 4 Dist.,2008.

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida,Fourth District.
CITY FIRST MORTGAGE CORP., Appellant,
v.

Lewis BARTON and Native Country Broadcasting & Productions, Inc., Indian River County, Florida, Piling Products, Inc., William B. and Jane Boswell Robinson, Barker Electric Air Conditioning and Heating, Inc., Storch, Hansen & Morris, P.A. n/k/a Storch & Morris, P.A., The Terminal Marketing Company, Inc., Marshall Entertainment Insurance, Inc., and all other parties in possession, Appellees.
No. 4D06-4419.

July 16, 2008.

Rehearing Denied Aug. 29, 2008.

Background: Lender brought action against borrower to accelerate a loan that was in default and foreclose on the mortgage securing the loan, and borrower filed affirmative defenses and counterclaims, including unclean hands and violations of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). The Nineteenth Judicial Circuit Court, Indian River County, Robert A. Hawley, J., denied foreclosure from the date claimed by lender due to unclean hands, allowed foreclosure as of a different date, and awarded damages to borrower for violations of FDUTPA. Lender appealed, and borrower cross-appealed.

Holdings: The District Court of Appeal, May, J., held that:

(1) borrower failed to establish that he sustained

any actual damages from lender's alleged FDUTPA violations, and

(2) lender was entitled to interest on the loan from the date of its inception despite the delay in foreclosure.

Reversed and remanded.

[1] Equity 150 65(1)

150 Equity

150I Jurisdiction, Principles, and Maxims

150I(C) Principles and Maxims of Equity

150k65 He Who Comes Into Equity Must Come with Clean Hands

150k65(1) k. In General. **Most Cited Cases**

A lender can be estopped from foreclosing on an accelerated basis where the borrower establishes that the lender has unclean hands.

[2] Antitrust and Trade Regulation 29T 134

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk133 Nature and Elements

29Tk134 k. In General. **Most Cited Cases**

Antitrust and Trade Regulation 29T 138

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk133 Nature and Elements

29Tk138 k. Reliance; Causation; Injury, Loss, or Damage. **Most Cited Cases**

A consumer claim for damages under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. **West's F.S.A. § 501.204(1).**

[3] Antitrust and Trade Regulation 29T 369

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(E) Enforcement and Remedies

29TIII(E)6 Evidence

29Tk369 k. Weight and Sufficiency.

Most Cited Cases

Borrower who asserted a claim against lender under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) arising out of lender's misrepresentations as to the amount needed to bring loan current, and its failure to make certain disclosures, failed to establish that he sustained any actual damages, despite borrower's claim that he was unable to close on a loan commitment from another bank because of the failure to bring the loan current; borrower produced no testimony or documentation to corroborate his claim, and loss of a prospective loan would not have constituted actual damages, as opposed to consequential or special damages. [West's F.S.A. § 501.204\(1\)](#).

[4] Antitrust and Trade Regulation 29T 389(1)

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(E) Enforcement and Remedies

29TIII(E)7 Relief

29Tk387 Monetary Relief; Damages

29Tk389 Grounds and Subjects

29Tk389(1) k. In General. [Most](#)

Cited Cases

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) does not provide for the recovery of nominal damages, speculative losses, or compensation for subjective feelings of disappointment. [West's F.S.A. § 501.204\(1\)](#).

[5] Equity 150 65(1)

150 Equity

150I Jurisdiction, Principles, and Maxims

150I(C) Principles and Maxims of Equity

150k65 He Who Comes Into Equity Must Come with Clean Hands

150k65(1) k. In General. [Most Cited Cases](#)

Lender whose unclean hands delayed the date from which it could foreclose and accelerate loan that was in default was nevertheless entitled to interest on the loan from the date of its inception, though the default interest rate would only apply from the date lender was permitted to foreclose.

[Jane Kreusler-Walsh](#) of Kreusler-Walsh, Compiani & Vargas, P.A., West Palm Beach, and [Fred L. Kretschmer, Jr.](#), of Brennan & Kretschmer, Vero Beach, for appellant.

[H. Michael Muñiz](#) of Buckingham, Doolittle & Burroughs, LLP, Boca Raton, for appellee/cross-appellant.

MAY, J.

*1 A dispute between a lender and borrower over the insurance proceeds from a destroyed oceanfront property brings this appeal before the court. The lender argues the trial court erred in applying the unclean hands doctrine to postpone foreclosure of the mortgage after the borrower defaulted and also erred in its determination of damages. It also argues that the trial court erred in awarding damages to the borrower for a violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) ^{FN1} on the borrower's counter-claim. On cross-appeal, the borrower argues that the trial court erred in allowing the lender to foreclose because it had not paid consideration for the assignment of the mortgage. We reverse in part.

Long before the current dispute arose, the borrower defaulted on a promissory note with Wachovia, which held a mortgage on the property. Wachovia filed a foreclosure action in 2001, but the borrower and Wachovia entered into a settlement agreement. That agreement contained a stipulation for entry of a foreclosure judgment and sale of the property if the borrower failed to pay a stipulated sum by a date certain. The agreement also provided that

Wachovia's mortgage would be declared superior to two other mortgages held by one of the borrower's companies.

As the date certain approached, the borrower was unable to find a lender to pay off the mortgage. He placed an ad in a newspaper, which was answered by a mortgage broker. The broker negotiated a loan with the current lender, City First Mortgage Corp., but not in time for the borrower to pay off the Wachovia loan. The borrower then filed for bankruptcy to admittedly stall the foreclosure sale long enough to finalize the deal with the current lender, which he was able to do.

The borrower now had to deal with the new lender. The new loan had terms designed to offset the obvious risk. Aside from an origination fee of 5%, the \$900,000, thirty-year loan had an interest rate of 10.99%, and default rates at the maximum allowed by law. It was a "hard-equity" loan based only on the appraised value of the collateral property. Failure to make a payment within four days of the due date would result in a default, allowing the lender to declare the entire unpaid principal balance and all accrued interest due immediately.

The borrower missed the first payment on November 1, 2003, prompting the lender to send a certified demand letter to the address provided in the loan application. The letter advised the borrower that he had defaulted on his loan obligations, and all legal remedies would be pursued if he failed to pay the arrearage with interest and fees by November 25th. The borrower failed to respond. When the borrower missed the December 1, 2003, payment, the lender filed a foreclosure action and a *lis pendens*.

The borrower again enlisted the broker's services, this time to negotiate with the lender and find alternative financing to pay off the loan. The lender advised the broker that it was concerned about the debt and that the default interest rate was now 25%. After some discussion, the lender's representative agreed to an 18% default interest rate and the broker negotiated a reduction in attorney's fees for

the pending foreclosure. The broker asked the lender for a figure to bring the loan current.

***2** The lender advised the broker that \$48,816.50 was needed to reinstate the mortgage through February 29, 2004. The borrower provided a certified check in that amount, albeit late, which the lender accepted and cashed a few days later. Although the borrower had been promised a letter with the breakdown of the funds and reinstatement of the loan, the lender failed to provide the letter as promised. Two weeks later, the lender sent a stipulation to the borrower showing an additional \$15,414.97 owed to bring the loan current. The borrower refused to sign the stipulation, and the following week the lender advised the borrower that, because no agreement had been reached, the lender was proceeding with the foreclosure.

The borrower contacted the lender nearly two months later and was advised that his account was in arrearage for March and April in the amount of \$19,984.18, including late fees. The lender requested that funds be paid by April 15, 2004, to avoid further collection expenses. The borrower did not submit the requested funds until May 27, 2004.

The lender responded to the payment by advising the borrower that the monies would be applied to his indebtedness, but unless they reached a written agreement, the lender would continue to proceed with foreclosure. The borrower submitted another check for \$19,984.18 on June 27th, but no written agreement was ever reached and the foreclosure proceedings continued.

Subsequently, the mortgaged property suffered substantial damage as a result of the 2004 hurricanes.[FN2](#)

The borrower asserted several affirmative defenses to the foreclosure action and filed counter-claims, most of which the trial court found to be unsupported by the evidence. However, the trial court found that the doctrine of unclean hands prevented the lender from foreclosing on the property until July 1,

2004, due to the misrepresentations made by the lender on the amount necessary to bring the loan current, the acceptance of additional monies paid by the borrower, and the lender's failure to provide the borrower with a letter bringing the loan current and to discharge the *lis pendens*. The court also found these same facts supported a violation of FDUTPA.

While disallowing the foreclosure as of November 2003, the trial court did ultimately allow for the foreclosure because the borrower again defaulted on the note and mortgage by failing to make timely payments from July 1, 2004, through the final judgment. The trial court found the lender entitled to the full amount under the promissory note and mortgage, as well as attorney's fees. The court ordered payment of the \$900,000 principal, plus accrued interest since July 1, 2004, less past payments and escrows. On the FDUTPA counter-claim, the trial court awarded \$312,009.46 to the borrower as a setoff against the lender's award. That payment was the equivalent of the total amount of interest owed the lender from July 1, 2004, through the final judgment less payments and escrows.

*3 The lender makes three main arguments with several sub-parts. First, the trial court erred in finding the lender had unclean hands and was precluded from foreclosing on the property until July 2004. Second, the trial court erred in its calculation of damages due to the borrower's default. And third, the court erred in awarding damages for a violation of FDUTPA. We find error in the court's decision on the FDUTPA counterclaim and in its calculation of damages, but affirm in all other respects.

[1] By the terms of the note and mortgage, the lender had a right to declare the borrower in default four days after his first missed payment. *LRB Holding Corp. v. Bank of Am., N.A.*, 944 So.2d 1113, 1114 (Fla. 3rd DCA 2006) (citing *David v. Sun Fed. Sav. & Loan Ass'n*, 461 So.2d 93 (Fla.1984)). A lender can be estopped from foreclosing on an accelerated basis, however, where the borrower establishes that the lender has unclean hands. See

Knight Energy Servs., Inc. v. Amoco Oil Co., 660 So.2d 786, 789 (Fla. 4th DCA 1995).

Because the resolution of the unclean hands defense is predicated upon the trial court's factual findings, and those findings in this case are supported by competent, substantial evidence, we are compelled to affirm the trial court's refusal to foreclose and accelerate the loan until July 1, 2004. See, e.g., *Pelle v. Glantz*, 349 So.2d 732 (Fla. 3d DCA 1977). However, those findings do not support, nor is there competent, substantial evidence to support, the court's damages award for violation of FDUTPA.

[2] The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) provides for a civil cause of action for "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." § 501.204(1), Fla. Stat. (2005); *Smith v. 2001 S. Dixie Highway, Inc.*, 872 So.2d 992, 993 (Fla. 4th DCA 2004). "A consumer claim for damages under FDUTPA has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." *Rollins, Inc. v. Butland*, 951 So.2d 860, 869 (Fla. 2d DCA 2006), review denied, 962 So.2d 335 (Fla.2007).

[3][4] Here, the borrower neither alleged nor proved a recoverable loss under FDUTPA. See *Smith*, 872 So.2d at 994. The borrower alleged and the trial court found that the lender's "representations and nondisclosures" resulted in the borrower's inability to refinance the loan. However, a plaintiff may recover only "actual damages" incurred "as a consequence of a violation of the statute." *Id.* The lender suggests, and we agree, that the borrower failed to establish any damages caused by the lender's misrepresentations. While the borrower asserted that he obtained a loan commitment and was unable to close on it because of the failure to bring the loan current, he produced no testimony or executed documentation to corroborate his claim. "FDUTPA does not provide for the recovery of nominal damages, speculative losses, or compensation for subjective feelings of disappointment." *But-*

land, 951 So.2d at 873.

*4 Moreover, even if the record contained evidence supporting the borrower's speculation as to why the new bank terminated its loan offer, it would be insufficient to establish damages under FDUTPA, which provides for recovery only of "actual damages," which cannot include consequential or special damages. *Smith*, 872 So.2d at 994; § 501.211(1); see *Orkin Exterminating Co. v. Petsch*, 872 So.2d 259, 263 (Fla. 2d DCA 2004). For these reasons, we reverse that part of the final judgment that awarded \$312,009.46 to the borrower on his FDUTPA counter-claim.

[5] We also find error in the trial court's failure to award the lender interest from the inception of the loan. While the trial court determined that the lender was not able to foreclose the mortgage until July 1, 2004, the borrower still owed interest for the entire life of the loan. *Smiley v. Manufactured Hous. Assocs. III Ltd.*, 679 So.2d 1229, 1232 (Fla. 2d DCA 1996). The original interest rate should be applied from the inception of the loan through June 30, 2004, and the default rate from July 1, 2004 through the final judgment. We therefore reverse and remand the case to the trial court to recalculate the amount of interest owed to the lender.

Reversed and remanded for proceedings consistent with this opinion.

STEVENSON and GROSS, JJ., concur.

FN1. § 501.204(1), Fla. Stat. (2005).

FN2. Insurance proceeds are currently being held in escrow awaiting the outcome of this litigation.

Fla.App. 4 Dist., 2008.

City First Mortg. Corp. v. Barton

--- So.2d ----, 2008 WL 2744274 (Fla.App. 4 Dist.)

END OF DOCUMENT

[*1]

U.S. Bank Natl. Assn. v Louis

2008 NY Slip Op 52241(U) [21 Misc 3d 1126(A)] [21 Misc 3d 1126(A)]

Decided on November 6, 2008

Supreme Court, Kings County

Schack, J.

Published by New York State Law Reporting Bureau

<<http://www.courts.state.ny.us/reporter/>> pursuant to Judiciary Law
431.

This opinion is uncorrected and will not be published in the printed
Official Reports.

Decided on November 6, 2008

Supreme Court, Kings County

U.S. Bank National Association, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF
THE ADJUSTABLE RATE MORTGAGE TRUST 2007-1, ADJUSTABLE RATE MORTGAGE-
BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-1 c/o Select Portfolio
Servicing, Inc. 3815 Southwest Temple Salt Lake City, UT 84114,
Plaintiff,

against

Kenneth Louis, et. al., Defendants.

< /tbody>

21101/07

Plaintiff:

Michael J. Wrona, Esq.

Steven Baum PC

Buffalo NY

Defendant

Defendant did not answer or interpose any response in this foreclosure
action.

Arthur M. Schack, J.

Plaintiff U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, ON BEHALF OF THE
HOLDERS OF THE ADJUSTABLE RATE MORTGAGE TRUST 2007-1, ADJUSTABLE RATE
MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES [*2]2007-1 (U.S.

BANK) renewed application for an order of reference for the premises located at 604 Bainbridge Street, Brooklyn, New York (Block 1511, Lot 21, County of Kings) is denied without prejudice. Plaintiff is granted leave to renew its application for an order of reference upon providing the Court with a satisfactory explanation to questions related to: the employment history of John Shelley, who is Vice President of plaintiff's mortgage servicer in its first application for an order of reference and is plaintiff's Vice President in the instant application; possible fraud in the origination of the instant mortgage and note; and, why plaintiff purchased the instant nonperforming loan.

Background

Defendant KENNETH LOUIS (LOUIS) executed the instant mortgage and note on December 19, 2006, and borrowed \$540,000.00 from CREDIT SUISSE FINANCIAL CORPORATION (CREDIT SUISSE). The LOUIS Mortgage was recorded by Mortgage Electronic Registrations Systems, Inc. (MERS), as nominee for CREDIT SUISSE, on January 9, 2007, in the Office of the City Register of the City of New York, City Register File Number (CRFN) 2007000014875 [exhibit E of application]. MERS assigned the mortgage, on June 13, 2007, to plaintiff U.S. BANK, with the assignment recorded on July 5, 2007, in the Office of the City Register of the City of New York, CRFN 2007000344271 [exhibit F of application].

The LOUIS adjustable rate note [exhibit D of application] had an initial interest rate of 8.75% for the first five years, and then will be adjusted every six months, commencing with the January 1, 2012 payment. Defendant LOUIS was to pay interest only for the first ten years of the note. The interest-only payments for the first five years were to be \$3,937.50 per month. Then, commencing with the January 1, 2012 payment, and every six months thereafter, the interest rate could change on the "change date," based upon an "index" that is the average of interbank offered rates for the six-month U.S. dollar-denominated deposits in the London market (LIBOR) as published in the Wall Street Journal. The specific terms of the LOUIS Note provided that the new interest rate would be the LIBOR rate plus 5.00%, rounded to the nearest .125%. The interest-rate could increase on the first "change date" to a maximum of 14.75%. The Note capped the interest rate at 14.75% and set 5.00% as the floor.

In my December 17, 2007 decision and order, I rejected plaintiff's initial application for an order of reference and denied the application without prejudice, because the affidavit of merit did not comply with CPLR 3215 (f). The affidavit of merit was executed by John Shelly, "Vice President of SELECT PORTFOLIO SERVICING, INC. [SPS], Attorney in Fact for U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE ADJUSTABLE RATE MORTGAGE TRUST 2007-1, ADJUSTABLE RATE MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-1." An attached "Limited Power of Attorney," presented to the Court, from US BANK to SPS, its servicing agent, did not grant SPS the power to engage in foreclosure actions and did not refer to U.S. BANK as the Trustee for THE HOLDERS OF THE ADJUSTABLE RATE MORTGAGE TRUST 2007-1, ADJUSTABLE RATE MORTGAGE-BACKED PASS- THROUGH CERTIFICATES, SERIES 2007-1. I granted plaintiff leave to renew its application for an order of reference, upon presentation to the Court of plaintiff's "compliance with the statutory requirements of CPLR 3215 (f), with an affidavit of facts by someone with authority to execute such an affidavit."

Discussion

[*3]

Plaintiff, in the renewed instant application, presents an affidavit of merit from an officer of plaintiff U.S. BANK. This officer, who alleges in his January 10, 2008-affidavit [exhibit B of application] to be "Vice President of U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE ADJUSTABLE RATE MORTGAGE TRUST 2007-1, ADJUSTABLE RATE MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-1," is the same John Shelley, who in the rejected initial application for an order of reference, stated he was Vice President of SPS. The Court does not know for whom Mr. Shelley is currently employed. Did he switch employers or did plaintiff make him a Vice President solely to satisfy the Court? Therefore, the Court needs to know Mr. Shelley's employment history.

Defendant LOUIS, according to the moving papers, made only one payment on the Note. He defaulted on the March 1, 2007 payment. The Court is concerned that LOUIS' default could be a strong indicator of either his inability to pay or outright fraud. Therefore, to determine whether the instant mortgage loan was fraudulent, plaintiff's application for an order of reference is denied without prejudice for plaintiff to provide the Court with all the documentation used in granting the underlying loan. The Court will determine whether the borrower did not have sufficient income to make any payment, which could mean that the loan may have been in violation of federal statutes, or that the entire mortgage event was a fraud.

Further, the moving papers present SPS' April 17, 2007-demand letter to defendant LOUIS [exhibit G of application], for \$8,709.22 to cure his loan default. The letter states that "[t]his letter is a formal demand to pay the amount due. If this amount is not paid to Select Portfolio Servicing, Inc. (SPS) within 30 days of the date of this letter, the entire unpaid balance, together with accrued interest, fees and expenses, may be ACCELERATED and your loan may be referred to outside counsel to commence foreclosure actions." Yet, almost two months later, and more than three months subsequent to defendant LOUIS' initial payment default, on March 1, 2007, plaintiff U.S. BANK was willing to take an assignment of the instant nonperforming loan from MERS, as nominee for CREDIT SUISSE. The Court requires a satisfactory explanation by U.S. BANK of why it purchased a nonperforming loan from MERS, as nominee for CREDIT SUISSE. This explanation must be in an affidavit by an officer of U.S. BANK. The Court is not sure that the stockholders of U.S. BANK and the noteholders of the Trust are aware that U.S. BANK purchased the instant "toxic" nonperforming mortgage loan. It could well be that MERS, as nominee for CREDIT SUISSE, transferred the instant nonperforming loan, as well as others to U.S. BANK, as part of what former Federal Reserve Board Chairman Alan Greenspan referred to in his October 23, 2008 testimony, before the House Oversight Committee, as "a once in a century credit tsunami."

< br>

Conclusion

Accordingly, it is

ORDERED that the renewed application of plaintiff U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE ADJUSTABLE RATE MORTGAGE TRUST 2007-1, ADJUSTABLE RATE MORTGAGE-BACKED PASS-

THROUGH CERTIFICATES, SERIES 2007-1, for an order of reference for the premises located [*4]at 604 Bainbridge Street, Brooklyn, New York (Block 1511, Lot 21, County of Kings) is denied without prejudice; and it is further ORDERED, that leave is granted to plaintiff U.S. BANK NATIONAL

ASSOCIATION, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE ADJUSTABLE RATE MORTGAGE TRUST 2007-1, ADJUSTABLE RATE MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-1, to renew its application for an order of reference for the premises located at 604 Bainbridge Street, Brooklyn, New York (Block 1511, Lot 21, County of Kings), provided it presents to the Court, within 60 days from the date of this decision and order: an affidavit from John Shelley, describing his employment history for the past three years; all documentation used to grant the underlying loan to defendant KENNETH LOUIS; and, an affidavit from an officer of plaintiff U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE ADJUSTABLE RATE MORTGAGE TRUST 2007-1, ADJUSTABLE RATE MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-1, explaining why plaintiff purchased the instant nonperforming loan from MERS, as nominee for CREDIT SUISSE FINANCIAL CORPORATION. This constitutes the Decision and Order of the Court.
ENTER

HON. ARTHUR M. SCHACKJ. S. C.

[*1]
HSBC Bank USA, N.A. v Fleurimond
2008 NY Slip Op 52320(U) [21 Misc 3d 1132(A)]
Decided on November 18, 2008
Sup Ct, Kings County
Schneier, J.
Published by New York State Law Reporting Bureau
<<http://www.courts.state.ny.us/reporter/>> pursuant to Judiciary Law 431.
As corrected in part through January 9, 2009; it will not be published in the printed Official Reports. < /tr>

Decided on November 18, 2008

Sup Ct, Kings County

HSBC Bank USA, N.A. AS TRUSTEE FOR THE REGISTERED HOLDERS OF ACE SECURITIES CORP. HOME EQUITY LOAN TRUST SERIES, 2055-HE2, ASSET BACKED PASS-THROUGH CERTIFICATES, C/O OCWEN LOAN SERVICING, LLC 1675 PALM BEACH LAKES WEST BEACH FL 33401, Plaintiff,

against

Marie L. Fleurimond, LOUISE R. DEROSE, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, OCWEN LOAN SERVICING, LLP., ROCIO VIGUERA, SHAKERA BETHEA, et al., Defendants.

7453-1006

ATTORNEY FOR PLAINTIFF

HSBC BANK USA,N.A.ET AL

STEVEN J. BAUM, P.C.

P.O. BOX 1291

BUFFALO, NEW YORK 14240-1291 (761) 204-2400

ATTORNEYS FOR DEFENDANT

MARIE L. FLEURIMOND

ROBERTS & FIDLER, P.C.

26 COURT STREET, PENTHOUSE SUITE

BROOKLYN, NEW YORK 11242

(718) 596-3800 EXT.18

Martin Schneier, J.

In this foreclosure action defendant, Marie L. Fleurimond (Fleurimond) moves to set aside the foreclosure auction sale of the mortgaged premises, 960 Ralph Avenue, Brooklyn, NY (premises) on the grounds that there was no personal jurisdiction over her.

Background

Fleurimond purchased the premises and obtained a mortgage on December 20, 2004. Fleurimond defaulted on the mortgage and plaintiff commenced this foreclosure action on March 8, 2006. Plaintiff was granted a default Judgment of Foreclosure and Sale on August 15, 2007 and, a foreclosure sale was held on March 20, 2008, at which the premises were sold back to plaintiff.

Plaintiff submits three conflicting affidavits of service of the Summons and Complaint.

Process server John Medina in his affidavit of service sworn to on March 28, 2006 avers:

"That on 03/23/2006 at 0:2:45 P.M. at 960 Ralph Avenue Brooklyn, NY 11236 deponent served the within SUMMONS AND COMPLAINT bearing Index Number and Filing Date endorsed thereon on MARIE L. FLEURIMOND defendant therein named."

"By affixing 1 true copy thereof to the door of said premises, the same being the defendant's dwelling place²⁰ within the State of New York."
[*2] Process server, Gary Cardi in his affidavit of service sworn to on

March 10, 2006 avers:

"That on 04/07/2006 at 9:45 P.M. at 100 S. Central Ave., Valley Stream, NY 11580 deponent served the within SUMMONS AND COMPLAINT bearing Index Number and Filing Date endorsed thereon on MARIE L. FLEURIMOND defendant therein named."

"By affixing 1 true copy thereof to the door of said premises, the same being the defendant's dwelling place within the State of New York."
Mikita J. Thompson in her hearsay Supplemental Affidavit

sworn to on April 21, 2008 avers:

"To the best of deponent's information and knowledge deponent hereby states,"

..... "deponent confirmed that the defendant s did not reside at said address" (960 Ralph Avenue, Brooklyn NY 11236).

"Deponent's office ran an Accurint "Person" search for both defendants. Said search for Marie L. Fleurimond provided possible addresses of 3035 Brighton 6th Street, Apt. 3, Brooklyn, NY 11235 and 100 N. Central Avenue, Valley Stream NY 11580."

"After diligent attempts, on April 7, 2006 at 9:45 a.m. your deponent served Marie L. Fleurimond by nail and mail service in accordance with CPLR 308 (4) at 100 N. Central Avenue, Valley Stream, NY 11580, however said affidavit of attempt names the address as 100 S. Central Avenue, Valley Stream, NY, 11580." [*3] Fleurimond in her affidavits avers that, "I never lived at 9 60 Ralph Avenue. My name never appeared on the door or mailbox."

"....I have absolutely no association with either 100 N. Central Avenue or 100 S. Central Avenue, Valley Stream, New York. I have never ever visited these addresses."

"Until December, 2006, I lived for 18 years at 3035 Brighton 6th Street, Brooklyn, New York."

DISCUSSION

It is "axiomatic that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void" (McMullen v. Arnone, 79 AD2d 496, 499 [2d Dept. 1981]), irrespective of the question of merit.

Mikita A. Thompson's Supplemental Affidavit is without any evidentiary value whatsoever with respect to the alleged service of the Summons and Complaint at premises 100 N. Central Avenue, Valley Stream, NY 11580 as it is replete solely with hearsay. Thus, there is no affidavit of this service by the process server, Gary Cardi.

CPLR 308 provides in pertinent part:

Personal service upon a natural person shall be made by any of the following methods:"

"4...by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served...."

This method of service is often referred to as "nail and mail" [*4]

service" or "substituted service."

Fleurimond's assertion that she never resided at 960 Ralph Avenue, Brooklyn, NY or 100 S. Cental Avenue, Valley Stream NY or 100 N.

Central Avenue, Valley Stream, NY and has only resided at 3035 Brighton 6th Street, Brooklyn, NY remains as unrebutted proof that the place at which she was purportedly served pursuant to CPLR 308(4) was never her actual dwelling nor her usual place of abode (Bank Nat'l Assn. v. Osorio, 26 AD3d 452 [2d Dept 2006]) Where the defendant asserts that she was never personally served pursuant to CPLR 308(4) the plaintiff is required to proffer a process server's affidavit showing that the SUMMONS was affixed to the door of defendant's "actual dwelling place or usual place of abode" (Feinstein v. Bergner, 48 NY2d 234 [1979]) Here there is no competent process server's affidavit submitted to show that the summons was duly affixed to the door of 100 N. Central Avenue, Valley Stream, NY, 11580 which plaintiff claims to be Fleurimond's "actual dwelling place or usual place of abode". Thus, there is no prima facie evidence of proper service.

CONCLUSION

Based on the foregoing, Fleurimond's motion to set aside the foreclosure auction sale of premises 960 Ralph Avenue, Brooklyn, NY is granted and the Judgment of Foreclosure and Sale dated August 15, 2007, is vacated.

This constitutes the Decision and Order of the Court.

J.S.C.

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA
CIVIL ACTION

WASHINGTON MUTUAL BANK F/K/A
WASHINGTON MUTUAL BANK, FA,

Plaintiff,

CASE NO.: 58-2008-CA-015507-NC

VS.

DIVISION: C

BETTY B. KELLOGG , et al,
Defendant(s).

ORDER CANCELING FORECLOSURE SALE AND ENJOINING
PLAINTIFF FROM APPLYING FOR SALE DATE

THIS CAUSE came on for consideration pursuant to the defendant's duly noticed Motion to Cancel Sale and for Attorneys Fees and costs. The Court, having considered the Motion, and being otherwise fully advised in the premises, it is therefore,

ORDERED AND ADJUDGED as follows:

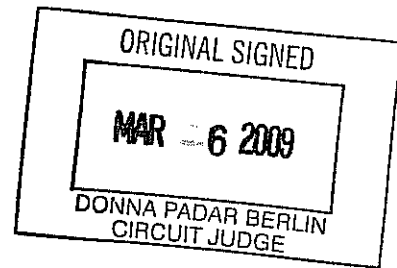
1. Defendant's Motion to Cancel Foreclosure Sale set for March 30, 2009, be and the same is hereby GRANTED.
2. The Clerk shall cancel the sale in this case set for March 30, 2009 and shall not reset the sale date unless upon further order.
3. Plaintiff made a motion for a new sale date in spite of the court order entered in this matter on February 6, 2009, which set aside final judgment of foreclosure upon finding excusable neglect by defendant occasioned by plaintiff's representations to defendant that she would be able to modify her loan and that this foreclosure case would be abandoned by the plaintiff.
4. Plaintiff is enjoined from applying for another sale date until plaintiff is able first to obtain a final judgment of foreclosure.
5. If plaintiff moves for another sale date in violation of this order, plaintiff will face sanctions of an award of defense counsel's attorneys fees and costs.

DONE AND ORDERED in Chambers in SARASOTA County, Florida,
this 6th day of March, 2009.

DONNA PADAR BERLIN
CIRCUIT COURT JUDGE

Copies to:
Elizabeth M. Boyle, Esquire
Gulfcoast Legal Services, Inc.

Lindsey Diehl, Esquire
Florida Default Law Group, PL
P.O. Box 25018
Tampa, Florida 33622-5018



SOUTH GATE VILLAGE GREEN CONDOMINIUM SECTION THREE ASSOCIATION,
INC.

c/o Michelle A. Stellaci, Esq.
2033 Main Street
Suite 403
Sarasota, FL 34237

CLERK OF THE COURT

IN THE CIRCUIT COURT OF THE 4TH
JUDICIAL CIRCUIT IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO: ____-200_-_____-XXXX-MA
DIVISION: ____-____

PLAINTIFF

VS.

DEFENDANT

MOTION TO ENLARGE TIME TO FILE RESPONSE

Defendant, _____, move(s) pursuant to Rule 1.090(b) of the Florida Rules of Civil Procedure for an extension of time to file a responsive pleading, on the grounds that (he/she/they) is unable to obtain an attorney within the time allotted.

WHEREFORE, Defendant, _____, are seeking legal assistance concerning this matter, but due to time limitations, Defendant has not been given the opportunity to adequately consult with an attorney, and for this reason requests the extension of time to respond.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this document has been sent by U.S. Mail to _____ Esq., Law Offices _____, of _____, FL _____, Attorney for Plaintiff on this _____ day of _____, 2008.

NAME (print) _____
Defendant

INSTRUCTIONS:

Please follow these instructions CAREFULLY, and complete each and every step as listed below:

- Step 1: Under Certificate of Service you must put:
1. The date you mailed it to the attorney on the lawsuit against you,
 2. Sign your name on the line above your printed name & DEFENDANT
- Step 2: Make 2 copies of this Motion (after you sign it). Keep 1 for YOUR records, and one to mail to the plaintiff's attorney. (see step 4)
- Step 3: Sign the **original** in BLUE INK, and take it to the Courthouse and file it with the Clerk (Circuit-Civil County/ROOM 103 in the Downtown Bay Street Courthouse). They close at 4:30 pm. You need to place into a wire basket labeled "FOR FILING ONLY". If unsure, ask a clerk.
- Step 4: Mail a copy to the attorney for the Plaintiff. (name & address in the certificate of service section). It does not need to go any through any special US Postal Service- regular first class mail is fine.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

Index No. 102944/07
Motion No.:001

**OPTION ONE MORTGAGE CORPORATION,
3 Ada
Irvine, CA 92618**

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**GUILLERMO M. MASSANET
a/k/a GUILLERMO MASSANET,
LUCIANO SANTOS, JR. a/k/a LUCIANO SANTOS,
MARIA MASSANET,
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC
as Nominee for
FIRST CONTINENTAL MORTGAGE & INVESTMENT
CORPORATION,
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,
NEW YORK CITY TRANSIT ADJUDICATION BUREAU, and
JOHN DOE, (Said names being fictitious it being the intention
of Plaintiff to designate any and all occupants of premises
being foreclosed herein, and any parties, corporations or
entities, if any, having or claiming an interest or lien upon the
mortgaged premises.),**

Defendants.

The following items were considered in the review of this motion to vacate a default judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendants, Guillermo Massanet, Maria Massanet and Lucciano Santos, move this court pursuant to CPLR § 5015(a)(1) for an order vacating the default judgment of foreclosure and sale taken against them by the plaintiff. The defendants' motion is granted in its entirety.

Facts

This matter concerns a previous *ex parte* judgment of foreclosure and sale for the property located at 317 Boundary Avenue, Staten Island, NY 10306 granted on July 21, 2008. The moving defendants are signatories to a mortgage with Old Merchants Mortgage Bank (“Old Merchants”) that closed on January 4, 2006. At some point after the execution of the mortgage by the moving defendants the mortgage was either reassigned to the plaintiff; or the plaintiff began servicing the mortgage.

According to the verified proposed answer the Massanets contacted Chris Rodriguez in response to an ad run by Old Merchants. The Massanets informed Mr. Rodriguez that they wanted to refinance their home, but could only afford a maximum mortgage payment of \$2,800. The Massanets submitted an application to Old Merchants and subsequently arranged for their home to be appraised. The appraiser valued the Massanets home at \$430,000. Subsequently, Old Merchants commissioned a second appraisal unbeknownst to the Massanets that valued their home at \$470,000. On the eve of closing it is alleged that Mr. Rodriguez contacted the Massanets to inform them that the loans monthly payment would be \$3,800 with an adjustable interest rate initially set at 10%. According to the verified proposed answer when the Massanets expressed concern about the monthly payment and high rate of interest, allegedly Mr. Rodriguez instructed them to use the cash proceeds of the loan to “bridge” the difference between the amount they could afford to pay, and the actual payments. The Massanets further allege that Mr. Rodriguez instructed them not to worry about the high rate of interest and monthly payment because they would be able to refinance their mortgage.

In or about September 2006 the Massanets contacted the plaintiff to inform them that there were having difficulty paying their monthly mortgage obligations. At that time the plaintiff informed the Massanets that they would not be able to refinance this high interest mortgage because of a pre-payment penalty.

In November 2006, Maria Massanet was awarded lump sum retroactive disability

benefits in the amount of \$11,747.37. The Massanets used this money to “bridge” their monthly payments until its depletion in March 2007.

In March 2007 the Massanets contacted the plaintiff in attempt to make partial payments toward their mortgage or refinance. These requests are corroborated by the plaintiff’s system notes. Both requests were rejected. However, by July 2007 the Massanets and the plaintiff began the process to modify their existing mortgage. Over the next several months the Massanets and the plaintiff exchanged phone calls and documentation. The plaintiff’s notes confirm that multiple telephone calls occurred between the parties during this time period. The notes further show that modification documents were sent on June 12, 2007 and that the Massanets should receive it within five to seven business days.

The plaintiff’s notes indicate that prior to a decision on the requested loan modification “loss mit” began between the dates of July 11, 2007 and July 23, 2007. The entries for the dates July 20, and 23 state “FC Approved” and “Active Foreclosure” respectively. On August 1, 2007 the plaintiff filed a request for judicial intervention (“RJI”) and on August 30, 2007 filed a summons and complaint. However, one day prior to filing the RJI the plaintiff transmitted an additional loan modification package to the Massanets. A close inspection of the plaintiff’s notes reveal that the plaintiff never notified the Massanets with respect to a decision on their loan modification request-- either before or after the commencement of foreclosure proceedings.

Subsequent to receiving the summons and complaint in October 2007, Mr. Massanet attempted to speak with Steven M. Baum, Esq. regarding the complaint. Mr. Baum’s office refused to speak with Mr. Massanet. This fact is not refuted by the plaintiff.

In or about November 2007 the Massanets aver in their affidavits that the plaintiff contacted them to ask if they wanted to apply for a loan modification. The plaintiff does not refute this statement. On December 3, 2007 the plaintiff moved for an order of reference and the court signed the same on December 18, 2008. The plaintiff’s notes indicate that it sent a loan modification package to the Massanets on January 8, 2008. On precisely the same date, the

plaintiff's counsel submitted an *ex parte* judgement of foreclosure. However, the submission was rejected. Once again, according to the plaintiff's notes, the plaintiff sent an additional loan modification package on January 30th.

The Massanets then attended an event for homeowners facing foreclosure sponsored by State Senator Diane Savino on February 24, 2008. The Massanets attendance is confirmed by the State Senator's office, yet the plaintiff's notes make no reference to the event. At that event the Massanets met with the plaintiff's representatives Claudia Ornales and Mike Riola. At that event the Massanets were informed that they would be able to modify their loan and received assurances that the a hold was placed on the foreclosure action. The plaintiff offers no evidence to contradict these statements.

Subsequent to receiving this event the Massanets received no confirmation from the plaintiff that it completed the loan modification. The Massanets attempted to contact Ms. Ornales to no avail. Finally, in June of 2008 the Massanets aver that they spoke to a representative named "Brad." The plaintiff's notes indicate that it transferred the Massanets file to Mr. Brad Bigda on May 7, 2008. According to the Massanets, Brad indicated that Ms. Ornales did not complete all the tasks assigned to her and were being reassigned to other employees. Additional attempts to contact Ms. Ornales directly yielded an answer from a full voicemail inbox. Once again the plaintiff does not offer any evidence to refute the statements in the Massanets sworn affidavits.

Nearly concurrently with receiving assurances by the plaintiff that their loan modification was being processed, the plaintiff's attorney submitted a proposed order of foreclosure and sale on June 17, 2008, which was signed on July 21, 2008. While the plaintiff never informed the Massanets that their loan modification was rejected it did notify the Massanets by letter that their home was going to be sold at auction on September 10, 2008. These facts are not refuted by the plaintiff.

Discussion

Recently this court rendered a decision whereby it vacated a judgement of foreclosure and sale obtained by a plaintiff *ex parte* during loan modification negotiations with *pro se* defendants.¹ The case involved a similar fact pattern and concerned the same attorney for the plaintiff.

The CPLR permits a court to vacate a default judgment where the moving party demonstrates both a reasonable excuse for the default and a meritorious defense.² The determination of what constitutes a reasonable excuse is “. . . left to the sound discretion of the court. . .”³

Reasonable Excuse

As was the case in *Miele* this court must again determine whether the defendants failure to answer the complaint served by the plaintiffs counsel during the course of good faith loan modification negotiations constitutes a reasonable excuse under CPLR § 5015(a)(1). The record once again supports an affirmative finding.

The Appellate Division, Second Department has long recognized that a default judgment may be overturned where the interest of justice requires such action.⁴ In addition, the Appellate Division, Second Department reasoned that there is a “. . . strong public policy that actions be resolved on their merits . . .” rather than on default especially where there is evidence that the

¹*Deutsche Bank Natl. Trust Co. v. Miele*, 20 Misc.3d 1146(A), [Sup Ct, Richmond County 2008].

² CPLR § 5015(a)(1).

³ *Savino v. “ABC Corp.”*, 44 AD3d 1026, [2d Dep’t, 2007].

⁴ *See, Gunther v. American Label Co., Inc.*, 243 AD 528, [2d Dep’t 1934].

default by the defendant was not wilful, nor where there is prejudice to the plaintiff.⁵

As was the case in *Miele*, the plaintiff relies on the Appellate Division, Second Department case in detail in an attempt to persuade the court that ongoing negotiations do not constitute a reasonable excuse to vacate a default judgement of foreclosure and sale. The plaintiff's rely on the Appellate Division, Second Department's holding *American Shoring, Inc. v. D.C.A. Construction, Ltd.*⁶ This case is once again distinguished from the matter currently under consideration. In finding that the defendant's excuse was unreasonable the Appellate Division, Second Department found:

... any reliance by the defendant on the parties' settlement negotiations between October 2003 and January 2004 did not constitute a reasonable excuse for the default, ***since the defendant was aware during those negotiations that the plaintiff had already obtained a default judgment.*** (Emphasis added)⁷

In this case it is not contested that the moving defendants time to answer the plaintiff's complaint expired. Instead, the issue is whether their excuse is reasonable. In *American Shoring* the defendant's attorney, and by extension the defendant, was aware that the plaintiff had already taken a default judgment against them while negotiations progressed between the parties. Here, the moving defendants were *pro se* at the time they received the plaintiff's summons and complaint. Concurrently, with their receipt of legal process they were engaged in ongoing negotiations directly with the plaintiff. These negotiations are confirmed by the plaintiff's own internal notes system.

In support of their motion the defendants cite two Appellate Division, Second

⁵ *New York Univ. Hosp. Rusk Inst. v. Illinois Natl. Ins. Co.*, 31 AD3d 511, [2d Dep't 2006].

⁶ *American Shoring, Inc. v. D.C.A. Constr., Ltd.*, 15 AD3d 431, [2d Dep't 2005].

⁷ *Id.*

Department cases where it vacated default judgments taken during the course of good faith negotiations.⁸ Counsel for the plaintiff seeks to persuade the court that these holdings do not apply to this situation, as the negotiations in these two case occurred between attorneys for the litigants. This argument is not compelling. Whether negotiations are between parties to a litigation represented by counsel or not has no bearing on whether the defendants are offering a reasonable excuse. The fact that negotiations were actively being conducted is the dispositive fact in the court's inquiry into reasonableness. This court will not differentiate between negotiations between counsel and litigants.

When Mr. Massanet attempted to contact Mr. Baum regarding the complaint he was rebuffed and ignored. It is striking that the plaintiff's counsel does not address this allegation in her opposition. This court is aware of no disciplinary rule or other ethical standard in New York that prevented Mr. Baum, or a member of his staff familiar with Mr. Massanet's file from speaking to him. The fact that Mr. Massanet does not have legal training, nor his inability to retain private counsel to act on his behalf should prevent him from speaking with his adversary to effect a prospective settlement. This court finds that a defendant acting *pro se* must be treated with the same respect as an attorney when attempting to contact opposing counsel upon receipt of a summons and complaint.

Strikingly, while the plaintiff's attorney points to the statutory notice accompanying foreclosure actions to demonstrate that the Massanets had knowledge of the consequences if they failed to answer the summons and complaint; the plaintiff, in its own capacity, contacted the Massanets to try to modify their existing mortgage. Furthermore, prior to the plaintiff's counsel taking the *ex parte* judgment of foreclosure and sale against the moving defendants, the

⁸ See, *Swain v. Janzen*, 121 AD2d 378, [2d Dep't 1986] (A defendant's default was reasonable where counsel for both parties were in constant communication and plaintiff never mentioned that it would move for a default.); See also, *Scarlett v. McCarthy*, 2 AD3d 623 [2d Dep't 2003] (A defendant's default was found to be reasonable where counsel for the parties were engaged in negotiations and the plaintiff's counsel never mentioned that he would move for a default).

plaintiff's own employee, Ms. Ornales, represented to the Massanets that they no longer needed to worry about losing their home.

The blatantly contradictory actions taken by both the plaintiff and its counsel justify a finding that moving defendants failure to serve an answer is reasonable under the statute.

Meritorious Defense

The second prong that must be demonstrated by a moving party seeking to vacate a default judgment is the demonstration of a meritorious defense. In addition, to their own affidavits and attorney's affirmation the moving defendants annex a proposed verified answer verified by Mrs. Massanet.

The moving defendants allege various defenses, counterclaims, and third party claims in their proposed answer. These claims include violations of the federal Truth in Lending Act,⁹ the Home Ownership and Equity Protection Act,¹⁰ New York's Deceptive Practices Act,¹¹ the Credit Repair Organizations Act (CROA),¹² fraud, and unjust enrichment. In response, the plaintiff's counsel argues that the defendants will not be able to successfully meet evidentiary standards to prove their defenses, counterclaims and third party claims at trial.

Where a party moves to vacate a default judgment the moving party need not prove its proposed meritorious defenses by trial evidentiary standards. The movant is only required to set forth facts that sufficiently establish that its claims and defenses are meritorious.¹³ This court

⁹ 15 USC § 1601.

¹⁰ 15 USC § 1602(a)(1)(B)16.

¹¹ GBL § 349.

¹² 15 USC § 1679.

¹³ See, *Anamdi v. Anugo*, 229 AD2d 408 [2d Dep't 1996].

finds only that based on the record before it, that the defenses, counterclaims and third party claims contained in the defendants proposed answer are meritorious and worthy of being interposed.

Conclusion

The moving defendants established a reasonable excuse for their default, as well as a meritorious defense in accordance with CPLR § 5015(a)(1). As such the default judgment of foreclosure and sale previously issued by this court is vacated and the moving defendants have leave to serve their proposed verified answer.

Accordingly, it is hereby:

ORDERED, that the motion brought by defendants, Guillermo Massanet, Maria Massanet and Lucciano Santos is granted in its entirety; it is further

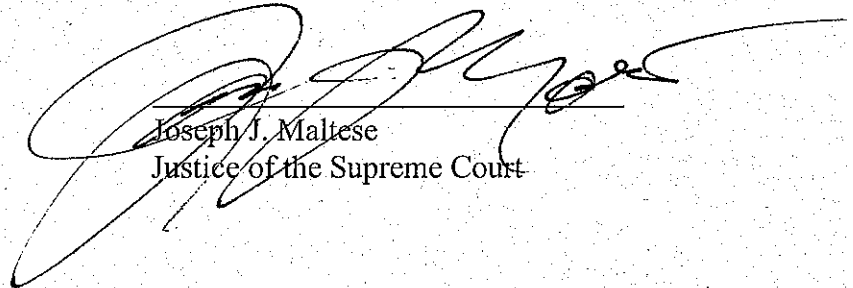
ORDERED, that the judgment of foreclosure and sale dated July 21, 2008 is hereby vacated; it is further

ORDERED, that the defendants shall serve their proposed verified answer by March 20, 2009; and it is further

ORDERED, that all parties to this action return to DCM Part 3 on Wednesday, May 19, 2009 at 9:30 A.M. for a Preliminary Conference.

ENTER,

DATED: February 5, 2009



Joseph J. Maltese
Justice of the Supreme Court

IN THE CIRCUIT COURT,
TWELFTH JUDICIAL CIRCUIT,
IN AND FOR SARASOTA
COUNTY, FLORIDA

CASE NO: 2008-CA-0015507-NC

WASHINGTON MUTUAL
BANK et al,

Plaintiff,

vs.

BETTY B. KELLOGG

Defendant

VERIFIED MOTION TO SET ASIDE DEFAULT, FORECLOSURE
FINAL JUDGMENT AND CANCEL SALE DATE
AND FOR LEAVE TO FILE A RESPONSE

Comes now, Defendant, Betty B. Kellogg ("Defendant," "Ms. Kellogg,"), pursuant to Rules 1.190(a) and (e), 1.500(d), 1.540(b)(1) and (3), *Fla.R.Civ.P.*, and moves this Court to set aside the default entered herein again Betty B. Kellogg, to set aside the foreclosure final judgment entered on January 9, 2009, to cancel the sale date established therein for February 11, 2009 and for leave to file a response and states:

1. As is more particularly set forth below there have been several instances of either mistake, misrepresentation, and/or excusable neglect which occurred in this case leading up to the entry of the January 9, 2009 final judgment, including but not limited to

- Plaintiff's failure to file Ms. Kellogg's written statement which she was advised to write to the lender, a hardship letter, which is essentially a response to the foreclosure lawsuit, attached hereto as Exhibit F,
- Plaintiff's failure to communicate to the Court that Ms. Kellogg was working diligently with the lender's representatives and mortgage counselors in telephoning the counseling agencies she was urged to call,

including HOPE NOW on average 5 or 6 times a week since she fell behind in payments in the summer of 2008,

- Plaintiff's agents representatives using loss mitigation conversations with Ms. Kellogg as a subterfuge of pretending to work out the loan luring her into a false sense of security to believe they would not proceed with foreclosure, as late as January 14, 2009, Plaintiff's agent, a foreclosure counselor Money Management told Ms. Kellogg that she did "not have to worry" about the February 11, 2009 sale date because they could work something out, 1-888-845-5669 ext 5669,
- Plaintiff's failure to make clear to Ms. Kellogg that Ms. Kellogg's communication with plaintiff and plaintiff's agents would not substitute for filing a document in the lawsuit to protect from the entry of default judgment;
- Plaintiff's seeking a default against Ms. Kellogg without notice to her despite receipt of a great deal of communication from Ms. Kellogg,
- Ms. Kellogg's extremely impaired health and lack of timely access to free legal aid which proved an obstacle to dealing with the formalities of the lawsuit effectively and asserting her legal rights to protect her homestead from the predatory lending practices in this case.

2. Ms. Kellogg has meritorious defenses as the underlying loan dated October 10, 2007, was predatory and fraudulently underwritten, e.g., the lender's agent inflated Ms. Kellogg's monthly income from employment by a factor of 9, Ms. Kellogg, a 71 year old widow, has worked at Geier's Sausage Kitchen, a Sarasota German gourmet deli, for almost 16 years as a sales woman and makes about \$380.00 a month in income, whereas the lender stated on a loan application prepared by the lender that Ms. Kellogg was an assistant supervisor making \$2300 a month in income from Geier's. When Ms. Kellogg told the lender's agent that she could not afford to pay the proposed loan, the lender's agent told her "not to worry about it" that she could refinance a few months after closing. This was a document prepared by the plaintiff's agency and it was fraudulent subjecting the mortgage to being void and unenforceable. A copy of the Loan Application from October 2007 is attached hereto as Exhibit A.

A. Plaintiff Failed to Communicate to the Court the Fact that Ms. Kellogg had been communicating with its agent diligently and on numerous occasions both before and after this lawsuit was filed.

3. Plaintiff filed this case on or about September 25, 2008. Ms. Kellogg was served September 27, 2008. Ms. Kellogg received several letters imploring her to call to engage in loss mitigation efforts with the plaintiff and plaintiff's agent, including the much advertised HOPE NOW program. These letters are dated August of 2008, before the lawsuit was filed, and October, 2008, after the lawsuit was filed. There is also a letter dated January 14, 2009 from what is believed to be HOPE NOW counselor with the results of a budget counseling (moneymanagement.org). These letters are attached hereto as Exhibits B, C, D, and E.

4. In good faith Ms. Kellogg has done what she and millions of other Americans have been told to do: call the counselors. She has spent hours and hours on the phone. She estimates that she has averaged 5 to 6 phone calls a week to these counselors trying to avoid this foreclosure. Unfortunately, none of these non-lawyer counselors have brought to Ms. Kellogg's attention that the underlying loan may violate the law and be unenforceable. None of this counseling has proved effective to reach the real problem: a predatory fraudulent loan system victimizing a frail widow by subjecting her to the loss of her homestead.

5. Ms. Kellogg was advised to write a hardship letter which she did: it is attached hereto as Exhibit F. This letter is submitted as evidence of the hardship Ms. Kellogg is under with respect to her health in support of the Court finding excusable neglect on her part.

B. For the Cancellation of the Sale Date: This is a Freddie Mac Fannie Mae Loan and there is a Moratorium in Place on Foreclosure Sales and Evictions.

6. Freddie Mac has extended its moratorium on foreclosure sales until January 31, 2009. This loan is a Freddie Mac Loan. It is anticipated that Freddie Mac will extend the moratorium a third time. In light of this, Ms. Kellogg requests the February 11, 2009 sale date be cancelled. A copy of the Freddie Mac January 8, 2009 press release regarding the moratorium is attached hereto as Exhibit G.

7. The summary judgment would be improper because Ms. Kellogg has provided prima facie evidence of the lender's fraud on the loan application raising factual issues which would ultimately void the right of the plaintiff to foreclose the mortgage against Ms. Kellogg's homestead. See Delandro v. America's Mortgage Servicing, Inc., 674 So. 2d 184, 186 (Fla. 3d DCA 1996) (summary judgment set aside when borrower's pro se answer raised tender defense and illegal late charges rendering lender's conclusory motion for summary judgment which failed to address the borrower's defense insufficient to show there were no disputed issues of material fact with respect to the defenses put forward by the borrower). See Campbell v. Sands, 404 So. 2d 402, 403 (Fla. 5th DCA 1981) (not necessary for borrower to file an affidavit in opposition to motion for summary judgment).

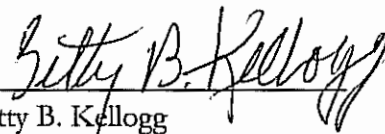
8. Ms. Kellogg lives on a very low income. Ms. Kellogg's formal education stopped at the completion of the 8th grade in Middleburg, Virginia. Ms. Kellogg has no expertise in loans and finance and Truth in Lending law. Ms. Kellogg did not even know to call GULFCOAST LEGAL SERVICES, INC., or LEGAL AID OF MANASOTA until she read of this option in this Court's new Uniform Order of Foreclosure in the

January 9, 2009 Final Judgment entered in this case which she received in the mail after its entry. She then called for free legal assistance. She and the legal aid attorney have acted as quickly as possible once she called GULFCOAST LEGAL SERVICES, INC., and filed this motion within days of her first call to the legal services office.

WHEREFORE, the Ms. Kellogg respectfully requests this court to set aside the default entered herein against her and set aside the foreclosure final judgment in this case, to cancel the foreclosure sale scheduled for February 11, 2009 and for leave to file a amended response and for such other and further relief and this Court deems equitable.

I have read the foregoing motion and swear and affirm the factual statements in the foregoing motion are true and correct based upon my personal knowledge.

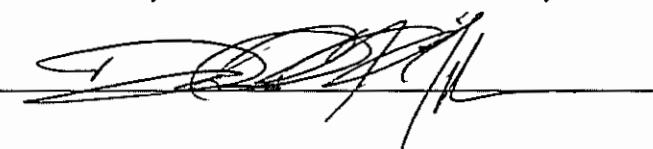
Executed at Sarasota, Florida on this _____ 28th day of January, 2009.


Betty B. Kellogg

STATE OF FLORIDA
COUNTY OF SARASOTA

I hereby Certify that on this day, before me, an officer duly authorized to administer oaths and take acknowledgments, personally appeared BETTY B. KELLOGG, who produced Florida Drivers' License as identification, and who are the persons described in and who executed the foregoing instrument and who acknowledged before me that they executed the same, and that an oath was taken.

Witness my hand official seal in the County and State this 28th day of January, 2009.


NOTARY PUBLIC-STATE OF FLORIDA
David M. Miller
Commission #DD692611
Expires: AUG. 25, 2011
BONDED THRU ATLANTIC BONDING CO., INC.

Page 5 of 6

I HEREBY CERTIFY, that a true copy of this document has been furnished by first class mail to counsel for plaintiff, Lindsey Diehl, Esquire, FLORIDA DEFAULT LAW GROUP PL, P.O. Box 25018, TAMPA, Florida 33622-5018 this 28th day of January, 2009.

GULFCOAST LEGAL SERVICES, INC.
1750 17TH Street, Unit I
Sarasota, Florida 34234
(941) 366-1746

/s/ Elizabeth M. Boyle

Elizabeth M. Boyle, FBN: 362610
Attorney for MS. BETTY B. KELLOGG

Uniform Residential Loan Application

This application is designed to be completed by the applicant(s) with the Lender's assistance. Applicants should complete this form as "Borrower" or "Co-Borrower", as applicable. Co-Borrower information must also be provided (and the appropriate box checked) when ☐ the income or assets of a person other than the "Borrower" (including the Borrower's spouse) will be used as a basis for loan qualification or ☐ the income or assets of the Borrower's spouse or other person who has community property rights pursuant to state law will not be used as a basis for loan qualification, but his or her liabilities must be considered because the spouse or other person has community property rights pursuant to applicable law and Borrower resides in a community property state, the security property is located in a community property state, or the Borrower is relying on other property located in a community property state as a basis for repayment of the loan.

If this is an application for joint credit, Borrower and Co-Borrower each agree that we intend to apply for joint credit (sign below):

Borrower		Co-Borrower	
TYPE OF MORTGAGE AND TERMS OF LOAN			
Mortgage Applied for:	☐ VA ☐ FHA	☒ Conventional ☐ USDA/Rural Housing Service	Other (explain):
Agency Case Number		Lender Case Number	
		0057.	
Amount \$	180,000	Interest Rate	7.875 %
No. of Months	360	Amortization Type:	☒ Fixed Rate ☐ GPM ☐ Other (explain): ☐ ARM (type):
PROPERTY INFORMATION AND PURPOSE OF LOAN			
Subject Property Address (street, city, state, & ZIP)			No. of Units
3259 GIFFORD LN. UNIT 309, SARASOTA, FL 34239 County: SARASOTA			1
Legal Description of Subject Property (attach description if necessary)			Year Built
SEE TITLE DESCRIPTION			1967
Purpose of Loan		Property will be:	
☐ Purchase ☒ Refinance ☐ Construction ☐ Construction-Permanent ☐ Other (explain):		☒ Primary Residence ☐ Secondary Residence ☐ Investment	
Complete this line if construction or construction-permanent loan.			
Year Lot Acquired	Original Cost	Amount Existing Liens	(a) Present Value of Lot
	\$	\$	\$
		(b) Cost of Improvements	Total (a+b)
		\$	\$
Complete this line if this is a refinance loan.			
Year Acquired	Original Cost	Amount Existing Liens	Purpose of Refinance
2000	\$	143,000	Cash-Out/Other
Describe Improvements		☒ made ☐ to be made	
FLOORS, KITCHEN, BATHS		Cost: \$ 75,000	
Title will be held in what Name(s)		Manner in which Title will be held	Estate will be held in:
BETTY B. KELLOGG		Single woman	☒ Fee Simple ☐ Leasehold (show expiration date)
Source of Down Payment, Settlement Charges and/or Subordinate Financing (explain)			
Equity from Subject Property			
Borrower III. BORROWER INFORMATION			
Borrower's Name (include Jr. or Sr. if applicable)		Co-Borrower's Name (include Jr. or Sr. if applicable)	
BETTY B. KELLOGG			
Social Security Number	Home Phone (incl. area code)	DOB (mm/dd/yyyy)	Yrs. School
			14
☐ Married ☐ Separated	☒ Unmarried (include single, divorced, widowed)	Dependents (not listed by Co-Borrower)	
		no. ages	
Present Address (street, city, state, ZIP)		☒ Own ☐ Rent	6.9 No. Yrs.
3259 GIFFORD LN. UNIT 309			
SARASOTA, FL 34239			
Mailing Address, if different from Present Address		Mailing Address, if different from Present Address	
3162 JACKSON AVE			
COCONUT GROVE, FL 33133			
If residing at present address for less than two years, complete the following:			
Former Address (street, city, state, ZIP)		☐ Own ☐ Rent	No. Yrs.
Former Address (street, city, state, ZIP)		☐ Own ☐ Rent	No. Yrs.

Borrower		IV. EMPLOYMENT INFORMATION		Co-Borrower	
Name & Address of Employer GEIER'S SUASAGE KITCHEN 7447 S. TAMiami TRAIL SARASOTA, FL 34231		☐ Self Employed	Yrs. on this job 15 yr(s) 8 mth(s) Yrs. employed in this line of work/profession 20	Name & Address of Employer 	
Position/Title/Type of Business ASSISTANT SUPERVISOR		Business Phone (incl. area code) 941-923-3004		Position/Title/Type of Business 	
Business Phone (incl. area code) 					
If employed in current position for less than two years or if currently employed in more than one position, complete the following:					
Name & Address of Employer 		☐ Self Employed	Dates (from-to) 	Name & Address of Employer 	
Position/Title/Type of Business 		Business Phone (incl. area code) 		Position/Title/Type of Business 	
Business Phone (incl. area code) 		Monthly Income \$ 		Business Phone (incl. area code) 	
Monthly Income \$ 		Business Phone (incl. area code) 		Monthly Income \$ 	
Name & Address of Employer 		☐ Self Employed	Dates (from-to) 	Name & Address of Employer 	
Position/Title/Type of Business 		Business Phone (incl. area code) 		Position/Title/Type of Business 	
Business Phone (incl. area code) 		Monthly Income \$ 		Business Phone (incl. area code) 	
Monthly Income \$ 		Business Phone (incl. area code) 		Monthly Income \$ 	
Name & Address of Employer 		☐ Self Employed	Dates (from-to) 	Name & Address of Employer 	
Position/Title/Type of Business 		Business Phone (incl. area code) 		Position/Title/Type of Business 	
Business Phone (incl. area code) 		Monthly Income \$ 		Business Phone (incl. area code) 	
Monthly Income \$ 		Business Phone (incl. area code) 		Monthly Income \$ 	
Name & Address of Employer 		☐ Self Employed	Dates (from-to) 	Name & Address of Employer 	
Position/Title/Type of Business 		Business Phone (incl. area code) 		Position/Title/Type of Business 	
Business Phone (incl. area code) 		Monthly Income \$ 		Business Phone (incl. area code) 	
Monthly Income \$ 		Business Phone (incl. area code) 		Monthly Income \$ 	

V. MONTHLY INCOME AND COMBINED HOUSING EXPENSE INFORMATION						
Gross Monthly Income	Borrower	Co-Borrower	Total	Combined Monthly Housing Expense	Present	Proposed
Base Empl Income*	\$ 2,300.00		\$ 2,300.00	Rent	\$	
Overtime				First Mortgage (P&I)	664.31	\$ 1,305.12
Bonuses				Other Financing (P&I)	141.00	
Commissions				Hazard Insurance		
Dividends/Interest				Real Estate Taxes	107.69	107.69
Net Rental Income				Mortgage Insurance		115.00
Other (before computing, see the notice in "describe other income," below)				Homeowner Assn. Dues	242.00	242.00
Total	\$ 3,621.25	\$	\$ 3,621.25	Total	\$ 1,155.00	\$ 1,759.81

* Self Employed Borrower(s) may be required to provide additional documentation such as tax returns and financial statements.

Describe Other Income Notice: Alimony, child support, or separate maintenance income need not be revealed if the Borrower (B) or Co-Borrower (C) does not choose to have it considered for repaying this loan.

B/C	Monthly Amount
B SOCIAL SECURITY/ DISABILITY INCOME (1,057 * 125%)	\$ 1,321.25

VII. DETAILS OF TRANSACTION		VIII. DECLARATIONS				
a. Purchase price	5	If you answer "Yes" to any questions a through i, please use continuation sheet for explanation. a. Are there any outstanding judgments against you? b. Have you been declared bankrupt within the past 7 years? c. Have you had property foreclosed upon or given title or deed in lieu thereof in the last 7 years? d. Are you a party to a lawsuit? e. Have you directly or indirectly been obligated on any loan which resulted in foreclosure, transfer of title in lieu of foreclosure, or judgment? (This would include such loans as home mortgage loans, SBA loans, home improvement loans, educational loans, manufactured (mobile) home loans, any mortgage, financial obligation, bond, or loan guarantee. If "Yes," provide details, including date, name and address of Lender, FHA or VA case number, if any, and reasons for the action.) f. Are you presently delinquent or in default on any Federal debt or any other loan, mortgage, financial obligation, bond, or loan guarantee? If "Yes," give details as described in the preceding question. g. Are you obligated to pay alimony, child support, or separate maintenance? h. Is any part of the down payment borrowed? i. Are you a co-maker or endorser on a note? ----- j. Are you a U. S. citizen? k. Are you a permanent resident alien? l. Do you intend to occupy the property as your primary residence? If "Yes," complete question m below. m. Have you had an ownership interest in a property in the last three years? (1) What type of property did you own-principal residence (PR), second home (SH), or investment property (IP)? (2) How did you hold title to the home-solo by yourself (S), jointly with your spouse (SP), or jointly with another person (O)?	Borrower		Co-Borrower	
b. Alterations, improvements, repairs			Yes	No	Yes	No
c. Land (if acquired separately)			☐	☒	☐	☐
d. Refinance (incl. debts to be paid off)	161,235.00		☒	☐	☐	☐
e. Estimated prepaid items	1,882.91		☐	☒	☐	☐
f. Estimated closing costs	8,764.50		☐	☒	☐	☐
g. PMI, MIP, Funding Fee			☐	☒	☐	☐
h. Discount (if Borrower will pay)			☐	☒	☐	☐
i. Total costs (add items a through h)	171,882.41		☐	☒	☐	☐
j. Subordinate financing			☐	☒	☐	☐
k. Borrower's closing costs paid by Seller		☐	☒	☐	☐	
l. Other Credits (explain)		☐	☒	☐	☐	
m. Loan amount (exclude PMI, MIP, Funding Fee financed)	180,000.00	☒	☐	☐	☐	
n. PMI, MIP, Funding Fee financed		☐	☒	☐	☐	
o. Loan amount (add m & n)	180,000.00	☐	☒	☐	☐	
p. Cash from/to Borrower (subtract j, k, l & o from l)	-8,117.59	☐	☒	☐	☐	

IX. ACKNOWLEDGEMENT AND AGREEMENT

Each of the undersigned specifically represents to Lender and to Lender's actual or potential agents, brokers, processors, attorneys, insurers, servicers, successors and assigns and agrees and acknowledges that: (1) the information provided in this application is true and correct as of the date set forth opposite my signature and that any intentional or negligent misrepresentation of this information contained in this application may result in civil liability, including monetary damages, to any person who may suffer any loss due to reliance upon any misrepresentation that I have made on this application, and/or in criminal penalties including, but not limited to, fine or imprisonment or both under the provisions of Title 18, United States Code, Sec. 1001, et seq.; (2) the loan requested pursuant to this application (the "Loan") will be secured by a mortgage or deed of trust on the property described in this application; (3) the property will not be used for any illegal or prohibited purpose or use; (4) all statements made in this application are made for the purpose of obtaining a residential mortgage loan; (5) the property will be occupied as indicated in this application; (6) the Lender, its servicers, successors or assigns may retain the original and/or an electronic record of this application, whether or not the loan is approved; (7) the Lender and its agents, brokers, insurers, servicers, successors and assigns may continuously rely on the information contained in the application, and I am obligated to amend and/or supplement the information provided in this application if any of the material facts that I have represented herein should change prior to closing of the Loan; (8) in the event that my payments on the Loan become delinquent, the Lender, its servicers, successors or assigns may, in addition to any other rights and remedies that it may have relating to such delinquency, report my name and account information to one or more consumer reporting agencies; (9) ownership of the Loan and/or administration of the Loan account may be transferred with such notice as may be required by law; (10) neither Lender nor its agents, brokers, insurers, servicers, successors or assigns has made any representation or warranty, express or implied, to me regarding the property or the condition or value of the property; and (11) my transmission of this application as an "electronic record" containing my "electronic signature," as those terms are defined in applicable federal and/or state laws (excluding audio and video recordings), or my facsimile transmission of this application containing a facsimile of my signature, shall be as effective, enforceable and valid as if a paper version of this application were delivered containing my original written signature.

Acknowledgment. Each of the undersigned hereby acknowledges that any owner of the Loan, its servicers, successors and assigns, may verify or reverify any information contained in this application or obtain any information or data relating to the Loan, for any legitimate purpose through any source, including a source named in this application or a consumer reporting agency.

Borrower's Signature X	Date	Co-Borrower's Signature X	Date

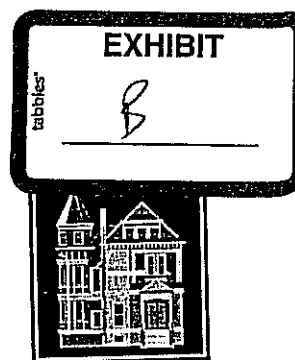
X. INFORMATION FOR GOVERNMENT MONITORING PURPOSES

The following information is requested by the Federal Government for certain types of loans related to a dwelling in order to monitor the lender's compliance with equal credit opportunity, fair housing and home mortgage disclosure laws. You are not required to furnish this information, but are encouraged to do so. The law provides that a Lender may not discriminate either on the basis of this information, or on whether you choose to furnish it. If you furnish the information, please provide both ethnicity and race. For race, you may check more than one designation. If you do not furnish ethnicity, race, or sex, under Federal regulations, this lender is required to note the information on the basis of visual observation and surname if you have made this application in person. If you do not wish to furnish the information, please check the box below. (Lender must review the above material to assure that the disclosures satisfy all requirements to which the lender is subject under applicable state law for the particular type of loan applied for.)

BORROWER ☐ I do not wish to furnish this information		CO-BORROWER ☐ I do not wish to furnish this information	
Ethnicity: ☐ Hispanic or Latino ☒ Not Hispanic or Latino	Ethnicity: ☐ Hispanic or Latino ☐ Not Hispanic or Latino		
Race: ☐ American Indian or Alaska Native ☐ Asian ☐ Black or African American ☒ White ☐ Native Hawaiian or Other Pacific Islander	Race: ☐ American Indian or Alaska Native ☐ Asian ☐ Black or African American ☐ Native Hawaiian or Other Pacific Islander ☐ White		
Sex: ☒ Female ☐ Male	Sex: ☐ Female ☐ Male		
To be Completed by Interviewer: This application was taken by: ☒ Face-to-face interview ☐ Mail ☐ Telephone ☐ Internet		Name and Address of Interviewer's Employer REGIONS MORTGAGE & FINANCIAL SVCS CORP 3162 JACKSON AVENUE COCONUT GROVE, FL 33133 (P) 305-448-0900 (F) 305-448-0938	
Interviewer's Name (print or type) Abdallah Haboud Interviewer's Signature _____ Date _____ Interviewer's Phone Number (incl. area code) 305-448-0900			

Housing Education Program

A division of Consumer Credit Counseling Service of San Francisco
595 Market Street, 15th Floor, San Francisco, CA 94105
(877) 511-2272 x191 www.housingeducation.org



Betty Kellogg
3259 Gifford Lane Unit 309
Sarasota
FL 34239

1802253
8/19/08

Dear Homeowner,

Freddie Mac, the company that owns your mortgage, asked us, the **Housing Education Program** of Consumer Credit Counseling Service of San Francisco, a non-profit counseling organization to offer you free financial counseling.

You accepted our offer and took the first step to help protect what may probably be your biggest asset, your house. Thank you for utilizing our free housing counseling service.

Please take time to review the enclosed information. Also, please re-visit a few definitions listed below, as it will help you effectively use your personalized Cash Flow Analysis and Action Plan.

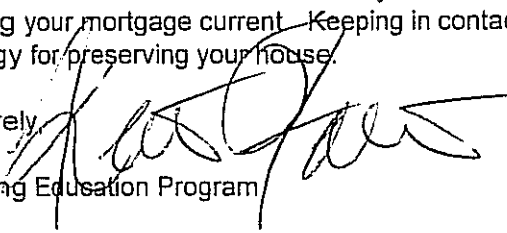
Cash Flow Analysis - To review essential monthly expenses and compare them to monthly take-home pay. In some instances, expenses can exceed income.

Income - Monthly revenue earned from employment, received for social security or child support, etc.

Action Plan - Guidelines for direction to prioritize the repayment of monthly financial obligations.

Finally, you may have the misconception that the lender wants to take your home back through foreclosure. This is not true. The vast majority of lenders are only interested in seeing that payments are made each month as agreed in the mortgage terms. As a general rule, lenders only begin the foreclosure process when all else fails. This is why we commend you for being proactive with exploring your options to bring your mortgage current. Keeping in contact with your lender during difficult times is the best strategy for preserving your house.

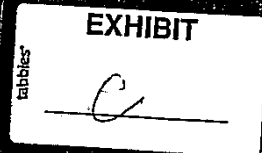
Sincerely,


Housing Education Program



595 Market Street, 15th Floor, San Francisco, CA 94105

(415) 788-0288 • (415) 777-4052 FAX • www.housingeducation.org



August 14, 2008

BETTY KELLOGG
3259 GIFFORD LN UNIT 309
SARASOTA, FL 34239

RE: Freddie Mac Loan # 478912838
Servicer Name: Washington Mutual Bank
Servicer Loan #: 3014670883
Property Address: 3259 GIFFORD LN UNIT 309
SARASOTA, FL 34239

Dear BETTY KELLOGG:

We are a nonprofit HUD-approved housing counseling agency, and we have been asked by Freddie Mac to make available to you free financial and housing counseling. Freddie Mac is the owner of your mortgage and was recently notified by your mortgage lender, Washington Mutual Bank, that your loan has become delinquent. Freddie Mac has retained us to work with you to see whether our financial counseling can help resolve the delinquency.

The Housing Education Program is not a collection agency. As a nonprofit housing counseling agency, we share your interest in seeing you keep your home and maintain your credit reputation. A mortgage delinquency is a serious matter. The Housing Education Program can assist you in working with your lender to make suitable arrangements to resolve your delinquent payments.

Please call us today at 1-877-511-2272 or visit our website at <http://www.housingeducation.net/> to learn what options are available. These options may include:

1. **Forbearance:** You may be permitted to pay less than the full amount due or no payments for a period of time. At the end of the forbearance, the loan would need to be:
 - a. Reinstated
 - b. Paid off in full
 - c. Another workout option may be approved.
2. **Repayment Plan:** You may be permitted to repay the total amount you are behind over the course of several months. Example: Delinquent amount of \$2,000.00 paid over 6 months = \$333.33, plus your regular payment of \$600.00. Total payment for 6 months would be \$933.33. Once current your payment would revert back to the \$600.00.
3. **Loan Modification:** If you can make the payments on your loan, but do not have enough money to pay the past due payments or you cannot afford the total amount of your current payment, your lender may be able to change one or more terms of your original loan to make the payment more affordable. For example: Delinquency \$2,000.00 would be added to the principal balance and the loan re-amortized over the remaining term of the mortgage.
4. **Sale:** If you can no longer afford your home, a specific amount of time may be allowed for you to find a purchaser and pay off the total amount owed. If the property's sales value is not enough to pay the loan in full, your lender may be able to accept less than the full amount owed.

It's important that you respond quickly because Washington Mutual Bank, will not stop the collection and foreclosure process. Contacting The Housing Education Program will not automatically stop this process, but our trained counselors are ready now to help you explore your options.

You may have the misconception that the lender wants to take your home back through foreclosure. This is not true. Lenders for Freddie Mac are only interested in seeing that payments are made each month as agreed in the mortgage terms. As a general rule, lenders only begin the foreclosure process when all efforts to resolve the delinquency fail.

If you have brought your loan current or are already working with Washington Mutual Bank, and don't require our assistance, please disregard this letter.

Sincerely,

Rick Harper

The Housing Education Program



P.O. Box 100511
Florence, SC 29502-0511

October 10, 2008

+ 0207551 000049747 09WCRL

Betty B Kellogg
3259 Gifford Ln # 309
Sarasota FL 34239-5733

|||||



Re: Washington Mutual Bank Loan No: 3

Dear Betty B Kellogg:

Welcome to JPMorgan Chase Bank. As you may know, on September 25, 2008, Washington Mutual Bank, the servicer of your loan, was closed by the Office of Thrift Supervision and the Federal Deposit Insurance Corporation was named Receiver. Upon the closure, JPMorgan Chase Bank, National Association ("JPMorgan Chase") acquired certain assets of Washington Mutual Bank from the FDIC, including the right to service your loan.

As a result, this letter is to notify you that the servicing of your mortgage loan, that is, the right to collect payments from you, was assigned, sold or transferred from Washington Mutual Bank to JPMorgan Chase, effective September 25, 2008. Although JPMorgan Chase is the servicer of your loan, your loan will be serviced by JPMorgan Chase under the name "Washington Mutual" for now. For convenience, the new servicer is referred to in this letter as "Washington Mutual." **This transfer does not require any changes on your part at this time. For now, all contact numbers and mailing addresses for Washington Mutual as the new servicer are unchanged. We will advise you of any future changes to the name of the servicer, telephone numbers, addresses or other contact information.**

This assignment, sale or transfer of the servicing of the mortgage loan does not affect any term or condition of the mortgage documents, other than terms directly related to the servicing of your loan.

Under the circumstances described above, the law requires JPMorgan Chase to send you a notice of transfer of the servicing within 30 days after September 25, 2008. In this case, all necessary information regarding the prior servicer and the new servicer is combined in this one notice.

Your former servicer was Washington Mutual Bank and due to the nature of this transfer of servicing rights your new servicer is JP Morgan Chase Bank, National Association, under the name Washington Mutual. If you have any questions relating to the transfer of servicing from your former servicer or for your current servicer, please call Washington Mutual's Enterprise Customer Care Department at the following toll free telephone number:

**Washington Mutual
Enterprise Customer Care Department
1-866-926-8937
Monday through Friday, 8:00 a.m. to 11:00 p.m., Eastern Time**

You should also be aware of the following information, which is set out in more detail in Section 6 of the Real Estate Settlement Procedures Act (RESPA) (12 U.S.C. 2605):

During the 60-day period following the effective date of the transfer of the loan servicing, a loan payment received by your old servicer before its due-date may not be treated by the new loan servicer as late, and a late fee may not be imposed on you.

Section 6 of RESPA (12 U.S.C. 2605) gives you certain consumer rights. If you send a “qualified written request” to your loan servicer concerning the servicing of your loan, your servicer must provide you with written acknowledgment within 20 Business Days of receipt of your request. A “qualified written request” is a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, which includes your name and account number, and your reasons for the request.

Not later than 60 Business Days after receiving your request, your servicer must make any appropriate corrections to your account, and must provide you with a written clarification regarding any dispute. During this 60-Business Day period, your servicer may not provide information to a consumer reporting agency concerning any overdue payment related to such period or qualified written request. However, this does not prevent the servicer from initiating foreclosure if proper grounds exist under the mortgage documents.

A Business Day is a day on which the offices of the business entity are open to the public for carrying on substantially all of its business functions.

Section 6 of RESPA also provides for damages and costs for individuals or classes of individuals in circumstances where servicers are shown to have violated the requirements of that Section. You should seek legal advice if you believe your rights have been violated.

For your convenience, we provided some answers to questions you may have about this transfer. If you have any additional questions, please contact the Enterprise Customer Care Department toll free at 1-866-926-8937.

We appreciate the opportunity to serve you.

Sincerely,

Enterprise Customer Care Department

9009 W Loop S, Suite 700
Houston, TX 77096-1719



Money Management
INTERNATIONAL

1/14/2009

EXHIBIT

tabbies

KE

BETTY KELLOGG
3259 Gifford Ln
Sarasota, FL 34239

Re: Client # 14663259-1

Dear Mrs. Betty Kellogg:

Thank you for contacting us about your financial concerns. During your counseling session, we reviewed your current income, living expenses, assets and liabilities to help analyze your financial situation.

Based on that information, we created a customized budget and action plan. Enclosed is a copy for your review. It contains the recommendations and options discussed during the counseling session.

Thank you for choosing Money Management International, Inc. with your financial concerns. If your circumstances change or you have additional needs, please contact us at 1-888-845-5669. Counselors are available 24 hours a day, 7 days a week to assist you.

Sincerely,

Money Management International, Inc.
Phone: 1-888-845-5669 (toll-free)
Fax: 888-845-0501 (toll-free)
www.moneymanagement.org



A Non-Profit Community Service Organization
Member of the National Foundation for Credit Counseling

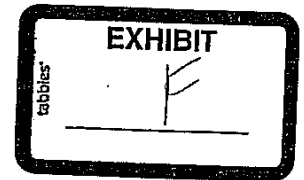


PRIVACY PRACTICES

The following privacy practices detail circumstances under which we will release your information to a third party:

1. We may compile data and aggregate information that you give to us, but this information may not be disclosed in a manner that would personally identify you in any way.
2. We do not disclose any nonpublic personal information about our customers or former customers to anyone, except as permitted or required by law.
3. We collect nonpublic personal information about you from the following sources:
 - Information we received from you on our applications or other forms you provide;
 - Information about your transactions with us, your creditors, or others; and
 - Information we receive from a credit reporting agency or other unaffiliated financial institution.
4. We may disclose the following nonpublic personal information about you:
 - Information we receive from you on applications or other forms, such as your name, address, social security number, assets, and income;
 - Information about your transactions with us, your creditors, or others, such as your account balance, payment history, parties to transactions and credit card usage; and
 - Information we receive from a credit reporting agency or other unaffiliated financial institution, such as your credit history, unless you give us a written request not to.
5. We may disclose information that we collect to creditors or third parties who you have authorized and who need this information in order for us to assist you after a counseling session.
6. We may also disclose the information that we collect to creditors and related financial institutions that need this information in order to put you on a DMP.
7. We restrict access to nonpublic personal information about you to those employees who need to know that information to provide services to you. We maintain physical, electronic and procedural safeguards that comply with federal regulations to guard your nonpublic personal information.

Washington Mutual
My Loan No is 3014670883



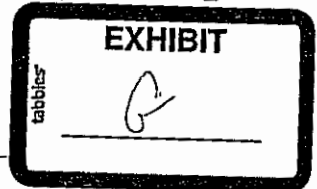
My name is Betty B. Kellogg, I am widow, I am 71 years old, 7-7-37 all those 7th should be lucky, Do they pay. I have lost 6 members of my family when I lost my beloved husband in 93, I wanted to lay down & go with him. What I lost, 2 who later I lost my younger sister, Lung Cancer & Breast Cancer, she was 42 yrs. And I lost another sister, she move in after my husband past, she share my Mortgage & Hospital Bills & own House Bills. She past 01, we were going to go old together, I miss her & my beloved Kellogg so bad. She was 58 yrs old Heart fail & Cancer. And in 03 I lost older sister. And in 07 I lost my youngest son, he was kill, 45 yrs old. So ask God why him, why not me. And in 08 I lost a brother, we were very close. He would send me cash money to help me with bills. I have dear friend who is 87 yrs old, He send money when he can. Now about me. I have Diabetes, Fibrillation of Heart (Irregular Heart Rhythms) Asthma, I had Breast cancer in 94 & 2000 it's in very bad, I still have furs up & down. I have Arthritis, Osteoarthritis and Detecoration of my left knee. The Cartilage is gone. I had phallothessy to help grow the cartilage back. it's help a lot, No surgical abjection of Substance, and I have to pd out of my pocket for treatment. I sometime walk with a cane. On my right side of me, I have a very big arm & leg ^{it's call} swollen, hard to raise my arm & leg up, it's from cancer. Now they tell me I have Cataract, & ~~face~~ face Surgery one of these days And Life insurance. I love life & people with all it's up & down. Every day, I thank God for all my blessing. I put a smile on my face and go. Please work with me & help me stay in my home. Please lower payments, I want to pd you. I would like to know, why I was approve for my loan, who did it Tanny Mac, Freddie Mac. Washington Mutual or Beaton or me. I think I was take I am just lost, I just don't know what to do. Please help me.

I hope you can
help this

Thank you
Betty B. Kellogg



Page location:
[/singlefamily/2008-11-20_sfadvisory.html](/singlefamily/2008-11-20_sfadvisory.html)



Suspension of Foreclosure Sales and Evictions Extended Through January 31, 2009

January 8, 2009 Single Family Advisory

Today, Freddie Mac announced the extension of a suspension of all foreclosure sales and scheduled evictions on occupied single family 1-4 unit residences with Freddie Mac-owned mortgages. Originally effective November 26, 2008 through January 9, 2009, the suspension is extended through January 31, 2009. This extension reinforces our commitment to pursue every responsible opportunity to avoid preventable foreclosures. Servicers of Freddie Mac-owned mortgages now have more time to help delinquent borrowers and implement the Streamlined Modification Program that Freddie Mac jointly announced with the FHFA, Fannie Mae and representatives of the HOPE NOW Alliance on November 11, 2008.

At this critical time for the market and homeowners, today's announcement and the extension of the temporary servicing requirements outlined below reinforce our long-standing commitment of working with you to help borrowers successfully maintain long-term equity through homeownership. With this extension:

- Servicers must postpone foreclosure sales on eligible Freddie Mac-owned mortgages scheduled between November 26, 2008 through January 31, 2009. You should continue to refer delinquent mortgages to foreclosure and process the foreclosure proceedings. However, Servicers must ensure that a foreclosure sale is not scheduled to occur until after the suspension period has expired.
- At the end of the suspension period, Servicers must determine whether additional foreclosure relief should be extended to allow time for a workout in process to be completed or whether the Servicer should proceed with foreclosure sale. Servicers are not required to seek approval from Freddie Mac to proceed with foreclosure sales after January 31, 2009, if the Servicer has determined that a successful alternative to foreclosure is not possible.
- To prevent negative impacts to individual Servicers' Performance Profile by mortgages for which foreclosure has been postponed under these temporary provisions, Servicers must report Default Action Code "09-Forebearance" through Electronic Default Reporting.
- Servicers must manage the need for additional fees and costs associated with the suspension and, in accordance with the requirements of Section 66.69 of the *Single-Family Seller/Servicer Guide* (Guide), obtain our approval to exceed the expense guidelines set forth in Exhibit 57, 1- to 4- Unit Property Approved Expense Amounts, and Exhibit 57A, *Approved Attorney Fees and Title Expenses*, by submitting Form 105 to Freddie Mac at overallowables@freddiemac.com.

These special foreclosure provisions will be incorporated into a *Single-Family Seller/Servicer Guide* Bulletin at a later date.

As always, we thank you for your ongoing efforts to preserve the dream of homeownership for troubled borrowers with Freddie Mac-owned mortgages, wherever possible.

For More Information

- Utilize our [Avoiding Foreclosure Resource Center](#).
- [Review our press release online](#).
- Direct questions to your Freddie Mac representative or (800) FREDDIE.

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CA06-1027
DIVISION: 55

DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE OF ARGENT
MORTGAGE SECURITIES, INC. ASSET
BACKED PASS THROUGH CERTIFICATES,
SERIES 2006-W4 UNDER THE POOLING
AND SERVICING AGREEMENT DATED AS
OF APRIL 1, 2006, WITHOUT RECOURSE,
Plaintiff,

vs.

TIMOTHY R. MARTIN, et al.,
Defendants.

**ORDER ON DEFENDANT'S MOTION REQUESTING EMERGENCY HEARING TO
VACATE FORECLOSURE COMPLAINT FOR FRAUD ON THE COURT,
AND MOTION TO STRIKE PLAINTIFF'S
ORDER RE-SCHEDULING FORECLOSURE SALE**

THIS CAUSE came before the Court on Defendant's Motion Requesting Emergency Hearing to Vacate Foreclosure Complaint for Fraud on the Court, and Motion to Strike Plaintiff's Order Re-Scheduling Foreclosure Sale. The Court has reviewed and considered the Motion, Plaintiff's Response, and the case law provided by the Parties, and has heard and considered the argument of Counsel, and being otherwise advised in the premises, finds as follows:

The Motion to Vacate the Foreclosure Complaint will be denied. Based on the Court's holding and discussion in WM Specialty Mortg., LLC v. Salomon, 874 So.2d 680 (Fla. 4th DCA 2004), the Court will conduct an evidentiary hearing to address the affect of the assignment on the Final Summary Judgment of Mortgage Foreclosure entered on January 31, 2007, in favor of

the Plaintiff. The evidentiary hearing will be scheduled by the Parties after such time as is needed for discovery. The Court will vacate the Order Rescheduling Foreclosure Sale dated May 16, 2008. The sale scheduled for June 26, 2008, will be cancelled by separate order of the Court. Accordingly, it is:

ORDERED AND ADJUDGED that:

1. Defendant's Motion to Vacate Foreclosure Complaint is and the same is hereby DENIED.
2. The Parties may request an evidentiary hearing to address the affect of the assignment on the Final Summary Judgment of Mortgage Foreclosure entered January 31, 2007, after such time as they have had an opportunity to conduct discovery addressed to the issues.
3. The Order Rescheduling Foreclosure sale dated May 16, 2008, is and the same is hereby VACATED.

DONE AND ORDERED in Chambers, St. Johns County, Florida on this 19 day of June, 2008.

/s/ J. MICHAEL TRAYNOR

J. MICHAEL TRAYNOR
Circuit Court Judge

Copies furnished to:

Colleen Lehmann, Esquire, The Florida Default Law Group, P.L., P.O Box 25018, Tampa, FL 33622-5018

Robert J. Dykes, Esquire, Watson & Osborne, P.A., 208 Ponte Vedra Park Dr., Ste. 101, Ponte Vedra, FL 32082

Fred Tromberg, Esquire, Law Offices of Fred Tromberg, 4925 Beach Blvd., Jacksonville, FL 32207

April Charney, Esquire, Jacksonville Area Legal Aid, Inc., 126 W. Adams St., Jacksonville, FL 32202-3849

Timothy Martin, Jr., 23 Maria Place, Ponte Vedra, FL 32082

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CA06-1027
DIVISION: 55

DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE OF ARGENT
MORTGAGE SECURITIES, INC. ASSET
BACKED PASS THROUGH CERTIFICATES,
SERIES 2006-W4 UNDER THE POOLING
AND SERVICING AGREEMENT DATED AS
OF APRIL 1, 2006, WITHOUT RECOURSE,
Plaintiff,

vs.

TIMOTHY R. MARTIN, et al.,
Defendants.

ORDER CANCELING FORECLOSURE SALE

THIS CAUSE came before the Court on Defendant's Motion to Strike and Motion to Vacate and Set Aside Plaintiff's Motion to Reschedule Foreclosure Sale and Order Rescheduling Foreclosure Sale. The Court has considered the Motion, and being otherwise fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED that:

1. The Foreclosure Sale scheduled for June 26, 2008, is and the same is hereby CANCELED.

DONE AND ORDERED in Chambers, St. Johns County, Florida on this 19 day of June, 2008.
/s/ J. MICHAEL TRAYNOR

J. MICHAEL TRAYNOR
Circuit Court Judge

Copies furnished to:

Colleen Lehmann, Esquire, The Florida Default Law Group, P.L., P.O Box 25018, Tampa, FL 33622-5018

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April Charney, Esquire, Jacksonville Area Legal Aid, Inc., 126 W. Adams St., Jacksonville, FL 32202-3849

Timothy Martin, Jr., 23 Maria Place, Ponte Vedra, FL 32082

DEMAND FOR PRELITIGATION SETTLEMENT

In our opinion, the case should be settled for a complete release of the mortgage obligation, the filing of the satisfaction of lien, release and return of the note or an affidavit stating that the note is lost, which affidavit will be filed in the County records, and payment of attorney fees, auditing fees and expert witness fees in an amount not less than \$16,500. This offer automatically expires at 5:00pm ten (10) calendar days following the date of this letter or the next business day if said ten day period ends on a weekend or United States National Holiday.

We explain our reasoning below. Unless you disagree, it probably would be wise to accept the offer immediately, since we are authorized to bring suit in a court of competent jurisdiction based upon the facts and causes of action raised in this letter and prior correspondence. Based upon information received from the experts in this case and based upon our own factual and legal investigation there appear to be claims in addition to the claims stated in prior correspondence, which claims based upon the following summary, are in most cases not exclusive and therefore the demands stated in this letter and prior correspondence you have received, which is incorporated herein as specifically as if set forth at length hereat, should all be considered cumulative.

demand is herewith made for full satisfaction of the mortgage and note plus
 >>>>>>>>>>>>>>>>>>

Any further attempts at collection will result in further action taken on behalf of the borrowers for all remedies available in law and equity in both administrative proceedings, and judicial forums possessing competent jurisdiction, which will seek damages for unfair trade trade practices, treble damages under applicable law for RICO, FTC and little FTC violations, consequential damages and refunds, attorney fees, court costs, and all other available remedies in law or equity.

September 10, 2008

I agree to settle the pending foreclosure case on the following terms:

1. The loan is modified to reflect a total principal balance of \$ 50,000; the interest rate is reduced and fixed at 6%; the term is extended to 30 years.
2. I pay my property taxes and hazard insurance outside my mortgage.
3. The mortgage is modified to provide that only force placement of conventional property hazard insurance is authorized should I not maintain property insurance.
4. The plaintiff and all plaintiff's successors, assignees and agents, including the servicer of this loan agree to replace all derogatory tradeline information provided to CRAs about this debt and to submit a tradeline that reflects the modification of the loan and that I am current on the payment of this debt.
5. I agree to begin making regular monthly payments upon settlement and both parties agree to dismiss the claims pending in the foreclosure action.
6. I agree to sign a release to release the plaintiff from all claims raised in the pleadings filed in this action.
7. Plaintiff agrees there will be no 1099 issued in connection with this settlement.
8. The plaintiff provides me with proof that it is the present owner of my mortgage and that the plaintiff is the present holder of my promissory note and has authority to settle this foreclosure.

IN THE CIRCUIT COURT , FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO: 16-2005-CA-002687
DIVISION: CV-B

CENDANT MORTGAGE CORPORATION,
Plaintiff,

vs.

LINDA WOOLBRIGHT, et al., Defendants.

**DEFENDANT LINDA WOOLBRIGHT'S AFFIDAVIT IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

1. I am the defendant and the homeowner in this foreclosure action.
2. I became ill with Multiple Sclerosis in 2003 and became unable to meet my mortgage obligation and I defaulted on this residential mortgage which is the subject of this cause of action for reasons beyond my control.
3. I did try to meet the terms of a workout agreement with my lender but I was not able to meet the payment terms based on my loss of income and having to go on social security disability.
4. With the assistance of my daughter, I sent a letter on March 28, 2005 (copy attached) to my mortgage company with a payment of \$716.01 to cover the January, 2005 payment and I begged my lender to please work with me on a payment plan that I could afford to avoid me having to lose my home. This payment was refused and I was not offered any further assistance for a workout with terms that I could meet based on my income.
5. On March 25, 2006 after this foreclosure action had already been filed I sent my lender another letter (copy attached) advising that I was unable to make any payments since 2005 because of my illness which manifested in debilitating forms and required me to be repeatedly hospitalized for most of 2004 and into 2005.
6. I became somewhat stabilized with my illness and again I begged my lender for a workout with payment terms that I could meet based on my income so that I could avoid losing my home.
7. I received a workout package from my lender after this foreclosure action had been filed and I sent in all the information that my lender asked for but I could not meet the payment terms demanded by my lender due to my limited income.

8. On July 5, 2006, upon the advise and with the assistance of my lawyer, I sent a letter (copy attached) to my lender again begging my lender for a loan workout and modification that I could afford given my severe income limits. I had no choice but to ask for a reduction in the interest rate and a new payment schedule based on my income.

9. My lender refused to work with me so that I could keep my home and make payments and I am terrified that I am going to lose my home.

10. I have worked very hard to scrimp and save money each month to try to show that I can meet a regular monthly payment if given the chance and at this time I have \$7,500.00 saved to pay toward a loan modification.

11. Based on my very meager monthly income of less than \$800.00, I can make a mortgage payment of \$300.00 a month. I have begged my lender to please accept my money and to turn my loan into a loan that will balloon in 30 years so that I can keep my home. I am willing to agree to a balance, but I am limited to a fixed amount that I can afford each month to pay.

12. I have no other options to save my home.

13. I worked as hard as I could, given my severe illness and setbacks and limited finances to communicate with my lender about my financial hardship and my emergency need, through no fault of my own, to access and qualify for special loss mitigation and default loan servicing.

14. I tried to come to an understanding with my lender but nobody would listen to me or assist me.

15. I believe that my lender is required to and should have helped me and given me options to avoid foreclosure and to provide me with special default loan servicing. During all this time Cendant Mortgage did have an office in Jacksonville (see attached public records from an internet search) but no one from my lender ever offered to meet with me in person to help me avoid losing my home.

16. Instead, my lender is pursuing this foreclosure action to take away my home.

17. I believe that instead of foreclosure my lender should help me keep my home.

18. I am very anxious and upset about this foreclosure and prospect of losing my home. I have nowhere else to live.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Lance Forman, Law Offices of David J. Stern, 801 S. University Drive, Suite 500, Plantation, Florida 33324 by fax to 954 233-8577 and by U.S. Mail on _____.

JACKSONVILLE AREA LEGAL AID, INC.

APRIL CARRIE CHARNEY, Esquire

Fla. Bar No.: 310425

126 West Adams Street

Jacksonville, Florida 32202

Telephone: (904) 356-8371, ext.373

Facsimile: (904) 224-7050

april.charney@jaxlegalaid.org

Attorneys for the Defendant

**HCBA BROWN BAG WITH COUNTY JUDGE ELIZABETH G. RICE
MARCH 7, 2006**

**Avoiding Technical Minefields and Overcoming Procedural Hurdles
in Drafting Affidavits and Obtaining Default and Summary Final Judgments.**

Elizabeth G. Rice
Copyright 2006

OUTLINE

1. Motions.

a. Motions for Entry of Default Final Judgment.

- (1) County Court Cases - Governed by *Fla. R. Civ. P.* 1.500(e).
“Final judgments after default may be entered by the court at any time....If it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter to enable the court to enter judgment or to effectuate it, the court may receive affidavits, make references, or conduct hearings as it deems necessary and shall accord a right of trial by jury to the parties when required by the Constitution or any statute.” (emphasis added)
- (2) Small Claims Cases - Governed by *Small Claims R.* 7.170(b).
“After default is entered, the judge shall receive evidence establishing the damages and enter judgment in accordance with the evidence and the law.” (emphasis added)

b. Motions for Summary Final Judgment.

- (1) Governed by *Fla. R. Civ. P.* 1.510.

2. Affidavits in Support of Default and Summary Final Judgments.

a. Affidavits in General.

(1) **“Affidavit” Defined.** Webster’s New World College Dictionary (4th ed. 1999) defines an affidavit as a “written statement made on oath before a notary public or other person authorized to administer oaths.”

(2) **Properly Notarized.** As stated in the definition above, the affiant must make an oath or affirmation as to the truth of the facts stated in the affidavit. If the oath is administered by a notary public, the notary’s “jurat” or certificate of administration of the oath must be included in the affidavit in the correct form. *In re Sinclair*, 191 B.R. 474 (Bankr. M.D. Fla. 1996). *See Fla. Stat.* § 117.05(13)(a) (2005). The notary’s certificate of acknowledgment of execution (i.e., “the foregoing instrument was acknowledged before me”) in lieu of an oath renders the affidavit legally insufficient. *See id.* at 475; *Fla. Stat.* § 117.05(13)(b) (2005).

(3) **Affiant’s Competency.** An affidavit must clearly show the affiant is competent to testify to the matters stated in the affidavit. *Fla. R. Civ. P.* 1.510 Author’s Comment – 1967 [hereinafter “*FRCP* 1.510 Comment”]; *Elser v. Law Offices of James*

M. Russ, P.A., 679 So. 2d 309 (Fla. 5th DCA 1996). An affiant fails to satisfy this competency requirement where affiant merely states, without more, that affiant has “personal knowledge.” *Id.*; see also *Montejo Invests. N.V. v. Green Cos., Inc. of Fla.*, 471 So. 2d 158 (Fla. 3d DCA 1985)(where affiant merely stated his title, that he was familiar with the facts stated in the complaint, and that to the best of his knowledge and belief the facts were true and accurate, affidavit was legally insufficient as it failed to show affirmatively that affiant was competent to testify to matters set forth therein, was not based on personal knowledge, and did not set forth facts as would be admissible in evidence); *Iglesia v. City of Miami Beach*, 487 So. 2d 1205 (Fla. 3d DCA 1986), *rev. denied*, 494 So. 2d 1151 (Fla. 1986)(“addition of the phrase that the affiant is ‘personally knowledgeable’ with respect to the allegations of the complaint adds nothing, since it is not a statement of fact, but is itself a mere conclusion or opinion of the affiant”). An affiant should establish the factual basis for affiant’s competence (i.e., age, bases of affiant’s personal knowledge of the relevant matters at issue in the case, etc.). M. Tanner & E. Gonzalez, *Florida Civil Trial Preparation*, Motion Practice (Fla. Bar 2002).

(4) **Affiant’s Personal Knowledge.** An affidavit therefore must be based on an affiant’s personal knowledge. The purpose of this requirement is to prevent the trial court from relying on hearsay as the basis for its decision and to ensure there is an admissible evidentiary basis for the claim or affiant’s position rather than mere belief or conjecture. *Florida Dept. of Fin. Servs. v. Associated Indus. Ins. Co., Inc.*, 868 So. 2d 600 (Fla. 1st DCA 2004); 49 *Fla. Jur 2d*, Summary Judgment § 39 (2006). Accordingly, an affiant should state in detail the facts showing affiant has personal knowledge. *Id.* See, e.g., *Hoyt v. St. Lucie County, Bd. of County Comm’rs*, 705 So. 2d 119 (Fla. 4th DCA 1998)(affidavit legally insufficient where it fails to reflect facts demonstrating how affiant would possess personal knowledge of the matters at issue in case); *Carter v. Cessna Fin. Corp.*, 498 So. 2d 1319 (Fla. 4th DCA 1986)(affidavit legally insufficient where affiant failed to set out a factual basis to support claim of personal knowledge of matter at issue in case and failed to make assertions based on personal knowledge).

An affiant’s failure, however, to expressly state in the affidavit that it is “based on personal knowledge” does not necessarily render the affidavit deficient. A court may find the affidavit is legally sufficient if it is clear from the statements set forth therein that affiant has personal knowledge of the relevant matter at issue in the case. See, e.g., *Myrick v. St. Catherine Laboure Manor, Inc.*, 529 So. 2d 369 (Fla. 1st DCA 1988)(affidavit could be considered where it was clearly evident from face of affidavit that defendant merely recounting actions and conversations in which she was involved); *Wright v. Yurko*, 446 So. 2d 1162 (Fla. 5th DCA 1984)(affidavit sufficient where it was clear from statements made therein that they were based on affiant’s own knowledge); *Alvarez v. Florida Ins. Guar. Ass’n, Inc.*, 661 So. 2d 1230 (Fla. 3d DCA 1995)(affidavit sufficient where affiant stated her title as officer and manager, stated she was familiar with certain relevant procedures, described those procedures, and stated that copies of documents attached to affidavit were true and correct copies); 49 *Fla. Jur 2d*, Summary Judgment § 39 (2006).

(a) Affidavits based on “information and belief” and to the “best of knowledge” are legally insufficient. See *Thompson v. Citizens Nat’l Bank of Leesburg*, 433 So. 2d 32 (Fla. 5th DCA 1983); *P & T Elec. Co. v. Spadea*, 227 So. 2d 234 (Fla. 4th DCA 1969), writ discharged, 235 So. 2d 510 (Fla. 1970); *Tarkoff v. Schmunk*, 117 So. 2d 442 (Fla. 2d DCA 1960); see also *Hayn v. Frederick*, 66 So. 2d 823 (Fla. 1953). But see, *First Nat’l Entertainment Corp. v. Brumlik*, 531 So. 2d 403, 405 (Fla. 5th DCA 1988)(summary judgment affidavit based on “information and belief” sufficient where body of affidavit indicated affiant had personal knowledge of facts and circumstances surrounding basis of plaintiff’s claim).

(b) An affidavit which shows conclusively on its face that the affiant could not possess personal knowledge of the matters stated therein likewise is legally deficient. *Avatar Props., Inc. v. Boney*, 494 So. 2d 289 (Fla. 2d DCA 1986)(affidavit legally insufficient to defeat summary judgment where affiant clearly incapable of having personal knowledge of facts at issue in case); *Thompson v. Citizens Nat’l Bank of Leesburg*, 433 So. 2d 32 (Fla. 5th DCA 1983)(affidavit filed by liquidator of FDIC in case involving note obtained from FDIC’s predecessor in interest was legally insufficient where affiant’s allegations as to the history of the loan transaction and the relevant business records could not have been made on the basis of personal knowledge); 49 *Fla. Jur. 2d*, Summary Judgment § 39 (2006).

(c) Note: Although affidavits must set forth facts which would be admissible in evidence, this does not mean that the affidavit itself is admissible. *Fla. Jur. 2d* Summary Judgment § 39. *Ex parte* affidavits actually are hearsay.

(5) **Must Be Based on Admissible Evidence.** Affidavits should set forth facts which would be admissible at trial. *Humphrys v. Jarrell*, 104 So. 2d 404 (Fla. 2d DCA 1958); see *Warden v. Chase Manhattan Bank, USA, N.A.*, 872 So. 2d 432 (Fla. 4th DCA 2004). Allegations in an affidavit that set forth incompetent and inadmissible matter, such as hearsay or opinion testimony, that would be inadmissible at trial, should be disregarded by the trial court. *Id.* at 409; see also *Palmer v. Liberty Nat’l Life Ins. Co.*, 499 So. 2d 903 (Fla. 1st DCA 1986), rev. denied, 499 So. 2d 903 (Fla. 1987) (“If evidence presented to the trial judge as a part of his consideration of a motion for summary judgment is incompetent and would be inadmissible during trial, that evidence should not be considered in ruling on the motion.”); *Ham v. Heintzelman’s Ford, Inc.*, 256 So. 2d 264 (Fla. 4th DCA 1972)(“affidavit predicated on inadmissible hearsay does not comply with the summary judgment rule and cannot be utilized either in support of or in opposition to summary judgment”).

(6) **Affidavits Based on Ultimate Facts Legally Insufficient.** Affidavits may not be based on allegations of ultimate facts. *Dean v. Gold Coast Theatres, Inc.*, 156 So. 2d 546 (Fla. 2d DCA 1963)(“Statements of ultimate facts in an affidavit in support of a motion for summary decree are of no weight.”). For example, the statement “at no time did affiant have any knowledge of the alleged fraudulent circumstances set

forth in plaintiff's complaint" would be a statement of ultimate fact as it provides no detail as to how affiant lacked knowledge of the alleged matter. *See id.* at 549; *Jones Constr. Co. of Central Florida, Inc. v. Florida Workers' Comp. JUA, Inc.*, 793 So. 2d 978, 979-80 (Fla. 2d DCA 2001)(affidavit that states only that affiant has personal knowledge of the facts, that the allegations in the complaint are true and correct, and that defendant owes plaintiff \$3,671,312 is legally insufficient as affidavit failed to set forth any evidentiary facts that would be admissible in evidence). Moreover, an affidavit that amounts to nothing more than a statement by affiant that the allegations in the complaint are true similarly is insufficient. *See Iglesia v. City of Miami Beach*, 487 So. 2d 1205 (Fla. 3d DCA 1986).

(7) **Affidavits Based on Conclusions of Law Legally Insufficient.** Affidavits likewise may not be based on conclusions of law. *Hurricane Boats, Inc. v. Certified Indus. Fabricators, Inc.*, 246 So. 2d 174 (Fla. 3d DCA 1974); *Deerfield Beach Bank v. Nager*, 140 So. 2d 120 (Fla. 2d DCA 1962).

(8) **Document Supplying Basis for Knowledge – Must be Attached and Authenticated.** When a document supplies the basis for an affiant's personal knowledge, the affiant must attach the document to the affidavit. *Fla. R. Civ. P.* 1.510(e); *see, e.g., CSX Transp., Inc. v. Pasco County*, 660 So. 2d 757 (Fla. 2d DCA 1995)(court reversed summary judgment where witness based statements on reports, but failed to attach reports to affidavit); *Zoda v. Hedden*, 596 So. 2d 1225 (Fla. 2d DCA 1992)(attorney not competent to testify in affidavit as to property transactions reflected in settlements, deeds, and judgments contained in public records, since attorney was not custodian of public records, and consequently, was unable to authenticate documents referred to in his affidavit); *Topping v. Hotel George V*, 268 So. 2d 388 (Fla. 2d DCA 1972)(attorneys' affidavit stating he was familiar with client's records and the records reflected certain information constituted inadmissible hearsay); *Rowland v. Wolf*, 192 So. 2d 47, 49 (Fla. 3d DCA 1966)(court rejected Plaintiff's affidavit that defendant acknowledged debt in writing where Plaintiff failed to attach letters from defendant); *Crosby v. Paxon Elec. Co.*, 534 So. 2d 787 (Fla. 1st DCA 1988), *appeal after remand*, 576 So. 2d 906 (Fla. 1st DCA 1991). If the affiant lacks possession of a copy of the document, affiant must state so in the affidavit and describe the document, state when and where affiant saw it and under what circumstances, who has possession, and what efforts have been made to obtain it or a copy of it. *FRCP* 1.510 Comment.

(9) **Sound Discretion of Trial Court.** The admission and consideration of an affidavit is a matter within the sound discretion of the trial court. *Scott v. NCNB Nat'l Bank of Fla.*, 489 So. 2d 221, 223 (Fla. 2d DCA 1986).

b. Affidavit in “Proof of Claim”/Support of Motion – Selected Issues.

(1) **Documentary Evidence.** When appropriate, a client’s affidavit should be used to provide an evidentiary foundation for the primary supporting documentary evidence of a party’s claim. M. Tanner & E. Gonzalez, *Florida Civil Trial Preparation, Motion Practice* (Fla. Bar 2002). In proving a claim, there are two layers of documentary evidence. *Id.* The first layer consists of documents that support the facts stated in the motion for relief or, in some instances, the complaint. *See id.* The second layer consists of the affidavits or other documents that support the admissibility of the “first-layer” or primary supporting documents. *Id.* If an evidentiary foundation for the primary documentary evidence is necessary, but not properly laid, the primary supporting documentary evidence is inadmissible and it would be error for the court to consider it in support of the party’s motion or request for relief. *Id.*; *Nichols v. Preiser*, 849 So. 2d 478 (Fla. 2d DCA 2003)(trial court unable to properly consider attorneys’ documents in legal malpractice action where documents had not been properly authenticated).

(2) **Business Records.** To be admissible, a business record pursuant to section 90.803(6), Florida Statutes, must:

- (a) be made at or near the time of an act, event, condition, opinion, or diagnosis (i.e., entry made contemporaneous with act, event, condition, opinion, or diagnosis),
- (b) contain information supplied by or transmitted by a person with knowledge acting within the course of a regularly conducted business activity,
- (c) be kept in the course of a regularly conducted business activity,
- (d) be the type of document the business regularly makes when engaging in its particular business activity; and
- (e) be shown by the testimony of the custodian of the record or other qualified witness who has the necessary knowledge to testify as to how a particular document was made or by a certification or declaration with appropriate notice of affiant’s intent to rely on such certification or declaration.

If a party has failed to lay the proper foundation for a business record’s admissibility, a witness may not testify as to the contents of the record. *See Fla. Stat.* § 90.803(6); *Thompson v. State*, 705 So. 2d 1046, 1048 (Fla. 4th DCA 1998); *Brown v. State*, 537 So. 2d 180 (Fla. 3d DCA 1989); *Cullimore v. Barnett Bank of Jacksonville*, 386 So. 2d 894, 895 (Fla. 1st DCA 1980). *See also* 1 *Fla. Prac., Evidence* § 803.6 (2005 ed.)

(3) **Computer Records.** Like business records, computer printouts are admissible if the custodian or other qualified witness is available to testify as to the manner of preparation, reliability, and trustworthiness of the information in the printout. *LEA Indus., Inc. v. Raelyn Int’l, Inc.*, 363 So. 2d 49, 52 (Fla. 3d DCA 1978); *see Specialty Linings, Inc. v. B.F. Goodrich Co.*, 532 So. 2d 1121 (Fla. 2d DCA 1988).

(4) **Affidavits by Party's Attorneys.** An attorney should avoid giving an affidavit in support of the claim of the attorney's client (except of course as to attorneys' fees). In *Hardemon v. Fish*, 325 So. 2d 411 (Fla. 3d DCA 1976), the court ruled it was inappropriate for counsel to give an affidavit in support of his client's motion for summary judgment because doing so was in contravention to Canon 5, EC 5-9, DR 5--102, Code of Professional Responsibility, and other legal precedent. 325 So. 2d 411, citing *Millican v. Hunter*, 73 So. 2d 58 (Fla. 1954); *Hubbard v. Hubbard*, 233 So. 2d 150 (Fla. 4th DCA 1970). In reaching its decision, the *Hardemon* court reasoned that the trial court should not have considered counsel's affidavit because counsel would not have been permitted to testify at trial due to ethical prohibitions (and hence, the affidavit failed to contain evidence that would be admissible at trial). *Id.* at 150.

(5) **Pre-judgment Interest.** Affidavits in proof of claim should (and must in County Court Division J) contain at a minimum and in most circumstances a pre-judgment interest calculation setting forth the following information: (1) the date from which and through which the party is seeking interest; and (2) the rate of interest being sought. In addition, it is advisable that the party seeking pre-judgment interest provide the court an interest per diem to assist the court in determining the amount of pre-judgment interest due to the date of the judgment. [Note: This Court has observed the prevalent practice of parties filing separate "affidavits of interest." As pre-judgment interest is an aspect of a party's claim, it would seem that sworn statements regarding the calculation of pre-judgment interest should be included in the party's affidavit in proof of claim.]

c. Affidavit of Non-Military Service. Pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (a/k/a the Servicemembers Civil Relief Act), 50 *U.S.C.A. App.* § 501, et seq., a plaintiff must file in both federal and state cases (a) an affidavit setting forth facts showing that the defendant is not in the military service, or (b) an affidavit setting forth that the defendant is in military service or that the plaintiff is unable to determine whether or not the defendant is in such service, before a judgment based on the defendant's default may be entered.

d. Affidavit of Attorneys' Fees and Costs. If a party is seeking attorneys' fees and costs pursuant to a contract, statute, or rule of procedure, then the attorney representing such party must file an affidavit setting forth, at a bare minimum, the number of hours expended and the rate (or flat fee) charged to the client in accordance with *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).

e. Affidavit as to Reasonable Attorneys' Fees. The party seeking attorneys' fees also must file an affidavit as to the reasonableness of such attorneys' fees in accordance with *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), unless the reasonableness of such fee previously has been admitted by the opposing party.

3. **Additional Pleading/Proof Requirements for Entry of Default Final Judgments.**

a. **Documentary Evidence of Claim - EGR Requirements.**

(1) **Credit Card Cases.** In most circumstances, the court will require the following documents be attached to the affidavit in proof of claim, unless such documents were previously attached to plaintiff's complaint/statement of claim: (a) copy of the last credit card statement actually sent to defendant; (b) copy of card member agreement, to prove entitlement to pre-judgment interest in excess of statutory rate and attorneys' fees; (c) if some doubt or uncertainty exists regarding plaintiff's standing to bring an action on the debt as an assignee, then the assignment of the debt or bill of sale of the account.

(2) **Promissory Note Cases.** In most circumstances, the court will require the original note be attached to the affidavit in proof of claim, unless previously attached to plaintiff's complaint/statement of claim.

(3) **Automobile Loan Deficiency Cases.** The court may require the following documents be attached to the affidavit in proof of claim, unless previously attached to plaintiff's complaint/statement of claim: (a) a copy of the section 679.611, Florida Statutes, notification of disposition to defendant; (b) a copy of the section 679.616, Florida Statutes, explanation of calculation of deficiency to defendant.

(4) **Subrogation Cases.** The court may require the following documents be attached to the affidavit in proof of claim, unless previously attached to plaintiff's complaint/statement of claim: (a) evidence of damages (i.e., estimate for repair, photos, etc.); (b) evidence of payment (i.e., canceled check, etc.). [Note: In subrogation cases in which the insured/subrogor has not been joined as a plaintiff, the insurer/subrogee may not seek the recovery of the insured's deductible as an element of damage against defendant.]

b. **Attorneys' Fees Constitute Unliquidated Damages – Hearing Legally Required.**

As attorneys' fees constitute unliquidated damages, a defaulted party has a due process right to notice and an opportunity to be heard on the issue as to the reasonableness of the amount of fees sought to be awarded against the defaulted party. *Asian Imports, Inc.*, 633 So. 2d 551 (Fla. 1st DCA 1994); *Scott v. Revels, Inc.*, 491 So. 2d 1230 (Fla. 2d DCA 1986); *Bowman v. Kingsland Dev., Inc.*, 432 So. 2d 660 (Fla. 5th DCA 1983); *Fla. R. Civ. P.* 1.440(c). Indeed, it is reversible error for a court to award attorneys' fees against a defaulted party absent reasonable notice and a hearing on the matter. *See id.* In *Sloan v. Freedom Savings & Loan Association*, 525 So.2d 1000 (Fla. 5th DCA 1988), however, the court concluded a claim for damages, liquidated or unliquidated, including a claim for attorneys' fees and costs, could be decided by summary judgment. *Id.* at 1001.

4. **Additional Pleading/Proof Requirements for Entry of Summary Final Judgments.**

a. **Summary Judgment Affidavits in Particular**

(1) **Governed by Fla. R. Civ. P. 1.510(e).**

(2) **FRCP 1.510 Comment Instructive.** The Author's Comment – 1967 to Rule 1.510 provides, among other things, that the function of the affidavit is to show there is available competent testimony which can be introduced at trial. *FRCP* 1.510 Comment. The affidavit therefore should be in the form of testimony admissible at trial. *Id.* In addition, the court may disregard a statement in an affidavit which physically is impossible in light of common knowledge or scientific principles. *Id. citing Watley v. Florida Power & Light Co.*, 192 So. 2d 27 (Fla. 1st DCA 1966).

(3) **Deadline for Serving Affidavits.** A party moving for summary judgment must file and serve supporting affidavits with the motion at least 20 days prior to the hearing. *Mack v. Commercial Indus. Park, Inc.*, 541 So. 2d 800 (Fla. 4th DCA 1989); *Marlar v. Quincy State Bank*, 463 So. 2d 1233; *Coastal Caribbean Corp. v. Rawlings*, 361 So. 2d 719 (Fla. 4th DCA 1978). A movant may file supplemental affidavits less than 20 days before the hearing, but only with the opposing party's written stipulation and consent or upon leave of court granted by written order after written application, with notice to the opposing party, and an opportunity for hearing. *Marlar*, 463 So. 2d at 1234; *see also Ellis v. Barnett Bank of Lakeland*, 341 So. 2d 545, 546 (Fla. 2d DCA 1977). If service of the summary judgment motion and affidavits is achieved by mail, then five days must be added to the notice period pursuant to Rule 1.090(e). *C.E. Huffman Trucking, Inc. v. Red Cedar Corp.*, 723 So.2d 296 (Fla. 2d DCA 1998); *Nelson v. Balkany*, 620 So. 2d 1138, 1139 (Fla. 3d DCA 1993). The motion and affidavits accordingly would need to be served no less than 25 days before the hearing.

(4) **Affidavits Contradicting Prior Testimony.** Generally, an affiant may not contradict or repudiate affiant's prior deposition testimony so as to create an issue of fact. *See Briguera v. Behr Paint Corp.*, 712 So. 2d 824 (Fla. 2d DCA 1998); *Ellison v. Anderson*, 74 So. 2d 680 (Fla. 1954). A court, however, may consider such an affidavit if affiant has attempted in the affidavit to excuse or explain the discrepancy. *Stanford v. CSX Transp., Inc.*, 637 So. 2d 37 (Fla. 2d DCA 1994), *rev. denied*, 645 So. 2d 451 (Fla. 1994).

b. **Documentary Evidence – EGR Requirements.**

See 3.a. (Documentary Evidence) above.

5. Requirements for Entry of Default Final Judgment After Breach in Settlement Stipulation – EGR Requirements.

a. Affidavit of Default/Non-Compliance. In settlement stipulations providing for the entry of a final judgment or for an order allowing execution on a final judgment (i.e., in the case of a final judgment, execution withheld) on an *ex parte* basis, without further notice or hearing to the other party, the party seeking the entry of the final judgment must file with the Court an “affidavit of default” or “affidavit of non-compliance” setting forth the following assertions of fact: (1) the date of the default, non-payment, or non-compliance; (2) the total dollar amount of payments made by the defaulting party as of the date of the affidavit; (3) the manner in which the party seeking the final judgment applied the payments to the outstanding indebtedness; and (4) the outstanding balances due and owing for principal, pre-judgment interest, costs, and reasonable attorneys’ fees, and the total the amount for which judgment is sought.

Example: (Stipulation provides that upon default, plaintiff may seek amount originally sought in the statement of claim/complaint).

“Defendant failed to make the payment due on May 5, 2005. Defendant has paid Plaintiff a total of \$300 under the settlement stipulation as of the date of this affidavit. The \$1,000 was applied first to costs and fees, then to interest, and last to principle. Plaintiff accordingly seeks the entry of a final judgment in the amount of \$4,000 in principal, \$400 in interest, \$280 in costs, and \$200 in reasonable attorneys’ fees, for a total sum due of \$4,880.”

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR DUVAL
COUNTY, FLORIDA.

CASE NO: 16-2008-CA-10998
DIVISION: CV-D

U.S. BANK, N.A., Plaintiff(s),

vs.

NIKKIA L. FULLER et al., Defendant(s).

ORDER ON PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM

THIS CAUSE came on to be heard upon the Plaintiff's Motion to Dismiss Defendant's CounterClaim. Plaintiff filed a mortgage foreclosure complaint on August 25, 2008. On October 20, 2008, the Defendant filed an Answer, Affirmative Defenses and CounterClaim. The Defendant asserted affirmative defenses and alleged counterclaims against the Plaintiff. On November 6, 2008, the Plaintiff filed a Motion to Dismiss the Defendant's CounterClaim. The Court, having considered the record received and reviewed responses and arguments from the parties, finds as follows:

In Count I of the Defendants CounterClaim, the Defendant pleads this Court to dismiss the Plaintiff's Complaint and alleges that the Plaintiff has engaged in violation of the Florida Consumer Collection Practices, F.S. §559.729, and that the Defendant is entitled to damages under F.S. §559.77.

In Count II, the Defendant seeks injunctive and declaratory relief and damages pursuant to the Florida Deceptive and Unfair Trade Practices Act, F.S. §501.201. It is well established law in Florida that the function of a motion to dismiss a complaint is to raise as a question of law, the sufficiency of the facts alleged to state a cause of action, and the court is not permitted to speculate as to whether a plaintiff has any prospect of proving the allegations, Crews v. Ellis, 531 So.2d. 1372, Fla. 1st DCA 1988. A motion to dismiss for failure to state a cause of action is not a substitute for a motion for summary judgment and, in ruling on such a motion, the appellate court is confined to consideration of the allegations within the four corners of the

complaint. All material allegations of the complaint are taken as true and the appellate court is not permitted to speculate as to whether the allegations ultimately will be proven, Cyn-Co, Inc. v. Lintco, 677 So.2d. 78, Fla. 2nd DCA 1996.

This Court's function in dealing with the Plaintiff's Motion to Dismiss the Defendant's CounterClaim is limited to the four corners of the Defendant's CounterClaim and the Defendant should be granted an opportunity to prove her claims.

Therefore, it is

ORDERED AND ADJUDGED

1. The Plaintiff's Motion to Dismiss Defendant's CounterClaim, Count I, Florida Consumer Collection Practices Act", be and the same is hereby **DENIED**.

2. The Plaintiff's Motion to Dismiss Defendant's CounterClaim, Count II, Florida Deceptive and Unfair Trade Practices Act, be and the same is hereby **DENIED**.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this _____ day of February, 2009.

ORDER ENTERED

FEB 23 2009

JEAN M. JOHNSON
CIRCUIT JUDGE

/s/ JEAN JOHNSON

Copies furnished to:

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IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2004-CA-03395-XX
DIVISION: CV-B

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.,

Plaintiff,

vs.

KAREN MURPHY, *et al.*

Defendants.

**ORDER DENYING PLAINTIFF’S MOTION TO
DISMISS THIRD AMENDED COUNTERCLAIM**

This cause came on to be heard on the Plaintiff’s Motion to Dismiss the Defendant’s Third Amended Counterclaim and the Court having reviewed the file, heard argument of counsel for both parties and reviewing relevant law, finds as follows:

1. In her Third Amended Counterclaim, Defendant alleges Plaintiff engaged in deceptive and unfair practices in violation of the Florida Deceptive and Unfair Trade Practices Act, Chapter 501, Part 2 (hereinafter “FDUTPA”) during the course of the collection of the subject mortgage.

2. In support of her counterclaim, Defendant alleges that Plaintiff made misleading statements of fact and omitted certain facts concerning her pre-foreclosure options and charged unfair sums prior and subsequent to the filing of the subject mortgage foreclosure lawsuit.

3. Defendant also alleges these actions when taken as a whole are unfair and deceptive when viewed in context of the regulations promulgated by HUD, pursuant to the National Housing Act, 12 U.S.C. §1710(a) which are incorporated in her mortgage contract.

4. Defendant also alleges specific harm which has been incurred and will continue to be incurred as a result of these unfair and deceptive practices.

5. In reviewing a motion to dismiss, the Court is confined to the four corners of the complaint and must assume that all well pled allegations contained in the pleading are true and must draw all reasonable inferences in favor of the pleader. *Weaver v. Leon County Classroom Teachers Association*, 680 So.2d 478 (Fla. 1st DCA 1996).

6. Defendant is not required to allege that Plaintiff has violated a specific provision of federal or Florida law to support a claim pursuant to FDUTPA. *Department of Legal Affairs v. Father and Son Moving & Storage, Inc.*, 643 So.2d 22 (Fla. 4th DCA), see also *Deltona Corporation v. Jannotti*, 391 So.2d 976 (Fla. 1st DCA 1981). An unfair practice is one that offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. Deception is a proper characterization of a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment. *PNR, Inc. v. Beacon Property Management, Inc.*, 842 So.2d 773, 777. (Fla. 2003)

Also, §501.203(3) provides

(3) "Violation of this part" means any violation of this act or the rules adopted under this act and may be based upon any of the following as of July 1, 2001:

(a) Any rules promulgated pursuant to the Federal Trade Commission Act, 15 U.S.C. §§41 et seq.;

(b) The standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts;

(c) Any law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices.

Asserting a claim for sums in excess of the actual costs in a foreclosure can also support a claim under FDUTPA. *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 896 So.2d

773 (Fla. 1st DCA 2004).

7. In regulations regarding single family mortgage servicing responsibilities, the Department of Housing and Urban Development states, in material part: “It is the intent of the Department that no mortgagee shall commence foreclosure or acquire title to a property until the requirements of this subpart have been followed.” 24 C.F.R. §203.500 (“Servicing Responsibilities General Requirements”). See also (“Mortgagee Action and Forebearance” 24 C.F.R. §203.600, *et seq.* While violations of these servicing requirements do not necessarily create a private cause of action, any substantial deviation from the recommended norm established in an effort to avoid foreclosure may be considered by a trial court as a matter of equity. *Cross v. Federal National Mortgage Association*, 359 So.2d 464 (Fla. 4th DCA 1978).

8. Based upon the foregoing, this Court finds Defendant’s allegation when taken as a whole, provide a basis for stating a cause of action that a party has acted deceptively or unfairly in a consumer transaction.

Therefore, it is

ORDERED and ADJUDGED:

A. The Plaintiff’s Motion to Dismiss Third Amended Counterclaim is denied.

B. The Plaintiff shall have twenty (20) days from the date of this Order to file a response to the Third Amended Counterclaim.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this ____ day of FEBRUARY, 2006.

KAREN K. COLE
CIRCUIT JUDGE

Copies to:

Jeff Gano, Esquire

Mark Kessler, Esquire

Lynn Drysdale, Esquire

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, FLORIDA

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR THE REGISTERED HOLDERS
OF GSAMP TRUST 2005-SEA1, MORTGAGE PASS-
THROUGH CERTIFICATES, SERIES 2005-SEA1,
Plaintiff,

CASE NO.:16-2007-CA-003840-XXXX-MA
Division CV-G

vs.

MARGARET A MASSEY, ET AL,
Defendants.

**ORDER DENYING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S AFFIRMATIVE
DEFENSES; DENYING MOTION TO DISMISS COUNTERCLAIMS and DENYING
PLAINTIFF'S MOTION TO STRIKE DEMAND FOR JURY TRIAL**

Now on this 3rd day of April, 2008, came on for hearing the above captioned cause on plaintiff's motions to strike defendant's affirmative defenses and demand for jury trial and on plaintiff's motion to dismiss counterclaims. The parties appeared through counsel and the court, being sufficiently advised, finds:

1. Rule 1.110(d) of the Florida Rules of Civil Procedure provides that in pleading to a preceding pleading a party shall set forth affirmatively any matter constituting an avoidance or affirmative defense.

2. A motion to strike a defense should not be granted where the defense presents a bona fide question of fact. KIDDER & CO. v. TURNER, 106 So. 2d 905 (Fla. 1958). Furthermore, a motion to strike an affirmative defense should be denied "if the defense is sufficient as a matter of law, or if it fairly presents a question of law or fact which the court ought to hear." TALAROWSKI v. The PENNSYLVANIA RAILROAD COMPANY, 135 F. Supp. 503 (D. Del.1955), citing 2 Moore's Federal Practice, 2320. "For the purpose of reaching a decision on this motion, the well-pleaded allegations of the defendant's first affirmative defense must be accepted as true." Id.

3. Defendant's first affirmative defense claims that the plaintiff failed to comply with a contractual condition precedent to filing this foreclosure by allegedly failing to provide a notice of default that complies with the notice provision set out in paragraph 22 of the subject mortgage.

4. The court finds that the defendant's first affirmative defense is adequate to survive the plaintiff's motion to strike since the affirmative defense of failure to provide a notice of default under the mortgage contract fairly presents questions of law and fact which the court ought to hear. For this reason, the plaintiff's motion to strike the defendant's first affirmative defense

should be and is hereby denied.

5. Defendant's second affirmative defense claims that the plaintiff failed to comply with a federal statute, 12 U.S.C. 1701x(c)(5), which the defendant claims is a condition precedent to filing this foreclosure.

6. 12 USC 1701x(c)(5) is a section of the National Housing Act that requires creditors who service conventional loans, (non federally-insured home loans) to send a specific notice about access and availability of homeownership counseling to defaulting homeowners within 45 days of a home loan payment default. The secretary of HUD determined that "if a creditor's compliance...is challenged in court, the ultimate determination of the adequacy of the creditor's notification and the legal consequences of any noncompliance will be made by the court." 55 FR 2416 (01/24/1990) Additionally, the Secretary of HUD has determined that "noncompliance with the statute can be an actionable event that could affect a mortgagee's ability to carry out foreclosure in a timely manner. 54 Fed. Reg. 20964-65 (May 15, 1989)

7. Great caution should be exercised when a court is considering denying a litigant the opportunity to demonstrate that he is entitled to the benefit of a trial. Stephens v. Dichtenmueller, 216 So.2d 448 (Fla. 1968) This is especially the case in a mortgage foreclosure which is an equitable proceeding. Cross v. Federal National Mortgage Association, 359 So.2d 464,465 (Fla. 4th D.C.A. 1978); see also, U.S. v. Trimble, 86 F.R.D. 435 (S.D. Fla. 1980) (failure to comply with the notice requirement contained in the federal regulation is a valid defense to a mortgage foreclosure action); Family Bank v. Able Realty of America Corp., 702 So.2d 1322 (Fla. 4th DCA 1998) ("court in its discretion may refuse to grant prayer for foreclosure of mortgage for equitable reasons..."mortgage foreclosure is an equitable action and thus equitable defenses are appropriate")

8. The court finds that the defendant's second affirmative defense is adequate to survive the plaintiff's motion to strike since the affirmative defense of failure to provide a 12 USC 1701x(c)(5) notice fairly presents questions of law and fact which the court ought to hear. For this reason, the plaintiff's motion to strike the defendant's second affirmative defense should be and is hereby denied.

9. In her third affirmative defense, defendant alleges that the plaintiff failed to provide her with access to certain preforeclosure relief under a Pooling and Servicing Agreement or other trust agreement applicable to the subject mortgage loan. Defendant alleges that the Plaintiff's non-compliance renders this foreclosure premature and inequitable. Counsel for defendant advised that the plaintiff has exclusive possession and control of the pooling and

servicing agreement and that said agreement is being sought through discovery. On this basis, the court finds that the defendant was not able to attach the agreement to her answer.

10. The court finds that the defendant's third affirmative defense is adequate to survive the plaintiff's motion to strike as it fairly presents questions of law and fact which the court ought to hear. The plaintiff's motion to strike the defendant's third affirmative defense should be and is hereby denied.

11. Defendant's fourth affirmative defense alleges that the plaintiff intentionally failed to act in good faith or to deal fairly with the Defendant by failing to follow the mortgage servicing standards that the defendant claims applies to the subject mortgage.

12. The court finds that the defendant's fourth affirmative defense is adequate to survive the plaintiff's motion to strike; that the fourth affirmative defense fairly presents questions of law and fact which the court ought to hear and that for these reasons, the plaintiff's motion to strike the defendant's fourth affirmative defense should be and is hereby denied.

13. In her fifth affirmative defense, defendant alleges that the plaintiff comes to court with unclean hands as a result of certain acts and omissions on the part of the plaintiff dealing with the subject mortgage and that as a matter of equity this Court should refuse to foreclose this mortgage.

14. "In considering a motion to dismiss, a trial court is confined to the allegations contained within the four corners of the complaint." CREWS v. ELLIS, 531 So. 2d 1372 (Fla. 1st DCA 1988) For this reason, the court does not consider any of the documents attached to the plaintiff's motions that are outside the complaint or the documents attached thereto.

15. The court finds that the defendant's fifth affirmative defense fairly presents questions of law and fact which the court ought to hear and is adequate to survive the plaintiff's motion to strike. The plaintiff's motion to strike the defendant's fifth affirmative defense should be and is hereby denied.

16. In her sixth affirmative defense, the defendant alleges that the plaintiff charged and/or collected payments for certain fees, costs and charges not authorized by the note and mortgage. The court finds that the defendant's sixth affirmative defense is adequate to survive the plaintiff's motion to strike. The plaintiff's motion to strike the defendant's sixth affirmative defense should be and is hereby denied.

17. In her seventh affirmative defense, the defendant challenges the plaintiff's standing and alleges that the plaintiff is not the true owner of the claim sued upon and is not the real party in interest. Defendant previously raised this issue by way of motion to dismiss which the court

denied advising defendant to pursue the claims by way of affirmative defense. The court does not consider the documents attached to the plaintiff's motion for purposes of this ruling and finds that the plaintiff's motion to strike the defendant's sixth affirmative defense should be and is hereby denied.

18. Count 1 of the Defendant's counterclaim alleges a cause of action for declaratory and injunctive relief based on specific acts and omissions on the part of the plaintiff in dealing with the subject mortgage. Under F.S. 86.011 this court has the power "to declare rights, status, and other equitable or legal relations of "(a)ny person claiming to be interested or who may be in doubt about his or her rights under a... contract, or other article...or instrument in writing."

19. Under F.S. 86.021, this court may declare the rights of any person "whose rights, status or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by... contract,...or other article, memorandum, or instrument in writing..."

20. In count II of her counterclaims, the defendant alleges that the plaintiff violated the Florida Consumer Collection Practices Act by asserting a right to foreclose when the plaintiff knew that such right did not exist absent compliance with certain servicing obligations. F.S. 559.72(9)

21. Taking the defendant's allegations as true, the court finds that the defendant has sufficiently pled counterclaims that fairly present questions of law and fact which the court ought to hear and that are adequate to survive the plaintiff's motion to dismiss. The plaintiff's motion to dismiss the defendant's counterclaims should be and is hereby denied.

22. As the court has denied the plaintiff's motion to dismiss defendant's counterclaims the court finds that the defendant is entitled to a trial by jury as a matter of law. For this reason, the plaintiff's motion to strike the defendant's request for trial by jury should be and is hereby denied.

IT IS SO ORDERED, nunc pro tunc, this _____

ORDER ENTERED

JUN 13 2008

LANCE M. DAY

Lance M. Day, Circuit Judge

copies provided to:

Ira Silverstein, Shapiro and Fishman, attorney for plaintiff
April Carrie Charney, attorney for defendant Margaret Massey

Fla. Stat. § 90.803 (2008)

§ 90.803. Hearsay exceptions; availability of declarant immaterial

The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(6) *RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY.*

(a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(c) A party intending to offer evidence under paragraph (a) by means of a certification or declaration shall serve reasonable written notice of that intention upon every other party and shall make the evidence available for inspection sufficiently in advance of its offer in evidence to provide to any other party a fair opportunity to challenge the admissibility of the evidence.... A motion opposing the admissibility of such evidence must be made by the opposing party and determined by the court before trial. A party's failure to file such a motion before trial constitutes a waiver of objection to the evidence, but the court for good cause shown may grant relief from the waiver.

(7) *ABSENCE OF ENTRY IN RECORDS OF REGULARLY CONDUCTED ACTIVITY.* --Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, of a regularly conducted activity to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances show lack of trustworthiness.

(14) *RECORDS OF DOCUMENTS AFFECTING AN INTEREST IN PROPERTY.*

--The record of a document purporting to establish or affect an interest in property, as proof of the contents of the original recorded or filed document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording or filing of the document in the office.

(15) *STATEMENTS IN DOCUMENTS AFFECTING AN INTEREST IN PROPERTY.* --A statement contained in a document purporting to establish or affect an interest in property, if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(17) *MARKET REPORTS, COMMERCIAL PUBLICATIONS.* --Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations if, in the opinion of the court, the sources of information and method of preparation were such as to justify their admission.

(18) *ADMISSIONS.* --A statement that is offered against a party and is:

(a) The party's own statement in either an individual or a representative capacity;

(b) A statement of which the party has manifested an adoption or belief in its truth;

(c) A statement by a person specifically authorized by the party to make a statement concerning the subject;

(d) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship; or

(e) A statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD GAMBY,
BERYLLIN GAMBY,

Plaintiffs,

v.

EQUIFAX INFORMATION SERVICES,
LLC, et al.,

Defendants.

CIVIL ACTION NO. 06-11020

DISTRICT JUDGE MARIANNE O. BATTANI

MAGISTRATE JUDGE DONALD A. SCHEER

ORDER

This matter is before the magistrate judge on Plaintiffs' Third Motion to Compel Depositions and Enforce Compliance with Document Production Requests (Docket #79) and on Plaintiffs' Motion for Discovery Sanctions (Docket #87). The first motion was argued on July 31, 2008 and taken under advisement. The second motion was argued on August 21, 2008. Having reviewed both motions, and Defendants' Responses, and having heard the arguments of counsel, I find that both motions are meritorious and that relief should be granted.

Plaintiffs have asserted claims arising under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §1681 et seq. Discovery in a typical FCRA case centers largely on documents and evidence relating to policies and procedures employed in the handling of accounts. Once basic documents are identified and produced, depositions normally focus upon authenticating the written records and examining the formulation and implementation of credit reporting policies and procedures. Plaintiffs commenced discovery regarding their claims against First National Bank of Omaha ("FNBO") with written interrogatories and

requests for production of documents served in October 2006. Defendant filed written responses, many of which contain objections to the form and/or content of the particular request. Those responses are not at issue. Rather, Plaintiffs' Motion for Sanctions relates to numerous discovery responses as to which Defendant asserted no objection. As to those written responses, and subsequent deposition testimony based upon, or relating to them, Plaintiffs assert that FNBO and its attorneys have: (a) purposefully withheld information; (b) intentionally misdirected the court and Plaintiffs' counsel; (c) delayed in disclosing key evidence; and (d) failed to comply with this court's Orders. Plaintiffs further maintain that Defendant and its counsel have failed to make reasonable inquiry into the matters addressed in discovery, and that they have otherwise attempted to frustrate their discovery efforts. Having reviewed the motions and exhibits, and having heard the arguments of counsel, I agree.

Defendant's responses to Plaintiffs' written Interrogatories and documents requests were incomplete and misleading, so as to: (a) omit the identities of material witnesses; (b) withhold relevant documents; and (c) conceal the existence and/or location of relevant data sources. As a direct result of Defendant's failure to produce complete and accurate written responses, Plaintiffs' efforts to conduct meaningful depositions have been seriously undermined. The existence of witnesses and documentary evidence not revealed in responses to written discovery requests was discovered in a piecemeal fashion, necessitating additional expenditure of time, effort and money by Plaintiffs. Not only do I find that Defendant failed to make reasonable inquiry to insure that all responsive information was produced in a timely and accurate fashion, I find as well that counsel for Defendant interposed improper and obstructive objections during subsequent depositions;

failed to produce documents in his possession in a timely manner, despite their clear relevance, so as to diminish Plaintiffs opportunity to employ those documents in their discovery efforts; and misled the court as to the reason for the late production of documents and witness identities to which Plaintiff was clearly entitled.

I find that Defendant failed to supplement its incomplete and misleading discovery disclosures even after their inadequacy was exposed. Defendant further failed to identify and prepare a witness for deposition pursuant to Fed.R.Civ.P. 30(b)(6). Plaintiff filed two earlier Motions to Compel Discovery, addressing some of the matters described above. In reliance upon the assumed good faith of Defendant, and of defense counsel, the court granted only partial relief. Unfortunately, I now conclude that my reliance was misplaced. As a result primarily of the repeated failure of Defendant and defense counsel to cooperate in discovery, Plaintiffs have been delayed, and perhaps irrevocably hindered, in their efforts to obtain relevant and material information for their use in this action. I conclude that Defendant has been grossly negligent, if not wilful, in failing to meet its discovery obligations, and that sanctions are warranted.

Defendant attempts to minimize the significance of its wholly inadequate discovery performance by arguing: (1) that it has a strong case on the merits; (2) that Plaintiffs had access to relevant information from other sources; and (3) that the true purpose of the instant motions is to prejudice Defendant in the eyes of the court. None of those arguments is persuasive. Common sense would dictate that a party with a strong case on the merits would wish to demonstrate that fact by prompt and complete discovery compliance, so as to not delay ultimate victory on dispositive motions or at trial. The possibility that Plaintiffs could obtain relevant evidence from alternative sources is no

justification for the failure of an opposing party to produce any and all requested relevant evidence in its possession. Finally, no effort by Plaintiffs to prejudice the Defendant in the eyes of the court could be successful in the absence of evidence demonstrating improper conduct. Such evidence exists in abundance in this case.

Plaintiffs have accurately cited the four factors which a court must consider in determining the appropriateness of dismissal or default as a consequence of discovery abuses.

(1) whether the parties failure to cooperate in discovery is due to wilfulness, bad faith or fault;

(2) whether the adversary was prejudiced by the dismissed party's failure to cooperate in discovery;

(3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and

(4) whether less dramatic sanctions were imposed or considered before dismissal was ordered.

Regional Refuse Systems, Inc. v. Inland Reclamation Co., 842 F.2d 150, 155 (6th Cir. 1988). In this case, I find that the arguments stated in the Brief in Support of Plaintiffs' Motion for Discovery Sanctions are valid, and that the factual bases asserted have been established. I further find that Plaintiffs have been prejudiced by Defendant's wilful and/or negligent failure to produce discovery in a timely and complete fashion. In two earlier Motions to Compel, this court has imposed modest burdens upon Defendant in an effort to permit the prompt and efficient completion of Plaintiffs' discovery. The within Order constitutes yet another attempt to adjust this discovery dispute in a fashion that will permit a fair trial on the merits. Only the fourth factor identified in Regional Refuse is not satisfied. Prior to the instant Motion for Sanctions, and based substantially upon the representations

of defense counsel which now appear to have been unsupportable in fact, the court did not warn Defendant of the potential for default judgment as a consequence of its continued recalcitrance. But for the lack of such warning, I would recommend judgment by default for Plaintiff at this juncture. I view the conduct of Defendant and its attorney as a calculated effort to obstruct and frustrate Plaintiffs' legitimate right to discovery. It is the intent of this Order to admonish Defendant in a clear and unmistakable fashion that its continued obstruction of discovery may result in a default judgment for Plaintiffs.

IT IS THEREFORE ORDERED that, within 21 days of the date of this Order, Defendant shall:

1. Review every response to Plaintiffs' previous written discovery requests of October 2006;
2. Provide full, accurate and complete supplemental responses to each item which is incomplete or inaccurate as presently formulated;
3. Provide, for each request as to which no supplemental data is produced, a declaration under oath describing the measures taken to confirm the accuracy and completeness of the original response;
4. Produce all documents responsive to Plaintiffs' requests in their entirety.

All objections not specifically raised in Defendant's original responses are deemed waived.

IT IS FURTHER ORDERED that discovery shall be reopened, for Plaintiffs only, for a period of 120 days from the date of this Order. All motions relating to discovery must be filed prior to the expiration of the 120 day discovery period.

IT IS FURTHER ORDERED that Plaintiffs shall provide to the court, and to counsel for Defendant, an accounting of time and expenses relating to discovery undertaken to date. Counsel for Plaintiffs shall further serve upon the court and defense counsel an estimate of the portion of fees and costs incurred as a direct consequence of Defendant's obstructive conduct, together with a statement of facts supporting that estimate. Defendant may serve a response brief within 10 days of Plaintiffs' submission, and Plaintiffs may file a Reply within 5 days thereafter. The court will assess a portion of Plaintiffs' reasonable attorney fees and costs against Defendant and its counsel, in equal parts, as a sanction for their failure to meaningfully participate in discovery.

Defendant is hereby placed on notice that any significant violation of its obligation to respond in discovery from this point forward will result in a report and recommendation to the district court judge that Defendant's Answer be stricken and that default judgment be rendered in favor of the Plaintiffs on the issue of liability.

s/Donald A. Scheer

DONALD A. SCHEER

UNITED STATES MAGISTRATE JUDGE

DATED: September 5, 2008

CERTIFICATE OF SERVICE

I hereby certify on September 5, 2008, I electronically filed the foregoing paper with the Clerk of the Court sending notification of such filing to all counsel registered electronically. I hereby certify that a copy of this notice was mailed to the following non-registered ECF participants on September 5, 2008:

s/Terri L. Hackman

Secretary



July, 2008

RE: Comments on Best Practices & Incentivized Change
Re: Mortgage Loan Servicing Industry

The industry is experiencing an historical breakdown in the mortgage banking, credit and capital markets. The system is broken. There is a terrible void in government, policy and industry leadership. The industry is without effective voice. Major industry institutions are falling to its knees. Many assumptions once held as foundational, like the nation-wide stability of home values, and the attendance of market liquidity, has been shattered. Great institutions have been harmed, and millions of consumers have seen their American Dream turned into a nightmare. The fallout of the mortgage meltdown has been felt worldwide.

When something is broken, it must be fixed. Let's face it. Our old form best practices and management controls need a face lift. Part of our old best practices mentality was: If it works, don't fix it. Well this time it's broken and we have to fix it. To fix it this time – we need input and reconciliation from all conflicting and diverse interests. Then we need comprehensive and reconciled incentivized consensus or real change. Not change for the sake of change – we need motivated and collaborative change. A bid for change must come with incentives. All parties must be motivated to act for their benefit, by receiving something of value, something that resolves a problem, and something that guides them to better times going forward. To date the solutions offered by industry and government have failed to be comprehensively incentivized.

Industry leaders, state and federal regulators and enforcement agencies, politicians and interest groups are struggling to develop solutions to this crisis. Change is now necessary to achieve effective solutions. Effective and sensible solutions cannot reveal itself until leadership appears and embraces comprehensive reconciliation that prompts change for all diverse conflicting self interests. Change starts from within but must reconcile with many. Norman Vincent Peale said: ***“Change your thoughts and you change your world.”*** Without effective political and franchised leadership, change will start from within. It starts with leadership with those who step up and have the audacity to offer the 1st draft and/or accept the challenge of debate - leaders like Deb Miller, George Stevenson, Hank Hildebrand, Edward Highland, Michael Gutierrez, Judge Raymond Lyons, William Leroy and organizations like NACTT, Standard & Poor's, Hope Now, ASF, AFN, etc.

Best Practices are a tool of offense and defense. Best Practices should be embraced in every aspect of business; not only as management efficiency “controls” but as “litigation defensive measures” and “risk mitigation devices.” The biggest defensive or check-mate move that the industry can take is to reach deep down into the functional knowledge base of its members; have each develop its respective best practices; and then have the industry comprehensively reconcile those controls and best practices. It is now time for the entire industry, individually and collectively, to step up and put forth its best practices and live or die by them. No one knows better than the functional experts of each practice area.

Although best practices are not mandatory or law, it can set a reasonable standard, act as an operational risk mitigator, an efficiency tool, and a litigation defense device. We need to embrace new best practices not as operational limitations but as “operational certainty controls.” Credit agencies, the ultimate operational arbiter, will separate the weak from the strong by expanded review of best practices controls

including: oversight and quality controls, comprehensive and enterprise risk analysis controls. Standard & Poor's ([S&P](#)) recently announced new best practice guidelines as set forth by Ed Highland. These guidelines ultimately will reshape the 'thinking' and business philosophy of corporate and risk governance models going forward.

One of the first to step up and set out best practices in the related mortgage banking and bankruptcy field was NACFTT. [NACFTT Best Practices](#) should be reviewed and implemented as procedural controls. It is the author's opinion that these best practices as outlined will be the DNA for standardization for comprehensive best practices in the related mortgage loan servicing industry. Standardization is the process of developing and agreeing upon technical standards. A standard is a document that establishes uniform engineering or technical specifications, criteria, methods, processes, or practices. Some standards are mandatory while others are voluntary. Some standards are *de facto*, meaning a norm or requirement which has an informal but dominant status. Some standards are *de jure*, meaning formal legal requirements.

[The AFN](#) and the [Coalition for Mortgage Industry Solutions](#) have agreed to supply the framework to comprehensively reconcile such controls and best practices in its working groups, as the experts – step up and produce outlines of their respective best practice suggestions. The ***Comprehensive Legal Authorities & Practices Task Force*** (CLAPT) will be the forum and repository for such reconciliation (www.cigtaskforce.org). CLAPT will be co-chaired by William Leroy (CEO of AFN) and Richard I. Rydstrom, Chairman of the Coalition for Mortgage Industry Solutions. To effectively reconcile all diverse conflicting self-interests, for the betterment of housing and the economy at large, we must first consider all such interests in a comprehensive forum. The results of such discussions will yield principles-based standards with objectively obtainable safe harbors. New solutions allowable in such a framework, would lessen risks, and enhance certainty for all industry participants, including borrowers.

We must spark a renaissance of innovative best practices and loan, credit enhancement and analytical products; products that are in tune with the industry as a whole. We must have a system of regulation and/or regulators that inspire new product innovation without unreasonable hindrance. The industry can not be responsible for innovation if it is not allowed to innovate. However, we must do so responsibly. We must refine our thinking to yield responsible innovation in a free but responsible open market. By definition our innovations must be more comprehensive in nature. We need to update and refine our regulatory system as well as our product and origination systems. We must refine and innovate. Not primarily from a product-focused orientation, but we must go back to the basics starting with the identification of the need or use for such products, including the exposures that need to be hedged or mitigated, and do so not only in terms of the use for the company, but in terms of the industry as a whole, including the borrower, and the stability of the markets and the assets or instruments intended to support such markets.

I would like to give special recognition to all emerging leaders in the evolving best practices revolution, specifically Deb Miller, George Stevenson, Hank Hildebrand, Edward Highland, Michael Gutierrez, Judge Raymond Lyons, William Leroy and organizations like NACFTT, Standard & Poor's, Hope Now, ASF, and the AFN.

Richard Ivar Rydstrom, Esq., Chairman, Coalition for Mortgage Industry Solutions
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SECURITIZATION OF FINANCIAL ASSETS

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GENERAL BACKGROUND

Mortgage backed (**MBS**) and asset backed (**ABS**) securitizations, or more generally, the securitization of financial assets (for purposes of this outline, **Securitizations**), is a form of structured finance initially developed in the early 1980's in MBS format. It matured in the late 1980's in both MBS and ABS formats and is now a U.S. \$2+ trillion industry in the U.S. alone. In recent years, it has spread to Europe (the largest market outside the U.S.), Latin America and Southeast Asia (primarily Japan), and the worldwide market is estimated to be in excess of U.S.\$4 trillion.

Virtually all forms of debt obligations and receivables (**Receivables**) have been securitized in the U.S.: residential mortgages; home equity loans; commercial loans; manufactured housing loans; timeshare loans; auto, truck, RV, aircraft and boat loans and leases; credit card receivables; trade receivables (just about any type, i.e., airline tickets, telecommunications receivables, toll road receipts); equipment loans and leases; small business loans; student loans; lottery winnings; legal fees from tobacco litigation; and record album receivables (David Bowie and Pavarotti). Although the basic concepts, many based upon tax and accounting effects and desired results, are essentially the same, each asset class presents unique structuring considerations, and the players are constantly looking for ways to improve structures to achieve higher ratings (and thus lower costs) and reduced expenses. Securitizations outside the U.S. have been more limited because of certain impediments (discussed below). In Latin America and the Caribbean the principal asset classes securitized have been home mortgage loans and trade receivables (primarily the "future flow" from trade receivables, discussed in more detail below).

BASIC STRUCTURE

In its simplest form a Securitization involves (1) the sale of a large pool of Receivables by an entity (**Originator**) that creates such Receivables (or purchases the Receivables from entities that create them) in the course of its business to a "bankruptcy remote," special purpose entity (**SPE**) in a manner that qualifies as a "true sale" (vs. a secured loan) and is intended to achieve certain results for accounting purposes, as well as protecting the Receivables from the claims of creditors of the Originator, and (2) the issuance and sale by the SPE (**Issuer**), in either a private placement or public offering, of debt securities (**Securities**) that are subsequently satisfied from the proceeds of and secured by the Receivables. When the Securitization is "closed," funds flow from the purchasers of the Securities (**Investors** - usually banks, insurance companies and pension funds) to the Issuer and from the Issuer to the Originator. All of these transactions occur virtually simultaneously.

In the United States, the Issuer in the basic structure is normally a trust (grantor, owner or business, depending upon the Originator's objectives and the structure), which issues Securities consisting of notes or other forms of commercial paper (**Notes**) or certificates evidencing an undivided ownership in the Issuer (**Certificates**), or both. Frequently, there is also created a

residual interest in the Issuer that entitles the holder (usually the Originator) to funds remaining after all obligations to the holders of the Notes and Certificates (**Securityholders**) have been satisfied. During the term of the Securitization, payments on the Receivables are collected by a servicing entity, usually the Originator (**Servicer**), deposited and invested (in “eligible securities”) in various accounts under the control of a trustee (**Trustee**), and disbursed by the Trustee to the Securityholders in payment of the Securities.

In most instances a “two step” structure is used whereby the Receivables are first transferred by the Originator to an intermediate SPE (**Intermediate SPE**) that is a wholly owned subsidiary of the Originator, but which is only permitted to engage in the business of acquiring, owning and selling the Receivables, has at least one independent director or member and is restricted in various ways from entering into voluntary bankruptcy and other prohibited acts. Frequently, this transfer is, at least in part, a contribution of capital by the Originator to the Intermediate SPE. In the second of the “two steps,” the Intermediate SPE sells the Receivables to the Issuer. This structure is intended to enhance the “true sale” and “bankruptcy remote” characteristics of the transaction. That is, the transaction is structured to insure that the sale of Receivables to the Intermediate SPE is a “true sale” rather than a financing device, which is necessary for the Originator to get the Receivables off its balance sheet and book a profit or loss for accounting purposes and, combined with the second transfer by the Intermediate SPE to the Issuer, an essential part of the required protection from the claims of creditors, including by avoiding consolidation of the Receivables with the assets of the Originator in the event of the bankruptcy of the Originator. Beginning in 1997, a change in accounting rules in the U.S. pursuant to FAS 140¹ has virtually mandated the use of the two step structure to obtain an “isolation of assets” and, therefore, a “true sale,” whenever the Originator retains an interest in the Securities issued by the Issuer (usually for credit enhancement purposes, as discussed below). However, it should be noted that in some cases the Originator does not want a true sale to occur (and book a gain or loss) and deliberately structures the transaction as a secured loan or under provisions of the IRC that will result in a taxable transaction.

The above description of the Securitization structure is very basic. Actual structures involve many more elements and participants.² The classes of assets also result in different and, in many cases, more complex structures. For example, in securitizing motor vehicle leases, to avoid the very high costs of multiple transfers of titles to the vehicles, a new structure was developed several years ago (in which the author of this outline participated) where the vehicles are initially titled in and the leases made through an “origination” or “titling” trust and the trust then issues, in a series of complex transfers to other trusts, limited partnerships and limited liability companies (**LLCs**), units and sub-units of beneficial interest in the trust which are actually the “receivables” that are securitized, the Securityholders having no interest, beneficial or otherwise, in the underlying vehicles or leases.

¹ Statement of Financial Accounting Standards No. 140, *Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities*, issued by the Financial Accounting Standard Board of the Financial Accounting Standards Foundation (issued originally June, 1996 as FAS 125 and effective after December 31, 1996).

² Further, as of the date of this Article the FASB is considering new interpretations of FAS 140 that would require changes in the structure of some securitizations. Such matters are beyond the scope of this Article.

ADVANTAGES

The Securitization structure is intended to provide significant advantages to Originators, such as:

1. The Receivables are moved “off balance sheet” and replaced by a cash equivalent (less expenses of the Securitization), thus improving the Originator’s balance sheet and resulting in gain or loss, which itself is usually an intended, beneficial consequence.³

2. The Originator does not have to wait until it receives payment of the receivables (or, in a “future flow” securitization, until it even generates them) to obtain funds to continue its business and generate new Receivables. In many cases this is essential, and a role otherwise filled by more traditional methods of financing, including factoring (in some ways Securitization is a very sophisticated form of factoring). This is more significant when the Receivables are relatively long term, such as with real property mortgages, auto loans, student loans, etc., and not as significant with short term Receivables, such as trade and credit card Receivables.

3. The Securities issued in the Securitization are more highly rated by participating rating agencies (because of the isolation of the Receivables in a “bankruptcy remote” entity), thus reducing the cost of funds to the Originator when compared to traditional forms of financing. In instances where the Receivables bear interest, there is usually a significant spread between the interest paid on the Securities and the interest earned on the Receivables. Ultimately, the Originator receives the benefit of the spread. In addition, the Originator usually acts as Servicer and receives a fee for its services.

4. In non-revolving structures, and those with fixed interest rate Receivables, assets and related liabilities can be matched, eliminating the need for hedges (although in most transactions, hedges are required).

5. Because the Originator usually acts as Servicer and there is normally no need to give notice to the obligors under the Receivables, the transaction is transparent to the Originator’s customers and other persons with whom it does business. This is frequently not the case in foreign securitizations.

These advantages are tempered by the fact that the Securitization structure results in higher costs than traditional forms of financing, but this is more than offset by the advantages. However, these higher costs mean that the value of a pool of Receivables must be significant to justify Securitization. Most Securitization offerings are in excess of U.S.\$100,000,000, a number greater than U.S.\$1 billion, and some in the several billions of dollars. In fact, many Securitizations at the low end are not structured by the Originators, but use “**conduit**” Issuers maintained by banks and investment bankers. In these securitizations, Originators sell Receivables to conduits that aggregate Receivables from multiple Originators (even different forms of Receivables) to create large pools to support the Securities issued by the Issuer-conduit. Because the operators of the conduits keep a bigger share of the “pie,” an Originator is

³ The concept of “off balance sheet” refers to the intended result that after the securitization of the Receivables they will not be consolidated for financial accounting purposes on the balance sheet of the Originator. Making that determination has become more complex since the Financial Accounting Standard Board issued *Interpretation No. 46* in early 2003. Such considerations are beyond the scope of this Article.

frequently better off structuring a Securitization that uses its own Issuer in a “term” Securitization when its pool of Receivables is sufficiently large. This doesn’t always follow, however, particularly when there is a steady need for cash and a series of more frequent, smaller conduit securitizations may meet that need better than less frequent, larger term securitizations.

It has also become fairly common for Originators to use conduits as “warehouse” facilities. That is, Receivables are sold to a conduit for all of the reasons described above and are later repurchased and included in a pool of Receivables for a term securitization. In this manner, an Originator can accumulate Receivables for inclusion in a substantial term securitization while still moving the Receivables off balance sheet (if desired) and obtaining funds for its business. Of course, as the conduit has a fiduciary duty to its investors, the Receivables must be repurchased at fair market value, and to protect the “true sale” there is no option or other right to repurchase.

The Securitization structure described herein and in the “Anatomy of a Securitization,” attached as **Appendix A**, is for a term securitization. In a conduit Securitization, the structure stops as far as the Originator is concerned when the ISPE sells the Receivables to the conduit (rather than to an Issuer), although in most cases the Originator acts as Servicer, as described below. Further, there is no PPM, Offering Circular or Prospectus (as described in the Anatomy of a Securitization).

There has also developed a form of securitized lending that is briefly described in attached **Appendix B**. This structure has been found useful for smaller pools of Receivables where the cost of a term or even conduit structure is prohibitive, and can even provide better cost/benefit results with a very substantial pool of Receivables depending on the nature of the Receivables and the needs of the Originator. This is a structure that should be considered by most Originators when they do their preliminary analysis.

MAJOR PLAYERS

The major “players”⁴ in the securitization game, all of whom require legal representation to some degree, are as follows (this terminology is typical, but different terms are used; for example the “originator” is often referred to as the “issuer” or “seller”):

Originator - the entity that either generates Receivables in the ordinary course of its business, or purchases and assembles portfolios of Receivables (in that sense, not a true “originator”). Its counsel works closely with counsel to the Underwriter/Placement Agent and the Rating Agencies in structuring the transaction and preparing documents and usually gives the most significant opinions. It also retains and coordinates local counsel in the event that it is not admitted in the jurisdiction where the Originator’s principal office is located, and in situations where significant Receivables are generated and the security interests that secure the Receivables are governed by local law rather than the law of the state where the Originator is located.

Issuer - the special purpose entity, usually an owner trust (but can be a grantor, business or even common law trust, or a corporation, partnership or fund), created pursuant to a

⁴ In describing the players, it is necessary to refer to certain documents and structural elements that are not fully described herein. These are described in greater detail in the attached “Anatomy of a Securitization.”

Trust Agreement or Pooling and Servicing Agreement between the Originator (or in a two step structure, the Intermediate SPE) and the Trustee, that issues the Securities and avoids taxation at the entity level. This can create a problem in foreign Securitizations in civil law countries where the trust concept does not exist (see discussion below under “Foreign Securitizations”).

Trustees - usually a bank or other entity authorized to act in such capacity. The Trustee, appointed pursuant to a Trust Agreement or Pooling and Servicing Agreement, holds the Receivables, receives payments on the Receivables and makes payments to the Securityholders. In many structures there are two Trustees. For example, in an Owner Trust structure, which is most common, the Notes, which are pure debt instruments, are issued pursuant to an Indenture between the Trust and an Indenture Trustee, and the Certificates, representing undivided interests in the Trust (although structured and treated as debt obligations), are issued by the Owner Trustee. The Issuer (the Trust) owns the Receivables and grants a security interest in the Receivables to the Indenture Trustee to secure payment of the Notes. Counsel to the Trustee provides the usual opinions on the Trust as an entity, the capacity of the Trustee, etc.

Investors - the ultimate purchasers of the Securities. Usually banks, insurance companies, retirement funds and other “qualified investors.” In some cases, the Securities are purchased directly from the Issuer, but more commonly the Securities are issued to the Originator or Intermediate SPE as payment for the Receivables and then sold to the Investors, or in the case of an underwriting, to the Underwriters.

Underwriters/Placement Agents - the brokers, investment banks or banks that sell or place the Securities in a public offering or private placement, frequently retaining portions for their own account. The Underwriters/Placement Agents usually play the principal role in structuring the transaction, frequently seeking out Originators for Securitizations, and their counsel (or counsel for the lead Underwriter/Placement Agent) is usually, but not always, the primary document preparer, generating the offering documents (private placement memorandum or offering circular in a private placement; registration statement and prospectus in a public offering), purchase agreements, trust agreement, custodial agreement, etc. Such counsel also frequently opines on securities and tax matters.

Custodian - an entity, usually a bank, that actually holds the Receivables as agent and bailee for the Trustee or Trustees.

Rating Agencies - Moody’s, S&P and Fitch. In Securitizations, the Rating Agencies frequently are active players that enter the game early and assist in structuring the transaction. In many instances they require structural changes, dictate some of the required opinions and mandate changes in servicing procedures.

Servicer - the entity that actually deals with the Receivables on a day to day basis, collecting the Receivables and transferring funds to accounts controlled by the Trustees. In most transactions the Originator acts as Servicer.

Backup Servicer - the entity (usually in the business of acting in such capacity, as well as a primary Servicer when the Originator does not fill that function) that takes over the event that something happens to the Servicer. Depending upon the quality of the Originator/Servicer, the need and significance of the Backup Servicer may be important. In some cases the Trustee retains the Backup Servicer to perform certain monitoring functions on a continuing basis.

CREDIT ENHANCEMENT

Credit enhancements are required in every Securitization. The nature and amount depends on the risks of the Securitization as determined by the Rating Agencies, Underwriters/Placement Agents and Investors. They are intended to reduce the risks to the Investors and thereby increase the rating of the Securities and lower the costs to the Originator. Typical forms of credit enhancement are:

1. Over-collateralization - transferring to the Issuer, Receivables in amounts greater than required to pay the Securities if the proceeds of the Receivables were received as anticipated). The amount of over-collateralization (usually 5% to 10%) is determined by the Rating Agencies and the Underwriters/Placement Agents, and this in turn will depend upon the quality of the Receivables, other credit enhancement that may be available, the risk of the structure (such as the possible bankruptcy of the Originator/Servicer), the nature and condition of the industry in which the Receivables are generated, general economic conditions and, in the case of foreign-based Securitizations, the "Sovereign risk" (see discussion below under "Foreign Securitizations"). If all goes well, it is repurchased at the end of the transaction (see the attached Appendix entitled "Anatomy of a Securitization") or returned as part of the residual interest. This form of credit enhancement is required in virtually all Securitizations.

2. Senior/subordinated structure - issuance of subordinated or secondary classes of Securities, which are lower-rated (and bear higher interest rates) and sold to other Investors or held by the Originator. In the event of problems, the higher rated (senior) Securities receive payments prior to the lower rated (subordinated) Securities. It is not uncommon for there to be a number of classes of Securities that are each subordinated to the more highly rated, resulting in a complex "waterfall" of payments of principal and interest. In the common structure described above, senior and subordinated classes of Notes would be paid, in order of priority, prior to classes of Certificates, and Certificates prior to any residual interest in the Issuer, and subordinated Securities may be retained by the Originator and pledged for the benefit of the Trust (and, therefore, the Investors). This form of credit enhancement has become routine, but cannot be used in a grantor trust structure, which is why the owner trust has become most common.

3. Early amortization - if certain negative events occur, all payments from Receivables are applied to the more senior securities until paid. This is very common.

4. Cash collateral account or reserve fund - the Originator deposits funds at closing, or funds are taken from excess spread and deposited until the agreed amount is reached, in an account with Trustee to be used if proceeds from Receivables are not sufficient. Adjustable depending upon events. May be in the form of a demand "loan" by the Originator to the account.

5. Security bond - guarantee (or wrap) of payments due on the Securities. Issued by AAA-rated monoline insurance companies (if available).

6. Liquidity provider - in effect, a guarantee by the Originator (or its parent) or another entity of all or a portion of payments due on the Securities.

7. Letter of credit (for portion of amounts due on Securities) - not used much any more because of costs. These were common in the late 1980's when issued by Japanese banks at low rates.

LEGAL OPINIONS

Legal opinions are very important documents in every Securitization and result in considerable negotiations among counsel for the Originator, Underwriter/Placement Agent and Rating Agencies. The opinions given by the Originator's counsel are the most extensive, frequently running 50 or more pages because of the need for reasoned opinions, as courts have not ruled upon many of the underpinnings of the Securitization structure. In addition to the usual opinions regarding due organization, good standing, corporate power, litigation, etc, others deal with the validity and priority of security interests, true sale vs. secured loan, substantive consolidation in bankruptcy, fraudulent transfer, tax consequences and compliance with securities laws and ERISA. Opinions are also given by counsel for the Trustees and frequently by counsel to the Originator or Underwriter/Placement Agent in regard to tax and securities matters. As indicated above, local counsel opinions may be required as well.

For reasons of structuring and such opinions, in addition to attorneys who are experienced in Securitizations, expertise is required in the areas of securities law, tax law, bankruptcy and the UCC. Expertise is also required in many instances in the substantive laws relating the business of the Originator and the nature of the Receivables.

FOREIGN SECURITIZATIONS

This Securitization structure has presented problems in civil law-based countries, where the concepts of trust law have traditionally not existed. In addition, in many countries there are concerns about government intervention in the international flow of funds and other aspects of Securitizations, the ability of the Servicer and Trustee to enforce the collection of Receivables in a commercially reasonable manner, additional tax burdens, the unpredictable nature of courts and government instability. These are known as the "sovereign risk" and have either completely blocked in-country Securitizations or have resulted in ratings of the Securities no higher than the rating of the country. As a result, many Securitizations, particularly those involving Latin American originated Receivables, have used a structure where the Receivables are transferred to offshore entities ("offshore" may be in the U.S.) and the entire transaction takes place outside the country of origin.

This situation continues to prevail in a number of countries, but many have adopted legislation to permit the limited use of trusts or the creation of special purpose corporations to serve the same purpose. However, even where such legislation has been adopted, sovereign risk issues may prevent a Securitization that is able to take advantage of international money markets, particularly outside of Western Europe. Further, such legislation has often been incomplete or flawed.

Nevertheless, economic and financial market conditions in many countries have provided strong incentives for Originators and the non-US market is growing every year, although the Asian and South American markets are very difficult at this time. Moreover, because of a lack of experienced underwriters, trustees and attorneys in most countries, many such service providers have expanded into Europe and Latin America.

In Latin America, one of the most common asset classes is "future flow" receivables. In this type of Securitization, involving trade receivables of short duration, only a relatively small amount of existing Receivables are transferred to the Issuer and the Investors purchase Securities with a much higher face value based upon the subsequent transfer by the Originator

to the Issuer of a “future flow” of Receivables to be generated by the Originator with the proceeds of the Securitization. In effect, the Originator receives payment for Receivables that do not exist, and will only come into existence through the future conduct of the Originator’s business. Obviously, this can only be accomplished by Originators with strong track records and engaged in businesses with a high likelihood of continuing at profitable levels. In addition, it usually involves foreign Receivables that can readily be transferred and collected offshore.

Appendix A

ANATOMY OF A SECURITIZATION

All terms herein have the same meanings used above in “Securitization of Financial Assets”. It should be noted, however, that while the nomenclature used herein is common, different terms are also used and some terms may be used with different meanings. For example, the “Originator” is often referred to as the “Issuer” or “Seller,” and is in fact deemed to be the “Issuer” by the SEC for registration purposes.

PLAYERS

Originator -	the owner of the Receivables prior to the Securitization; either the entity that originated the Receivables or that acquired them from originators.
ISPE -	the intermediate SPE, a wholly owned corporate or limited liability company subsidiary of the Originator, to which the Originator initially sells or contributes the Receivables in a two-step “true sale” transaction, such as described in FAS 140; if U.S. based it is typically formed in the State of Delaware, it must be qualified in the jurisdictions where it will conduct business.
Issuer -	the SPE, usually a trust (grantor, owner or business), that purchases the Receivables to hold during the Securitization and issues the Securities, directly or indirectly; a pass-through tax entity.
Trustee -	the entity that acts as Trustee of the Issuer – in a typical owner trust structure, called the “Owner” Trustee.
Indenture Trustee -	in an owner trust structure, the Trustee appointed under the Indenture created pursuant to the Issuer Trust Agreement.
Custodian -	the entity that holds the Receivables as agent for the Trustee and, in an owner trust structure, a security interest in the Receivables for the Owner Trustee.
Servicer -	the entity that services the Receivables on behalf of the Issuer and the Trustee (and Indenture Trustee, if there is one); usually the Originator.
Backup Servicer -	the entity that assumes the duties of the Servicer in the event that the Servicer is removed or otherwise cannot act; may also provide services on behalf of the Issuer and the Trustee (and Indenture Trustee, if there is one) prior to such assumption. May not be required, depending on strength and past performance of the Servicer.
Investors -	the ultimate purchasers of the Offered Securities (as opposed to the Securities retained by the ISPE and/or Originator as credit enhancement).

- Underwriters/ - Placement Agents** - the brokers, investment banks or banks that sell or place the Offered Securities in a private placement or public offering (the Securitization described herein is a private placement).
- Rating Agencies** - Moody's, S&P and Fitch; usually two rate the Offered Securities.
- DTC** - The Depository Trust Company; as the Securities are usually book-entry only (unless certain events occur), the DTC holds global Notes, through its nominee, Cede & Co., and communicates information to and receives payments on behalf of the beneficial owners of the Securities. Not used in private placements.

SUMMARY OF TRANSACTIONS AND DOCUMENTS

Bear in mind that everything happens essentially simultaneously. Most of the principal documents are dated as of the same date, usually the first day of the month in which the Securitization closes. This simplifies references and avoids conflicts with intermediate acts, such as the creation of the Issuer. Documents relating to various elements of the structure are indicated in **bold**. Nomenclature in actual structure and documents may change; terms are those used in typical Securitizations.

1. The Underwriters/Placement Agents and Rating Agencies conduct due diligence of the Originator, the Receivables and the servicing procedures of the Originator. Frequently, counsel to these parties participate. If counsel to the Originator has not represented the Originator to any extensive degree, it may also have to conduct due diligence.
2. The Underwriter/Placement Agent and the Originator (and their counsel) structure the Securitization (in many cases the Rating Agencies will participate).
3. Counsel to the Originator and Underwriters/Placement Agents prepare drafts of the transaction documents. Usually, counsel to the Underwriters/Placement Agents is the primary drafter, and counsel to the Originator reviews and comments, although in some cases counsel to the Originator assumes the primary role. In addition, counsel to the Custodian, Rating Agencies and Backup Servicer usually draft the principal documents to be signed by their clients. It is typical that these documents are worked on right up to the closing, but they should be in essentially final substantive form prior to the issuance of the Preliminary **Private Placement Memorandum** (or **PPM**) or **Offering Circular** (recently, the latter has become the term preferred by the Underwriters/Placement Agents) in a private placement, or a **Prospectus** in a public offering.
4. ISPE is formed. Its **Certificate of Incorporation** and **Bylaws** (or if a limited liability company, its **Certificate of Formation** and **Limited Liability Company Agreement**) are specialized and must contain certain provisions to insure its bankruptcy remote character. Part of this is the appointment of at least one independent director (or member in an LLC) with no relationship to the Originator. There are professional independent directors that are typically retained.
5. The Originator and ISPE enter into **Underwriting** or **Private Placement Agreements** with the Underwriters/Placement Agents, and **Rating Agency Agreements** with the Rating Agencies.

6. Based upon information provided by the Originator and its accountants, and its own due diligence, counsel to Underwriters/Placement Agents or the Originator, as the case may be, with the Underwriters/Placement Agents and the Originator, prepares the Preliminary Private Placement Memorandum or Offering Circular for distribution to potential investors, and in some cases a separate **Term Sheet** is used as well. The final Private Placement Memorandum or Offering Circular, or the Prospectus is issued just prior to the closing.
7. The Issuer is formed pursuant to a **Trust Agreement** or **Pooling and Servicing Agreement** between ISPE and the [Owner] Trustee and, if a business trust, the filing of an appropriate **Certificate of Trust** with the Secretary of State of the state of formation (usually Delaware). The Issuer is given a name, such as “[Originator] [Receivables] Owner Trust 2005-1.”
8. If Notes (see 14, below) are to be sold, an **Indenture** is created between the Issuer and the Indenture Trustee. Pursuant to the Indenture, the Trust will grant a security interest in the Receivables to the Indenture Trustee.
9. The Originator sells the Receivables to ISPE pursuant to a **[Receivables] Purchase Agreement**. The Originator will make comprehensive representations and warranties to and limited repurchase agreements with ISPE and its successors and assigns. However, to insure a true sale, the Originator’s only obligations in regard to the Receivables are to repurchase or replace Receivables that do not meet the representations and warranties; it does not warrant the performance of the Receivables or guarantee payment of the Securities. But see the limited right of the Originator/Servicer to repurchase the Receivables, below. Because there is very little judicial authority as to Securitization true sale transactions, the Originator also grants a “backup” security interest in the Receivables to ISPE in the event a court should hold that the transaction is in fact a secured loan.
10. ISPE sells the Receivables to the Issuer pursuant to the **Sale [Transfer] and Servicing Agreement** (or **Pooling and Servicing Agreement**, if creates the trust) among the ISPE, the Issuer, the Servicer and the [Owner] Trustee. The Servicer will agree to service the Receivables pursuant to the Sale [Pooling] and Servicing Agreement and, assuming the Originator is also the Servicer, make representations and warranties as to the Receivables substantially the same as in the [Receivables] Purchase Agreement. In addition, if the Backup Servicer is significant to the transactions, it may also be a party to the Sale and Servicing Agreement, or there may a separate **Back-Up Servicing Agreement**. The ISPE also grants a backup security interest in the Receivables to the Issuer. The Originator/Servicer usually has the right (and is expected) to purchase the remaining Receivables when the face amount remaining is equal to or less than 10% of their original face amount (5% as to some asset classes). The Sale and Servicing Agreement and the Offering Circular are the most complex and important transaction documents. Both describe the Securities and the “waterfall” of payments in detail.
11. Pursuant to the **Custodian Agreement** among the Custodian, the Servicer, ISPE and the Indenture Trustee, the Receivables will be delivered by the Originator, on behalf of ISPE, to the Custodian to hold on behalf of the Indenture Trustee.

12. There will frequently be, if the structure provides for multiple trustees, an **Administration Agreement** between the Servicer or an affiliate, as Administrator, and the Owner Trustee, for the purpose of performing most of the obligations of the Owner Trustee.
13. The Offered Securities will be rated and priced by the Rating Agencies.
14. The Indenture Trustee will issue to the ISPE in partial consideration for the Receivables, pursuant to the Indenture, Notes or several tranches of **Notes**, with different degrees of priority of payment and other attributes. The most subordinated may be retained by the ISPE or the Originator as a credit enhancement. Actually, global Notes (and Certificates as described in the next paragraph) are issued and delivered to DTC to be distributed by DTC to and to hold on behalf of the beneficial owners pursuant to the **Letter of Representations** among DTC, the Issuer, the Owner Trustee and the Indenture Trustee.
15. The Issuer may also issue **Certificates**, representing undivided ownership interests in the Issuer, to the Investors, and the residual interest in the Issuer to the ISPE in payment of the balance of the consideration for the Receivables, all subordinated to the Notes. If a series, the Certificates will also have different degrees of payment and priority, and may also be retained by ISPE or the Originator as a credit enhancement. In some transactions only Certificates are issued, and in that case there is no Indenture or Indenture Trustee and Notes are not issued.
16. The ISPE will sell the Offered Securities (the Notes and Certificates not retained by ISPE or the Originator) to the Underwriters for resale to Investors, or directly to Investors in a private placement by the Placement Agents pursuant to **Note and Certificate Purchase Agreements**.
17. Payments on the Receivables will be received by the Servicer and, after the deduction of permitted servicing fees and expenses of the Servicer, paid into a Collection Account controlled by the Indenture Trustee and invested in eligible securities. When payments on the Securities are due, the necessary funds may be paid directly from the Collection Account or be transferred into Note and Certificate Distribution Accounts for such purpose. A Lock Box Account may also be required. These accounts must be created with appropriate depositories, typically with the Owner Trustee. Such payments are distributed in the order of priority pursuant to a "waterfall." Upon the occurrence of specific "trigger" events, such as insufficient funds to pay the primary waterfall, the available funds are distributed pursuant to an alternative waterfall with a different order of priority, designed to first protect the fees and expenses of trustees and other necessary costs to maintain the structure and then the amounts due on the Securities in their order of priority.
18. Other documents:

Directors resolutions, as appropriate.

UCC Financing Statements evidencing the sales and grants of security interests.

Opinions of counsel for the Originator/Servicer and ISPE, the Issuer, the [Owner] Trustee, the Indenture Trustee (if any) and the Backup Servicer (if any), covering,

among other things (depending upon the party), organization, good standing, authorization, non-breach, no litigation, enforceability, true sale, security interests in the Receivables, tax consequences to holders of the Offered Securities, compliance with securities laws and ERISA, accuracy of the Private Placement Memorandum/Offering Circular, non-consolidation, treatment of the Notes and Certificates as debt, etc.

Officer's Certificates as to Articles, Bylaws, incumbency and other matters required by the agreements.

Officer's Certificates to support assumptions in legal opinions.

Various **certifications; designations; receipts as to Receivables and related files, and funds; wiring instructions; authentications of the Notes and Certificates, etc.**

Appendix B

Securitized Loan Structure

This is essentially hypothecation financing, but where the Receivables pledged as security are isolated in an SPE, which in turn becomes the borrower. In its most basic form, the Originator (or multiple, affiliated Originators) transfers the Receivables to its wholly-owned SPE in a “true” sale, and the SPE then uses the Receivables as collateral for a loan from a bank-related lender and participating liquidity banks (the bank itself usually acting as agent for all the lenders). In turn, the lenders may, and usually do, securitize the loan, sell participations to investors, etc. in order to obtain the funds for the loan, but in most cases the Originator is not directly involved in such transactions. The structure of the securitized loan, required legal opinions and the like, however, are dictated by the structure and requirements of the ultimate securitization facility.

The loan can be for a fixed amount, which would be typical for long term Receivables, or on a revolving basis for short term Receivables, with the Originator transferring new Receivables to the SPE-borrower as existing Receivables are paid and the outstanding balance of the loan fluctuating with the amount of the unpaid Receivables owned by the SPE-borrower.

The loan proceeds are used to pay the Originator the purchase price for the Receivables or are distributed to the Originator, depending on whether the Receivables are sold or contributed as capital by the Originator to the SPE-borrower. LLCs are commonly used for SPEs as they facilitate this process. As in a securitization, the Originator typically acts as Servicer, including after the loan itself is securitized by the lender. Among the issues that need to be addressed are the ratio of the loan or revolving advances to the face amount of the Receivables, and other forms of credit enhancement, such as a reserve fund.

The revolving facility structures are typically for terms of one year and renewable annually. They may be amended in the interim or upon renewal to, among other things, adjust the maximum amount of the loan and add other affiliates of the initial Originators as additional Originators.

This is usually a simpler and less-expensive structure than a term or conduit securitization in terms of legal and other structuring fees, but perhaps not in net cost. The front end of the structure is basically identical to the first stage of a term securitization, and thus isolates the receivables for bankruptcy purposes, which is why the funding costs are lower than in traditional warehouse or factoring transactions.

WHERE'S THE NOTE, WHO'S THE HOLDER: ENFORCEMENT OF PROMISSORY NOTE SECURED BY REAL ESTATE

HON. SAMUEL L. BUFFORD
UNITED STATES BANKRUPTCY JUDGE
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES, CALIFORNIA

(FORMERLY HON.) R. GLEN AYERS
LANGLEY & BANACK
SAN ANTONIO, TEXAS

AMERICAN BANKRUPTCY INSTITUTE
APRIL 3, 2009
WASHINGTON, D.C.

WHERE'S THE NOTE, WHO'S THE HOLDER

INTRODUCTION

In an era where a very large portion of mortgage obligations have been securitized, by assignment to a trust indenture trustee, with the resulting pool of assets being then sold as mortgage backed securities, foreclosure becomes an interesting exercise, particularly where judicial process is involved. We are all familiar with the securitization process. The steps, if not the process, is simple. A borrower goes to a mortgage lender. The lender finances the purchase of real estate. The borrower signs a note and mortgage or deed of trust. The original lender sells the note and assigns the mortgage to an entity that securitizes the note by combining the note with hundreds or thousands of similar obligation to create a package of mortgage backed securities, which are then sold to investors.

Unfortunately, unless you represent borrowers, the vast flow of notes into the maw of the securitization industry meant that a lot of mistakes were made. When the borrower defaults, the party seeking to enforce the obligation and foreclose on the underlying collateral sometimes cannot find the note. A lawyer sophisticated in this area has speculated to one of

the authors that perhaps a third of the notes “securitized” have been lost or destroyed. The cases we are going to look at reflect the stark fact that the unnamed source’s speculation may be well-founded.

UCC SECTION 3-309

If the issue were as simple as a missing note, UCC §3-309 would provide a simple solution. A person entitled to enforce an instrument which has been lost, destroyed or stolen may enforce the instrument. If the court is concerned that some third party may show up and attempt to enforce the instrument against the payee, it may order adequate protection. But, and however, a person seeking to enforce a missing instrument must be a person entitled to enforce the instrument, and that person must prove the instrument’s terms and that person’s right to enforce the instrument. §3-309 (a)(1) & (b).

WHO’S THE HOLDER

Enforcement of a note always requires that the person seeking to collect show that it is the holder. A holder is an entity that has acquired the note either as the original payor or transfer by endorsement of order paper or physical possession of bearer paper. These requirements are set out in Article 3 of the Uniform Commercial Code, which has been adopted in every state, including Louisiana, and in the District of Columbia. Even in bankruptcy proceedings, State substantive law controls the rights of note and lien holders, as the Supreme Court pointed out almost forty (40) years ago in *United States v. Butner*, 440 U.S. 48, 54-55 (1979).

However, as Judge Bufford has recently illustrated,²⁰ in one of the cases discussed below, in the bankruptcy and other federal courts, procedure is governed by the Federal Rules of Bankruptcy and Civil Procedure. And, procedure may just have an impact on the issue of “who,” because, if the holder is unknown, pleading and standing issues arise.

BRIEF REVIEW OF UCC PROVISIONS

Article 3 governs negotiable instruments - it defines what a negotiable instrument is and defines how ownership of those pieces of paper is transferred. For the precise definition, see § 3-104(a) (“an unconditional promise or order to pay a fixed amount of money, with or without interest”) The instrument may be either payable to order or bearer and payable on demand or at a definite time, with or without interest.

Ordinary negotiable instruments include notes and drafts (a check is a draft drawn on a bank).

See § 3-104(e).

Negotiable paper is transferred from the original payor by negotiation. §3-301. “Order paper” must be endorsed; bearer paper need only be delivered. §3-305. However, in either case, for the note to be enforced, the person who asserts the status of the holder must be in possession of the instrument. See UCC § 1-201 (20) and comments.

The original and subsequent transferees are referred to as holders. Holders who take with no notice of defect or default are called “holders in due course,” and take free of many defenses. See §§ 3-305(b).

The UCC says that a payment to a party “entitled to enforce the instrument” is sufficient to extinguish the obligation of the person obligated on the instrument. Clearly, then, only a holder - a person in possession of a note endorsed to it or a holder of bearer paper - may seek satisfaction or enforce rights in collateral such as real estate.

NOTE: Those of us who went through the bank and savings and loan collapse of the 1980’s are familiar with these problems. The FDIC/FSLIC/RTC sold millions of notes secured and unsecured, in bulk transactions. Some notes could not be found and enforcement sometimes became a problem. Of course, sometimes we are forced to repeat history. For a recent FDIC case, see *Liberty Savings Bank v. Redus*, 2009 WL 41857 (Ohio App. 8 Dist.), January 8, 2009.

THE RULES

Judge Bufford addressed the rules issue this past year. See *In re Hwang*, 396 B.R. 757 (Bankr. C. D. Cal. 2008). First, there are the pleading problems that arise when the holder of the note is unknown. Typically, the issue will arise in a motion for relief from stay in a bankruptcy proceeding.

According F.R.Civ. Pro. 17, “[a]n action must be prosecuted in the name of the real party in interest.” This rule is incorporated into the rules governing bankruptcy procedure in several ways. As Judge Bufford has pointed out, for example, in a motion for relief from stay, filed under F.R.Bankr.Pro. 4001 is a contested matter, governed by F. R. Bankr. P. 9014, which makes F.R. Bankr. Pro. 7017 applicable to such motions. F.R. Bankr. P. 7017 is, of course, a restatement of F. R. Civ. P. 17. In *re Hwang*, 396 B.R. at 766. The real party in interest in a federal action to enforce a note, whether in bankruptcy court or federal district court, is the owner of a note. (In securitization transactions, this would be the trustee for the “certificate holders.”) When the actual holder of the note is unknown, it is impossible - not difficult but

impossible - to plead a cause of action in a federal court (unless the movant simply lies about the ownership of the note). Unless the name of the actual note holder can be stated, the very pleadings are defective.

STANDING

Often, the servicing agent for the loan will appear to enforce the note. Assume that the servicing agent states that it is the authorized agent of the note holder, which is "Trust Number 99." The servicing agent is certainly a party in interest, since a party in interest in a bankruptcy court is a very broad term or concept. See, e.g., *Greer v. O'Dell*, 305 F.3d 1297, 1302-03 (11th Cir. 2002). However, the servicing agent may not have standing: "Federal Courts have only the power authorized by Article III of the Constitutions and the statutes enacted by Congress pursuant thereto. ... [A] plaintiff must have Constitutional standing in order for a federal court to have jurisdiction." *In re Foreclosure Cases*, 521 F.Supp. 3d 650, 653 (S.D. Ohio, 2007) (citations omitted).

But, the servicing agent does not have standing, for only a person who is the holder of the note has standing to enforce the note. See, e.g., *In re Hwang*, 2008 WL 4899273 at 8.

The servicing agent may have standing if acting as an agent for the holder, assuming that the agent can both show agency status and that the principle is the holder. See, e.g., *In re Vargas*, 396 B.R. 511 (Bankr. C.D. Cal. 2008) at 520.

A BRIEF ASIDE: WHO IS MERS?

For those of you who are not familiar with the entity known as MERS, a frequent participant in these foreclosure proceedings:

MERS is the "Mortgage Electronic Registration System, Inc. "MERS is a mortgage banking 'utility' that registers mortgage loans in a book entry system so that ... real estate loans can be bought, sold and securitized, just like Wall Street's book entry utility for stocks and bonds is the Depository Trust and Clearinghouse." Bastian, "Foreclosure Forms", State. Bar of Texas 17th Annual Advanced Real Estate Drafting Course, March 9-10, 2007, Dallas, Texas. MERS is enormous. It originates thousands of loans daily and is the mortgagee of record for at least 40 million mortgages and other security documents. *Id.*

MERS acts as agent for the owner of the note. Its authority to act should be shown by an agency agreement. Of course, if the owner is unknown, MERS cannot show that it is an

authorized agent of the owner.

RULES OF EVIDENCE - A PRACTICAL PROBLEM

This structure also possesses practical evidentiary problems where the party asserting a right to foreclose must be able to show a default. Once again, Judge Bufford has addressed this issue. At *In re Vargas*, 396 B.R. at 517-19. Judge Bufford made a finding that the witness called to testify as to debt and default was incompetent. All the witness could testify was that he had looked at the MERS computerized records. The witness was unable to satisfy the requirements of the Federal Rules of Evidence, particularly Rule 803, as applied to computerized records in the Ninth Circuit. See *id.* at 517-20. The low level employee could really only testify that the MERS screen shot he reviewed reflected a default. That really is not much in the way of evidence, and not nearly enough to get around the hearsay rule.

FORECLOSURE OR RELIEF FROM STAY

In a foreclosure proceeding in a judicial foreclosure state, or a request for injunctive relief in a non-judicial foreclosure state, or in a motion for relief proceeding in a bankruptcy court, the courts are dealing with and writing about the problems very frequently.

In many if not almost all cases, the party seeking to exercise the rights of the creditor will be a servicing company. Servicing companies will be asserting the rights of their alleged principal, the note holder, which is, again, often going to be a trustee for a securitization package. The mortgage holder or beneficiary under the deed of trust will, again, very often be MERS.

Even before reaching the practical problem of debt and default, mentioned above, the moving party must show that it holds the note or (1) that it is an agent of the holder and that (2) the holder remains the holder. In addition, the owner of the note, if different from the holder, must join in the motion.

Some states, like Texas, have passed statutes that allow servicing companies to act in foreclosure proceedings as a statutorily recognized agent of the noteholder. See, e.g., Tex. Prop. Code §51.0001. However, that statute refers to the servicer as the last entity to whom the debtor has been instructed to make payments. This status is certainly open to challenge. The statute certainly provides nothing more than prima facie evidence of the ability of the servicer to act. If challenged, the servicing agent must show that the last entity to communicate instructions to the debtor is still the holder of the note. See, e.g., HSBC Bank,

N.A. v. Valentin, 2l N.Y. Misc. 3d 1123(A), 2008 WL 4764816 (Table) (N.Y. Sup.), Nov. 3, 2008. In addition, such a statute does not control in federal court where Fed. R. Civ. P. 17 and 19 (and Fed. R. Bankr. P. 7017 and 7019) apply.

SOME RECENT CASE LAW

These=2 0cases are arranged by state, for no particular reason.

Massachusetts

In re Schwartz, 366 B.R.265 (Bankr. D. Mass. 2007)

Schwartz concerns a Motion for Relief to pursue an eviction. Movant asserted that the property had been foreclosed upon prior to the date of the bankruptcy petition. The pro se debtor asserted that the Movant was required to show that it had authority to conduct the sale. Movant, and “the party which appears to be the current mortgagee...” provided documents for the court to review, but did not ask for an evidentiary hearing. Judge Rosenthal sifted through the documents and found that the Movant and the current mortgagee had failed to prove that the foreclosure was properly conducted.

Specifically, Judge Rosenthal found that there was no evidence of a proper assignment of the mortgage prior to foreclosure. However, at footnote 5, Id. at 268, the Court also finds that there is no evidence that the note itself was assigned and no evidence as to who the current holder might be.

Nosek v. Ameriquest Mortgage Company (In re Nosek), 286 Br. 374 (Bankr D Mass. 2008).

Almost a year to the day after Schwartz was signed, Judge Rosenthal issued a second opinion. This is an opinion on an order to show cause. Judge20Rosenthal specifically found that, although the note and mortgage involved in the case had been transferred from the originator to another party within five days of closing, during the five years in which the chapter 13 proceeding was pending, the note and mortgage and associated claims had been prosecuted by Ameriquest which has represented itself to be the holder of the note and the mortgage. Not until September of 2007 did Ameriquest notify the Court that it was merely the servicer. In fact, only after the chapter 13 bankruptcy had been pending for about three years was there even an assignment of the servicing rights. Id. at 378.

Because these misrepresentations were not simple mistakes: as the Court has noted on more

than one occasion, those parties who do not hold the note of mortgage do not service the mortgage do not have standing to pursue motions for leave or other actions arising from the mortgage obligation. *Id.* at 380.

As a result, the Court sanctioned the local law firm that had been prosecuting the claim \$25,000. It sanctioned a partner at that firm an additional \$25,000. Then the Court sanctioned the national law firm involved \$100,000 and ultimately sanctioned Wells Fargo \$250,000. *Id.* at 382-386.

In re Hayes, 393 B.R. 259 (Bankr. D. Mass. 2008).

Like Judge Rosenthal, Judge Feeney has attacked the problem of standing and authority head on. She has also held that standing must be established before either a claim can be allowed or a motion for relief be granted.

Ohio

In re Foreclosure Cases, 521 F.Supp. 2d (S.D. Ohio 2007).

Perhaps the District Court's orders in the foreclosure cases in Ohio have received the most press of any of these opinions. Relying almost exclusively on standing, the Judge Rose has determined that a foreclosing party must show standing. "[I]n a foreclosure action, the plaintiff must show that it is the holder of the note and the mortgage at the time that the complaint was filed." *Id.* at 653.

Judge Rose instructed the parties involved that the willful failure of the movants to comply with the general orders of the Court would in the future result in immediate dismissal of foreclosure actions.

Deutsche Bank Nat'l Trust Co. v. Steele, 2008 WL 111227 (S.D. Ohio) January 8, 2008.

In *Steele*, Judge Abel followed the lead of Judge Rose and found that Deutsche Bank had filed evidence in support of its motion for default judgment indicating that MERS was the mortgage holder. There was not sufficient evidence to support the claim that Deutsche Bank was the owner and holder of the note as of that date. Following *In re Foreclosure Cases*, 2007 WL 456586, the Court held that summary judgment would be denied "until such time as Deutsche Bank was able to offer evidence showing, by a preponderance of evidence, that it owned the note and mortgage when the complaint was filed." 2008 WL 111227 at 2. Deutsche Bank was

given twenty-one days to comply. *Id.*

Illinois

U.S. Bank, N.A. v. Cook, 2009 WL 35286 (N.D. Ill. January 6, 2009).

Not all federal district judges are as concerned with the issues surrounding the transfer of notes and mortgages. *Cook* is a very pro lender case and, in an order granting a motion for summary judgment, the Court found that *Cook* had shown no “countervailing evidence to create a genuine issue of facts.” *Id.* at 3. In fact, a review of the evidence submitted by U.S. Bank showed only that it was the alleged trustee of the securitization pool. U.S. Bank relied exclusively on the “pooling and serving agreement” to show that it was the holder of the note. *Id.*

Under UCC Article 3, the evidence presented in *Cook* was clearly insufficient.

New York

HSBC Bank USA, N.A. v. Valentin, 21 Misc. 3D 1124(A), 2008 WL 4764816 (Table) (N.Y. Sup.) November 3, 2008. In *Valentin*, the New York court found that, even though given an opportunity to, HSBC did not show the ownership of debt and mortgage. The complaint was dismissed with prejudice and the “notice of pendency” against the property was cancelled.

Note that the *Valentin* case does not involve some sort of ambush. The Court gave every HSBC every opportunity to cure the defects the Court perceived in the pleadings.

California

In re Vargas, 396 B.R. 511 (Bankr. C.D. Cal. 2008)

and

In re Hwang, 396 B.R. 757 (Bankr. C.D. Cal. 2008)

These two opinions by Judge Bufford have been discussed above. Judge Bufford carefully explores the related issues of standing and ownership under both federal and California law.

Texas

In re Parsley, 384 B.R. 138 (Bankr. S.D. Tex. 2008)

and

In re Gilbreath, 395 B.R. 356 (Bankr. S.D. Tex. 2008)

These two recent opinions by Judge Jeff Bohm are not really on point, but illustrate another thread of cases running through the issues of motions for relief from stay in bankruptcy court and the sloppiness of loan servicing agencies. Both of these cases involve motions for relief that were not based upon fact but upon mistakes by servicing agencies. Both opinions deal with the issue of sanctions and, put simply, both cases illustrate that Judge Bohm (and perhaps other members of the bankruptcy bench in the Southern District of Texas) are going to be very strict about motions for relief in consumer cases.

SUMMARY

The cases cited illustrate enormous problems in the loan servicing industry. These problems arise in the context of securitization and illustrate the difficulty of determining the name of the holder, the assignee of the mortgage, and the parties with both the legal right under Article 3 and the standing under the Constitution to enforce notes, whether in state court or federal court.

Interestingly, with the exception of Judge Bufford and a few other judges, there has been less than adequate focus upon the UCC title issues. The next round of cases may and should focus upon the title to debt instrument. The person seeking to enforce the note must show that:

- (1) It is the holder of this note original by transfer, with all necessary rounds;
- (2) It had possession of the note before it was lost;
- (3) If it can show that title to the note runs to it, but the original is lost or destroyed, the holder must be prepared to post a bond;
- (4) If the person seeking to enforce is an agent, it must show its agency status and that its principal is the holder of the note (and meets the above requirements).

Then, and only then, do the issues of evidence of debt and default and assignment of mortgage rights become relevant.

**PURCHASING MORTGAGE-BACKED SECURITIES DOES NOT GIVE THE GOVERNMENT THE
ABILITY TO MODIFY MORTGAGES BACKING THE SECURITIES**

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The residential mortgage-related assets that the government is proposing to purchase in the bailout plan are for the most part not mortgages themselves. Rather, the assets are mortgage-backed securities (MBS). An MBS is a security issued by a trust (SPV) that has been specially created for a securitization transaction. The SPV will purchase large pool of mortgages from a financial institution. The SPV pays for the mortgages by issuing securities. These securities are collateralized by the mortgages owned by the SPV, hence they are “mortgage-backed” securities. These MBS are typically referred to as “certificates,” and most are debt securities that entitle the holder to a series of regularly scheduled payments, as with a corporate bond.

By purchasing MBS, the government will not become the direct owner of the mortgages. Instead, it will simply hold securities of an entity that owns mortgages. This is insufficient to give the government the ability to modify the mortgages. Just as corporate bond holders have no right to control the bond issuer’s management decisions, so too do MBS holders have no right to control how the SPV’s management of the mortgages.

The decision to modify mortgages held by an SPV rests with the SPV’s agent, call the servicer. The servicer to performs the day-to-day tasks related to the mortgages owned by the SPV, such as collecting payments, handling paperwork, foreclosing, and selling foreclosed properties. These servicers, including many “mortgage companies” like Countrywide and Wells Fargo owned by bank holding companies, are the entities that actually consider loan modification requests. Confusingly, the servicer is often, but not always, the originator.

Servicers carry out their duties according to what is specified in their contract with the SPV. This contract is known as a “pooling and servicing agreement” or PSA. PSAs frequently place restrictions on servicers’ ability to modify mortgages. Sometimes the modification is forbidden outright, sometimes only certain types of modifications are permitted, and sometimes the total number of loans that can be modified is capped (typically at 5% of the pool). Additionally, servicers are frequently required to purchase any loans they modify at par (100 cents on the dollar). This functions as an anti-modification provision. Moreover, all PSAs prohibit the servicer from undertaking any action, including many modifications, that would threaten the MBS’s pass-thru tax status.

In order to direct servicers to engage in large scale loan modification, it is necessary to amend the PSA; a servicer that does not comply with a PSA risks being sued by the SPV and by the MBS holders. PSAs, however, cannot easily be modified. This is to preserve pass-thru tax status for the trust in order to avoid double taxation; to preserve the bankruptcy remoteness of the trust, so that the trust’s assets cannot be seized by creditors of the mortgages’ originators; and to protect the MBS holders from liability for the trust’s actions.

To date, servicers have granted few significant modifications for several reasons: contractual limitations (discussed above); understaffing for the volume of modification demand; lack of properly trained personnel; fear of suit by MBS holders who believe that modifications hurt their investments; and misaligned incentives. Foreclosure is frequently more profitable to

servicers than loan modification. Therefore servicers are incentivized to foreclose rather than modify loans, even if modification is in the best interest of the MBS holders and the homeowners.

Six major problems prevent the government from modifying mortgages simply by purchasing hundreds of billions of dollars of MBS. Some of these problems prevent modification outright; others would result in a significant loss to taxpayers due to the modifications.

Problem 1. Treasury Will Typically Need to Hold At Least Two-Thirds of All MBS in a Pool to Modify the Underlying Mortgages

The typical PSA provides that it may only be modified with the consent of two-thirds of all of the MBS holders, as well as the insurer for the Net Interest Margin Securities—the resecuritization of the residual claims on the SPV.¹ Further, PSAs prohibit any modification of the underlying mortgages that would change the scheduled cashflow to a MBS holder, absent the holder’s consent. PSAs contain this provision to comply with the Trust Indenture Act of 1939.² Thus, Treasury would have to incur all of the losses itself if it wished to engage in modifications. In so doing, the Treasury would be bailing out not just the financial institutions that chose to sell their MBS holdings to Treasury, but also the ones that did not sell, as their positions would be protected by the losses absorbed by Treasury.

Even if Treasury were willing to absorb all the modification losses itself, there is still the question of whether the government will be able to purchase the necessary two-thirds of MBS issued by any particular pool in order to have the authority to alter the PSA. This alone will be a tall order, as there might be thousands of MBS from a single pool and these MBS might be dispersed world-wide. Some may be held by entities from which the Treasury Department will not be authorized to make purchases. And others will be held by entities that choose not to sell to the Treasury Department. The Treasury would need to put a Humpty-Dumpty of MBS back

¹ See, e.g., Pooling and Servicing Agreement, Park Place Securities, Inc., Series 2005-WHQ4:

This Agreement or any Custodial Agreement may also be amended from time to time by the Depositor, the Master Servicer, the NIMS Insurer, the Trustee and, if applicable, the Custodian, with the consent of the NIMS Insurer and the Holders of Certificates entitled to at least 66% of the Voting Rights for the purpose of adding any provisions to or changing in any manner or eliminating any of the provisions of this Agreement or any Custodial Agreement or of modifying in any manner the rights of the Swap Provider or Holders of Certificates; provided, however, that no such amendment shall (i) reduce in any manner the amount of, or delay the timing of, payments received on Mortgage Loans which are required to be distributed on any Certificate without the consent of the Holder of such Certificate, (ii) adversely affect in any material respect the interests of the Swap Provider or Holders of any Class of Certificates (as evidenced by either (i) an Opinion of Counsel delivered to the Trustee or (ii) written notice to the Depositor, the Master Servicer and the Trustee from the Rating Agencies that such action shall not result in the reduction or withdrawal of the rating of any outstanding Class of Certificates with respect to which it is a Rating Agency) in a manner other than as described in (i), or (iii) modify the consents required by the immediately preceding clauses (i) and (ii) without the consent of the Holders of all Certificates then outstanding.

² 15 U.S.C. § 77ppp(b). (“Notwithstanding any other provision of the indenture...the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder...”).

together again in order to modify the PSA to direct the servicer to engage in large-scale loan modification.

Problem 2. Collateralized Mortgage Obligations Make It Exceedingly Difficult for Treasury to Purchase a Sufficient Number of MBS to Modify Mortgages

The Treasury's Humpty-Dumpty problem is exacerbated by collateralized mortgage obligations, second mortgages, and mortgage insurance. Collateralized mortgage obligations or resecuritization seriously impedes the government's ability to purchase a sufficient number of MBS for any particular pool in order to ultimately engage in modification of the underlying mortgages. MBS issued by an SPV are typically tranching—divided into different payment priority tiers, each of which will have a different dividend rate and a different credit rating. Because the riskier tranches are not investment grade, they cannot be sold to entities like pension plans and mutual funds. Therefore, they are often resecuritized into what are known as collateralized mortgage obligations (CMOs). A CMO is a securitization in which the assets backing the securities are themselves mortgage-backed securities rather than the underlying mortgages. CMOs are themselves then tranching, and the senior tranches can receive investment grade ratings, making it possible to sell them to major institutional investors. The non-investment grade components of CMOs can themselves be resecuritized once again into what are known as CMO²s. This process can be repeated, of course, an endless number of times.

The upshot of this financial alchemy is that to control a sufficient share of MBS to alter a PSA, the government will frequently also have to own a sufficient share of CMOs to alter the CMOs' PSA and of CMO²s to alter the CMOs PSA in order to alter the MBS PSA. As a result it will be incredibly difficult for the government to purchase a sufficient amount of MBS to ultimately be able to modify the underlying mortgages.

Problem 3. Junior Mortgages Are Securitized Separately and Must Also Be Modified for Any Modification of Senior Mortgages to Be Effective

The impossibility of modifying PSAs to permit modification on a wide scale is further complicated because many homeowners have more than one mortgage. Even if the mortgages are from the same lender, they are often securitized separately. If a homeowner is in default on two or three mortgages it is not enough to reassemble the MBS pieces to permit a modification of one of the mortgages. Modification of the senior mortgage alone only helps the junior mortgage holders, not the homeowner. For homeowners with multiple mortgages, the obstacle to providing effective mortgage modification through government purchase of loans is even higher.

Problem 4. Net Interest Margin Securities Insurers Must Agree to Modifications of PSAs and Mortgages

An SPV's income can exceed the dividends it must pay certificate holders. The residual value of the SPV after the certificate holders are paid is called the Net Interest Margin (NIM). The NIM is typically resecuritized separately into an NIMS, and the NIMS is insured by a financial institution. This NIMS insurer holds a position similar to an equity holder for the SPV. The NIMS insurer's consent is thus typically required both for modifications to PSAs and modifications to the underlying mortgages beyond limited thresholds. NIMS insurers financial

positions are very similar to out of the money junior mortgagees—they are unlikely to cooperate absent a payout because they have nothing to lose. This will complicate mortgage modification by the Treasury and add to its expense.

Problem 5. Loss of Private Mortgage Insurance Coverage Upon Modification Would Destroy MBS Resale Value and Cost Taxpayers Money

On top of all this, many mortgages are insured by private mortgage insurance. This can be purchased either by the borrower or by the lender. Private mortgage insurance protects MBS investors from losses and greatly enhances the value of MBS. Private mortgage insurance policies typically provide for the termination of the insurance upon a loan modification.³ The termination of private mortgage insurance would greatly reduce the resale value of loans for the government.

Problem 6. REMIC Tax Problems from Modification Would Destroy MBS Resale Value and Cost Taxpayers Money

Even if the government could somehow modify the underlying mortgages by purchasing MBS in spite of all the obstacles mentioned thus far, modification would result in serious negative tax consequences for the MBS that would make them hard for the government to resell and would penalize MBS holders who could not or did not participate in the bailout.

The value of MBS depends heavily on their tax treatment. MBS are structured to enjoy REMIC (Real Estate Mortgage Investment Conduit) status under the Internal Revenue Code, which enables the MBS to avoid double taxation of income. Absent REMIC status, federal income tax would apply to the SPV as well as to the dividends paid to the MBS holders. REMIC status gives an SPV pass-thru status, so federal income tax only applies to the MBS holders on the dividends received from the trust. In order to qualify for tax-advantaged REMIC status, the pool of loans securitized in a REMIC must generally be treated as a static pool.⁴ This usually precludes large scale modification of loans in the pool.⁵ Thus, significant mortgage modification

³ Radian Guaranty Master Policy, Condition 4.C, at http://www.radian.biz/pdf/Master_Policy_2008.pdf:

Notwithstanding any other provision of this Policy, the coverage extended to any Loan by a Certificate of Insurance may be terminated at the Company's sole discretion, immediately and without notice, if, with respect to such Loan, the Insured shall permit or agree to any of the following without prior written consent of the Company: (1) Any material change or modification of the terms of the Loan including, but not limited to, the borrowed amount, interest rate, term or amortization schedule, excepting such modifications as may be specifically provided for in the Loan documents, and permitted without further approval or consent of the Insured.

⁴ Treasury Reg. Subchapter F, § 301.7701-4, provides in part:

Generally speaking, an arrangement will be treated as a trust under the Internal Revenue Code if it can be shown that the purpose of the arrangement is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit.

⁵ Statement of Sheila C. Bair, Chairman, Federal Deposit Insurance Corporation on Possible Responses to Rising Mortgage Foreclosures before the Committee on Financial Services, U.S. House of Representatives; 2128 Rayburn House Office Building, April 17, 2007, at

by servicers could cost an SPV its REMIC status and result in double taxation of the MBS. Because of this concern, many PSA place significant constraints on modification of mortgage loans as well as modification of the PSA itself.⁶ Once REMIC status is lost, it cannot be regained, so any government action that would cost an MBS its REMIC status would seriously impair its resale value.

The Government Will Be Unable to Modify Mortgages Simply By Purchasing Billions of Dollars of Mortgage-Backed Securities. Bankruptcy Modification Provides the Only Guaranteed Method of Widescale Mortgage Modification for Distressed Homeowners

Only bankruptcy law changes can require the trust to go along with a loan modification and deal with the junior lien problem. Already Chapter 11 bankruptcy is used for the same effect. Because of the Trust Indenture Act, it is very difficult to engage in a consensual modification of corporate bonds. As a result businesses that need to restructure their bonds often find it necessary to do in bankruptcy. Amending the Bankruptcy Code to permit modification of all mortgages would also make voluntary modifications more likely, because a trust could defend any lawsuit by asserting that the borrower could have gotten the same deal (or one less favorable to the trust) in bankruptcy. Thus, permitting bankruptcy relief may well cause it to be unnecessary in many cases.

<http://www.fdic.gov/news/news/speeches/archives/2007/chairman/spapr1707.html>.

⁶ Pooling and Servicing Agreement, ABFC 2005-OPT1 Trust, at <http://www.sec.gov/Archives/edgar/data/1343316/000091412105002222/as871211-ex4.txt>:

Notwithstanding any provision of this Agreement to the contrary, neither the Trustee nor the NIMS Insurer shall consent to any amendment to this Agreement unless it shall have first received an Opinion of Counsel, delivered by (and at the expense of) the Person seeking such Amendment, to the effect that such amendment will not result in the imposition of a tax on any REMIC constituting part of the Trust Fund pursuant to the REMIC Provisions or cause any REMIC constituting part of the Trust Fund to fail to qualify as a REMIC at any time that any Certificates (other than the Class P Certificates) are outstanding and that the amendment is being made in accordance with the terms hereof.

American Securitization Forum

Streamlined Foreclosure and Loss Avoidance Framework for Securitized Subprime Adjustable Rate Mortgage Loans

Executive Summary

July 8, 2008

Scope:

This streamlined framework applies to all first lien subprime residential adjustable rate mortgage (ARM) loans that have an initial fixed rate period of 36 months or less (including “2/28s” and “3/27s”), referred to below as “subprime ARM loans” that:

- were originated between January 1, 2005 and July 31, 2007;
- are included in securitized pools; and
- have an initial interest rate reset between January 1, 2008 and July 31, 2010.

This streamlined framework may be applied to subprime ARM loans in advance of an initial, or any subsequent, reset date. Typically, servicer/borrower communication should begin 120 days prior to the initial reset date.

As a general overview, under this streamlined framework, if the loan is current and is eligible for refinance, then it should be refinanced. If the loan is current but is not eligible for a refinance, then it would be eligible for a streamlined modification if: the property is occupied as the borrower's primary residence; the borrower meets the “FICO test”; and the payment amount would go up by more than 10% over the current payment amount at the upcoming reset.

Overarching Principles:

- The servicer will not take any action that is prohibited by the pooling and servicing agreement (“PSA”) or other applicable securitization governing document, or that would violate applicable laws, regulations, or accounting standards. ASF’s Statement of Principles, Recommendations and Guidelines for a Streamlined Foreclosure and Loss Avoidance Framework for Securitized Subprime Adjustable Rate Mortgage Loans, published concurrently with this document, analyzes how the framework

described in the Executive Summary is consistent with typical PSA provisions. The ASF urges readers of this Executive Summary to review the full Statement.

- The ASF believes that this framework is consistent with the authority granted to a servicer to modify subprime mortgage loans in typical PSAs. The ASF expects that the procedures in this framework will constitute standard and customary servicing procedures for subprime loans.
- The servicer will expeditiously implement the ASF Investor Reporting Guidelines for the Modification of Subprime ARM Loans recommended by the ASF, which is simultaneously released with this framework.
- LTV and CLTV will be determined based on information at origination. If an origination LTV is below 97%, a servicer may obtain an updated home value by obtaining an AVM, BPO or other means.
- All servicers of second liens to subprime borrowers should cooperate fully with this framework by providing information needed by first lien servicers and by agreeing to subordinate the second lien to any new first lien resulting from a refinance (with no cash out) under this framework.
- All existing contractual obligations and remedies related to fraudulent mortgage origination activity should be strictly enforced.
- The streamlined framework outlined in this framework represents the consensus view of the membership of the ASF, acting through its Board of Directors, as to the parameters used to determine the segmentation of subprime ARM loans, including the numeric values included in those parameters. It is understood by the ASF's members that the numeric values included in the parameters are not based on historic data, but rather simply represent a consensus view as to appropriate numeric values for use within this framework for the purpose of supporting a streamlined approach to loan modifications that complies with typical securitization governing documents. The ASF, acting through its Board of Directors, may in the future change these numeric values or further refine these parameters as experience is gained and market conditions evolve.

Borrower Segmentation:

Under this framework, subprime ARM loans are divided into 3 segments.

Segment 1 includes current (as defined below) loans where the borrower is likely to be able to refinance into any available mortgage product, including FHA, FHA Secure or readily available mortgage industry products.

- Generally, the servicer will determine whether loans may be eligible for refinancing into readily available mortgage industry products based on ascertainable data not requiring direct communication with the borrower, such as LTV, loan amount, FICO and payment history. Servicers will generally not determine current income or DTI to determine initial eligibility for refinancing.
- If the borrower also has a second lien on the property, this framework contemplates that the borrower is able to refinance the first lien only, on a no cash out basis. In order for the loan to fall into this segment, the second lien does not have to be refinanced; however, any second lien holder will need to agree to subordinate their interest to the refinanced first lien.

Segment 2 includes current loans where the borrower is unlikely to be able to refinance into any readily available mortgage industry product.

- *Current*: For purposes of this framework “current” means the loan must be not more than 30 days delinquent, and must not have been more than 1 x 60 days delinquent in the last 12 months, both under the OTS method. Corresponding tests would apply under the MBA method if the servicer uses that standard.
- *Not eligible for refinance*: All current loans that do not satisfy FHA Secure requirements, including delinquency history, DTI at origination, LTV (97% is the maximum LTV allowed under FHA Secure) and loan amount standards for this program, are within Segment 2; unless the servicer can determine whether they may meet eligibility criteria for another product, by reviewing eligibility criteria without performing an underwriting analysis.

Segment 3 includes loans where the borrower is not current as defined above, demonstrating difficulty meeting the introductory rate.

Segment 1 – Refinance:

- It is expected that borrowers in this category should refinance their loans, if they are unable or unwilling to meet their reset payment. However, a servicer may evaluate each borrower in this category on a case by case basis or apply any framework consistent with the applicable servicing standard in the transaction documents for a loan modification or other loss mitigation outcome.
- The servicer will facilitate a refinance in a manner that avoids the imposition of prepayment penalties wherever feasible. This may be accomplished by timing the refinance to occur after the upcoming reset date.
- Servicers should take all reasonable steps permitted under the PSA and other governing documents to encourage or facilitate refinancing for borrowers in Segment 1, or to borrowers in Segment 2 who become eligible for a refinance, including,

where permitted, providing borrowers with information about FHA, FHA Secure and other readily available mortgage industry products, even if that servicer is not able to provide those products through any affiliated originator.

Segment 2 – Loan Modification:

- The servicer will determine the following for each Segment 2 borrower: current owner occupancy status (based on information known to the servicer, including billing and property address), current FICO score and the FICO score at origination of the loan.
- FICO test:
 - If the current FICO score is less than 660 and is less than a score 10% higher than the FICO score at origination, the borrower is considered to have met the “FICO test.” If the borrower meets the FICO test, the servicer will generally not determine the borrower’s current income.
 - If either a) the current FICO score is 660 or higher, or b) the current FICO is at least 10% higher than the FICO score at origination, the borrower is considered to not meet the “FICO test.” If the borrower does not meet the FICO test, the servicer will use an alternate analysis to determine if the borrower is eligible for a loan modification.
- Segment 2 loans will only be eligible for a fast track loan modification if:
 - The borrower currently occupies the property as his or her primary residence;
 - The borrower meets the FICO test; and
 - The servicer determines that, at the upcoming reset, the payment amount would go up by more than 10% over the current payment amount.
- Borrowers in this segment and eligible for a fast track loan modification as described above may be offered a loan modification under which the interest rate will be kept at the existing rate in effect prior to the upcoming reset, generally for 5 years following the upcoming reset.
- As to Segment 2 loans eligible for a fast track loan modification, the servicer may make the following presumptions:
 - The borrower is able and willing to pay under the loan modification based on his or her current payment history prior to the reset date.

- The borrower is unable to pay (and default is reasonably foreseeable) after the upcoming reset under the original loan terms, based on the size of the payment increase that would otherwise apply.
 - The modification maximizes the net present value of recoveries to the securitization trust and is in the best interests of investors in the aggregate, because refinancing opportunities are likely not available and the borrower is able and willing to pay under the modified terms.
 - The terms of the loan modification shall be binding on the servicer and the borrower, if there is no signed modification agreement, so long as a) the terms of such loan modification are more favorable to the borrower than the existing terms, and b) the servicer sends a written notice to the borrower describing the terms of the modification.
- For borrowers that do not meet the FICO test, the servicer will use an alternate analysis to determine if the borrower is eligible for a loan modification, as well as the terms of the modification (which may vary). This may include a) conducting an individual review of current income and debt obligations, debt-to-income analysis, and considering a tailored modification for a borrower, or b) applying any other framework consistent with the applicable servicing standard in the transaction documents to determine if a borrower is eligible for a loan modification.
- For borrowers that are eligible for a fast track modification, the fast track option is non-exclusive and does not preclude a servicer from using an alternate analysis to determine if a borrower is eligible for a loan modification, as well as the terms of the modification.

Segment 3 – Loss Mitigation:

- For loans in this category, the servicer will determine the appropriate loss mitigation approach in a manner consistent with the applicable servicing standard in the transaction documents, but without employing the fast tracking procedures described under Segment 2. The approach chosen should maximize the net present value of the recoveries to the securitization trust. The available approaches may include loan modification (including rate reduction and/or principal forgiveness), forbearance, short sale, short payoff, or foreclosure.
- These borrowers will require a more intensive analysis, including where appropriate current debt and income analysis, to determine the appropriate loss mitigation approach.

American Securitization Forum

Statement of Principles, Recommendations and Guidelines for a Streamlined Foreclosure and Loss Avoidance Framework for Securitized Subprime Adjustable Rate Mortgage Loans

July 8, 2008

I. Introduction and Overarching Principles

The American Securitization Forum (ASF)¹ is publishing this Statement as an update to its December 2007 Statement regarding the Streamlined Foreclosure and Loss Avoidance Framework (the “December 2007 Statement”), and as part of its continuing efforts to inform its members and promulgate relevant securitization industry guidance in light of the challenges currently confronting the subprime residential mortgage markets. Current subprime residential mortgage market conditions include a number of concerns that impact securitization transactions, subprime mortgage finance and the overall housing market: an increase in delinquency, default and foreclosure rates; an increase in real estate owned inventories; a decline in home price appreciation; and a prevalence of loans with a relatively low introductory rate that are adjusting to a higher rate.

This Statement is being published concurrently with our Streamlined Foreclosure and Loss Avoidance Framework for Securitized Subprime ARM Loans, Executive Summary, and provides additional background, detail and discussion supporting that document.

The ASF continues to believe that minimizing foreclosures and preserving homeownership, wherever possible, is in the best interests of borrowers, servicers, originators and investors as foreclosure is typically the most costly and least-preferred method of resolving a defaulted mortgage loan. As such, the interests of secondary mortgage market participants continue to be aligned with borrowers, communities and policymakers to prevent foreclosures where possible.

In light of these concerns and to help prevent unnecessary foreclosures, the ASF released a statement in June, 2007 (attached as Exhibit A, the “June 2007 Statement”) concluding that loan modifications, for subprime mortgage loans that are in default or for which default is reasonably foreseeable, are an important servicing tool that can typically help borrowers avoid foreclosure as well as minimize losses to securitization investors. Higher than normal rates of foreclosure may harm borrowers and their communities, and may adversely affect housing values and

¹ The American Securitization Forum is a broad-based professional forum of over 380 organizations that are active participants in the U.S. securitization market. Among other roles, ASF members act as investors, insurers, issuers, financial intermediaries and professional advisers working on securitization transactions. ASF’s mission includes building consensus, pursuing advocacy and delivering education on behalf of the securitization markets and its participants. This statement was developed principally in consultation with ASF’s Loan Modifications Working Group, Servicer Working Group and Investor Committee with input from other ASF members and committees. Additional information about the ASF, its members and activities may be found on ASF’s internet website at www.americansecuritization.com.

therefore collateral values on both performing and non-performing loans. Accordingly, the ASF recommended the use of loan modifications under appropriate circumstances and also provided guidance for servicers of securitized subprime residential mortgage loans.

Given increasing and evolving borrower and servicer needs in the current mortgage environment, the ASF also released a statement in October 2007 (attached as Exhibit B) concluding that borrower counseling expenses typically can be reimbursable from securitization trust cash flows for loans where the servicer determines, in its reasonable judgment, that the related counseling service has had or is likely to have the effect of preventing foreclosures and mitigating losses on a loan.

In December 2007, we also released the ASF Recommended Definitions and Investor Reporting Standards for Modifications of Securitized Residential Mortgage Loans (attached as Exhibit C, the “Modification Reporting Guidelines”). Such guidelines will provide a greater level of information regarding loan modifications to investors for securitization trusts and the performance of those loans.

The ASF also released the Operational Guidelines for Reimbursement of Counseling Expenses in Residential Mortgage-Backed Securitizations on May 20, 2008 (attached as Exhibit D), which are designed to assist mortgage loan servicers and counseling organizations in implementing procedures for reimbursing expenses associated with the provision of borrower counseling services.

The current market conditions are unique in aligning the interests of securitization investors, servicers and borrowers; it is in all market participants’ best interests that homeowners are enabled to stay in their houses. Keeping borrowers in their homes whenever feasible avoids losses associated with foreclosure, promotes a healthy housing market that provides for further financing and investment opportunities, and mitigates losses on those loans for which foreclosure is unavoidable by reducing the downward pressure on real estate values. We believe that applying the framework outlined in this Statement will streamline the loss mitigation efforts of servicers, and will maximize trust proceeds to investors as compared to the proceeds typically realized through foreclosure.

The overall purpose of this Statement is to provide further guidance for servicers to streamline borrower evaluation procedures and to facilitate the effective use of all forms of foreclosure and loss prevention efforts, including refinancings, forbearances, workout plans, loan modifications, deeds-in-lieu and short sales or short payoffs. We believe that publication of these principles, recommendations and guidelines will help to establish a common framework for servicers to efficiently evaluate the financial condition of the borrowers they work with and, where needed, employ the most effective foreclosure and loss prevention techniques. As a consequence, the ASF believes that this guidance will promote greater uniformity, clarity and certainty of application of these provisions throughout the industry.

This Statement is focused on subprime first-lien adjustable rate residential mortgages loans (subprime ARM loans) that have an initial fixed rate period of 36 months or less, are included in

securitized pools, were originated between January 1, 2005 and July 31, 2007, and have an initial interest rate reset date between January 1, 2008 and July 31, 2010. Some of the principles, recommendations and guidelines reflected in this Statement may also apply to loss mitigation efforts of other types of residential mortgage loans, including prime and Alt A loans, but are likely not to be appropriate for loss mitigation efforts of second-lien residential mortgage loans.

The streamlined framework outlined in this Statement represents the consensus view of the membership of the ASF, acting through its Board of Directors, as to the parameters used to determine the segmentation of subprime ARM loans, including the numeric values included in those parameters. It is understood by the ASF's members that the numeric values included in the parameters are not based on historic data, but rather simply represent a consensus view as to appropriate numeric values for use within this framework for the purpose of supporting a streamlined approach to loan modifications that complies with typical securitization governing documents. The ASF, acting through its Board of Directors, may in the future alter these numeric values or further refine these parameters as experience is gained and market conditions evolve.

While this Statement addresses certain legal, regulatory and accounting matters, it does not constitute and should not be viewed as providing legal or accounting advice.

In implementing this Statement, each servicer will not take any action that is prohibited by the pooling and servicing agreement or other applicable securitization governing document, or that would violate applicable laws and regulations (including REMIC) or accounting standards. Moreover, each servicer will expeditiously implement the ASF Modification Reporting Guidelines.

All servicers of second liens to subprime borrowers should cooperate fully with this framework by providing information needed by first lien servicers and by agreeing to subordinate the second lien to any new first lien resulting from a refinance (with no cash out) under this framework.

II. Overview of Current Subprime ARM Borrower Population and Recommendations for Borrower Evaluation Procedures

The subprime mortgage market has been and is expected to experience rising rates of defaults and foreclosures through 2008, in particular as the interest rate reset date on a significant number of subprime ARM loans arrives. A significant portion of subprime ARM loans that would have had a reset over the next two years have already paid in full. A smaller portion of loans that would have had a reset in the next two years have been subject to short sales, foreclosure or other disposition. A significant portion of the remaining subprime borrowers should be eligible for refinancing, due to their relatively low loan-to-value/combined loan-to-value (LTV/CLTV) ratios or good credit scores or payment history. The remaining population of these subprime ARM loans may be eligible for a loan modification or some other type of loss mitigation technique, depending on the facts and circumstances of each individual borrower.

As the rates on these subprime ARM loans continue to reset, efficient and decisive action will be required by servicers to keep borrowers from defaulting on their mortgage payments. The proposed streamlined framework will facilitate servicers' management of the increasing volume of loans coming upon an interest rate reset that may otherwise default. Servicers will be able to identify more effectively the appropriate segment of the subprime borrower population for each borrower and, in certain circumstances, expedite refinancing into more affordable loan products and fast track borrowers for loan modifications. Servicers will also be able to devote more of their time and effort to other more intense loss mitigation efforts for loans that present greater challenges.

It is critical to the implementation of any loss mitigation technique that the servicer comply with the terms of the pooling and servicing agreement or other applicable securitization governing document, and that servicers select loss mitigation techniques that are most likely to keep the borrower in his or her home while maximizing trust proceeds to investors in securities backed by subprime ARM loans. It is also critical to the timely implementation of any loss mitigation technique that the borrower is contacted as early as possible in the process, preferably 120 days prior to such reset date.

III. Streamlined Implementation of Refinancings and Other Loss Mitigation Techniques

The streamlined framework described below applies to all first lien subprime residential adjustable rate mortgage loans (referred to as "subprime ARM loans" or "loans") that (i) have an initial fixed rate period of 36 months or less, (ii) were originated between January 1, 2005 and July 31, 2007, (iii) are included in securitized pools and (iv) have an initial interest rate reset date between January 1, 2008 and July 31, 2010. This streamlined framework would be applied to subprime ARM loans in advance of an initial, or any subsequent, reset date. Typically, servicer/borrower communication should begin 120 days prior to the initial reset date.

This population of subprime ARM loans can be roughly segmented into the following categories:

Segment 1 includes current (as defined below) loans where the borrower is likely to be able to refinance into any available mortgage product, including FHA, FHA Secure or readily available industry products.

- Generally, the servicer will determine whether loans may be eligible for refinancing into readily available mortgage products based on ascertainable data not requiring direct communication with the borrower such as LTV, loan amount, FICO and payment history. Servicers will generally not determine current income or DTI to determine initial eligibility for refinancing.
- If the borrower also has a second lien on the property, this Statement contemplates that the borrower is able to refinance the first lien only, on a no cash out basis. In order for the loan to fall into this segment, the second lien does not have to be refinanced; however any second

lienholder will need to agree to subordinate their interest to the refinanced first lien.

Segment 2 includes current loans where the borrower is unlikely to be able to refinance into any available product.

- *Current:* For purposes of this Statement, “current” means the loan must be not more than 30 days delinquent, and must not have been more than 1 x 60 days delinquent in the last 12 months, both under the OTS method. For servicers who determine delinquency under the MBA method, “current” means the loan must be not more than 60 days delinquent, and must not have been more than 1 x 90 days delinquent in the last 12 months, both under the MBA method.
- *Not eligible for refinance:* All current loans that otherwise do not satisfy FHA Secure requirements, including delinquency history, DTI at origination, LTV (97% is the maximum LTV allowed under FHA Secure) and loan amount standards for this program, are within Segment 2; unless the servicer can determine whether they may meet eligibility criteria for another product, by reviewing eligibility criteria without performing an underwriting analysis.

For all purposes under this Statement, LTV and CLTV will be determined based on information at origination. If an origination LTV is below 97%, a servicer may obtain an updated home value by obtaining an AVM, BPO or other means.

Segment 3 includes loans where the borrower is not current as defined above, demonstrating difficulty meeting the introductory rate.

Sections A, B and C below outline recommended approaches that servicers can apply to the three segmentations of subprime ARM loans discussed above.

A. Segment 1—Current Borrowers Able to Refinance into Private or FHA Loan Products

- It is expected that borrowers in this category should refinance their loans, if they are unable or unwilling to meet their reset payment. However, a servicer may evaluate each borrower in this category on a case by case basis or apply any framework consistent with the applicable servicing standard in the transaction documents for a loan modification or other loss mitigation outcome.
- The servicer will facilitate a refinance in a manner that avoids the imposition of prepayment penalties wherever feasible. This may be

accomplished by timing the refinance to occur after the upcoming reset date.

- Servicers should take all reasonable steps allowed under the pooling and servicing agreement and governing documents to encourage or facilitate refinancing for borrowers in Segment 1, or to borrowers in Segment 2 who become eligible for a refinance, including, where permitted, providing borrowers with information about FHA, FHA Secure and other readily available mortgage products, even if that servicer is not able to provide those products through any affiliated originator.

For borrowers that do not meet the criteria for any refinance product, the servicer should apply normal servicing methods to evaluate a borrower's financial situation on a case by case basis, including making a determination as to whether a particular loan is otherwise eligible for the fast track loan modification process applicable to Segment 2.

B. Segment 2—Current Borrowers Unable to Refinance into any Loan Product

- The servicer will determine the following for each Segment 2 borrower: current owner occupancy status, current FICO score and the FICO score at origination of the loan. Owner occupancy status will be determined solely based on the borrower's representations at origination together with any information known to or readily available to the servicer. For example, the servicer may compare the current billing address with the property address.
 - If the current FICO score is a) less than 660 and b) is less than a score 10% higher than the FICO score at origination, the borrower is considered to have met the "FICO test." If the borrower meets the FICO test, the servicer will generally not determine the borrower's current income.
 - If either a) the current FICO score is 660 or higher, or b) the current FICO is at least 10% higher than the FICO score at origination, the borrower is considered to not meet the "FICO test." If the borrower does not meet the FICO test, the servicer will use an alternate analysis to determine if the borrower is eligible for a loan modification.
- Segment 2 loans will only be eligible for a fast track loan modification if:
 - The borrower currently occupies the property as his or her primary residence;
 - The borrower meets the FICO test; and

- The servicer determines that, at the upcoming reset, the payment amount would go up by more than 10% over the current payment amount.
- Borrowers in this segment and eligible for a fast track loan modification described above may be offered a loan modification under which the interest rate will be kept at the existing rate in effect prior to the upcoming reset, generally for 5 years following the upcoming reset.
- As to Segment 2 loans eligible for a fast track loan modification, the servicer may make the following presumptions:
 - The borrower is able and willing to pay under the loan modification based on his or her current payment history prior to the reset date.
 - The borrower is unable to pay (and default is reasonably foreseeable) after the upcoming reset under the original loan terms, based on the size of the payment increase that would otherwise apply.
 - The modification maximizes the net present value of recoveries to the securitization trust and is in the best interests of investors in the aggregate, because refinancing opportunities are likely not available and the borrower is able and willing to pay under the modified terms.
 - The terms of the loan modification shall be binding on the servicer and the borrower, if there is no signed modification agreement, so long as a) the terms of such loan modification are more favorable to the borrower than the existing terms, and b) the servicer sends a written notice to the borrower describing the terms of the modification.
- For borrowers that do not meet the FICO test, the servicer will use an alternate analysis to determine if the borrower is eligible for a loan modification, as well as the terms of the modification (which may vary). This may include a) conducting an individual review of current income and debt obligations, debt-to-income analysis, and considering a tailored modification for a borrower, or b) applying any other framework consistent with the applicable servicing standard in the transaction documents to determine if a borrower is eligible for a loan modification.
- For borrowers that are eligible for a fast track modification, the fast track option is non-exclusive and does not preclude a servicer from using an

alternate analysis to determine if a borrower is eligible for a loan modification, as well as the terms of the modification.

C. Segment 3—Borrowers Not Eligible Under Segment 1 or Segment 2

- For loans in this category, the servicer will determine the appropriate loss mitigation approach in a manner consistent with the applicable servicing standard in the transaction documents, but without employing the fast tracking procedures described in Segment 2. The approach should maximize the net present value of the recoveries to the securitization trust. The available approaches may include loan modification (including rate reduction and/or principal forgiveness), forbearance, short sale, short payoff (including a short refinancing), or foreclosure.
- These borrowers will require a more intensive analysis, including where appropriate current debt and income analysis, to determine the appropriate loss mitigation approach.

IV. Detailed Provisions Related to this Framework

Servicers and counselors should work with borrowers, where needed, to help borrowers understand their current loan terms and the refinancing options available in the market. Outreach efforts should be conducted by servicers, utilizing credit counselors and the HOPE NOW Alliance, if helpful in facilitating communication with borrowers.

We recognize that servicers will not be able to make confirmed contact with all borrowers, particularly those in Segment 2 who meet the FICO test and for whom detailed analysis is not required. ASF is of the view that borrowers who fall within the eligibility criteria for a fast track loan modification should not fail to receive a modification solely due to the servicer's inability to obtain a signed agreement. Generally, it would appear reasonable for a servicer to deem a borrower to have consented to the terms of the modification, if there is no signed modification agreement, so long as a) the terms of such loan modification are more favorable to the borrower than the existing terms, and b) the servicer sends a written notice to the borrower describing the terms of the modification.

In the event of a modification, any advances made by the servicer in respect of delinquent monthly payments will be at the modified rate (or the lower rate described above).

For loans that require payment of interest only prior to the initial reset, followed by amortizing payments, the rate would be kept at the rate as modified during the modification term, but the borrower would be required to make an amortizing payment beginning after the initial reset date.

Some securitization operative documents limit the servicer's ability to solicit refinancings of mortgage loans in the trust. The ASF believes that where possible these restrictions should not be interpreted to restrict the solicitation of refinancings under this framework. We believe that

the servicer's efforts to facilitate and encourage refinancings of loans are part of an overall loss mitigation strategy which is designed to protect the interests of investors.

Under this framework, servicers will not take any action that would violate applicable laws and regulations. In particular, as to subprime ARM loans that are included in a securitization for which a REMIC election was made for federal income tax purposes, the servicer will not engage in any fast track loan modification unless default on the loan is "reasonably foreseeable" as that term is used in applicable REMIC regulations. In order to make clear that a fast track loan modification would not affect a securitization trust's REMIC status, the IRS released Revenue Procedure 2007-72 ("RP 2007-72") concurrently with the December 2007 Statement, and concurrently with this Statement the IRS also released Revenue Procedure 2008-47 ("RP 2008-47") which amplifies and supersedes RP 2007-72. RP 2008-47, effective as of July 8, 2008 confirms that a servicer's actions within the framework will not adversely impact the REMIC status of the related securitization trust.

Similarly, servicers will not take any action under this Statement that would alter the accounting treatment of any securitization that was treated as a sale under FAS 140. The Office of the Chief Accountant ("OCA") of the Securities and Exchange Commission ("SEC") issued a letter dated January 7, 2008 to the Committee on Corporate Reporting and the Center for Audit Quality regarding the application of FAS 140, *Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities with regards to the guidance issued in the ASF Streamlined Foreclosure and Loss Avoidance Framework for Securitized Subprime Adjustable Rate Mortgage Loans*. The letter indicates that the SEC OCA will recognize the continuing QSPE status of the related securitization trust if a fast track loan modification was implemented.

In issuing this Statement, the ASF notes that fraud in connection with loan origination was a contributing factor to the wave of defaults to date on subprime loans. This Statement is designed to avoid rewarding borrowers who may have participated in fraud. Consistent with this intent, the fast track loan modification procedures outlined in this Statement are targeted to borrowers who occupy their homes as primary residences and who have established a track record of being willing and able to make their loan payments at the current interest rate. In addition, the ASF recommends that all existing contractual obligations and remedies related to fraudulent mortgage origination activity should be strictly enforced.

V. Compliance with Applicable Agreements

The ASF firmly believes that the framework outlined in this Statement is consistent with the authority typically granted to a servicer under the operative documents governing a subprime loan securitization.

As indicated in the ASF's June 2007 Statement, existing subprime securitization operative documents generally authorize the servicer to modify loans for which default is reasonably foreseeable, provided that the modification is in the best interests of security holders, and would not result in a REMIC violation. The June 2007 Statement also provides interpretive guidance that standard and customary servicing procedures for servicing subprime loans included in a

securitization, as used as an overarching standard in securitization operative documents, should be interpreted to permit loan modifications for loans for which default is reasonably foreseeable, so long as the modification is in the best interests of investors in the aggregate.

The June 2007 Statement provides further interpretive guidance that the modification standard “default is reasonably foreseeable” should be deemed to be met where there has been direct contact between the servicer and the borrower, where the servicer has evaluated the borrower’s current ability to pay of the borrower, and has a reasonable basis for determining that the borrower is unlikely to be able to make scheduled payments on the loan in the foreseeable future. We believe that the fast track loan modifications under Segment 2 comply with this guidance. Servicers will endeavor to discuss the modification with the borrower in a live call, but in any event there will be a communication sent to the borrower that explains the terms of the modification. The servicer will evaluate the ability of the borrower to continue to pay at the current rate by relying on the payment history. The servicer will also have a reasonable basis for believing that the borrower will not be able to make payments under the loan as originally required after the upcoming reset date, based on the size of the payment increase that would otherwise apply.

The June 2007 Statement provides further interpretive guidance that in evaluating a loan modification, the servicer should compare the anticipated recovery under the loan modification with the anticipated recovery through foreclosure on a net present value basis, that whichever action maximizes recovery should be deemed in the best interests of investors, and also that the standard “in the best interests of” the investors should be interpreted by reference to the investors in that securitization in the aggregate. For any securitized pool and set of fast track loan modifications, as to each loan in the group, the servicer will have determined individually that the borrower is not able to refinance, that the borrower is able to pay at the current rate, and that there is a reasonable basis for believing that the borrower will not be able to make payments under the loan as originally required after the upcoming reset date. In light of current market conditions including home value trends, it appears that key elements of any net present value determination (such as default rates with or without a modification, and loss severities) cannot be accurately predicted based on historic data. Nevertheless, we believe that a servicer can appropriately take the view that a group of loans modified under the fast track procedures for Segment 2 loans will in the aggregate result in a better recovery on a net present value basis, when comparing the reduction in interest payments that may result from the modifications with potential losses upon foreclosure that might have resulted absent the modifications. Accordingly, we believe that the methodology for making fast track loan modifications under Segment 2 complies with this guidance, and will result in action that is in the best interests of investors.

We further note that based on the adoption and implementation of this framework by a substantial number of subprime loan servicers, the fast track procedures for Segment 2 to date demonstrably constitute standard and customary servicing procedures for subprime loans.

Based on the foregoing, it is anticipated that master servicers, trustees and other transaction parties that are required to provide their consent to loan modifications will concur that servicers who follow the criteria set forth for fast track loan modifications under Segment 2 are complying

with the terms of the securitization operative documents and the applicable servicing standard, and therefore will provide the requisite consent.

The foregoing discussion is subject to any specific provisions of securitization operative documents that may limit modifications, such as a provision limiting the total number of modified loans to a percentage of the securitized pool.

VI. Conclusion

The volume of defaults and pending interest rate resets that may trigger defaults is unprecedented in the history of the United States residential housing market. We believe that adoption of a streamlined approach to evaluating individual loans for modification in order to facilitate rapid and orderly loan modifications is consistent with the authority typically granted to a servicer under the securitization agreements, and critical to an effective loss mitigation strategy under current market conditions.

The ASF believes that the streamlined framework described in this Statement is consistent with prior ASF statements and with the approach expressed by many regulators and the administration. The approach outlined is intended to keep borrowers in their homes while also maximizing trust proceeds to investors. We emphasize the importance of not disrupting investor expectations as represented by the terms of securitization agreements, which will foster the continuation of the availability of affordable loan products and investment opportunities. As compared to the alternative of a significant amount of defaults and foreclosures, this streamlined framework may provide in many cases a relatively higher realization of returns to investors. Although the framework attempts to provide solutions to subprime ARM loan resets, this Statement does not address circumstances where borrowers are not able to meet their contractual obligations under the current rate.

Borrowers should work to stay current and contact their servicer if they believe they will have difficulties making the higher reset payment. These borrower efforts will help them to get the best refinancing or loss mitigation option. If a borrower thinks they will not be able to make the reset payment, today's announcement should encourage borrowers to contact their servicer or counselor prior to the reset date. We believe servicers can and will do everything possible to help prevent unnecessary foreclosures.

EXHIBIT A

JUNE 2007 STATEMENT



American Securitization Forum

Statement of Principles, Recommendations and Guidelines for the Modification of Securitized Subprime Residential Mortgage Loans

June 2007

I. Introduction

The American Securitization Forum (ASF)¹ is publishing this Statement as part of its overall efforts to inform its members and promulgate relevant securitization industry guidance in light of the widespread challenges currently confronting the subprime residential mortgage markets.

Current subprime residential mortgage market conditions include a number of attributes of concern that impact securitization transactions and the broader environment for subprime mortgage finance: an increase in delinquency, default and foreclosure rates; a decline in home price appreciation rates; a prevalence of loans with a reduced introductory rate that will soon adjust to a higher rate; and a reduced availability of subprime mortgage lending for refinancing purposes. In light of these concerns, the ASF is of the view that loan modifications, for subprime mortgage loans that are in default or for which default is reasonably foreseeable, are an important servicing tool that can both help borrowers avoid foreclosure and minimize losses to securitization investors.

Moreover, the ASF recognizes that it is an important goal to minimize foreclosure and preserve homeownership wherever possible. Higher than normal rates of foreclosure may harm borrowers and their communities, and may adversely affect housing values and therefore collateral values on both performing and non-performing loans. Accordingly, the ASF recommends the use of loan modifications under appropriate circumstances as described in this Statement.

The overall purpose of this Statement is to provide guidance for servicers modifying subprime residential mortgage loans that are included in a securitization. It is our hope that publication of these principles, recommendations and guidelines will help to establish a

¹ The American Securitization Forum is a broad-based professional forum of over 350 organizations that are active participants in the U.S. securitization market. Among other roles, ASF members act as insurers, investors, financial intermediaries and professional advisers working on securitization transactions. ASF's mission includes building consensus, pursuing advocacy and delivering education on behalf of the securitization markets and its participants. This statement was developed principally in consultation with ASF's Subprime Mortgage Finance Task Force and Loan Modifications Working Group, with input from other ASF members and committees. Additional information about the ASF, its members and activities may be found at ASF's internet website, located at www.americansecuritization.com. ASF is an independent, adjunct forum of the Securities Industry and Financial Markets Association.

common framework relating to the structure and interpretation of loan modification provisions in securitization transactions, thereby promoting greater uniformity, clarity and certainty of application of these provisions throughout the industry. As a consequence, ASF hopes that this guidance will facilitate wider and more effective use of loan modifications in appropriate circumstances.

While this Statement addresses certain legal, regulatory and accounting matters, it does not constitute and should not be viewed as providing legal or accounting advice.

This Statement is focused on modifications of first lien subprime residential mortgage loans. Many of the principles reflected in this Statement would also apply to modifications of other types of residential mortgage loans. This Statement does not address modifications of second lien residential mortgage loans.

II. Overview of Typical Securitization Document Modification Provisions

Servicing of subprime residential mortgage loans included in a securitization is generally governed by either a pooling and servicing agreement or servicing agreement. These agreements typically employ a general servicing practice standard. Typical provisions require the related servicer to follow accepted servicing practices and procedures as it would employ “in its good faith business judgment” and which are “normal and usual in its general mortgage servicing activities” and/or certain procedures that such servicer would employ for loans held for its own account.

Most subprime transactions authorize the servicer to modify loans that are either in default, or for which default is either imminent or reasonably foreseeable. Generally, permitted modifications include changing the interest rate on a prospective basis, forgiving principal, capitalizing arrearages, and extending the maturity date. The “reasonably foreseeable” default standard derives from and is permitted by the restrictions imposed by the REMIC sections of the Internal Revenue Code of 1986 (the “REMIC Code”) on modifying loans included in a securitization for which a REMIC election is made. Most market participants interpret the two standards of future default – imminent and reasonably foreseeable – to be substantially the same.

The modification provisions that govern loans that are in default or reasonably foreseeable default typically also require that the modifications be in the best interests of the securityholders or not materially adverse to the interests of the securityholders, and that the modifications not result in a violation of the REMIC status of the securitization trust.

In addition to the authority to modify the loan terms, most subprime pooling and servicing agreements and servicing agreements permit other loss mitigation techniques, including forbearance, repayment plans for arrearages and other deferments which do not reduce the total amount owing but extend the time for payment. In addition, these agreements typically

permit loss mitigation through non-foreclosure alternatives to terminating a loan, such as short sales and short payoffs.

Beyond the general provisions described above, numerous variations exist with respect to loan modification provisions. Some agreement provisions are very broad and do not have any limitations or specific types of modifications mentioned. Other provisions specify certain types of permitted modifications and/or impose certain limitations or qualifications on the ability to modify loans. For example, some agreement provisions limit the frequency with which any given loan may be modified. In some cases, there is a minimum interest rate below which a loan's rate cannot be modified. Other agreement provisions may limit the total number of loans that may be modified to a specified percentage (typically, 5% where this provision is used) of the initial pool aggregate balance. For agreements that have this provision: i) in most cases the 5% cap can be waived if consent of the NIM insurer (or other credit enhancer) is obtained, ii) in a few cases the 5% cap can be waived with the consent of the rating agencies, and iii) in all other cases, in order to waive the 5% cap, consent of the rating agencies and/or investors would be required. It appears that these types of restrictions appear only in a minority of transactions. It does not appear that any securitization requires investor consent to a loan modification that is otherwise authorized under the operative documents.

III. Loan Modification Principles

Based upon extensive consultation with its members and other securitization market participants, ASF believes that the following principles articulate widely-accepted industry views regarding the use of loan modifications in connection with securitized subprime residential mortgage loans:

1. For subprime mortgage loans that are in default or where default is reasonably foreseeable, loan modifications are an important loss mitigation tool that should be used in the circumstances described in this Statement. Modifications may include changing the interest rate on a prospective basis, forgiving principal, capitalizing arrearages and extending the maturity date. Other loss mitigation alternatives include forbearance, repayment plans for arrearages and other deferments which do not reduce the total amount owing, and also non-foreclosure alternatives to terminating a loan, such as short sales and short payoffs. Unlike other loss mitigation alternatives, loan modifications have the additional advantage that they can be used prior to default, where default is reasonably foreseeable.
2. Establishing early contact with borrowers is a critically important factor in the success of any loss mitigation initiative. Servicers should be permitted and encouraged to reach out affirmatively and proactively to borrowers for whom default is more likely, determine whether default is reasonably foreseeable, and

then explore modification possibilities. In particular, such outreach should be permitted and encouraged prior to an upcoming first adjustment date on a hybrid ARM loan.

3. Loan modifications should be considered and made on a loan-by-loan basis, taking into account the unique combination of circumstances for each loan and borrower, including the borrower's current ability to pay. The ASF is opposed to any across-the-board approach to loan modifications, and to any approach that would have all modifications structured in a particular manner. The ASF is also opposed to any proposals that would provide an across-the-board moratorium or delay period on foreclosures.
4. Generally, the ASF believes that loan modifications should only be made:
 - a. Consistently with applicable securitization operative documents (including amendments that can be made without investor or other consents);
 - b. In a manner that is in the best interests of the securitization investors in the aggregate;
 - c. In a manner that is in the best interests of the borrower;
 - d. In a manner that, insofar as possible, avoids materially adverse tax or accounting consequences to the servicer and, to the extent known, to the securitization sponsor or investors;
 - e. Where the loan is either in default or default is reasonably foreseeable, and if the latter, where there is a reasonable basis for the servicer determining that the borrower is unlikely to be able to make scheduled payments on the loan in the foreseeable future;
 - f. Where there is a reasonable basis for the servicer concluding that the borrower will be able to make the scheduled payments as modified; and
 - g. In a manner that is designed to provide sustainable and long-term solutions, but does not reduce the required payments beyond the magnitude required to return the loan to performing status, or beyond the anticipated period of borrower need.
5. The ASF believes that loan modifications meeting the criteria in Loan Modification Principles point 4 above are generally preferable to foreclosure where the servicer concludes that the net present value of the payments on the loan as modified is likely to be greater than the anticipated net recovery that would result from foreclosure.

6. In considering loss mitigation alternatives that reduce the interest rate prospectively, servicers should consider whether to make the rate reduction temporary (such as a relatively short term extension of the initial fixed period on a hybrid ARM), or permanent, based on the anticipated period of borrower need. For temporary rate reductions, servicers should re-evaluate the borrower's ability to pay, and the continued need for a rate reduction, at the end of the temporary period.
7. Any loan modification that reduces otherwise lawful, contractually required payments of principal or interest must be understood to be a financial concession by the securitization investors. There is no basis for requiring such concessions from investors unless the modification is determined to be in the best interests of the investors collectively. Loan modifications should seek to preserve the originally required contractual payments as far as possible.
8. Reasonable determinations made by servicers with respect to loan modifications, where made in good faith and in accordance with generally applicable servicing standards and the applicable securitization operative documents, should not expose the servicer to liability to investors and should not be subject to regulatory or enforcement actions.

IV. Loan Modification Interpretive Guidance

The ASF endorses the following interpretive positions on specific issues arising in connection with loan modifications:

1. The ASF believes, based on prevailing existing practice, that standard and customary servicing procedures for servicing subprime mortgage loans included in a securitization, as typically used as an overarching servicing standard in securitization operative documents, should be interpreted to allow the servicer to: a) permit loan modifications (including prospective interest rate reductions which may be either temporary or permanent, forgiveness of principal, capitalizing arrearages, or maturity extension not beyond the securitization maturity date) for loans that are in default or for which default is reasonably foreseeable, so long as the modification is in the best interests of investors in the aggregate, and b) engage in other loss mitigation alternatives including forbearance, repayment plans for arrearages and other deferments which do not reduce the total amount owing, and also non-foreclosure alternatives to terminating a loan, such as short sales and short payoffs. The ASF believes that existing securitization pooling and servicing agreements should be interpreted, to the maximum extent possible, to authorize the servicer to take the actions referenced above.

2. With respect to existing pooling and servicing or other operative agreements that expressly prohibit or restrict the servicer from taking the actions referenced above, the ASF believes that amendments to those agreements authorizing such actions should be approved by all parties required to consent to such amendments, as and when requested to do so.
3. The ASF believes that securitization operative documents should not impose numerical limitations on loan modifications, such as limits based on the percentage of the pool that may be modified.
4. The modification standards “default is imminent” and “default is reasonably foreseeable” should be interpreted to have the same meaning.
5. The modification standard “default is reasonably foreseeable” should be deemed to be met where there has been direct contact between the servicer and the borrower, where the servicer has evaluated the current ability to pay of the borrower, and has a reasonable basis for determining that the borrower is unlikely to be able to make scheduled payments on the loan in the foreseeable future. (This interpretation is intended to provide guidance only as to a set of circumstances where the standard would generally be viewed to be met, and not to reflect any view that the standard would not be met in other circumstances.)
6. In evaluating whether a proposed loan modification will maximize recoveries to the investors, the servicer should compare the anticipated recovery under the loan modification to the anticipated recovery through foreclosure on a net present value basis. Whichever action is determined by the servicer to maximize recovery should be deemed to be in the best interests of the investors.
7. The standards “in the best interests of” or “not materially adverse to the interests of” investors or securityholders in any securitization should be interpreted by reference to the investors in that securitization in the aggregate, without regard to the specific impact on any particular class of investors, and in a manner that is neutral as to the effect on the cash flow waterfall or any particular class of securities.

V. Loan Modification Recommendations

The ASF recommends the following further actions in respect of loan modifications:

A. Existing and future securitizations:

1. The ASF endorses and encourages the adoption of the position articulated in the Mortgage Bankers Association position paper titled “FAS 140

Implications of Restructurings of Certain Securitized Mortgage Loans”, dated May [24], 2007 (the “MBA Position Paper”).

2. Servicers should maintain policies, procedures and guidelines that are reasonably designed to identify and manage any actual or perceived conflicts of interest that may arise in connection with their loan modification activities and decision making. Such policies, procedures and guidelines should address, among other topics, situations in which a servicer (a) has an ownership interest in one or more classes of bonds supported by principal and/or interest collections on subprime mortgage loans that it services; (b) receives servicing fees or other compensation that is tied to various attributes of subprime mortgage loans that it services (e.g., outstanding principal balance, delinquency/default status); and (c) is not reimbursed for the costs of loan modifications from collections on subprime mortgage loans that it services.
3. Securitization operative documents should clearly state, for purposes of “delinquency triggers” or “cumulative loss triggers” which control whether excess cash flow may be released to the residual, the following: (a) whether and under what conditions a modified loan is to be considered “current”, and (b) whether and how any interest rate reduction or forgiveness of principal resulting from a loan modification should be treated as a realized loss.
4. As an urgent, high priority matter, the ASF should develop guidelines under which delinquency triggers and cumulative loss triggers in securitization operative documents, which control whether excess cash flow may be released to the residual, should be interpreted in a manner consistent with the parties’ intent and in a manner that appropriately reflects any loan modifications that have occurred. It is the sense of investors that (a) any partial forgiveness of principal should be treated as a loss for purposes of cumulative loss triggers, and (b) a modified loan performing in accordance with its modified terms should be treated as delinquent for purposes of delinquency triggers for some appropriate period of time.
5. Greater clarity, transparency and consistency should be established regarding how any interest rate reduction or forgiveness of principal resulting from a loan modification should be reflected for purposes of investor reporting, and for purposes of allocating payments for the cash flow waterfall.
6. Consistent with the foregoing recommendations, servicers should not make decisions to use or not use loan modifications for the purpose of

manipulating the application of delinquency triggers or cumulative loss triggers which control whether excess cash flow may be released to the residual.

7. The ASF will conduct a survey of typical document provisions and interpretations, on the question of whether and under what conditions a modified loan is to be considered current for purposes of investor reporting, and for purposes of delinquency triggers and cumulative loss triggers which control whether excess cash flow may be released to the residual. Additional guidelines should be developed and recommendations should be made and evaluated regarding amendments to securitization transactional documents, based on the results of this survey.

B. Future securitizations:

1. The ASF will develop standard, uniform model contractual provisions governing the servicer's ability to provide loan modifications for use in future securitizations. Such provisions should expressly authorize the actions referenced in Loan Modification Interpretive Guidance point 1 above.
2. Use of an increased or supplemental servicing fee should be considered for loans that have been modified to defray the additional costs of administering modifications.
3. The ASF will develop standard, uniform model contractual provisions, both as to timing and priority, to govern the servicer's ability to obtain reimbursement for P&I advances and servicing advances made in respect of loans where there has been a loan modification, or where other types of loss mitigation have been used.

EXHIBIT B

OCTOBER 2007 STATEMENT



American Securitization Forum

Statement on Reimbursement of Counseling Expenses in Residential Mortgage-Backed Securitizations

October 10, 2007

The American Securitization Forum (ASF)¹ is publishing this Statement as part of its ongoing efforts to inform its members and promulgate guidance to the securitization industry in light of challenges confronting the residential mortgage markets.

Under current residential mortgage market conditions, the ASF recognizes that it is a particularly important goal to minimize foreclosure and preserve homeownership wherever possible. Higher than normal rates of foreclosure harm borrowers and their communities, and may adversely affect housing values and therefore collateral values on loans in securitizations. Accordingly, the ASF hereby reaffirms our June 2007 *Statement of Principles, Recommendations and Guidelines for the Modification of Securitized Subprime Residential Mortgage Loans* (June Statement), and that prudent and responsible loan modifications, among other loss mitigation techniques, are an important servicing tool that can both help borrowers keep their homes and minimize losses to investors in mortgage-backed securities.

Given the wide array of options typically available to the servicer in connection with a borrower default or reasonably foreseeable default, ranging from forbearance, modification, short sales, to foreclosure, effective communication with the borrower is an essential part of gathering the information needed to determine which option provides the best result for securitization investors. While servicers have the sole contractual responsibility for communication with borrowers and resolving delinquencies and defaults, counseling can help bridge gaps between servicers and borrowers by educating borrowers about their options and mediating potentially adversarial situations. The availability of professionally trained counseling services to borrowers can be an important tool to help prevent mortgage loan defaults and avoid difficult and costly foreclosures that ultimately hurt borrowers as well as investors in mortgage-backed securities.

¹ The American Securitization Forum is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice issues. ASF members include over 370 firms, including issuers, investors, servicers, financial intermediaries, rating agencies, financial guarantors, legal and accounting firms, and other professional organizations involved in securitization transactions. The ASF also provides information, education and training on a range of securitization market issues and topics through industry conferences, seminars and similar initiatives. For more information about ASF, its members and activities, please go to www.americansecuritization.com.

Most operative documents that govern securitization transactions entitle servicers to reimbursement from trust cashflows for certain unanticipated costs, or “servicing advances,” related to their servicing of loans. These reimbursements typically include any customary, reasonable and necessary out of pocket expenses incurred by servicers in connection with the performance of their duties. Further, most securitization transactions permit servicing advances to be reimbursable from securitization trust cashflows if those advances are deemed unrecoverable from proceeds of the related loan.

Despite the potential that counseling offers in facilitating forbearance arrangements, loan modifications, short sales or other loss mitigation outcomes, many servicers of residential mortgage-backed securitizations have generally not sought reimbursement of counseling expenses from trust cashflows.

Given increasing and evolving borrower and servicing needs in the current mortgage-backed securities market, the ASF is of the view that borrower counseling expenses should be viewed as servicing advances, and therefore reimbursable from securitization trust cashflows where consistent with the terms of the applicable securitization operative documents, in the following circumstances:

- for loans in default or where default is reasonably foreseeable; and
- where the servicer concludes, in its reasonable judgment, that the related counseling service has had or is likely to have the effect of mitigating losses or maximizing recoveries on the particular loan.

In order to encourage counseling that may help keep borrowers in their homes and facilitate outcomes in the best interests of investors in securities backed by such mortgage loans, the ASF hereby recommends that servicers and counseling organizations work together to implement reimbursement procedures consistent with the above view. In making this recommendation, ASF acknowledges and affirms the existing contractual responsibilities of servicers as set forth in securitization governing documents. Subject to the specific terms and provisions of those governing documents, ASF believes that the engagement of borrower counseling services and reimbursement of related expenses as outlined in this Statement can serve as an important complement to servicers’ existing obligations to service loans, mitigate losses and maximize recoveries in securitization transactions.

The ASF will continue to work to develop more specific counseling reimbursement provisions for inclusion in future securitization operative documents. The ASF will also work with counseling agencies, servicers, investors and other securitization transaction parties to facilitate those parties developing and clarifying procedures for implementing counseling reimbursements from trust cashflows, as well as servicer and counselor reporting practices to investors in mortgage-backed securities.

The ASF hopes that this recommendation, in addition to our June Statement, will further facilitate wider and more effective use, in appropriate circumstances, of loan modifications and other loss mitigation tools.

EXHIBIT C

MODIFICATION REPORTING GUIDELINES



**American Securitization Forum:
Recommended Definitions and Investor Reporting Standards for
Modifications of Securitized Residential Mortgage Loans
December, 2007**

Background:

The American Securitization Forum (ASF)¹ is publishing these *Recommended Definitions and Investor Reporting Standards for Modifications of Securitized Residential Mortgage Loans* (the "ASF Loan Modification Reporting Standards," or "Standards") as part of its continuing efforts to inform its members and promulgate relevant securitization industry guidance in light of the widespread challenges confronting the subprime residential mortgage markets.

In June 2007, ASF published a *Statement of Principles, Recommendations and Guidelines for the Modification of Securitized Subprime Residential Mortgage Loans* (the "June ASF Statement"). The purpose of that statement, together with several follow-up ASF initiatives since that time², is to establish a common framework relating to the structure and interpretation of loan modification provisions in securitization transactions, thereby promoting greater uniformity, clarity and certainty of application of those provisions throughout the industry. ASF's overall goal in issuing recommended guidance on these topics is to facilitate wider and more effective use of loan modifications and other loss mitigation options in appropriate circumstances.

The June ASF Statement included the following recommendations, among others:

- Greater clarity, transparency and consistency should be established regarding how any interest reduction or forgiveness of principal resulting from a loan modification should be reflected for purposes of investor reporting, and for purposes of allocating payments for the cash flow waterfall.

¹ The American Securitization Forum is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice issues. ASF members include over 375 firms, including issuers, investors, servicers, financial intermediaries, rating agencies, financial guarantors, legal and accounting firms, and other professional organizations involved in securitization transactions. The ASF also provides information, education and training on a range of securitization market issues and topics through industry conferences, seminars and similar initiatives. For more information about ASF, its members and activities, please go to www.americansecuritization.com. ASF is an affiliate of the Securities Industry and Financial Markets Association (SIFMA).

² *ASF Statement on Reimbursement of Counseling Expenses in Residential Mortgage-Backed Securitizations*, October 10, 2007; *ASF Streamlined Foreclosure and Loss Avoidance Framework For Securitized Subprime ARM Loans*, December 2007.

- As an urgent, high priority matter, ASF should develop guidelines under which delinquency triggers and cumulative loss triggers in securitization operative documents, which control whether excess cash flow may be released to the residual, should be interpreted in a manner consistent with the parties' intent and in a manner that appropriately reflects any loan modifications that have occurred.
- Securitization operative documents should clearly state, for purposes of "delinquency triggers" or "cumulative loss triggers" which control whether excess cash flow may be released to the residual, the following: (a) whether and under what conditions a modified loan is to be considered "current," and (b) whether and how any interest rate reduction or forgiveness of principal resulting from a loan modification should be treated as a realized loss.

The following ASF Loan Modification Reporting Standards are intended to be responsive to the above recommendations contained in the June ASF Statement. These ASF Loan Modification Reporting Standards are an important body of companion guidance to accompany ASF's Streamlined Foreclosure and Loss Avoidance Framework for Securitized Subprime ARM Loans (the "ASF Streamlined Framework"), which ASF is publishing simultaneously with these Standards.

Consistent with the June Statement, ASF is in the process of developing additional guidance on the treatment of modified loans for purposes of delinquency and cumulative loss trigger calculations, and will be issuing that further guidance shortly.

Scope and Implementation:

These ASF Loan Modification Reporting Standards are intended to apply to monthly investor reporting of loan modification activity for securitizations of residential mortgage loans generally, including but not limited to subprime mortgage securitizations. The scope of the recommended guidance does not include non-securitized (i.e., portfolio) loans. However, ASF recommends that consistency of reporting for all modification activity should be pursued whenever possible.

These Standards are intended to establish a common, minimum recommended framework for investor reporting of loan modification activity in securitizations. Individual transaction participants may elect to report additional loan modification details.

Servicers, trust administrators and other entities having responsibilities for securitization investor reporting are encouraged to implement these Standards as soon as practicable, including reporting prospective loan modification activity for existing transactions. For new deals, transaction participants are encouraged to incorporate these Standards into operative documents that set forth investor reporting requirements.

Finally, with the adoption of the ASF Streamlined Framework, servicers should consider collecting and reporting loan modification data for the various segments of loans that are set

forth in that guidance, as these are likely to be relevant to the ongoing evaluation of the efficacy of the loan modification recommendations set forth therein.

Summary of ASF Loan Modification Reporting Standards:

Part (A)--Definition of Modified Loan:

This definition is intended to identify actions taken with respect to a mortgage loan that constitute a loan modification, as distinct from other, less formal revisions to the payment terms of the loan, such as a trial period or forbearance arrangement. Accordingly, the definition of "Modified Loan" includes a revision to the contractual payment terms of the mortgage note that is agreed to by the servicer and borrower. The definition then sets forth a reasonably comprehensive, but not necessarily exclusive, list of actions that fit within this overarching definition. This definition does not include foreclosure, short sales, or any other final disposition of mortgage loans.

Part (B)--Recommended Loan Modification Data Fields:

This section of the Statement identifies and provides a brief description of the specific individual data fields for investor reports. Importantly, all of these reporting fields are intended to capture data at the individual loan level. This is intended to facilitate flexibility in aggregating loan-level data to produce pool-level reports, or other aggregated presentations of individual loan characteristics. The promulgation of specific data reporting templates and file formats was outside the scope of this initial project. This may be the focus of additional work, to the extent that developing standardized reporting templates and file formats may be helpful. Reporting fields applicable exclusively to adjustable-rate mortgages are denoted with an asterisk; certain other reporting fields are applicable only if they relate to particular loan types (e.g., balloon loans, IO loans).

A) Definition of Modified Loan:

"Modified Loan" includes the following: With respect to any mortgage loan, a revision to the contractual payment terms of the related mortgage note, agreed to by the servicer and borrower, including without limitation the following:

1. Capitalization of any amounts owing by adding such amount to the outstanding principal balance;
2. Extension of the maturity;
3. Change in amortization schedule;
4. Reduction or other revision to the mortgage note interest rate;
5. Extension of the fixed-rate payment period of any adjustable rate mortgage loan;
6. Reduction or other revision to the note interest rate index, gross margin, initial or periodic interest rate cap, or maximum or minimum mortgage rate of any adjustable rate mortgage loan;

7. Forgiveness of any amount of interest and/or principal owed by the related borrower;
8. Forgiveness of any principal and/or interest advances that are reimbursed to the servicer from the securitization trust; and
9. Forgiveness of any escrow advances of taxes and insurance and/or any other servicing advances that are reimbursed to the servicer from the securitization trust.

B) Recommended Loan Modification Data Fields:

Data Reporting Field	Description
1. Modified Loan Amount	Beginning actual unpaid principal balance owed by the borrower as of the Modification Effective Payment Date.
2. Modification Effective Payment Date	Date on which first payment is due under the modified terms.
3. Ending Actual Balance	Actual outstanding principal balance as of the monthly cutoff date.
4. Ending Scheduled Balance	Scheduled principal balance as of the monthly cutoff date.
5. Total Capitalized Amount	Total amount owing under the loan and added to the Ending Actual Balance.
6. Pre-Modification Interest Rate	Interest rate of the loan immediately preceding the Modification Effective Payment Date.
7. Post-Modification Interest Rate	Interest rate of the loan as of the Modification Effective Payment Date.
8. Post-Modification Margin	Margin as of the Modification Effective Payment Date.
9. Post-Modification Periodic Interest Caps*	Maximum interest rate which can be charged in an adjustment period, as of the Modification Effective Payment Date.
10. Post-Modification Lifetime Interest Caps*	Maximum interest rate which can be charged over the life of the loan, as of the Modification Effective Payment Date.
11. Pre-Modification P&I Payment	Total principal and interest payment amount preceding the Modification Effective Payment Date.
12. Post-Modification P&I Payment	Total principal and interest payment amount as of the Modification Effective Payment Date.
13. Pre-Modification Maturity Date	Original maturity date of the loan. (If there is more than one modification over

	the life of the loan, subsequent “pre-modification maturity date” would reflect the value immediately preceding the most recent Modification Effective Payment Date reported.)
14. Post-Modification Maturity Date	Maturity date of the loan as of the Modification Effective Payment Date.
15. Pre-Modification Interest Reset Period (If changed.)*	Original duration of the Interest Reset Period of the loan.
16. Post- Modification Interest Reset Period (If changed.)*	Duration of the Interest Reset Period of the loan as of the Modification Effective Payment Date.
17. Pre-Modification Initial Reset Date*	First interest reset date under the original terms of the loan.
18. Post-Modification Initial Reset Date, and Next Reset Date*	Initial interest reset date as of the Modification Effective Payment Date, and the subsequent reset date.
19. Fixed to ARM (Y/N)	Change in loan status from fixed rate to ARM.
20. ARM to Fixed (Y/N)	Change in loan status from ARM to fixed rate.
21. IO to Fully Amortizing (Y/N)	Change in loan status from IO to fully amortizing.
22. Fully Amortizing to IO (Y/N)	Change in loan status from fully amortizing to IO.
23. Pre-Modification IO Term (If applicable.)	Term of IO preceding the Modification Effective Payment Date.
24. Post-Modification IO Term (If applicable.)	Term of IO as of the Modification Effective Payment Date.
25. Balloon Payment Amount	Cumulative amount of balloon principal payment due.
26. Balloon Payment Date	Date on which Balloon Payment Amount is due.
27. Forgiven Principal Amount	Amounts owing and payable of principal forgiven.
28. Forgiven Interest Amount	Gross amount of interest forgiven.

*Applicable to adjustable-rate mortgages only.

EXHIBIT D

OPERATIONAL GUIDELINES FOR REIMBURSEMENT OF COUNSELING EXPENSES



American Securitization Forum

Operational Guidelines for Reimbursement of Counseling Expenses in Residential Mortgage-Backed Securitizations

May 20, 2008

A. Background and Purpose

These guidelines are designed to assist mortgage loan servicers and counseling organizations in implementing procedures for reimbursing expenses associated with the provision of borrower counseling services. These guidelines follow the American Securitization Forum's ("ASF")¹ *"Statement on Reimbursement of Counseling Expenses in Residential Mortgage-Backed Securitizations"* ("October Statement"), which is attached as Exhibit A. Pursuant to that guidance, borrower counseling expenses may be viewed as servicing advances, where consistent with the terms of applicable securitization operative documents, and therefore eligible for reimbursement from securitization trust cashflows in the following circumstances:

1. For loans that are in default or where default is reasonably foreseeable; and
2. Where the servicer concludes, in its reasonable judgment, that the related counseling service has had or is likely to have the effect of mitigating losses and maximizing recoveries on the particular loan.

Consistent with the October Statement, these guidelines set forth a set of operational procedures by which servicers may conclude that appropriate counseling expenses may be reimbursable from securitization trust cashflows. Servicers may use their own operational procedures rather than those set forth by these guidelines if those procedures are also consistent with the applicable securitization operative documents.

These guidelines are specifically designed to address reimbursement of counseling expenses from securitization trust cashflows and are not intended to establish industry standards or interpretations for any other purpose.

These guidelines will sunset on July 31, 2010, prior to which the ASF will undertake a comprehensive evaluation of these guidelines.

¹ The American Securitization Forum is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice issues. ASF members include over 365 firms, including investors, servicers, issuers, financial intermediaries, rating agencies, financial guarantors, trustees, legal and accounting firms, and other professional organizations involved in securitization transactions. The ASF also provides information, education and training on a range of securitization market issues and topics through industry conferences, seminars and similar initiatives. For more information about ASF, its members and activities, please go to www.americansecuritization.com.

B. General Principles

1. This guidance is intended principally for securitized residential mortgage loans, but may also be applicable in the context of non-securitized residential mortgage loans, in each case as may be qualified by the governing documents. In either circumstance, any relevant contractual provisions governing the reimbursement of borrower counseling expenses and other servicing advances shall control over any provision contained in these guidelines.
2. Prior to counseling services being rendered, servicers must execute written agreements with counseling organizations for the services of those organizations to be eligible for reimbursement.
3. Servicers should contract with quality and trusted counseling organizations that they believe, in their reasonable judgment, will act in good faith to: 1) help borrowers connect with their servicers; 2) collect information and data relevant to loss mitigation evaluations; 3) recommend appropriate loss mitigation alternatives to servicers; and/or 4) assist borrowers in restructuring the full range of their debt obligations to help them better meet their mortgage obligations. In the aggregate for each counseling organization, the servicer must conclude that counseling expenses reimbursed through securitization trust proceeds are in the best economic interests of securitization trust investors in the aggregate.
4. If a servicer manages loans for the benefit of itself or those of an affiliate reimburses counseling expenses from securitization trust proceeds, that servicer should contract with counseling organizations and institute reimbursement procedures similar to those that such servicer is employing for loans held in its own account.
5. Servicers are recommended to reimburse up to \$150 out of securitization trust proceeds for any individual counseling session. Servicers may consider reimbursing larger amounts in compelling circumstances such as when a counseling service results in a loss mitigation outcome that directly produces a net present value benefit to securitization trust investors in the aggregate.
6. Servicers may consider applicable counseling expenses as servicing advances and reimbursable from securitization trust proceeds on or after the date such expenses have been remitted by the servicer to the counseling organization.
7. Prior to effectuating any loss mitigation outcome based on information and data received from a counseling organization, a servicer must have policies and procedures in place to ensure that relevant information and data received from the counseling organization is materially accurate.
8. Although a counseling organization may make a loss mitigation recommendation to a servicer, that servicer still has the contractual obligation to consider, on a loan-by-loan basis, the range of available loss mitigation alternatives for that borrower. If a servicer selects a different loss mitigation alternative than that recommended by a counseling organization, the counseling expense may still be viewed as reimbursable, irrespective of the results of the loss mitigation effort.

9. Counseling expenses are eligible for reimbursement for both owner-occupied homes and non owner-occupied homes.
10. Any servicer reimbursing counseling expenses through securitization trust cashflows should not realize on the servicer's tax return any charitable tax deduction benefit for reimbursements from securitization trust cashflows.
11. In order for a counseling expense to be eligible for reimbursement, documented responses to questions such as those enumerated in Appendix A should be provided to the servicer by the applicable counseling organization.
12. Servicers reimbursing counseling expenses should continue to evaluate and analyze the effectiveness of these guidelines in maximizing the aggregate economic interests of securitization trust investors.

C. Loans Eligible for Reimbursement

Counseling services provided for the following loans are eligible for reimbursement unless specifically prohibited in this section:

1. All loans in delinquency
 - a. This includes loans that have re-defaulted while participating in a prior loss mitigation plan (including, but not limited to, modifications and repayment plans)
2. All loans that are current but where default is imminent or reasonably foreseeable
 - a. Imminent or reasonably foreseeable default can be determined when:
 - i. The borrower, in his or her judgment, may have difficulty making his or her mortgage payment in coming months; AND
 - ii. There is a pending rate reset within 6 months; OR
 - iii. The borrower has suffered or expects to suffer a material reduction in income; OR
 - iv. The borrower has experienced a significant increase in his or her debt burden or recurring obligations or expects to experience a non-discretionary increase in his or her debt burden or recurring obligations.
3. Loans currently in loss mitigation with extenuating circumstances
 - a. Extenuating circumstances can be determined when:
 - i. The borrower, in his or her judgment, may have difficulty making his or her mortgage payment in coming months under their current loss mitigation plan; AND
 - ii. The borrower is currently in a loss mitigation plan and there is a pending rate reset within 6 months; OR
 - iii. The borrower, since entering the loss mitigation plan, has suffered or expects to suffer a material reduction in income; OR

- iv. The borrower, since entering the loss mitigation plan, has experienced a significant increase in his or her debt burden or recurring obligations or expects to experience a non-discretionary increase in his or her debt burden or recurring obligations; OR
 - v. The borrower's current loss mitigation plan is expiring in the coming months and the borrower, in his or her judgment, may have difficulty making a higher mortgage payment.
- 4. Loans where the borrower is within 30 days of a foreclosure sale, where:
 - a. The counseling agency conducts an immediate warm-transfer to the servicer for foreclosure prevention; OR
 - b. If the counselor is unable to complete a warm-transfer using best efforts, the counselor successfully transmits data through the designated servicer portal with appropriate high priority designation.
- 5. All loans where the servicer documents the individual counseling expense had a net present value benefit. These situations include all current loans where default is imminent, all delinquent loans and/or loans in foreclosure (including loans in States with pending redemption status).

D. Loans Ineligible for Reimbursement

- 1. Loans where the borrower is in active bankruptcy at the time of the counseling session.
- 2. Loans where the loan number provided to the servicer by the counseling agency is inaccurate, duplicated or repeated in a prior billing cycle.
- 3. Loans where the borrower has already had a credit counseling session in the previous 12 months.
 - a. Exceptions to D.3. above can be made by servicers on a case by case basis for borrowers when extenuating circumstances have occurred since the previous counseling session. Extenuating circumstances can be determined when:
 - i. The borrower, in his or her judgment, may have difficulty making his or her mortgage payment in coming months; AND
 - ii. There is a subsequent pending rate reset within 6 months; OR
 - iii. The borrower has suffered or expects to suffer a subsequent material reduction in income; OR
 - iv. The borrower has experienced a subsequent significant increase in his or her debt burden or recurring obligations or expects to experience a subsequent non-discretionary increase in his or her debt burden or recurring obligations.

APPENDIX A

Borrower Evaluative Questions

1. What is your loan number and mortgage company name?
2. Are you delinquent on your mortgage loan? If so, how many payments?
3. Are you in bankruptcy? If so, are you in Chapter 7 or 13?
4. Do you have any other mortgage loan on your property? If so, who is the lender? Are you delinquent on other loans? If so, how many payments have you missed?
5. Are you within 30 days of foreclosure sale?
6. Do you anticipate you will not be able to afford your mortgage loan payment in the near future?
7. Have you worked with your mortgage company on developing a solution? If so, can you describe the type of solution offered?
8. What is the main reason why you can't pay your mortgage?
9. Have you recently worked with another counseling agency to attempt to find a solution to your mortgage loan problems?

EXHIBIT A

October Statement



American Securitization Forum

Statement on Reimbursement of Counseling Expenses in Residential Mortgage-Backed Securitizations

October 10, 2007

The American Securitization Forum (ASF)¹ is publishing this Statement as part of its ongoing efforts to inform its members and promulgate guidance to the securitization industry in light of challenges confronting the residential mortgage markets.

Under current residential mortgage market conditions, the ASF recognizes that it is a particularly important goal to minimize foreclosure and preserve homeownership wherever possible. Higher than normal rates of foreclosure harm borrowers and their communities, and may adversely affect housing values and therefore collateral values on loans in securitizations. Accordingly, the ASF hereby reaffirms our June 2007 *Statement of Principles, Recommendations and Guidelines for the Modification of Securitized Subprime Residential Mortgage Loans* (June Statement), and that prudent and responsible loan modifications, among other loss mitigation techniques, are an important servicing tool that can both help borrowers keep their homes and minimize losses to investors in mortgage-backed securities.

Given the wide array of options typically available to the servicer in connection with a borrower default or reasonably foreseeable default, ranging from forbearance, modification, short sales, to foreclosure, effective communication with the borrower is an essential part of gathering the information needed to determine which option provides the best result for securitization investors. While servicers have the sole contractual responsibility for communication with borrowers and resolving delinquencies and defaults, counseling can help bridge gaps between servicers and borrowers by educating borrowers about their options and mediating potentially adversarial situations. The availability of professionally trained counseling services to borrowers can be an important tool to help prevent mortgage loan defaults and avoid difficult and costly foreclosures that ultimately hurt borrowers as well as investors in mortgage-backed securities.

¹ The American Securitization Forum is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice issues. ASF members include over 370 firms, including issuers, investors, servicers, financial intermediaries, rating agencies, financial guarantors, legal and accounting firms, and other professional organizations involved in securitization transactions. The ASF also provides information, education and training on a range of securitization market issues and topics through industry conferences, seminars and similar initiatives. For more information about ASF, its members and activities, please go to www.americansecuritization.com.

Most operative documents that govern securitization transactions entitle servicers to reimbursement from trust cashflows for certain unanticipated costs, or “servicing advances,” related to their servicing of loans. These reimbursements typically include any customary, reasonable and necessary out of pocket expenses incurred by servicers in connection with the performance of their duties. Further, most securitization transactions permit servicing advances to be reimbursable from securitization trust cashflows if those advances are deemed unrecoverable from proceeds of the related loan.

Despite the potential that counseling offers in facilitating forbearance arrangements, loan modifications, short sales or other loss mitigation outcomes, many servicers of residential mortgage-backed securitizations have generally not sought reimbursement of counseling expenses from trust cashflows.

Given increasing and evolving borrower and servicing needs in the current mortgage-backed securities market, the ASF is of the view that borrower counseling expenses should be viewed as servicing advances, and therefore reimbursable from securitization trust cashflows where consistent with the terms of the applicable securitization operative documents, in the following circumstances:

- for loans in default or where default is reasonably foreseeable; and
- where the servicer concludes, in its reasonable judgment, that the related counseling service has had or is likely to have the effect of mitigating losses or maximizing recoveries on the particular loan.

In order to encourage counseling that may help keep borrowers in their homes and facilitate outcomes in the best interests of investors in securities backed by such mortgage loans, the ASF hereby recommends that servicers and counseling organizations work together to implement reimbursement procedures consistent with the above view. In making this recommendation, ASF acknowledges and affirms the existing contractual responsibilities of servicers as set forth in securitization governing documents. Subject to the specific terms and provisions of those governing documents, ASF believes that the engagement of borrower counseling services and reimbursement of related expenses as outlined in this Statement can serve as an important complement to servicers’ existing obligations to service loans, mitigate losses and maximize recoveries in securitization transactions.

The ASF will continue to work to develop more specific counseling reimbursement provisions for inclusion in future securitization operative documents. The ASF will also work with counseling agencies, servicers, investors and other securitization transaction parties to facilitate those parties developing and clarifying procedures for implementing counseling reimbursements from trust cashflows, as well as servicer and counselor reporting practices to investors in mortgage-backed securities.

The ASF hopes that this recommendation, in addition to our June Statement, will further facilitate wider and more effective use, in appropriate circumstances, of loan modifications and other loss mitigation tools.

Servicing Real Estate Mortgage Investment Conduits in U.S. Mortgage Securitizations

*Milton A. Vescovacci, Esq. **

The U.S. securitization market is the largest market in the world for issuances of asset securitizations. As of December 31, 2005, over \$1.68 trillion of asset-backed securities were issued in the U.S.¹ The great majority of those asset securitizations involve securities backed by pools of mortgage loans sold via Real Estate Mortgage Investment Conduits (or "REMICs"). The purpose of this article is to (1) describe certain features of REMICs that are generally applicable to pools of mortgage loans in securitizations and (2) highlight certain REMIC-related provisions that are typically found in servicing agreements of securitized mortgage pools. Capitalized terms used in this article and not otherwise defined in the body of the article will have the meanings assigned to them in **Schedule A** attached hereto.

I. What is a REMIC?

A REMIC is a corporation, trust, partnership or a segregated pool of assets that qualifies for special tax treatment under the Internal Revenue Code of 1986, as amended (the "IRC"). The REMIC Provisions were adopted with the passing of the Tax Reform Act of 1986. Recent modifications to the REMIC Provisions made by the American Jobs Creation Act of 2004, which became effective on January 1, 2005, permit new kinds of debt obligations, such as reverse mortgages, home equity lines of credit and government originated loans (i.e., small business administration disaster loans), to be securitized using REMICs. The REMIC Provisions are among the most complex and elaborate sections of the IRC.

II. Why are REMICs Used in Securitizations?

The principal advantage of forming REMICs for the sale of mortgage-backed securities is that REMICs are treated as pass-through vehicles for tax purposes which are not subject to double taxation. For instance, in many mortgage-backed securitizations, the owner of a pool of mortgage loans sells, transfers or contributes such loans to a special purpose entity, which may be a trust, corporation, limited liability company or partnership, that is designed to qualify as a REMIC and, simultaneously, the special purpose entity issues securities that are backed by the cash flows generated from the transferred assets to investors in order to pay for the loans. If the special purpose entity or the assets transferred qualify as a REMIC, then any income of the REMIC is "passed through" and taxable to the holders of the REMIC Regular Interests and Residual Interests.

* The author is a senior associate in the Securitization and Structured Finance Practice Group of Akerman Senterfitt. Akerman Senterfitt is a full service law firm consisting of over 475 attorneys and advises issuers, originators, servicers, underwriters, investors and trustees in securitization and structured finance transactions.

1 Asset-Backed Alert, Summary of Worldwide Securitization Volumes 2005 (December 31, 2005).

To qualify for REMIC status, the following criteria must be satisfied:

- The mortgage-backed securities offered to investors must be structured to consist of “Regular Interests” and “Residual Interests.” The mortgage-backed securities that represent Regular Interests of a REMIC are considered debt for tax purposes and the Regular Interest holders are considered creditors of the REMIC. The mortgage-backed securities that represent Residual Interest of a REMIC are considered equity and the Residual Interest holders are treated as partners for tax purposes. Only a single class of Residual Interests may be created to qualify as a REMIC; and
- Substantially all of the assets must be Qualified Mortgages and Permitted Investments as of the third month after a REMIC’s Startup Day. A REMIC may contain a nominal amount (but no greater than 1%) of non-qualified mortgages assets; and
- A REMIC election must be made on the REMIC’s first tax return by the person authorized to sign the REMIC’s tax return (e.g., the sponsor of the REMIC or the trustee) in the first taxable year of the REMIC’s existence, which begins on the Startup Day and ends on December 31st of that same year in order for a legal entity or a segregated pool of mortgage loans to be treated as a REMIC thereafter.

Most securitizations in the U.S. that qualify as REMICs use the statutory trust or common law trust as the legal entity of choice for various reasons including ease of formation and administration and bankruptcy related reasons, none of which are dealt with in this article. However, a legal vehicle that fails to satisfy the criteria listed above cannot be a REMIC (pass-through vehicle) and may be treated as a taxable mortgage pool under IRC § 7701(i), which have less favorable tax considerations and may be subject to double taxation.

III. What is the Impact of Non-Compliance with REMIC Provisions?

Generally, non-compliance with REMIC requirements subjects a REMIC to loss of its tax-free status and to a sizeable tax. This can be catastrophic to the REMIC, the investors and, depending on the contractual arrangement, to whomever causes the REMIC to lose its tax-free status. The IRS has the discretion to reverse a REMIC’s failed status if such termination is inadvertent or steps were taken to reinstate the REMIC status within a reasonable time period.

The following events will cause a REMIC to lose its tax-free status and potentially become subject to a sizeable tax:

- The occurrence of any Prohibited Transaction and the realization of net income from Prohibited Transactions. Any net income generated from a Prohibited Transaction is subject to a 100% tax. A Prohibited Transaction can also cause the tax-free status of a REMIC to be lost or suspended. A Significantly Modified Obligation that is not a Qualified Replacement Mortgage will be considered a Prohibited Transaction and thus be subject to a 100% tax; or
- The realization of net income from Foreclosure Property. Any net income realized from the operation of Foreclosure Property is subject to IRC §857(b)(4)(B) as if the REMIC were a real estate investment trust, which is then subject to tax at the highest corporate tax rate; or

- The making of unqualified contributions to a REMIC after the Startup Day. Any contributions to a REMIC after its Startup Day is taxed at a rate of 100% unless they are made in cash and are related to: (i) a contribution made to facilitate a Cleanup Call, (ii) a payment in the nature of a guaranty, (iii) a contribution made during the three-month period beginning on the Startup Day, (iv) contribution made to a Qualified Reserve Fund by a Residual Interest holder in the REMIC or (v) a permitted contribution made under the treasury regulations; or
- The transfer of Residual Interests to Disqualified Organizations. Any transfers of Residual Interests to Disqualified Organizations are taxed at the highest corporate tax rate and are taxable to the transferor or its agent.

IV. Applicable REMIC Provisions under a Typical Pooling and Servicing Agreement.

A Pooling and Servicing Agreement would typically provide that the trustee of the trust shall elect to treat the Trust Fund as comprised of a certain number of REMICs. The Trust Fund under a typical Pooling and Servicing Agreement in a mortgage-backed securitization contains, among other things, the pool of mortgage loans sold or transferred by the sellers into the trust, including those loans currently being serviced by the servicer. In addition, a typical Pooling and Servicing Agreement will contain the principal REMIC provisions that apply to the servicer of the pool of mortgage loans, who agrees to perform certain functions, make certain payments and provide certain information to help maintain the status of the REMIC. Some of the typical provisions are described in more detail below:

- A. Furnish Necessary Information. The servicer is required to provide to the trustee upon request any information as the trustee may need with respect to the mortgage loans that the servicer is servicing.
- B. Trustee to Act or Not Act. The servicer may require the trustee to take certain actions or refrain from taking such actions as to the REMIC assets if the servicer furnishes the trustee an opinion of counsel stating that such actions or inactions may or may not result in an adverse REMIC event.
- C. Payment of Prohibited Transaction Taxes. The servicer is required to pay any taxes levied on the trust resulting from a Prohibited Transaction caused by a breach in the servicer's obligations under the applicable Pooling and Servicing Agreement or if the servicer, in its discretion, has determined to indemnify the Trust Fund against the imposing of such taxes.
- D. No Contributions of Assets. The servicer is prohibited from accepting any contributions of assets to the REMIC, except with respect to substitutions for Defective Qualified Mortgages, unless the servicer receives an opinion of counsel from the party seeking to make such contributions stating that such contributions will not cause the REMIC to fail to qualify as a REMIC at any time that the Certificates are outstanding or subject the REMIC to any tax under federal, state or local laws.
- E. No Fees or Income Other Than From Qualified Mortgages or Permitted Investments. The servicer is prohibited from entering into any arrangement by which the REMIC will receive any fees or other compensation and allowing the REMIC to accept any income from assets other than Qualified Mortgages or Permitted Investments.

- F. No Disposition of Assets. The servicer is prohibited from selling, disposing of or substituting for any of the mortgage loans it services, except in connection with the (i) default, imminent default or foreclosure of a mortgage loan, including but not limited to properties acquired or sold by deed in lieu of foreclosure, (ii) bankruptcy of the REMIC, (iii) termination of the REMIC pursuant to the applicable Pooling and Servicing Agreement and (iv) purchase or repurchase of mortgage loans pursuant to the applicable Pooling and Servicing Agreement. Similarly, the servicer is prohibited from acquiring any assets for the REMIC, selling or disposing of any investments in the collection accounts for gain and accepting any contributions to the REMIC after the closing date, unless the servicer receives an opinion of counsel that such, disposition, substitution or acquisition will not adversely affect the status of the REMIC or unless the servicer has determined, in its discretion, to indemnify the Trust Fund against any taxes imposed on the REMIC as a result thereof.
- G. No Modifications, Waivers or Amendments. The servicer agrees to protect the interests of the Trust Fund as it would protect its interests in its own mortgage portfolio and agreed not to make or permit any modification, waiver or amendment of any applicable mortgage loan which would cause the REMIC to fail to qualify as a REMIC or result in the imposition of any tax under Section 860F(a) or Section 860G(d) of the IRC.
- H. Management of Foreclosure Property. The servicer is required to dispose of any mortgage property acquired by the Trust Fund with respect to a default or imminent default prior to three years after the end of the calendar year of such acquisition unless an opinion of counsel is furnished by the servicer to the trustee to the effect that the holding by the Trust Fund of such mortgage property subsequent to such 3-year period will not result in the imposition of taxes on Prohibited Transactions or cause the REMIC to fail to qualify as a REMIC at any time that any Certificates are outstanding or unless the servicer applied for, prior to the expiration of such three-year period, an extension of such 3-year period in accordance with IRC §856(e)(3). In addition, the servicer is restricted from renting (or allowing to continue to be rented) any mortgage property acquired by foreclosure or otherwise using such property for the production of income in such a manner or pursuant to any terms that would (i) cause such property to fail to qualify as Foreclosure Property or (ii) subject the REMIC to the imposition of any federal, state or local income taxes on the income earned from such property unless the servicer agrees to indemnify the Trust Fund with respect to the imposition of any such taxes.

In general, a breach by the servicer of any of the relevant REMIC provisions, as those stated above, that results in a loss of the REMIC's status or imposition of taxes on the REMIC would be the responsibility of the servicer, which can be a significant risk to a servicer depending on the severity of such breach and the results thereof.

In general, a breach by the servicer of any of the relevant REMIC provisions, as those stated above, that results in a loss of the REMIC's status or imposition of taxes on the REMIC would be the responsibility of the servicer, which can be a significant risk to a servicer depending on the severity of such breach and the results thereof.

V. Conclusions.

REMICs have made it relatively easy for sponsors of mortgage-backed securitizations and the investors of securities issued by legal vehicles qualifying as REMICs to benefit from the tax advantages afforded by the IRC. As the U.S. mortgage market continues to grow, REMICs will continue to play a significant role in the securitization of pools of mortgage loans in the U.S. However, strict compliance with the REMIC Provisions is required to take advantage of the tax benefits afforded by such rules. Non-compliance can be fatal and costly for the REMIC, the servicer and the investors of the related mortgage-backed securities.

Schedule A**DEFINITIONS**

"Cash Flow Investments" means any investment of amounts received under Qualified Mortgages for a temporary period not to exceed 13 months before distributing the holders of interests in the REMIC.

"Certificate" means the mortgage-backed pass-through certificates purchased by investors under a Pooling and Servicing Agreement.

"Clean-up Call" means the redemption of a class of Regular Interests when, by reason of prior payments with respect to those interests, the administrative costs associated with servicing that class outweigh the benefits of maintaining the class. Factors to consider in making this determination include the number of holders of that class of Regular Interests, the frequency of payments to holders of that class, the effect the redemption will have on the yield of that class of Regular Interests, the outstanding principal balance of that class, and the percentage of the original principal balance of that class still outstanding. The notion being that the cash flows produced by the mortgage pool are insufficient to cover the expenses of the continued administration of the trust. A Clean-up Call is not a Prohibited Transaction.

"Defective Qualified Mortgage" means a Qualified Mortgage that (i) is in default or in imminent default, (ii) was fraudulently obtained, (iii) breached a seller representation or warranty as to the characteristics of the mortgage or (iv) does not fall within the "Principally Secured" definition. Defective Qualified Mortgages must be disposed of from a REMIC within 90 days of discovering its defect.

"Disqualified Organizations" means the U.S., any state or its political subdivisions, foreign governments, international organizations, agency or instrumentality of the foregoing, any tax-exempt organization unless it is subject to unrelated business tax, and any energy or telephone cooperatives.

"Foreclosure Property" means any real property (including interests in real property) and any personal property incident to real property acquired as a result of a foreclosure sale or having otherwise reduced such property to ownership or possession by agreement or process of law after there was a default or imminent default of a Qualified Mortgage held by the REMIC or on an indebtedness which such property secured, in each case, subject to a 3-year grace period which period can be extended further with special approval of the Secretary of the Treasury.

"Issue Price" means the issue price of any Regular Interest or Residual Interest in a REMIC as determined by under Section 1273(b) of the IRC in the same manner as if such interest were a debt instrument; except that if the interests is issued for property, Section 1273(b)(3) of the IRC would apply to whether or not the requirements of such section are met.

"Permitted Investments" means any Cash Flow Investment, Qualified Reserve Asset or Foreclosure Property.

“Pooling and Servicing Agreement” means an agreement entered into by and among the originator and seller of the mortgage loans, if applicable, a depositor that acquires the mortgage loans from the originator/seller and then sells them to a trust that qualifies as a REMIC and issues mortgage-backed securities, the trustee of the trust and the servicer of the mortgage loans as agent of the trust.

“Principally Secured” means an interest in real property means that the fair market value of the property securing the obligation either: (i) was equal to or more than 80% of the adjusted issue price of the obligation at its origination date or at the time such property was contributed to the REMIC or (ii) substantially all of the obligation proceeds were used to purchase or improve or protect the property securing the obligation at origination. In the case of any obligation originated by the United States or any state (or any political subdivision, agency, or instrumentality of the United States or any state), such obligations will be Principally Secured by an interest in real property if more than fifty percent (50%) of such obligations which are transferred to, or purchased by, the REMIC are Principally Secured by an interest in real property (determined without regard hereto).

“Prohibited Transaction” means the disposition of a Qualified Mortgage, not related to any of the following:

- i. A potential default on the regular interest where the threatened default resulted from a default on one or more Qualified Mortgage;
- ii. To facilitate a Clean-up Call;
- iii. Other than: (i) pursuant to a substitution of a Qualified Replacement Mortgage for a Qualified Mortgage or repurchase of a defective obligation in lieu thereof, (ii) incident to a foreclosure, default or imminent default of a mortgage, (iii) a bankruptcy or insolvency of the REMIC or (iv) a qualified liquidation;
- iv. Receipt by a REMIC of income derived from any asset other than a Qualified Mortgage or a Permitted Investment;
- v. Receipt by a REMIC of fees or other compensation; or
- vi. Gain from disposition of a Cash Flow Investment other than related to a qualified liquidation or unless it was necessary to prevent a default on the regular interest where the threatened default resulted from a default on one or more Qualified Mortgage.

“Qualified Mortgage” means (A) any obligations (including any participation or certificate of beneficial interest therein) that are Principally Secured by an interest in real property (e.g., including stock of real property cooperatives and Qualified Replacement Mortgages) and which is (i) transferred to the REMIC on the Startup Day in exchange for Regular Interests or Residual Interests in the REMIC, (ii) is purchased by the REMIC within the 3-month period beginning on the Startup Day if related to a fixed price contract in effect on such Startup Day, or (iii) represents an increase in the principal amount under the original terms of an obligation described in clause (i) or (ii) if such increase (I) is attributable to an advance made to the obligor pursuant to the original terms of a reverse mortgage loan or other obligations, (II) occurs after the Startup Day, and (III) is purchased by the REMIC pursuant to a fixed price contract in effect on the Startup Day, (B) any Qualified Replacement Mortgage, and (C) any regular interest in another REMIC transferred to the REMIC on the Startup Day in exchange for Regular Interests or Residual Interests of the REMIC. Qualified Replacement Mortgages or defeased

mortgages can also be Qualified Mortgages as long as: (i) the lien over the real property is lifted, (ii) the substitute collateral are government securities, (iii) defeasance is done pursuant to the terms of the mortgage and (iv) the defeasance is entered into after 2 years from the Startup Day. In addition, Regular Interests in other REMICs fall within the purview of the definition of a Qualified Mortgage if transferred to the REMIC on the Startup Day in exchange for the Regular Interests and Residual Interests of the REMIC. Further, Qualified Mortgages shall also include any obligations originated by the United States or any state (or any political subdivision, agency, or instrumentality of the United States or any state) if more than fifty percent (50%) of such obligations which are transferred to, or purchased by, the REMIC are Principally Secured by an interest in real property (determined without regard to this sentence).

“Qualified Reserve Asset” means any intangible property held for investment and as part of a Qualified Reserve Fund.

“Qualified Reserve Fund” means any reasonable required reserve to (i) provide for full payment of expenses of the REMIC or amounts due on regular interests in the event of defaults on Qualified Mortgages or lower than expected returns on Cash Flow Investments, or (ii) provide a source of funds for the purchase of obligations described in clauses (A)(ii) or (iii) of the definition of Qualified Mortgages. The aggregate fair market value of the assets held in any Qualified Reserve Fund may not exceed fifty percent (50%) of the aggregate fair market value of all of the assets of the REMIC on the Startup Day, and the amount of any such Qualified Reserve Fund shall be promptly and appropriately reduced to the extent the amount held in such Qualified Reserve Fund is no longer reasonably required for purposes specified in the foregoing clauses (i) or (ii). A reserve will not be treated as a Qualified Reserve Fund for any taxable year (and all subsequent taxable years) if more than 30 percent (30%) of the gross income from the assets in such fund for the taxable year is derived from the sale or other disposition of property held for less than three (3) months. Gain on the disposition of a Qualified Reserve Asset shall not be taken into account if the disposition giving rise to such gain is required to prevent default on a Regular Interest where the threatened default resulted from a default on 1 or more Qualified Mortgages.

“Qualified Replacement Mortgages” means Qualified Mortgages received either in exchange for other Qualified Mortgages within 3 months after a REMIC’s Startup Day or in exchange for a Defective Qualified Mortgage within 2 years after a REMIC’s Startup Day.

“Qualified Reserve Fund Payment” means any payment made to a Qualified Reserve Fund.

“Regular Interest” means any interest in a REMIC which is issued at the Issue Price on the Startup Day with fixed terms and which is designated as a regular interest if: (A) such interest unconditionally entitles the holder to receive a specified principal amount (or other similar amount), and (B) interest payments (or other similar amount), if any, with respect to such interest at or before maturity (i) are payable based on a fixed rate (or to the extent provided in treasury regulations, at a variable rate), or (ii) consist of a specified portion of the interest payments on Qualified Mortgages and such portion does not vary during the period such interest is outstanding. The interest shall not fail to meet the requirements of the foregoing clause (A) merely because the timing (but not the amount) of the principal payments (or other similar amounts) may be contingent on the extent of prepayments on qualified mortgages and the amount of income from permitted investments. An interest in the REMIC

shall not fail to qualify as a Regular Interest solely because the specified principal amount of the Regular Interest solely because the specified principal amount of the Regular Interest (or the amount of interest accrued on the Regular Interest) can be reduced as a result of the non-occurrence of 1 or more contingent payments with respect to any reverse mortgage loan held by the REMIC if, on the Startup Day for the REMIC, the sponsor of the REMIC reasonably believes that all principal and interest due under the Regular Interest will be paid at or the liquidation of the REMIC.

“REMIC” means a Real Estate Mortgage Investment Conduit as further defined in the REMIC Provisions.

“REMIC Provisions” means the enabling provisions of the IRC applicable to REMICs found under Sections 860A through 860G and Treasury Regulations §1.860A through §1.860G.

“Residual Interest” means an interest in a REMIC which is issued at the Issue Price on the Startup Day, which is not a Regular Interest, and which is designated as a residual interest.

“Significantly Modified Obligation” means an obligation subject to changes in its terms such that it is treated as an exchange other than (i) changes in the terms of the obligation occasioned by a default or imminent default, (ii) assumptions of the obligation, (iii) waivers of a due-on-sale clause or a due-on-encumbrance clause, and (iv) conversion of interest rates pursuant to the terms of a convertible mortgage.

“Startup Day” means generally the day on which a REMIC issues all of its Regular Interests and Residual Interests. A sponsor of the REMIC may contribute property to a REMIC in exchange for Regular Interests and Residual Interests over any period of ten (10) consecutive days and the REMIC may designate any one of those 10 days as the REMIC’s Startup Day.

“Trust Fund” means as it is defined in the applicable Pooling and Servicing Agreement which would include, among other things, a pool of mortgage loans.

FINDING POOLING AND SERVICING AGREEMENTS FOR SECURITIZED MORTGAGE LOANS

The “Pooling and Servicing Agreement” is the legal document that contains the responsibilities and rights of the servicer, the trustee, and others over a pool of mortgage loans. The Pooling and Servicing Agreement can be a stand alone document or it can be part of another paper, usually called the “Prospectus.” If the securitization is public, these documents must be filed with the Securities and Exchange Commission (SEC). These filings are available to the public at <http://www.sec.gov>. Finding the Pooling and Servicing Agreement on the SEC website can be a challenge.

The most important information you will need to find the Pooling and Servicing Agreement is the name of the original lender and the title of the pool of loans. We will work through an example below. Assume that the lender is Ameriquest Mortgage Co. We don’t know the name of the pool that the homeowner’s mortgage ended up in but we do know that the mortgage was made on June 1, 2002.

Step One:

Go to <http://www.sec.gov> and click on “Search for Company Filings” under “Filing & Forms (EDGAR).” Under “General-Purpose Searches,” click on “Companies & other filers.” Then, in the “Enter your search information” box, type in “Ameriquest” next to “Company name” and click on the “Find Companies” button.

Step Two:

The page you are now looking at shows a long list of the names of securitized pools of loans. We know the mortgage was made on June 1, 2002. Look for the entry titled “AMERIQUEST MORT SEC INC ASS BK PAS THR CERTS SER 2002 2.” The document number is CIK 0001175125. Click on that number. We selected this entry because it said 2002 on it and the loan in question was made in 2002. There may be several other pools of mortgage loans that Ameriquest securitized in 2002 but this is the first one we come to on this list (when reviewed in late February 2007) so we will pull it up.

Step Three:

Now you see a list of documents filed with the SEC that are related to this pool of loans. Scroll down to the bottom and you will see a document titled “Prospectus.” This is the document that will likely be the one you want, assuming that the mortgage loan you are concerned about is in this pool. We can only make an educated guess, unless you know the name of the securitized pool in advance (which is unlikely).

Click on either “htm or text” next to this document and the Prospectus will appear. Now, bookmark this document on your internet so you can come back to it easily in the future. Note that this Prospectus is also contained on this CD-ROM for your use.

Step Four:

Is this likely to be the document you want? Scroll down to page S-2 and you will see a Table of Contents. Included in that is the “Pooling and Servicing Agreement” which starts on page S-76. Also, scroll down one more page past the Table of Contents and you will see a “Summary of Prospectus Supplement.” Certain important information is listed there, including the cut-off and closing dates for loans that will be included in this pool. The closing date is June 7, 2002. Based on this information, you can assume that this document governs the responsibilities of the servicer of the mortgage loan in question, unless that servicer tells you otherwise and can back it up with a reference to a different agreement or pool.

Other important information listed in this Summary includes the title of the pool, and the identity of the servicer and trustee. The servicing rights may have been sold since this document was filed and the current servicer may be a different company but the trustee (the legal holder of the mortgage) should be accurate.

Step Five:

Go the Pooling and Servicing Agreement to find what you need to know. It should describe how the servicer is paid and by how much, who keeps late and other fees, what authority it has to modify the loan or engage in workouts with homeowners, and its obligations to pass mortgage payments on to the trustee.

Congratulations! You are now entitled to an official Sherlock Holmes hat.

Mortgage Backed Security

Pooling and Servicing Agreement

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February 12, 2009

§1 Introduction

This article is meant to help interpret the contractual relationships that generally exist in a Pooling and Servicing Agreement (PSA) of a Mortgage Backed Security (MBS). The majority of PSAs look very similar, so the example used in this article will likely correlate with your PSA.

§2 Mortgage Backed Security

To help begin to understand a PSA it is first important to be familiar with Mortgage Backed Securities. Essentially a Mortgage Backed Security is a collection of single mortgage loans gathered into one securitized pool. The pool is then divided into tranches based on the degree of risk and transferred as a whole to a trust. The trust then issues a series of bonds and these bonds are then sold to investors. It seems like an excessive amount of handling, but the theory is that pooling the loans gives investors opportunities to gain rewards that would not be available in a single loan. Of course, with the opportunity for financial returns, there is always risk involved. However, the theory is, or was, that by creating a diverse pool of loans it will decrease the investors' risk.

§3 Pooling and Servicing Agreement

Once a loan has been securitized, the need for a PSA becomes apparent. The PSA is essentially a contract that exists between the parties involved in the securitization of the loans. This contract will dictate how the investment proceeds and losses will be distributed to the parties and investors. Most important though it will also describe how the Mortgage Backed Security pool of loans will be serviced and transferred from the parties.

§4 Parties Involved in a PSA

In general there are four parties involved in a MBS PSA and each has important responsibilities. The following is a list of the parties most often involved in the securitization of a loan along with their individual responsibilities:

Depositor: The entity that accumulates the mortgages and transfers them to the Trust along with the issuance of the securities to the certificate holders. The Depositor can be the seller of a

portfolio of mortgages or an entity established just for the purpose of holding the mortgages until the pool accumulation is completed.

Master Servicer: The Master Servicer services the loans in the pool through maturity and is regularly expected to process all requests made by the borrower. However, if the borrower defaults then they may subcontract duties to a Special or Sub-Servicer but the Master Servicer is still generally responsible for their performance.

Securities Administrator/ Custodian: Responsible for safeguarding the financial assets. The role of a custodian is to hold the assets in safekeeping, arrange settlement of any purchases and sales of securities, and collect information on the income from the assets.

Special Servicer: In the event of a default or other specified incident, the loan's administration is transferred to the Special Servicer. They also have the authority to oversee actions such as loan assumptions. Furthermore, the Special Servicer may have the right to "put" the defaulted loan back to the loan originator in the event of a document defect or breach of a representation or warranty by the borrower which materially and adversely affects the value of the loan.

Credit Risk Manager: Evaluates the credit risk and communicates with the Trustee.

Trustee: Holds loan documents and distributes payments received from the Master Servicer to the bondholders and is often granted a broad authority regarding aspects of the loan under the pooling and servicing agreement. However, it is usual for them to delegate authority to the Special Servicer or the Master Servicer. Because the Trustee holds the loan documents, the Trustee is the one who will be named in lawsuits or non-judicial foreclosures.

EXAMPLE: THIS POOLING AND SERVICING AGREEMENT, dated as of April 1, 2007, among HSI ASSET SECURITIZATION CORPORATION, as depositor (the "**Depositor**"), WELLS FARGO BANK, N.A., a national banking association, as master servicer (in such capacity, the "**Master Servicer**"), as securities administrator (in such capacity, the "**Securities Administrator**") and as custodian (in such capacity, "the **Custodian**"), OFFICETIGER GLOBAL REAL ESTATE SERVICES INC., as credit risk manager (the "**Credit Risk Manager**"), and DEUTSCHE BANK NATIONAL TRUST COMPANY, a national banking association, as trustee (the "**Trustee**").

§5 Contents of a PSA

This section is an overview of what one would expect to find in a MBS PSA along with an interpretation of the intended objective of each Article.

Again, the PSA can most often be found in file 8-K of the Current Report in the Prospectus. As with most large legal documents there is a Table of Contents. The following is an example Table of Contents that are generally found in a PSA:

Article I: Definitions

Article II: Conveyance of Mortgage Loans; Representations and Warranties

Article III: Administration and Servicing of Mortgage Loans

Article IV: Distributions

Article V: Certificates

Article VI: Depositor

Article VII: Default

Article VIII: Concerning the Trustee

Article IX: Administration of the Mortgage Loans by the Master Servicer

Article X: Concerning the Securities Administrator

Article XI: Termination

Article XII: Miscellaneous Provisions

Exhibits

Article I **Definitions**

The following is a list of important terms pulled from this article that are specifically relevant to the relationship and contractual obligations of the PSA.

Assignment of Mortgage: An assignment of the Mortgage, notice of transfer or equivalent instrument in recordable form reflecting the sale of the Mortgage to the Trustee.

Certificateholder or Holder: The person in whose name a Certificate is registered in the Certificate Register, and is the owner of the bond that is sold.

Closing Date: This is the day the agreement starts.

Cut-off Date: This is the day the last loan is allowed into the pool.

Debt Service Reduction: With respect to any Mortgage Loan, a reduction by a court of competent jurisdiction in a proceeding under the United States Bankruptcy Code in the Scheduled Payment for such Mortgage Loan which became final and non-appealable, except such a reduction resulting from a Deficient Valuation or any reduction that results in a permanent forgiveness of principal.

EDGAR: The Security and Exchange Commission Electronic Data Gathering and Retrieval System. This data base can be found at www.sec.gov under the Filing and Forms section.

Final Recovery Determination: With respect to any defaulted Mortgage Loan or any REO Property the Servicer, in its reasonable good faith judgment, expects to be finally recoverable in respect thereof have been so recovered.

Form 8-K Disclosure Information: This form.

Liquidated Mortgage Loan: A defaulted Mortgage Loan (including any REO Property) which was liquidated in the preceding calendar month. As to which a Servicer has certified to the Securities Administrator that it has received all amounts it expects to receive in connection with the liquidation of such Mortgage Loan.

Loan-to-Value Ratio or LTV: As of any date and as to any Mortgage Loan, the ratio (expressed as a percentage) of the outstanding principal balance of the Mortgage Loan in relation to its appraised value at the time of sale or at the time of the refinancing or modification.

MERS: Mortgage Electronic Registration Systems, Inc., is an electronic mortgage filing service that allows for little to no paper work.

Mortgage: The mortgage, deed of trust or other instrument identified on the Mortgage Loan Schedule as securing a Mortgage Note.

Mortgage File: The items pertaining to a particular Mortgage Loan contained in either the Servicing File or Custodial File.

Mortgage Loan: An individual Mortgage Loan that is the subject of this Agreement, each Mortgage Loan originally sold and subject to this Agreement being identified on the Mortgage Loan Schedule.

Mortgage Loan includes: the Mortgage File, the Scheduled Payments, Principal Prepayments, Liquidation Proceeds, Subsequent Recoveries, Condemnation Proceeds, Insurance Proceeds, REO Disposition proceeds, Prepayment Charges, and all other rights, benefits, proceeds and obligations arising from or in connection with such Mortgage Loan, excluding replaced or repurchased Mortgage Loans.

Mortgage Loan Seller: Any entity which sold Mortgage Loans to the Sponsor pursuant to a Transfer Agreement.

Mortgage Loan Schedule: A schedule of Mortgage Loans prepared by the Depositor, delivered to the Trustee on the Closing Date and referred to on Schedule I, such schedule setting forth the Data Tape Information with respect to each Mortgage Loan.

Mortgage Note: The note or other evidence of the indebtedness of a Mortgagor under a Mortgage Loan.

Mortgaged Property: With respect to each Mortgage Loan, the real property (or leasehold estate, if applicable) identified on the Mortgage Loan Schedule as securing repayment of the debt evidenced by the related Mortgage Note.

Mortgagor: The obligor(s) on a Mortgage Note.

REO Property or Real Estate Owned: A Mortgaged Property acquired by the Trust Fund through foreclosure or deed-in-lieu of foreclosure in connection with a defaulted Mortgage Loan.

Responsible Officer: When used with respect to the Trustee, the Securities Administrator, the Master Servicer, any vice president, any assistant vice president, any assistant secretary, any assistant treasurer, any associate, or any other officer of the Trustee, the Securities Administrator or the Master Servicer customarily performing functions similar to those performed by any of the above designated officers who at such time shall be officers to whom, with respect to a particular

matter, such matter is referred because of such officer's knowledge of and familiarity with the particular subject and who, in each case, shall have direct responsibility for the administration of this Agreement.

Sub-Servicer: Any Person that services Mortgage Loans on behalf of a Servicer, and is responsible for the performance (whether directly or through sub-servicers or Subcontractors) of servicing functions required to be performed under this Agreement.

Trust Fund: The trust fund consists of (i) the Mortgage Loans and all interest and principal with respect thereto received on or after the related Cut-off Date; (ii) the Collection Account, the Distribution Account, the Cap Termination Receipts Account, the Cap Replacement Receipts Account the Swap Termination Receipts Account, the Swap Replacement Receipts Account; (iii) property that secured a Mortgage Loan and has been acquired by foreclosure, deed-in-lieu of foreclosure or otherwise; (iv) the Insurance Policies.

Article II

Conveyance of Mortgage Loans; Representations and Warranties

§2.01 Conveyance of Mortgage Loans

This section sets out how the Loans are to be transferred from the Depositor to the Trustee.

- a) The Depositor will sell, transfer, assign, set over and otherwise convey to the Trustee all rights, title and interest with respect to the Mortgage Loans on or after the Cut-Off date.
- b) In connection with the transfer and assignment of each Mortgage Loan, the Depositor delivers the Custodian the original Mortgage Note. If the original Mortgage Note cannot be located then the Mortgage Loan Seller must send an affidavit and record of the Mortgage being recorded in a public recording office. If the Mortgage had been previously assigned there must be evidence of the complete chain of ownership from the originator to the last assignee.
- c) The parties agree that is the policy and intention to acquire Mortgage Loans meeting the requirements set forth in the Transfer Agreements and in the Purchase Agreements.
- d) The Trustee has the power and authority to accept the sale, transfer, and assignment for the Trustee of the right, title and interest that is held by the Depositor.

§2.02 Acceptance by the Custodian of the Mortgage Loans

The Custodian will hold the documents named in §2.01 for the benefit of the present and future investors. The Custodian is required to inform the Depositor, Securities Administrator, the Trustee and the Servicer by facsimile certifying that they received the Mortgage Note and Assignment of Mortgage for each Mortgage Loan (exhibit E). Furthermore, within 90 days of the Closing Date the Custodian shall have all of the required documents for each Mortgage Loan listed in the Mortgage Loan Schedule. This basically means that they must have every document for every Mortgage Loan within 90 days of the Closing Date.

§2.03 Remedies for Breaches of Representation and Warranties with Respect to the Mortgage Loans

a) Upon the removal of a Deleted Mortgage Loan the Custodian shall release the Mortgage File to the applicable Mortgage Loan Seller and the Trustee. Upon receipt of a Request for Release, all amounts required to be deposited have been deposited in the related Collection Account. The Trustee shall execute and deliver at the applicable Mortgage Loan Seller's direction such instruments of transfer or assignment prepared by the applicable Mortgage Loan Seller that are necessary to vest title in the applicable Mortgage Loan Seller of the Trustee's interest in any Deleted Mortgage Loan substituted for pursuant to this Section 2.03.

b) The Sponsor shall indemnify the Depositor, any of its Affiliates, the Master Servicer, each Servicer, the Securities Administrator, the Trustee and the Trust and hold such parties harmless against any losses, damages, penalties, judgments and other costs and expenses resulting from any third party claim resulting from, a breach by the Sponsor of any of its representations and warranties or obligations contained in this Agreement.

c) Upon receipt of a Request for Release, at the direction of the Servicer, the Custodian shall release the Custodial File to the related Mortgage Loan Seller or the Sponsor. The Trustee shall execute and deliver instruments of transfer or assignment as shall be necessary to transfer title from the Trustee. The Securities Administrator shall notify each Rating Agency of a purchase of a Mortgage Loan pursuant to this Section 2.03 or pursuant to a Transfer Agreement.

d) The Trustee acknowledges that the Sponsor shall not have any obligation or liability with respect to any breach of a representation or warranty made by it with respect to a Mortgage Loan sold by it provided that such representation or warranty was also made by a Mortgage Loan Seller with respect to the related Mortgage Loan.

The representations and warranties of the Sponsor and assigned to the Trustee by the Depositor shall survive the transfer of the Mortgage Loans by the Depositor to the Trustee on the Closing Date. It will insure the benefit of the Trustee and the Certificateholders any restrictive or qualified endorsement on any Mortgage Note or Assignment of Mortgage and shall continue throughout the term of this Agreement. Upon the discovery by any of the Sponsor, the Depositor, the Securities Administrator, the Trustee, the Master Servicer or any Servicer of a breach of any of the Sponsor's representations and warranties the party discovering the breach shall give prompt written notice to the others.

§2.04 Execution and Delivery of Certificates

The Trustee acknowledges that the execution and delivery of the Certificates are in authorized denominations evidencing the entire ownership of the Trust Fund.

§2.05 REMIC Matters

This states that the Preliminary Statement (which can be found prior to the Table of Contents) sets forth that the Trust meets federal income tax code for Real Estate Mortgage Investment Conduits (REMIC).

§2.06 Representation and Warranties of the Depositor

The Depositor warrants and covenants that as of the date of the agreement that:

- a) They exist in good standing under Delaware law;
- b) They have the power to convey the Mortgage Loans and enter into these types of agreements;
- c) They understand they are entering into a legally binding agreement;
- d) That it is not required to inform any governmental authority of the transactions prior to the Closing Date;
- e) That this agreement does not break any of their by-laws or breach other agreement that they are a part of or violate any law, rule, or regulation;
- f) There are no actions or investigations against them;
- g) They are not in default with any government;
- h) That they had good title and was the sole owner of each Mortgage Loan and that they transferred all interest in each Mortgage Loan to the Trustee.

Article III

Administration and Servicing of Mortgage Loans

§3.01 Establishment of Certain Accounts

This section sets forth how the Securities Administrator will set up the Excess Fund Account and Distribution Account. The sub-sections of §3.01 go into further detail as to how the Securities Administrator maintain the Distribution Account and how the Servicers pay into the Distribution Account.

§3.02 Investment of Funds in Distribution Account

The Securities Administrator may invest funds from the Distribution Account and any income gained by the investment is for the benefit of the Securities Administrator. However, if there is a loss then the Securities Administrator is liable to the Trust for that amount.

§3.03 Report on Assessment of Compliance with Relevant Servicing Criteria

This section sets forth a policy that once a calendar year the Master Servicer, the Securities Administrator and the Custodian will furnish a report on an assessment of compliance with the Relevant Servicing Criteria set forth in Exhibit S to the Securities Administrator and the Depositor. The report will contain a statement regarding each party's assessment of compliance with the Relevant Servicing Criteria, including, any material instance of noncompliance with the Relevant Servicing Criteria.

Furthermore, after receipt of the report the Depositor will review each such report and consult with the Master Servicer, the Securities Administrator, the Custodian, as to the nature of any material instance of noncompliance. Furthermore, the Securities Administrator shall confirm that the assessment addresses all of the Servicing Criteria for each party as set forth on Exhibit S or in the applicable Servicing Agreement.

The Master Servicer will enforce any obligation of each Servicer and submit an annual report on assessment of compliance to the Securities Administrator within the time frame set forth in the Servicing Agreement.

§3.04 Report on Attestation of Compliance with Relevant Servicing Criteria

This section sets forth a policy that once a calendar year the Master Servicer, the Securities Administrator and the Custodian will furnish a Certified Public Accountants to furnish an attestation report to the Securities Administrator and the Depositor. The attestation report includes information regarding the Relevant Servicing Criteria.

§3.05 Annual Officer's Certificates

The Master Servicer and the Securities Administrator will deliver an Officer's Certificate to the Depositor which states that the Officer reviewed the business activities of their party. Furthermore, the Certificates must adhere to the standards of the Sarbanes-Oxley Act.

§3.06 Indemnification

The Depositor, Master Servicer, Securities Administrator, Custodian, Trustee, and any Servicing Participant are considered an "Indemnifying Party." In the case that any one of those parties fail to submit any required information, data or materials that party is indemnified and held harmless from and against any and all claims, losses, damages, penalties, fines, forfeitures, reasonable legal fees and related costs, judgments and other costs and expenses. So long as that dispute arose out of or based upon (a) any breach by such party of any if its obligations hereunder; (b) any material misstatement or omission in any information, data or materials provided by such party including any material misstatement or material omission, or (c) the negligence, bad faith or willful misconduct in connection with its performance hereunder.

If the indemnification provided is unavailable or insufficient to hold the party harmless then each Indemnifying Party agrees that it shall contribute to the amount paid or payable as a result of any claims, losses, damages or liabilities incurred by the at fault party. Furthermore, the indemnification shall survive the termination of this Agreement or the termination of any party to this Agreement.

The Depositor, the Securities Administrator, the Custodian and the Trustee shall immediately notify the Master Servicer if a claim is made by a third party with respect to this Agreement or the Mortgage Loans. Whereupon, the Master Servicer shall assume the defense of any such claim and pay all expenses to discharge and satisfy any judgment. If any indemnified parties have a conflict of interest with respect to any such claim, the indemnified party shall have the right to retain separate counsel.

§3.07 Advances

This section states a number of ways that the advances can be made to the pursuant to the Servicing Agreement.

Article IV

Distributions

§4.01 The Distribution Account

The Master Servicer will deposit the funds collected into Distribution Account pursuant to the Servicing Agreements.

§4.02 Priorities of Distribution

On each Distribution Date the Securities Administrator will distribute payments pursuant to REMIC standards. Furthermore, this section states how the funds will be distributed to different sets of investors. The investors will often times set up accounts to invest in different classes or tranches. The classes with the less risk will be paid first with the higher risk classes to be paid last.

§4.03 Monthly Statements to Certificateholders

The Securities Administrator is required to have a report available on each Distribution Date for the Master Servicer, the Servicers, the Credit Risk Manager, the Depositor, the Trustee, and each Certificateholder. The report will have information about the balances and interest in each of the accounts. More importantly, the report will have the following (1) the number and aggregate outstanding principal balances of Mortgage Loans that are delinquent 31 to 60 days, 61 to 90 days and 91 or more days, (2) that have become REO Property, (3) that are in foreclosure and (4) that are in bankruptcy, as of the close of business on the last Business Day of the immediately preceding month.

§4.04 Certain Matters Relating to the Determination of LIBOR

This section basically states that the Securities Administrator will use the London Interbank Offered Rate (LIBOR) to determine interest. However, they have option of choosing which Reference Bank that will determine the LIBOR.

§4.05 Allocation of the Applied Realized Loss Amount

The Securities Administrator will apply a loss to the Class M Certificates.

§4.06 Supplemental Interest Trust

The section requires the Securities Administrator to set up a Supplemental Interest Trust for the purpose of managing Permitted Investments and Swap accounts. A Swap is a side agreement between two parties to exchange or insure future cash flows.

§4.07 Rights of the Swap Counterparty

The Swap Counterparty shall be deemed a third-party beneficiary of this Agreement to the same extent as if it were an original party and shall have the right to enforce its rights under this Agreement.

§4.08 Termination Receipts

This section details what would happen if a Swap is terminated and where the money invested will be deposited.

Article V The Certificates

This article gives information in regard to how the certificates are originated and how they can be transferred. A certificate in this context is basically legal proof of ownership in a specific Class. The section also gives information on who can be deemed an owner and how a list of the owners.

Article VI

The Depositor

§6.01 Liabilities of the Depositor

The Depositor is liable for the obligations set forth in this section.

§6.02 Merger or Consolidation of the Depositor

The Depositor will remain a franchise or corporation under the laws of the United States for the purposes of protecting the validity and enforceability of the Agreement and any of the Mortgage Loans.

§6.03 Limitation on Liability of the Depositor and Others

The section begins by stating that neither the Depositor nor its agents are liable to the Certificateholders for any act or omission to act that is made in good faith or error of judgment.

The Depositor may rely in good faith on any document of any kind properly executed and submitted by any Person respecting any matters arising hereunder.

The Depositor shall be indemnified by the Trust Fund and held harmless against any loss, liability or expense incurred in connection with any audit, controversy or judicial proceeding relating to government taxing, or any legal action relating to this Agreement. However, that excludes any loss, liability or expense related to any specific Mortgage Loan or Mortgage Loans. Furthermore, the Depositor would be liable for any breach of representations or warranties, willful misfeasance, bad faith, negligence, or reckless disregard of obligations and duties.

The Depositor is not under any obligation to appear in any legal action that is not in relation to its duties. However, the Depositor may in its discretion undertake any such action that it may deem necessary or desirable.

Article VII

Default

§7.01 Master Servicer to Act; Appointment of Successor

The Master Servicer or Trustee can decide to terminate any Sub-Servicer and appoint a new Servicer without limitation. If they decide to terminate a Sub-Servicer then they will have a period (not to exceed 90 days) to complete the transfer of all servicing data and correct or manipulate servicing data as may be required to correct any errors or insufficiencies to service the Mortgage Loans properly and effectively.

Any successor to a Servicer shall be an institution which is willing to service the Mortgage Loans and which executes and delivers to the Depositor, the Master Servicer and the Trustee an agreement accepting all of the rights, powers, duties, responsibilities, obligations, and liabilities of Servicer, as if originally named as a party to such Servicing Agreement.

§7.02 Notification of Certificateholders

The Securities Administrator is required to notify the Certificateholders if there is a termination of a servicer.

Article VIII

Concerning the Trustee

§8.01 Duties of the Trustee

In the event that the Master Servicer is unable to perform its duties pursuant to this Agreement the Trustee has the power to act as the Servicer. In that case the Trustee is to be furnished with all of the documents the Master Servicer held. Upon receipt the Trustee shall examine the documents but is not responsible for the accuracy or content. However, the Trustee is not to be relieved of any liability for negligence or willful misconduct.

- a) No implied covenants or obligations shall be read into this Agreement. The Trustee can rely that the documents are true and correct.
- b) The Trustee shall not be liable for error in judgment made in good faith unless the Trustee was negligent in ascertaining pertinent facts.
- c) The Trustee shall not be liable for any action taken in good faith for the Certificate Holders.

§8.02 Certain Matters Affecting the Trustee

- a) The Trustee can rely upon any document believed to be true and shall not have any responsibility to confirm the genuineness.
- b) The Trustee can receive advice from counsel or advisors that is done in good faith.
- c) The Trustee is not liable for any action or omission taken in good faith.
- d) The Trustee does not need to investigate any matters dealing with the genuineness of the documents unless requested by 25% of the Certificateholders.
- e) The Trustee may perform duties through its agents and is not responsible for the negligence of any agent appointed with due care.
- f) The Trustee is not required to expend its own funds in performance of its duties.
- g) The Trustee is not liable for any loss on investment pursuant to this Agreement.
- h) The Trustee is not responsible for knowledge of a Master Servicer being unable to perform until receiving written notice from the Master Servicer.
- i) The Trustee is not obligated to conduct or defend any litigation

§8.03 Trustee Not Liable for Certificates or Mortgage Loans

This section states that the Trustee assumes not responsibility for the correctness of and document related to this agreement or the Mortgage Loans. Furthermore, they state that the Trustee is not responsible to maintain the perfection of any security interest or lien granted to it.

§8.04 Trustee May Own Certificates

The Trustee may own or pledge Certificates.

§8.05 Trustee Fees Indemnification and Expense-

- a) The Trustee is compensated by the Master Servicer own funds pursuant to a separate agreement. The Trustee cannot put a lien on the Trust for the payment of fees.
- b) The Trustee can be reimbursed for any liability or expense associated with any claim or legal action. There are a number of exceptions which include willful misconduct or bad faith by the Trustee.

§8.06 Eligibility Requirements for the Trustee

The Trustee must be a corporation operating under United States law. This section also requires that the corporation have fifty million dollars in capital pursuant to federal authority and if it fails to do so the Trustee shall resign.

§8.07 Registration and Removal of the Trustee

The Trustee can resign or be removed at any time. If the Trustee does resign they must give written notice 60 days in advance.

§8.08 Successor Trustee

When a successor Trustee is appointed they must be eligible under 8.06 and must inform the Depositor, Servicers, and Certificateholders.

§8.09 Merger or Consolidation of Trustee

Any corporation that merges or consolidates must be eligible under 8.06.

§8.10 Appointment of Co-Trustee or Separate Trustee

The Trustee can appoint co-trustees or separate trustees and are said to have the same right and powers as the Trustee. No Trustee shall be held personally liable and the Trust Fund will be liable for payments.

§8.11 Tax Matters

This section states that the assets are intended to be qualify as Real Estate Mortgage Investment Conduits (REMIC) as defined by the Internal Revenue Service. Furthermore, it states that it is the Securities Administrator's responsibility to act as the agent to prepare, file, and maintain the REMIC assets.

§8.12 Commission Reporting

The Securities Administrator is responsible for preparing and filing reports with the Securities and Exchange Commission via EDGAR.

Article IX

Administration of the Mortgage Loans by the Master Servicer

§9.01 Duties of the Master Servicer; Enforcement of Servicer's Obligations

This section delineates the contractual obligations of the Master Servicer.

- a) The Master Servicer will, in good faith, monitor the obligations and performance of the Sub-Servicers as it relates to the Servicing Agreement.
- b) The Maaster Servicer or the Trustee pay the cost of monitoring the Sub-Servicers.
- c) If the Master Servicer or Trustee replace a Sub-Servicer as successor, the successor does not assume liability for the representations and warranties of the replaced Sub-Servicer.
- d) Only the Master Servicer or Trustee can legally consent to the assignment of Sub-Servicer's obligations.

§9.02 [Reserved]

§9.03 [Reserved]

§9.04 Maintenance of Fidelity Bond and Errors and Omissions

This section sets forth that the Master Servicer is required to have a blanket fidelity bond and an insurance policy that covers any errors or omissions in the performance of the its obligations. Furthermore, the insurance policy and fidelity bond should be in an amount generally acceptable for master servicers or trustees.

§9.05 Representation and Warranties of the Master Servicer

- a) The Master Servicer represents and warrants that as of the Closing Date:
 - i. They are a national banking association in good standing and have the power to transact in any and all business contemplated in this agreement;
 - ii. That this agreement does not break any of their by-laws or breach other agreement that they are a part of or violate any law, rule, or regulation;
 - iii. They understand they are entering into a legally binding agreement;
 - iv. They are not in default with any government;
 - v. They are not a party to or bound by any agreement or charter provision that would adversely affect its ability to perform its obligations.
 - vi. There are no actions or investigations against them;
 - vii. That it is not required to inform any governmental authority of the transactions prior to the Closing Date;
- b) If the Master Servicer materially breaches their representation and warranties set forth in §9.05 they will indemnify the Depositor, Securities Administrator, and Trustee.

§9.06 Master Servicer Event of Default

The following constitute an Event of Default:

- a) Failure to deposit a payment made by a Sub-Servicer into the Distribution Account for longer than two days;
- b) Failure to observe or perform any covenants that continue unresolved for thirty days;
- c) An order of the court entered against the Master Servicer for liquidation or bankruptcy that is unresolved for sixty days or more;
- d) If the Master Servicer attempts to assign its duties and obligations to another party without the consent of the Depositor or Securities Administrator;
- e) If the Master Servicer is indicted for fraud or criminal activity in performance of its duties under this Agreement;
- f) Failure of the Master Servicer to provide annual statements of compliance.

§9.07 Waiver of Default

An Event of Default can be waived by the Trustee along with 51% of the Certificateholders votes.

§9.08 Successor Master Servicer

Upon termination of a Master Servicer the Depositor will appoint a successor. The successor must be an approved Fannie Mae or Freddie Mac servicer in good standing. In the event the Master Servicer is terminated they still must perform their duties until a successor is appointed.

If no successor can be appointed within ninety days the Trustee will become the successor and be subject to the liabilities of the former Master Service but will not be obligated to monitor Sub-Servicers.

§9.09 Compensation of the Master Servicer

The Master Servicer is paid the Master Servicing Fee. The Master Servicing Fee can generally be found in the Definitions.

§9.10 Merger or Consolidation

Any Person that is merged or consolidates with the Master Servicer must agree to service the Mortgage Loans in accordance with Fannie Mae and Freddie Mac guidelines and have a net worth no less than twenty-five million dollars.

§9.11 Resignation of the Master Servicer

This section states that the Master Servicer cannot resign unless it is no longer allowed, by law, to be the Master Servicer. If the Master Servicer does resign then it is not effective until another Master Servicer assumes the duties. In this PSA the Master Servicer and the Security Administrator are the same company therefore if the company resigns as the Master Servicer it must also resign as the Securities Administrator.

§9.12 Assignment or Delegation of Duties by the Master Servicer

The Master Servicer is not allowed to assign its duties or obligations to anyone unless the upon written consent of the Depositor.

§9.13 Limitation on Liability of the Master Servicer

The Master Servicer is has no liability to the Trustee or Certificateholders for any act, omission, or error in judgment made in good faith. However, the Master Servicer will be liable for willful misfeasance, bad faith, negligence, or reckless disregard for its obligations. The Master Servicer is not liable for any acts or omissions of any Sub-Servicer. However, the Master Servicer can be liable if the Sub- Servicer acts with willful misfeasance, bad faith, negligence, or reckless disregard for its obligations.

The Master Servicer may rely in good faith on any document that is properly executed and submitted.

The Master Servicer is under no obligation to appear in any legal action that is not in relation to its duties. However, the Master Servicer may in its discretion undertake any such action that it may deem necessary or desirable.

§9.14 Indemnification; Third Party Claims

The Master Servicer indemnifies the Trustee as successor master servicer from any claims that the Trustee may sustain as a result of liability or obligations of the Master Servicer and in connection with the Trustee's assumption of the Master Servicer's obligations, duties or responsibilities under such agreement.

The Trust will indemnify the Master Servicer against any and all claims that the Master Servicer may incur in connection with this Agreement. The Master Servicer would be entitled to reimbursement for any indemnified amount. However, if the liability or expense is related to

- i) a material breach of the Master Servicer's representations and warranties,

- ii) the Master Servicer's willful malfeasance, bad faith or negligence or by reason of its reckless disregard of its duties and obligations or
- iii) failure to provide the assessment, attestation and annual statement of compliance in accordance with Sections 3.03, 3.04 and 3.05

The Master Servicer is not liable for any action taken by a Servicer with respect to loss mitigation of defaulted Mortgage Loans at the direction of the Credit Risk Manager pursuant to a Credit Risk Management Agreement. Furthermore, the Master Servicer is not liable for the performance of a Servicer under any Credit Risk Management Agreement.

§9.15 Duties of the Credit Risk Manager

This section begins by stating the name of the Credit Risk Manager. The Credit Risk Manager provides reports and recommendations in relation to delinquent and defaulted Mortgage Loans, and the collection of Prepayment Charges. The reports are based on information given in a Monthly Statement by the Master Servicer and Sub-Servicers.

§9.16 Limitation Upon Liability of the Credit Risk Manager

The Credit Risk Manager has no liability to the Trustee, Securities Administrator, Depositor, or Certificateholders for any act, omission, or error in judgment made in good faith. However, the Credit Risk Manager will be liable for willful misfeasance, bad faith, negligence, or reckless disregard for its obligations. The Master Servicer is not liable for any acts or omissions of any Sub-Servicer. However, the Master Servicer can be liable if the Sub-Servicer acts with willful misfeasance, bad faith, negligence, or reckless disregard for its obligations. The Credit Risk Manager may rely in good faith upon the accuracy of any document furnished by the Servicers.

§9.17 Removal or Resignation of Credit Risk Manager- This section allows for the Credit Risk Manager to be removed by the Certificateholders by a two-thirds vote. The section also states that five years from the date of the Agreement and annually thereafter the Credit Risk Manager can resign or be terminated by the Depositor.

Article X

Concerning the Securities Administrator

§10.01 Duties of Securities Administrator

The Securities Administrator is responsible for obtaining all of the documents in the Agreement and examine them to make sure they are in the required form specified in the Agreement. However, the Securities Administrator is not responsible for the accuracy or content of the document. If the Securities Administrator finds that a document does not conform to the requirements then they are to request a corrected document. If at that time they do not receive a corrected document then they must notify the Certificateholders.

The Securities Administrator is not to be relieved of any liability for negligence or willful misconduct.

- a) The Securities Administrator is only liable for the duties set forth in the Agreement. No implied covenants or obligations shall be read into this Agreement. The Securities Administrator can rely on the documents furnished to them as true and correct.

- b) The Securities Administrator shall not be liable for error in judgment made in good faith unless the Trustee was negligent in ascertaining pertinent facts.
- c) The Securities Administrator shall not be liable for any action taken in good faith for the Certificate Holders.
- d) The Securities Administrator shall have no liability for the acts or omission of the Master Servicer or the Trustee.

§10.02 Certain Matters Affecting the Securities Administrator

- a) The Securities Administrator can rely upon any document believed to be true and shall not have any responsibility to confirm the genuineness.
- b) The Securities Administrator can receive advice from counsel or advisors that is done in good faith.
- c) The Securities Administrator is not liable for any action or omission taken in good faith.
- d) The Securities Administrator does not need to investigate any matters dealing with the genuineness of the documents unless requested by 25% of the Certificateholders.
- e) The Securities Administrator may perform duties through its agents and is not responsible for the negligence of any agent appointed with due care.
- f) The Securities Administrator is not required to expend its own funds in performance of its duties.
- g) The Securities Administrator is not responsible for the performance or obligations of the Master Servicer or the Trustee.
- h) The Securities Administrator is generally not obligated to conduct or defend any litigation that is not incidental to its duties.

§10.03 Securities Administrator Not Liable for Certificates or Mortgage Loans

The Securities Administrator assumes no responsibility for the correctness of the Certificates because the Certificates are statements of the Depositor. The Securities Administrator makes no representation or warranty of any Mortgage Loan or related document. The Securities Administrator executes the Certificates on behalf of the Trust Fund and not in its individual capacity or personal undertaking.

§10.04 Securities Administrator May Own Certificates

The Securities Administrator may own or pledge Certificates.

§10.05 Securities Administrator Fees and Expense

- a) The Securities Administrator is compensated from the investment funds earned from the Distribution Account during the Float Period. The Trustee cannot put a lien on the Trust for the payment of fees.
- b) The Securities Administrator can be indemnified by the Trust for any liability or expense associated with a claim or legal action. However, there are a number of exceptions which include willful misconduct or bad faith by the Trustee.

§10.06 Eligibility Requirements for the Securities Administrator

The Securities Administrator must be a corporation operating in good standing under United States law. This section also requires that the corporation have fifty million dollars in capital pursuant to federal authority and if it fails to do so the Securities Administrator shall resign.

§10.07 Registration and Removal of the Securities Administrator

The Securities Administrator can resign or be removed at any time. If the Trustee does resign they must give written notice 60 days in advance.

§10.08 Successor Securities Administrator

When a successor Securities Administrator is appointed they must be eligible under 10.06 and must inform the Depositor, Servicers, and Certificateholders.

§10.09 Merger or Consolidation of Securities Administrator

Any corporation that merges or consolidates must be eligible under 10.06.

§10.10 Assignment or Delegation of Duties by the Securities Administrator

The Securities Administrator is not allowed to assign its duties or obligations to anyone unless the upon written consent of the Depositor.

Article XI**Termination****§11.01 Termination upon Liquidation or Purchase of the Mortgage Loans**

This section gives information on how the purchase price will be calculated in the event of liquidation or an Option to Purchase the Mortgage Loans.

§11.02 Final Distribution on the Certificates

This section states how the Final Distribution will be announced and paid in the event of maturity or purchase.

§11.03 Additional Termination Requirements

In the event of an Option to Purchase the Trust Fund will terminate and the Securities Administrator must give REMIC information to the buying party.

Article XII**Miscellaneous Provisions****§12.01 Amendment**

This section list the reasons why the Agreement may be amended at anytime. There is a clear policy that an amendment cannot be made to adversely affect the Certificateholders.

Furthermore, the Agreement can be amended to maintain qualification with REMIC standards and avoid any tax with regards to any REMIC.

If there are any amendments made the Certificateholders and Rating Agency must be notified.

§12.02 Recordation of Agreement; Counterparts

The Agreement is to be recorded in all appropriate public offices for real property records in all jurisdictions in which the Mortgaged Properties are situated. The recordation of the Agreement

can take place simultaneously with the use of counterparts. Furthermore, those counterparts constitute as the original instrument.

§12.03 Governing Law

This section states the applicable governing law.

§12.04 Intention of Parties

It is Depositor's intention to convey all right, title and interest in the property as a sale of property not a grant of security interest to secure a loan.

However, if the conveyance is deemed to be a security interest then: (i) the rights and obligations of the parties are pursuant to the Agreement; (ii) the Trustee is obligated to secure payment of the certificates; (iii) the Agreement constitutes a security agreement under the governing law.

If the Agreement is deemed to be a security interest in the Mortgage Loans the Depositor must take reasonable actions to ensure that the security interest is perfected and maintained under applicable law. The Depositor will make all initial filings and forward a copy to the Trustee. Furthermore, the Depositor must prepare and file the necessary documents to perfect the Trustee's security interest or lien on the Mortgage Loans. Those documents include: any change of name or jurisdiction of the Depositor, Sponsor, or Trustee; any transfer of interest of the Sponsor or Depositor in any Mortgage Loan; any change under relevant UCC or other applicable laws.

§12.05 Notices

This section set forth a number of causes that the Securities Administrator must notify the Rating Agency. Included in the list is the repurchase or substitution of Mortgage Loans.

§12.06 Severability of Provision

Each provision in the Agreement is considered severable so that if one provision is found to be invalid it does not affect the validity or enforceability of any other provision.

§12.07 Certificates Nonassessable and Fully Paid

The Certificateholders shall not be personally liable for the obligations of the Trust Fund.

§12.10 Rules of Construction

This states that the article and section heading are only for the purpose of making the document convenient to read and are to show the intent of the parties.

§12.11 Waiver of Jury Trial

This section states that each party waives their right to a jury trial and that any dispute will be tried before a judge.

**First Franklin Mortgage Loan Trust-Series 2006-FF18
Form 8-K
Pooling and Servicing Agreement**

ARTICLE II

**CONVEYANCE OF MORTGAGE LOANS;
REPRESENTATIONS AND WARRANTIES**

SECTION 2.01. Conveyance of Mortgage Loans

The Depositor, concurrently with the execution and delivery hereof, does hereby sell, transfer, assign, set over and convey to the Trustee without recourse all the right, title and interest of the Depositor in and to the assets of the Trust Fund. Such assignment includes all interest and principal received on or with respect to the Mortgage Loans on or after the Cut-off Date (other than Scheduled Payments due on the Mortgage Loans on or before the Cut-off Date).

It is agreed and understood by the Depositor, the Servicer and the Trustee that it is not intended that any Mortgage Loan be included in the Trust that is, without limitation, either (i) a "High-Cost Home Loan" as defined in the New Jersey Home Ownership Act effective [November 27, 2003](#); (ii) a "High-Cost Home Loan" as defined in the New Mexico Home Loan Protection Act effective [January 1, 2004](#); (iii) a "High-Cost Home Mortgage Loan" as defined in the Massachusetts Predatory Home Loan Practices Act effective [November 7, 2004](#); (iv) a "High-Cost Home Loan" as defined by the Indiana High Cost Home Loan Law effective [January 1, 2005](#) or (v) a "High-Cost Home Loan" as defined by the Illinois High Risk Home Loan Act effective [January 1, 2004](#).

In connection with such assignment, the Depositor does hereby deliver to, and deposit with the Trustee the following documents or instruments with respect to each Mortgage Loan:

(A) **The original Mortgage Note endorsed in blank or, "Pay to the order of LaSalle Bank National Association, as trustee for the First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2006-FF18, without recourse" together with all riders thereto. The Mortgage Note shall include all intervening endorsements showing a complete chain of the title from the Originator of the Mortgage Loan to [_____].**

(B) Except as provided below and for each Mortgage Loan that is not a MERS Loan, **the original recorded Mortgage together with all riders thereto, with evidence of recording thereon**, or, if the original Mortgage has not yet been returned from the recording office, a copy of the original Mortgage together with all riders thereto certified to be a true copy of the original of the Mortgage that has been delivered for recording in the appropriate recording office of the jurisdiction in which the Mortgaged Property is located and **in the case of each MERS Loan, the original Mortgage together with all riders thereto, noting the presence of the MIN of the Loan and either language indicating that the Mortgage Loan is a MOM Loan or if the Mortgage Loan was not a MOM Loan at origination, the original Mortgage and the assignment thereof to MERS**, with evidence of recording indicated thereon, or a copy of

the Mortgage certified by the public recording office in which such Mortgage has been recorded.

(C) In the case of each Mortgage Loan that is not a MERS Loan, **the original Assignment of each Mortgage in blank or, to "LaSalle Bank National Association, as trustee for the First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2006-FF18."**

(D) **The original policy of title insurance** (or a preliminary title report, commitment or binder if the original title insurance policy has not been received from the title insurance company).

(E) **Originals of any intervening assignments of the Mortgage, with evidence of recording thereon** or, if the original intervening assignment has not yet been returned from the recording office, a copy of such assignment certified to be a true copy of the original of the assignment which has been sent for recording in the appropriate jurisdiction in which the Mortgaged Property is located.

(F) **Originals of all assumption and modification agreements, if any.**

(G) If in connection with any Mortgage Loan, the Depositor cannot deliver the Mortgage, Assignments of Mortgage or assumption, consolidation or modification, as the case may be, with evidence of recording thereon, if applicable, concurrently with the execution and delivery of this Agreement solely because of a delay caused by the public recording office where such Mortgage, Assignments of Mortgage or assumption, consolidation or modification, as the case may be, has been delivered for recordation, the Depositor shall deliver or cause to be delivered to the Trustee written notice stating that such Mortgage or assumption, consolidation or modification, as the case may be, has been delivered to the appropriate public recording office for recordation. Thereafter, the Depositor shall deliver or cause to be delivered to the Trustee such Mortgage, Assignments of Mortgage or assumption, consolidation or modification, as the case may be, with evidence of recording indicated thereon, if applicable, upon receipt thereof from the public recording office. To the extent any required endorsement is not contained on a Mortgage Note or an Assignment of Mortgage, the Depositor shall make or cause to be made such endorsement.

(H) With respect to any Mortgage Loan, none of the Depositor, the Servicer or the Trustee shall be obligated to cause to be recorded the Assignment of Mortgage referred to in this Section 2.01. In the event an Assignment of Mortgage is not recorded, the Servicer shall have no liability for its failure to receive and act on notices related to such Assignment of Mortgage.

The ownership of each Mortgage Note, the Mortgage and the contents of the related Mortgage File is vested in the Trustee on behalf of the Certificateholders. Neither the Depositor nor the Servicer shall take any action inconsistent with such ownership and shall not claim any ownership interest therein. The Depositor and the Servicer shall respond to any third party inquiries with respect to ownership of the Mortgage Loans by stating that such ownership is held by the Trustee on behalf of the certificateholders. Mortgage documents relating to the Mortgage Loans not delivered to the Trustee are and shall be held in trust by the Servicer, for the benefit of the Trustee as the owner thereof, and the Servicer's possession of the contents of each Mortgage File so retained is for the sole purpose of servicing the related Mortgage Loan, and such retention and possession by the Servicer, is in a custodial capacity only. The Depositor agrees to take no action inconsistent with the Trustee's ownership of the Mortgage Loans, to

promptly indicate to all inquiring parties that the Mortgage Loans have been sold and to claim no ownership interest in the Mortgage Loans.

It is the intention of this Agreement that the conveyance of the Depositor's right, title and interest in and to the Trust Fund pursuant to this Agreement shall constitute a purchase and sale and not a loan. If a conveyance of Mortgage Loans from the Sponsor to the Depositor is characterized as a pledge and not a sale, then the Depositor shall be deemed to have transferred to the Trustee all of the Depositor's right, title and interest in, to and under the obligations of the Sponsor deemed to be secured by said pledge; and it is the intention of this Agreement that the Depositor shall also be deemed to have granted to the Trustee a first priority security interest in all of the Depositor's right, title, and interest in, to and under the obligations of the Sponsor to the Depositor deemed to be secured by said pledge and that the Trustee shall be deemed to be an independent custodian for purposes of perfection of the security interest granted to the Depositor. If the conveyance of the Mortgage Loans from the Depositor to the Trustee is characterized as a pledge, it is the intention of this Agreement that this Agreement shall constitute a security agreement under applicable law, and that the Depositor shall be deemed to have granted to the Trustee a first priority security interest in all of the Depositor's right, title and interest in, to and under the Mortgage Loans, all payments of principal of or interest on such Mortgage Loans, all other rights relating to and payments made in respect of the Trust Fund, and all proceeds of any thereof. If the trust created by this Agreement terminates prior to the satisfaction of the claims of any Person in any Certificates, the security interest created hereby shall continue in full force and effect and the Trustee shall be deemed to be the collateral agent for the benefit of such Person.

In addition to the conveyance made in the first paragraph of this Section 2.01, the Depositor does hereby convey, assign and set over to the Trustee for the benefit of the Certificateholders its rights and interests under the Sale Agreement, including the Depositor's right, title and interest in the representations and warranties contained in the Sale Agreement, the rights in the Transfer Agreements described therein, and the benefit of the repurchase obligations and the obligation of the Sponsor contained in the Sale Agreement to take, at the request of the Depositor or the Trustee, all action on its part which is reasonably necessary to ensure the enforceability of a Mortgage Loan.

The Trustee hereby accepts such assignment, and shall be entitled to exercise all rights of the Depositor under the Sale Agreement as if, for such purpose, it were the Depositor. The foregoing sale, transfer, assignment, set-over, deposit and conveyance does not and is not intended to result in creation or assumption by the Trustee of any obligation of the Depositor, the Sponsor, or any other Person in connection with the Mortgage Loans or any other agreement or instrument relating thereto.

SECTION 2.02. Acceptance by the Trustee of the Mortgage Loans

Except as set forth in the exception report delivered contemporaneously herewith (the "[Exception Report](#)"), the **Trustee acknowledges receipt of the Mortgage Note for each Mortgage Loan and delivery of a Mortgage File** (but does not acknowledge receipt of all documents required to be included in such Mortgage File) with respect to each Mortgage Loan and declares that it holds and will hold such documents and any other documents constituting a part of the Mortgage Files delivered to it in trust for the use and benefit of all present and future Certificateholders. The Depositor will cause the Sponsor to repurchase any Mortgage Loan to which a material exception was taken in the Exception Report unless

such exception is cured to the satisfaction of the Depositor and the Trustee within 45 Business Days of the Closing Date.

The Trustee acknowledges receipt of the three Corridor [Contracts](#) (forms of which are attached hereto as Exhibits M-1, M-2 and M-3), the Transfer Agreement and the Sale Agreement.

The Trustee acknowledges receipt of the Swap Agreement and the Cap [Contract](#) that will be held in the Supplemental Interest Trust and is hereby instructed to enter into the Swap Agreement and the Cap [Contract](#), not in its individual capacity, but solely as Supplemental Interest Trust Trustee.

The Trustee agrees, for the benefit of Certificateholders to review each Mortgage File delivered to it within sixty (60) days after the Closing Date. The Trustee will ascertain and to certify, within seventy (70) days of the Closing Date, to the Depositor and the Servicer that all documents required by Section 2.01 (A)-(B), (C) (if applicable), and (D)-(E), and the documents if actually received by it, under Section 2.01(F), have been executed and received, and that such documents relate to the Mortgage Loans identified in Exhibit B that have been conveyed to it. It is herein acknowledged that, in conducting such review, the Trustee shall not be under any duty or obligation to inspect, review or examine any such documents, instruments, certificates or other papers to determine that they are genuine, enforceable or appropriate for the represented purpose, that they have actually been recorded or that they are other than what they purport to be on their face. If the Trustee finds any document or documents constituting a part of a Mortgage File to be missing or defective (that is, mutilated, damaged, defaced or unexecuted) in any material respect, the Trustee shall promptly (and in any event within no more than five Business Days) after such finding so notify the Servicer, the Sponsor and the Depositor. In addition, the Trustee shall also notify the Servicer, the Sponsor and the Depositor if the original Mortgage with evidence of recording thereon with respect to a Mortgage Loan is not received within seventy (70) days of the Closing Date; if it has not been received because of a delay caused by the public recording office where such Mortgage has been delivered for recordation, the Depositor shall deliver or cause to be delivered to the Trustee written notice stating that such Mortgage has been delivered to the appropriate public recording office for recordation and thereafter the Depositor shall deliver or cause to be delivered such Mortgage with evidence of recording thereon upon receipt thereof from the public recording office. The Trustee shall request that the Sponsor correct or cure such omission, defect or other irregularity, or substitute a Mortgage Loan pursuant to the provisions of Section 2.03(c), within ninety (90) days from the date the Sponsor was notified of such omission or defect and, if the Sponsor does not correct or cure such omission or defect within such period, that the Sponsor purchase such Mortgage Loan from the Issuing Entity within ninety (90) days from the date the Trustee notified the Sponsor of such omission, defect or other irregularity at the Purchase Price of such Mortgage Loan.

The Purchase Price for any Mortgage Loan purchased pursuant to this Section 2.02 shall be paid to the Servicer and deposited by the Servicer in the Certificate Account or Collection Account, as appropriate, promptly upon receipt, and upon receipt by the Trustee of written notification of such deposit signed by a Servicing Officer or receipt of such deposit by the Trustee, the Trustee, upon receipt of a Request for Release and certification of the Servicer of such required deposit, shall promptly release to the Sponsor the related Mortgage File and the Trustee shall execute and deliver such instruments of transfer or assignment, without recourse, as shall be requested by the Sponsor and necessary to vest in the Sponsor or its designee, as the case may be, any Mortgage Loan released pursuant hereto, and the Trustee shall have no further responsibility with regard to such Mortgage Loan. It is

understood and agreed that the obligation of the Sponsor to purchase, cure or substitute any Mortgage Loan as to which a material defect in or omission of a constituent document exists shall constitute the sole remedy respecting such defect or omission available to the Trustee on behalf of Certificateholders. The preceding sentence shall not, however, limit any remedies available to Certificateholders, the Depositor or the Trustee pursuant to the Sale Agreement or the Transfer Agreement.

The Trustee shall be under no duty or obligation to inspect, review and examine such documents, instruments, certificates or other papers to determine that they are genuine, enforceable, recordable, duly authorized, sufficient, legal, valid or appropriate to the represented purpose, or that they have actually been recorded, or that they are other than what they purport to be on their face. The Trustee shall keep confidential the name of each Mortgagor except as required for the performance of this Agreement and the Trustee shall not solicit any such Mortgagor for the purpose of refinancing the related Mortgage Loan; notwithstanding anything herein to the contrary, the foregoing shall not be construed to prohibit (i) disclosure of any and all information that is or becomes publicly known, or information obtained by the Trustee from sources other than the other parties hereto, (ii) disclosure of any and all information (A) if required to do so by any applicable law, rule or regulation, (B) to any government agency or regulatory body having or claiming authority to regulate or oversee any aspects of the business of the Trustee or that of any Affiliate, (C) pursuant to any subpoena, civil investigation demand or similar demand or request of any court, regulatory authority, arbitrator or arbitration to which the Trustee or any Affiliate or an officer, director, employer or shareholder thereof is a party or (D) to any Affiliate, independent or internal auditor, agent, employee or attorney of the Trustee having a need to know the same, provided that the Trustee advises such recipient of the confidential nature of the information being disclosed, or (iii) any other disclosure authorized by the Depositor.

Within seventy (70) days of the Closing Date, the Trustee shall deliver to the Depositor and the Servicer the Trustee's Certification, substantially in the form of Exhibit D attached hereto, evidencing the completeness of the Mortgage Files, with any exceptions noted thereto.

SECTION 2.03. Representations, Warranties and Covenants of the Depositor

(a) The Depositor hereby represents and warrants to the Servicer and the Trustee as follows, as of the date hereof:

(i) The Depositor is duly organized and is validly existing as a corporation in good standing under the laws of the State of Delaware and has full power and authority (corporate and other) necessary to own or hold its properties and to conduct its business as now conducted by it and to enter into and perform its obligations under this Agreement and the Sale Agreement.

(ii) The Depositor has the full corporate power and authority to execute, deliver and perform, and to enter into and consummate the transactions contemplated by, this Agreement and the Sale Agreement and has duly authorized, by all necessary corporate action on its part, the execution, delivery and performance of this Agreement and the Sale Agreement; and this Agreement and the Sale Agreement, assuming the due authorization, execution and delivery hereof by the other parties hereto, constitutes a legal, valid and binding obligation of the Depositor, enforceable against the Depositor in accordance with its terms, subject, as to enforceability, to (i) bankruptcy, insolvency, reorganization, moratorium and other similar laws affecting creditors' rights

generally and (ii) general principles of equity, regardless of whether enforcement is sought in a proceeding in equity or at law.

(iii) The execution and delivery of this Agreement and the Sale Agreement by the Depositor, the consummation of the transactions contemplated by this Agreement and the Sale Agreement, and the fulfillment of or compliance with the terms hereof are in the ordinary course of business of the Depositor and will not (A) result in a material breach of any term or provision of the charter or [by-laws](#) of the Depositor or (B) materially conflict with, result in a violation or acceleration of, or result in a material default under, the terms of any other material agreement or instrument to which the Depositor is a party or by which it may be bound or (C) constitute a material violation of any statute, order or regulation applicable to the Depositor of any court, regulatory body, administrative agency or governmental body having jurisdiction over the Depositor; and the Depositor is not in breach or violation of any material [indenture](#) or other material agreement or instrument, or in violation of any statute, order or regulation of any court, regulatory body, administrative agency or governmental body having jurisdiction over it which breach or violation may materially impair the Depositor's ability to perform or meet any of its obligations under this Agreement.

(iv) No litigation is pending, or, to the best of the Depositor's knowledge, threatened, against the Depositor that would materially and adversely affect the execution, delivery or enforceability of this Agreement and the Sale Agreement or the ability of the Depositor to perform its obligations under this Agreement and the Sale Agreement in accordance with the terms hereof.

(v) No consent, approval, authorization or order of any court or governmental agency or body is required for the execution, delivery and performance by the Depositor of, or compliance by the Depositor with, this Agreement and the Sale Agreement or the consummation of the transactions contemplated hereby, or if any such consent, approval, authorization or order is required, the Depositor has obtained the same. The Depositor hereby represents and warrants to the Trustee with respect to each Mortgage Loan as of the Closing Date, and following the transfer of the Mortgage Loans to it by the Sponsor, the Depositor had good title to the Mortgage Loans and the Mortgage Notes were subject to no offsets, claims, liens, mortgage, pledge, charge, security interest, defenses or counterclaims.

(b) The representations and warranties of the Transferor with respect to the Mortgage Loans in the Transfer Agreement, which have been assigned to the Trustee hereunder, were made as of the date specified in the Transfer Agreement. The representations and warranties of the Sponsor with respect to the Mortgage Loans contained in the Sale Agreement were made as of the Closing Date. To the extent that any fact, condition or event with respect to a Mortgage Loan constitutes a breach of a representation or warranty of the Sponsor under the Sale Agreement, the obligations of the Sponsor under the Sale Agreement shall be enforced against the Sponsor, as set forth in the Sale Agreement. The Trustee acknowledges that the Depositor shall have no obligation or liability with respect to any breach of any representation or warranty with respect to the Mortgage Loans (except as set forth in Section 2.03(a)(v)) under any circumstances.

In addition, with respect to each Mortgage Loan, the Transferor made certain additional covenants regarding such Mortgage Loan, as set forth in the Transfer Agreement. With respect to any breach of such additional covenants that materially and adversely affects the interests of the Certificateholders in such Mortgage Loan, the Sponsor shall repurchase such Mortgage Loan in accordance with this Section 2.03.

(c) Upon discovery by any of the Depositor, the Servicer or the Trustee (or its custodian) of a breach of any of such representations and warranties that adversely and materially affects the value of the related Mortgage Loan, Prepayment Charges or the interests of the Certificateholders, the party discovering such breach shall give prompt written notice to the other parties. Within ninety (90) days of the discovery of such breach of any representation or warranty, the Sponsor shall either (a) cure such breach in all material respects, (b) repurchase such Mortgage Loan or any property acquired in respect thereof from the Trustee at the Purchase Price or (c) within the two year period following the Closing Date, substitute a Replacement Mortgage Loan for the affected Mortgage Loan. In the event of discovery of a breach of any representation and warranty of the Sponsor, the Trustee's rights shall be enforced under the Sale Agreement for the benefit of Certificateholders. If a breach of the representations and warranties set forth in the Purchase Agreement hereof exists solely due to the unenforceability of a Prepayment Charge, the Trustee or the other party having notice thereof shall notify the Servicer thereof and not seek to enforce the repurchase remedy provided for herein unless such Mortgage Loan is not current. In the event that such breach relates solely to the unenforceability of a Prepayment Charge, amounts received in respect of such indemnity up to the amount of such Prepayment Charge shall be distributed pursuant to Section 4.04(b)(i). As provided in the Sale Agreement, if the Sponsor substitutes for a Mortgage Loan for which there is a breach of any representations and warranties in the Purchase Agreement which adversely and materially affects the value of such Mortgage Loan and such substitute mortgage loan is not a Replacement Mortgage Loan, under the terms of the Sale Agreement, the Sponsor will, in exchange for such substitute Mortgage Loan, (i) provide the applicable Purchase Price for the affected Mortgage Loan or (ii) within two years of the Closing Date, substitute such affected Mortgage Loan with a Replacement Mortgage Loan. Any such substitution shall not be effected prior to the additional delivery to the Trustee of a Request for Release substantially in the form of Exhibit I and shall not be effected unless it is within two years of the Startup Day.

As provided in the Sale Agreement, the Sponsor indemnifies and holds the Issuing Entity, the Trustee (or its custodian, as applicable), the Depositor, the Servicer and each Certificateholder harmless against any and all taxes, claims, losses, penalties, fines, forfeitures, reasonable legal fees and related costs, judgments, and any other costs, fees and expenses that the Issuing Entity, the Trustee (or its custodian, as applicable), the Depositor, the Servicer and any Certificateholder may sustain in connection with any actions of the Sponsor relating to a repurchase of a Mortgage Loan other than in compliance with the terms of this Section 2.03 and the Sale Agreement, to the extent that any such action causes (i) any federal or state tax to be imposed on the Issuing Entity or any REMIC provided for herein, including without limitation, any federal tax imposed on "*prohibited transactions*" under Section 860F(a)(1) of the Code or on "*contributions after the startup day*" under Section 860G(d)(1) of the Code, or (ii) any REMIC created hereunder to fail to qualify as a REMIC at any time that any Certificate is outstanding. In furtherance of the foregoing, if the Sponsor is not a member of MERS and repurchases a Mortgage Loan which is registered on the MERS System, the Sponsor, at its own expense and without any right of reimbursement, shall cause MERS to execute and deliver an assignment of the Mortgage in recordable form to transfer the Mortgage from MERS to the Sponsor and shall cause such Mortgage to be removed from registration on the MERS System in accordance with MERS' rules and regulations.

With respect to any Mortgage Loan repurchased by the Sponsor pursuant to the Sale Agreement, the principal portion of the funds received by the Servicer in respect of such repurchase of a Mortgage Loan will be considered a Principal Prepayment and shall be

deposited in the Certificate Account pursuant to Section 3.05. Upon receipt by the Trustee of notice from the Servicer of receipt by the Servicer of the full amount of the Purchase Price for a Deleted Mortgage Loan, and upon receipt by the Trustee of the Mortgage File for a Replacement Mortgage Loan substituted for a Deleted Mortgage Loan and a Request for Release, the Trustee shall release and reassign to the Sponsor the related Mortgage File for the Deleted Mortgage Loan and shall execute and deliver such instruments of transfer or assignment, in each case without recourse, representation or warranty, as shall be necessary to vest in such party or its designee or assignee title to any Deleted Mortgage Loan released pursuant hereto, free and clear of all security interests, liens and other encumbrances created by this Agreement, which instruments shall be prepared by the Depositor or the Sponsor, and the Trustee (and its custodian) shall have no further responsibility with respect to the Mortgage File relating to such Deleted Mortgage Loan.

With respect to each Replacement Mortgage Loan to be delivered to the Trustee pursuant to the terms of this Article II in exchange for a Deleted Mortgage Loan: (i) the Sponsor must deliver to the Trustee the Mortgage File for the Replacement Mortgage Loan containing the documents set forth in Section 2.01 along with a written certification certifying as to the Mortgage Loan satisfying all requirements under the definition of Replacement Mortgage Loan and the delivery of such Mortgage File and containing the granting language set forth in Section 2.01; and (ii) the Depositor will be deemed to have made, with respect to such Replacement Mortgage Loan, each of the representations and warranties made by it with respect to the related Deleted Mortgage Loan. The Trustee shall review the Mortgage File with respect to each Replacement Mortgage Loan and certify to the Depositor that all documents required by Section 2.01(A)-(B), (C) (if applicable), and (D)-(E) have been executed and received.

For any month in which the Sponsor substitutes one or more Replacement Mortgage Loans for one or more Deleted Mortgage Loans, the Sponsor will determine the amount (if any) by which the aggregate principal balance of all such Replacement Mortgage Loans as of the date of substitution and the aggregate Prepayment Charges with respect to such Replacement Mortgage Loans is less than the aggregate Stated Principal Balance (after application of the principal portion of the Scheduled Payment due in the month of substitution) and aggregate Prepayment Charges of all such Deleted Mortgage Loans. An amount equal to the aggregate of the deficiencies described in the preceding sentence (such amount, the "[*Substitution Adjustment Amount*](#)") plus an amount equal to any unreimbursed costs, penalties and/or damages incurred by the Trust Fund in connection with any violation relating to such Deleted Mortgage Loan of any predatory or abusive lending law shall be remitted by the Sponsor to the Trustee for deposit into the Certificate Account by the Sponsor on the Determination Date for the Distribution Date relating to the Prepayment Period during which the related Mortgage Loan became required to be purchased or replaced hereunder.

Notwithstanding any other provision of this Agreement, the right to substitute Mortgage Loans pursuant to this Article II shall be subject to the additional limitations that no substitution of a Replacement Mortgage Loan for a Deleted Mortgage Loan shall be made unless the Trustee shall have received an Opinion of Counsel (at the expense of the party seeking to make the substitution) that, under current law, such substitution will not (A) affect adversely the status of any REMIC established hereunder as a REMIC, or of the related "*regular interests*" as "*regular interests*" in any such REMIC, or (B) cause any such REMIC to engage in a "*prohibited transaction*" or prohibited contribution pursuant to the REMIC Provisions.

The Depositor shall amend the Mortgage Loan Schedule to reflect the removal of such Deleted Mortgage Loan from the terms of this Agreement and the substitution of the Replacement Mortgage Loan or Replacement Mortgage Loans. Upon such substitution by the Sponsor, such Replacement Mortgage Loan or Replacement Mortgage Loans shall constitute part of the Mortgage Pool and shall be subject in all respects to the terms of this Agreement and the Sale Agreement, including all applicable representations and warranties thereof included in the Sale Agreement as of the date of substitution.

(d) It is understood and agreed that the representations, warranties and indemnification (i) set forth in this Section 2.03, (ii) of the Sponsor and the Depositor set forth in the Sale Agreement and assigned to the Trustee by the Depositor hereunder and (iii) of the Transferor, assigned by the Sponsor to the Depositor pursuant to the Sale Agreement and assigned to the Trustee by the Depositor hereunder shall each survive delivery of the Mortgage Files and the Assignment of Mortgage of each Mortgage Loan to the Trustee and shall continue throughout the term of this Agreement.

(e) The Depositor shall deliver a copy of the Mortgage Loan Schedule to the Servicer on the Closing Date.

(f) The Depositor shall notify the Servicer and the Trustee when any NIM Notes are issued and when such NIM Notes are no longer outstanding.

SECTION 2.04. Representations and Warranties of the Servicer

(a) The Servicer hereby represents and warrants to the Depositor and the Trustee as follows, as of the date hereof:

(i) The Servicer is duly organized and is validly existing as a corporation in good standing under the laws of the State of Delaware and is duly authorized and qualified to transact any and all business contemplated by this Agreement to be conducted by the Servicer in any state in which a Mortgaged Property is located or is otherwise not required under applicable law to effect such qualification and, in any event, is in compliance with the doing business laws of any such state, to the extent necessary to ensure its ability to enforce each Mortgage Loan, to service the Mortgage Loans in accordance with the terms of this Agreement and to perform any of its other obligations under this Agreement in accordance with the terms hereof.

(ii) The Servicer has the corporate power and authority and to service each Mortgage Loan, and to execute, deliver and perform, and to enter into and consummate the transactions contemplated by this Agreement and has duly authorized by all necessary corporate action on the part of the Servicer the execution, delivery and performance of this Agreement; and this Agreement, assuming the due authorization, execution and delivery hereof by the other parties hereto, constitutes a legal, valid and binding obligation of the Servicer, enforceable against the Servicer in accordance with its terms, except that (a) the enforceability hereof may be limited by bankruptcy, insolvency, moratorium, receivership and other similar laws relating to creditors' rights generally and (b) the remedy of specific performance and injunctive and other forms of equitable relief may be subject to equitable defenses and to the discretion of the court before which any proceeding therefor may be brought.

(iii) The execution and delivery of this Agreement by the Servicer, the servicing of the Mortgage Loans under this Agreement, the consummation of any other of the transactions contemplated by this Agreement, and the fulfillment of or compliance with

the terms hereof are in the ordinary course of business of the Servicer and will not (A) result in a material breach of any term or provision of the charter or [by-laws](#) of the Servicer or (B) materially conflict with, result in a material breach, violation or acceleration of, or result in a material default under, the terms of any other material agreement or instrument to which the Servicer is a party or by which it may be bound, or (C) constitute a material violation of any statute, order or regulation applicable to the Servicer of any court, regulatory body, administrative agency or governmental body having jurisdiction over the Servicer; and the Servicer is not in breach or violation of any material [indenture](#) or other material agreement or instrument, or in violation of any statute, order or regulation of any court, regulatory body, administrative agency or governmental body having jurisdiction over it which breach or violation may materially impair the Servicer's ability to perform or meet any of its obligations under this Agreement.

(iv) The Servicer is an approved servicer of mortgage loans for Fannie Mae.

(v) No litigation is pending or, to the best of the Servicer's knowledge, threatened, against the Servicer that would materially and adversely affect the execution, delivery or enforceability of this Agreement or the ability of the Servicer to service the Mortgage Loans or to perform any of its other obligations under this Agreement in accordance with the terms hereof.

(vi) No consent, approval, authorization or order of any court or governmental agency or body is required for the execution, delivery and performance by the Servicer of, or compliance by the Servicer with, this Agreement or the consummation of the transactions contemplated hereby, or if any such consent, approval, authorization or order is required, the Servicer has obtained the same.

(vii) The Servicer will fully furnish (for the period it services the Mortgage Loans), in accordance with the Fair Credit Reporting Act and its implementing regulations, accurate and complete information (e.g., favorable and unfavorable) on its borrower credit files to Equifax, Experian and Trans Union Credit Information Company on a monthly basis.

SECTION 2.05. Substitutions and Repurchases of Mortgage Loans that are not "Qualified Mortgages"

Upon discovery by the Depositor, the Servicer or the Trustee that any Mortgage Loan does not constitute a *"qualified mortgage"* within the meaning of section 860G(a)(3) of the Code, the party discovering such fact shall promptly (and in any event within five (5) Business Days of discovery) give written notice thereof to the other parties. In connection therewith, the Depositor shall, at the Depositor's option, either (i) substitute, if the conditions in Section 2.03(c) with respect to substitutions are satisfied, a Replacement Mortgage Loan for the affected Mortgage Loan, or (ii) repurchase the affected Mortgage Loan within ninety (90) days of such discovery in the same manner as it would a Mortgage Loan for a breach of representation or warranty contained in Section 2.03. The Trustee, upon the written direction of the Depositor, shall reconvey to the Depositor the Mortgage Loan to be released pursuant hereto in the same manner, and on the same terms and conditions, as it would a Mortgage Loan repurchased for breach of a representation or warranty contained in Section 2.03.

SECTION 2.06. Authentication and Delivery of Certificates

The Trustee acknowledges the transfer and assignment to it of the Trust Fund and, concurrently with such transfer and assignment, the Trustee has caused to be authenticated

and delivered to or upon the order of the Depositor, in exchange for the Mortgage Loans, Certificates duly authenticated by the Authenticating Agent in authorized denominations evidencing ownership of the entire Trust Fund. The Trustee agrees to hold the Trust Fund and exercise the rights referred to above for the benefit of all present and future Holders of the Certificates and to perform its duties set forth in this Agreement in accordance with the provisions hereof.

SECTION 2.07. REMIC Elections

(a) The Depositor hereby instructs and authorizes the Trustee to make an appropriate election to treat each of the Upper Tier REMIC, the Lower Tier REMIC and the SWAP REMIC as a REMIC. The Trustee shall sign the returns providing for such elections and such other tax or information returns that are required to be signed by the Trustee under applicable law. This Agreement shall be construed so as to carry out the intention of the parties that each of the Upper Tier REMIC, the Lower Tier REMIC and the SWAP REMIC be treated as a REMIC at all times prior to the date on which the Trust Fund is terminated.

(b) The Preliminary Statement sets forth the designations and "latest possible maturity date" for federal income tax purposes of all interests created hereby. The "Startup Day" for purposes of the REMIC Provisions shall be the Closing Date. Each REMIC's fiscal year shall be the calendar year.

The SWAP REMIC shall consist of all of the assets of the Trust Fund, other than (i) amounts distributable to the Class P Certificates pursuant to Section 4.04(b)(i) hereof, (ii) the interests issued by the SWAP REMIC and the interests issued by the Lower Tier REMIC, (iii) the grantor trusts described in Section 2.07 hereof, (iv) each Corridor Contract and the Corridor Contract Account, (v) the Swap Agreement, the Cap Contract and the Supplemental Interest Trust. The SWAP REMIC shall issue the SWAP REMIC Regular Interests, which shall be designated as regular interests of such REMIC, and shall issue the Class SWR Interest, which shall be designated as the sole class of residual interest in the SWAP REMIC. Each of the SWAP REMIC Regular Interests shall have the characteristics set forth in the Preliminary Statement and this Section 2.07.

The Lower Tier REMIC shall consist of the SWAP REMIC Regular Interests. The Lower Tier REMIC shall issue the Lower Tier REMIC Regular Interests, which shall be designated as regular interests of such REMIC and shall issue the Class LTR Interest, which shall be designated as the sole class of residual interest in the Lower Tier REMIC. Each of the Lower Tier REMIC Regular Interests shall have the characteristics set forth in its definition and the Preliminary Statement.

The assets of the Upper Tier REMIC shall be the Lower Tier REMIC Regular Interests. The REMIC Regular Interests shall be designated as the regular interests in the Upper Tier REMIC and the Residual Interest shall be designated as the sole class of residual interest in the Upper Tier REMIC. For federal income tax purposes, the pass-through rate on each REMIC Regular Interest (other than the Uncertificated Class C Interest and the Class UT-IO Interest) and on the sole class of residual interest in the Upper Tier REMIC shall be subject to a cap equal to the Upper Tier REMIC Net WAC Cap.

The beneficial ownership of the Class SWR Interest, the Class LTR Interest and the Residual Interest shall be represented by the Class R Certificate. The Class SWR Interest and the Class LTR Interest shall not have a principal balance or bear interest.

(c) The "[tax matters person](#)" with respect to each REMIC for purposes of the REMIC Provisions shall be the beneficial owner of the Class R Certificate; provided, however, that the Holder of the Class R Certificate, by its acceptance thereof, irrevocably appoints the Trustee as its agent and attorney-in-fact to act as "[tax matters person](#)" with respect to each such REMIC for purposes of the REMIC Provisions. If there is more than one beneficial owner of the Class R Certificate, the "[tax matters person](#)" shall be the Person with the greatest percentage interest in the Class R Certificate and, if there is more than one such Person, shall be determined under Treasury regulation Section 1.860F-4(d) and Treasury regulation Section 301.6231(a)(7)-1.

(d) (i) It is intended that the rights of each Class of the Class A, Class M and Class B Certificates to receive payments in respect of Excess Interest shall be treated as a right in interest rate cap [contracts](#) written by the Class C Certificateholders in favor of the holders of each Class of the Class A, Class M and Class B Certificates and such shall be accounted for as property held separate and apart from the regular interests in the Upper Tier REMIC held by the holders of the Class A Certificates (other than the Class R Certificate), Class M Certificates, Class B Certificates and the residual interest in the Upper Tier REMIC held by the holder of the Class R Certificate. For information reporting requirements, the rights of the Class A, Class M and Class B Certificates to receive payments in respect of Excess Interest shall be assumed to have zero or a de minimis value. This provision is intended to satisfy the requirements of Treasury Regulations Section 1.860G-2(i) for the treatment of property rights coupled with REMIC interests to be separately respected and shall be interpreted consistently with such regulation. On each Distribution Date, to the extent that any of the Class A, Class M and Class B Certificates receive payments in respect of Excess Interest, such amounts, to the extent not derived from payments on the Corridor [Contracts](#), the Cap [Contract](#) or the Swap Agreement, will be treated as distributed by the Upper Tier REMIC to the Class C Certificates pro rata in payment of the amounts specified in Section 4.04(g) and then paid to the relevant Class of Certificates pursuant to the related interest rate cap agreement.

(ii) It is intended that the beneficial owners of the Certificates (other than the Class P and Class C Certificates) shall be treated as having entered into a notional principal [contract](#) with respect to the beneficial owners of the Class C Certificates. Pursuant to each such notional principal [contract](#), all beneficial owners of each Class of Certificates (other than the Class P and Class C Certificates) shall be treated as having agreed to pay, on each Distribution Date, to the beneficial owners of the Class C Certificates an aggregate amount equal to the excess, if any, of (i) the amount payable on such Distribution Date on the Corresponding REMIC Regular Interest of such Class of Certificates over (ii) the amount payable on such Class of Certificates on such Distribution Date (such excess, a "[Class Payment Shortfall](#)"). A Class Payment Shortfall shall be allocated to each Class of Certificates to the extent that interest accrued on such Class for the related Accrual Period at the Pass-Through Rate for a Class, computed by substituting "[Upper Tier REMIC Net WAC Cap](#)" for the Available Funds Cap set forth in the definition thereof, exceeds the amount of interest accrued on such Certificate at the Pass-Through Rate (without such substitution) for the related Accrual Period, and a Class Payment Shortfall payable from principal collections shall be allocated to the most subordinate Class of Certificates with an outstanding principal balance to the extent of such balance.

(e) The parties intend that the portion of the Trust Fund consisting of the Uncertificated Class C Interest, the uncertificated Class UT-IO Interest, the rights to receive payments deemed made by the Class A, Class M and Class B Certificates in respect of notional principal [contracts](#) described in Section 2.07(d)(ii), the Corridor [Contract](#) Account, the Corridor [Contracts](#), the Supplemental Interest Trust which holds the Swap Agreement

and the Cap [Contract](#), and the obligation of the holders of the Class C Certificates to pay amounts in respect of Excess Interest to the holders of the Class A, Class M and Class B Certificates shall be treated as a "*grantor trust*" under the Code, for the benefit of the holders of the Class C Certificates, and the provisions hereof shall be interpreted consistently with this intention. In furtherance of such intention, the Trustee shall (i) furnish or cause to be furnished to the holders of the Class C Certificates information regarding their allocable share, if any, of the income with respect to such grantor trust, (ii) file or cause to be filed with the Internal Revenue Service Form 1041 (together with any necessary attachments) and such other forms as may be applicable, (iii) comply with such information reporting obligations with respect to payments from such grantor trust to the holders of Class A, Class M, Class B and Class C Certificates as may be applicable under the Code and (iv) provide, upon applying for and receiving the tax identification number for the grantor trust from the IRS, a properly completed Form W-9 on behalf of such grantor trust to the Swap Counterparty and Cap [Contract](#) Counterparty.

(f) The parties intend that the portion of the Trust Fund consisting of the right to receive amounts distributable to the Class P Certificates pursuant to Section 4.04(b)(i) hereof shall be treated as a "*grantor trust*" under the Code, for the benefit of the holders of the Class P Certificates, and the provisions hereof shall be interpreted consistently with this intention. In furtherance of such intention, the Trustee shall (i) furnish or cause to be furnished to the holders of the Class P Certificates information regarding their allocable share of the income with respect to such grantor trust and (ii) file or cause to be filed with the Internal Revenue Service Form 1041 (together with any necessary attachments) and such other forms as may be applicable.

(g) The parties intend that amounts paid to the Swap Counterparty under the Swap Agreement shall be deemed for federal income tax purposes to be paid by the Class C Certificates first, out of funds deemed received in respect of the Class UT-IO Interest, second, out of funds deemed received in respect of the Uncertificated Class C Interest and third, out of funds deemed received in respect of notional principal [contracts](#) described in Section 2.07(d)(ii), and the provisions hereof shall be interpreted consistently with this intention. On each Distribution Date, to the extent that amounts paid to the Swap Counterparty are deemed paid out of funds received in respect of the Uncertificated Class C Interest, such amounts will be treated as distributed by the Upper Tier REMIC to the Class C Certificates pro rata in payment of the amounts specified in Section 4.04(g) and then paid to the Swap Counterparty pursuant to the Swap Agreement.

The Supplemental Interest Trust shall be an "*outside reserve fund*" for federal income tax purposes and not an asset of any REMIC. Furthermore, the Holders of the Class C Certificates shall be the beneficial owners of the Supplemental Interest Trust for all federal income tax purposes, and shall be taxable on all income earned thereon.

(h) All payments of principal and interest at the Net Mortgage Rate on each of the Mortgage Loans (other than amounts distributable to the Class P Certificates pursuant to Section 4.04(b)(i) hereof) received by the SWAP REMIC with respect to the Mortgage Loans shall be paid to the SWAP REMIC Regular Interests until the principal balance of all such interests have been reduced to zero and any losses allocated to such interests have been reimbursed. Any available funds remaining in the SWAP REMIC on a Distribution Date after distributions to the SWAP REMIC Regular Interests shall be distributed to the Class R Certificates on account of the Class SWR Interest. On each Distribution Date, the Trustee shall distribute the aggregate Interest Funds (net of expenses and payments to the Class P Certificates) with respect to each of the SWAP REMIC Regular Interests based on the interest rates for each such SWAP REMIC Regular Interest. On each Distribution Date, the

Trustee shall distribute the aggregate Principal Funds with respect to the Group One Mortgage Loans first to the Class 1-SW1 Interest until its principal balance is reduced to zero and then sequentially to each of the other SWAP REMIC Regular Interests beginning with designation "1" in ascending order of their numerical class designation, in equal amounts to each such class in such numerical designation, until the principal balance of each such class is reduced to zero. All losses with respect to the Group One Mortgage Loans shall be allocated among the SWAP REMIC Regular Interests beginning with the designation "1" in the same manner that principal distributions are allocated. On each Distribution Date, the Trustee shall distribute the aggregate Principal Funds with respect to the Group Two Mortgage Loans first to the Class 2-SW2 Interest until its principal balance is reduced to zero and then sequentially to each of the other SWAP REMIC Regular Interests beginning with designation "2" in ascending order of their numerical class designation, in equal amounts to each such class in such numerical designation, until the principal balance of each such class is reduced to zero. All losses with respect to the Group Two Mortgage Loans shall be allocated among the SWAP REMIC Regular Interests beginning with the designation "2" in the same manner that principal distributions are allocated. Subsequent Recoveries with respect to the Group One and Group Two Mortgage Loans shall be allocated in the reverse fashion from the manner in which losses are allocated.

All payments received by the Lower Tier REMIC with respect to the SWAP REMIC Regular Interests shall be paid to the Lower Tier REMIC Regular Interests until the principal balance of all such interests have been reduced to zero and any losses allocated to such interests have been reimbursed. Any excess amounts shall be distributed to the Class LTR Interest. On each Distribution Date, payments and losses shall be allocated among the Lower Tier REMIC Regular Interests so that (i) each of the Lower Tier REMIC I Marker Interests shall have a principal balance equal to 25% of the principal balance of the Corresponding Certificates, (ii) the Class LTIX Interest has a principal balance equal to the excess of (x) 50% of the remaining principal balance of the Mortgage Loans over (y) the aggregate principal balance of the Lower Tier REMIC I Marker Interests (if necessary to reflect an increase in vercollateralization, accrued and unpaid interest on the Class LTIX interest may be added to its principal amount to achieve this result) and (iii) the aggregate principal amount of the Class LTII1A Interest, Class LTII1B Interest, Class LTII2A Interest, Class LTII2B Interest and Class LTIIX Interest shall equal 50% of the remaining principal balance of the Mortgage Loans. Distributions and losses allocated to the Lower Tier REMIC Regular Interests described in clause (iii) of the preceding sentence will be allocated among such Lower Tier REMIC Regular Interests in the following manner: (x) such distributions shall be deemed made to such Lower Tier REMIC Regular Interests first, so as to keep the principal balance of the each such Lower Tier REMIC Regular Interest with "B" at the end of its designation equal to 0.05% of the aggregate scheduled principal balance of the Mortgage Loans in the related Mortgage Group and second, to such Lower Tier REMIC Regular Interests with "A" at the end of its designation so that the uncertificated principal balance of each such Lower Tier REMIC Regular Interest is equal to 0.05% of the excess of (I) the aggregate scheduled principal balance of the Mortgage Loans in the related Mortgage Group over (II) the aggregate principal balance of Certificate Group One, in the case of the Class LTII1A Interest, or Certificate Group Two, in the case of the Class LTII2A Interest (except that if 0.05% of any such excess is greater than the principal amount of the related Lower Tier REMIC II Marker Interest with "A" at the end of its designation, the least amount of principal shall be distributed to each Lower Tier REMIC II Marker Interest with "A" at the end of its designation such that the Lower Tier REMIC Subordinated Balance Ratio is maintained) and finally, any remaining distributions of principal to the Class LTIIX Interest and (y) such losses shall be allocated among the Lower Tier REMIC Regular Interests described in clause (iii) of the preceding sentence first, so as to keep the principal balance of the each such Lower Tier REMIC Regular Interest with "B" at the end of its designation

equal to 0.05% of the aggregate scheduled principal balance of the Mortgage Loans in the related Mortgage Group; second, to such Lower Tier REMIC Regular Interests with "A" at the end of its designation so that the uncertificated principal balance of each such Lower Tier REMIC Regular Interest is equal to 0.05% of the excess of (I) the aggregate scheduled principal balance of the Mortgage Loans in the related Mortgage Group over (II) the aggregate principal balance of Certificate Group One, in the case of the Class LTII1A Interest, or Certificate Group Two, in the case of the Class LTII2A Interest (except that if 0.05% of any such excess is greater than the principal amount of the related Lower Tier REMIC II Marker Interest with "A" at the end of its designation, the least amount of losses shall be allocated to each Lower REMIC II Marker Interest with "A" at the end of its designation such that the Lower Tier REMIC Subordinated Balance Ratio is maintained) and finally, any remaining losses to the Class LTIIX Interest. Notwithstanding the preceding two sentences, however, losses not allocated to any Class of Certificates will not be allocated to any Lower Tier REMIC Regular Interests. All computations with respect to the Lower Tier REMIC Regular Interests shall be taken out to ten decimal places.

Any available funds remaining in the Lower Tier REMIC on a Distribution Date after distributions to the Lower Tier REMIC Regular Interests shall be distributed to the Class R Certificates in respect of the Class LTR Interest.

If on any Distribution Date the Certificate Principal Balance of any Class of Certificates is increased pursuant to the last sentence of the definition of "[Certificate Principal Balance](#)", then there shall be an equivalent increase in the principal amounts of the Lower Tier REMIC Regular Interests, with such increase allocated (before the making of distributions and the allocation of losses on the Lower Tier REMIC Regular Interests on such Distribution Date) among the Lower Tier REMIC Regular Interests so that, to the greatest extent possible, (i) each of the Lower Tier REMIC I Marker Interests has a principal balance equal to 25% of the principal balance of the Corresponding Certificates, (ii) the Class LTIX Interest has a principal balance equal to the excess of (x) 50% of the remaining principal balance of the Mortgage Loans over (y) the aggregate principal balance of the Lower Tier REMIC I Marker Interests and (iii) the aggregate principal amount of the Lower Tier REMIC II Marker Interests and the Class LTIIX Interest shall equal 50% of the remaining principal balance of the Mortgage Loans. Allocations in connection with clause (iii) shall be made so that, to the greatest extent possible, (a) the principal balance of each Lower Tier REMIC II Marker Interest with "B" at the end of its designation equals 0.05% of the aggregate scheduled principal balance of the Mortgage Loans in related Mortgage Group, (b) the principal balance of each Lower Tier REMIC II Marker Interest with "A" at the end of its designation equals 0.05% of the excess of (x) the aggregate scheduled principal balance of the Mortgage Loans in related Mortgage Group over (y) the aggregate principal balance of Certificate Group One in the case of the Class LTII1A Interest, or Certificate Group Two in the case of the Class LTII2A Interest and (c) any remaining allocations are made to the Class LTIIX Interest.

(i) In the event that any REMIC provided for herein fails to qualify as a REMIC, loses its status as a REMIC or incurs federal, state or local taxes as a result of a prohibited transaction or prohibited contribution under the REMIC Provisions due to the negligent performance by the Servicer of its duties and obligations set forth herein, the Servicer shall indemnify the Trustee and the Issuing Entity against any and all Losses resulting from such negligence; provided, however, that the Servicer shall not be liable for any such Losses attributable to the action or inaction of the Trustee, the Depositor or the Holder of the residual interest in such REMIC, as applicable, nor for any such Losses resulting from misinformation provided by the Holder of the residual interest in such REMIC on which the Servicer has relied. The foregoing shall not be deemed to limit or restrict the rights and remedies of the Holder of the residual interest in such REMIC now or hereafter

existing at law or in equity. Notwithstanding the foregoing, however, in no event shall the Servicer have any liability (1) for any action or omission that is taken in accordance with and in compliance with the express terms of, or which is expressly permitted by the terms of, this Agreement, (2) for any Losses other than those arising out of a negligent performance by the Servicer of its duties and obligations set forth herein, and (3) for any special or consequential damages to Certificateholders (in addition to payment of principal and interest on the Certificates).

(j) In the event that any REMIC provided for herein fails to qualify as a REMIC, loses its status as a REMIC, or incurs federal, state or local taxes as a result of a prohibited transaction or prohibited contribution under the REMIC Provisions due to the negligent performance by the Trustee of its duties and obligations set forth herein, the Trustee shall indemnify the Issuing Entity against any and all Losses resulting from such negligence; provided, however, that the Trustee shall not be liable for any such Losses attributable to the action or inaction of the Servicer, the Depositor or the Holder of the residual interest in such REMIC, as applicable, nor for any such Losses resulting from misinformation provided by the Holder of the residual interest in such REMIC on which the Trustee has relied. The foregoing shall not be deemed to limit or restrict the rights and remedies of the Holder of the residual interest in such REMIC now or hereafter existing at law or in equity. Notwithstanding the foregoing, however, in no event shall the Trustee have any liability (1) for any action or omission that is taken in accordance with and in compliance with the express terms of, or which is expressly permitted by the terms of, this Agreement, (2) for any Losses other than those arising out of a negligent performance by the Trustee of its duties and obligations set forth herein, and (3) for any special or consequential damages to Certificateholders (in addition to payment of principal and interest on the Certificates).

SECTION 2.08. [RESERVED]

SECTION 2.09. Covenants of the Servicer

The Servicer hereby covenants to each of the other parties to this Agreement that the Servicer shall comply in the performance of its obligations under this Agreement with all reasonable rules and requirements of the insurer under each Required Insurance Policy.

<http://www.secinfo.com/dsvr4.uBc.d.htm#4oiv>

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SECTION 1. PURPOSE

This revenue procedure describes conditions under which modifications of certain mortgage loans will not cause the Internal Revenue Service (the Service) either to challenge the tax status of certain securitization vehicles that hold the loans or to assert that those modifications create a liability for tax on a prohibited transaction.

No inference should be drawn about whether similar consequences obtain if a loan modification falls outside the scope of this revenue procedure. Furthermore, there should be no inference that, in the absence of this revenue procedure, transactions within its scope would have impaired the tax status of securitization vehicles or would have created liability for tax on a prohibited transaction.

SECTION 2. BACKGROUND—FORECLOSURE PREVENTION PROGRAMS

.01 Many servicers of mortgage loans have developed, and are implementing, foreclosure prevention programs. These programs are particularly useful in the current economic environment where there are an increasingly large number of borrowers who are not able to afford their current mortgage payments and are at risk of losing their homes. These servicers apply the programs both to loans that investors hold directly and to those that are held through securitization vehicles such as investment trusts and real estate mortgage investment conduits (REMICs). Typically, these sophisticated programs establish guidelines to streamline modifications of troubled mortgage loans. The guidelines take into account a broad range of information in an effort to identify borrowers whose loans are likely to go into foreclosure if the terms of the loans remain unmodified but who may be able to make timely payments on a modified loan with more favorable terms. The programs also indicate the type and extent of a modification that may allow the borrower to make timely payments under the modified terms and so avoid foreclosure. The modifications that are effected under these programs may include interest rate reductions, principal forgiveness, extensions of maturity, and alterations in the timing of changes in an interest rate.

.02 The terms of many residential mortgage loans provide that, if a borrower fails to make a scheduled payment on the date the payment is due, the borrower is in “default” on the mortgage but that transient lateness may not have any adverse consequences for the borrower. Most such loans provide for a “grace period” (typically, 15 days) during which an underpayment can be cured without the borrower being liable for a late fee.

.03 Servicers have concluded that foreclosure prevention programs such as those described in Section 2.01 of this revenue procedure can assess with a high degree of accuracy whether a borrower presents an unacceptably high risk of eventual foreclosure, even when some desired information is unavailable for a particular borrower and the borrower has not yet missed any payments due under the loan.

SECTION 3. BACKGROUND—REMICs

.01 REMICs are widely used securitization vehicles for mortgages and are governed by sections 860A through 860G of the Internal Revenue Code.

.02 Section 860D(a)(4) of the Code provides that an entity qualifies as a REMIC only if, among other things, as of the close of the third month beginning after the startup day and at all times thereafter, substantially all of its assets consist of qualified mortgages and permitted investments. This asset test is satisfied if the entity owns no more than a *de minimis* amount of other assets. See § 1.860D-1(b)(3)(i) of the Income Tax Regulations. As a safe harbor, the amount of assets other than qualified mortgages and permitted investments is *de minimis* if the aggregate of the adjusted bases of those assets is less than one percent of the aggregate of the adjusted bases of all of the entity's assets. § 1.860D-1(b)(3)(ii).

.03 With limited exceptions, a mortgage loan is not a qualified mortgage unless it is transferred to the REMIC on the startup day in exchange for regular or residual interests in the REMIC. See section 860G(a)(3)(A)(i).

.04 The legislative history of the REMIC provisions indicates that Congress intended the provisions to apply only to an entity that holds a substantially fixed pool of real estate mortgages and related assets and that "has no powers to vary the composition of its mortgage assets." S. Rep. No. 99-313, 99th Cong., 2^d Sess. 791-92; 1986-3 (Vol. 3) C.B. 791-92.

.05 Section 1.1001-3(c)(1)(i) defines a "modification" of a debt instrument as any alteration, including any deletion or addition, in whole or in part, of a legal right or obligation of the issuer or holder of a debt instrument, whether the alteration is evidenced by an express agreement (oral or written), conduct of the parties, or otherwise. Section 1.1001-3(e) governs which modifications of debt instruments are "significant." Under § 1.1001-3(b), for most federal income tax purposes, a significant modification produces a deemed exchange of the original debt instrument for a new debt instrument.

.06 Under § 1.860G-2(b), related rules apply to determine REMIC qualification. Except as specifically provided in § 1.860G-2(b)(3), if there is a significant modification of an obligation that is held by a REMIC, then the modified obligation is treated as one that was newly issued in exchange for the unmodified obligation that it replaced. See § 1.860G-2(b)(1). For this purpose, the rules in § 1.1001-3(e) determine whether a modification is "significant." See § 1.860G-2(b)(2). Thus, even if an entity initially qualifies as a REMIC, one or more significant modifications of the loans held by the entity may terminate the qualification if the modifications cause less than substantially all of the entity's assets to be qualified mortgages.

.07 Certain loan modifications, however, are not significant for purposes of § 1.860G-2(b)(1), even if the modifications are significant under the rules in § 1.1001-3 and thus cause section 1001 to apply. In particular, under § 1.860G-2(b)(3)(i), if a change in the terms of an obligation is "occasioned by default or a reasonably foreseeable default," the change is not a significant modification for purposes of § 1.860G-2(b)(1), regardless of the modification's status under § 1.1001-3.

.08 Section 860F(a)(1) imposes a tax on a REMIC equal to 100 percent of the net income derived from "prohibited transactions." The disposition of a qualified mortgage is a prohibited transaction unless the disposition is pursuant to (i) the substitution of a qualified replacement mortgage for a qualified mortgage; (ii) a disposition incident to the foreclosure, default, or imminent default of the mortgage; (iii) the bankruptcy or insolvency of the REMIC; or (iv) a qualified liquidation. Section 860F(a)(2)(A).

SECTION 4. BACKGROUND—TRUSTS

.01 Section 301.7701-2(a) of the Procedure and Administration Regulations defines a “business entity” as any entity recognized for federal tax purposes (including an entity with a single owner that may be disregarded as an entity separate from its owner under § 301.7701-3) that is not properly classified as a trust under § 301.7701-4 or otherwise subject to special treatment under the Code.

.02 Section 301.7701-4(a) provides that an arrangement is treated as a trust if the purpose of the arrangement is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit.

.03 Section 301.7701-4(c) provides that an “investment” trust is not classified as a trust if there is a power under the trust agreement to vary the investment of the certificate holders.

SECTION 5. SCOPE

This revenue procedure applies to a modification of a mortgage loan that is held by a REMIC, or by an investment trust, if all of the following conditions are satisfied:

.01 The real property securing the mortgage loan is a residence that contains fewer than five dwelling units.

.02 The real property securing the mortgage loan is owner-occupied.

.03 (1) If a REMIC holds the mortgage loan, then as of either the startup day or the end of the 3-month period beginning on the startup day, no more than ten percent of the stated principal of the total assets of the REMIC was represented by loans the payments on which were then overdue by 30 days or more; or

(2) If an investment trust holds the mortgage loan, then as of all dates when assets were contributed to the trust, no more than ten percent of the stated principal of all the debt instruments then held by the trust was represented by instruments the payments on which were then overdue by 30 days or more.

.04 The holder or servicer reasonably believes that there is a significant risk of foreclosure of the original loan. This reasonable belief may be based on guidelines developed as part of a foreclosure prevention program similar to that described in Section 2 of this revenue procedure or may be based on any other credible systematic determination.

.05 The terms of the modified loan are less favorable to the holder than were the unmodified terms of the original mortgage loan.

.06 The holder or servicer reasonably believes that the modified loan presents a substantially reduced risk of foreclosure, as compared with the original loan.

SECTION 6. APPLICATION

If one or more modifications of mortgage loans are described in Section 5 of this revenue procedure—

.01 The Service will not challenge a securitization vehicle’s qualification as a REMIC on the grounds that the modifications are not among the exceptions listed in § 1.860G-2(b)(3);

.02 The Service will not contend that the modifications are prohibited transactions under section 860F(a)(2) on the grounds that the modifications resulted in one or more dispositions of qualified mortgages and that the dispositions are not among the exceptions listed in section 860F(a)(2)(A)(i)-(iv);

.03 The Service will not challenge a securitization vehicle’s classification as a trust under section 301.7701-4(c) on the grounds that the modifications manifest a power to vary the investment of the certificate holders; and

.04 The Service will not challenge a securitization vehicle's qualification as a REMIC on the grounds that the modifications resulted in a deemed reissuance of the REMIC regular interests.

SECTION 7. EXAMPLE

The following example illustrates the application of this revenue procedure:

.01 *Facts.* As part of its business, *S* services mortgage loans that are held by *R*, a REMIC that is described in Section 5.03(1) of this revenue procedure. *S* has developed a foreclosure prevention program to guide it in determining the risk of a foreclosure eventually becoming necessary on a loan that it is servicing. For each loan that the program identifies as presenting an undesirable risk of foreclosure, the program also attempts to determine whether a modification to the terms of the loan might materially reduce the risk of foreclosure and, if so, what modification strikes the best balance between minimizing the sacrifice of some required cash flows under the loan and maximizing the reduction in foreclosure risk.

The factors that the program generally takes into account include the borrower's payment history on the loan; the borrower's payment history (as reported by a credit bureau) on the borrower's other indebtedness; the borrower's FICO score; the loan-to-value ratio of the loan when it was originated; changes in property values in the neighborhood where the property securing the loan is located; an estimate of the current loan-to-value ratio; whether the monthly debt service under the loan has recently changed or will soon change; and, where available, any additional data obtained from the borrower (for example, changes in employment and other income sources, family medical status, uninsured losses, adverse court judgments, inheritances, etc.). Because *S*'s program takes into account statistical models that were developed using extensive amounts of data involving diverse information from very many borrowers, *S* has found the program to be generally reliable at assessing with a high degree of accuracy whether a borrower presents an unacceptably high risk of eventual foreclosure, even when some desired information is unavailable for a particular borrower.

Borrower *B* is the issuer of one of the mortgage loans that is held by *R*. The real property securing *B*'s mortgage loan is described in Section 5.01 and 5.02 of this revenue procedure. None of *B*'s payments on the mortgage loan has been late in the few years that the loan has been outstanding. On the other hand, a very large increase in *B*'s monthly debt service is scheduled in the near future; the loan had a high loan-to-value ratio when it was originated; home values in the neighborhood of the collateral have declined significantly; *B*'s FICO score has dropped; and a credit bureau reports that *B* is developing a pattern of increasingly late payment on rising levels of consumer debt. Although *S* tried several times to contact *B*, both by phone and by mail, *B* did not answer any of the phone calls and did not respond to any of the letters or any of the phone messages that were left.

Even without the benefit of individual information that *S* could have obtained from a conversation with *B*, *S*'s model determines that, if the loan to *B* is not modified, there is a significant risk of eventual foreclosure. The model also indicates, however, that reducing both the principal amount of, and the interest rate on, the loan would substantially reduce the risk of foreclosure. The anticipated benefit of reducing the risk of foreclosure outweighs the lower payments that would be required under the modified terms of the loan. Under *S*'s foreclosure prevention program, therefore, the loan is modified by reducing both the principal amount and the interest rate.

.02 *Analysis.* The modified terms of *B*'s loan are less favorable to *R* than were the unmodified terms of the original loan. Moreover, the modification was undertaken because of *S*'s reasonable beliefs that the unmodified loan presented a significant risk of foreclosure and that the modification would substantially reduce that risk. Accordingly, the modification is within the scope of this revenue procedure.

SECTION 8. EFFECTIVE DATE

This revenue procedure governs determinations made by the Service on or after May 16, 2008, with respect to loan modifications that are effected on or before December 31, 2010.

SECTION 9. REQUEST FOR COMMENTS

The Service invites public comment on this revenue procedure. In particular, the Service invites comments on whether this revenue procedure should be extended to loan modifications that are effected after 2010, whether the Service should consider changing other provisions of this revenue procedure, and whether the Service should consider issuing any additional guidance regarding Federal tax issues that are raised by modifications of mortgage loans to reduce the risk of foreclosure. Comments should be submitted no later than July 15, 2008, to the Internal Revenue Service, CC:PA:LPD:RU (Rev. Proc. 2008-28), room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Comments may be hand delivered between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:RU (Rev. Proc. 2008-28), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224. Alternatively, comments may be submitted via the Internet at *Notice.Comments@irsounsel.treas.gov* (Rev. Proc. 2008-28). All comments will be available for public inspection and copying in their entirety. Therefore, comments received by the IRS and Treasury should not include taxpayer-specific information of a confidential nature. Comments should include the name and telephone number of a person to contact.

SECTION 10. DRAFTING INFORMATION

The principal author of this revenue procedure is Diana Imholtz of the Office of Associate Chief Counsel (Financial Institutions and Products). For further information, contact Ms. Imholtz at (202) 622-3930 (not a toll-free call).

**-Pooling and Servicing Agreement for Deutsche Bank National Trust Company,
GSAMP Trust 2005-S1 (Massey file)**

Article III Section 3.01 Servicer to Servicer Mortgage Loans

(a) For and on behalf of the Certificateholders, the Servicer shall service and administer the Mortgage Loans in accordance with the terms of this Agreement. ...the Servicer shall have full power and authority, acting alone or through Subservicers as provided in Section 3.02, to do or cause to be done any and all things in connection with such servicing and administration which it may deem necessary or desirable. ...the Servicer in its own name or in the name of a Subservicer is hereby authorized and empowered by the Trustee when the Servicer believes it appropriate in its best judgment in accordance with Accepted Servicing Practices, to execute and deliver any and all instruments of satisfaction or cancellation, or of partial or full release or discharge, and all other comparable instruments, with respect to the related Mortgage Loans and the Mortgaged Properties and to institute foreclosure proceedings or obtain a deed-in-lieu of foreclosure so as to convert the ownership of such properties, and to hold or cause to be held title to such properties, on behalf of the Trustee and in the name of the Trust. ...the Trustee hereby grants to the Servicer, and this Agreement shall constitute, a power of attorney to carry out such duties including a power of attorney to take title to Mortgaged Properties after foreclosure on behalf of the Trustee and in the name of the Trust.

(b) ...the Servicer shall advance or cause to be advanced funds as necessary for the purpose of effecting the timely payment of taxes and assessments on the Mortgaged Properties (to the extent the Servicer has received reasonable timely notice that such taxes or assessments have not been paid by the related Mortgagor or the owner or the servicer of the related First Lien Mortgage Loan),...

(c) The sServicer shall not (i) permit modification with respect to any Mortgage Loan that would change the Mortgage Interest Rate, reduce or increase the principal balance (except for reductions resulting from actual payments or principal) or change the final maturity date on such Mortgage Loan (except for (A) a reduction of interest or principal payments resulting from the application of the Servicemembers Civil Relief Act or any similar state statutes or (B) as provided in Section 3.07, if the Mortgagor is in default with respect to the Mortgage Loan or such default is, in the judgment of the Servicer, reasonably foreseeable)...

(d) the Servicer may delegate its responsibilities under this Agreement...

(e) If the Mortgage relating to a Mortgage Loan had a related First Lien Mortgage Loan on the related Mortgaged Property as of the Cut-off Date, then the Servicer, in such capacity, may consent to the refinancing of the related First Lien Mortgage Loan, provided that the such refinancing is consistent with the Radian Guidelines or, if the Mortgage Pool Insurer has denied a claim with respect to the related Mortgage Loan, the following requirements are met:

(i) the resulting Combined Loan-to-Value Ratio of such Mortgage Loan is no higher than the Combined Loan-to-Value Ratio prior to such refinancing;

(ii) the interest rate, or, in the case of an adjustable rate related First Lien Mortgage Loan, the maximum interest rate; for the loan evidencing the refinanced senior lien is no more than 2.0% higher than the interest rate of the maximum interest rate, as the case may be, on the existing First Lien Mortgage Loan immediately prior to the date of such refinancing; and

(iii) the loan evidencing the refinanced senior lender is not subject to negative amortization.

Article III Section 3.02 Subservicing Agreements Between the Servicer and Subservicers

(a) The Servicer may enter into subservicing agreements with subservicers for the servicing and administration of the Mortgage Loans.

Article III Section 3.07 Collection of Certain Mortgage Loan Payments

(a) The Servicer shall make reasonable efforts to collect all payments called for under the terms and provisions of the Mortgage Loans and shall, to the extent such procedures shall be consistent with this Agreement and the terms and provisions of any applicable insurance policies, follow such collection procedures as it would with respect to mortgage loans comparable to the Mortgage Loans and held for its own account. ...the Servicer may (i) waive any late payment charge or, any penalty interest, or (ii) extend the due dates for the Scheduled Payments due on a Mortgage Note for a period of not greater than 180 days; provided, that any extension pursuant to clause (ii) above shall not affect the amortization schedule of any Mortgage Loan for purposes of any computation hereunder, except as provided below. In the event of any such arrangement pursuant to clause (ii) above, the Servicer shall make timely advances on such Mortgage Loan during such extension to the extent required by Section 4.01 and in accordance with the amortization schedule of such Mortgage Loan without modification thereof by reason of such arrangements, subject to Section 4.01 (d) pursuant to which Servicer shall not be required to make any such advances that are Nonrecoverable P & I Advances. ...in the event that any Mortgage Loan is in default or in the judgment of the applicable Servicer, such default is reasonably foreseeable, the Servicer, may also waive, modify or vary any term of such Mortgage Loan (including modification that would change the Mortgage Interest Rate, forgive the payment of principal or interest, extend the final maturity date of such Mortgage Loan or waive, in whole or in part, a Prepayment Premium), accept payment from the related Mortgagor of an amount less than the Stated Principal Balance in final satisfaction of such Mortgage Loan, or consent to the postponement of strict compliance with any term or otherwise grant indulgence to any Mortgagor...provided that the Servicer's approval of a modification of a Due Date shall not be considered a modification for purposes of this sentence; and provided; that the final maturity date of any Mortgage Loan may not be extended beyond the Final Scheduled Distribution Date for the Offered Certificates and no such modification will be granted without the prior consent of the Mortgage Pool Insurer if so required in the related Mortgage Pool Insurance Policy. ...the Servicer may also waive (or permit a Subservicer to waive), in whole or in part, a Prepayment Premium if such waiver would, in the applicable Servicer's judgment, maximize recoveries on the related Mortgage Loan or if such Prepayment Premium is (i) not permitted to be collected by applicable law...(ii) there is a certified class action in which a similar type prepayment premium is being challenged or (iii) the enforceability thereof is limited (1) by bankruptcy, insolvency, moratorium, receivership or other similar laws relating to creditor's rights or (2) due to acceleration in connection with a foreclosure or other involuntary payment. If a Prepayment Premium is waived other than as permitted in this Section, then the Servicer is required to pay the amount of such Prepayment Premium...by depositing such

amount into the Collection Account together with and at the time that the amount prepaid on the related Mortgage Loan is required to be deposited into the Collection Account...

(b) The Servicer shall give notice to the Trustee, each Rating Agency and the Depositor of any proposed change of the location of the Collection Account within a reasonable period of time prior to any change thereof.

Article III Section 3.09 Collection of Taxes, Assessments and Similar Items, Escrow Accounts

...The Servicer shall establish and maintain one or more accounts, which shall be Eligible Accounts. The Servicer shall deposit in the clearing account in which it customarily deposits payments and collections on mortgage loans in connection with its mortgage loan servicing activities on a daily basis, and in no event more than one Business Day after the Servicer's receipt thereof, all collections from the Mortgagors for the payment of taxes, assessments, hazard insurance premiums and comparable items for the account of the Mortgagors collected on account of the Mortgage Loans and shall thereafter deposit such Escrow Payments in the Escrow Accounts... Withdrawals of amounts from an Escrow Account may be made only to (i) effect payment of taxes, assessments, fire and hazard insurance premiums, condominium charges and comparable items; (ii) reimburse the Servicer out of related collections for any advances made pursuant to Section 3.13; (iii) refund to Mortgagors any sums as may be determined to be overages; (iv) apply to the restoration or repair of the Mortgaged Property; (v) transfer to the Collection Account and application to reduce the principal balance of the Mortgage Note; (vi) pay interest to the Servicer and, if required and as described below, to Mortgagors on balances in the Escrow Account; (vii) clear and terminate the Escrow Account at the termination of the Servicer's obligations and responsibilities in respect of the Mortgage Loans under this Agreement; or (viii) recover amounts deposited in error for which amounts previously deposited are returned due to a "not sufficient funds" or other denial of payment by the related Mortgagor's banking institution. As part of its servicing duties, the Servicer or Subservicers shall pay to the Mortgagors interest on funds in Escrow Accounts, to the extent required by law... ...the Servicer shall advance such taxes to avoid loss of the Mortgaged Property. The Servicer assumes full responsibility for the payment of all such bills within such time and shall effect payments of all such bills irrespective of the Mortgagor's faithful performance...

Article III Section 3.11 Withdrawals from the Collection Account

(a) The Servicer shall, make withdrawals from the Collection Account for any of the following purposes or as described in Section 4.01:

(i) on or prior to the Remittance Date, to remit to the Trustee (A) the Trustee Fee with respect to such Distribution Date and (B) all Available Funds in respect of the related Distribution Date together with all amounts representing Prepayment Premiums from the Mortgage Loans received during the related Prepayment Period;

(ii) to reimburse the Servicer for P&I Advances...

(iii) to pay the Servicer or any Subservicer (A) any unpaid Servicing Fees or (B) any unreimbursed Servicing Advances with respect to each Mortgage Loan serviced by the Servicer;

(iv) to pay to the Servicer as servicing compensation on the Remittance Date any interest or investment income earned on funds deposited in the Collection Account;

(v) to pay the Responsible Party or the Depositors with respect to each Mortgage Loan that has previously been repurchased or replaced pursuant to this Agreement all amounts received thereon subsequent to the date of purchase or substitution ;

(vi) to reimburse the Servicer for (A) any P&I Advance or Servicing Advance previously made which the Servicer has determined to be a Nonrecoverable P&I Advance or Nonrecoverable Servicing Advance in accordance with the provisions of Section 4.01 and (B) any unpaid Servicing Fees to the extent not recoverable from Liquidation Proceeds, Insurance Proceeds or other amounts received with respect to the related Mortgage Loan under Section 3.11(a);

(vii) to pay, or to reimburse the Servicer for advances in respect of, expenses incurred in connection with any Mortgage Loan serviced by the Servicer pursuant to Section 3.15;

(viii) to reimburse the Servicer, the Depositor or the Trustee for expenses incurred by or reimbursable to the Servicer, the Depositor, the Trustee;

(ix) to reimburse the Servicer or the Trustee for expenses reasonably incurred in respect of the breach or defect giving rise to the repurchase obligation under Section 2.03 of this Agreement that were included in the Repurchase Price of the Mortgage Loan, including any expenses arising out of the enforcement of the repurchase obligation, to the extent not otherwise paid pursuant to the terms thereof;

(x) to withdraw any amounts deposited in the Collection Account in error or for which amounts previously deposited are returned due to a “not sufficient funds” or other denial of payment by the related Mortgagor’s banking institution;

(xi) to withdraw any amounts held in the Collection Account ...to reimburse the Servicer for unreimbursed P & I Advances;

(xii) to invest funds in Permitted Investments in accordance with Section 3.12;

(xiii) to pay itself any Prepayment Interest Excess; and

(xiv) to clear and terminate the Collection Account upon termination of this Agreement.

(b) The Servicer shall keep and maintain separate accounting, on a Mortgage Loan by Mortgage Loan basis, for the purpose of justifying any withdrawal from the Collection Account, to the extent held by or on behalf of it, pursuant to subclause (a), (iii), (iv), (v), (vi), (vii), (viii), and (ix) above. The Servicer shall provide written notification to the Depositor, on or prior to the next succeeding Remittance Date, upon making any withdrawal from the related Collection Account pursuant to subclause (a) (vi) above.

Article III Section 3.12 Investment of Funds in the Investment Account and the Distribution Account.

(a) The Servicer may invest the funds in the Collection Account and the Trustee may invest funds in the Distribution Account during the Trustee Float Period...

(b) The Servicer shall keep in force during the term of this Agreement a policy or policies of insurance covering errors and omissions for failure in the performance of the Servicer's obligations under this Agreement, which policy or policies shall be made in such form and amount that would meet the requirements of Fannie Mae or Freddie Mac, The Servicer shall also maintain a fidelity bond in the form and amount that would meet the requirements of Fannie Mae or Freddie Mac, unless the Servicer has obtained a waiver of such requirements from Fannie Mae or Freddie Mac...The Servicer shall also cause each Subservicer to maintain a policy of insurance covering errors and omissions and a fidelity bond which would meet such requirements.

Article III Section 3.14 Enforcement of Due-On-Sale Clauses; Assumption Agreements

The Servicer will, to the extent it has knowledge of any conveyance or prospective conveyance of any Mortgaged Property by any Mortgagor (whether by absolute conveyance or by contract of sale, and whether or not the Mortgagor remains or is to remain liable under the Mortgage Note and/or the Mortgage), exercise its rights to accelerate the maturity of such Mortgage Loan under the "due-on-sale" clause, if any, applicable thereto; provided however, that the Servicer shall not be required to take such action if, in its sole business judgment, the Servicer believes it is not in the best interests of the Trust Fund and shall not exercise any such rights if prohibited by law from doing so. The Servicer shall deposit in the Collection Account and Escrow Account the amount of any loss of principal incurred in respect of any such Permitted Investment made with the funds in such accounts immediately upon realization of such loss.

The Servicer is also authorized to enter into a substitution of liability agreement...

Article III Section 3.13 Maintenance of Hazard Insurance, Errors and Omissions and Fidelity Coverage

(a) The Servicer shall obtain and maintain a blanket policy insuring against losses arising from fire and hazards covered under extended coverage on all of the Mortgage Loans...

Article III Section 3.15 Realization Upon Defaulted Mortgage Loans

(a) The Servicer shall use its commercially reasonable efforts, consistent with Accepted Servicing Practices and the requirements under the Mortgage Pool Insurance Policy, to foreclose upon or otherwise comparably convert the ownership of properties securing such of the Mortgage Loans as come into and continue in default and as to which no satisfactory arrangements can be made for collection of delinquent payments...The Servicer shall use reasonable efforts to realize upon such defaulted Mortgage Loans if the Servicer believes there will be a Significant Net Recovery in such manner as will maximize the receipt of principal and interest by the Trustee...The Servicer shall be responsible for all other costs and expenses incurred by it in any such proceedings; provided, however, that it shall be entitled to reimbursement thereof from the related property...

The Servicer shall take on behalf of the Trust, whatever actions are necessary to protect the interests of the Trust in accordance with Accepted Servicing Practices and the REMIC Provisions if the Servicer believes there will be a significant Net Recovery.

(b) Notwithstanding anything to the contrary contained in this Agreement, with respect to any Mortgage Loan that is one hundred twenty (120) days delinquent, the Servicer shall obtain a broker's price opinion with respect to the related Mortgaged Property and shall use reasonable efforts to obtain a total indebtedness balance for any related First Lien Mortgage Loan. After obtaining the related broker's price opinion, the Servicer will determine whether any Significant Net Recovery is possible through foreclosure proceedings or other liquidation of the related Mortgaged Property...

(c) If the Servicer determines based on the broker's price opinion obtained under paragraph (b) above and other relevant considerations that (x) no Significant Net Recovery is possible through foreclosure proceedings or other liquidation of the related Mortgaged Property or (y) the potential Net Recoveries are anticipated to be an amount, determined by the Servicer in its good faith judgment and in light of other mitigating circumstances, that is insufficient to warrant proceeding through foreclosure or other liquidation of the related Mortgaged Property, it will be obligated to charge off the related Mortgage Loan at the time such Mortgage Loan becomes 210 days delinquent.

(d) Any Charged Off Loan may continue to be serviced by the Servicer for the Certificateholders using Wilshire Special Servicing.

(e) Notwithstanding anything to the contrary contained herein, in connection with a foreclosure of acceptance of a deed in lieu of foreclosure, in the event the Servicer has received actual notice of, or has actual knowledge of the presence of, hazardous or toxic substances or wastes on the related Mortgaged Property, or if the Depositor of the Trustee otherwise requests, the Servicer shall cause an environmental inspection or review of such Mortgaged Property to be conducted by a qualified inspector. After reviewing the environmental inspection report, the Servicer shall determine consistent with Accepted Servicing Practices, to proceed with respect to the Mortgaged Property.

Article III Section 3.16 Release of Mortgage Files

(a) Upon the payment in full of any Mortgage Loan, the Servicer will, within five Business Days of the payment in full, notify the Trustee by a certification of a Servicing Officer and shall request delivery to it of the Custodial File by completing a Request for Release.

Article III Section 3.17 Title, Conservation and Disposition of REO Property

(a) In the event that title to any such REO Property is acquired, the Servicer shall cause the deed or certificate of sale to be issued in the name of the Trustee, on behalf of the Certificateholders, or the Trustee's nominee.

(b) The Servicer shall manage, conserve, protect and operate each REO Property for the Trustee solely for the purpose of its prompt disposition and sale. The Servicer, either itself or through an agent selected by the Servicer, shall manage, conserve, protect and operate the REO property in the same manner that it manages, conserves, protects and operates other foreclosed property for its own account... The

Servicer shall attempt to sell the same on such terms and conditions as the Servicer deems to be in the best interest of the Trustee.

(c) ...the Servicer shall use its commercially reasonable efforts to dispose of the REO Property as soon as possible and shall sell such REO Property in any event within three years after title has been taken to such REO Property.

(d) The Servicer shall segregate and hold all funds collected and received in connection with the operation of any REO Property separate and apart from its own g=funds and general assets and shall deposit such funds in the Collection Account.

(e) The Servicer shall deposit net of reimbursement to the Servicer for any related outstanding Servicing Advances and unpaid Servicing Fees provided in Section 3.11...

(h) The Servicer shall use its commercially reasonable efforts to sell, or cause the Subservicer to sell, in accordance with Accepted Servicing Practices, any REO Property as soon as possible, but in no event later than the conclusion of the third calendar year beginning after the year of its acquisition by the REMIC...

Article III Section 3.19 Access to Certain Documentation and Information Regarding the Mortgage Loans

The Servicer shall provide, or cause the applicable Subservicer to provide, to the Depositor, the Trustee, the Mortgage Pool Insurer ...access to the documentation regarding the Mortgage Loans in its possession required by applicable regulations of the OTS.

Nothing in this Section 3.19 shall require the Servicer to collect, create, collate or otherwise generate any information that it does not generate in its usual course of business.

Article III Section 3.20 Documents, Records and Funds in Possession of the Servicer to be held for the Trustee

The Servicer shall account fully to the Trustee for any funds received by the Servicer or which otherwise are collected by the Servicer as Liquidation Proceeds, Condemnation Proceeds or Insurance Proceeds in respect of any Mortgage Loan.

Article III Section 3.21 Servicing Compensation

(a) As compensation for its activities hereunder, the Servicer shall, with respect to each Mortgage Loan, be entitled to retain from deposits to the Collection Account and from Liquidation Proceeds, Insurance Proceeds, and Condemnation Proceeds related to such Mortgage Loan, the Servicing Fee with respect to each Mortgage Loan.

(c) Except as otherwise provided in this Agreements, the Servicer shall be required to pay all expenses incurred by it in connection with its servicing activities hereunder...

Article III Section 3.22 Annual Statement as to Compliance

The Servicer will deliver or cause to be delivered to the Depositor, the Rating Agencies, and the Trustee on or before March 14th of each calendar year, commencing in 2006, an Officer's Certificate stating (i) a review of the activities of the

Servicer for the preceding year and (ii) and that the Servicer has performed all its duties under this agreements.

Article III Section 3.23 Annual Independent Public Accountants' Servicing Statement; Financial Statements

Not later than March 15th of each calendar year commencing in 2006, the Servicer, at its expenses shall cause a nationally recognized firm of independent certified accountants to furnish Depositor, the Rating Agencies, and the Trustee a report stating (i) that the Servicer has met the minimum residential loan servicing standards and (ii) and that such representation is fairly stated in all material facts.

Article III Section 3.25 Compensating Interest

The Servicer shall remit to the Trustee on each Remittance Date an amount from its own funds equal to Compensating Interest payable by the Servicer for such remittance date.

Article III Section 3.26 Credit Reporting; Gramm-Leach-Bliley Act

(a) With respect to each Mortgage Loan, the Servicer shall fully furnish, in accordance with the Fair Credit Reporting Act and its implementing regulations accurate and complete information on the related Mortgagor credit files to the three national credit repositories, on a monthly basis.

(b) ...the Servicer shall provide all privacy notices required of the Servicer under the Privacy Laws.

Article III Section 3.29 Maintenance of Mortgage Pool Insurance Policy

The Servicer shall exercise its commercially reasonable efforts to maintain and keep the Mortgage Pool Insurance Policy in full force and effect until (a) each Mortgage Loan has been paid in full, liquidated or no longer an asset of the Trust Fund or (b) the Certificates are no longer outstanding, unless coverage thereunder has been exhausted through payment of claims.

In connection with its activities as administrator and servicer of the Mortgage Loans, the Servicer agrees to file, on behalf of itself, the Trustee, the Co-Trustee, the Depositor and the Certificateholders claims and provide notices and other information to the Mortgage Pool Insurer in a timely fashion in accordance with the terms of the Mortgage Pool Insurance Policy and, in this regard, to take such action as shall be necessary to permit recovery under the Mortgage Pool Insurance Policy respecting a defaulted Mortgage Loan. The Servicer shall comply with all applicable terms of the Mortgage Pool Insurance Policy and the claims-filling procedures of the Mortgage Pool Insurer, to the extent necessary to avoid any adjustments to claims paid under the Mortgage Pool Insurance Policy.

Article IV Section 4.01 Advances

(a) The Servicer shall make P&I Advances...

(b) On each Remittance Date, the Servicer shall remit in immediately available funds to the Trustee an amount equal to the aggregate amount of P&I Advances...

(c) The obligation of the Servicer to make the P&I Advances is mandatory

...

Article IV Section 4.03 Monthly Statements to Certificateholders

(d) The Servicer shall furnish to the Trustee and the Mortgage Pool Insurer an individual loan accounting report, as of the last Business Day of each month, to document Mortgage Loan payment activity on an individual Mortgage Loan basis.

Article VI Section 6.01 Respective Liabilities of the Depositor and the Servicer

The Depositor and the Servicer shall each be liable in accordance herewith only to the extent of the obligations specifically and respectively imposed upon and undertaken herein.

Article VI Section 6.05 Additional Indemnification by the Servicer; Third Party Claims

The Servicer shall indemnify the Responsible Party, the Depositor and the Trustee and hold each of them harmless against any and all claims, losses, damages, penalties, fines, forfeitures, reasonable and necessary legal fees and related costs, judgments, and any other costs, fees and expenses that any of them may sustain in any way related to (1) any breach by the Servicer of its representations and warranties referred to in Section 2.03 (a). (ii) any error in any tax or information return prepared by the Servicer, or (iii) the failure of the Servicer to perform its duties and service the Mortgage Loans in compliance with the terms of this Agreement; provided that such indemnification shall be limited to instances in which the Servicer acts with willful misfeasance, bad faith or negligence.

Article VII Section 7.01 Events of Default

(d) The Servicer shall consent to the appointment of a conservator or receiver or liquidator in any insolvency, bankruptcy, readjustment of debt, marshalling of assets and liabilities or similar proceedings of or relating to the Servicer or of or relating to all or substantially all of its property; or

(e) the Servicer shall admit in writing its inability to pay its debts generally as they become due...

Article VII Section 7.02 Trustee to Act; Appointment of Successor

In the event that the Servicer is terminated pursuant to Section 7.01, the terminated Servicer shall provide notices to the Mortgagors, transfer the Servicing Files to a successor Servicer and pay all of its own out-of-pocket costs and expenses related to such obligations.

Any successor to the Servicer as servicer shall give notice to the Mortgagors of such change of Servicer, in accordance with applicable federal and state law, and shall, during the term of its service as Servicer, maintain in force the policy or policies that the Servicer is required to maintain pursuant to Section 3.13.

Article IX Section 9.01 Termination upon Liquidation or Purchase of the Mortgage Loans

On the optional Termination Date, the Servicer shall have the option to purchase all of the Mortgage Loans at a price equal to the greater of (a) Fair Value and (b) Par Value.

Article IX Section 9.02 Final Distribution on the Certificates

If on any Remittance Date, the Servicer notifies the Trustee that there are no Outstanding Mortgage Loans and no other funds or assets in the Trust Fund other than the funds in the Collection Account, the Servicer shall direct the Trustee promptly to send a Notice of Final Distribution to each Certificateholder.

Article X Section 10.01 Amendment

This Agreement may be amended from time to time by the Depositor, the Responsible Party, the Servicer and the Trustee without the consent of any of the Certificateholders (i) to cure any ambiguity or mistake, (ii) to correct any defective provisions herein or to supplement any provisions herein which may be inconsistent with any other provisions herein...

This Agreement may also be amended from time to time by the Depositor, the Servicer, the Responsible Party and the Trustee with the consent of the Holders of Certificates evidencing Percentage Interests aggregating not less than 66 2/3% of each Class of Certificates affected thereby for the purpose of adding any provisions to or changing in any manner or eliminating any of the provisions of this Agreement or of modifying in any manner the rights of the Holders of Certificates...

Article X Section Assignment, Sales, Advance Facilities

(a) ...the Agreement may be assigned by the Servicer with the prior written consent of the Depositor, and the Trustee. In addition, for so long as the Servicer is acting as the Servicer hereunder (i) the Servicer is hereby authorized to enter into an advance facility under which (A) the Servicer sells, assigns or pledges to an Advancing Person the Servicer's rights under this Agreement to be reimbursed for any P&I Advances or Servicing Advances and/or (B) an Advancing Person agrees to fund some or all P&I Advances or Servicing Advances required to be made by the Servicer pursuant to this Agreement...

(c) The Servicer shall maintain and provide to any successor Servicer a detailed accounting on a loan-by-loan basis as to amounts advanced by, pledged or assigned to, and reimbursed to any Advancing Person.

Article X Section 10.09 Inspection and Audit Rights

The Servicer agrees that, on reasonable prior notice, it will permit any representative of the Depositor, the Mortgage Pool Insurer or the Trustee during the Servicer's normal business hours, to examine all the books of account, records, reports and other papers of the Servicer relating to the Mortgage Loans, to make copies and extracts therefrom, to cause such books to be audited by independent certified public accountants selected by the Depositor, the Mortgage Pool Insurer or the Trustee and to discuss its affairs, finances and accounts relating to the Mortgage Loans with its officers, employees and independent public accountants, all at such reasonable times and as often as may be reasonably requests.

Nothing in this Section 10.09 shall limit the obligation of the Servicer to observe any applicable law prohibiting disclosure of information regarding the Mortgagors and the failure of the Servicer to provide access as provided in this Section as a result of such obligation shall not constitute a breach of this Section.

Exhibit K Contents of Each Mortgage File

With respect to each Mortgage Loan, the Mortgage File shall include each of the following items, which shall be available for inspection by the Purchaser and which shall be retained by the Servicer...

- (a) the original Mortgage Note...
- (b) the original of any guarantee executed in connection with the Mortgage Note...
- (c) the original Mortgage with evidence of recording thereon or a certified true copy of such Mortgage submitted for recording.
- (d) the originals of all assumption, modification, consolidation or extension agreements, if any, with evidence of recording thereon or a certified true copy of such agreement submitted for recording;
- (e) the original Assignment or Mortgage for each Mortgage Loan endorsed in blank and in recordable form;
- (f) the originals of all intervening assignments of mortgage evidencing a complete chain of assignment from the originator to the last endorsee with evidence of recording thereon...
- (g) the original mortgage policy of title insurance or, in the event such original title policy unavailable, a certified true copy of the related policy binder or commitment for title certified to be true and complete by the title insurance company; and
- (h) a security agreement, chattel mortgage or equivalent document executed in connection with the Mortgage;

Evidence of payment of taxes and insurance, insurance claim files, correspondence, current and historical computerized data files and all other processing, underwriting and closing papers and records which are customarily contained in a mortgage loan file and which are required to document the Mortgage Loan or to service the Mortgage Loan.

Exhibit Q Form of Power of Attorney

...hereby constitutes and appoints the Servicer, by and through the Servicer's officers, the Trustee's true and lawful Attorney-in-Fact...

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, FLORIDA

CASE NO.:16-2007-CA-003840-XXXX-MA
DIVISION: CV-G

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR THE REGISTERED HOLDERS
OF GSAMP TRUST 2005-SEA1, MORTGAGE PASS-
THROUGH CERTIFICATES, SERIES 2005-SEA1,

Plaintiff,

vs.

MARGARET A MASSEY, ET AL,
Defendants.

DEFENDANT'S' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE

1. 12 USC 1701x(c)(5) PRE FORECLOSURE HOMEOWNERSHIP COUNSELING NOTICE

12 USC 1701x(c)(5) imposes a specific statutory obligation on all creditors across the United States who service conventional loans, (non federally-insured home loans) that requires the creditor to send a specific notice about access and availability of homeownership counseling to defaulting homeowners within 45 days of a home loan payment default. The creditor is obliged to advise the homeowner of any homeownership counseling offered by the servicer of the loan and/or information about how to access HUD homeownership counseling.

The issue before the court in this action on plaintiff's motion to is whether the plaintiff 's alleged failure to comply with the federal statutory notice obligation before instituting this foreclosure action can be grounds for the court to equitably deny the lender the remedy of a foreclosure. Otherwise, the allegations as alleged by the defendant for purposes of the plaintiff's motion, are taken as true and besides, the facts, as alleged by the defendant, are supported by the documents submitted by plaintiff, improperly at this stage of the proceeding and on a motion to strike. The court should disregard the plaintiff's exhibits outside the pleadings upon consideration of the plaintiff's motion.

12 USC 1701x(c)(5) was enacted 21 years ago as part of the Housing and Community Development Act of 1987. This statute was recently extended to require creditors to send another very specific pre-foreclosure notice directed to homeowners in the military service of

this country.

However, in this action, the relevant part of the federal statute provides:

12 USC 1701x. Assistance with respect to housing for low-and moderate income families

(c)(5): Notification of availability of homeownership counseling.

(A) Notification of availability of homeownership counseling.

(i) Requirement. Except as provided in subparagraph C, **the creditor of a loan...shall provide notice under clause (ii) to (I) any eligible homeowner who fails to pay** any amount by the date the amount is due under a home loan,...

(ii) Content. Notification under this subparagraph shall—

(I) notify the homeowner...of the **availability of any homeownership counseling offered by the creditor...**;

(III) notify the homeowner...of the **availability of homeownership counseling provided by nonprofit organizations** approved by the Secretary and experienced in the provision of homeownership counseling, or provide the toll-free telephone number described in subparagraph (D)(i);...

(B) Deadline for notification. The notification required in subparagraph (A) shall be made—

(i) in a manner approved by the Secretary; and

(ii) **before the expiration of the 45-day period** beginning on the date on Which the failure referred to in such subparagraph occurs.

(6) Definitions. For purposes of this subsection:

(A) The term “**creditor**” **means** a person or entity that is servicing a home loan on behalf of itself or another person or entity.

(B) The term “**eligible homeowner**” **means** a homeowner eligible for counseling under paragraph 4.

(C) The term “**home loan**” **means** a loan secured by a mortgage or lien on residential property.

(D) The term “**homeowner**” **means** a person who is obligated under a home loan.

(E) The term “residential property” means a 1-family residence,...

(7) Regulations. The Secretary shall issue any regulations that are necessary to carry out this

subsection.

Under the terms of the statute, an “eligible homeowner” is one who is eligible for counseling as follows:

12 USC 1701x(c)(4) Eligibility for counseling. A homeowner shall be eligible for homeownership counseling under this subsection if—

- (A) the home is secured by **property that is the principal residence**...of the homeowner;
- (B) the home is ***not*** assisted under title V of the Housing Act of 1949; and (*emphasis added*)
- (C) the homeowner is, or is expected to be, unable to make payments, correct a home loan delinquency within a reasonable time, or resume full home loan payments due to a reduction in the income of the homeowner because of—
 - (i) an involuntary loss of, or reduction in, the employment of the homeowner, the self-employment of the homeowner, or income from the pursuit of the occupation of the homeowner; or
 - (ii) any similar loss or reduction experienced by any person who contributes to the income of the homeowner.

The secretary of HUD, in a question and answer supplement “ published in order to respond to creditor inquiries and to clarify creditor responsibilities” under the statute. 55 FR 2416 (01/24/1990) states: “We note that if a creditor’s compliance...is challenged in court, the ultimate determination of the adequacy of the creditor’s notification and ***the legal consequences of any noncompliance will be made by the court.***” (*emphasis added*)

The question and answer supplement advises creditors that:

1. The “notification requirement applies to all home loans **except** those assisted by the Farmers Home Administration...Thus, both conventional mortgages and loans, and those insured by HUD or guaranteed by the Department of Veterans Affairs, are subject to section 169.” (Section 169 is a reference to the section of the Housing and Community Development Act that enacted 12 USC 1701x(c)(5))

2. “[S]ince the purpose of the notice is to help the homeowner avert foreclosure, it should be sent soon enough to enable the homeowner to benefit from the counseling. HUD recommends that the notice be included in the creditor’s first communication with the homeowner regarding the delinquency.”

3. “***A notice must be sent to every homeowner every time*** the homeowner becomes delinquent. If the homeowner brings the loan current and becomes delinquent again, another notice must be sent.”

4. “***The notice must contain*** information on any counseling provided by the creditor

and either the name, address and telephone number of the HUD-approved counseling agencies near the homeowner or a cost-free telephone number at the creditor's office where the homeowner can obtain this information..."

5. HUD does not supply a form. "It is HUD's view that sufficient information has been provided on the section 169 notice requirement to enable creditors to prepare the notice.

6. "Creditors may prefer to send the notice to all delinquent homeowners, rather than attempt to determine the cause of each delinquency."

7. "The notice is not required (on) property sold under a land sales contract...until the contract is completed..."

8. "The statute does not require any creditor to provide counseling."

9. If a creditor does provide homeownership counseling, the creditor still has to "notify the delinquent homeowner of the availability of homeownership counseling by HUD-approved counselors or by the Department of Veterans Affairs..."

A copy of 12 USC 1701x has been provided to the court together with the FDIC Compliance Handbook (June 2006) section on the Homeownership Counseling Act. A copy of 55 FR 2416 is accessible online.

HUD published an advisory on the notice requirement of the statute which states: 54 "[T]he notice requirements ...apply virtually to all mortgagees..." and that "noncompliance with the law's requirements could be an actionable event that could affect a mortgagee's ability to carry out foreclosure in a timely manner...HUD regards the obligations imposed on creditors by the new law as self-executing: that is, the law speaks directly to creditors, imposing an obligation upon any and all creditors to notify any eligible homeowner counseling, whenever a home loan is "delinquent". 54 Fed. Reg. 20964-65 (May 15, 1989)

Great caution should be exercised when a court is considering denying a litigant the opportunity to demonstrate that he is entitled to the benefit of a trial. Hance, supra, citing Stephens v. Dichtenmueller, 216 So.2d 448 (Fla. 1968) This is especially the case in a mortgage foreclosure which is an equitable proceeding. Cross v. Federal National Mortgage Association, 359 So.2d 464,465 (Fla. 4th D.C.A. 1978).

Whether the Plaintiff gave the required pre-foreclosure counseling notice to Mrs. Massey within the required 45 days from the failure to pay as required by 12 USC 1701x(c)(5) presents a legitimate equitable affirmative defense and the basis for consumer debt collection and unfair practice counterclaims.

In a Florida mortgage foreclosure action in which a borrower similarly argued that the Plaintiff failed to comply with a federally-mandated notice provision, the court denied the

Plaintiff's motion for judgment of foreclosure based on Plaintiff's failure to provide the required notice to borrower. In U.S. v. Trimble, 86 F.R.D. 435 (S.D. Fla. 1980), the court held that the failure of the mortgagee to comply with the notice requirement contained in the federal regulation is a valid defense to a mortgage foreclosure action. Trimble dealt with a Farmers Home Administration loan, but the holding of that case is premised on the same principle-- compliance with applicable federal laws can be upheld as equitable defense to deny a creditor the judicial remedy of foreclosure. Defendant has properly raised an equitable defense to the plaintiff's claim in this action.

Mortgage foreclosure is an equitable action and the Court must consider equitable defenses in ruling on a complaint for foreclosure. Cross, supra (genuine issues of material fact precluded summary judgment). See also: Family Bank v. Able Realty of America Corp., 702 So.2d 1322 (Fla. 4th DCA 1998) ("court in its discretion may refuse to grant prayer for foreclosure of mortgage for equitable reasons..."mortgage foreclosure is an equitable action and thus equitable defenses are appropriate") and LaSalle Bank NA v. Williams, 13 Fla. L. Weekly 462 (Fla. 4th Cir. 2006) (circuit court opinion of the Honorable Charles Arnold, Jr., denying plaintiff's motion to strike 12 USC 1701x(c)(5) affirmative defense and Order Denying Summary Judgment entered by Judge Nachman in DEUTSCHE BANK, NATIONAL TRUST COMPANY, AS TRUSTEE FOR MORGAN STANLEY ABS CAPITAL 1 INC., TRUST 2005-HE2 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-HE2 vs. YOLANDA RAY, CASE NO.: 16 2005 CA 0004237, 4th Judicial Circuit Court (copy provided to the court).

This defendant has also raised and preserved issues that the plaintiff's complaint is fatally defective and leaves the plaintiff without standing or real-party in interest status to pursue this foreclosure and also leaves this court without subject matter jurisdiction.

2. The defendant has stated a claim for declaratory relief

Count 1 of the Defendant's counterclaim states a cause of action for declaratory and injunctive relief based on the plaintiff's failure to provide legitimate and non predatory access to debt management relief that the defendant claims the plaintiff must make available before filing a foreclosure action. Defendant claims that the forbearance relief the plaintiff is obligated to provide must include special default loan servicing designed to avoid foreclosure of this loan.

Compliance with default loan servicing obligations owed to a borrower pursuant to a pooling and servicing agreement can be held to be a contractual condition precedent to instituting a foreclosure action and the failure of the plaintiff to implement foreclosure avoidance servicing is an appropriate subject for a counterclaim for declaratory and injunctive relief. See: U.S. v. Trimble, 86 F.R.D. 435 (S.D. Fla. 1980) and Cross v. Federal National Mortgage Association, 359 So. 2d 464, 465 (Fla. 4th DCA 1978): "A mortgage foreclosure is an equitable action and thus equitable defenses are most appropriate [I]t appears to us that given the purpose of ...the recommended efforts to obviate the necessity of foreclosure, any substantial deviation from the recommended norm might be construed by the trial court under the heading of an equitable defense." Id., 359 So. 2d at 465.

Whether and to what extent the plaintiff's obligation to provide specialized default loan servicing are issues of fact in dispute between the parties to be determined by the court upon review of the evidence to be produced and the mortgage and note attached to the plaintiff's complaint.

This court has jurisdiction pursuant to F.S. 86.011 "to declare rights, status, and other equitable or legal relations of "(a)ny person claiming to be interested or who may be in doubt about his or her rights under a...contract, or other article...or instrument in writing." The court also has the power to declare the rights of any person "whose rights, status or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by...contract,...or other article, memorandum, or instrument in writing..." F.S. 86.021

"No action or procedure is open to objection on the ground that a declaratory judgment is demanded." F.S. 86.011

“The court’s declaration may be either affirmative or negative in form and effect and such declaration has the force and effect of a final judgment. F.S. 86.011

The court has the power to render a declaratory judgment on the existence, or nonexistence of any right or of any fact upon which the existence or nonexistence of such right does or may depend, whether such right exists or will arise in the future. F.S. 86.011

“Any person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent or supplemental relief in the same action.” F.S.86.011(2)

“The existence of another adequate remedy does not preclude a judgment for declaratory relief...The court has power to give as full and complete equitable relief as it would have had if such proceeding had been instituted as an action in chancery.” F.S.86.111 and 86.021

A contract may be construed either before or after there has been a breach. F.S. 86.031

“Further relief based on a declaratory judgment may be granted when necessary or proper...” F.S.86.061

The statute is declared to be “substantive and remedial. Its purpose is to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations and is to be liberally administered and construed.” F.S.86.101

The defendant in this residential foreclosure has sufficiently stated a counterclaim for declaratory relief and this court should declare whether and to what extent the default loan servicing procedures apply and also whether and to what extent the default servicing obligations control the plaintiff’s conduct in the servicing of the defendant’s mortgage in default.

The court should also declare whether and to what extent the pooling and servicing default loan servicing requirements and procedures are incorporated into the mortgage and whether the defendant has a right, as she asserts, to access the special loan servicing prior to facing a foreclosure on her home.

The Declaratory Judgment statute grants the defendant the right to ask the court to enjoin the plaintiff from foreclosing and to further compel the plaintiff to comply with the default servicing procedures before instituting a foreclosure action against this defendant.

The court has the power to award such declaratory and other appropriate relief to the defendant.

“Unlike other actions, a motion to strike a petition for declaratory judgment does not go to the merits but goes only to the question of whether or not the plaintiff is entitled to a declaration of rights not to whether or not he is entitled to a declaration in his favor.” Effort

Enterprises of Florida, Inc. v. Lexington Insurance Company, 666 So.2d 930, 932 (Fla. 4th DCA 1995)

“A ruling on the merits should not be made until after final hearing where the parties have full opportunity to present evidence in support of their respective positions. Id., citing Government Employees Ins. Co. v. Anta, 379 So.2d 1038, 1039 (Fla. 3d DCA 1980)

“Where a suit has been filed by one party and claims asserted by the others, it cannot be said conclusively that there is not a ‘real and present dispute’ nor that there is not ‘a bona fide, actual, present, and practical need for a declaration’.” Strachan Shipping Company v. Spigner, 573 So.2d 926, 928 (Fla. 1st DCA 1991) citing Stonewall Ins. Co. v. W.W. Gay Mechanical Contractor, Inc., 351 So.2d 403 (Fla. 1st DCA 1977) “Under these circumstances, the entry of a dismissal...was in error.” Id.

The Honorable Bernard Nachman, in denying an almost identical motion to dismiss a declaratory judgment counterclaim in a foreclosure action involving an FHA-insured mortgage, cited Mills v. Ball, 344 So.2d 635,638 (Fla. 1st DCA 1977) and found that:

“A ruling on the merits should not be made until after final hearing where the parties have full opportunity to present evidence in support of their respective positions.” See: Order On Plaintiff’s Motion To Strike Amended Affirmative Defenses, Dismiss Amended Counterclaim, And Strike Demand For Jury Trial entered in Washington Mutual Bank, F.A. v. McCampbell, Case No. 02-7356, a copy of which will be provided.

II: The Defendant has stated a claim under the Florida Consumer Collection Practices Act

Defendant claims that the plaintiff has an obligation to comply with the forbearance, mortgage modification and other foreclosure prevention loan servicing requirements of the pooling and servicing agreement.

The Florida Consumer Collection Practices Act (FCCPA) provides stronger protection for consumers than the protection afforded consumers under the Federal Fair Debt Collection Practices Act (FDCPA). F.S. 559.552

For purposes of the plaintiff’s motion to strike, the defendant’s factual claims are taken as true. The FCCPA prohibits the plaintiff from collecting the underlying consumer mortgage debt involved in this action by asserting its right to foreclose when the plaintiff knows that such right does not exist because the plaintiff did not comply with the applicable default

servicing obligations and guidelines prior to filing this foreclosure action.

F.S. 559.72(9) provides (in pertinent part):

Prohibited practices generally.-In collecting consumer debts, no person shall:

(9) Claim, attempt, or threaten to enforce a debt when such person...assert(s) the existence of some other legal right when such person knows that the right does not exist.

The FCCPA applies to anyone attempting to collect a consumer debt unlawfully and F.S. 559.72 "includes all allegedly unlawful attempts at collecting consumer claims." *Seaton Jackson v. Wells Fargo Homemortgage, Inc.*, 12 Fla. L. Weekly Supp. 188 (Fla. 6th Circuit 2004) citing *Williams v. Streeps Music Co., Inc.*, 333 So.2d 65 (Fla. 4th DCA 1976) See also, *Hart v. GMAC Mortgage Corporation*, 246 B.R. 709 (D. MASS. 2000) (Debtor stated a cause of action under the FDCPA where continuation of foreclosure proceedings amounted to conduct "the natural consequence of which was to harass, oppress, or abuse")

The Honorable Bernard Nachman, in denying an almost identical motion to dismiss a FCCPA counterclaim in the above-referenced foreclosure involving an FHA-insured mortgage, found that:

"Defendant's allegation that the Plaintiff has pursued a foreclosure when it knew that it did not have the right to foreclosure and is therefore in violation of the FCCPA is sufficient to survive the Plaintiff's motion to dismiss as it does state a cause of action under the FCCPA

The defendant has also adequately stated a breach of fiduciary duty, breach of good faith and fair dealing and breach of contract claims based on the plaintiff's breach by failing to service the loan as required by the pooling and servicing agreement that control the defendant's mortgage and that also control the plaintiff's course of conduct in servicing this mortgage in that pool and by illegally adding predatory servicing fees and costs into the balance of the loan.

CONCLUSION

The Defendant has sufficiently stated valid and legitimate claims for declaratory relief and for violations of the Florida Consumer Collection Practices Act and for breach of contract and fiduciary duty.. The court should deny the plaintiff's motion to strike/dismiss.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this document has been mailed to Ira Silverstein, Shapiro & Fishman, 2424 N. Federal Highway, Suite 360, Boca Raton, Florida 33431, Attorney for Plaintiff this _____, 2008.

JACKSONVILLE AREA LEGAL AID, INC.

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Attorney for Defendant Margaret Massey

Attorney for Defendants

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA.

CASE NO.: 2008 CA 015863
DIVISION: CV-A

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., AS NOMINEE FOR FREMONT
INVESTMENT & LOAN

Plaintiff,

vs.

DOUGLAS BOOK AND WANDA BOOK,
HUSBAND AND WIFE; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., AS NOMINEE
FOR FREMONT INVESTMENT & LOAN; WESTCHASE
MANOR HOMEOWNERS' ASSOCIATION, INC.;
UNKNOWN PARTIES IN POSSESSION #1; UNKNOWN
PARTIES IN POSSESSION #2; IF LIVING, AND ALL
UNKNOWN PARTIES CLAIMING BY, THROUGH,
UNDER AND AGAINST THE ABOVE NAMED
DEFENDANT(S) WHO ARE NOT KNOWN TO BE DEAD
OR ALIVE, WHETHER SAID UNKNOWN PARTIES MAY
CLAIM AN INTEREST AS SPOUSE, HEIRS, DEVISEES,
GRANTEES, OR OTHER CLAIMANTS,

Defendants.

**DEFENDANTS, DOUGLAS AND WANDA BOOKS' MOTION TO SET ASIDE
PLAINTIFF'S ORDER FOR SUBSTITUTION AND MOTION TO DISMISS
PLAINTIFF'S COMPLAINT, OR IN THE ALTERNATIVE,
MOTION FOR MORE DEFINITE STATEMENT**

The Defendants, Douglas and Wanda Book (hereafter referred to as the "Books"), by and through their undersigned counsel, files this objection and motion to set aside Plaintiff's Order for Substitution of Parties and moves to dismiss the above-styled case and states:

INTRODUCTION

1. This action was filed by Mortgage Electronic Registration System, Inc., as

Nominee for Fremont Investment & Loan (“MERS”). Attached to the complaint was a mortgage payable to “MERS (solely as nominee for Lender, as hereinafter defined, and Lender’s successors and assigns). MERS was not listed as the lender on the mortgage note.

2. MERS subsequently filed a Motion for Substitution of Parties seeking to substitute Deutsche Bank National Trust Company as Trustee, under Pooling and Servicing Agreement Dated as of November 1, 2006 Securitized Asset Backed Receivable LLC Trust 2006-FR4 Mortgage Pass-Through Certificates Series 2006-FR4 (“Deutsche Bank”) as the party plaintiff based upon a clerical error on December 26, 2008. An Order to Substitute Party Plaintiff was granted on January 6, 2009, prior to Defendants obtaining legal counsel.

3. In order to change the name of the party due to a clerical error, Plaintiff needs to establish that the change is due to a mere misnomer and is not substituting in an entirely new party. Assuming arguendo that Plaintiff can overcome that hurdle, Plaintiff would have to have standing and be a real party in interest. Standing is a threshold determination necessary for the maintenance of all actions. To satisfy the requirement of standing, the plaintiff must show that a case or controversy exists between the plaintiff and the defendant, and that such case or controversy continues from the commencement through the existence of the litigation. Godwin v. State, 593 So. 2d 211 (Fla. 1992); Montgomery v. Department of Health and Rehabilitative Services., 468 So. 2d 1014 (Fla. 1st DCA 1985). Further, the determination of standing to sue concerns a court's exercise of jurisdiction to hear and decide the cause pled by a particular party. Rogers & Ford Construction Corporation v. Carlandia Corporation, 626 So.2d 1350,1352 (Fla. 1993).

4. If this Court were to find MERS never had standing to pursue this foreclosure lawsuit, there is no rule of procedure that permits MERS to substitute another party in its stead.

**FLORIDA RULE OF CIVIL PROCEDURE 1.540(a) IS NOT THE APPROPRIATE
VEHICLE TO SUBSTITUTE A PARTY PLAINTIFF**

5. Florida Rule of Civil Procedure 1.540(a) is not the appropriate process to effectuate the substitution of a party in a foreclosure complaint.

6. Plaintiff filed its Motion to Substitute Party Plaintiff pursuant to Florida Rule of Civil Procedure 1.540(a) and stated that “said filing in the name of MERS constitutes a clerical error and should be changed to the true and correct owner and holder of the mortgage and note, to wit, Deutsche Bank National Trust Company as Trustee, under Pooling and Servicing Agreement Dated as of November 1, 2006 Securitized Asset Backed Receivable LLC Trust 2006-FR4 Mortgage Pass-Through Certificates Series 2006-FR4.”

6. Florida Rule of Civil Procedure 1.1540(a) provides in pertinent part: “Clerical Mistakes. --Clerical mistakes in judgments, decrees, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders.” Fla. R. Civ. P. 1.540.

7. “Clerical mistakes” as contemplated by rule 1.540(a) are only “errors or mistakes arising from accidental slip or omission, and not errors or mistakes in the [s]ubstance of what is decided by the judgment or order.” Byers v. Callahan, 848 So. 2d 1180, 1184 (Fla. 2d DCA 2003).

8. In this case, the Plaintiff seeks to correct a pleading which is not a judgment or decree, but instead, is the initial foreclosure complaint itself. Furthermore, Plaintiff is not requesting a simple typographical or clerical error as it asserts, but actually seeks to change the

entire party responsible for bringing the foreclosure complaint, which is much more than a mere “accidental slip or omission.” Therefore, Plaintiff’s request for relief pursuant to 1.540 is not only misplaced, but entirely inappropriate, and should not stand.

THE PROPER PROCEDURE WHEN NAMING A NEW PARTY
IS TO DISMISS AND REFILE THE ACTION

9. When naming an entirely new party to an action and dropping all original parties, the appropriate process is to dismiss and refile the action. See Trawick's Florida Practice and Procedure, 2007 edition, §4:11 at 64.

9. Substitution is not the appropriate remedy when the wrong party brings an action, but instead, the proper procedure in this event is to dismiss the action without prejudice under rule 1.420(a)(1) and to refile it naming the proper parties. Id.

11. Ordinarily, the court, in its discretion, may allow an amendment of pleading to correct a misnomer or mistake in the name of a party. See Sexton v. Panning Lumber Co., 260 So. 2d 898, 902 (Fla. 4th DCA 1972).

12. "A mere misnomer is defined as the misdescription of a party." G.B. Holdings, Inc. v. Steinhauser, 862 So.2d 97, 99 (Fla. 4th DCA 2003).

13. The threshold question is whether the subject party is merely misdescribed or in instead, an entirely new party:

Under modern practice, if the right party is before the court, although under a wrong name, an amendment to cure a misnomer of parties will be allowed, and many statutes and rules specifically provide for the cure of misnomer by amendment. Thus, the statutes and rules in many jurisdictions provide that where the proper party is before the court, although there under a wrong name, and, if the plaintiff, he or she is the party having the cause of action, and, if

the defendant, he or she is the party the plaintiff intended to sue and did sue, and the court considers such defendant within its jurisdiction, an amendment of process and pleading will be allowed to change or correct the name of either plaintiff or defendant to cure the misnomer . . . However, an amendment changing a name or correcting a misnomer is something distinct although often difficult to distinguish from an amendment which seeks to substitute one party for another, which in some jurisdictions and under certain circumstances may be impermissible, as where the statute of limitations has run at the time a substitution of parties is attempted. Thus, it is declared that ordinarily an amendment of process and pleadings may be allowed to correct a misnomer or mistake in the name of a party where the amendment does not amount to a substitution or an entire change of parties.

Lyle v. Nowlin, 15 Va. Cir. 295, 296 (Va. Cir. Ct. 1989) citing 59 Am. Jur. 2d, Parties, § 255.

14. In Florida, the court has applied this “misnomer” theory in Garrido v. Markus, 358 So. 2d 577, 581 (Fla. 3d DCA 1978) when examining the rule on the relation back of substituted parties. In Garrido, the court found that where “an amendment of process or pleading, or both, will be allowed which changes the description or characterization of a party after the statute of limitations has run, from a corporation to an individual, partnership, or other association, or vice versa, seems to depend upon whether the misdescription or mischaracterization is interpreted as merely a misnomer or defect in the description or characterization, or whether it is deemed a substitution or entire change of parties; in the former case an amendment will be held to relate back to the commencement of the action, while in the latter the amendment will be held to amount to the institution of a new action . . .” Id.

15. The general rule is that there must be a close alliance between the two entities before the court will characterize a correction as a misnomer instead of a substitution of a new party. See Palm Beach County v. Savage Constr. Corp., 627 So. 2d 1332, 1333 (Fla. 4th DCA 1993); see e.g. St. John's Hosp. and Health Ctr. v. Toomey, 610 So. 2d 62 (Fla. 3d DCA 1992)

(Holding that where text of the amended complaint and original complaint were identical except for correction of plaintiff's name from St. John's Hospital and Health Center to St. Johns's Hospital and Health Center Foundation, the error was merely a correctable misnomer); see also G.B. Holdings, Inc. v. Steinhauser, 862 So. 2d 97, 99 (Fla. 4th DCA 2003) (Finding that amendment did not correct a mere misnomer or scrivener's error because it brought an entirely new party into the litigation at a point where a final judgment had been entered and it was too late to defend the suit).

16. The cases allowing an amendment due to a misnomer are distinguishable from the case at bar. First, this is not a case where the entity suing and the entity that intended to sue were related companies functioning through the same management structure. See e.g. Sexton v. Panning Lumber Co., 260 So. 2d 898, 899, 903 (Fla. 4th DCA 1972). Nor is this a case where the plaintiff sued under a fictitious name. See e.g. Royal Atlantic Health Spa, Inc. v. B.L.N., Inc., 677 So. 2d 1385, 1386 (Fla. 4th DCA 1996). Third, this is not a case where the error was a simple typographical error or transposition of letters. Instead, the original Plaintiff, MERS, substituted a completely different entity, Deutsche Bank, claiming that the misnaming of the parties was merely a “clerical error.”

17. Naming two entirely different companies that do not share a close alliance and that are completely separate and unrelated falls squarely outside of the “misnomer” definition as defined by the court. Therefore changing the name from MERS to Deutsche Bank should be considered as substituting an entirely new party and should not be permitted. Therefore this Court should set aside the Order granting the Party Substitution and Plaintiff’s Case should be dismissed.

**ASSUMING ARGUENDO THAT THE PROPER PROCEDURE WAS FOLLOWED,
DEFENDANT MOVES TO DISMISS PLAINTIFF'S COMPLAINT, OR IN THE
ALTERNATIVE, MOVES FOR A MORE DEFINITE STATEMENT**

18. The Defendants, the Books, by and through their undersigned attorney, files this motion to dismiss the Plaintiff's Complaint, or in the alternative, for more definite statement, pursuant to Rules 1.210(a), 1.130(a), 1.140(b)(6), 1.140(b)(7), and 1.140(e) of the Florida Rules of Civil Procedure and states:

19. The Books are the owners of the property which is the subject of this Complaint.

20. The Books request the Court dismiss this action pursuant to Rule 1.210(a) and 1.140(7), because it appears on the face of the Complaint that a person other than the Plaintiff is the true owner of the claim sued upon and that the Plaintiff is not the real party in interest and is not shown to be authorized to bring this action. In re: Shelter Development Group, Inc., 50 B.R. 588 (Bankr. S.D. Fla. 1985) (Finding that "it is axiomatic that a suit cannot be prosecuted to foreclose a mortgage which secures the payment of a promissory note, unless the Plaintiff actually holds the original note," citing Downing v. First National Bank of Lake City, 81 So. 2d 486 (Fla. 1955)). See also Davanzo v. Resolute Insurance Company, et al., 346 So. 2d 1227, 1228 (Fla. 3d DCA 1977) (Holding that "one who holds legal title to a mortgaged property is an indispensable party in suit to foreclose a mortgage").

21. The Plaintiff's complaint is so vague and ambiguous the Defendants cannot reasonably be required to frame a responsive pleading because the complaint fails to attach any document to identify who or what MERS or Deutsche Bank are; nor can Defendants determine from the Plaintiff's complaint upon what facts the Plaintiff is claiming to be the real party in interest with standing to pursue this foreclosure action on a promissory note which is required by

the Florida Rules of Civil Procedure.

22. Plaintiff attaches documents to its complaint that identify an entity that is not the Plaintiff as the owner and holder of the mortgage and these documents conflict with the Plaintiff's allegations of material facts in the complaint as to ownership of the subject note and mortgage.

23. The Plaintiff's complaint fails to contain sufficient facts to establish who the Plaintiff is or the plaintiff's relationship to the Defendants, the Books, or the Plaintiff's relationship or connection to the claim for foreclosure of a promissory note, including the failure to allege an assignment/endorsement of the mortgage and note to the plaintiff.

24. Fla. R.Civ. P. Rule 1.130(a) requires a Plaintiff to attach copies of all "bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought" to its complaint. The Plaintiff has attached a copy of a mortgage payable to Suntrust Mortgage, Inc. Plaintiff has failed to attach a copy of a mortgage note. The documents attached to the Plaintiff's Complaint conflict with the allegations in Paragraph 6 of the Plaintiff's Complaint in which it alleges it is the owner of the subject Mortgage and Mortgage Note.

25. Fla. R. Civ. P. Rule 1.310(b) provides that all exhibits attached to a pleading shall be considered a part of the pleading for all purposes. It appears on the face of Plaintiff's Complaint that it is not the proper party to bring this action.

26. In this case, Plaintiff's allegations of material fact claiming it is the owner of the subject note are inconsistent with the documents attached to the Complaint. Further, Plaintiff has alleged it does not have the original promissory note. When exhibits are inconsistent with the plaintiff's allegations of material fact as to who the real party in interest is, such allegations cancel each other out. Fladell v. Palm Beach County Canvassing Bd., 772 So. 2d 1240, 1242

(Fla. 2000); Greenwald v. Triple D Properties, Inc., 424 So. 2d 185, 187 (Fla. 4th DCA 1983).

27. Rule 1.210(a) of the Florida Rules of Civil Procedure provides, in pertinent part:

Every action may be prosecuted in the name of the real party in interest, but a personal representative, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought . . .

The Plaintiff in this action meets none of these criteria.

28. Plaintiff does not have standing to pursue this action. “Standing depends on whether a party has a sufficient stake in a justiciable controversy, with a legally cognizable interest which would be affected by the outcome of the litigation.” Nedeau v. Gallagher, 851 So. 2d 214, 215 (Fla. 1st DCA 2003).

29. “Standing encompasses not only the ‘sufficient stake’ definition, but the at least equally-important requirement that the claim be brought by or on behalf of one who is recognized by the law and a ‘real party in interest,’ that is ‘the person in whom rests, by substantive law, the claim sought to be enforced.’” Kumar Corp. v. Nopal Lines, 462 So. 2d 1178, 1183 (Fla. 3d DCA 1985).

30. Further, the Books move to dismiss Plaintiff's request for entry of judgment confirming its right to enforce the lost note as it fails to state a cause of action pursuant to the requirements of Fla. Stat. § 673.3091.

31. Plaintiff cannot use § 673.3091 of Florida Statute to enforce this Note because Chapter 673 only applies to negotiable instruments. Plaintiff has not alleged the lost Note was a negotiable instrument.

32. By failing to comply with Fla. R. Civ. P. 1.130(a), the Plaintiff can not comply with Florida Statute § 673.3091. Even if Plaintiff could allege that the Note was a negotiable instrument and that § 673.3091, Fla. Stat. was applicable, Plaintiff has failed to allege one or more elements of that section.

33. Fla. Stat. § 673.3091 sets out the prerequisites for pleading a claim for the enforcement of a lost, destroyed, or stolen instrument and allows:

- (1) A person not in possession of an instrument is entitled to enforce the instrument if:
 - (a) The person seeking to enforce the instrument was entitled to enforce the instrument when loss of possession occurred, or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;
 - (b) The loss of possession was not the result of a transfer by the person or a lawful seizure; and
 - (c) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

34. The documents attached to the Complaint do not indicate that the Plaintiff was ever entitled to enforce the instrument and therefore the Plaintiff can not allege that it

was entitled to enforce the note when the loss of possession occurred or that it directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce it when it was lost.

WHEREFORE, Mr. and Mrs. Book requests this honorable Court to:

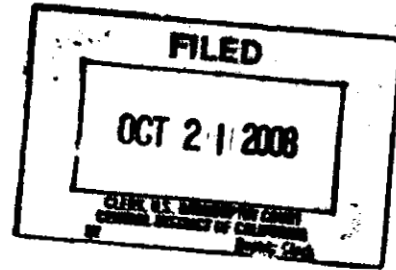
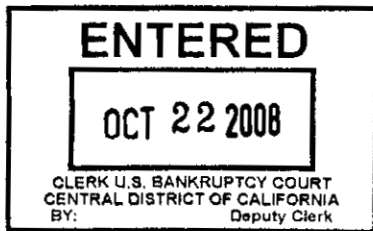
- a. Set aside Plaintiff's Order Granting Substitution of Parties.
- b. Dismiss the Plaintiff's Complaint,
- c. Alternatively, to order the Plaintiff to make its Complaint more definite and certain in the particulars identified hereinabove,
- d. And for an award of attorney's fees and for all other relief to which this Defendant proves himself entitled.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this document has been mailed to Heidi Mohammed, Esq., Shapiro & Fishman, LLP, 2424 North Federal Highway, Suite 360, Boca Raton, Florida 33431, by U.S. Mail this _____, 2009.

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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re:

RAYMOND VARGAS,

Debtor.

Case No.: LA08-17036SB

Chapter 7

**MERS RELIEF FROM STAY MOTION:
FINDINGS OF FACT AND CONCLUSION OF
LAW**

Date: September 30, 2008

Time: 9:30 a.m.

Ctrm: 1575

Floor: 15th

I. Introduction

Movant Mortgage Electronic Registration Systems, Inc. ("MERS") supports this relief from stay motion solely with evidence from a low level clerk whose only function is to compare the financial numbers on his evidentiary declaration with those on a computer screen. After trial, the court finds that the clerk is not competent to testify as to anything relevant to the motion, under the applicable evidentiary rules, and that MERS has presented no admissible evidence in support of its motion. In consequence, the court denies the motion. In addition, the court finds that sanctions should be imposed on the

law firm under Rule 9011¹ for bringing the motion with no evidentiary support.

In addition, MERS purports to join as moving parties "its assignees and/or successors in interest." The court finds that this is an improper effort to obtain relief from stay for undisclosed parties, and that the motion must be denied also on these grounds.

II. Relevant Facts

¹ Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C.A. §§ 101-1532 (West 2008) and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 Debtor Raymond Vargas is an 83-year
2 old retired World War II veteran, whose
3 monthly income consists of approximately
4 \$1,004 in social security payments and a
5 union pension of \$308. Debtor purchased a
6 new home in 1971, and fully paid the
7 mortgage thereon in approximately 1993.
8 His wife became ill in approximately 2000, and
9 suffered multiple ailments that led to her death
10 in December 2004.

11 Debtor obtained a reverse mortgage
12 from Wells Fargo Bank in December 2003 for
13 approximately \$320,000 to pay for his wife's
14 medical care and expenses. In opposition to
15 the motion, debtor also submitted loan
16 documents for two other loans, in 2004 and in
17 2005, which appeared to bear his signature
18 but which he did not recall making. He was
19 physically debilitated and wheel-chair bound at
20 the time these loans were purportedly made.
21 None of these loans is at issue in this case.

22 There purport to be two loans in 2006.
23 One was made on May 12 for \$650,000 with
24 Countrywide Bank. The other, which underlies
25 this motion for relief from the automatic stay,
26 was purportedly made with Freedom Home
27 Mortgage ("FHM") on October 3 for \$630,000.
28 In addition, there is another October 3 loan for
\$150,500, also with FHM. Debtor asserts that
none of these documents bears his signature
and that each signature is invalid and forged.

The documents submitted with this
motion include an adjustable rate promissory
note, in which FHM is the promisee, in the
amount of \$630,000 with an initial interest rate
of 1.75% per annum. The note is supported
by a deed of trust, showing FHM as the
lender. The deed of trust shows that MERS is
the beneficiary under the deed of trust "acting
solely as a nominee for lender and lender's
successors and assigns."

No evidence is provided as to any
adjustments in the interest rate, whether
proper or improper, pursuant to the adjustment
clause. Debtor denies having signed either
the promissory note or the deed of trust and
asserts that the signatures are forged.

The debtor filed this case originally
under chapter 13 on May 21, 2008. On July 7,
2008, the case was converted to a case under

chapter 7. MERS filed its motion for relief
from the automatic stay on July 30, 2008.
The movant, as stated in the motion, is
"Mortgage Electronic Registrations System,
Inc. (MERS), its assignees and/or successors
in interest."

The motion includes a declaration by
Robert Turner, an employee of Countrywide
Home Loans, Inc. ("Countrywide"), "which is
a duly authorized servicing agent of the
Movant." The declaration states that Turner is
a custodian of the books, records and files of
"Movant," that he knows that these documents
were prepared in the ordinary course of
business of "Movant" and that he has a
business duty to record accurately the events
documented in those records. However,
neither the declaration nor the testimony at
trial gives any hint as to how Turner has
custody of any books, records or files of
MERS, or as to any connection between him
and MERS.

Turner appeared and testified on
September 30, 2008 on this motion. From his
testimony the court finds that he is a low level
clerk for Countrywide responsible for some
500 loan defaults per week in Southern
California. His principal responsibility is to
review draft motions for relief from stay, to
make sure that the numbers in paragraphs 6²
and 8³ of his declaration agree with the
numbers that appear on the Countrywide
computer screen at his desk. He testified that

² Paragraph 6 of the form declaration requires
that the movant state the following information
about the loan at issue: the amount of
principal, accrued interest, late charges, costs,
advances, and the total claim.

³ Paragraph 8 requires that the movant state
the current interest rate, the contractual
maturity date, the amount of the current
monthly payments, the number of unpaid
prepetition and postpetition payments, the
date of postpetition default, the date of the last
payment received, the date of recording of a
notice of default and a notice of sale, the date
of the scheduled foreclosure, and the amounts
of future payments coming due (including the
late charge, if the payment is not timely).

1 he spends about five minutes on this task for
2 each relief from stay motion. He further
3 testified that, apart from checking these
4 numbers, he gives no consideration to
5 anything else contained in such a declaration,
6 and that he gave no consideration to anything
7 else but the numbers in paragraphs 6 and 8 of
8 the declaration before the court.

9 III. Analysis

10 The motion for relief from stay must
11 be denied on two separate grounds. First,
12 it purports to include unidentified moving
13 parties, who are intended to benefit from the
14 relief from stay order. Second, Turner is
15 altogether incompetent to give any testimony
16 relevant to this motion.

17 A. Names of the Parties

18 MERS purports to join as moving
19 parties "its assignees and/or successors in
20 interest," which are otherwise unidentified.
21 No such unidentified parties are permitted in a
22 motion before the court.

23 Rule 10(a) of the Federal Rules of
24 Civil Procedure provides in relevant part:
25 "Caption; Names of Parties. Every pleading
26 must have a caption The title of the
27 complaint must name all of the parties."⁴
28 While there is no comparable rule in the
Federal Rules of Bankruptcy Procedure,
Local Rule 1002-1(a)(8) fills in this gap by
specifying what must be stated on the title
(or first) page of all papers filed in this court.
Rule 1002-1(a)(8)(D) states: "The names of
the parties shall be placed below the title of
the court and to the left of center"

For a relief from stay motion, the
movant must use local form 4001-1M.RP.
See Local Rule 1002-1(d)(9) ("Motions for
relief from stay shall be made using those
forms designated for mandatory use in the F
4001-1 series of the court-approved forms.").

⁴ This provision also prohibits the addition of
a "John Doe" defendant (i.e., an unidentified
defendant whose name may be provided at a
later date).

Like Rule 1002-1(d)(8), the form requires that
the name of the movant be stated on the
second line below the line stating, "Notice of
Motion and Motion for Relief from the
Automatic Stay." Thus, each movant in a
motion for relief from stay must be named on
the first page of the motion.

The identification of the movant
serves several important functions. First,
it links the motion to the Schedule A list of real
property owned by the debtor. Second, this
identification links the motion to the Schedule
D list of creditors holding secured claims.
Third, this identification permits the judge to
determine whether the judge must recuse
based on the Code of Conduct for United
States Judges (requiring recusal in a variety of
circumstances based on the judge's
relationship, if any, to the moving party).⁵

The exclusion of these unidentified
parties is particularly important in this
proceeding. It is highly unlikely that FHM has
kept the promissory note: most likely, it sold
the note into the market for mortgage
securitization.⁶ In consequence, it is quite
unlikely that MERS is an authorized agent of
the holder of the note here at issue.
By adding these unidentified movants, MERS
is trying to obtain relief from the automatic stay
for the current note holders without disclosing
to the court their existence, identities or the
source of MERS's authority to act on their
behalf. This is improper.

A secured promissory note traded on
the secondary mortgage market remains
secured because the mortgage follows the
note. CAL. CIV. CODE § 2936
("The assignment of a debt secured by

⁵ As of this date, I still do not know whether
my recusal may be required in this case.

⁶ See, e.g., James R. Barth et al., *A Short
History of the Subprime Mortgage Market
Meltdown* 5 fig.2 (Milken Institute 2008),
available at [http://www.milkeninstitute.org/
publications/publications.taf?function=detail&
ID=38801038&cat=Papers](http://www.milkeninstitute.org/publications/publications.taf?function=detail&ID=38801038&cat=Papers) (showing that
approximately 85% of all home mortgages
originated in 2006 and 2007 were securitized).

1 mortgage carries with it the security.”).
2 California codified this principle in 1872.
3 Similarly, this has long been the law
4 throughout the United States: when a note
5 secured by a mortgage is transferred, “transfer
6 of the note carries with it the security, without
7 any formal assignment or delivery, or even
8 mention of the latter.” *Carpenter v. Longan*,
9 83 U.S. 271, 275 (1872). Clearly, the
10 objective of this principle is “to keep the
11 obligation and the mortgage in the same
12 hands unless the parties wish to separate
13 them.” RESTATEMENT (THIRD) OF PROPERTY
14 (MORTGAGES) § 5.4 (1997). The principle is
15 justified, in turn, by reasoning that the
16 “the debt is the principal thing and the
17 mortgage an accessory.” *Id.* Consequently,
18 “[e]quity puts the principal and accessory upon
19 a footing of equality, and gives to the assignee
20 of the evidence of the debt the same rights in
21 regard to both.” *Id.* Given that “the debt is the
22 principal thing and the mortgage an
23 accessory,” the Supreme Court reasoned that,
24 as a corollary, “[t]he mortgage can have
25 no separate existence.” *Carpenter*, 83 U.S.
26 at 274. For this reason, “an assignment of the
27 note carries the mortgage with it, while an
28 assignment of the latter alone is a nullity.”
Id. at 274. While the note is “essential,” the
mortgage is only “an incident” to the note. *Id.*

Thus, if FHM has transferred the note,
MERS is no longer an authorized agent of the
holder unless it has a separate agency
contract with the new undisclosed principal.
MERS presents no evidence as to who owns
the note, or of any authorization to act on
behalf of the present owner.

In consequence, because these
purported movants are not identified, the
motion must be denied on these grounds
alone.

B. Competence of Witness

The purpose of the declaration
submitted with the motion, which is
a mandatory form in the Central District

of California,⁷ is to provide competent
evidence supporting the motion for relief from
the automatic stay. Competent evidence is
required so that “the truth may be ascertained
and proceedings justly determined.” FED R.
EVID. 102. Questions concerning the
admissibility of evidence are determined by
the court. *See id.* 104(a).

While the form of the declaration is
mandatory, a moving party is required to
modify and supplement it (and show the
modifications) to present admissible evidence
on every item covered by the declaration. It is
manifest that, except for the numbers in
paragraphs 6 and 8, Turner made no attempt
whatever to assure the accuracy of the
declaration.

The general rule is that a witness may
only testify as to matters within the personal
knowledge of the witness: “A witness may not
testify to a matter unless evidence is
introduced sufficient to support a finding that
the witness has personal knowledge of the
matter.” *Id.* 602. MERS has failed to
introduce evidence of any kind sufficient to
show that Turner has personal knowledge or
is otherwise competent to testify as to any
matter relevant to the motion before the court.

1. Payments and Amount Owing

Hearsay evidence is not admissible
unless an exception to the hearsay rule
applies: “Hearsay is not admissible except as
provided by these rules” *Id.* 802.
Hearsay is “a statement, other than one made
by the declarant while testifying at the trial
or hearing, offered in evidence to prove
the truth of the matter asserted.” *Id.* 801(c).
In his declaration, Turner presented the
numbers in paragraphs 6 and 8 for their truth.
This evidence was hearsay, and is not
admissible unless an exception to the hearsay
rule is applicable.

The declaration in a real property
relief from stay motion is required to state in
paragraph 6 the amount of movant’s claim
with respect to the property, including the

⁷ See Local Rule 1002-1(d)(9).

principal owing on the loan, the amount of accrued interest, the amount of late charges, any advances such as for property taxes or insurance, and the total amount of the claim. The declarant must further attach a true and correct copy of the promissory note and the deed of trust, and the declarant must be competent to testify as to the authenticity of these documents. The form further requires that the declarant state in paragraph 8 the current rate of interest, the number and amount of unpaid prepetition payments, the number and amount of postpetition payments, the date of the recording of any notice of default or notice of sale, and further information on the foreclosure process. The declaration must also state the fair market value of the property and the basis for this determination. A number of other items relating to the promissory note, the lien and the status of debtor's payments are also required.

FHM apparently relies on Rule 803(6) for the admissibility of this hearsay evidence.⁸

⁸ Rule 803(6), providing for the admission of records of regularly conducted activity (formerly known as the "business records rule"), states:

Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph

"The basic elements for the introduction of business records under the hearsay exception for records of regularly conducted activity all apply to records maintained electronically." *In re Vinhnee*, 336 B.R. 437, 444 (B.A.P. 9th Cir. 2005). *Vinhnee* also states the requirements for qualification as business records: "Such records must be: (1) made at or near the time by, or from information transmitted by, a person with knowledge; (2) made pursuant to a regular practice of the business activity; (3) kept in the course of regularly conducted business activity; and (4) the source, method, or circumstances of preparation must not indicate lack of trustworthiness." *Id.* (citing FED. R. EVID. 803(6); *United States v. Catabran*, 836 F.2d 453, 457 (9th Cir. 1988)).

The admission of computer records requires that movant provides an 11-step foundation:

1. The business uses a computer.
2. The computer is reliable.
3. The business has developed a procedure for inserting data into the computer.
4. The procedure has built-in safeguards to ensure accuracy and identify errors.
5. The business keeps the computer in a good state of repair.
6. The witness had the computer readout certain data.
7. The witness used the proper procedures to obtain the readout.
8. The computer was in working order at the time the witness obtained the readout.
9. The witness recognizes the exhibit as the readout.
10. The witness explains how he or she recognizes the readout.
11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact.

includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

1 *Vinhnee*, 336 B.R. at 446 (citing EDWARD J.
2 IMWINKELRIED, EVIDENTIARY FOUNDATIONS
§ 4.03[2] (5th ed. 2002)).

3 Under Ninth Circuit law, the fourth
4 requirement subsumes details regarding the
5 computer policy consisting of (a) control
6 procedures including control of access to the
7 database, (b) control of access to the
8 program, (c) recording and logging of
9 changes, (d) back-up practices, and (e) audit
10 procedures to assure the continuing integrity
11 of the records. See *id.* at 446-47.

12 Turner did present competent
13 evidence as to items 1 and 6 through 8. The
14 remaining seven requirements, however, were
15 totally unmet, including *Vinhnee's* five-part
16 gloss on the fourth element. The court finds
17 that Turner was unable and failed to present
18 any competent testimony as to these items.

12 2. Documents – Note and Deed of Trust

13 In addition to the data concerning
14 payment on the loan, movant must provide
15 evidence that the underlying debt is owing to
16 it, and evidence of the security interest (if the
17 obligation is secured).

18 A party offering an item of
19 non-testimonial evidence, such as a document
20 (not offered to prove the truth of its contents),
21 must prove that the item is what the party
22 claims it is. See, e.g., 31 WRIGHT & GOULD,
23 FEDERAL PRACTICE & PROCEDURE: EVIDENCE ¶
24 7101 (2000). Accordingly, authentication is a
25 condition to the admissibility of such evidence.
26 See *id.*

27 Thus, a person testifying in support of
28 a motion for relief from stay (including a
29 declarant making a declaration under penalty
30 of perjury) must have personal knowledge of
31 the authenticity of the promissory note and
32 deed of trust, or the documents must be
33 admissible under another evidentiary rule.

34 MERS attached to Turner's
35 declaration a copy of the relevant promissory
36 note and deed of trust. However, MERS
37 declined to move the admission of any of
38 these documents or any other documents
39 attached to the moving papers. Thus, there is

no evidence properly before the court as to the
promissory note or the deed of trust.

Similarly, MERS declined to move the
admission of the declaration itself. Indeed, the
court finds that Turner is not competent to
testify as to any relevant information
underlying the relief from stay motion.

a. Promissory Note

There are two issues that MERS must
address with respect to the promissory note.
First, it must authenticate the note. Second,
it must show that it is entitled to enforce
the note.

i. Authentication of Note

For admission as evidence,
a promissory note does not need to qualify
as a record of regularly conducted activity
(or for some other exception to the hearsay
rule). The note itself is not hearsay, and thus
is not subject to the hearsay rule. See, e.g.,
Remington Invs., Inc. v. Hamedani, 55 Cal.
App. 4th 1033, 1042 (App. 1997)
("A promissory note document itself is not a
business record as that term is used in the law
of hearsay, but rather is an operative
contractual document admissible merely upon
adequate evidence of authenticity.").

A promissory note cannot be admitted
into evidence unless it is authenticated.⁹
Federal Rule of Evidence 901(a) provides:
"The requirement of authentication . . . as a
condition precedent to admissibility is satisfied
by evidence sufficient to support a finding that
the matter in question is what its proponent
claims." Rule 901(b) illustrates how a
document such as a promissory note may be
authenticated. Turner gave no testimony as to
the authenticity of the note here at issue, and

⁹ In fact, there is no rule of evidence that
explicitly requires that a document be
authenticated. However, this unstated
requirement underlies the rules on
authentication of documents. See 31 WRIGHT
& GOLD, *supra*, ¶ 7012 (2000).

1 MERS has not presented any evidence on this
2 subject.

3 Indeed, the debtor vigorously contests
4 the authenticity of the note in this case. Given
5 the lack of evidence on the part of MERS,
6 authentication of the note is altogether missing
7 from its evidence in this case.

8 **ii. Right to Enforce the Note**

9 In addition to authenticating the note,
10 MERS must show that it is entitled to enforce
11 the note. Only the holder of a negotiable
12 promissory note (with minor exceptions not
13 relevant in this case) is entitled to enforce the
14 note. See CAL. COM. CODE § 3301.
15 The holder enforces the note by making a
16 demand for payment. See *id.* § 3501(a).
17 The person making a demand shows its right
18 to enforcement by showing the original of the
19 promissory note. See *id.* § 3501(b)(2).

20 MERS has not brought to court the
21 note here at issue, and makes no pretense
22 that it holds the note. Indeed, MERS is not in
23 the business of holding promissory notes.¹⁰
24 Its business is only to hold deeds of trust as
25 an agent for the holder of the note.
26 This status for MERS is disclosed in the deed
27 of trust here at issue, which states that MERS
28 is "acting solely as a nominee [a type of agent]
for lender and lender's successors and
assigns."

In addition, there is no evidence
before the court as to who is the holder of the
promissory note and is entitled to enforce it.
MERS contends that Countrywide acts as
agent for MERS. However, MERS does not
purport to be the holder of the promissory
note. Under California law, only the holder of
a note is entitled to enforce it (with minor
exceptions not relevant herein). See CAL.
COM. CODE § 3301.

¹⁰ MERS, Inc. is an entity whose sole purpose
is to act as mortgagee of record for mortgage
loans that are registered on the MERS
System. This system is a national electronic
registry of mortgage loans, itself owned and
operated by MERS, Inc.'s parent company,
MERSCORP, Inc.

The court finds that MERS has
altogether failed to show that it is entitled to
enforce the note here at issue in this case.

b. Deed of Trust

A deed of trust is normally
authenticated by showing that it is a public
record under Rule 901(b)(7).¹¹ Extrinsic
evidence of authenticity is not required as a
condition precedent to admissibility with
respect to a certified copy of a public record
such as a deed of trust.¹²

¹¹ Rule 901(b) provides in relevant part:

(b) Illustrations.

By way of illustration only, and not by
way of limitation, the following are
examples of authentication or
identification conforming with the
requirements of this rule:

....
(7) *Public records or reports.* Evidence
that a writing authorized by law to be
recorded or filed and in fact recorded or
filed in a public office, or a purported
public record, report, statement, or data
compilation, in any form, is from the
public office where items of this nature
are kept.

¹² Rule 902 provides in relevant part:

Extrinsic evidence of authenticity as a
condition precedent to admissibility is
not required with respect to the
following:

....
(4) **Certified copies of public records.**
A copy of an official record or report
or entry therein, or of a document
authorized by law to be recorded or
filed and actually recorded or filed in
a public office, including data
compilations in any form, certified as
correct by the custodian or other
person authorized to make the
certification, by certificate complying
with paragraph (1), (2), or (3) of this
rule or complying with any Act of

1 The deed of trust in this case gives
2 the appearance of being a certified copy of the
3 original recorded deed. However, the
4 purported certification is defective. It states
5 only: "I HEREBY CERTIFY THAT THIS IS A
6 TRUE AND EXACT COPY OF THE
7 ORIGINAL", followed by the signature of
8 Martha J. Urquijo.

9 A certified copy of a public record
10 must be made "by the custodian or other
11 person authorized to make the certification . . .
12 ." FED. R. EVID. 902(4). In addition, the
13 certification of a domestic document must
14 comply with paragraph (1) (for documents
15 under seal) or (2) (for documents not under
16 seal) of Rule 902. If the document is not
17 under seal (as appears in this case), the
18 signature must be "in the official capacity of an
19 officer or employee" of a governmental entity
20 qualifying under paragraph (1). Finally, the
21 certification must include a certification under
22 seal, made by "a public officer having a seal
23 and having official duties in the district or
24 political subdivision of the [certifying] officer or
25 employee" that the signer "has the official
26 capacity and that the signature is genuine."
27 All of this is missing from the purported
28 certification. Thus, the court must assume
that Ms. Urquijo has no authority whatever to
certify the deed of trust.

Here, the authenticity of the deed of
trust is disputed by the debtor. Presumably in
consequence thereof, MERS has declined to
move its admission into evidence.¹³

Congress or rule prescribed by the
Supreme Court pursuant to statutory
authority.

¹³ The declarant's total lack of competence to
testify on this motion raises a serious question
as to the good faith of counsel for MERS under
Rule 9011. Counsel should have known that
Turner was incompetent to testify as to anything
relevant to this motion. Thus, counsel should
not have filed with the court the declaration in
which he stated falsely, under penalty of perjury:
"I have personal knowledge of the matters set
forth in this declaration and, if called upon to
testify [as he was], I could and would
competently testify thereto."

C. Fraudulent Character of Note and Deed of Trust

The debtor contends that the note and
deed of trust involved in this motion are
fraudulent. The court makes no findings on
this issue. Such a determination requires an
adversary proceeding which is not before the
court. However, the court can deny a motion
for relief from stay pending the determination
of such an adversary proceeding where the
debtor presents serious evidence that the note
and deed of trust are fraudulent. On these
grounds, also, the court denies the motion.

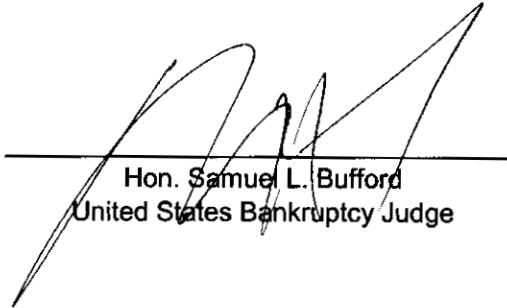
D. Other Defects in Motion

There appear to be other defects in
the motion, that the court does not address
because of lack of appropriate admissible
evidence. For example, Freedom Home
Mortgage is the payee on the note. There is
no evidence before the court as to who is the
present holder is entitled to enforce the note.
The holder must join in the motion for relief
from stay. See *In re Hwang*, __ B.R. __
(Bankr. C.D. Cal. 2008).

IV. Conclusion

The court concludes that this motion
for relief from stay must be denied on two
separate grounds. First, the motion
improperly attempts to obtain relief for
unidentified parties, in violation of the rule
requiring the disclosure of parties appearing
before the court. Second, the only evidence
supporting the motion is provided by a witness
who is incompetent to provide any relevant
evidence.

Dated: October 21, 2008



Hon. Samuel L. Bufford
United States Bankruptcy Judge

CERTIFICATE OF MAILING

I certify that a true copy of this **MERS RELIEF FROM STAY MOTION: FINDINGS OF FACT AND CONCLUSION OF LAW** was mailed on **OCT 22 2008** to the parties listed below:

Raymond Vargas
13055 Destino Lane
Cerritos, California 90703

Marcus Gomez, Esq.
12749 Norwalk Boulevard
Suite 204A
Norwalk, California 90650

Mark. T. Domeyer, Esq.
Miles, Bauer, Bergstrom & Winters, LLP
1665 Scenic Avenue
Suite 200
Costa Mesa, California 92626

John P. Pringle, Trustee
6055 East Washington Boulevard
#608
Los Angeles, California 90040-2427

U.S. Trustee's Office
725 South Figueroa Street
Suite 2600
Los Angeles, California 90017

Dated: **OCT 22 2008**



DEPUTY CLERK

CSD 1162 [08/22/03]

Name, Address, Telephone No. & I.D. No.
JaVonne M. Phillips, Esq., SBN 187474
Jennifer C. Wong, Esq., SBN 246725
McCarthy & Holthus, LLP
1770 Fourth Avenue
San Diego, CA 92101
Phone (619) 685-4800
Fax (619) 685-4810

akars



UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

325 West "F" Street, San Diego, California 92101-6991

In Re

Maria Leonor Calderon,

BANKRUPTCY NO. 07-06030-LA7

Debtor.

Wilshire Credit Corporation, its assignees and/or
successors

RS NO. JCW-1

Moving Party

Maria Leonor Calderon, Debtor(s), and Gregory
Akers, Chapter 7 Trustee

Respondent(s) Chapter 07

ORDER ON NONCONTESTED MOTION FOR RELIEF FROM AUTOMATIC STAY

☒ **REAL PROPERTY** ☐ **PERSONAL PROPERTY**

IT IS ORDERED THAT the relief sought as set forth on the continuation pages attached and numbered two (2) through 3 with exhibits, if any, for a total of 3 pages, is granted. Motion/Application Docket Entry No. 8

// **MOVANT HAS FAILED TO PROVIDE EVIDENCE THAT IT IS ENTITLED TO BRING MOTION.**

// **ORIGINAL NOTE AND DEED OF TRUST IN NAME OF MORTGAGE LENDER USA AND NOT MOVANT.**

// **NO EVIDENCE OF ASSIGNMENT TO MOVANT. PROVIDE COPIES OF ASSIGNMENT AND RESUB-**

// **MIT ORDER.**

DATED: December 05, 2007

Ju

NOT APPROVED

Signature by the attorney constitutes a certification under
Fed. R. of Bankr. P. 9011 that the relief in the order is the
relief granted by the court.

Submitted by:

McCarthy & Holthus, LLP

(Firm Name)

By: /s/ Jennifer C. Wong, Esq.

Attorney for ☒ Movant ☐ Respondent

Louise Delaunay Adler
Judge, United States Bankruptcy Court

CSD 1162

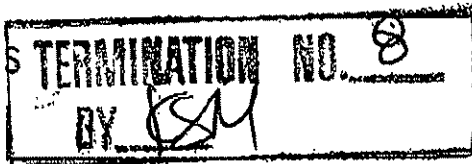
FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

2008 AUG -6 PM 3:15

DEUTSCHE BANK NATIONAL TRUST
COMPANY,

CLERK OF COURTS



Plaintiff,

:

vs.

:

Case No. 08CVE05-6925

VERA L. GILLIAM, et al.,

:

Judge Cain

Defendants.

FINAL APPEALABLE ORDER

DECISION AND ENTRY GRANTING DEFENDANT'S, VERA L. GILLIAM,
MOTION TO DISMISS COMPLAINT, FILED JUNE 30, 2008

Rendered this 17th day of August 2008.

CAIN, J.

This matter is before this Court on Defendant's, Vera L. Gilliam (hereinafter "Defendant"), Motion to Dismiss Complaint, filed June 30, 2008. Plaintiff filed its Memorandum Contra on July 9, 2008 to which Defendant did not timely reply. This motion is now ripe for decision.

The present action is one for the foreclosure of property owned by Defendant located at 1774 East 26th Avenue, Columbus, Ohio 43219 (hereinafter the "Property"). On June 17, 2008 Plaintiff filed a Motion for Summary Judgment asking the Court to issue a decree in foreclosure and order of sale on the Property. In response to this motion, Defendant filed her Motion to Dismiss. In her motion, Defendant argues that Plaintiff has failed to state a claim upon which relief may be granted. More specifically, Defendant argues that Plaintiff has failed to show that it is the holder of the note and mortgage that is secured by the

Property. As such, Defendant argues that Plaintiff is not the real party in interest to this action.

While Defendant's motion indicates that it is being made pursuant to Civ. R. 12(B)(6), the arguments presented in it do not conveniently fit into the standard that a motion based upon Civ. R. 12(B)(6) is normally judged. Defendant is not actually arguing that Plaintiff's Complaint is insufficient so as to not state a claim upon which relief may be granted. In fact, Plaintiff's Complaint adequately states a cause of action against Defendant. However, the question that the Court must answer is: Is Plaintiff the proper party that can bring this claim against Defendant? Since the Court is not testing the sufficiency of Plaintiff's Complaint, it is not bound by the constraints that would be present as to a Civ. R. 12(B)(6) motion. Therefore, the Court is not bound by the allegations in Plaintiff's Complaint and can look at other factors in making its decision. Even with this being said, the Court does not need to look far past Plaintiff's Complaint to determine that Plaintiff has failed to demonstrate that it is the real party in interest as to this action.

Plaintiff has not demonstrated to the Court that it is the holder of the note and mortgage that are the subject of this action. In its Complaint, Plaintiff alleges that it is the holder of the note and mortgage attached to its Complaint. The note and mortgage attached to Plaintiff's Complaint both state that they were executed in favor of Argent Mortgage Company, LLC. Plaintiff in this action is Deutsche Bank National Trust Company. These two entities are not the same.

Therefore, it would appear from the outset that Plaintiff is not the real party in interest.

In order to be considered the holder of the note and mortgage that are the subject of this case, Plaintiff needs to present the Court with something to show that they were assigned to it. In the affidavit of Denise Bailey, attached to Plaintiff's Motion for Summary Judgment, she states that Plaintiff is the holder of the note and mortgage. In Plaintiff's Memorandum Contra to the present motion, Plaintiff states that the note and mortgage were assigned to it. This is all well and good, but what Plaintiff has failed to do is present the Court with an actual copy of this assignment. Mere statements that a note and mortgage have been assigned are not enough. The Court needs documentation that the assignment occurred. While this is not a hard requirement to meet, Plaintiff has failed to provide the Court with the proper documentation. As such, Plaintiff has failed to sufficiently establish that it is the holder of the note and mortgage that are the subject of this case. Since this is so, Plaintiff is not the real party in interest in this matter and Plaintiff's Complaint must be dismissed.

After review and consideration, the Court finds Defendant's, Vera L. Gilliam, motion to be well-taken, and is hereby GRANTED. Plaintiff's Complaint is hereby DISMISSED with prejudice along with Defendant's, City of Columbus, Cross-Claim. This entry constitutes a final appealable order in this matter.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'D. E. Cain', is written over a horizontal line.

David E. Cain, Judge

Copies to:

Matthew I. McKelvey
Counsel for Plaintiff

Ester D. Harber
Counsel for Defendant, Vera L. Gilliam

Adria L. Fields
Counsel for Defendant, Franklin County Treasurer

Brent M. Ralston
Counsel for Defendant, City of Columbus

**UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF MASSACHUSETTS**

~~~~~  
In re  
**ROBIN HAYES,**  
Debtor

Chapter 13  
Case No. 07-13967-JNF

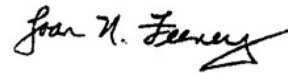
~~~~~  
ORDER

In accordance with the Memorandum dated August 19, 2008, the Court denies the "Motion of Deutsche Bank National Trust Company, as Trustee of Argent Mortgage Securities, Inc. Asset-Backed Pass through Certificates Series 2004-W11, under the Pooling and Servicing Agreement Dated as of October 1, 2004, without Recourse for Relief from Stay." The Court sustains the Debtor's First Omnibus Objection with respect to the proof of claim filed by AMC Mortgage Services, Inc. The Court disallows the claim without prejudice to reconsideration. *See* 11 U.S.C. § 502(j); Fed. R. Bankr. P. 3008.

The Court orders Deutsche Bank, and its counsel, to show cause, in writing, within 30 days of the date of this order, why they should not be sanctioned under Fed. R. Bankr. P. 9011 for filing and prosecuting its Motion for Relief from the Automatic Stay without competent evidence that Deutsche Bank had the requisite standing under applicable law as the holder of the mortgage executed by the Debtor in favor of Argent Mortgage Company, LLC to assert the positions advanced in its Motion for Relief from the Automatic

Stay. The Court hereby orders counsel to the Debtor to submit an application for compensation itemizing fees and expenses incurred with respect to the Debtor's defense of the Motion for Relief from the Automatic Stay within 14 days of the date of this order.

By the Court,

A handwritten signature in black ink, reading "Joan N. Feeney". The signature is written in a cursive, flowing style with a prominent initial "J" and a stylized "F".

Joan N. Feeney
United States Bankruptcy Judge

Dated: August 19, 2008

cc: David G. Baker, Esq., John McNicholas, Esq., Sanjit Korde, Esq., Julie A. Ranieri, Esq.,
Carolyn Bankowski, Esq.

UNITED STATES BANKRUPTCY COURT
EASTERN DIVISION, DISTRICT OF MASSACHUSETTS

In re:

Robin Hayes

Debtor

Chapter 13
Case No. 07-13967-JNF

DEBTOR'S POST-TRIAL MEMORANDUM REGARDING HER OBJECTION TO
PROOF OF CLAIM OF AMC/DEUTSCHE BANK AND
ITS MOTION FOR RELIEF FROM STAY

NOW COMES Robin Hayes, debtor and submits the following for her post-trial memorandum.

ARGUMENT

There are two matters before the Court: 1) the debtor's objection to the proof of claim filed by "AMC Mortgage Services, Inc. as loan servicer for Argent Mortgage Company, LLC" (number seven on the Claims Register); and 2) the motion for relief from stay filed by Deutsche Bank National Trust Company, as Trustee of a securitized real estate trust. The initial issue that the Court must resolve is whether either entity has standing in this bankruptcy case.

1. Standing

The Bankruptcy Appellate Panel of the First Circuit considered the issue of standing in In re Newcare Health Corp., 244 BR 167 (1st Cir. BAP 2000). The Panel observed that:

Standing is a threshold question in every federal case, determining the power of the court to entertain the suit. Hence, a defect in standing cannot be waived; it must be raised, either by the parties or by the court, whenever it becomes apparent.

The inquiry into standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. Apart from this minimum constitutional mandate, the Supreme Court recognizes other limits on the class of persons who may invoke the courts' decisional remedial powers. These prudential limitations are self-imposed rules of judicial restraint:

These considerations, which militate against standing, principally concern whether the litigant (1) asserts the rights and interests of a third party and not his or her own, (2) presents a claim arguably falling outside the zone of interests protected by the specific law

invoked, or (3) advances abstract questions of wide public significance essentially generalized grievances more appropriately addressed to the representative branches. The burden of alleging facts necessary to establish standing falls upon the party seeking to invoke the jurisdiction of the court.

(citations and quotation marks omitted).

Although a Proof of Claim is entitled to *prima facie* evidentiary effect, FRBP 2001(f), when a claim is challenged, it is incumbent upon the claimant to come forward with evidence in support of the claim, In re Healthco International, Inc., 257 BR 379 (Bkrty.D.Mass. 2001), including evidence that it is the owner of the debt at issue, In re Melillo, BAP No. MB07-060, slip opinion, July 8, 2008 (affirming order disallowing claim for credit card debt because claimant could not produce proof of ownership of the debt)¹; In re Long, 353 BR 1, 17 (Bkrty. D.Mass. 2006) (disallowing claim and voiding security interest because claimant could not show complete chain of title). Because Deutsche Bank has failed to show a complete, proper chain of title to the mortgage, the claim must be disallowed, the security interest voided and the motion for relief from stay denied with prejudice.

Initially, Hayes requests that the Court take judicial notice of its records, not merely the evidence introduced at trial. A court may always take judicial notice of its own records. In re Hyde, 334 BR 506 (Bkrty.D.Mass. 2005), *citing* Freshman v. Atkins, 269 U.S. 121, 46 S.Ct. 41, 70 L.Ed. 193 (1925). It is important that the Court do so in order for the confusing and contradictory statements of AMC, Deutsche Bank and CitiResidential to be properly considered.

Deutsche Bank filed its motion for relief from stay on or about September 17, 2007. In the motion, Deutsche Bank alleged at paragraph 3 that it “holds the mortgage via assignment.” The motion did not state when the purported assignment was executed, nor did it indicate that the assignment had been recorded. A copy of the assignment was not attached to the motion. The allegation that Deutsche Bank is the holder was repeated at paragraph 5f of the motion. In her response to the motion, Hayes questioned Deutsche Bank’s standing.

About two weeks prior to the motion being filed, Hayes objected to the claim filed by AMC Mortgage Services, questioning whether the claim, in fact, was secured since no copy of the note and mortgage was attached to the claim. AMC filed a response to the claim objection on November 6, 2007, and attached a copy of the note, mortgage and a loan history. AMC claimed to be “the servicer for the holder of a mortgage on the Debtor’s property”, but did not identify the holder in its response, nor did it refer to Deutsche Bank, notwithstanding the fact that Deutsche Bank represented in its motion that it was the holder. Notably, AMC’s response to the claim objection did not include a copy of an assignment or any other proof that it is authorized to act as servicer for whomever the owner of the mortgage is.

After Hayes filed an Amended Plan, Deutsche Bank filed an objection to the plan on

¹ Although marked “For Publication”, it has not appeared on Westlaw as of the date and time of this memorandum.

April 25, 2008, stating that Deutsche Bank is the holder and that Citi Residential Lending, Inc., is the current servicer. A few days later, a “Transfer of Claim other than for Security” was filed, in which it was alleged that the claim had been transferred from AMC to “Citi Residential Lending, Inc., as a loan servicer for the secured creditor Deutsche Bank National Trust Company, as Trustee, in trust for the registered holders of Argent Securities Inc.” No further identification of the secured creditor was provided in the Transfer form.

In the days prior to the trial, cross-motions to compel production of documents intended to be used at trial were filed and allowed. In response to Hayes’ motion, counsel for Deutsche Bank filed 96 pages of documents that she intended to seek to admit into evidence. Since the documents were filed, the Court may take judicial notice of them, even if not admitted at trial.

The Note

At trial, Deutsche Bank presented one witness and introduced twenty-one exhibits², including copies of the Note and Mortgage. Because the mortgage bears indicia indicating that it was recorded at the Registry of Deeds, it may be considered authentic within the meaning of Fed.R.Evid. 901. However, the copy of the Note is not entitled to the same consideration since it is not recorded and the copy is not certified, nor is it a public record. This is critical to Deutsche Bank’s claim for at least two reasons: 1) in Hayes’ motion to compel production of documents, she requested that Deutsche Bank be required to present at trial the original Note. Deutsche Bank did not do so, and thus failed to comply with the Court’s order. 2) of greater concern is that the copy presented does not have any indication that Deutsche Bank is the holder of the note. Because a note is a negotiable instrument within the meaning of Section 3-104 of the Uniform Commercial Code, it cannot be assigned in the same way that a mortgage is assigned. Rather, it must be “negotiated”, *see* UCC §3-202. Absent an endorsement by the transferor, the transferee obtains only limited rights, if any, *see* UCC §3-203.

Since Deutsche Bank did not produce the original note at trial and the copy of the note that *was* produced bears no endorsement of any sort, Deutsche Bank has failed to prove that it is the holder of the note. Having failed to show that it is the owner of the debt, it lacks standing to enforce the debt. In re Melillo, BAP No. MB07-060, slip opinion, July 8, 2008 (affirming order disallowing claim for credit card debt because claimant could not produce proof of ownership of the debt)³.

The Assignments

Exhibit 3 was a “Confirmatory Corporation Assignment of Deed of Trust/Mortgage”. This document was executed on April 16, 2008, by Tamara Price, claiming to be a Vice

² Hayes’ counsel’s notes are a bit unclear on this point, but he believes this to be correct.

³ Although marked “For Publication”, it has not appeared on Westlaw as of the date and time of this memorandum.

President of Citi Residential Lending, Inc, and that Citi Residential Lending, Inc., was the “Attorney-in-Fact” for Argent Mortgage Company, LLC. The document bore indicia of having been recorded at the Plymouth Country Registry of Deeds on April 28, 2008. It also purported to assign and transfer the mortgage from Argent Mortgage Company, LLC, to Deutsche Bank, as trustee. Lastly, it claimed that “the effective date of this assignment is October 24, 2005”. Handwritten on the assignment is the phrase: “For POA see Plymouth 35315 – 69”. This is the same document found at page 23 of the 96 pages filed in advance of trial. The designation “confirmatory” was never explained.

At page 38 of the 96 pages, counsel for Deutsche submitted an apparently unrecorded assignment that allegedly was “executed and delivered on 11/03/2004” and assigned the mortgage from Argent Mortgage Company, LLC, to Ameriquest Mortgage Company.

At page 40 of the 96 pages, counsel for Deutsche submitted another apparently unrecorded assignment, purporting to assign the mortgage from AMC Mortgage Services, Inc. to Deutsche Bank. This assignment was also signed by Tamara Price, and was executed on February 4, 2008. Unlike exhibit 3 at trial, this assignment does not purport to backdate the effective date of the assignment.

The Pooling and Servicing Agreement

At trial, Deutsche Bank introduced a “Pooling and Servicing Agreement” (PSA), which it alleges, in essence, governs its authority to do business. In general, the document evidences an agreement between Argent Securities, Inc., Ameriquest Mortgage Company, and Deutsche Bank National Trust company. The sixth page of the Agreement has a Preliminary Statement indicating that Argent Securities, Inc., the “depositor”, intends to sell pass-through certificates in several REMIC. A “REMIC” is a “real estate mortgage investment conduit”, a legal entity with certain characteristics. *See* 26 USC §860D. Shorn of the legal verbiage, a REMIC is an investment vehicle in which transferable shares in a trust are sold to investors, the *res* of the trust consisting of mortgages and promissory notes. Overall, the import of these and related statutes is that a REMIC is a type of real estate investment trust (“REIT”) subject to strict regulation. 26 USC §851; 26 USC §860G(e). Section 4.06 of the Pooling and Servicing Agreement requires the trustee to comply with reporting requirements of the Securities Exchange Act of 1934.

In order for a mortgage to become part of a REMIC pool, the mortgage must be in existence on or before the day the REMIC is formalized. 26 USC §860G(a)(3). The day the REMIC is formalized is known as the “startup day”. 26 USC §860G(a)(9).

According to the PSA, the startup day is defined as the closing date, *see page 63*, which is specified as October 8, 2004, *see page 20*. Under Section 2.01 of the PSA, the Depositor conveyed, on the closing day (or within a short time thereafter), a number of documents, *see page 72*:

1. the original Mortgage Note, endorsed in blank or as otherwise specified;
2. the original Mortgage with evidence of recording, and related documents;
3. an original Assignment assigned in blank, without recourse;
4. the original recorded intervening Assignments showing a complete chain of title from the originator to the Person assigning the mortgage to the trustee;
5. the original or copies of assumptions, modifications or related documents; and
6. the original lender's title insurance policy or attorney's opinion of title and related documents.

Boiled down to its essence, the PSA is a purchase and sale agreement whereby a depositor, Argent Securities, Inc., agrees to form a REIT, of which Deutsche Bank will act as trustee. Argent then will sell the pool to Deutsche Bank as trustee, and Ameriquest Mortgage Company will act as master servicer to see to the collection of money due from mortgagors. *See section 2.01 of the PSA.*

As stated above, the mortgages included in the pool must be in existence as of the closing date. In some circumstances, a mortgage that is not a part of the original pool may be substituted for a mortgage that is later found to be not in conformity with the standards for inclusion. The replacement mortgages are known as a "qualified replacement mortgage loan". *See page 49 of the PSA; 26 USC §860G(A)(4).*

Analysis

As Section 2.01 of the PSA makes clear, the only entity that can convey mortgage loans to the trust is Argent Securities, Inc. Although Argent Mortgage Company, LLC, is identified as one of the "originators" of the mortgages included in the pool, *see page 41 of the PSA*, there is nothing in the PSA that gives Argent Mortgage Company, LLC, the right to convey mortgage loans directly to Deutsche Bank as trustee. In Section 2.01, the depositor, Argent Securities, Inc., is required to provide, on the closing day or within a short time thereafter the *original* mortgage loan documents, including assignments from the originator (in this case, Argent Mortgage Company) to the "Person" assigning the mortgage to Deutsche Bank, i.e., Argent Securities, Inc.

As noted above, the "closing day" for this trust – i.e., the date it was formally established – was October 4, 2004. The note and mortgage, in evidence as exhibits 1 and 2 at trial, clearly indicate that they were signed on November 3, 2004, almost a month after the REIT was established. Hayes' mortgage loan could not have been a part of the pool of mortgages in the trust on the "closing day".

Although a mortgage loan may become part of a pool after the closing day, the evidence introduced at trial by Deutsche Bank, and otherwise in the record of this case, warrants a finding that Hayes' loan never legally became a part of the pool. At trial, Deutsche Bank's exhibit 3 is a "confirmatory corporation assignment of deed of trust/mortgage". It was signed on April 16,

2008 – almost three and one-half years after the trust was formed and approximately ten months after Hayes filed the present chapter 13 case. Furthermore, the assignment was from Argent Mortgage Company, LLC, to Deutsche Bank as trustee. This is not a valid assignment because, as argued above, only Argent Securities, Inc., has any authority to convey mortgage loans to the trust.

Curiously, this assignment purports to be effective as of October 24, 2005. There was no explanation as to the reason for this backdating. It would not serve to make the mortgage loan a part of the pool because the closing day was October 4, 2004, slightly more than a year before the supposed effective date of the assignment. Furthermore, the validity of a back-dated assignment is highly questionable since an assignment must be “delivered” to the assignee. *See Property Asset Management Inc., v. Chicago Title Insurance Co., Inc.*, 173 F.3d 84 (2nd Cir. 1999); *Benmaor v. Goldberg*, 1999 WL 706627 (Mass. Sup.Ct. 1999); *Lamson & Co. v. Abrams*, 305 Mass. 238 (1940) (assignment becomes effective upon delivery at the earliest); *Sullivan v. Hudgins*, 303 Mass. 442 (1939 (assignment must be delivered to be effective). Furthermore, assignments must be in writing since, at least in Massachusetts, they convey an interest in land. *Kaufman v. Federal Nat. Bank*, 287 Mass. 97 (1934).

Leaving aside that issue, Deutsche Bank has also failed to demonstrate that the person signing the assignment, Tamara Price, had authority to convey Hayes’ mortgage to the trust. Ms. Price signed as Vice President of Citi Residential Lending, Inc., as attorney-in-fact for Argent Mortgage Company, LLC. The assignment has the following handwritten on it: “For POA see Plymouth 35315 – 69.” This would appear to be an indication that a Power of Attorney could be found recorded at book 35315, page 69 in the Plymouth Registry of Deeds that would show that Tamara Price is authorized to sign the assignment. At trial, Deutsch Bank did not introduce this Power of Attorney. Instead, it introduced exhibit 4, which is a “Limited Power of Attorney” bearing indicia that it was recorded on October 17, 2007 at book 21675, page 174, and exhibit 5, which is an “Incumbency Certificate”, recorded on November 5, 2007, at book 21724, page 219. Deutsche Bank thus has failed to show that Tamara Price had any authority to execute the assignment. Even assuming that exhibit 4 was somehow related to Hayes’ loan, there is nothing in the Power of Attorney that indicates that Citi Residential had authority to convey loans on behalf of Argent Mortgage Company in any circumstance other than those specifically enumerated, which do not include assigning them to a REIT. Paragraph 6 does refer to assignments, but only “in connection with the repurchase of the mortgage loan”. “Repurchase” means “to buy back” or “reacquire”, in the every-day sense of the word. In order to “repurchase” the loan, it must have been sold in the first place. Thus paragraph 6 would seem to apply to the circumstance in which Argent Mortgage Company is a trustee of a REIT and needs to assign the mortgage out of the pool, possibly because the mortgage loan has been found not to qualify for inclusion in the pool.

As noted above, there are two other assignments in the record of this case. The first is an assignment that allegedly was “executed and delivered on 11/03/2004”, and assigned the mortgage from Argent Mortgage Company, LLC, to Ameriquest Mortgage Company. There is no proof that the mortgage was never assigned by Ameriquest to any other entity.

Another apparently unrecorded assignment purported to assign the mortgage from AMC Mortgage Services, Inc. to Deutsche Bank. This assignment was also signed by Tamara Price, and was executed on February 4, 2008. Unlike exhibit 3 at trial, this assignment does not purport to backdate the effective date of the assignment. This assignment manifestly is invalid since there is no dispute that AMC Mortgage Services, Inc., was never assigned the mortgage.

Based on all of the foregoing, therefore, Hayes requests that the court find and rule that Deutsche Bank does not have legal title to the mortgage and thus lacks standing to appear in this case or to file a proof of claim, and that its purported security interest is void pursuant to 11 USC §506(d). In re Long, 353 BR 1, 17 (Bkrcty. D.Mass. 2006) (disallowing claim and voiding security interest because claimant could not show complete chain of title).

2. Relief from the automatic stay

In order to obtain relief from the automatic stay, a moving party must show a “colorable” right to possession of the property. In re Maisel, 378 BR 19 (Bkrcty.D.Mass. 2007), *citing, inter alia*, Grella v. Salem Five Cent. Sav. Bank, 42 F.3d 26 (1st Cir. 1994). The Maisel court quoted In re Parrish, 326 BR 708 (Bankr.N.D.Ohio 2005):

"If the claimant is the original lender, the claimant can meet its burden by introducing evidence as to the original loan. If the claimant acquired the note and mortgage from the original lender or from another party who acquired it from the original lender, the claimant can meet its burden through evidence that traces the loan from the original lender to the claimant. A claimant who is the servicer must, in addition to establishing the rights of the holder, identify itself as an authorized agent for the holder."

In this case, Deutsche Bank has failed to produce “evidence that traces the loan from the original lender to the claimant.” Accordingly it has failed to show a “colorable” right to possession of the property.

Furthermore, the motion is predicated on post-petition defaults on payments directly to Citi Residential, the purported servicer of the mortgage loan. However, Hayes’ amended plan set forth a modification of the loan pursuant to §1322(b)(2), this being a multi-family property, as Deutsche Bank must admit since its own evidence, an appraisal admitted at trial as exhibit 9, clearly indicates “Property Type – Multifamily”. It is well settled that a secured claim is modifiable if it is multifamily property, even if part of the property is the debtor’s principal residence. Lomas Mortgage, Inc. v. Louis, 82 F.3d 1 (1st Cir. 1996). Under case law in this

district, when a secured claim is modified, the claim must be paid through the trustee, not directly. In re Bernard, 201 BR 600 (Bkrcty.D.Mass. 1996). Thus Hayes is not required to make any payments directly to Deutsche or its servicer. The motion is moot and must be denied.

3. The Proof of Claim

At trial, Deutsche Bank introduced its Proof of Claim as exhibit 8. Addendum “A” to the Proof of Claim alleges a total of \$75,676.57 in pre-petition arrears, comprised of \$58,290.23 in principal and interest, and \$17,386.34 in late charges, property inspections, foreclosure fees and costs and the like.

As to the principal and interest payments, these consist of 22 payments at different amounts: 16 payments of \$2,514.28; 5 at \$2,972.50; and 1 at \$3,199.25. The note (exhibit 1) indicates that it is a variable interest rate note. Deutsche Bank’s witness testified that the one payment at \$3,199.25 constituted the principal and interest payment of \$2,972.50 plus a fraction of an annual cost for force-placed insurance. However, Deutsche Bank failed to introduce any evidence showing that the principal and interest increase reflected by the 5 payments at \$2,972.50 was correctly computed in accordance with the terms of the note, and its witness was unable to testify as to the computations. Having failed to do so, Deutsche Bank cannot collect the increased amount, even assuming that it owns the note and mortgage. At best, it can only collect pre-petition arrears of 21 payments at the contract payment (\$2,514.28), and one payment at the contract payment plus a fraction of the insurance charge, that being \$55,540.91.

A secured creditor may collect fees and costs if the note and mortgage so provide and the fees and costs are reasonable and necessary. In re Plant, 288 BR 635 (Bkrcty.D.Mass. 2003); In re Stewart, --BR --, 2008 WL 2676961 (Bkrcty.E.D.La 2008). When challenged, the creditor must provide evidence in support of the fees and costs. Id. In Massachusetts, the mechanism where by this is done generally is a fee application pursuant to the Local Rules. Plant. Deutsche Bank did not file a fee application. In addition, the Court sustained Hayes’ objection to the admission of supporting documents, or *in camera* consideration of the same, because Deutsche Bank failed to comply with the Court’s order to produce the same to Hayes’ counsel prior to the trial. There being no evidence before the Court from which the Court may assess the reasonableness or necessity of the fees and costs, they must be disallowed.

Overall, Deutsche Bank did not provide evidence that the Principal Balance of \$322,422.61 shown on the proof of claim is correct, or that the total debt of \$398,099.18 is correct, nor did it explain the difference. Because Hayes’ plan modifies the claim and therefore must be paid in full during the term of the plan, this is critical not only to the Court’s assessment of any future plans, but to the allowance of the claim, also.

Because Deutsche Bank has not shown that it owns the debt at issue, the claim must be

disallowed in full. In re Melillo, BAP No. MB07-060, slip opinion, July 8, 2008 (affirming order disallowing claim for credit card debt because claimant could not produce proof of ownership of the debt)⁴; In re Long, 353 BR 1, 17 (Bkrcty.D.Mass. 2006) (disallowing claim and voiding security interest because claimant could not show complete chain of title). Similarly, Deutsche Bank has not shown that its calculation of the Principal Balance and Total Debt is accurate. If the Court is inclined to allow the claim at all, the total debt as of the petition date should be computed as follows:

1. The first payment was due on January 1, 2005. (See Note, exhibit 1).
2. The petition date was June 26, 2007.
3. The difference between the two dates is approximately thirty months.
4. The principal amount of the note is \$324,000. (See Note, exhibit 1).
5. In the proof of claim, AMC alleges that Hayes is in arrears for 22 payments, meaning that she (or her mother, who is the only maker on the note) made 8 payments.
6. Eight payments at \$2,514.28 totals \$20,114.24.
7. The original principal of \$324,000 minus 8 payments equals \$303,885.76.
8. At best, therefore, the total debt should be found to be no more than \$303,885.76.

CONCLUSION

Deutsche Bank has failed to demonstrate by way of competent evidence that it is the holder of the note and mortgage. Accordingly its claim must be disallowed and the security interest declared void, and the motion for relief from stay denied with prejudice. To the extent that the court is at all inclined to allow the claim, it should be allowed only as a total debt of no more than \$303,885.76, for all of the reasons given. Because the motion for relief from stay is predicated on the now incorrect allegation that Hayes was required to make direct payments to Deutsche Bank or its servicer, the motion still must be denied, with prejudice.

It seems well settled that debtors are punished, in one way or another, if they “play fast and loose” with the courts. In re Marrama, 445 F.3d 518 (1st Cir. 2006). Courts are increasingly coming to the conclusion that similarly abusive behavior by creditors warrants punishment, as well. Wells Fargo Bank, N.A. v. Jones, -- BR --, 2008 WL 2635369 (E.D.La. 2008); In re Nosek, 2005 WL 3159643 (Bkrcty.D.Mass. 2005); In re Nosek, 2006 WL 1867096 (Bkrcty.D.Mass. 2006), *aff’d in part and reversed in part and remanded*, 354 BR 331 (D.Mass. 2006), *on remand* 363 BR 643 (Bkrcty.D.Mass. 2007). The record of this case strongly suggests that Deutsche Bank, AMC Mortgage Services, and/or CitiResidential are “playing fast and loose” with the facts. As a result, they should be punished appropriately.

⁴ Although marked “For Publication”, it has not appeared on Westlaw as of the date and time of this memorandum.

Hayes requests that the court enter findings of fact and conclusions of law consistent with the foregoing, and grant her judgment accordingly.

August 19, 2008

Respectfully submitted,
Robin Hayes
By debtor's attorney,

/s/ David G. Baker
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Certificate of Service

The undersigned states upon information and belief that the within paper was served upon the entities named below by the court's CM/ECF system.

/s/ David G. Baker
David G. Baker

1. Carolyn Bankowski-13 13trustee@ch13boston.com
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4. Gillian Feiner on behalf of Attorney General gillian.feiner@state.ma.us
5. Adam B. Finkel on behalf of Deutsche Bank National Trust Company, as Trustee of
Argent Mortgage Securities, Inc., Asset-Backed Pass-Through Certificates Series 2004-
W11, Under the Pooling and servicing Agreement Dated as of Octo
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6. John Fitzgerald USTPRegion01.BO.ECF@USDOJ.GOV
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10. Julie A. Ranieri on behalf of AMC Mortgage Services, Inc. as Servicer for Argent
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11. Michael Van Dam on behalf of Capital Trust, LLC mvandam@trainilaw.com,
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UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON

FOR PUBLICATION

In re:

PETER A. JACOBSON and
MARIA E. JACOBSON,

Debtors.

No. 08-45120

DECISION ON RELIEF FROM STAY

Before the court is a motion for relief from the automatic stay of § 362(a)¹ to enforce a deed of trust on the Debtors' residence. As it was neither brought in the name of the real party in interest, nor by anyone with standing, the motion for relief from stay will be DENIED.

I. History

Attached to the motion of "UBS AG, as servicing agent for ACT Properties, LLC ("Movant")" (docket no. 31) are unauthenticated copies of:

¹

Absent contrary indication, all "Code," chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23. "Rule" references are to the Federal Rules of Bankruptcy Procedure, and "FRCP" and "FRE" references to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, respectively.

"GR" references are to the Local Rules, U.S. District Court, W.D. Washington, and "LBR" to the Local Bankruptcy Rules, W.D. Washington.

"RCW" references are to the Revised Code of Washington.

- 1 1. The adjustable rate note purportedly executed on
2 14 November 2009 in Elkridge, Maryland, by Debtors in favor of
3 Castle Point Mortgage, Inc., which bears an undated "without
4 recourse" indorsement in blank by someone identified as
5 "VP/CFO";
- 6 2. A barely-legible copy of Debtors' deed of trust in favor of
7 Castle Point Mortgage (as "lender"); the beneficiary is
8 identified as Mortgage Electronic Registration Systems, Inc.
9 ("MERS"), a separate corporation, "solely as nominee for
10 lender and lender's successors and assigns," with an
11 adjustable rate rider (executed in Pierce County, Washington,
12 on the same day as the note, according to the acknowledgment);
- 13 3. An apparently unrecorded "Assignment of Mortgage" to ACT
14 Properties, LLC, referencing the deed of trust by parties,
15 date, and recording number, executed by a director of MERS in
16 December of 2008, according to the acknowledgment; and
- 17 4. Debtors' real property and secured claims schedules (A and D,
18 respectively, the latter identifying the secured creditor as
19 "UBS").

20 The motion notes Debtors' bankruptcy petition, filed 7 October
21 2008, the attendant automatic stay, and goes on to recount the history
22 of the loan, including its transfer "to Movant," stating that Wells
23 Fargo Document Custody "has possession" of the original note in
24 Minneapolis, Minnesota. The narrative continues with Debtors' default
25 and the commencement of non-judicial foreclosure proceedings, with sale
26 set for 17 October 2008, (presumably by a predecessor in interest of ACT
27

1 Properties, since it was pre-assignment; the foreclosing party is not
2 identified). The Debtors' filing automatically stayed the foreclosure,
3 § 362(a); the motion indicates no foreclosure activity is pending.
4 There follows a calculation of the amounts due and lack of equity, and
5 sketchy argument that the Movant is entitled to relief under § 362(d) (1)
6 for lack of adequate protection.

7 The motion is supported by the declaration of a "bankruptcy
8 specialist" (docket no. 32) which parrots the narrative set forth in the
9 motion (or perhaps it is the other way around – the text respecting the
10 history of the transaction and documentation is virtually identical, and
11 both make the same mistake regarding the date the deed of trust was
12 executed – they both state that the deed of trust was executed
13 8 December 2006, while the acknowledgment shows it as 14 November 2006).
14 Declarant, too, declares that Wells Fargo Document Custody "has
15 possession" of the original note in Minnesota, and indicates that true
16 copies of the note, deed of trust, and assignment are attached, but
17 there are no exhibits to the filed declaration. The declaration was
18 executed in Irvine, California.

19 No evidence is provided, nor is any assertion even made, regarding
20 UBS AG's authority to act for the holder of the note, beyond the
21 unelaborated statements that it is "servicing agent for ACT Properties,
22 LLC" in the motion, and "servicing agent for ACT Properties, LLC, its
23 successors and/or assigns" in the declaration.

24 Nor do the papers disclose what kind of an entity "UBS AG" is.
25 "AG" may indicate a corporate entity from Germany, Switzerland,
26 Liechtenstein, Austria, or perhaps elsewhere, and UBS is a major Swiss
27

1 financial institution. See Nelson D. Schwartz, *For Swiss banks, an*
2 *Uncomfortable Spotlight*, Int'l Herald Tribune, March 4, 2009,² and
3 UBS AG: a Short History.³

4 This latter point became significant when Debtors, pro se (although
5 they have counsel), filed their Motion to Dismiss Movant's Motion for
6 Relief from Stay (docket no. 44), the thrust of which is that UBS
7 transferred the security in the real property to the Central Bank of
8 Switzerland in return for approximately \$220,000, and referencing
9 numerous press and internet accounts respecting the Swiss bank. Debtors
10 do not explicate how they reach the conclusion, from news stories about
11 the handling of toxic assets in the banking systems of this country and
12 Switzerland, that UBS AG (or UBS AG, which only claims to service the
13 loan for another holder) was paid an amount approximating the default
14 alleged in the motion. That said, they raise a standing question.

15 UBS AG's counsel, while located in San Diego, California, is
16 admitted to practice in this district and electronically filed the
17 motion and supporting papers. He continued the motion once and then
18 confirmed the motion for hearing two days prior to the calendar, also
19 via the court's electronic filing system. A local practitioner whose
20
21

22 ² available at:

23 <http://www.iht.com/articles/2009/03/04/business/04>
24 [swiss.php](http://www.iht.com/articles/2009/03/04/business/04) (last visited 4 March 2009)

25 ³ available at:

26 [http://www.ubs.com/1/e/about/history/a_short_histo](http://www.ubs.com/1/e/about/history/a_short_history.html?isPopup=yes)
27 [ry.html?isPopup=yes](http://www.ubs.com/1/e/about/history/a_short_history.html?isPopup=yes) (last visited 5 March 2009).

1 role in the case was not disclosed in the docket appeared for UBS AG at
2 the continued hearing; Debtor Peter Jacobson appeared pro se.

3 4 **II. Jurisdiction**

5 This is a core proceeding within this court's jurisdiction.
6 28 U.S.C. §§ 1334(a) and (b), and 157(a) and (b)(2)(G); GR 7, ¶ 1.01,
7 Local Rules, W.D. Washington.

8 9 **III. Issues**

10 **A. Appearances**

11 Were the parties properly represented at hearing?
12

13 **B. Real Party in Interest**

14 Is a "servicing agent" the real party in interest in whose name a
15 relief from stay motion may be brought?
16

17 **C. Standing**

18 Does UBS AG or Movant have standing to seek relief from stay to
19 enforce Debtors' deed of trust?
20

21 **IV. Analysis**

22 **A. Appearances**

23 Debtors were and still are represented by counsel in this case.
24 Although they filed their response to the motion pro se, they indicate
25 having informed counsel of their intent to file their response. I infer
26 counsel declined to argue their position. Nevertheless, because I have
27

28 (08-45120-Peter A. Jacobson and Maria E. Jacobson)
DECISION ON RELIEF FROM STAY - 5 of 18

1 an independent duty to determine jurisdiction, see part IV.C. below, the
2 question is before me, and Mr. Jacobson appeared at the hearing.

3 GR 2(g)(1) permits the court to hear represented individuals, even
4 though their counsel is not present:

5 Whenever a party has appeared by attorney, he cannot
6 thereafter appear or act in his own behalf in the cause, or
7 take any step therein; provided, that the court may in its
discretion hear a party in open court, notwithstanding the
fact that he has appeared, or is represented by attorney.

8 Respecting Movants' representation at the hearing, Rule 9010(b)
9 provides that:

10 [a]n attorney appearing for a party in a case under the Code
11 shall file a notice of appearance with the attorney's name,
office address and telephone number, unless the attorney's
12 appearance is otherwise noted in the record.

13 (emphasis added). In other words, an attorney must first file a notice
14 of appearance containing the data specified in Rule 9010(b) to represent
15 a party in a hearing.

16 In addition to Rule 9010(b), a local rule of the U.S. District
17 Court for the Western District of Washington, which applies via
18 LBR 9029-2,⁴ requires:

19 An attorney eligible to appear may enter an appearance in a
20 civil case by signing any pleading or other paper described in
Rule 5(a), Federal Rules of Civil Procedure, filed by or on

22 ⁴ Which provides:

23 The Local Rules of the United States District Court
24 for the Western District of Washington (herein
"Local Rules W.D. Wash.") are rules of the United
25 States Bankruptcy Court for the Western District of
Washington, except as they may be inconsistent with
26 Title 11, United States Code (herein "Bankruptcy
Code"), the Federal Rules of Bankruptcy Procedure,
27 or these Local Bankruptcy Rules.

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1 behalf of the party the attorney represents, or by filing a
2 Notice of Appearance.

3 GR 2(h). No formal notice of appearance is required so long as the new
4 attorney has somehow made his or her involvement in the case known prior
5 to the hearing, such as by signing and filing pleadings.

6 But once counsel has appeared, GR 2(g)(3) provides:

7 The authority and duty of attorneys of record shall continue
8 until there shall be a substitution of some other attorney of
9 record, except as herein otherwise expressly provided, and
10 shall continue after final judgment for all proper purposes.

11 And GR 2(g)(2)(B):

12 Where there has simply been a change or addition of counsel
13 within the same law firm, an order of substitution is not
14 required; the new attorney will file a Notice of Appearance
15 and the withdrawing attorney will file a Notice of Withdrawal.
16 However, where there is a change in counsel that effects a
17 termination of one law office and the appearance of a new law
18 office, the substitution must be effected . . . which
19 requires leave of court.

20 And, of course, corporations must be represented by counsel in
21 federal court. See Rowland v. California Men's Colony, 506 U.S. 194,
22 201-02 (1993).

23 The careful reader will have noticed that none of the foregoing
24 rules directly address the situation where the original attorney
25 continues as counsel of record, but another lawyer, not of the same
26 firm, joins for some portion of the representation. But, read together,
27 the requirement of corporate representation and the continuing role of
28 counsel of record preclude interloping counsel. For other attorneys not
part of the same firm as record counsel to represent a party, something
must be done of record. Customarily, this is accomplished by filing a

1 notice of association, and it is common when lead counsel is distant and
2 the use of local counsel for particular matters in the case will promote
3 efficiency, or the new counsel provides particular expertise. Once the
4 notice of association is served and filed, all parties to the case are
5 aware of the changed representation, and associated counsel receives
6 notice directly of events and filings in the case.

7 The practice of undisclosed "appearance attorneys" creates
8 problems – other parties (and the court) are sandbagged, and the Debtor,
9 trustee, other creditors, and counsel cannot readily communicate
10 regarding scheduling or substance. In addition to the ramifications of
11 this practice, explored in In re Wright, 290 B.R. 145 (Bankr. C.D. Cal.
12 2003); Hon. Jim D. Pappas, Simple Solution = Big Problem, 46 The [Idaho]
13 Advocate 31 (Oct. 2003); and Neil M. Berman, Judge, This is Not My
14 Case . . ., Norton Bankr. L. Adviser 3 (May 2004), the lack of formal
15 association could raise questions about the informally-appearing
16 attorney's authority to speak for, and make judicial admissions on
17 behalf of, the client (the contrary suggestion would not be a promising
18 argument).

19 While this defect is not dispositive, clarity of representation on
20 the record is important to judicial economy and the orderly
21 representation of other parties. So I will require, absent emergency or
22 significant hardship, formal notice of association to be filed not later
23 than the confirmation of the hearing. And there is no remedy for self-
24 inflicted harm – law firms undertaking distant representations must be
25 prepared to appear or timely associate local counsel who will. As
26 corporations must be represented by counsel in federal court, the

consequence of not having counsel of record at hearing will be that that party's position may be deemed without merit. See LBR 9013-1(e)(1).⁵ This is the flip side of Woody Allen's observation that "Eighty per cent of success is showing up"⁶ – if you (or your counsel of record if you are a corporate entity) don't, your chance of success approaches zero.

In short, henceforth only counsel of record or individuals representing themselves will be heard.

B. Real Party in Interest

The moving party here is UBS AG, which claims only to be a servicer for the holder of the note. It neither asserts beneficial interest in the note, nor that it could enforce the note in its own right. As noted in In re Hwang, 396 B.R. 757, 766-67 (Bankr. C.D. Cal 2008), Rule 4001 makes stay relief a contested matter by providing that Rule 9014 governs. That rule in turn applies Rule 7017, imposing FRCP 17's requirement⁷ that actions be prosecuted in the name of the real party interest.

⁵ Which provides:

[A]pppearance is required at all scheduled hearings. Failure to appear at the date and time appointed for hearing may be deemed by the court to be an admission that the motion, or the opposition to the motion, as the case may be, is without merit.

⁶ Quoted in Thomas J. Peters and Robert H. Waterman, In Search of Excellence, Harper & Row 1982, at 119.

⁷ Which provides in (a)(1):

An action must be prosecuted in the name of the real party in interest. . . .

1 [t]he right to enforce a note on behalf of a noteholder does
2 not convert the noteholder's agent into a real party in
3 interest. "As a general rule, a person who is an attorney-in-
4 fact or an agent solely for the purpose of bringing suit is
viewed as a nominal rather than a real party in interest and
will be required to litigate in the name of his principal
rather than in his own name."

5 Hwang, 396 B.R. at 767, quoting 6A Wright, Miller & Kane, Federal
6 Practice and Procedure: Civil 2d § 1553.

7 The real party in interest in relief from stay is whoever is
8 entitled to enforce the obligation sought to be enforced. Even if a
9 servicer or agent has authority to bring the motion on behalf of the
10 holder, it is the holder, rather than the servicer, which must be the
11 moving party, and so identified in the papers and in the electronic
12 docketing done by the moving party's counsel.

13 It follows that orders granting relief from stay must do so to the
14 holder of the obligation to be enforced – not the servicer or others, or
15 the collective "Movant," as in the proposed order UBS AG submitted. Of
16 course, setting forth that the holder may act through agents, or may
17 later assign or transfer the interest, e.g., "ACT Properties, LLC, and
18 its agents, successors, and assigns," is appropriate.

1 If UBS AG'S motion had merit, the standing deficiency could be
2 cured by joinder, as FRCP 17(a)(3),⁸ applicable via Rules 9014 and 7017,
3 allows. As will be seen, joinder would not salvage this motion.

4
5 **C. Standing**

6 UBS AG has submitted no evidence that it is authorized to act for
7 whomever holds the note. That deficiency puts its standing in question,
8 See In re Parrish, 326 B.R. 708, 720-21 (Bankr. N.D. Ohio 2005), and I
9 have an independent duty to determine whether I have jurisdiction over
10 matters that come before me. FW/PBS, Inc. v. City of Dallas, 493 U.S.
11 215, 231 (1990). I must therefore determine whether UBS AG (or Movant)
12 has standing to seek relief from stay.

13
14 **1. Law:** For a federal court to have jurisdiction, the litigant
15 must have constitutional standing, which requires an injury fairly
16 traceable to the defendant's allegedly unlawful conduct and likely to be
17 redressed by the requested relief. United Food & Commercial Workers
18 Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 551 (1996).

19 [T]he question of standing is whether the litigant is
20 entitled to have the court decide the merits of the dispute or
21 of particular issues. Standing doctrine embraces several
judicially self-imposed limits on the exercise of federal

22 ⁸ Which provides:

23 The court may not dismiss an action for failure to
24 prosecute in the name of the real party in interest
25 until, after an objection, a reasonable time has
26 been allowed for the real party in interest to
27 ratify, join, or be substituted into the action.
After ratification, joinder, or substitution, the
action proceeds as if it had been originally
commenced by the real party in interest.

1 jurisdiction, such as the general prohibition on a litigant's
2 raising another person's legal rights

3

4 Typically . . . the standing inquiry requires careful
5 judicial examination of a complaint's allegations to ascertain
6 whether the particular plaintiff is entitled to an
7 adjudication of the particular claims asserted.

8 Allen v. Wright, 468 U.S. 737, 750-52 (1984) (citations omitted).
9 Constitutional standing, predicated on the "case or controversy"
10 requirement of Article III of the Constitution, is a threshold
11 jurisdictional requirement, and cannot be waived. Pershing Park Villas
12 Homeowners Ass'n v. United Pacific Ins. Co., 219 F.3d 895, 899-900 (9th
13 Cir. 2000).

14 A litigant must also have "prudential standing," which stems from
15 rules of practice limiting the exercise of federal jurisdiction to
16 further considerations such as orderly management of the judicial
17 system. Pershing Park, 219 F.3d at 899-900; In re Godon, 275 B.R. 555,
18 564-565 (Bankr. E.D. Cal. 2002) (citing Bender v. Williamsport Area Sch.
19 Dist., 475 U.S. 534, 541-42 (1986)).

20 Generally, a party without the legal right under applicable
21 substantive law to enforce the obligation at issue, or pursuing an
22 interest outside those protected by the law invoked or abstract
23 questions more appropriately addressed legislatively, lacks prudential
24 standing. Doran v. 7-Eleven, Inc., 524 F.3d 1034, 1044 (9th Cir. 2008).

25 Under the Bankruptcy Code, a party seeking relief from stay must
26 establish entitlement to that relief. § 362(d); see In re Hayes,
27 393 B.R. 259, 266-267 (Bankr. D. Mass. 2008). Foreclosure agents and
28 servicers do not automatically have standing, In re Scott, 376 B.R. 285,

1 290 (Bankr. D. Idaho 2007); Hwang, 396 B.R. at 767, and must show
2 authority to act for the party which does.

3 In Washington, only the holder of the obligation secured by the
4 deed of trust is entitled to foreclose. RCW 61.24.005(2) defines
5 "beneficiary" under a deed of trust as the holder of the instrument or
6 document evidencing the obligations secured by the deed of trust.⁹ See
7 also Fidelity & Deposit Co. of Maryland v. Ticor Title Ins. Co.,
8 88 Wash. App. 64, 943 P.2d 710 (1997). Having an assignment of the deed
9 of trust is not sufficient, id. at 68-69, because the security follows
10 the obligation secured, rather than the other way around. This
11 principle is neither new nor unique to Washington:

12 [T]ransfer of the note carries with it the security, without
13 any formal assignment or delivery, or even mention of the
latter.

14 Carpenter v. Longan, 83 U.S. 271, 275 (1872).

15 It follows that, to have standing, UBS AG must establish its
16 authority to act for the holder of Debtors' note.

17
18 **2. Evidence:** Some courts require a party moving for stay relief
19 to provide admissible evidence tracing the identity of the various
20 holders and servicers of the mortgage or deed of trust in question, and
21 the holders of the note evidencing the underlying obligation. See Hayes,
22 393 B.R. at 269; and Parrish, 326 B.R. at 720-21. I need not here go so
23 far, because UBS AG's proof neither shows who presently holds Debtors'
24 note nor its own authority.

25
26 ⁹ Which renders problematic the identification of MERS "solely
27 as nominee . . ." as the beneficiary of Jacobsons' deed of trust.

1 While business records may provide the necessary proof, this
2 exception to the hearsay rule¹⁰ requires that the records (1) be made at
3 or near the time by, or from information transmitted by, a person with
4 knowledge; (2) pursuant to a regular practice of the business activity;
5 (3) kept in the course of regularly conducted business activity; and
6 (4) the source, method, or circumstances of preparation must not indicate
7 lack of trustworthiness. These elements must be established by the
8 testimony of a custodian or other qualified witness, and the documents
9 must be authenticated. In re Vinhnee, 336 B.R. 437, 444 (9th Cir. BAP
10 2005). Specifically, "the record being proffered must be shown to
11 continue to be an accurate representation of the record that originally
12 was created." Id.; FRE 901(a).¹¹ A declarant authenticating business

13
14 ¹⁰ FRE 803(6) provides:

15 Records of Regularly Conducted Activity.--A
16 memorandum, report, record, or data compilation, in
17 any form, of acts, events, conditions, opinions, or
18 diagnoses, made at or near the time by, or from
19 information transmitted by, a person with
20 knowledge, if kept in the course of a regularly
21 conducted business activity, and if it was the
22 regular practice of that business activity to make
23 the memorandum, report, record or data compilation,
24 all as shown by the testimony of the custodian or
25 other qualified witness, or by certification that
26 complies with Rule 902(11), Rule 902(12), or a
27 statute permitting certification, unless the source
28 of information or the method or circumstances of
preparation indicate lack of trustworthiness. The
term "business" as used in this paragraph includes
business, institution, association, profession,
occupation, and calling of every kind, whether or
not conducted for profit.

25 ¹¹ Which provides:

26 The requirement of authentication or identification
27 as a condition precedent to admissibility is
28 satisfied by evidence sufficient to support a

1 records must be qualified. The bare assertion that one works for the
2 company and is familiar with its recordkeeping procedures is not
3 sufficient: "there needs to be enough information presented to
4 demonstrate that the person is sufficiently knowledgeable about the
5 subject of the testimony." Vinhnee, 336 B.R. at 448 (citation omitted).
6 The testimony must contain information warranting the conclusion that the
7 proffered records are what they purport to be. Id.

8 The only evidence UBS AG has submitted is the declaration of one of
9 its bankruptcy specialists. The initial paragraph of the declaration
10 reads:

11 I am employed as a Bankruptcy Specialist by UBS AG, as
12 servicing agent for ACT Properties LLC, its successors and/or
13 assigns ("Movant"). In this capacity, I am one of the
14 custodians of the books, records, files and banking records of
15 Movant, as those books, records, files and banking records
16 pertain to the loans and extensions of credit by Movant to
17 Peter A. Jacobson and Maria E. Jacobson ("Debtors"). I have
personally worked on said books, records, files and banking
records and, as to the following facts, I know them to be true
of my own knowledge or I have gained knowledge of them from
the Movant's business records, which were made at or about the
time of the events which were recorded, and which are
maintained in the ordinary course of Movant's business.

18 Declaration in Support . . . (docket no. 32).

19 One hopes the declarant is not as unsure of his own identity as this
20 imprecision suggests: is he employed as a bankruptcy specialist by
21 UBS AG only in its capacity as servicing agent for ACT Properties? Or
22 for a successor or assignee of ACT? Or is he a bankruptcy specialist for
23 UBS AG and its successors and/or assigns? Is he one of the custodians
24 of "the books, records, files and banking records" of all of these

25
26 finding that the matter in question is what its
proponent claims.

27
28 (08-45120-Peter A. Jacobson and Maria E. Jacobson)
DECISION ON RELIEF FROM STAY - 15 of 18

1 entities? And since the motion must be brought in the name of the real
2 party in interest; i.e., the present holder of Debtors' note, what is the
3 relevance of a possible future successor or assignee? Or if the
4 antecedent of "successors and/or assigns" is UBS AG, how does declarant
5 know he will be employed by whomever it is, or have access to its
6 records?

7 Setting aside for the moment that no business records are actually
8 proffered – the declarant recounts his conclusions, from whatever records
9 he consulted, and we are told that he is one of the custodians, that he
10 works on those records, that they were made at or about the time of the
11 events recorded, and that they are maintained in the ordinary course of
12 Movant's business. While that formulaic recitation attempts to satisfy
13 FRE 901(a), it would not withstand an objection to admissibility: there
14 is nothing meaningful regarding the declarant's qualifications to
15 authenticate business records, or the reliability of those records in
16 this instance.

17 That reliability is questionable, given obvious errors, such as the
18 date the Debtors executed the deed of trust and the assertion of a loan
19 or extension of credit "by Movant" to the Jacobsons – the lender (and the
20 payee of their note) was Castle Point Mortgage, Inc., not included in
21 either of the compositions of "Movant" set forth in UBS AG's papers. And
22 which of the matters he recounts are things he knows to be true of his
23 own knowledge, and which did he gain from someone's business records?
24 More fundamentally, ACT Properties was assigned the deed of trust just
25 days before the motion was filed. Why should credence be given to

26

27

28 (08-45120-Peter A. Jacobson and Maria E. Jacobson)
DECISION ON RELIEF FROM STAY - 16 of 18

1 UBS AG's records "as servicing agent for ACT Properties" respecting
2 anything before that assignment?

3 But even if all of the deficiencies were overlooked or resolved in
4 Movant's favor, one emerges from the syntactical fog into an impassable
5 swamp. The declaration of someone in California, apparently based on
6 business records, and perhaps predating his employer becoming servicing
7 agent, is that Debtor's note secured by the deed of trust is in "the
8 possession"¹² of a separate entity in Minnesota. Assuming the exhibits
9 to the motion are authentic and are the same as those intended to have
10 been attached to the declaration, the note is indorsed in blank. Without
11 more, that and possession (rather than mere custody) suggests that Wells
12 Fargo is the holder of the note. RCW 62A.3-201¹³ and 3-301¹⁴. Nothing

13
14 ¹² So in both the motion (at 3:11) and in the declaration
(at ¶ 4).

15 ¹³ Which provides:
16 (a) "Negotiation" means a transfer of possession,
17 whether voluntary or involuntary, of an instrument
18 by a person other than the issuer to a person who
thereby becomes its holder.

19 (b) Except for negotiation by a remitter, if an
instrument is payable to an identified person,
20 negotiation requires transfer of possession of the
instrument and its indorsement by the holder. If an
21 instrument is payable to bearer, it may be
negotiated by transfer of possession alone.

22 ¹⁴ Which provides:
23 "Person entitled to enforce" an instrument means
24 (i) the holder of the instrument, (ii) a nonholder
in possession of the instrument who has the rights
25 of a holder, or (iii) a person not in possession of
the instrument who is entitled to enforce the
26 instrument pursuant to RCW 62A.3-309 or 62A.3-
418(d). A person may be a person entitled to
27 enforce the instrument even though the person is

28 (08-45120-Peter A. Jacobson and Maria E. Jacobson)
DECISION ON RELIEF FROM STAY - 17 of 18

1 in the record establishes on whose behalf (if other than its own) Wells
2 Fargo Document Custody possesses the note; that (and verification of
3 current possession and present ability to produce the original, if
4 required) would have to come from Wells Fargo.

5 Nor does anything in the record establish UBS AG's authority to
6 enforce the Debtors' note, for whomever holds it; and thus to foreclose
7 the deed of trust. The declaration states that UBS AG is "servicing
8 agent," a term with no uniform meaning, and no definition cited. At a
9 minimum, there must be an unambiguous representation or declaration
10 setting forth the servicer's authority from the present holder of the
11 note to collect on the note and enforce the deed of trust. If
12 questioned, the servicer must be able to produce and authenticate that
13 authority.

14 UBS AG has not shown that it has standing to bring the motion for
15 relief from stay or authority to act for whomever does.

16
17 **V. CONCLUSION**

18 As the motion was not brought in the name of the real party in
19 interest, nor has standing to bring it been established, it will be
20 **DENIED.**

21 **/// - END OF DECISION - ///**

22 

23 Philip H. Brandt
24 United States Bankruptcy Judge
(Dated as of "Entered on Docket" date above)

25
26 not the owner of the instrument or is in wrongful
27 possession of the instrument.

28 (08-45120-Peter A. Jacobson and Maria E. Jacobson)
DECISION ON RELIEF FROM STAY - 18 of 18

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**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA**

**WELLS FARGO BANK, N.A.,
Plaintiff**

v.

CASE NO. 2008-CA-190

**JONNE RUSH; CHARLENE J. RUSH, et al,
Defendants**

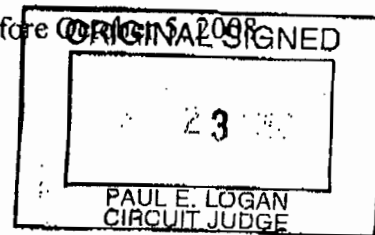
ORDER

THIS CAUSE came before the Court for hearing on September 15, 2008 on the Defendants' Motion to Dismiss, and the Court, upon argument of counsel, review of the record and being sufficiently advised, finds that the Plaintiff's Complaint fails to contain sufficient facts to establish who it is and its relationship to the Defendants and to the claim for foreclosure of a mortgage. Specifically, the court finds that although the Plaintiff names itself in the Complaint as the owner of the Promissory Note and Mortgage, the Plaintiff has attached copies of a note and mortgage that conflict with this allegation. Further, the court finds that neither the Allonge for the Purpose of Endorsement nor the Assignment of Mortgage filed in this matter is sufficient to confer standing upon this Plaintiff.

It is therefore **ORDERED AND ADJUDGED** that:

1. The Defendants' Motion to Dismiss is granted;
2. The Plaintiff is granted leave to amend its Complaint on or before **ORIGINAL SIGNED**

Dated: _____



Paul E. Logan, Circuit Judge

Copies provided to:

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[*1] New Century Mortgage Corporation, Plaintiff, against Shari N. Durden; Cordial Realty Group; "John Doe" and "Jane Doe" said names being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, Defendants.

7967/07

SUPREME COURT OF NEW YORK, KINGS COUNTY

2009 NY Slip Op 50175U; 2009 N.Y. Misc. LEXIS 205

February 2, 2009, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

COUNSEL: **[**1]** For Plaintiff: Mark K. Broyles, Esq., Fein, Such & Crane, LLP, Rochester, NY.

No Appearance by Defendants.

JUDGES: Carolyn E. Demarest, J.

OPINION BY: Carolyn E. Demarest

OPINION

Carolyn E. Demarest, J.

Plaintiff moves for default judgment and an order of reference for a referee to ascertain and compute the amount due to the plaintiff in this action to foreclose a mortgage, signed on October 11, 2006, for real property situated in the County of Kings, State of New York, at 518 Thomas Boyland St, Brooklyn, NY 11212 ("Mortgage"). On November 14, 2007, this court previously denied plaintiff's motion for an order of reference and noted the following:

Prior to filing the instant motion, the subject mortgage was assigned "in the secondary market" to DLJ Mortgage Capital, Inc. Accordingly, plaintiff no longer possesses any right, title or interest in the mortgage sought to be foreclosed and the affidavit of a Vice President of New Century is not competent in the circumstances. Any future application to foreclose on this mortgage should contain a copy of the mortgage application as it appears that no payment was ever made by the

mortgagor. Upon the renewed motion for an order of reference, plaintiff submitted an affidavit **[**2]** by Mordy Flam, Vice President for MAR Group, LLC ("MAR"), and a copy of the defendant's mortgage application.

[*2] Based on the documentation submitted by plaintiff in support of its motion, the Mortgage has been assigned numerous times, apparently as a mortgage backed security. On October 11, 2006, New Century Mortgage Corporation ("New Century") entered the note ("Note") and the Mortgage as the "lender." The Mortgage listed Mortgage Electronic Registration Systems, Inc. ("MERS") as the "mortgagee of record." On March 7, 2007, New Century filed the complaint in this action. On April 30, 2007, MERS assigned the mortgage to DLJ Mortgage Capital, Inc. ("DLJ"). On May 11, 2007, in an "Assignment of Mortgage," MERS purportedly assigned the Mortgage to New Century that included the phrase, "Date of Transfer: March 5, 2007." On January 15, 2008, after this court signed the order which denied New Century's previous motion for an order of reference, DLJ assigned the Mortgage to MAR. On February 8, 2008, in a "Gap Assignment of Mortgage," New Century purportedly assigned the Mortgage to "Mortgage Electronic Registration Systems, Inc. as nominee for New Century Mortgage Corp.". This "gap **[**3]** assignment" included the following provision:

THIS GAP ASSIGNMENT OF MORTGAGE is to be effective as of April 5, 2007. The intention of this GAP Assignment of Mortgage is to assign the above referenced mortgage from New Century Mortgage Corp. to Mortgage Electronic Registration Systems, Inc. as nominee for New Century Mortgage Corp, thus completing the intended chain of title.

It is critical for a plaintiff seeking judicial redress to have standing before this court. "If standing is denied, the pathway to the courthouse is blocked" (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 812, 798 N.E.2d 1047, 766 N.Y.S.2d 654 [2003], cert denied 540 U.S. 1017, 124 S. Ct. 570, 157 L. Ed. 2d 430 [2003]). "Standing to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request" (*Caprer v Nussbaum*, 36 AD3d 176, 181, 825 N.Y.S.2d 55 [2d Dept 2006]).

According to the documents submitted in support of plaintiff's motion, the plaintiff's action is predicated upon rights it presumed to acquire by virtue of an assignment from MERS as Nominee for New Century Mortgage Corporation on May 11, 2007. This action was commenced by the filing of a summons and complaint on March [**4] 7, 2007, prior to the date of the written assignment from MERS. However, a plaintiff may not foreclose on a mortgage where the plaintiff does not have title to the mortgage (*Kluge v Fugazy*, 145 AD2d 537, 538, 536 N.Y.S.2d 92 [2d Dept 1988]). The written assignment in the present matter from MERS states that the date of transfer is March 5, 2007. "The crucial issue then is whether the written assignment, dated after the commencement of the action but stated to be effective on a date before the commencement, was effective to give plaintiff the requisite interest in the mortgage and thus standing to commence an action to foreclose" (*Deutsche Bank Trust Co. Ams. v Peabody*, 20 Misc 3d 1108[A], 866 N.Y.S.2d 91, 2008 NY Slip Op 51286[U] [Sup Ct, Saratoga County 2008]).

Where there is no evidence that plaintiff, prior to commencing the foreclosure action, was the holder of the mortgage and note, took physical delivery of the mortgage and note, or was conveyed the mortgage and note by written assignment, an assignment's language purporting to give it retroactive effect prior to the date of the commencement of the action is insufficient to establish the plaintiff's requisite standing (*see Deutsche Bank*, 20 Misc 3d at 1108[A] (dismissing foreclosure action [**5] as plaintiff did not have an interest in the mortgage on the date of the action's commencement, and thus lacked standing to initiate the action, despite a retroactive effective date in the assignment of a mortgage); *Countrywide Home Loans, Inc. v Taylor*, 17 Misc 3d 595, 843 N.Y.S.2d 495 [*3] [Sup Ct, Suffolk County 2007] (denying motion for order of reference due to plaintiff's lack of standing as retroactive date in assignment of mortgage to plaintiff was insufficient to establish plaintiff's ownership interest at the time the action was commenced); *Countrywide Home Loans, Inc. v Hovanec*, 15 Misc 3d 1115[A], 839 N.Y.S.2d 432, 2007 NY Slip Op 50696[U] [Sup Ct, Suffolk County 2007] (denying motion for order

of reference as retroactive date in assignment was insufficient to establish plaintiff's ownership interest in the mortgage at the time the action was commenced and thus the court was unable to accept the affidavit in support of the motion by an officer of the plaintiff as a proper party affidavit pursuant to CPLR 3215(f)); *Bankers Trust Co. v Hoovis*, 263 AD2d 937, 694 N.Y.S.2d 245 [3d Dept 1999] (rejecting "defendant's contention that plaintiff lacked standing based on the allegation that plaintiff did not obtain the assignment of mortgage until after the commencement [**6] of the action" where defendant did not contradict plaintiff's documentation that the note and mortgage were physically delivered to the plaintiff prior to the initiation of the action); *Fremont Inv. & Loan v Laroc*, 21 Misc. 3d 1124[A], 2008 NY Slip Op 52166[U], *3-4 [Sup Ct, New York County 2008] (holding that plaintiff had standing to bring the foreclosure action where the equitable interest was transferred to the plaintiff by the physical delivery of the note and mortgage prior to the initiation of the action and it was undisputed that plaintiff was the holder of the mortgage and note from the outset despite the plaintiff's written assignment to itself after the commencement of the action "to avoid any objection to the standing of MERS as a nominee for the lender to bring a foreclosure action"))).

The court recognizes, as explained by the Court of Appeals, that ownership interest in a mortgage may be transferred among MERS members without being publicly recorded (*see Merscorp, Inc. v Romaine*, 8 NY3d 90, 96, 861 N.E.2d 81, 828 N.Y.S.2d 266 [2006]). However, unlike in *Fremont*, the relationship between the assignors and assignees is not clear in this matter and thus the plaintiff failed to demonstrate that it was the holder of the Mortgage [**7] and Note from the outset. Therefore the plaintiff failed to establish that it had standing to commence the present foreclosure action and the motion for an order of reference must be denied (*see Fremont Inv. & Loan*, 2008 NY Slip Op 52166[U] at *4; *Countrywide Home Loans, Inc.*, 15 Misc 3d at 1115[A]).

Furthermore, the assignments of May 11, 2007 and February 8, 2008, are apparently invalid as the assignors did not have a present interest in the Mortgage at the time of the assignments. "It is well settled that [n]o particular words are necessary to effect an assignment; it is only required that there be a perfected transaction between the assignor and assignee, intended by those parties to vest in the assignee a present right in the things assigned." In order for an assignment to be valid, the assignor must be divested of all control over the thing assigned." (*In re Stralem*, 303 AD2d 120, 122-123, 758 N.Y.S.2d 345 [2d Dept 2003], internal citations omitted).

Regardless of the purported "date of transfer" listed in the May 11, 2007 assignment, MERS had previously assigned the Mortgage to DLJ and therefore MERS did

not have a present interest in the mortgage on May 11, 2007. Therefore, MERS could not vest New [**8] Century with an interest in the Mortgage on May 11, 2007 (*see id.*). As a result of this invalid assignment, New Century did not receive the Mortgage through the May 11, 2007 assignment and did not have a present interest in the Mortgage to assign to MERS on February 8, 2008 regardless of the purported "effective" date (*see id.*). Accordingly, the May 11, 2007 assignment by MERS and the February 8, 2008 assignment by New Century are invalid.

While the parties may have successfully taken physical delivery of the Mortgage and Note in the chronology suggested by MERS and New Century's assignments, or actually assigned the [*4] Mortgage and Note through other means, the inclusion of retroactive dates in assignments, absent any evidence that the transfers actually occurred on those dates, is insufficient to demonstrate that New Century was the holder of the Mortgage and Note prior to commencing this foreclosure action (*see Deutsche Bank, 20 Misc 3d at 1108[A]*; *Countrywide Home Loans, Inc., 17 Misc 3d at 595*; *Countrywide Home Loans, Inc., 15 Misc 3d at 1115[A]*; *Bankers Trust*

Co., 263 AD2d at 937; *Fremont Inv. & Loan, 2008 NY Slip Op 52166[U]* at *3-4).

Accordingly, New Century's motion for default judgment [**9] and an order of reference is denied without prejudice and the action is dismissed due to New Century's lack of standing (*Saratoga County Chamber of Commerce, Inc., 100 NY2d at 812*). Furthermore, according to a search of the New York City Department of Finance Automated City Register Information System, after New Century commenced this action, the defendant transferred the deed to Celeste Ann Henry. Should the current holder of the Mortgage commence a new foreclosure action, "all parties having an interest, including persons holding title to the subject premises, must be made a party defendant to the action" (*Home Sav. of Am., F.A. v Gkanios, 233 AD2d 422, 650 N.Y.S.2d 756 [2d Dept 1996]*). In addition, the Mortgage holder's complaint must comply with the recently enacted *Real Property Actions and Proceedings Law § 1304*.

The foregoing constitutes the decision and order of the court.



56666960

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

COUNTRYWIDE HOME LOANS INC.
Plaintiff

Case No: CV-08-675083

Judge: RICHARD J MCMONAGLE
Magistrate: MONICA KLEIN

DEBORAH PEARL ETAL
Defendant

MAGISTRATE'S ORDER

DEFAULT HEARING HELD BY MAGISTRATE ON 3/26/09. PLAINTIFF DID NOT PRESENT EVIDENCE TO THE COURT THAT IT OWNED THE SUBJECT PROMISSORY NOTE AND MORTGAGE AS OF THE DATE OF THE FILING OF ITS COMPLAINT IN THIS CASE AND COULD NOT, THEREFORE, PROVE THAT IT HAD STANDING TO FILE THIS CASE. SEE WELLS FARGO BANK V. JORDAN, 2009 OHIO 1092 (8TH DIST. CT. APP., MAR. 12, 2009). PLAINTIFF IS ORDERED TO SHOW CAUSE, WITHIN THIRTY (30) DAYS OF THE DATE OF THIS ORDER, AS TO WHY ITS COMPLAINT SHOULD NOT BE DISMISSED WITHOUT PREJUDICE FOR LACK OF STANDING. ANY RESPONSE TO THIS ORDER MUST BE FILED, DOCKETED, AND WALKED THROUGH TO THE MAGISTRATES' DEPARTMENT. FAILURE TO COMPLY WITH THIS ORDER WILL RESULT IN DISMISSAL OF THE CASE WITHOUT PREJUDICE. PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AND THE MAGISTRATE'S DECISION WILL BE HELD IN ABEYANCE UNTIL PLAINTIFF COMPLIES WITH THIS ORDER.

Magistrate Signature

03/26/2009

CPMCZ

03/26/2009

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[Cite as *Wells Fargo Bank, N.A. v. Jordan*, 2009-Ohio-1092.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91675

WELLS FARGO BANK, N.A.

PLAINTIFF-APPELLEE

vs.

OTIES JORDAN, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-631753

BEFORE: Celebrezze, J., Rocco, P.J., and Kilbane, J.

RELEASED: March 12, 2009

JOURNALIZED:

FOR APPELLANTS

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ATTORNEY FOR APPELLEE

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Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellants, Oties Jordan, Sylvia Jordan, and Stay Focused, L.L.C., a company for which Oties Jordan is the statutory agent (collectively referred to as “Jordan”), bring this appeal challenging the trial court’s entry of summary judgment in favor of appellee, Wells Fargo Bank (“WFB”).

{¶ 2} On January 15, 2009, WFB filed a motion to dismiss for lack of a final appealable order. After a thorough review of the record, and for the reasons set forth below, we deny WFB’s motion to dismiss and hold that the trial court erred by granting summary judgment.

{¶ 3} On January 3, 2003, Jordan executed a note and mortgage (“the Mortgage”) with Delta Funding Corporation for property located on Wade Park Avenue in Cleveland, Ohio (“the Property”). On or about March 1, 2007, Jordan defaulted on the loan. On August 3, 2007, WFB filed a complaint against Jordan for money judgment, foreclosure, and relief. Attached to the complaint was a copy of the note and mortgage naming Delta Funding Corporation as the holder of the Mortgage. On November 8, 2007, Jordan filed his answer and counterclaim against WFB for fraud, negligence, and violations of federal and state creditor lending laws.

{¶ 4} On February 26, 2008, WFB filed a motion for summary judgment and a motion to dismiss Jordan’s counterclaim. Despite extensions of time

granted by the magistrate assigned to hear the case, Jordan did not file a timely opposition to WFB's motions. On April 7, 2008, the magistrate issued the following order: "As Plaintiff's motion to dismiss counterclaim presents matters outside the pleadings, said motion is deemed part of plaintiff's motion for summary judgment. Therefore, inasmuch as reasonable minds could conclude from the evidence submitted only that plaintiff is entitled to judgment and a decree of foreclosure, plaintiff's motion for summary judgment is granted. ***." Jordan filed objections to the magistrate's order.

{¶ 5} In its May 21, 2008 judgment entry, the trial court adopted the magistrate's decision in an entry that read: "The objection to the Magistrate's Decision is overruled. The Court adopts the Magistrate's Decision attached hereto and incorporated herein. Judgment for the substitute plaintiff against Oties Jordan, aka Oties Jordan, Jr., in the sum of \$72,690.93 with interest thereon at the rate of 9.24 [percent] per annum from March 1, 2007. Decree of foreclosure for substitute plaintiff. Pursuant to Civ.R. 54(B) the court finds no just cause for delay."

Final Appealable Order

{¶ 6} In its motion to dismiss, WFB argues that the trial court's entry is not a final appealable order because it does not set forth its own judgment. We disagree.

{¶ 7} Pursuant to Section 3(B)(2), Article IV of the Ohio Constitution, this court's appellate jurisdiction is limited to the review of final orders of lower courts. A trial court's order is final and appealable only if it meets the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *In re Adoption of M.P.*, Franklin App. No. 07AP-278, 2007-Ohio-5660, ¶15, citing *Denham v. City of New Carlisle*, 86 Ohio St.3d 594, 596, 1999-Ohio-128, 716 N.E.2d 184.

{¶ 8} R.C. 2505.02(B) defines a final order, in pertinent part, as follows: “An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following: (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment[.]”

{¶ 9} “For an order to determine the action and prevent a judgment for the party appealing, it must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court.” *Natl. City Commer. Capital Corp. v. AAAA at Your Serv., Inc.*, 114 Ohio St.3d 82, 2007-Ohio-2942, 868 N.E.2d 663.

{¶ 10} WFB takes issue here with whether the trial court’s entry adopting the magistrate’s decision is a final appealable order. “Civ.R. 53(E)(5) contains the following instruction: The court shall enter its own judgment on the issues submitted for action and report by the referee. Incorporating the referee's report without separately stating its own judgment does not constitute a final

appealable order.” *In re Michael* (1991), 71 Ohio App.3d 727, 595 N.E.2d 397. A trial court order stating merely that it is adopting a magistrate's decision is not a final appealable order. *Harkai v. Scherba Indus.* (2000), 136 Ohio App.3d 211, 736 N.E.2d 101. To constitute a final appealable order, a court's entry reflecting action on a magistrate's decision must be a separate and distinct instrument from the decision and must grant relief on the issues originally submitted to the court. *In re Jesmone Dortch* (1999), 135 Ohio App.3d 430, 734 N.E.2d 434.

{¶ 11} “[T]he trial court must *** enter its own independent judgment disposing of the matters at issue between the parties, such that the parties need not resort to any other document to ascertain the extent to which their rights and obligations have been determined. In other words, the judgment entry must be worded in such a manner that the parties can readily determine what is necessary to comply with the order of the court.” *Burns v. Morgan*, 165 Ohio App.3d 694, 2006-Ohio-1213, 847 N.E.2d 1288, quoting *Yahraus v. City of Circleville*, 4th Dist. No. 00CA04, 2000-Ohio-2019, quoting *Lavelle v. Cox* (Mar. 15, 1991), 11th Dist. No. 90-T-4396.

{¶ 12} We find that the trial court’s entry in this case is a final appealable order. In light of the fact that the magistrate incorporated WFB’s motion to dismiss Jordan’s counterclaim into its summary judgment motion, the judgment entry sets forth its judgment and a judgment amount in favor of WFB. Furthermore, the trial court order included the requisite Civ.R. 54(B) language, which grants this court jurisdiction to hear the appeal. WFB’s motion to dismiss is denied.

Review and Analysis

{¶ 13} We next address the merits of Jordan’s appeal, in which he raises three assignments of error for our review. We find Jordan’s first assignment of error dispositive of the case.

{¶ 14} “I. The trial court erred in granting summary judgment to the substitute party plaintiff as genuine issues of material fact remained outstanding to be determined.”

{¶ 15} In his first assignment of error, Jordan argues that summary judgment is improper because there was no evidence presented that WFB owned the Mortgage. Although we disagree with Jordan’s claim that summary judgment was improper due to a lack of ownership evidence, we find that WFB did not have standing when it filed the complaint; therefore, the trial court erred by granting summary judgment in favor of WFB and should have dismissed this case without prejudice.

{¶ 16} “Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 17} It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 1992-Ohio-95, 604 N.E.2d 138.

{¶ 18} In *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264, the Ohio Supreme Court clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd.* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. Under *Dresher*, “the moving party bears the initial responsibility of informing the trial court of the basis for the motion, *and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or material element of the nonmoving party’s claim.*” *Id.* at 296. (Emphasis in original.) The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. *Id.* at 293. The nonmoving party must set forth “specific facts” by the means listed in Civ.R. 56(C) showing that a genuine issue for trial exists. *Id.*

{¶ 19} This court reviews the lower court’s granting of summary judgment de novo. *Brown v. County Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). “The reviewing court evaluates the record *** in a light most favorable to the nonmoving party ***. [T]he motion must be overruled if reasonable minds could find for the party opposing the motion.” *Saunders v. McFaul*

(1990), 71 Ohio App.3d 46, 50, 593 N.E.2d 24; *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 741, 607 N.E.2d 1140.

{¶ 20} Civ.R. 17(A) states that “[e]very action shall be prosecuted in the name of the real party in interest. *** No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.”

{¶ 21} “A party lacks standing to invoke the jurisdiction of a court unless he has, in an individual or a representative capacity, some real interest in the subject matter of the action. *State ex rel. Dallman v. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 298 N.E.2d 515, syllabus. The Eleventh Appellate District has held that ‘Civ.R. 17 is not applicable when the plaintiff is not the proper party to bring the case and, thus, does not have standing to do so. A person lacking any right or interest to protect may not invoke the jurisdiction of a court.’ *Northland Ins. Co. v. Illuminating Co.*, 11th Dist. Nos. 2002-A-0058 and 2002-A-0066, 2004-Ohio-1529, at ¶17 (internal quotations and citations omitted). The court also noted that ‘Civ.R. 17(A) was not applicable unless the plaintiff had standing to invoke the jurisdiction of the court in the first place, either in an individual or representative capacity, with some real interest in the subject matter. Civ.R. 17 only applies if the action is commenced by one who is sui juris or the proper party to bring the action.’ *Travelers*

Indemn. Co. v. R. L. Smith Co. (Apr. 13, 2001), 11th Dist. No. 2000-L-014.” *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722.

{¶ 22} The holder of rights or interest in property is a necessary party to a foreclosure action. See *Hembree v. Mid-America Fed. Sav. & Loan Assn.* (1989), 64 Ohio App.3d 144, 152, 580 N.E.2d 1103.

{¶ 23} In *Deutsche Bank National Trust Co. v. Steele* (6th Cir., Jan. 8, 2008), Case No. 2:07-CV-886, the court held: “While a court has no duty to search the record and may properly limit its review of an unopposed motion for summary judgment to the facts relied on by defendant, *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 404-05 and 407 (6th Cir. 1992), it cannot enter judgment if the moving party is not entitled to judgment as a matter of law. Rule 56(c), Fed.R.Civ.P. Several judges have held that a complaint must be dismissed if the plaintiff cannot prove that it owned the note and mortgage on the date the complaint was filed. E.g., *In re Foreclosure Cases*, (N.D. Ohio 2007), Case Nos. 1:07CV2282, et seq., (Boyko, J.); *In re Foreclosure Cases* (S.D. Ohio 2007), 521 F. Supp.2d 650, (Rose, J.). Thus, if plaintiff has offered no evidence that it owned the note and mortgage when the complaint was filed, it would not be entitled to judgment as a matter of law.”

{¶ 24} In *Wells Fargo Bank, N.A. v. Byrd*, *supra*, where Wells Fargo filed suit on its own behalf but acquired the mortgage from the original lender after filing, the court held that, “in a foreclosure action, a bank that was not the mortgagee when suit

was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage.”

{¶ 25} Our facts are exactly the same here. Delta Funding Corporation owned the Mortgage for the Property on August 3, 2007, the date WFB filed its complaint against Jordan. On September 24, 2007, WFB filed a Notice of Filing of Final Judicial Report. Attached to the Notice were a Final Judicial Report and an Assignment of Mortgage, indicating the Mortgage had been assigned to WFB on August 22, 2007, nearly three weeks after it filed its complaint. In short, WFB was not the real party in interest on the date it filed its complaint seeking foreclosure against Jordan.

{¶ 26} Thus, WFB lacked standing to bring a foreclosure action against Jordan. As such, the trial court erred in granting summary judgment in favor of WFB because WFB was not entitled to judgment as a matter of law. We sustain Jordan’s first assignment of error, reverse summary judgment, and order the trial court to dismiss the complaint without prejudice.

{¶ 27} Having sustained Jordan’s first assignment of error, we find his remaining assignments of error are moot.¹

{¶ 28} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellants recover of said appellee costs herein taxed.

¹Appellant's remaining Assignments of Error are included in the Appendix to this Opinion.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

KENNETH A. ROCCO, P.J., and
MARY EILEEN KILBANE, J., CONCUR

APPENDIX

Appellant's remaining Assignments of Error:

II. That the trial court erred in granting the motion of Wells Fargo Bank to substitute party plaintiff filed 11/16/07 on 11/21/07 without hearing, substantial basis therefore, or even providing the defendant with an opportunity to receive, review or reply to the motion.

III. That the trial court erred in determining it had jurisdiction to proceed in this foreclosure contrary to the Federal Court determinations and the standard within the Court of Common Pleas Cuyahoga County.

UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF MASSACHUSETTS

~~~~~  
In re  
**ANN C. JONES,**  
Debtor

Chapter 13  
Case No. 07-15662-JNF

~~~~~  
MEMORANDUM

I. INTRODUCTION

The matter before the Court is the “Objection to Claim filed by Carrington Mortgage” filed by the Debtor, Ann C. Jones (the “Debtor”). On August 29, 2008, the Court heard the Debtor’s Objection and the Response filed by Carrington Mortgage Services, LLC (“Carrington”), as “Successor to New Century Mortgage Corporation.” At the hearing, the parties agreed to the submission of numerous documents. Additionally, they agreed that their pleadings could be construed as cross-motions for summary judgment in this contested matter. *See* Fed. R. Bankr. P. 9014(c). Neither party called witnesses or requested an evidentiary hearing. The issue presented is whether Carrington established its standing to file a proof of claim in the sum of \$393,211.09, either as the successor servicer for

Deutsche Bank National Trust Company, as Indenture Trustee for New Century Home Equity Loan Trust 2005-2, or as the current holder of the mortgage executed by the Debtor in favor of Ameripath Mortgage Corporation (“Ameripath”). The Court makes the following findings of fact and rulings of law in accordance with Fed. R. Bankr. P. 7052 and Fed. R. Bankr. P. 9014(c).

II. FACTS¹

The parties submitted a Joint Pre-Trial Memorandum in which they agreed to the following facts. On February 11, 2005, the Debtor executed an adjustable rate note in the original principal amount of \$335,500,² as well as a mortgage in favor of Ameripath secured by her multi-family property located at 114 Radcliffe Street, Dorchester, Massachusetts.

¹ For ease of reference, a timeline is set forth as an exhibit to the Court’s decision.

² The note provided for an initial 7.1% rate of interest and a monthly payment of \$2,254.67. On Schedule I-Current Income of Individual Debtor(s), the Debtor disclosed that she is an employee of the Registry of Motor Vehicles with monthly income of \$3,0666 (net \$2,074), which she supplements with income from her rental property in the sum of \$1,200 and social security income of \$796 for her disabled son. On Schedule J-Current Expenditures of Individual Debtor(s), the Debtor set forth monthly expenditures of \$3,848, excluding a monthly mortgage payment, resulting in net income of \$222. Assuming the interest rate applicable to the Debtor’s mortgage obligation did not adjust, her annual mortgage obligation, excluding the payment of insurance and taxes, would be \$27,048, compared with her annual income of \$48,840 (\$44,941 per Form 22C), an obligation which would consume 55.38% of her income. The interest rate applicable to her note had the potential to adjust as high as 14.1%. Pursuant to her Chapter 13 plan, filed on September 24, 2007, the Debtor proposed to pay no mortgage arrears, and to sell the Radcliffe Street property “as soon as practicable, but in no event more than three months after confirmation.” The Debtor subsequently filed a Second Amended Chapter 13 plan, proposing to cramdown the mortgage, fixing the interest rate at 7.1% and paying \$1,500 per month toward the claim, amortized over 30 years.

On February 15, 2005, Ameripath assigned the note to New Century Mortgage Corporation. Carrington attached a copy of the assignment of the note to its proof of claim.

On April 22, 2005, New Century Mortgage Corporation, as Master Servicer, New Century Home Equity Loan Trust 2005-2, as Issuer, and Deutsche Bank National Trust Company, as Indenture Trustee, executed a Servicing Agreement. The Servicing Agreement identified New Century Mortgage Securities LLC as the Depositor who would acquire “Mortgage Loans” pursuant to the terms of a Mortgage Loan Purchase Agreement. New Century Mortgage Securities LLC, as Depositor, was also charged with creating New Century Home Equity Loan Trust 2005-2 (the Issuer) and with transferring the Mortgage Loans and all of its rights under the Mortgage Loan Purchase Agreement to the New Century Home Equity Loan Trust 2005-2 (the Issuer) in exchange for certificates issued by New Century Home Equity Loan Trust 2005-2. New Century Home Equity Loan Trust 2005-2, in turn, was obliged to issue and transfer to, or at the direction of, the Depositor (New Century Mortgage Securities LLC) the Trust Certificates, Series 2005-2. Additionally, pursuant to the terms of an Indenture dated April 22, 2005 between New Century Home Equity Loan Trust 2005-2 and Deutsche Bank National Trust Company, as Indenture Trustee, New Century Home Equity Loan Trust 2005-2 was obliged to pledge the Mortgage Loans and issue and transfer to, or at the direction of, the Purchaser various asset backed notes identified by series and class.³ Finally, New Century Mortgage Corporation was to

³ The term “Purchaser” was not defined and the identity of the Purchaser was not specifically disclosed in the Servicing Agreement.

service the Mortgage Loans set forth on the Mortgage Loan Schedule, which was attached to the Service Agreement as Exhibit A, either directly or through one or more Sub-Servicers. The Servicing Agreement filed with the Court indicated that the actual schedule of mortgages was “filed in paper pursuant to a continuing hardship exemption available pursuant to “Rule 202 fo Regulation S-T.”

The Servicing Agreement executed on April 22, 2005 incorporated by reference the Indenture and its definitions, which were contained in an appendix to the Indenture identified as Appendix A. Neither the Indenture nor Appendix A were submitted into evidence. The Mortgage Loans which New Century Mortgage Securities LLC, as Depositor, transferred to Deutsche Bank National Trust Company as Indenture Trustee, supposedly were included on a Schedule A, which, as noted above, was not attached to the Servicing Agreement filed with the Court. Moreover, because the Indenture was not filed with the Court, the Court does not have a definition of what constitute “Mortgage Loans.”

On August 31, 2005, four months after the execution of the Servicing Agreement and related Indenture, Ameripath recorded with the Suffolk County Registry of Deeds an assignment, dated August 24, 2005, “without recourse in any event said mortgage [from Ann C. Jones] and the note and claim secured thereby to Deutsche Bank National Trust Company, as Indenture Trustee for New Century Home Equity Loan Trust 2005-2 c/o New Century Mortgage Corporation. That document contains a purported assignment of the mortgage, as well as the note executed by the Debtor, to Deutsche Bank as Indenture Trustee for New Century Home Equity Loan Trust 2005-2, although the parties agreed that

the note had been assigned on February 15, 2005 by Ameripath to New Century Mortgage Corporation.

On October 24, 2005, Deutsche Bank National Trust Company, as Indenture Trustee for New Century Home Equity Loan Trust 2005-2, claiming to be the holder of a mortgage covering the Radcliffe Street property, recorded notice that it had filed a complaint in the Land Court, Department of the Trial Court, for authority to foreclose the Debtor's mortgage, "now held by Plaintiff by assignment."

On December 15, 2006, approximately 14 months after Deutsche Bank, as Indenture Trustee for New Century Home Equity Loan Trust 2005-2, recorded notice of its intent to foreclose, and approximately 16 months after Ameripath assigned the mortgage to Deutsche Bank National Trust, as Indenture Trustee for New Century Home Equity Loan Trust 2005-2, New Century Mortgage Corporation recorded an assignment in the Land Court pursuant to which Ameripath assigned the Debtor's mortgage to it, although there was no mention in the assignment of New Century Mortgage Corporation's role as Master Servicer under the Servicing Agreement dated April 22, 2005 or of New Century Mortgage Services LLC.

The parties also agreed to introduce into evidence an order issued by the United States Bankruptcy Court for the District of Delaware pertaining to the sale of New Century Mortgage Corporation's mortgage servicing rights. The Court takes judicial notice that New Century Mortgage Corporation filed a Chapter 11 bankruptcy petition on April 2, 2007. Its case is jointly administered with those of 14 affiliates under the lead case of New

Century TRS Holdings, Inc., whose affiliates include NC Capital Corporation, which together with its affiliates, was referenced in ¶ 2.03 of the Servicing Agreement.

Two days after the commencement of the bankruptcy cases, New Century TRS Holdings, Inc. and its affiliates filed an emergency motion in connection with the proposed sale of certain mortgage loan servicing assets to Carrington. In its emergency motion, it represented the following:

The Debtors' Servicing Business is among the most substantial of the Debtors' operations being offered for sale, as loan servicing has been and remains a very important and profitable part of the Debtors' businesses. The Debtors presently service approximately \$19 billion of loans owned by third parties. The Debtors' mortgage servicing rights ("MSRs") are generally established in servicing contracts with securitization trusts or third party whole loan purchasers. For performing these functions, the servicer (usually NCMC [New Century Mortgage Corporation]) generally receives a servicing fee, one-twelfth of which is paid monthly, or 0.05% per annum of the outstanding principal balance of each loan in the mortgage servicing portfolio. These servicing fees are typically collected from the monthly payments made by the borrowers on the loans. In addition, the Debtors receive remuneration for loan servicing including float benefits representing interest earned on collection accounts where mortgage payments are held pending remittance to investors, as well as mortgagor-contracted fees such as late fees and, in some case, prepayment penalties.

... Carrington and its affiliates own the primary interests in 12 securitization trusts established from 2004-2006 (the "Carrington Securitization Trusts") which hold approximately \$8.6 billion of mortgage loans that the Debtors originated and sold to these securitization trusts. NCMC is the servicer of the mortgage loans held in the Carrington Securitization Trusts; so, the Carrington Securitization Trusts provide a significant portion of the revenue realized by the Debtors' Servicing Business.

On May 23, 2007, the United States Bankruptcy Court for the District of Delaware entered the order referenced above, captioned "Order Pursuant to Sections 105, 363 and

365 of the Bankruptcy Code and Rules 2002, 6004, 6006 and 9014 of the Federal Rules of Bankruptcy Procedure Approving (i) the Sale of Debtors' Servicing Business to Carrington Capital Management, LLC and Carrington Mortgage Services, LLC pursuant to the Second Amended and Restated Asset Purchase Agreement, dated as of May 21, 2007, Free and Clear of Liens, Claims, Encumbrances, and Interests, and (ii) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases to Carrington as part of Such Sale." The May 21, 2007 Agreement referenced in the caption of the order listed 28 so-called RMBS [residential mortgage-backed securities] Transactions, including New Century Home Equity Loan Trust Series 2005-2.

On April 16, 2008, following the sale of New Century Mortgage Corporation's servicing rights to Carrington, Deutsche Bank National Trust Company executed a Limited Power of Attorney. It provided in pertinent part:

Pursuant to that New Century Home Equity Loan Trust 2005-2, Servicing Agreement dated as of April 22, 2005 (the "Agreement") by and between and [sic] Deutsche Bank National Trust Company and Carrington Mortgage Services, LLC as successor Servicer to New Century Mortgage Corporation (the "Servicer") hereby constitutes and appoints the Servicer, by and through the Servicer's officers, the Trustee's true and lawful Attorney-in-Fact, in the Trustee's name, place and stead and for the Trustee's benefit, in connection with all mortgage loans serviced by the Servicer pursuant to the Agreement solely for the purpose of performing such acts and executing such documents in the name of the Trustee necessary and appropriate to effectuate the following enumerated transactions in respect of any of the mortgages or deeds of trust . . . and promissory notes secured thereby . . . for which the undersigned is acting as Trustee for various certificateholders (whether the undersigned is named therein as mortgagee or beneficiary or has become mortgagee by virtue of endorsement of the Mortgage Note secured by any such Mortgage or Deed of Trust) and for which Carrington Mortgage Services, LLC is acting as Servicer.

In the Limited Power of Attorney, Deutsche Bank National Trust Company did not grant Carrington authority to execute assignments of mortgages, except in connection with the repurchase of mortgage loans or upon payment and discharge of the mortgage.

The final document submitted by the parties was an Assignment dated July 18, 2008. Pursuant to that Assignment, New Century Mortgage Corporation, as the holder of the Debtor's mortgage, assigned the mortgage to Carrington Mortgage Services, LLC.

The Debtor filed her voluntary Chapter 13 petition on September 7, 2007, after the bankruptcy court authorized sale of New Century Mortgage Corporation's servicing rights to Carrington, but before the execution of the Limited Power of Attorney and the July 18, 2008 assignment.

III. DISCUSSION

The Court recently addressed the issue of standing to file both a proof of claim and a motion for relief from the automatic stay in In re Hayes, __ B.R. __, No. 07-13967-JNF, 2008 WL 3870820 (Bankr. D. Mass. Aug. 19, 2008). The Court shall not repeat that discussion here and, instead, incorporates its discussion herein. Id. at *5-*7.

Pursuant to Fed. R. Bankr. P. 3001(f), "[a] proof of claim executed and filed in accordance with the Federal Rules of Bankruptcy Procedure constitutes prima facie evidence of the validity and amount of the claim." See In re Long, 353 B.R. 1, 13 (Bankr. D. Mass. 2006). See also Juniper Dev. Group v. Kahn (In re Hemingway Transp., Inc.), 993 F.2d 915, 925 (1st Cir. 1993). An objecting party, in order to rebut the prima facie validity of the proof of claim must produce "substantial evidence," and, if the objecting party

produces substantial evidence in opposition to the proof of claim, rebutting the prima facie evidence, the burden shifts to the claimant to establish the validity of its claim. See Long, 353 B.R. at 13 (citations omitted).

In this case, the evidence submitted by the parties in the form of various documents supports the Debtor's position that Carrington, either as servicer for Deutsche Bank National Trust, as Indenture Trustee under the New Century Home Equity Loan Trust 2005-2, or on its own behalf lacked standing to file a proof of claim. Although Carrington established that it is the successor to New Century Mortgage Corporation as Servicer of the of the New Century Home Equity Loan Trust 2005-2 as a result of the May 23, 2007 order of the United States Bankruptcy Court for the District of Delaware, the Court finds that it failed to establish that the Debtor's mortgage actually was part of the New Century Home Equity Loan Trust 2005-2, or that Ameripath's assignment of the mortgage on August 24, 2005 to Deutsche Bank National Trust as Indenture Trustee for New Century Equity Loan Trust 2005-2 was a nullity. Absent an assignment from Deutsche Bank back to Ameripath, Ameripath's purported assignment of the mortgage to New Century Mortgage Corporation, which was recorded on December 15, 2006, was ineffective to convey an interest it no longer had. Moreover, the defect was not cured by the July 2008 assignment of the mortgage by New Century Mortgage Corporation to Carrington.

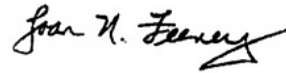
The creation of the New Century Home Equity Loan Trust on April 22, 2005 preceded the August 24, 2005 assignment of the mortgage on the Radcliffe Street property from Ameripath, the original holder, to Deutsche Bank National Trust Company, as

Indenture Trustee for New Century Home Equity Loan Trust 2005-2. The Servicing Agreement dated April 22, 2005 referenced the transfer of “Mortgage Loans” to the New Century Home Equity Loan Trust 2005-2, by New Century Mortgage Securities LLC, but the Court was not provided with a definition of the term “Mortgage Loans” and, thus, cannot conclude whether those loans included the Debtor’s mortgage. The evidence established that the note relating to the mortgage on the Radcliffe Street property was assigned by Ameripath to New Century Mortgage Corporation on February 15, 2005, but the assignment of the mortgage from Ameripath to Deutsche Bank National Trust Company post-dated the creation of the New Century Home Equity Loan Trust 2005-2. Further, the Court was not provided with Exhibit A to the Servicing Agreement, and there is no evidence that either the Debtor’s mortgage was part of the securitization trust or subsequently added to the trust res pursuant to the terms of the Indenture. Moreover, because New Century Mortgage Securities LLC, as the Depositor under that trust, not New Century Mortgage Corporation, was obligated to transfer “Mortgage Loans” to Deutsche Bank National Trust Company as Trustee of the New Century Home Equity Loan Trust 2005-2, it would appear that an assignment of the mortgage from Ameripath or New Century Mortgage Corporation to New Century Mortgage Securities LLC may have been required to establish an accurate chain of ownership of the mortgage. The documents submitted by the parties, including the Limited Power of Attorney and assignments made in December of 2006 and July of 2008, failed to cure the defects outlined above.

IV. CONCLUSION

Upon consideration of the foregoing, the Court grants the Debtor's motion for summary judgment and denies Carrington's motion for summary judgment. The Court sustains the Debtor's objection to the proof of claim. Pursuant to 11 U.S.C. § 502(j), "[a] claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case." Thus, if and when the chain of ownership of the mortgage executed by the Debtor on February 11, 2005 can be conclusively established, the appropriate party may file an amended proof of claim.

By the Court,

A handwritten signature in black ink, appearing to read "Joan N. Feeney", with a stylized flourish at the end.

Joan N. Feeney
United States Bankruptcy Judge

Dated: October 3, 2008

cc: David G. Baker, Esq., Jessica Rodger, Esq., Carolyn Bankowski, Esq.

EXHIBIT A - TIMELINE

February 11, 2005	Debtor executed Note and Mortgage to Ameripath Mortgage Corporation
February 15, 2005	Ameripath Mortgage Corporation assigned Debtor's Note to New Century Mortgage Corporation
April 22, 2005	New Century Mortgage Corporation, as Master Servicer, Deutsche Bank National Trust Company, as Indenture Trustee, and New Century Home Equity Loan Trust 2005-2, as Issuer, executed a Servicing Agreement for New Century Home Equity Loan Trust 2005-2 regarding certain Mortgage Loans purportedly attached on a schedule as Exhibit A
August 24, 2005	Ameripath Mortgage Corporation assigned Debtor's note and mortgage to Deutsche Bank National Trust Company, as Indenture Trustee for New Century Home Equity Loan Trust 2005-2
October 24, 2005	Deutsche Bank National Trust Company, as Indenture Trustee for New Century Home Equity Loan Trust 2005-2 recorded notice of complaint to foreclose Debtor's mortgage
December 15, 2006	New Century Mortgage Corporation recorded an assignment of Debtor's mortgage from Ameripath Mortgage Corporation to New Century Mortgage Corporation
April 2, 2007	New Century Mortgage Corporation filed Chapter 11 petition in District of Delaware
May 21, 2007	Carrington Mortgage Services LLC executed agreement to purchase servicing assets of New Century Mortgage Corporation and its affiliates
May 23, 2007	United States Bankruptcy Court for the District of Delaware entered order approving sale of New Century Mortgage Corporations's servicing business to Carrington Mortgage Services, LLC and Carrington Capital Management, LLC.

September 7, 2007	Ann C. Jones filed Chapter 13 petition in District of Massachusetts
September 28, 2007	Carrington Mortgage Services, LLC, as successor to New Century Mortgage Corporation, filed secured proof of claim for \$393,211.09 in Ann C. Jones's Chapter 13 case
April 16, 2008	Deutsche Bank National Trust Company, as Indenture Trustee, executed Limited Power of Attorney to New Century Mortgage Corporation
July 18, 2008	New Century Mortgage Corporation assigned Debtor's mortgage to Carrington Mortgage Services, LLC

IN THE CIRCUIT OF THE 4TH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR DUVAL COUNTY

Mortgage Electronic Registration Systems
Inc., as Nominee of WMC Mortgage Corp.,

Plaintiff

Case No: 2008 CA 015046

Division CV-C

v.

Marsha D. Nafie; et al.

Defendants.

ORDER

This cause having come on to be heard upon Defendants' Motion to Vacate Order to Substitute Party Plaintiff and Motion to Dismiss Action with Prejudice, the Court having heard argument of counsel and being otherwise fully advised in the premises, Orders and Adjudges as follows:

1. Defendants' Motion to Vacate Order to Substitute Party Plaintiff be and the same is hereby GRANTED.

2. Defendants' Motion to Dismiss Action with Prejudice being the same is hereby GRANTED without prejudice. The present action is dismissed and counsel for Plaintiff shall have fifteen (15) days from the date of this Order to file a new action, should it decide to do so. If no new action is filed within the applicable time period, this action shall stand dismissed with prejudice. Defendants shall have ten (10) days from the date of the filing of a new action to file responsive pleadings.

3. The Court retains jurisdiction to determine whether the filing of the original Complaint constituted a fraud on the Court and also retains jurisdiction to determine whether Defendants' attorneys shall be entitled to attorneys' fees and for their actions either in securing the dismissal of the present case or as it pertains to the pending issue of fraud on the Court.

DONE AND ORDERED in Chambers in Jacksonville, Duval County, Florida, this ____ day of _____, 2009.

Honorable L. Haldane Tayler
Circuit Judge

Copies to:

Jeffrey A. Cramer, Esquire
Cramer Law Center, P.L.
4217 Baymeadows Rd., Suite 1
Jacksonville, FL 32256

Tracy Starasoler, Esq.
Shapiro & Fishman, LLP
2424 North Federal Highway, Suite 360
Boca Raton, FL 33431

09cv72
PTS/FUN

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Court File No. _____

Rudolph I. Peterson,

Plaintiff,

v. ...

SUMMONS

Mortgage Electronic
Registration Systems, Inc.
d/b/a MERSCORP, a Delaware
Corporation.

Defendant.

THE STATE OF MINNESOTA TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED, and required to serve upon plaintiff's attorney an answer to the Complaint which is herewith served upon you, within twenty (20) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, Judgment by Default will be taken against you for the relief demanded in the Complaint.

This proceeding involves, affects, or brings into question real property situated in Hennepin County, Minnesota, and legally described as follows:

East 1/8 of the North 3 acres of Southeast Quarter of the Southeast Quarter, except road, Section 34, Township 28, Range 24, Hennepin County, Minnesota.

NOTICE OF ALTERNATIVE DISPUTE RESOLUTION

Parties to a lawsuit are encouraged to attempt alternative dispute resolution pursuant to Minnesota law. Alternative dispute resolution includes mediation, arbitration, and other processes set forth in the district court rules. You may contact the court administrator about

SCANNED

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U.S. DISTRICT COURT MPLS

resources in your area. If you cannot pay for mediation or alternative dispute resolution, in some counties, assistance may be available to you through a nonprofit provider or a court program.

**IF YOU FAIL TO ANSWER, JUDGMENT BY DEFAULT WILL BE TAKEN
AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.**

Dated: 15 Dec, 2008.

WESTRICK & McDOWALL-NIX, P.L.L.P.



John G. Westrick, #206581
450 Degree of Honor Building
325 Cedar Street
St. Paul, MN 55101
(612) 292-9603
Attorney for Plaintiff

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Court File No. _____

Rudolph I. Peterson,

Plaintiff,

v.

COMPLAINT

Mortgage Electronic
Registration Systems, Inc.
d/b/a MERSCORP, a Delaware
Corporation.

Defendant.

By and for his complaint against the Defendant, Plaintiff Rudolph I. Peterson alleges as follows:

IDENTIFICATION OF PARTIES AND VENUE

1. Plaintiff Rudolph I. Peterson is an individual who resides at 6682 Kingsview Lane North, Maple Grove, Minnesota, 55311.
2. Defendant Mortgage Electronic Registration Systems, Inc. is owned and operated by MERSCORP, a Delaware Corporation with its registered agent at 100 S 5th Str #1075 Minneapolis, Minnesota, 55402 (hereinafter "MERS"). The Defendant provides an electronic registration and management system for mortgages.
3. Venue is appropriate in Hennepin County because the real property involved in this law suit is situated within the county and the actions which form the basis of this lawsuit took place within the county.

FACTS GENERAL TO ALL COUNTS

4. This lawsuit concerns a mortgage on the real property located at 7600 Portland Avenue,

Richfield, Minnesota, 55423, with a legal description as follows:

**East 1/8 of the North 3 acres of Southeast Quarter of the Southeast Quarter, except road,
Section 34, Township 28, Range 24, Hennepin County, Minnesota.**

(hereinafter "the property").

5. Plaintiff Rudolph I. Peterson was the owners in fee simple of the property.
6. The Plaintiff granted a mortgage on to the property to Decision One Mortgage Company, LLC in return for a loan of \$184,500. The mortgage was registered with the Hennepin County Recorder's office on March 6th, 2007 as Document Number 8946298 (hereinafter "the mortgage").
7. Upon information and belief, Decision One Mortgage Company, LLC registered the mortgage with Defendant MERS. Upon information and belief, Defendant MERS acted as the nominee for Decision One Mortgage Company, LLC for recording purposes and assignment purposes with regards to the mortgage.
8. Defendant MERS was never given an interest in the mortgage and never owned the mortgage.
9. The Plaintiff went into default on the mortgage. The mortgage was foreclosed by advertisement by Defendant MERS on June 24, 2008. The certificate of sale was registered with the Hennepin County Recorder's office as Document Number 9151228. Foreclosure by advertisement is a proceeding *in pais*.
10. On information and belief, Defendant MERS received compensation for the foreclosure of the mortgage, including but not limited to a share of the proceeds.

COUNT I: DECLARATORY JUDGMENT

11. Plaintiffs restate paragraphs 1-10 here and, by restating, reaffirm them.
12. This Court has the authority to issue a declaratory judgment with regards to questions arising under statutes, contracts, ordinances, etc. pursuant to Minnesota Statute § 555.01, *et seq.*
13. The Plaintiff has a question regarding the applicability of the mortgage, and Minn. Stat. § 507.413. Minn. Stat. § 507.413 permits MERS to operate as a registration system, act as a nominee in the State of Minnesota, and to authorize foreclosures. Minn. Stat. § 507.413 does not grant MERS authority to foreclose or employ attorneys to foreclose.
14. Furthermore any agreement between either Decision One Mortgage Company, LLC and Defendant or between Plaintiff and Decision One Mortgage Company, LLC allowing foreclosure of the property by Defendant MERS are champertous and against Minnesota public policy.
15. When it initiated the foreclosure action against the Plaintiff, Defendant MERS did not have an interest in the mortgage being foreclosed, and any agreement allowing it to foreclose the mortgage was void as a matter of public policy. Accordingly, it lacked standing under Minnesota Statute §§ 580.02, *et seq.*

COUNT II: WRONGFUL FORECLOSURE

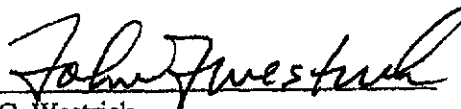
16. The Plaintiff restates the allegations in paragraphs 1-15 here and, by restating, reaffirms them.
17. Minn. Stat. § 580.20 authorizes mortgagors such as the Plaintiff to bring an action for wrongful foreclosure or set aside the foreclosure.
18. For the reasons stated in the above declaratory judgment action, the Plaintiffs assert that the foreclosure of their property is void and of no effect.

WHEREFORE, the Plaintiffs seek an order from this Court as follows:

1. Granting declaratory judgment stating:
 - a. That any agreement between Defendant MERS and the current owner of the mortgage in question here; authorizing MERS to foreclose the mortgage, is void against public policy as champertous;
 - b. That MERS lacks standing to act in the foreclosure process but may merely authorize a foreclosure to occur; and
 - c. That any action by MERS with respect to the mortgage referenced above is void *ab initio* and no valid foreclosure has occurred.
2. Stating that the foreclosure by advertisement of the real estate described above is void and of no effect.

Dated: 15 Dec, 2008

WESTRICK & MCDOWALL-NIX, PLLP

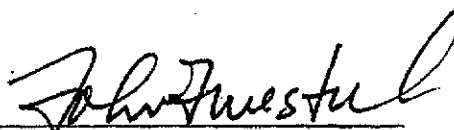


John G. Westrick
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450 Degree of Honor Building
325 Cedar Street
St. Paul, MN 55101
(651) 292 -9603
Attorneys for Plaintiff

ACKNOWLEDGMENT REQUIRED BY MINN.STAT. § 549.211

The undersigned hereby acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded to opposing party or parties pursuant to Minn.Stat. § 549.211.

Dated: 15 Dec, 2008



John G. Westrick

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

WELLS FARGO BANK, NATIONAL	:	APPEAL NOS. C-070889
ASSOCIATION, ON BEHALF OF THE		C-070890
CERTIFICATE HOLDERS OF	:	TRIAL NO. A-0700643
MORGAN STANLEY ABS CAPITAL, IN		
TRUST 2005-WMC5 MORTGAGE	:	<i>OPINION.</i>
PASS-THROUGH CERTIFICATES,		
SERIES 2005 C/O COUNTRYWIDE	:	
HOME LOANS,		
	:	
Plaintiff-Appellant,		
	:	
and		
	:	
THE LAW OFFICES OF JOHN D.		
CLUNK CO., LPA,	:	
	:	
Appellant,		
	:	
vs.		
	:	
GLORIA BYRD		
	:	
and		
	:	
ELLSWORTH BYRD,		
	:	
Defendants-Appellees,		
	:	
and		
	:	
AUDITOR OF HAMILTON COUNTY		
	:	
and		
	:	
TREASURER OF HAMILTON		
COUNTY,	:	
	:	
Defendants.		

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part as Modified in Part and Reversed in Part

Date of Judgment Entry on Appeal: September 12, 2008

The Law Offices of John D. Clunk, Jason A. Whitacre, Michael L. Wiery, and Laura C. Landor, for Appellants,

Legal Aid Society of Southwest Ohio, Noel M. Morgan, and Elizabeth Tull, for Appellees.

We have removed this case from the accelerated calendar.

DINKELACKER, Judge.

{¶1} Since plaintiff-appellant Wells Fargo was not a real party in interest at the time it filed suit in this foreclosure action, the trial court properly dismissed the case. But the dismissal should have been without prejudice. Further, the trial court lacked authority to sanction counsel by requiring counsel to adhere to additional pleading requirements in future cases.

Putting the Cart Before the House

{¶2} On January 23, 2007, Wells Fargo filed a foreclosure action against defendants-appellees Gloria and Ellsworth Byrd. Wells Fargo claimed that it was “the holder and owner of a certain promissory note” and “the owner and holder of a certain mortgage deed, securing the payment of said note.” But both the note and the mortgage identified in the complaint named WMC Mortgage Corp. as the lender.

{¶3} Wells Fargo filed a motion seeking summary judgment. Attached to the motion for summary judgment was an “Assignment of Note and Mortgage” that acknowledged that WMC had sold, assigned, transferred, and set over the mortgage deed and promissory note to Wells Fargo. The assignment was dated March 2, 2007—over a month after the complaint had been filed.

{¶4} The case was referred to a magistrate who entered summary judgment for Wells Fargo. The trial court sustained the Byrds’ subsequent objections to that decision. The trial court then took two additional steps not requested by the Byrds: (1) it dismissed the case with prejudice, and (2) it ordered the law firm representing Wells Fargo, appellant Law Offices of John D. Clunk Co., LPA, to submit “proof that their client is, in fact, a real party in interest at the time of the filing” of any future foreclosure complaints that the firm might file.

{¶5} Wells Fargo requested findings of fact and conclusions of law. In response, the trial court issued an entry titled “Findings of Fact, Conclusions of Law, and Amended Judgment Entry” in which it said that the dismissal was “not a dismissal on the merits.” The trial court explained the Clunk firm’s future obligations to the court by stating that “at the time of the filing of a foreclosure action, [the Clunk firm must] file documentation showing that their client is the real party in interest as of the date of the filing of the lawsuit.”

{¶6} Both Wells Fargo and the Clunk firm have appealed. Wells Fargo argues that (1) the trial court erred in dismissing the case with prejudice on jurisdictional grounds; (2) the trial court erred in dismissing the case without notice; (3) the trial court should have adopted the decision of the magistrate granting its motion for summary judgment; (4) the trial court misapplied Civ.R. 17; (5) the trial court lacked authority to convert its original dismissal with prejudice to a dismissal without prejudice; and (6) the trial court improperly used its subsequent entry to modify the substance of its prior decision. The Clunk firm argues, in two assignments of error, that the trial court improperly sanctioned it.

The Dismissal Issue: To Dismiss or Not

{¶7} There is little case-law guidance on the issue whether Wells Fargo, which was clearly not a real party in interest when the suit was filed, could later have cured the defect by producing an after-acquired interest in the litigation. We hold that the defect could not have been cured in that way.

{¶8} Civ.R. 17(A) says that “[e]very action shall be prosecuted in the name of the real party in interest. * * * No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has

been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.”

{¶9} A party lacks standing to invoke the jurisdiction of a court unless he has, in an individual or a representative capacity, some real interest in the subject matter of the action.¹ The Eleventh Appellate District has held that “Civ.R. 17 is not applicable when the plaintiff is not the proper party to bring the case and, thus, does not have standing to do so. A person lacking any right or interest to protect may not invoke the jurisdiction of a court.”² The court also noted that “Civ.R. 17(A) was not applicable unless the plaintiff had standing to invoke the jurisdiction of the court in the first place, either in an individual or representative capacity, with some real interest in the subject matter. Civ.R. 17 only applies if the action is commenced by one who is sui juris or the proper party to bring the action.”³

{¶10} The Twelfth Appellate District agrees. In 2007, the court held that “[t]he ‘real party in interest is generally considered to be the person who can discharge the claim on which the suit is brought * * * [or] is the party who, by substantive law, possesses the right to be enforced.’ ”⁴ Unless a party has some real interest in the subject matter of the action, that party will lack standing to invoke the jurisdiction of the court. The court concluded that, “[i]n a breach of contract claim,

¹ *State ex rel. Dallman v. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 298 N.E.2d 515,

² *Northland Ins. Co. v. Illuminating Co.*, 11th Dist. Nos. 2002-A-0058 and 2002-A-0066, 2004-Ohio-1529, at ¶17 (internal quotations and citations omitted).

³ *Travelers Indemn. Co. v. R. L. Smith Co.* (Apr. 13, 2001), 11th Dist. No. 2000-L-014.

⁴ *Discover Bank v. Brockmeier*, 12th Dist. No. CA2006-07-078, 2007-Ohio-1552, at ¶7, citing *In re Highland Holiday Subdivision* (1971), 27 Ohio App.2d 237, 240, 273 N.E.2d 903.

only a party to the contract or an intended third-party beneficiary of the contract may bring an action on a contract in Ohio.”⁵

{¶11} Such a rule would seem to be in the spirit of Civ.R. 17, which only allows a plaintiff to cure a real-party-in-interest problem by (1) showing that the real party in interest has ratified the commencement of the action, or (2) joining or substituting the real party in interest.⁶

{¶12} Since WMC was not joined or substituted in this case, the only argument Wells Fargo could have made was that WMC had ratified its actions. Ratification is a way that an agent can bind a principal.⁷ But ratification will not apply when the actor is not acting as the agent of the principal.⁸

{¶13} In this case, Wells Fargo admitted to the trial court that it was not the real party in interest when the suit was filed. Wells Fargo filed suit on its own behalf and acquired the mortgage from WMC later. It was not acting as WMC’s agent. There was no evidence that WMC had “ratified” the commencement of the action—only that it had sold the mortgage to Wells Fargo. None of the documents indicated that WMC even knew about this case. For ratification to occur, the ratifying party must know what actions it is ratifying.⁹ While Wells Fargo repeatedly argued that ratification had occurred, it seemed to be confused as to which party had to ratify. Below, it argued that “Plaintiff, being a real party in interest, did ratify the

⁵ Id., citing *Grant Thornton v. Windsor House, Inc.* (1991), 57 Ohio St.3d 158, 161, 566 N.E.2d 1220.

⁶ Civ.R. 17(A).

⁷ See *Morr v. Crouch* (1969), 19 Ohio St.2d 24, 249 N.E.2d 780.

⁸ See *Alban Equipment Co. v. MPH Crane, Inc.* (June 2, 1989), 4th Dist. No. 424 (“Ratification does not result from the affirmance of a transaction with a third person unless the one acting purported to be acting for the ratifier.”), quoting 1 Restatement of the Law 2d, Agency (1958), 217, Section 85; see, also, *Williams v. Stearns* (1898), 59 Ohio St. 28.

⁹ See *Lithograph Bldg. Co. v. Watt* (1917), 96 Ohio St. 74, 85, 117 N.E. 25 (before the principal can be held to ratify the unauthorized acts of his agent, it must appear that he had knowledge of all material facts).

commencement of this action * * * .” But Civ.R. 17 makes clear that it was WMC, not Wells Fargo, that had to ratify the commencement of the action.

{¶14} Wells Fargo has found one decision that holds to the contrary. In *Bank of New York v. Stuart*,¹⁰ the Ninth Appellate District held that a bank that had filed a foreclosure action could cure a real-party-in-interest problem by subsequently obtaining the mortgage.¹¹ But the only authority for this holding was two federal cases from 1966 and 1979. And the two cases are distinguishable. In the first case, the plaintiff was the one who had done all the work that was the subject of the litigation, and the “real party in interest” was “a mere straw man throughout.”¹² In the second case, the plaintiff was already a party in his own right and was assigned the claims of another plaintiff.¹³

{¶15} We find instructive a more recent federal case addressing the application of the rule (but in the context of a statute of limitations).¹⁴ In that case, the party suing did not have a claim at the time suit was filed, but received an assignment of the claim after it had commenced the litigation. The court held that “Rule 17(a) does not apply to a situation where a party with no cause of action files a lawsuit to toll the statute of limitations and later obtains a cause of action through assignment.”¹⁵ In that case, the court concluded that “B & K’s assignment to the Wulffs of its claim against CMA cannot ratify the Wulffs’ commencement of suit on a claim which theretofore did not exist.”¹⁶

¹⁰ 9th Dist. No. 06CA008953, 2007-Ohio-1483.

¹¹ *Id.* at ¶12.

¹² *Campus Sweater and Sportswear Co. v. M. B. Kahn Constr. Co.* (D.S.C.1979), 515 F.Supp. 64, 84-85

¹³ *Dubuque Stone Prods. Co. v. Fred L. Gray Co.* (C.A.8, 1966), 356 F.2d 718, 723-724.

¹⁴ *United States v. CMA, Inc.* (C.A.9, 1989), 890 F.2d 1070, 1074.

¹⁵ *Id.*

¹⁶ *Id.* See, also, *Feist v. Consolidated Freightways Corp.* (E.D.Pa.1999), 100 F.Supp.2d 273, 274 (plaintiff’s filing of suit in his own name after his Chapter 7 case was closed, and after having failed to list injury claim as estate asset, was not result of honest mistake and thus warranted dismissal rather than substitution of bankruptcy trustee as real party in interest); *Automated Information Processing, Inc. v. Genesys Solutions Group, Inc.* (D.N.Y.1995), 164 F.R.D. 1, 3 (The

{¶16} In light of the foregoing authority, we must respectfully disagree with the Ninth Appellate District. We hold that, in a foreclosure action, a bank that was not the mortgagee when suit was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage. Wells Fargo’s third, fourth, and sixth assignments of error are overruled.

The Dismissal Issue: Sua Sponte Dismissal

{¶17} Having determined that the trial court could have properly dismissed the case for lack of standing when the suit was filed, we must next determine if dismissal was proper when, as here, it was not requested by the Byrds. Sua sponte dismissals ordinarily prejudice appellants, as they deny any opportunity to respond to the alleged insufficiencies.¹⁷ But here, both parties argued the real-party-in-interest issue, and the facts were clear in the record. Wells Fargo did not have standing at the time the complaint was filed. The record unequivocally indicates that WMC did not assign its rights under the mortgage to Wells Fargo until March 2, 2007. Under these circumstances, there was nothing left for the trial court to address. We overrule Wells Fargo’s second assignment of error.

The Dismissal Issue: With or Without Prejudice

{¶18} A dismissal of a claim other than on the merits should be a dismissal without prejudice.¹⁸ We agree with Wells Fargo that a dismissal that is premised on jurisdiction “operates as a failure otherwise than on the merits” and should be a

rule permitting substitution of real party in interest when necessary to avoid injustice did not permit substitution of newly formed corporation as plaintiff after it was discovered that corporation that originally brought action had been dissolved.).

¹⁷ *MBNA Am. Bank, N.A. v. Canfora*, 9th Dist. No. 23588, 2007-Ohio-4137, at ¶ 14.

¹⁸ See *Chadwick v. Barba Lou, Inc.* (1982), 69 Ohio St.2d 222, 226, 431 N.E.2d 660.

dismissal without prejudice.¹⁹ The dismissal of an action because one of the parties is not a real party in interest or does not have standing is not a dismissal on the merits.²⁰

{¶19} But the trial court dismissed this case with prejudice. While it attempted to correct this with a subsequent entry, a trial court is without jurisdiction to modify an order dismissing a cause with prejudice to one without prejudice, unless the requirements of Civ.R. 60 are met.²¹

{¶20} In this case, the requirements of Civ.R. 60 were not met, and, therefore, the trial court could not have changed its final decision from a dismissal with prejudice to one without prejudice. We sustain Wells Fargo's first and fifth assignments of error. But since the case should have been dismissed without prejudice, we modify the decision of the trial court from a dismissal with prejudice to a dismissal without prejudice. Wells Fargo, now a proper party to initiate a foreclosure action against the Byrds, is free to do so.

The Sanction Issue

{¶21} The Clunk firm, in two related assignments of error, claims that the trial court improperly ordered it to "file documentation showing that their client is the real party in interest as of the date of the filing of the lawsuit" in all future foreclosure actions filed by the firm. We agree.

{¶22} There is no authority for what the trial court did. The Byrds did not seek sanctions, there was no notice of the possibility that this firm would be sanctioned, and there was no hearing on sanctions. The trial court did not limit the

¹⁹ See Civ.R. 41(B)(4).

²⁰ See *State ex rel. Coles v. Granville*, 116 Ohio St.3d 231, 2007-Ohio-6057, 877 N.E.2d 968, at ¶51.

²¹ *Young v. Ohio Adult Parole Auth.* (Apr. 27, 2001), 2nd Dist. No. 2001 CA 3.

sanction to this case, but sanctioned the firm for all of its future conduct. In essence, the trial court crafted an additional pleading requirement that would apply only to one law firm. Apart from the vexatious-litigator statute, there is no authority that would allow a trial court to impose additional pleading requirements on an individual—let alone a law firm—in future litigation. The Byrds have cited no such authority and, in fact, have not addressed these assignments of error in their brief. We sustain the law firm’s two assignments of error.

Conclusion

{¶23} The trial court properly dismissed the foreclosure complaint filed by Wells Fargo in this case because, at the time the complaint was filed, it did not own the mortgage that was the basis for the suit. Acquiring the mortgage by assignment after the suit was commenced could not have cured the jurisdictional defect arising from the fact that, at the time the lawsuit was filed, Wells Fargo had no claims to make against the Byrds. But while the dismissal was proper, it should have been, and is now ordered to be, without prejudice.

{¶24} The trial court lacked authority to order the Clunk firm, upon the filing of future foreclosure complaints, to present additional documentation demonstrating that its clients are the real parties in interest.

{¶25} The judgment of the trial court is affirmed in part as modified with respect to dismissal of the action, and reversed in part with respect to the imposition of sanctions.

Judgment accordingly.

HILDEBRANDT, P.J., and CUNNINGHAM, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this opinion.

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2004-CA-5879

DIVISION: CV-F

AMERICAN RESIDENTIAL EQUITIES,
XXXI, LLC,

Plaintiff,

vs.

JOHN C. KOHN, JR.; DEMETRIA L.
KOHN, et al.,

Defendants.

AMENDED MOTION FOR SUMMARY JUDGMENT

COME NOW JOHN and DEMETRIA KOHN, by and through their undersigned counsel and pursuant to the provisions of Rule 1.510, Florida Rules of Civil Procedure, and state as follows:

1. This action is based upon a mortgage foreclosure complaint filed by Plaintiff AMERICAN RESIDENTIAL EQUITIES, XXXXI, LLC'S (ARE) predecessor in interest, MTGLQ INVESTORS, LLP (MTGLQ).
2. MTGLQ commenced this action in September, 2004, with the Notice of *Lis Pendens* recorded September 1, 2004 at Book 12019, Page 1102 of the Official Records of Duval County.
3. At the time it filed and recorded the Notice of *Lis Pendens*, MTGLQ did not own the subject Note and Mortgage. Subsequent to the filing of this action, the predecessor owner of the Note and Mortgage, First NLC Financial Services, LLC,

completed an Assignment to ARE dated December 14, 2004, and recorded at Book 12248, Page 1243 of the Official Records of Duval County.

4. The record evidence confirms neither the current Plaintiff, ARE, or its predecessor, MTGLQ, owned the subject Note and Mortgage when this action was filed. Pursuant to Rule 1.510(c), Florida Rules of Civil Procedure, Defendants identify the following answers to interrogatories, admissions, depositions and other materials as would be admissible in evidence on which Defendants rely:

(a) The Public Records of Duval County as set forth in paragraphs 2 and 3, above;

(b) The Deposition of Lisette De Padua, taken November 3, 2006, with exhibits;

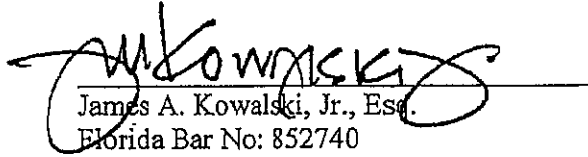
(c) The Deposition of Steven Brand, taken June 19, 2007, with exhibits.

5. As neither ARE nor MTGLQ had standing when the action was commenced, there are no genuine issues of material fact and the KOHNS are entitled to summary final judgment as a matter of law. Jeff-Ray v. Jacobson, 566 So.2d 885 (Fla. 4th DCA 1990); W.M. Specialty Mortgage, LLC v. Salomon, 874 So.2d 680 (Fla. 4th DCA 2004).

WHEREFORE, Defendants / Counter-Plaintiffs respectfully request this Honorable Court enter Final Summary Judgment in their favor, for the reasons set forth above.

DATED, this 3 day of July, at Jacksonville, Florida.

LAW OFFICES OF
JAMES A. KOWALSKI, JR., PL



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-and-

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Fax: (904) 727-5179

Co-Counsel for Defendants / Counter-Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to

Clay Holtsinger, Esq.
1505 North Florida Ave.
P.O. Box 800
Tampa, FL 33601-0800

Lashunda Larniece Alexander
382 S.W. Lightwood Place
Fort White, FL 32038

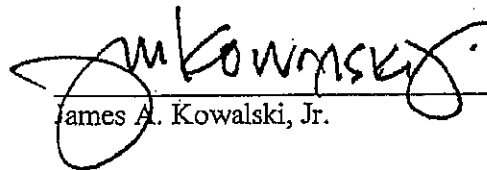
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Fred Franklin, Esq.
1301 Riverplace Blvd., Suite 1500
Jacksonville, FL 32207

Elizabeth Wellborne, Esq.
1701 Hillsboro Blvd., Suite 307
Deerfield Beach, FL 33442

by U.S. Mail this 3 day of July, 2007.


James A. Kowalski, Jr.

15 Fla. L. Weekly Supp. 453a

Mortgages -- Foreclosure -- Complaint dismissed for failure to state cause of action -- Only document presented by plaintiff in support of claim that it owns and holds note and mortgage was mortgage payable to another party -- Purported assignment filed in response to motion to dismiss, which did not contain name of assignee or recording information for mortgage, only clouds ownership issue

DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE FOR GOLDMAN SACHS-FFMLT-2004-FF3, Plaintiff, v. SCOTT POPE, et al., Defendants. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2007-CA-008285-XXXX-MA, Division G. March 7, 2008. Lance M. Day, Judge. Counsel: Mark Olivera and Mark S. Kessler, for Plaintiff. Lynn Drysdale, for Mr. Pope.

*ORDER GRANTING DEFENDANT, SCOTT POPE'S
MOTION TO DISMISS COMPLAINT*

This case came on to be heard on February 11, 2008 on Defendant, Scott Pope's Motion to Dismiss Complaint. The parties were represented by counsel and the Court having heard argument of counsel and reviewed the file and having been sufficiently advised in the premises, finds:

1. On or about September 18, 2007, Plaintiff, Deutsche Bank National Trust Company, Trustee for Goldman Sachs-FFMLT-2004-FF3 filed the above-styled case claiming a default in the mortgage and mortgage note attached to the Complaint.
2. The only documents attached to the Complaint were a letter from the Law Offices of Marshall C. Watson and a Mortgage payable to First Franklin Financial Corporation along with a prepayment rider, a planned unit development rider and an adjustable rate rider. No note was attached to the Complaint.
3. In response to the Defendant's motion to dismiss, Plaintiff filed a Notice of Filing. Attached to the Notice was a Corporate Assignment of Mortgage dated March 4, 2004. This assignment was executed by Steve Barnett, a Vice President of Mortgage Operations of First Franklin Financial Corporation on March 4, 2004. This document does not reflect the recording information for the mortgage purportedly assigned and does not provide the name of an assignee. A copy of this assignment is attached hereto. [Editor's note: attachment omitted]
4. Rule 1.210(a) of the Florida Rules of Civil Procedure provides, in pertinent part:

Every action may be prosecuted in the name of the real party in interest, but a personal representative, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly

authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought. . .

5. The only documents presented by the Plaintiff in support of its allegations that it owns and holds the subject note and mortgage do not support this allegation. Plaintiff has failed to provide a copy of the note; and the mortgage attached to the Complaint is payable to a different party. The assignment filed by Plaintiff only acts to cloud the ownership picture further. When exhibits are inconsistent with allegations of material fact as to who the real party in interest is, such allegations cancel each other out. *Fladell v. Palm Beach County Canvassing Board*, 772 So.2d 1240 (Fla. 2000); *Greenwald v. Triple D Properties, Inc.*, 424 So. 2d 185, 187 (Fla. 4th DCA 1983); *Costa Bella Development Corp. v. Costa Development Corp.*, 441 So. 2d 1114 (Fla. 3rd DCA 1983).

6. No Florida case holds that a separate entity can maintain suit on a note payable to another entity unless the requirements of Rule 1.210(a) of the Florida Rules of Civil Procedure and applicable Florida law are met. *Corcoran v. Brody*, 347 So. 2d 689 (Fla. 4th DCA 1977).

7. Because of the inconsistencies apparent in the documents filed by Plaintiff, this Court said not address the standing issue at this time.

Based upon the foregoing, it is ORDERED and ADJUDGED

A. Defendant's Motion to Dismiss Plaintiff's Complaint is granted for failure to state a cause of action.

B. Plaintiff shall have thirty (30) days from the date of this order to file an amended complaint.

C. Defendant shall have thirty (30) days from the date of service of the Plaintiff's amended complaint to file responsive pleadings.

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL COURT IN AND
FOR ST. JOHNS COUNTY, FLORIDA

CASE NO: 2007-114-CA

DIVISION: 55

DEUTSCHE BANK NATIONAL
TRUST COMPANY, AS TRUSTEE OF
AMERIQUEST MORTGAGE
SECURITIES, INC., ASSET-BACKED
PASS THROUGH CERTIFICATES, SERIES
2004-R7, UNDER THE POOLING AND
SERVICING AGREEMENT DATED AS
OF JULY 1, 2004, WITHOUT RECOURSE,

Plaintiff,

CLASS REPRESENTATION

vs.

JAMES W. YOUNG, et. al.,

Defendants (s) / Counter-Plaintiff,

vs.

DEUTSCHE BANK NATIONAL
TRUST COMPANY, AS TRUSTEE OF
AMERIQUEST MORTGAGE
SECURITIES, INC., ASSET-BACKED
PASS THROUGH CERTIFICATES, SERIES
2004-R7, UNDER THE POOLING AND
SERVICING AGREEMENT DATED AS
OF JULY 1, 2004; WITHOUT RECOURSE, and
CITI RESIDENTIAL LENDING, INC.,

Counter-Defendants.

COUNTERCLAIM AND THIRD PARTY DEFENDANT COMPLAINT
FOR INJUNCTIVE RELIEF

COMES NOW the Defendant, JAMES W. YOUNG, individually and on behalf of others similarly situated, and sues DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF AMERIQUEST MORTGAGE SECURITIES, INC., ASSET-BACKED PASS THROUGH CERTIFICATES, SERIES 2004-R7, UNDER THE POOLING AND SERVICING AGREEMENT DATED AS OF JULY 1, 2004, WITHOUT RECOURSE, (hereinafter "DEUTSCHE BANK" or Counter-Defendant) and Third Party Defendant CITI RESIDENTIAL LENDING, INC. (hereinafter "CITI") and alleges:

1. This is an action for injunctive relief within the equity jurisdiction of this court, and for reasonable attorneys' fees and costs.

2. Counter-Defendant DEUTSCHE BANK filed the instant Foreclosure Action and associated Notice of Lis Pendens seeking to foreclose the mortgage on Defendant's property.

3. At all times material hereto, CITI, formerly known as AMC Mortgage Services, a non-party to the foreclosure, acted as DEUTSCHE BANK'S agent and as the servicer for the loan. CITI was the entity responsible for directing the filing of the foreclosure complaint and thereafter maintaining the foreclosure action.

4. Defendant seeks declaratory and injunctive relief from this court, on behalf of himself and all those individuals similarly situated, pursuant to the Florida Deceptive and Unfair Trade Practices Act (hereinafter "FDUTPA"), Sections 501.201, *et seq.*, Florida Statutes.

5. At all times material hereto, CITI, acting as the servicer for various and numerous foreclosure lawsuits brought in the circuit courts throughout Florida, developed

and employed a series of practices which result in fraudulent documents being submitted before the circuit courts of this state. CITI acted as the agent and servicer for DEUTSCHE BANK in the instant case, as set forth above.

6. Specifically, CITI has developed a department or section, known as the "foreclosure support mail documents team" which is responsible for receiving various documents, including draft Affidavits in Support of Summary Judgment and Assignments of Mortgages. The foreclosure support mail documents team, which includes notaries public and witnesses to various documents, then forwards Affidavits in Support of Summary Judgment and Assignments of Mortgage to various individuals known as "Vice-Presidents."

The Vice Presidents then sign the Affidavits and Assignments without reviewing same and without examining any books, records, or other documents referred to in the Affidavits and Assignments, after which the documents are returned to the foreclosure support mail documents team, where witness signatures, notary signatures and notary stamps are affixed while the witnesses and notaries are outside the presence of the Vice-Presidents.

In the instant case, the Vice-President responsible for completing Affidavits in Support of Summary Judgment filed with this Court and Assignments of Mortgage recorded with the Clerk of Court has testified the following averments in her Affidavit were untrue:

"I am familiar with the books of account and have examined all books, records, and documents kept by AMC MORTGAGE SERVICES concerning the transactions alleged in the Complaint."

“Furthermore, Affiant has personal knowledge of the matters contained in the books, records, and documents kept by AMC MORTGAGE SERVICES.”

“I have personal knowledge of the facts contained in this affidavit. Specifically, I have personal knowledge of the facts regarding the sums of money which are due and owing [Plaintiff].”

The Affiant testified she reviewed no documents prior to signing her Affidavits or Assignments in the instant matter.

7. At all times material herein, CITI, as the servicer / agent of DEUTSCHE BANK and as servicer / agent for other entities:

(a) Filed Assignments of Mortgages without said Assignments being witnessed and notarized in compliance with Section 689.01, Florida Statutes;

(b) Filed false Affidavits in support of Motions for Summary Judgment before the various circuit courts of this state, with CITI employees completing said Affidavits on behalf of DEUTSCHE BANK and others without reviewing same, without having personal knowledge of the contents thereof, and affirming same while outside the presence of the notary, in violation of Florida and California’s notarial statutes.

Class Representation Allegations (Pleading Requirements: Rule 1.220(c))

8. This class action counterclaim is properly brought as a class action pursuant to Rule 1.220(b), Florida Rules of Civil Procedure.

9. Individual adjudications of the claims of each member of the class would substantially impair or impede the ability of other members of the class to protect their respective interests.

9. Alternatively questions of law or fact common to the claims predominate over any question of law or fact affecting individual members of the class.

10. Class of all the class members' representation is superior to other available methods for the fair and efficient adjudication of the plaintiff's claim.

Common Questions of Law or Fact (Rule 1.220(c)(2)(B))

11. There are common questions of law and fact at issue pleaded in these court cases that relate to and affect the rights of each member of each class.

12. The relief sought by Plaintiffs against CITI individually and as agent of DEUTSCHE BANK is common to the entire class.

13. CITI, individually and as agent of DEUTSCHE BANK has engaged and continues to engage in a pattern and practice of fraud upon the court by routinely and commonly submitting Assignments and Affidavits to the various circuit courts of Florida that violate the Florida and California notarial statutes and are completed by witnesses having no personal knowledge of the facts therein.

Typicality (Rule 1.220(c)(2)(C))

14. The class members each were or are consumers being sued by entities utilizing CITI as a mortgage loan servicer, including DEUTSCHE BANK, wherein CITI acted as the agent of the alleged owner and holder of the Note and Mortgage in pursuing foreclosure in state court.

15. Defendant YOUNG is a consumer who was sued for foreclosure in an action where CITI acts as the mortgage servicer on behalf of DEUTSCHE BANK.

Numerosity / Adequacy (Rule 1.220(c)(2)(D))

16. The exact number of class members, as herein identified and described, is not known, but is expected to exceed one thousand members. The names and addresses of the class members can be initially determined by a search of records maintained by CITI and/or DEUTSCHE BANK.

17. The consumer class is so numerous that joining of individual members is impracticable.

18. Defendant YOUNG, as named counter-plaintiff, is the representative party for the class, and is able to, and will fairly and adequately protect the interests of the class.

19. There is no conflict between counter-plaintiff YOUNG and the other members of the putative class with respect to this action or claims for relief herein.

20. The attorneys for plaintiffs are experienced and capable in class action litigating in the field of consumer law and are experienced in litigating actions involving violations of FDUTPA. Counsels for Plaintiffs have represented consumers in federal and state court and in other consumer class action litigation. Undersigned counsel are actively conducting this litigation and are responsible for plaintiffs' case herein.

The Class (Rule 1.220(c)(2)(D)(ii))

21. Each class plaintiff is a "consumer," as defined by Section 559.55(2), Florida Statutes, and is or was sued for foreclosure in an action wherein CITI acted as the servicer for the owner and holder of the Note and Mortgage.

22. CITI continues to submit false testimony and fraudulent documents to the circuit courts of this state on behalf of DEUTSCHE BANK and others in pursuit of mortgage foreclosure actions.

23. CITI engaged in the following illegal acts relating to its collection of consumer debts in Florida State court: CITI submitted false and fraudulent documents to the circuit courts of this state, as set forth above.

24. The foregoing actions and conduct by CITI, individually and on behalf of DEUTSCHE BANK, constitute an unfair and deceptive trade practice upon plaintiff YOUNG and the class members he represents.

25. Plaintiff and the class members he represents are "consumers" as defined by Section 501.203(7), Florida Statutes.

26. The acts of CITI in filing false and fraudulent documents in support of efforts to foreclose on residential property constitute acts of "trade and commerce" as defined by Section 501.203(8), Florida Statutes.

27. CITI engaged in the unfair and deceptive practices complained of herein in a continuing pattern during the four-year period prior to the filing of this counterclaims.

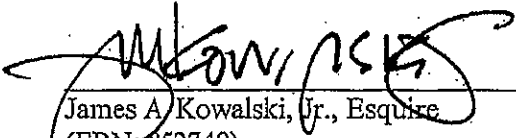
WHEREFORE, YOUNG, on behalf of himself and all those similarly situated class members, demands injunctive relief, costs, and reasonable attorneys' fees, and seeks specific relief from the Court as follows:

(a) Court approval for this action to proceed as a class claim, pursuant Rule 1.220(d), Florida Rules of Civil Procedure, with YOUNG as the class representative and the undersigned as class counsel;

- (b) Define the Class as set forth herein, above;
- (c) Retain jurisdiction to determine such subclasses as may be appropriate;
- (d) Court approval for a class notice to be sent to class members to be paid for by CITI;
- (e) Order reasonable and adequate notice be given to prospective class members following certification; and
- (f) Injunctive relief pursuant to Section 501.211(1) Florida Statutes, enjoining CITI from further violations, including requiring CITI to certify in writing, in every State Court action that it files in Florida seeking to foreclose on a residential loan, that CITI employees acting as Affiants on Affidavits in Support of Summary Judgment and as Vice Presidents for the purposes of signing Assignments actually reviewed the documents referenced in the Affidavit or Assignment, or modify its practices such that witnesses testify truthfully with regard to review of documents;
- (g) An order declaring that CITI'S practice of submitting false and fraudulent documents is deceptive and unfair and violates Florida law;
- (h) An order granting and awarding the class all other equitable relief as the court deems fair and reasonable, including an award of attorneys' fees and costs pursuant to the Florida Deceptive and Unfair Trade Practices Act.

DATED, at Jacksonville, Duval County, Florida, this 3 day of July
2008.

**LAW OFFICES OF
JAMES A. KOWALSKI, JR., PL**


James A. Kowalski, Jr., Esquire
(FBN: 852740)
12627 San Jose Blvd., Suite 203
Jacksonville, Florida 32223
Telephone: (904) 268-1146
Facsimile: (904) 268-1342
Attorneys for Defendant

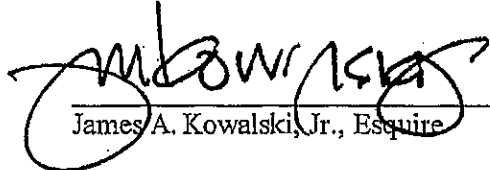
- and -

Craig E. Rothburd, Esquire
(FBN: 0049182)
CRAIG E. ROTHBURD, P.A.
808 West De Leon Street
Tampa, FL 33606
Telephone: (813) 251-8800
Facsimile: (813) 251-5042

Co-Counsel for YOUNG

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by First Class Mail to Celia Chapman Falzone, Esquire, 50 North Laura Street, Suite 2500, Jacksonville, Florida 32202; and to William P. Heller, Esquire, Las Olas Centre II, Suite 1600, Fort Lauderdale, Florida 33301, this 3 day of July, 2008.


James A. Kowalski, Jr., Esquire

IN THE CIRCUIT COURT OF THE XX^h JUDICIAL CIRCUIT
IN AND FOR XXXXXXXXXX COUNTY, STATE

NAME OF PLAINTIFF (COULD STATE
SOMETHING LIKE "AS INDENTURE
TRUSTEE FOR THE REGISTERED HOLDERS
OF IMH ASSETS CORP. COLLATERALIZED
ASSET-BACKED BONDS, SERIES 2005-3,"

Case No. XXXXXXXXXXXX
Bar No. XXXXXXXXXX

Plaintiff,

v.

NAME OF BORROWER,

BORROWER'S
MOTION FOR SANCTIONS
PURSUANT TO FLA.STAT. sec. 57.105

Defendants.

_____/_____

[EDITOR'S NOTE. THIS IS GENERALLY NOT FILED WITH THE CLERK BUT IS SENT TO OPPOSING COUNSEL. IT IS FIELD WITH THE CLERK AND NOTICED FOR HEARING WHEN BORROWER/DEFENDANT HAS WON THE MOTION TO DISMISS OR OTHERWISE PREVAILED. IT APPLIES NOT JUST TO THE GENERAL CLAIM BUT ANY PART OF ANY ALLEGATION THAT THE PLAINTIFF KNEW OR SHOULD HAVE KNOWN WAS NOT TRUE, THEREBY INVOKING THE REQUIREMENTS OF DUE DILIGENCE ON THE CLIENT, THE LAWYER WHO SIGNS THE PLEADING, AND THE LAW FIRM THAT THE LAWYER FOR PLAINTIFF WORKS FOR]

NAME OF PLAINTIFF, hereinafter Borrower, through undersigned counsel and pursuant to Fla.Stat. sec. 57.105, decisional law thereunder, and the record facts below, moves this Court to enter an Order of Sanctions against Plaintiff, and as grounds for same states:

On or about DATE, Plaintiff, through its agent and attorney NAME OF ATTORNEY WHO SIGNED PLEADING, Esq. of the Law Offices of NAME

OF LAW FIRM. (hereafter “agent and attorneys”), caused this civil action for foreclosure and to “enforce loan documents” to be filed in this Court. For purposes of this Motion, the referenced allegations of the Complaint are incorporated herein by reference.

In paragraph “X.” of Count X of the Complaint, Plaintiff, through its agent and attorneys, affirmatively represent to the Court that “The Plaintiff owns and holds the Note and Mortgage”.

In paragraph “X” of Count X, Plaintiff, through its agent and attorneys, affirmatively represent to the Court that the mortgage was “subsequently” assigned to the Plaintiff “by virtue of an assignment to be recorded” (that being some time in the future).

In paragraph “XX” of Count XX, Plaintiff, through its agent and attorneys, affirmatively represent to the Court that “The Plaintiff is not presently in possession of the Note and Mortgage” and “the Plaintiff cannot reasonably obtain possession of the Note and Mortgage because THERE whereabouts cannot be determined” (original emphasis).

In paragraph “XX” of Count XX, Plaintiff, through its agent and attorney affirmatively represent to the Court that “The Plaintiff will agree to the entry of a Final Judgment of Foreclosure wherein it will be required to indemnify and hold harmless the Defendant(s), from any loss they [sic] may occur by reason of a claim by another person to enforce the lost Note and Mortgage.” [EDITOR’S NOTE: VERY UNUSUAL PROVISION THUS FAR. MIGHT NOT APPLY TO YOUR CASE]

Plaintiff, through its agent and attorneys, thus inconsistently but affirmatively allege, in Count X, that “Plaintiff owns and holds the Note and Mortgage” when in fact the admissions in Count XX demonstrate, by the allegations of paragraphs “XX” and “XX” of the Complaint, that the Plaintiff **DOES NOT** and **CANNOT** legally establish possession or ownership of the Note or the Mortgage and that same is/are, at all times material, in the possession of an unknown party or parties.

A copy of the actual Note is not even attached to the Complaint, with the only reference to a Note being in paragraph “XX.” of the Complaint which alleges that a “ledger of loan” is attached (which in and of itself constitutes a violation of Fla.R.Civ.P. 1.130(a)).

By virtue of the admissions of the Plaintiff in paragraphs “XX”, “XX”, and “XX” of the Complaint, the Plaintiff has admitted its actual knowledge that it never, at any time material, had possession of either the mortgage or the note as same were sold, assigned, or transferred to one or more third parties. Such sale, assignment, or transfer was part of a single-transaction securitization process which resulted in the subject mortgage and/or note being sold, assigned, or transferred as parceled obligations and becoming part of one or more tranches within a special investment vehicle.

Plaintiff cannot establish that the subject note or mortgage is owned or controlled by the Plaintiff “indenture trustee” for unnamed holders of a series of asset-backed bonds (a copy of which are not even attached to the Complaint).

As a direct and proximate result of the transaction referred to in paragraph “8” above, the Plaintiff does not and cannot establish legal standing to even institute a foreclosure action, which legal capacity to institute this action *ab initio* and the alleged authority of the Plaintiff to institute this action in a representative capacity is properly raised by DEFENDANTS pursuant to Fla.R.Civ.P. 1.120(a).

Based on the foregoing, the allegation by the Plaintiff in paragraph “X” of the Complaint constitutes matters which are completely devoid of factual or legal support and are vitiated by the Plaintiff’s own admissions in Count II of the Complaint, and are thus “frivolous” within the meaning of Fla.Stat. sec. 57.105.

As the primary and threshold issue of legal standing to institute this action cannot be satisfied by the Plaintiff (which was known to Plaintiff and its agent and attorneys at the time that this action was instituted), this action is a patently frivolous claim within the meaning of Fla.Stat. sec 57.105, and in fact the filing and prosecution thereof constitutes a fraud upon this Court.

In view of the foregoing, both Plaintiff and its agent and attorneys knew or should have known, at the time they filed the Complaint in this action, that the foreclosure claim was legally nonexistent, and that any suit to foreclose on the alleged note and mortgage would be a legally impossibility prohibited by law, and further that the filing of any such action could not be in good faith or based on representations of the client.

As such, both Plaintiff and its agent and attorneys knew or should have known, at the time of the filing of the Complaint in this action, that the claim for foreclosure was both not supported by the material facts necessary to establish the claim, and also that the claim would not and could not be supported by the application of then-existing law to the material facts.

On DATE OF FRIVOLOUS CLAIM DEMAND LETTER, Defendants, through his undersigned counsel, provided Plaintiff's counsel with a formal written demand, which was both faxed and mailed, to immediately and forthwith dismiss the instant action with prejudice, provide clear title to the subject property, refund all monies paid by Defendants/Borrowers in connection with the alleged "loan" the subject of this action, and to pay all attorneys' fees and costs associated with the demand.

The time period provided by the statutory "safe-harbor" provision of Fla.Stat. sec. 57.105(4) permitting Plaintiff and its agent and attorneys to comply with the demands per the attached DATE OF FRIVOLOUS CLAIM DEMAND LETTER letter has passed with no compliance by either Plaintiff or its agent/attorneys.

As such and pursuant to Fla.Stat. sec. 57.105(4), Defendants file the instant Motion and demands the assessment of attorneys' fees against both the Plaintiff and its above-referenced counsel and the above-referenced Law Offices for having to defend the instant action; for the preparation and filing of this Motion; prejudgment interest as provided by

Fla.Stat. sec. 57.105(1), and for all other attorneys' fees and other relief provided by applicable law, and Fla.Stat. sec. 57.105 and decisional law thereunder.

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that a true and correct copy of the foregoing has been forwarded, via fax and mail, to NAME OF LAWYER WHO SIGNED THE PLEADING., Law Offices of NAME OF LAW FIRM, ADDRESS, on this XX rd day of MONTH, 2008.

**IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA**

**CASE NUMBER: 16-2005-CA-007522-XXXX-MA
Div. CV-F**

**FEDERAL NATIONAL MORTGAGE ASSOCIATION,
Plaintiff,**

vs.

**DONNA LOU BRIDGES,
Defendant.**

DEFENDANT’S MOTION TO DISMISS/ABATE ACTION FOR FAILURE TO SUBSTITUTE PLAINTIFF

COMES NOW, the Defendant Donna Lou Bridges, and moves the court to dismiss/abate this action on account of the plaintiff’s failure to substitute the Federal Housing Finance Agency as the real party in interest and in support, states:

1. On September 6, 2008, the Federal Housing Finance Agency (FHFA) was appointed Conservator for the Federal National Mortgage Association (Fannie Mae).
2. Subsequent to the appointment of Conservator, the FHFA assumed operation of Fannie Mae in accordance with the Federal Housing Finance Regulatory Reform Act of 2008, codified at 12 U.S.C. § 4617.
3. Pursuant to 12 U.S.C. § 4617, the FHFA “shall, as conservator or receiver, and by operation of law, immediately succeed to--
 - (i) all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity; and
 - (ii) title to the books, records, and assets of any other legal custodian of such regulated entity.” 12 USCS § 4617(b)(2)(A)
4. The Plaintiff, Federal National Mortgage Association, no longer has the authority to pursue this litigation.
5. The Plaintiff, Federal National Mortgage Association, is not the real party in interest and has no standing to pursue this action.
6. The present owner of the subject mortgage and holder of the subject promissory note is the entity with standing and the real party in interest and is an indispensable party to this action and must be substituted in order for relief to be accorded in this action pursuant to Florida law and the Florida Rules of Civil Procedure.

7. Despite notice to counsel for plaintiff and despite the fact that the FHFA was appointed Conservator 6 months ago, the Plaintiff has failed to substitute the real party in interest as the plaintiff in this foreclosure.

8. Under the control of the FHFA, a moratorium on Fannie Mae foreclosures, reportedly to be extended until May 31, 2009, has been ordered. New policy promulgated in response to the Making Home Affordable Program requires the mortgage loan servicer to verify that the borrower is ineligible for a Home Affordable modification and that all foreclosure prevention alternatives have been exhausted.

9. A copy of the Appointment of Conservator downloaded from the Office of Federal Housing Enterprise Oversight website (www.ofheo.gov) and the foreclosure moratorium announcement downloaded from the Fannie Mae website (www.fanniemae.com) concerning the plaintiff and documenting the above information are attached and incorporated herein.

Wherefore, pursuant to Rule 1.260 of the Florida Rules of Civil Procedure, the Defendant requests the court grant this motion and dismiss or abate this action for failure to substitute plaintiff and for all other relief to which defendant proves herself entitled.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this document has been mailed to Jeff Gano, Florida Default Law Group, P.O. Box 25018, Tampa, Florida 33622-5018 by U.S mail and by fax to 813 251 1541 on

JACKSONVILLE AREA LEGAL AID, INC.

April Carrie Charney, Esquire
Fla. Bar No.: 310425
126 West Adams Street
Jacksonville, Florida 32202
Telephone: (904) 356-8371, ext. 373
Facsimile: (904)224-7050
april.charney@jaxlegalaid.org
Attorney for Separate Defendant

NOTICE

TO COUNSEL AND PARTIES IN INTEREST

RELIEF FROM STAY MOTIONS

Revised 1/9/08

Beginning January 22, 2008 (and until further notice), Judge Bufford will require that a moving party on a relief from stay motion based on a promissory note bring to court for inspection the original promissory note. (Note: do not file the note with the court – bring it to the hearing). Production of the note will be excused only under circumstances such as those provided in Evidence Code Rule 1004 or Cal. Comm. Code § 3301 (as shown by competent evidence).

This requirement will apply because developments in the secondary market for mortgages and other security interests cause the court to lack confidence that presenting a copy of a promissory note is sufficient to show that movant has a right to enforce the note or that it qualifies as a real party in interest (as required by Rules 7017 and 9014). Pursuant to Cal. Comm. Code § 3412, an obligation to pay is only owing to a “person entitled to enforce an instrument” (as defined in § 3301). Thus, the court cannot admit copies of promissory notes in these circumstances under Evidence Code § 1003.

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA.

CASE NO.: CA-2007-0114
DIVISION: 55

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE OF AMERIQUEST MORTGAGE
SECURITIES, INC., ASSET-BACKED PASS
THROUGH CERTIFICATES, SERIES 2004-R7,
UNDER THE POOLING AND SERVICING
AGREEMENT DATED AS OF JULY 1, 2004,
WITHOUT RECOURSE,

Plaintiff,
vs.

JAMES W. YOUNG, et al,

Defendant(s).

STATE OF FLORIDA)
COUNTY OF ST. JOHNS)

DEPOSITION OF TAMARA PRICE

DATE TAKEN: April 21, 2008

TIME: 1:15 p.m. until 2:38 P.M.

PLACE: Offices of Coastal Court Reporters, LLC

3940 Lewis Speedway, Suite 2102

St. Augustine, Florida 32084

REPORTED BY: Carman L. Gaetanos, FPR

Court Reporter & Notary Public

COASTAL COURT REPORTERS, LLC
3940 LEWIS SPEEDWAY, SUITE 2102
ST. AUGUSTINE, FLORIDA 32084
OFFICE: (904) 824-3525; FAX: (904) 824-2525
COASTAL COURT REPORTERS, LLC

APPEARANCES:

WILLIAM P. HELLER, ESQUIRE

Akerman Senterfitt

Las Olas Centre II, Suite 1600

350 East Las Olas Boulevard

Fort Lauderdale, Florida 33301-2229

-and-

CELIA CHAPMAN FALZONE, ESQUIRE

Akerman Senterfitt

50 North Laura Street, Suite 250

Jacksonville, Florida 32202-2646

appearing on behalf of the Plaintiff.

JAMES A. KOWALSKI, JR., ESQUIRE

Law Offices of James A. Kowalski, Jr., PL

12627 San Jose Boulevard, Suite 203

Jacksonville, Florida 32223

appearing on behalf of the Defendant.

ALSO PRESENT:

Catherine Pacheco

COASTAL COURT REPORTERS, LLC

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COASTAL COURT REPORTERS, LLC

TAMARA PRICE,

having been duly sworn as a witness, testified as
follows:

DIRECT EXAMINATION

BY MR. KOWALSKI:

- Q Ma'am, can you state your full name, please.
- A Tamara Price.
- Q And your work address?
- A I don't know it by heart.
- Q Is it in a particular building?
- A It's in Rancho Cucamonga, California.
- Q Spell Cucamonga for us.
- A C-U-C-A-M-O-N-G-A.
- Q Is there a particular name for the complex?
- A (Shakes head negatively.)
- Q No?
- A No.
- Q Have you ever had your deposition taken
before?
- A No.
- Q There are some basic ground rules. A
deposition is a little bit of an artificial
conversation. Normally when you're talking a co-worker
or friend, there's a good bit of interruption. They
will know where you're going, you will know where

COASTAL COURT REPORTERS, LLC

1 they're going, they will finish a question, you will
2 start an answer, that type of thing. In a deposition we
3 kind of build in a little bit of a pause, so I will do
4 my best not to question over your answers, and I will
5 ask that you do your best not to interrupt the question
6 and let me get the questions, because the end of the
7 question may change where you thought I was going.

8 Fair enough?

9 A Fair enough.

10 Q It is not meant to be an endurance contest.
11 If you need to take a break for any reason, just let us
12 know. If you need to meet with your lawyers, just let
13 us know, and that's perfectly appropriate.

14 Your answers have to be out loud. You can say
15 uh-uh or uh-huh, but I'm going to ask you if it's a yes
16 or no because they end up being typed the same or
17 similarly when they come out in the transcript. So if
18 it's a yes or no, as opposed to saying uh-huh, I am
19 going to say, Is that a yes, and then I am sure pretty
20 quickly you will get into the hang of it and you will
21 answer that way.

22 Fair enough?

23 A Fair.

24 Q All right. Who do you work for?

25 A Citi Residential Lending, Inc.

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1 always been known as Citi Residential Lending, Inc.?

2 A No.

3 Q Okay. What name changes have occurred during
4 the ten and a half years, if you know?

5 A It's not -- the name change is what I'm having
6 trouble with, the way you're terming it.

7 Q What are you having trouble with?

8 A Well, AMC, as employees we became Citi
9 Residential, how that happened in the -- because we're
10 not formally known as AMC.

11 Q Right, I'm not asking --

12 A We're just Citi. So that's why I say I'm ten
13 and a half years because it all became one time zone.

14 Q Okay. And I'm not asking with the corporate
15 mergers or which entity was known as this as far as the
16 purchase and sales of the corporations are concerned.
17 I'm just asking what you know in terms of the name on
18 the building you walk into and the name on the paycheck
19 you get every couple of weeks.

20 A It's Citi Residential Lending, Inc.

21 Q And how long has it been Citi Residential
22 Lending, Inc.?

23 A Since October 1st, 2007.

24 Q And then before that, you were getting your
25 paychecks from AMC Mortgage Services?

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1 Q One other thing. If you don't understand any
2 part of my question or all of the question, let me know
3 and I will reask it, okay?

4 A Okay.

5 Q How long have you worked for Citi Residential
6 Lending, Inc.?

7 A Ten and a half years.

8 Q Now, were they known as something else not too
9 long ago, or have you worked for an entity known as Citi
10 Residential that whole time?

11 A No. I worked for AMC Mortgage Services before
12 Citi.

13 Q When did AMC Mortgage Services become Citi
14 Residential Lending, Inc.?

15 MR. HELLER: Object to the form.

16 BY MR. KOWALSKI:

17 Q Did Citi Residential -- I'm sorry. Did AMC
18 Mortgages Services become Citi Residential Lending,
19 Inc.?

20 A No.

21 Q Okay. Walk me through your employment then.
22 How long have you worked for the entity that is known as
23 Citi Residential Lending, Inc.?

24 A Ten and a half years.

25 Q And during that ten and half year period, it's

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1 A Right.

2 Q How long had your paychecks read, AMC Mortgage
3 Services, prior to October 1 of 2007?

4 A I believe it was January, 2006.

5 Q And then what was the name of the entity you
6 worked for before January 2006?

7 A Ameriquist Mortgage Company.

8 Q And was it Ameriquist Mortgage Company for the
9 remaining roughly eight years prior to that?

10 A Yes.

11 Q What is your job title for Citi at this
12 present time?

13 A Assistant foreclosure manager.

14 Q And tell me what that means. What are your
15 job duties?

16 A To assist the foreclosure manager in the
17 day-to-day running of the foreclosure department and
18 foreclosure support department.

19 Q Who is the foreclosure manager you assist?

20 A Rose Lara.

21 Q Spell that last name for us.

22 A L-A-R-A.

23 Q It's pronounced Lara?

24 A Yes.

25 Q And how long has Rose Lara been the

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1 foreclosure manager?
 2 A I don't know.
 3 Q More than two years?
 4 A Yes.
 5 Q Have you worked for Ms. Lara for more than two
 6 years? In other words have you held --
 7 A I am thinking since January -- I am trying to
 8 think back. I've held this position a year, so.
 9 Q The position --
 10 A January '07 is when I became assistant
 11 manager.
 12 Q So January of 2007, you became assistant
 13 foreclosure manager and you reported to Ms. Lara?
 14 A Yes.
 15 Q What did you do before January 2007 for
 16 Citi/AMC?
 17 A Foreclosure supervisor.
 18 Q And foreclosure supervisor is below assistant
 19 foreclosure manager?
 20 A Yes.
 21 Q Now, when you say foreclosure manager with
 22 regard to Ms. Lara's title in particular, is she
 23 managing foreclosures on behalf of AMC/Citi for the
 24 entire country, or do you have a particular area or zone
 25 that you focus on?

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1 stickers?
 2 (Defendant's Exhibit 1 marked for identification.)
 3 BY MR. KOWALSKI:
 4 Q Now, let me show you a Notice of Taking Depo
 5 that I've marked as Exhibit 1 and ask you if you've seen
 6 that before today?
 7 A No.
 8 Q Have you received -- have you seen any notices
 9 of taking your deposition before today?
 10 A No.
 11 Q The notice asks -- let me step back a second.
 12 Were you aware that we had been working on taking your
 13 deposition since roughly October of 2007?
 14 MR. HELLER: Object to the form.
 15 THE WITNESS: Yes.
 16 BY MR. KOWALSKI:
 17 Q All right. The notice asks that you bring
 18 some documents. And I'm referring specifically to page
 19 2 of Exhibit 1, paragraphs 1 and 2 there. Do you see
 20 that? One, two and three, I'm sorry.
 21 A Yes.
 22 Q It asks that you bring documents reviewed by
 23 you in preparation for testifying here today. It asks
 24 that you bring documents reviewed by you in preparation
 25 for completion of an affidavit that I'm going to show

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1 MR. HELLER: Object to the form.
 2 BY MR. KOWALSKI:
 3 Q Go ahead.
 4 A For the country.
 5 Q How many foreclosure managers are there?
 6 A One.
 7 Q Okay. And I may have interrupted you, but
 8 tell me what your job duties are as assistant
 9 foreclosure manager.
 10 A Assist in the foreclosure -- with the
 11 foreclosure manager in the daily functions of the
 12 foreclosure department and the foreclosure support
 13 department.
 14 Q What does foreclosure support mean?
 15 A It means that we're producing the necessary
 16 functions to keep the foreclosure specialists and the
 17 foreclosure attorneys to proceed with the foreclosure
 18 process.
 19 Q Where does the foreclosure specialist fit in
 20 between foreclosure manager, assistant foreclosure
 21 manager, foreclosure supervisor and specialist? Does it
 22 go one, two, three, four just as I've described?
 23 A Yes.
 24 Q Okay. Let me show you --
 25 MR. KOWALSKI: Do you have some exhibit

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1 you in just a minute, and it asks that you bring with
 2 you a copy of documents produced in response to request
 3 for production. Do you see that?
 4 A Yes.
 5 Q Have you brought documents with you today?
 6 A No.
 7 Q Can you tell me why?
 8 A My counsel has them.
 9 MR. HELLER: Right.
 10 MR. KOWALSKI: Okay. That's fair.
 11 MR. HELLER: Let me just -- this is Bill
 12 Heller speaking. Let me step in. I think time is
 13 appropriate. Mr. Kowalski, it's your deposition.
 14 I'm not going to speak on the record, but we did
 15 bring documents responsive to the duces tecums.
 16 And also as we corresponded about briefly, having
 17 substituted as counsel, we've gone back to tried to
 18 identify all the documents responsive to both the
 19 previously served production request and the
 20 deposition notices, and I believe the previously
 21 produced documents are also incorporated within
 22 some or both of the deposition notices.
 23 So on the table here I have a production for
 24 you, documents as kept in the ordinary course that
 25 are Bates labeled Citi, and that is one of these

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1 red wells that is the Citi supplemental production.
2 I also have for your convenience another set
3 in the white folders, one is for me and one is for you.
4 My top copy said there was four, of the documents
5 produced by previous counsel, the Echevarria firm, so
6 for use at deposition today, we have both the
7 supplemental production and the original production.

8 MR. KOWALSKI: Do you have documents specific
9 to paragraph two of Exhibit 1, documents reviewed
10 by Ms. Price in preparation for completion of her
11 affidavit?

12 MR. HELLER: We have the records of Citi and
13 AMC kept in the ordinary course. You will have to
14 ask the witness those questions.

15 MR. KOWALSKI: Okay.

16 BY MR. KOWALSKI:

17 Q Let me show you what we will mark as Exhibit
18 2, which is a copy of a Motion for Summary Judgment that
19 was filed March 23, 2007 with a number of documents
20 attached. And for purposes of the exhibit, I just kept
21 everything attached as it was filed.

22 The first document that's attached to Exhibit
23 2 is a document entitled Affidavit as to Amounts Due and
24 Owing. Do you see that?

25 A Yes.

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1 (Defendant's Exhibit 2 marked for identification.)

2 BY MR. KOWALSKI:

3 Q Okay. Let's go through your affidavit which
4 is an exhibit to Exhibit 2, and it identifies you as the
5 vice-president of AMC Mortgage Services. Do you see
6 that at paragraph 2?

7 A Yes.

8 Q Are you the vice-president of AMC Mortgage
9 Services as of February 26, 2007?

10 A For signing authority, yes.

11 Q Okay. Explain that to me. How are you the
12 vice-president of AMC for purposes of completing an
13 affidavit such as the one we have in front of us?

14 A AMC provided certain people with certain
15 signing authority, or to conduct businesses, process
16 documents for AMC.

17 Q And when you say provided certain authority,
18 were you appointed a vice-president of the company for
19 purposes of signing affidavits?

20 A Yes.

21 Q And what's the name of the document that
22 appointed you vice-president of AMC Mortgage Services
23 for purposes of the affidavit that's attached to Exhibit
24 2?

25 A I get confused in the way it's worded. I

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1 believe it's Certificate of Secretary.

2 Q Certificate of Secretary?

3 A Yes.

4 Q Have you seen the document that appointed you
5 vice-president?

6 A Yes.

7 Q Did you bring it here today?

8 A It's with counsel.

9 MR. KOWALSKI: Is it in the stack?

10 MR. HELLER: Yes.

11 MR. KOWALSKI: Okay.

12 BY MR. KOWALSKI:

13 Q Okay. If you look at paragraph 2, sentence 3,
14 it says, I am familiar with the books of account and
15 have examined all books, records, and documents kept by
16 AMC Mortgage Services concerning the transactions
17 alleged in the complaint.

18 Do you see that sentence?

19 A Yes.

20 Q What books, records and documents did you
21 review in preparation for completing this affidavit?

22 What did you physically look at?

23 A I did not review any books, records or
24 documents to complete, to sign the affidavit.

25 Q What did you look at?

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1 A I looked at the document itself and signed it.

2 Q Okay. Do you know what an affidavit is?

3 A Yes.

4 Q What is it?

5 A It's an affidavit to say what is in the
6 document is true.

7 Q Okay.

8 A That's my understanding.

9 Q And that's fair.

10 Do you understand it to be testimony before a
11 court?

12 A Yes.

13 Q And do you understand it to be testimony under
14 oath?

15 A Yes.

16 Q So when you say, I am familiar with the books
17 of account and have examined all books, records and
18 documents kept by AMC Mortgage Services concerning the
19 transactions alleged in the complaint, why did you not
20 examine all books, records and documents kept by AMC
21 Mortgage Services?

22 A I didn't examine them because we have
23 processes in place to where certain departments and
24 business units prepare functions or sections of the
25 document itself. And I am familiar with those processes

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1 and with the checks and balances of what they do to come
2 up with the figures, and so I am familiar with the
3 process.

4 Q Did you examine anything at all other than the
5 affidavit attached as part of Exhibit 2 in order to
6 complete the affidavit?

7 A No.

8 Q The affidavit sentence where you say, I am
9 familiar with the books of account and have examined all
10 books, records and documents, does that say anything
11 like that, what you just said in terms of, I'm familiar
12 with the processes and I'm familiar with how this
13 affidavit is created, but I didn't read anything in
14 support of this affidavit?

15 MR. HELLER: Object to the form.

16 THE WITNESS: Can you rephrase that. I don't
17 understand your question.

18 BY MR. KOWALSKI:

19 Q Okay. You indicated a moment ago that you're
20 familiar with the processes of how an affidavit such as
21 this is created, correct?

22 A Correct.

23 Q But that you did not review anything at all in
24 preparation for completing the affidavit, correct?

25 A Correct.

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1 of documents.

2 Q It is presented to you as a packet for
3 signature?

4 A Yes.

5 Q Does that happen several times a day typically
6 or just once a day?

7 A Several times a day.

8 Q And in that packet would be an affidavit such
9 as this, it may be other documents relating to this case
10 or it may be other affidavits or other documents
11 relating to other cases?

12 A Yes.

13 MR. HELLER: Object to the form.

14 Excuse me, you've got to give me an
15 opportunity to lodge an objection.

16 BY MR. KOWALSKI:

17 Q Is that correct?

18 MR. HELLER: Object to the form.

19 THE WITNESS: Yes.

20 BY MR. KOWALSKI:

21 Q Where was Ms. Tolliver, the notary, when you
22 signed this affidavit? Where was he physically in
23 relation to you?

24 A He is in the same office.

25 Q In the same office room like we are all

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1 Q Okay. So why doesn't the affidavit say, I am
2 familiar with the processes, but I didn't read anything?
3 Why doesn't it say that as opposed to what it says,
4 which is that you read a number of documents?

5 MR. HELLER: Object to the form.

6 THE WITNESS: I don't know why it doesn't say
7 that.

8 BY MR. KOWALSKI:

9 Q Who prepared the affidavit as to amounts due
10 and owing that you signed on February 26, 2007?

11 A Our foreclosure counsel.

12 Q And how was it transmitted to you?

13 A Through e-mail.

14 Q As an e-mail attachment?

15 A Yes.

16 Q And then you printed it out, correct?

17 A Correct.

18 Q And then what happens?

19 A Well, I want to phrase, I don't personally
20 print it out. I have a department that does that, and
21 then it gets processed and my -- it gets presented to me
22 in a package to sign.

23 Q Okay. With other affidavits or with other
24 documents relating to this case?

25 A It could be other documents, different types

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1 sitting here today, or in a different part of a
2 building?

3 A Same floor.

4 Q Is he physically close to you? In other
5 words, did Mr. Tolliver see you sign the affidavit in
6 front of you?

7 A No.

8 Q He was in a different part of the same floor?

9 A Yes.

10 Q And do you know whether Mr. Tolliver's notary
11 stamp was affixed the same day you signed the affidavit?
12 Do you know one way or the other?

13 A No, I do not.

14 Q Is the affidavit and the other documents that
15 are presented to you for signing several times a day,
16 are those routed through a notary department after they
17 leave your desk?

18 MR. HELLER: Object to the form.

19 THE WITNESS: No.

20 BY MR. KOWALSKI:

21 Q How would an affidavit such as this physically
22 get from your desk where it's presented to you to sign
23 to Mr. Tolliver's desk where it's presented to him to
24 notarize?

25 MR. HELLER: Object to the form.

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1 THE WITNESS: The department that does the
2 documents picks up the signed documents and then
3 presents them to the notaries.

4 BY MR. KOWALSKI:

5 Q What's the name of the document -- I'm sorry.
6 What's the name of the department that is handling these
7 document movements that you've describe?

8 A Foreclosure support mail documents team.

9 Q And I take it the "mail" is M-A-I-L?

10 A Yes.

11 Q So the foreclosure -- does the foreclosure
12 support mail documents team present the set of documents
13 to you in the first place?

14 A Yes.

15 Q And then they move it to wherever it goes
16 next, and if it's a notary that's next, they move it to
17 the notary department?

18 A Yes.

19 Q In other words, there are some documents that
20 I'm assuming you sign that don't require notarization,
21 and the mail documents team would move it to wherever
22 their next step would be?

23 A Yes.

24 Q The next sentence in paragraph 2 of your
25 affidavit signed or notarized February 26, 2007 states,

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1 they provide is true and accurate, and I rely on
2 that process.

3 BY MR. KOWALSKI:

4 Q I got that part. But how do you know -- let
5 me just give you an example. The Note, you agree that
6 this loan has a Note and a Mortgage, correct?

7 A Yes.

8 Q So there's a Note document somewhere and a
9 Mortgage document somewhere, correct?

10 A Yes.

11 Q Okay. You didn't read the Note or the
12 Mortgage in order to complete sentence 3 of paragraph 2,
13 right, we've already covered that?

14 A Yes.

15 Q Okay. So how do you know that the Note and
16 Mortgage is kept in the regular course of business as
17 AMC's servicer of the loan transaction? How do you know
18 that to be true?

19 A It's part of the way the company was -- it's
20 how they service the loans, the familiarity with the way
21 the departments service their parts of the loan. So how
22 do I know, I'm confused with the question. It seems
23 like it's the same question that you've asked me before,
24 that's why I'm giving the same answer as before.

25 Q Do you know from personal knowledge that the

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1 All of these books, records and documents are kept by
2 AMC Mortgage Services in the regular course of its
3 business as servicer of the loan transaction and are
4 made at or near the time by, and from information
5 transmitted by, persons with personal knowledge of the
6 facts such as your affiant. Do you see that sentence?

7 I am reading the fourth sentence of paragraph
8 2 of the Affidavit as to Amounts Due and Owning.

9 A Yes.

10 Q Do you see that now?

11 A Yes.

12 Q Okay. Tell me how you know that sentence to
13 be true, in other words, how do you know that books,
14 records and documents are kept in the regular course of
15 business and are made at or near the time by, and from
16 information transmitted by, persons with personal
17 knowledge of the facts such as your affiant, when you
18 did not review any books, records and documents, and had
19 no personal knowledge of the books, records and
20 documents themselves?

21 MR. HELLER: Object to the form.

22 THE WITNESS: There are different departments
23 that support the need for figures to the
24 foreclosure department. They have processes in
25 place that are checks and balances to ensure what

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1 books, records and documents relating to this loan are
2 kept by AMC in the regular course of its business as
3 servicer of the loan transaction, and are made at or
4 near the time by, and from information transmitted by
5 persons with personal knowledge of the facts such as
6 your affiant. Do you know that to be true from personal
7 knowledge?

8 A Yes.

9 Q Let's take for example the loan transaction
10 history, where comments and discussions with the
11 borrower are recorded. Okay.

12 A Okay.

13 Q How do you know from personal knowledge that
14 the conversations with the borrower are made, are
15 recorded at or near the time of the conversation? How
16 do you know that personally?

17 A I know that because that's the policy and
18 procedure that is in place.

19 Q I understand there's a policy and procedure,
20 but how do you know that what's done is made at or near
21 the time by, and from information transmitted by persons
22 with personal knowledge?

23 MR. HELLER: Object to the form.

24 BY MR. KOWALSKI:

25 Q In other words, how do you know policy is

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1 being followed?
2 MR. HELLER: Object to the form.
3 THE WITNESS: I don't know.
4 BY MR. KOWALSKI:
5 Q Okay. I'm going to skip the next line. The
6 line after that, again on paragraph 2 of Exhibit 2, The
7 books, records and documents which affiant has examined
8 are managed by employees or agents whose duty it is to
9 keep the books accurately and completely.
10 We've already covered the fact that you did
11 not examine any books, records or documents, correct?
12 MR. HELLER: Object to the form.
13 BY MR. KOWALSKI:
14 Q Is that true or not?
15 A In relating to signing this document.
16 Q That's correct.
17 A Yes.
18 Q Okay. And in the last sentence of paragraph 3
19 says, Furthermore, affiant has personal knowledge of the
20 matters contained in the books, records and documents
21 kept by AMC Mortgage Services. Do you see that?
22 A Yes.
23 Q Is that sentence a true statement?
24 A Yes, to the point of according to the
25 procedures that I know these departments do and that I

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1 rely on their doing their procedures.
2 Q I'm not asking that question. I'm asking you
3 to read the last sentence of paragraph 2 of Exhibit 2
4 and tell me if the last sentence of paragraph 2 of
5 Exhibit 2 is a true statement?
6 MR. HELLER: Object to the form.
7 THE WITNESS: Yes, it is true.
8 BY MR. KOWALSKI:
9 Q Okay. It is true that you have personal
10 knowledge of the matters contained in the books, records
11 and documents kept by AMC Mortgage Services?
12 A Yes.
13 Q Okay. Then what are the matters contained in
14 the book, records and documents kept by AMC Mortgage
15 Services with regards to this loan to which you just
16 testified you had personal knowledge?
17 A The system in which this loan is serviced.
18 Q Not what the sentence says, ma'am. The
19 sentence says that you have personal knowledge of the
20 matters contained in the books, records and documents
21 kept by AMC Mortgage. And I'm asking you what the
22 books, records and documents kept by AMC Mortgage
23 Services with regard to this loan to which you have
24 personal knowledge?

MR. HELLER: Object to the form.

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1 THE WITNESS: They're the systems that we
2 document and service by which we service the loan,
3 which are the books and records.
4 BY MR. KOWALSKI:
5 Q Okay.
6 A I know those systems.
7 Q You know the systems. I'm not asking you if
8 you know the systems. You've made it clear that you
9 know and rely on the systems. This sentence that we're
10 focusing on says, Furthermore, affiant has personal
11 knowledge of the matters contained in the books, records
12 and documents kept by AMC Mortgage Services. I am not
13 asking you about the system. I am asking the extent of
14 your personal knowledge that you've testified to under
15 oath, and under oath in this affidavit of the matters
16 contained in the books, records and documents kept by
17 AMC Mortgage Services with regard to this loan
18 pertaining to James Young?

MR. HELLER: Object to the form.

THE WITNESS: I'm sorry. I'm thinking I'm
answering your question because I don't understand
your question then.

BY MR. KOWALSKI:

Q Do you have personal knowledge of any
documents relating to Mr. Young?

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1 MR. HELLER: Object to the form.
2 THE WITNESS: Yes.
3 BY MR. KOWALSKI:
4 Q Have you ever read the Note in this case?
5 A No.
6 Q Have you ever read the Mortgage in this case?
7 A No.
8 Q Have you ever read any documents that pertain
9 to hazard insurance in this case?
10 A No.
11 Q Have you ever read the loan transaction
12 history?
13 A No.
14 Q Have you ever read the payment history?
15 A No.
16 Q Have you ever read any documents of any kind
17 in this case?
18 A The affidavit.
19 Q Other than the affidavit that you signed
20 without reviewing anything else?
21 A No.
22 Q Okay. Paragraph 3 states that you have
23 personal knowledge of the facts regarding the sums of
24 money which are due and owing to Deutsche Bank National
25 Trust Company, as trustee. Do you see that?

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1 A Yes.
2 Q Okay. And again, you did not review any
3 documents relating to sums of money, correct?
4 A Correct.
5 Q Do you know if Deutsche Bank is owed any
6 money?
7 A Yes.
8 Q How do you know that?
9 A By what the document says.
10 Q I know that, but you signed the document
11 saying that you had done some things. Are you saying
12 you know it to be true simply because it was presented
13 to you?
14 A No.
15 Q Well, how do you know that Deutsche Bank
16 National Bank, as trustee is owed thing?
17 A Because of the processes in place with the
18 department that generate all the foreclosure figures for
19 us, and I rely on their integrity and their accuracy.
20 Q Do you know if Deutsche Bank owned the Note as
21 of the day this was notarized February, 27, 2007?
22 A Yes.
23 Q How do you know that?
24 A By the transaction of the sale of the loan to
25 them.

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1 Q And what did you review personally with regard
2 to the transaction of the sale of the loan to Deutsche
3 Bank National Trust Company, as trustee?
4 A A screen on our system that shows us the date
5 that it happened.
6 Q Which is populated by somebody else, correct?
7 MR. HELLER: Object to the form.
8 BY MR. KOWALSKI:
9 Q The screen is --
10 A I --
11 Q Well, let me step back a second. Do you know
12 who provided the information on the screen on your
13 system?
14 A No.
15 Q Do you have any idea how the information on
16 the screen on your system is created?
17 A No.
18 Q Do you know who created the information on the
19 screen on your system relating to the date that Deutsche
20 Bank, as trustee bought the loan?
21 A No.
22 Q Do you know whether the information on the
23 screen on your system was created close to the time that
24 Deutsche Bank, as trustee bought the loan?
25 A That's what I've been told.

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1 Q By who?
2 A By investor operations.
3 Q Who is investor operations?
4 A They are the department that processes the
5 reporting to the investors.
6 Q Do you know if they populated the screen on
7 your computer that told you the date that Deutsche Bank,
8 as trustee, bought the loan?
9 A I do not know that.
10 Q Well, how do you know that investor operations
11 talked to the people who wrote the data on your computer
12 screen?
13 MR. HELLER: Object to the form.
14 THE WITNESS: I don't know.
15 BY MR. KOWALSKI:
16 Q What's the name of the computer screen that
17 has the field containing the date of the purchase?
18 A LNTH.
19 Q Do you know what LNTH stands for?
20 A No.
21 Q Do you know if the LNTH screen is part of a
22 larger computer networked screen or set of screens?
23 MR. HELLER: Object to the form.
24 THE WITNESS: It's part of the Fidelity
25 system.

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1 BY MR. KOWALSKI:
2 Q Does Citi use or have a name for the Fidelity
3 system that it operates?
4 A Yes.
5 Q And what is the name?
6 A It's Fidelity system or MSP are the terms we
7 use in the office.
8 Q Let me show you what I will mark as Exhibit 3
9 which is a notice that we were provided by prior counsel
10 as part of a notice of filing dated September 26, 2007.
11 (Defendant's Exhibit 3 marked for identification.)
12 BY MR. KOWALSKI:
13 Q That has an Affidavit as to Amounts Due and
14 Owing attached. Do you see the affidavit that's
15 attached to Exhibit 3?
16 A Yes.
17 Q And I can go through the same questions, but
18 let me see if I can summarize and you can correct me if
19 I am wrong. This is an affidavit that is Exhibit 3 that
20 is presented to you by foreclosure counsel as an
21 attachment to an e-mail, you read the affidavit and the
22 affidavit only, you signed it as part of a stack of
23 documents that were presented to you by the FC support
24 mail documents team, and it then left your desk to be
25 sent to the notary department; is that correct?

COASTAL COURT REPORTERS, LLC

1 MR. HELLER: Object to the form.
2 BY MR. KOWALSKI:
3 Q Well, since your lawyer objected, let me take
4 you through each sentence of the affidavit again.
5 Let me ask you, was the affidavit that's
6 attached as Exhibit 3, was that affidavit presented to
7 you as an attachment to -- as part of an attachment to
8 an e-mail?
9 A I believe so.
10 Q Was it -- did you review any documents in
11 preparation for completing the affidavit that's attached
12 to Exhibit 3?
13 A No.
14 Q Was the affidavit that's attached as Exhibit 3
15 presented to you as part of a stack of documents to
16 sign?
17 A I believe so.
18 Q Did it then leave your desk to be forwarded
19 over to the notary department?
20 A Yes. I am -- it's not a department. Their
21 mail docs team has notaries within the team so it's not
22 a department per se.
23 Q Fair enough. I appreciate that.
24 Paragraph 5 of both affidavits references a
25 reasonable attorney's fee to pay to Echevarria, Codilis

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1 & Stawiariski. Do you see that?
2 A Yes.
3 Q Are you familiar with the agreement between
4 Deutsche Bank, as trustee and Echevarria, Codilis &
5 Stawiariski?
6 A No.
7 Q Do you know whether Deutsche, as trustee,
8 agreed to pay the law firm of Echevarria, Codilis &
9 Stawiariski a flat fee?
10 A No.
11 Q You don't know anything about the arrangements
12 at all?
13 A No.
14 Q Are there any manuals that you follow as
15 assistant foreclosure manual -- manager, sorry. Are
16 there manuals that you follow as assistant foreclosure
17 manager in instructing you or discussing how to complete
18 the affidavits that we've been talking about today?
19 A No.
20 Q What training did you have to prepare you to
21 complete affidavits such as the part of Exhibit 2 and
22 the part of Exhibit 3?
23 A Really no training, more of a, read the
24 document and I had questions, I would ask the attorney,
25 our foreclosure attorney.

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1 Q Well, you talked about knowing and relying
2 upon the policies of Citi, correct?
3 A Correct.
4 Q And relying upon each department to do its
5 individual job so that you could sign an affidavit such
6 as these without reading anything, correct?
7 MR. HELLER: Object to the form.
8 THE WITNESS: Correct.
9 BY MR. KOWALSKI:
10 Q Okay. Well, tell me how you learned about the
11 policies of these different departments upon which you
12 rely?
13 A Over the years part of my job at one point was
14 to do the judgment figures, and then over the years, I
15 grew with the evolvement of these different departments
16 that became specialized in doing those functions.
17 Q Maybe I misunderstood you earlier. I thought
18 you said the affidavits are presented to you by the
19 foreclosure lawyer, correct?
20 A Through e-mail, yes.
21 Q Okay. Is it your testimony that there is a
22 department of Citi/AMC that provides the information in
23 the affidavit to the foreclosure lawyer?
24 MR. HELLER: Object to the form.
25 THE WITNESS: Only the foreclosure, only the

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1 figures.
2 BY MR. KOWALSKI:
3 Q What's the name of the department that
4 provides the figures to the foreclosure lawyer?
5 A FSS, I believe it's called FSS shared services
6 at this point.
7 Q And what does FSS stand for, if you know?
8 A Financial shared services.
9 Q Okay. So the SS stands for shared services?
10 A Yes.
11 Q So financial shared services.
12 Okay. Did you at one point work for financial
13 shared services?
14 A No.
15 Q Again, I misunderstood you because I thought
16 you just told me you used to work for the department
17 that created the figures for affidavits such as what
18 we've been discussing.
19 A It is -- what it was is that I used to do them
20 myself as a specialist, and as the company and
21 department grew, then this department became financial
22 shared services, a specialized area. So I didn't
23 actually ever work for that department, but I knew the
24 procedures, how to get the figures by doing them myself
25 when I was a specialist.

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1 Q And when were you a specialist?
2 A When I first started at Ameriquest.
3 Q Roughly ten years ago?
4 A Yes.
5 Q How long were you a specialist, just roughly?
6 A Roughly a year.
7 Q Do you know whether any of the protocols
8 changed after you left whatever department it was called
9 nine years ago that later became FSS?
10 A That department wasn't formed nine years ago,
11 that's what I'm saying. It formed three years, maybe
12 two, two, three years ago.
13 Q Okay. And what are the policies and
14 procedures of FSS?
15 A That's pretty broad. I mean, I'm not sure
16 what you're saying.
17 Q Well, let me ask it another way. Are you
18 familiar with the policy and procedures of FSS?
19 A Somewhat.
20 Q And how?
21 A By the standard in which getting the figures
22 are generated and where they get them from has not
23 changed.
24 Q And where do the figures come from?
25 A The MSP Fidelity System.

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1 Q Who populates the MSP Fidelity System?
2 A I don't know that.
3 Q Well, who creates the arithmetic that goes
4 into FSS?
5 MR. HELLER: Object to the form.
6 THE WITNESS: I don't know. I don't know
7 that.
8 BY MR. KOWALSKI:
9 Q Do you know anything about it at all?
10 A Not the mechanics of it.
11 Q Do you know where the numbers come from?
12 A I would assume from the different departments
13 that generate the data.
14 Q Well, I know you would assume that, but do you
15 know that at all to be true?
16 A Yes.
17 Q How?
18 A By conversations with people that work in that
19 department.
20 Q Tell us about that.
21 MR. HELLER: Object to the form.
22 THE WITNESS: The cashiering had that they
23 posted payments, correspondence through the -- mail
24 that they posted the payments. Again, I'm assuming
25 that they put the figures in.

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1 BY MR. KOWALSKI:
2 Q Okay. So cashiering puts the figures in when
3 the payment is received, correct?
4 A Right.
5 Q Who has the decision to make as to whether a
6 payment is allocated to suspense as opposed to principal
7 and interest?
8 A I don't know.
9 Q You don't know. So who has the responsibility
10 of determining whether a loan is in arrears?
11 A I don't know that.
12 Q Do you know anything at all about how the
13 figures are created or generated or documented that then
14 gets sent to FSS?
15 A No.
16 Q And then FSS sends it to the lawyer, as far as
17 you know, correct?
18 A Yes. Not as far as I know, they send it
19 through our Lenstar system.
20 Q Lenstar.
21 A L-E-N-S-T-A-R.
22 Q Okay. So you have no idea how the figures are
23 created, but you know they are then sent by FFS through
24 Lenstar to the lawyer; is that fair?
25 A No.

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40

1 MR. HELLER: Object the form.
2 BY MR. KOWALSKI:
3 Q What's wrong with that statement?
4 A To say I don't know how they're created,
5 they're in the system and the system -- the figures are
6 there for the FSS team to take and put in a format and
7 present to the attorney.
8 Q You're not familiar with how they're created
9 in the system though; is that fair?
10 A Initially, yes.
11 Q That's correct in order words?
12 A Yes.
13 Q And then the attorney creates the affidavit
14 and the affidavit gets sent to you?
15 A Yes.
16 Q Do you know whether or not the attorney is
17 privy to the FSS system or to the cashiering system in
18 order to check the truth of the financial information?
19 MR. HELLER: Object to the form.
20 THE WITNESS: Can you ask the first part of
21 the question again, Do I know --
22 BY MR. KOWALSKI:
23 Q Do you know if the lawyer is privy to or has
24 access to either the FSS system or the cashiering system
25 in order to check the truth of the financial information

COASTAL COURT REPORTERS, LLC

1 in your affidavit?

2 MR. HELLER: Object to the form.

3 THE WITNESS: Yes.

4 BY MR. KOWALSKI:

5 Q And what is the answer?

6 A No.

7 Q Does anybody check the truth of the financial
8 information in your affidavit?

9 A I don't know.

10 MR. KOWALSKI: Am I on 5?

11 THE REPORTER: I believe 4.

12 (Defendant's Exhibit 4 marked for identification.)

13 BY MR. KOWALSKI:

14 Q Let me show you what I've marked as Exhibit 4
15 which is a letter we got from Echevarria back in April
16 of '07. And this is a document signed by you, correct?

17 A Yes.

18 Q What I'm showing you that we were provided by
19 Echevarria is entitled Assignment of Mortgage, do you
20 see that?

21 A Yes.

22 Q What day did you sign Exhibit 4, the document
23 attached to Exhibit 4?

24 A I don't recall. I don't know.

25 Q Is there any way for anybody to know? If you

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1 look at the bottom of the assignment, it says, In

2 witness whereon, Assignor has executed and delivered
3 this Instrument on blank, 2007, the bottom of this page.

4 See that?

5 A Yes.

6 Q No date, right?

7 A Yes.

8 Q And then the notary stamp by Mr. Castrejon,
9 C-A-S-T-R-E-J-O-N, says that he notarized this the 30th
10 day of blank, 2007. Do you know whether it was January
11 30th, February -- couldn't have been February 30th, so
12 we know that. We know it wasn't February, right? Do
13 you know if it was January through December except for
14 February of '07?

15 MR. HELLER: Object to the form.

16 THE WITNESS: I don't know.

17 MR. HELLER: Object to the form.

18 BY MR. KOWALSKI:

19 Q Why would you sign an assignment that doesn't
20 have a date on it?

21 A The process is for me to sign it, then the
22 notary dates it.

23 Q I got that part. Is this similar to what we
24 talked about before?

25 A No.

COASTAL COURT REPORTERS, LLC

1 Q Did you read anything at all before you signed
2 the document that is attached to Exhibit 4?

3 A Read what?

4 Q Did you read anything at all? Did you look at
5 anything? Did you review any documents? Did you look
6 at any computer screens? Did you talk to any human on
7 the planet before you signed the document that is
8 attached to Exhibit 4?

9 MR. HELLER: Object to the form.

10 THE WITNESS: I reviewed the assignment to
11 make sure that my capacity was correct, that is
12 primarily what I review when I am signing the
13 document.

14 BY MR. KOWALSKI:

15 Q Your capacity?

16 A To sign; my title.

17 Q Okay. So you review to see if it has the word
18 "vice-president"?

19 A And by the, at that time it was AMC Mortgage
20 Services, as authorized agent.

21 Q Okay. What do you look at to determine if the
22 AMC Mortgage Services, Inc. as authorized agent is
23 correct?

24 A I -- I don't understand your question.

25 Q Well, what are you checking by reading those

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1 words?

2 A That they are spelled correctly, that it says
3 authorized agent and not something else, or it's missing
4 the word authorized agent. I am checking to make sure
5 the full language is there for AMC.

6 Q Do you review anything else -- let me step
7 back.

8 Do you review anything relating to the
9 purchase of this loan before completing an assignment
10 such as what is attached to Exhibit 4?

11 A No.

12 Q Do you review the polling and servicing
13 agreement?

14 A No.

15 Q Do you know whether or not the purchase
16 occurred on January 10, 2007, which is the date on the
17 assignment?

18 A Repeat that. I didn't hear it.

19 Q Do you review -- well, do you have the ability
20 to read that back?

21 (Question read back by court reporter.)

22 THE WITNESS: No.

23 BY MR. KOWALSKI:

24 Q Who would create the Assignment of Mortgage,
25 such as what is attached to Exhibit 4, which department?

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1 A Our foreclosure counsel.
2 Q So the lawyer actually drafts the Assignment?
3 A Yes.
4 Q And then it is then sent to FC support mail
5 documents team as an attachment to an e-mail?
6 A Yes.
7 Q And then printed and given to you?
8 A Yes.
9 Q And then signed and sent back to the FC
10 support mail documents team to be notarized?
11 A Yes.
12 Q From just looking at the attachment to Exhibit
13 4, can you tell us anything at all other than it was
14 apparently not February of 2007, can you tell us
15 anything at all as to when the attachment to Exhibit 4
16 was signed?
17 MR. HELLER: Object to the form.
18 THE WITNESS: No.
19 BY MR. KOWALSKI:
20 Q Do you know whether or not the notaries in the
21 mail documents team are required to keep notary logs?
22 A Yes.
23 Q Did you review any notary logs before coming
24 here today?
25 A No.

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1 Q Let me show you what I've marked as Exhibit 5
2 which is a Corrective Assignment of Mortgage. Do you
3 see that?
4 A Yes.
5 (Defendant's Exhibit 5 marked for identification.)
6 BY MR. KOWALSKI:
7 Q Okay. Now, in this one the notary at least
8 wrote the month in. So we know that R.P. Umali, is that
9 how you pronounce that?
10 A Yes.
11 Q U-M-A-L-I, am I reading that right?
12 A Yes.
13 Q Who is R.P. Umali? Do you know if that's a
14 man or a woman?
15 A It's a woman. Her name is Rosemary.
16 Q And her middle initial is P?
17 A Yes.
18 Q Ms. Umali notarized this on May 21 of 2007
19 from what it appears?
20 A Yes.
21 Q Okay. You were not physically with Ms. Umali
22 when she notarized it?
23 A Correct.
24 Q Okay. There is a date referenced above your
25 signature. Do you see that, it says, In witness

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1 whereof, comma?
2 A Yes.
3 Q There is no date there, correct?
4 A Correct.
5 Q Do we know when you signed Exhibit 5? Is
6 there any way to know when you signed Exhibit 5?
7 A No.
8 Q Now, you referenced that you check for typos
9 in the title above your name, correct?
10 A Correct.
11 Q This says by AMC Mortgage Services as
12 authorized Agent. Do you see that?
13 A Yes.
14 Q The D is missing.
15 A Yes.
16 Q Should be authorized agent.
17 A Yes.
18 Q But that's not important enough to correct, I
19 take it?
20 MR. HELLER: Object to the form.
21 THE WITNESS: Just an oversight.
22 BY MR. KOWALSKI:
23 Q Well, I know that. But I'm just following up
24 on your testimony that you were checking for the typing
25 or the label above your name.

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1 A Right.
2 Q Okay. If it says authorized agent, that would
3 not be something that you would send back to correct?
4 MR. HELLER: Object to the form.
5 THE WITNESS: Yes, that would be something
6 that I would send back. This is an oversight. I
7 would have corrected that.
8 BY MR. KOWALSKI:
9 Q Okay. So this is something you should have
10 sent back to correct?
11 A Yes. Well, one of myself or my mail docs
12 team.
13 Q Who is Eva Gamboa, G-A-M-B-O-A?
14 A At the time she was in the mail docs
15 department as an associate.
16 Q And who is Agripa, A-G-R-I-P -- Agripina, I'm
17 sorry, Pyfer, P-Y -- let me finish spelling Agripina,
18 A-G-R-I-P-N-A, Pyfer, P-Y-F-E-R. Who is that?
19 A She's an associate in the mail docs team.
20 Q Would Ms. Gamboa and Ms. Pyfer work with Ms.
21 Umali?
22 A Yes.
23 Q So as I'm understanding it then, and correct
24 me if I'm wrong, but Ms. Gamboa and Ms. Pyfer and Ms.
25 Umali are all signing it roughly the same time?

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1 A Correct.
2 Q Which would be a different time than you?
3 A Correct.
4 Q Could be a different day, could be a different
5 week as far as you know, correct?
6 A It's usually just by a day or hours sometimes.
7 Q Okay. Are there any protocols or manuals or
8 other documents that speak to the policies and
9 procedures to be followed by the mail team?
10 A Yes.
11 Q What is the name of the manual?
12 A It is policy and procedures. It's online
13 policy and procedures for mail docs.
14 Q Okay.
15 A Foreclosure, it would be under foreclosure.
16 Foreclosure support is under the foreclosure umbrella.
17 Q So is there a general foreclosure manual that
18 includes a section for mail docs?
19 A Yes.
20 Q And is that what you're talking about?
21 A Yes.
22 Q What is the general online foreclosure manual
23 called?
24 A Foreclosure department.
25 Q Okay. Do you know when Deutsche Bank, as

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1 trustee purchased this Note and Mortgage?
2 A No.
3 Q Paragraph 4 of Exhibit 2, do you still have
4 that in front of you? It's the first affidavit that we
5 talked about, probably that one right there. Just stay
6 on that page actually.
7 Do you see where it says paragraph 4?
8 A Yes.
9 Q Okay. I was going to ask you some questions
10 about what each one of these entries mean, principal,
11 interest per diem, pre-acceleration late charges,
12 property inspections, insurance, appraisal, B.P.O.
13 Suspense, total. Do you know what each of those labels
14 refer to?
15 A No.
16 Q Do you know, for example, what the appraisal
17 or whether -- well, let me step back. Do you know from
18 personal knowledge whether an appraisal was done?
19 A No.
20 Q What is a B.P.O.?
21 A It's stands for broker price opinion.
22 Q What does that mean?
23 A To my knowledge it's a document that is used
24 to put a value on a piece of property.
25 Q Do you know if a broker price opinion was done

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1 in this case?
2 A No.
3 Q Did you ever review a broker price opinion
4 that before signing the affidavit that's notarized
5 February 26, 2007?
6 A No.
7 MR. KOWALSKI: All right. That's all the
8 questions I have.
9 THE WITNESS: I do want to clarify one thing
10 with my year and date that I became foreclosure
11 manager, I believe it was 2006. I'm not real good
12 with timeframes actually. That's when I became
13 promoted. I said 2007, but I believe it was 2006.
14 MR. KOWALSKI: Okay.
15 THE WITNESS: I just wanted to be sure that
16 that was corrected.
17 MR. KOWALSKI: I appreciate that.
18 BY MR. KOWALSKI:
19 Q So you've been foreclosure manager for about
20 two years and three months, something like that?
21 A Correct.
22 MR. KOWALSKI: Fair enough. I appreciate it.
23 Do you want to talk to her about reading or
24 waiving?
25 MR. HELLER: I have some questions, but I need

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1 a restroom break.
2 MR. KOWALSKI: Absolutely.
3 Let's take a quick break.
4 (Break.)
5 CROSS EXAMINATION
6 BY MR. HELLER:
7 Q Ms. Price, some follow-up questions, please.
8 If I understand your testimony, you sign affidavits as
9 part of your job; is that correct?
10 A Yes.
11 Q Are those affidavits that you sign as part of
12 your job generally based on company business records?
13 A Yes.
14 Q Is that how it was at AMC?
15 A Yes.
16 Q Is that how it is at Citi?
17 A Yes.
18 Q Are you familiar with how AMC, or were you
19 familiar with how AMC kept its business records relating
20 to what amounts are owed on mortgage loans that that
21 company serviced?
22 A Yes.
23 Q Were those practices that you're referring to
24 that you just said that you were familiar with, were
25 those the routine practices of AMC when it serviced

COASTAL COURT REPORTERS, LLC

1 loans?
2 A Yes.
3 Q Same with questions for Citi. Are you
4 familiar with how Citi keeps records of the amounts owed
5 on mortgage loans it services?
6 A Yes.
7 Q Are those the routine practices of Citi?
8 A Yes.
9 Q Mr. Kowalski showed you some affidavits during
10 his direct examination this afternoon. When you signed
11 those affidavits, did you believe you were testifying
12 based on business records?
13 A Yes.
14 Q Is that generally how the affidavits that you
15 sign are written, based on business records?
16 A Yes.
17 Q Do you rely on your foreclosure counsel to
18 prepare the affidavits for you?
19 A Yes.
20 Q Do you recall who your foreclosure counsel was
21 in this case?
22 A No.
23 Q Mr. Kowalski asked you if I'm not mistaken
24 whether you checked the accuracy of figures before
25 signing an affidavit. My follow-up question is, do you

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1 believe that the routine practice involves -- let me
2 start over. Do you understand based on your experience
3 working with AMC and Citi, that the business practice,
4 the routine practice for generating amounts due on a
5 particular loan is verified in that process?
6 A Yes.
7 Q Is that a routine practice? Was that a
8 routine practice at AMC?
9 A Yes.
10 Q Is that the routine practice at Citi?
11 A Yes.
12 MR. HELLER: That's all I have.
13 MR. KOWALSKI: No follow up to that.
14 Do you want to read or waive?
15 MR. HELLER: Read, please.

(Witness excused.)

(Deposition concluded.)

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55

1 CERTIFICATE OF OATH

2
3 STATE OF FLORIDA)
4 COUNTY OF ST. JOHNS)

5
6 I, the undersigned authority, certify that TAMARA
7 PRICE, personally appeared before me and was duly sworn.

8
9 WITNESS my hand and official seal this 6th day of
10 May, 2008.

11
12 CARMAN L. GAETANOS, COURT REPORTER
13 Notary Public-State of Florida
14 Commission No. DD639656
Expires: 6/12/2011

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56

1 REPORTER'S DEPOSITION CERTIFICATE

2
3 STATE OF FLORIDA)
4 COUNTY OF ST. JOHNS)

5
6 I, CARMAN L. GAETANOS, FPR, Court Reporter, do
7 hereby certify that I was authorized to and did
8 stenographically report the deposition of TAMARA PRICE,
9 that a review of the transcript was requested; and that
10 the transcript, pages 1 through 57, is a true and
11 complete record of my stenographic notes.

12
13 I further certify that I am not a relative,
14 employee or counsel of any of the parties, nor am I a
15 relative or employee of any of the parties; attorney or
16 counsel connected with the action, nor am I financially
17 interested in the action.

18
19 DATED this 6th day of May, 2008.

20
21 CARMAN L. GAETANOS
22 Coastal Court Reporters, LLC

23
24
25
COASTAL COURT REPORTERS, LLC

ERRATA SHEET

DO NOT WRITE ON TRANSCRIPT - ENTER CHANGES HERE

IN RE: DEUTSCHE BANK NATIONAL TRUST COMPANY, et al

VS.

JAMES W. YOUNG, et al

CASE NO.: CA-2007-0114

PAGE NO. LINE NO. CHANGE REASON

Under penalties of perjury, I declare that I have
read my deposition and that it is true and correct
subject to any changes in form or substance entered
here.

DATE TAMARA PRICE

(CLG)

COASTAL COURT REPORTERS, LLC

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Everhome Mortgage Company,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 07AP-615
	:	(C.P.C. No. 07CVE04-5165)
Sara E. Rowland et al.,	:	
	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
	:	
(Gregory E. Vignon,	:	
	:	
Defendant-Appellant).	:	

O P I N I O N

Rendered on March 20, 2008

Shapiro & Felty, LLP, Richard J. Lacivita and John A. Polinko,
for plaintiff-appellee.

Dinsmore & Shohl, LLP, and Adam R. Todd, for defendant-
appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Gregory E. Vignon, appeals from a judgment of the Franklin County Court of Common Pleas that granted summary judgment in favor of plaintiff-appellee, Everhome Mortgage Company ("Everhome"). For the following reasons, we reverse.

{¶2} In April 2003, Vignon and his former wife, Sara E. Rowland, signed a promissory note and mortgage to secure a loan for the purchase of a house. Vignon and Rowland executed these instruments in favor of TrustCorp Mortgage Company ("TrustCorp").

{¶3} On April 16, 2007, Everhome filed a foreclosure action against Vignon and Rowland. In its complaint, Everhome alleged it is the holder of the note and mortgage Vignon and Rowland signed. Everhome also alleged that Vignon and Rowland defaulted in payment on the note and, as a consequence, owed Everhome \$143,830.83, plus interest.

{¶4} On June 4, 2007, Vignon filed an answer admitting that he has an interest in the property but denying that he defaulted in the payments. As an affirmative defense, Vignon asserted that Everhome was not a real party in interest.

{¶5} Ten days later, Everhome filed a motion for summary judgment. Vignon subsequently filed his memorandum contra, arguing that: (1) Everhome did not establish itself as the holder of the note and mortgage; (2) he did not owe the amount Everhome claimed; and (3) Everhome did not comply with the requirements of Section 203.604(b), Title 24, C.F.R. In his supporting affidavit, Vignon stated that he executed the note and mortgage at issue in favor of TrustCorp. He further stated that he never signed an agreement, note, or mortgage in favor of Everhome.

{¶6} The trial court entered final judgment in favor of Everhome on June 29, 2007. Vignon now appeals from that judgment and assigns the following error:

The trial court erred as a matter of law in granting summary judgment in favor of Plaintiff-Appellee and against Defendant-Appellant in the Final Judgment Entry in Foreclosure filed June 29, 2007.

{¶7} Pursuant to Civ.R. 56(C), a court shall render summary judgment if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on summary judgment, a court is not permitted to weigh evidence or choose among reasonable inferences. *Tonti v. East Bank Condominiums, LLC*, Franklin App. No. 07AP-388, 2007-Ohio-6779, at ¶25. Instead, a court must resolve all reasonable inferences in favor of the non-moving party. *Dupler v. Mansfield Journal Co., Inc.* (1980), 64 Ohio St.2d 116, 120. Thus, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶8} "[A] party seeking summary judgment * * * bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. If the moving party demonstrates that there is no genuine issue of fact, "the nonmoving party then has a reciprocal burden * * * to set forth specific facts showing that there is a genuine issue for trial * * *." *Id.*

{¶9} Appellate review of summary judgment is de novo. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Thus, an appellate court applies the

same standard as the trial court and conducts an independent review without deference to the trial court's determination. *Tonti*, at ¶27.

{¶10} By his only assignment of error, Vignon argues that the trial court erred in granting summary judgment because there is a genuine issue of fact about whether Everhome is the holder of the note and mortgage. He asserts that he executed the note and mortgage in favor of TrustCorp—not Everhome. He argues that because Everhome did not present evidence as to how it became the holder of the note and mortgage, it has not shown that it is a real party in interest. We agree.

{¶11} "Every action shall be prosecuted in the name of the real party in interest." Civ.R. 17(A). A real party in interest is one who is directly benefited or injured by the outcome of the case. *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 24. The purpose behind the real-party-in-interest requirement is " 'to enable the defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party at interest on the same matter.' " *Id.* at 24-25, quoting *In re Highland Holiday Subdivision* (1971), 27 Ohio App.2d 237, 240.

{¶12} In foreclosure actions, the real party in interest is the current holder of the note and mortgage. *Chase Manhattan Mtge. Corp. v. Smith*, Hamilton App. No. C-061069, 2007-Ohio-5874, at ¶18; *Kramer v. Millott* (Sept. 23, 1994), Erie App. No. E-94-5 (because the plaintiff did not prove that she was the holder of the note and mortgage, she did not establish herself as a real party in interest). A party who fails to establish itself as the current holder is not entitled to judgment as a matter of law. *First Union Natl. Bank v. Hufford* (2001), 146 Ohio App.3d 673, 677, 679-680. Thus, in *Hufford*, the Third District

Court of Appeals reversed a grant of summary judgment where a purported mortgagee failed to produce sufficient evidence explaining or demonstrating its right to the note and mortgage at issue. In that case, the record contained only "inferences and bald assertions" and no "clear statement or documentation" proving that the original holder of the note and mortgage transferred its interest to the appellee. *Id.* at 678. The failure to prove who was the real party in interest created a genuine issue of material fact that precluded summary judgment. *Id.* at 679-680.

{¶13} Similarly, in *Washington Mut. Bank, F.A. v. Green* (2004), 156 Ohio App.3d 461, the Seventh District Court of Appeals reversed the trial court's finding of summary judgment where the plaintiff failed to prove that it was the holder of the note and mortgage. There, the defendant executed a note and mortgage in favor of Check 'n Go Mortgage Services, not Washington Mutual Bank, F.A. Although Washington Mutual Bank, F.A. submitted an affidavit alleging an interest in the note and mortgage, it did not state how or when it acquired that interest. *Id.* at 467. The court concluded that this lack of evidence defeated the purpose of Civ.R. 17(A) by exposing the defendant to the danger that multiple "holders" would seek foreclosure based upon the same note and mortgage. *Id.*

{¶14} In the case at bar, the note and mortgage identify TrustCorp—not Everhome—as the lender. Therefore, Everhome needed to present the trial court with other evidence to prove its status as the current holder of the note and mortgage. To accomplish this, Everhome relied upon the affidavit testimony of Becky North, an Everhome officer. In her affidavit, North stated that "the copies of the Promissory Note and Mortgage Deed attached to Plaintiff's Complaint are true and accurate copies of *the*

original instruments held by Plaintiff." (Emphasis added.) Beyond this tangential reference, North's affidavit contains no further averments regarding Everhome's interest in the note and mortgage.

{¶15} We conclude that North's testimony is insufficient to establish that Everhome is the current holder of the note. First, Everhome failed to attach the note to its complaint. Thus, North's statement does not prove anything with regard to the note, much less that Everhome currently holds the note. Second, North does not specify how or when Everhome became the holder of the note and mortgage. Without evidence demonstrating the circumstances under which it received an interest in the note and mortgage, Everhome cannot establish itself as the holder.

{¶16} Lacking the necessary evidence in the trial court record, Everhome attempts to introduce that evidence on appeal. In its brief, Everhome alleges that TrustCorp assigned to it TrustCorp's interest in the note and mortgage on April 19, 2007. Although evidence of an assignment would establish Everhome's status as the current holder of the note and mortgage, we cannot consider Everhome's belated allegation that an assignment occurred. See *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus ("A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter.").

{¶17} Because Everhome did not present the trial court with evidence explaining how or when it became the holder of the note and mortgage, a genuine issue of material fact exists regarding whether it is a real party in interest. Therefore, the trial court erred in

granting Everhome summary judgment, and we sustain Vignon's sole assignment of error.

{¶18} On appeal, Vignon also disputes the amount owed under the note and argues that Everhome violated Section 203.604, Title 24, C.F.R. Because we reverse the trial court's judgment based on a factual dispute over the real party in interest, these remaining issues are moot.

{¶19} For the forgoing reasons, we sustain Vignon's assignment of error. Therefore, we reverse the final judgment of the Franklin County Court of Common Pleas, and remand this case for proceedings in accordance with law and this opinion.

Judgment reversed and cause remanded.

BRYANT and TYACK, JJ., concur.

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To: James Millard
From: Katrina Humphrey
Date: October 24, 2008
Re: Lis Pendens Statute Research Project

Statement of Facts:

The basic fact pattern that we are dealing with is that Company A assigned a mortgage to Company B. Company B recorded a lis pendens, but the assignment of the mortgage was not recorded until after the lis pendens. This memo is based upon the assumption that the assignment between Company A & B is a valid assignment. This fact pattern also presumes that we are in the state of Florida and thus are working within the purview of Florida Statute § 48.23.

Questions Presented and Short Answer:

- 1) Can a lis pendens be discharged when the lis pendens was recorded prior to the recording of the assignment? Yes, but only after the court has held an evidentiary hearing and found the requisite fair nexus between the claim and subject property lacking.
- 2) Is there any case law with a similar fact situation in Florida or in another state? Unfortunately, no, there is case law that is analogous to certain sub-issues (i.e. what does “founded upon” mean and what is a “duly recorded instrument”), but I have not been able to find case law analogous to the situation presented in this memoranda.

Brief Legal Overview

Florida Statute § 48.23(3) states that “[w]hen the initial pleading does not show that the action is founded on a duly recorded instrument . . . the court **may** control and discharge the notice of lis pendens as the court may grant and dissolve injunctions.”¹ Florida Statutes also state, if the notice of lis pendens is not founded upon a duly recorded instrument, notice of the lis pendens is not effectual beyond one year.² Case

¹ FLA. STAT. § 48.23(3) (2008).

² FLA. STAT. § 48.23(2) (2008).

law has interpreted this to mean that when an action is not founded on a duly recorded instrument the lis pendens statute allows the trial court to consider extending the one-year duration of the lis pendens on a case-by-case basis.³ More important for our situation it has been held that unless the initial pleading is founded upon a duly recorded instrument, the court has the authority to discharge the lis pendens or require the party to post a bond.⁴

What Does “Founded Upon” Mean in the Context of Florida Statute § 48.23?

The statutory requirement that the action be “founded upon” a duly recorded instrument equates to the action itself arising from, growing out of or resting upon the recorded instrument.⁵ In the case of a mortgage, the mortgage itself entitles the mortgagee to reclaim the property if the mortgagor-property owner fails to make payments or defaults under other terms of the mortgage.⁶ Thus, when seeking to foreclose on a mortgage the mortgagee is seeking to enforce the terms of the mortgage itself and reclaim the property and the complaint must reference the mortgage and its terms in order to be proper. Therefore, the lis pendens in a foreclosure action is founded upon the mortgage, which if properly recorded, is a duly recorded instrument.

Fraud & a Warranty Deed, an Example of a Cause of Action that Would Not Meet the Standard of “Founded Upon” Within the Context of Florida Statute § 48.23

In the case of a warranty deed, as with other property interest transfers, the conveyance must be recorded.⁷ The recorded instrument in this scenario gives notice to the public of the grantee’s ownership of the real property and the fact that the grantor no longer holds any interest in the property.⁸ If the grantor later claims that the grantee obtained title through fraud and brings an action to rescind the deed, the action is not founded upon the deed but on the preceding circumstances upon which the claim of fraud is based.⁹ Because the action would not be “based upon a recorded instrument,” the plaintiff would not be entitled to file a notice of lis pendens.¹⁰ If the plaintiff did record a lis pendens, the court would have the authority to “control and discharge the notice of lis pendens as the court may grant and dissolve injunctions.”¹¹

What Constitutes a Duly Recorded Instrument Within the Context of § 48.23?

The phrase “action is founded on a duly recorded instrument,” at first seems straightforward and innocuous. The reality is that it has caused much confusion among

³ De La Fuente v. Adrian Developers Corp., 967 So.2d 251, 252-53 (3d DCA 2007) (rehearing denied).

⁴ Ness Racquet Club, LLC v. Renzi Holdings, Inc., 959 So.2d 758, 759 (3d DCA 2007).

⁵ Avalon Assocs. of Delaware Ltd v. Avalon Park Assocs., Inc., 760 So.2d 1132, 1135 (5th DCA 2000).

⁶ Berkley Multi-Unit, Inc. v. Linder, 464 So.2d 1356, 1357 (4th DCA 1985).

⁷ Berkley Multi-Unit, 464 So.2d at 1357.

⁸ Id.

⁹ Berkley Multi-Unit, Inc., 464 So.2d at 1357-58.

¹⁰ Berkley Multi-Unit, Inc., 464 So.2d at 1358.

¹¹ Id.

litigants. “A duly recorded instrument constitutes notice to the public of plaintiff’s legal or equitable interest in the subject property.”¹² The purpose of a notice of lis pendens is to give notice to creditors, potential purchasers, and others who might have an interest in the property, that the title to that real property is involved in litigation.¹³ In the context of mortgages in Florida, mortgages are only liens and do not constitute an interest in the real property.¹⁴ The mortgage becomes perfected by recording it in public land records.¹⁵ When dealing with mortgages, the recorded mortgage itself is considered notice “that if the mortgagor-property owner fails to make payments or otherwise defaults under the terms of the mortgage and underlying promissory note”, the mortgagee has the authority to bring an action to foreclose the mortgage.¹⁶ Thus, an action to foreclose a mortgage on real property is considered an action “founded on a duly recorded instrument.”¹⁷

What Happens if the Lis Pendens is Based Upon an Unrecorded Instrument when the LP is filed?

Technically the lis pendens may be discharged when the lis pendens was recorded prior to the recording of the assignment, but this is only after the court has ruled that there is no fair nexus between the plaintiff’s claims and the subject property. Florida Statute § 48.23(3) states that “[w]hen the initial pleading does not show that the action is founded on a duly recorded instrument . . . the court **may** control and discharge the notice of lis pendens as the court may grant and dissolve injunctions.”¹⁸ The purpose of a lis pendens is to give notice to future purchasers or encumbrancers of that property that the subject property is in litigation.¹⁹ This is as much to protect subsequent third parties, as it is to protect the plaintiff.²⁰ The lis pendens helps to keep others from becoming entangled in the dispute and it protects the “plaintiff from intervening liens that could impair any property rights claimed and also from possible extinguishment of the plaintiff’s unrecorded equitable lien.”²¹ The fundamental idea behind Florida Statute §48.23(3) is, ‘if it was already clear to the public before the suit was filed that there was a cloud on the property being sued about, because of a recorded instrument showing an interest of the plaintiff, there was no reason to require a bond or otherwise to control or to discharge the lis pendens.’²² However, if the first time that the plaintiff’s claimed interest in the property is announced is through the lis pendens, the titleholder is entitled to notice and hearing.²³ During the notice and

¹² Feinstein v. Dolene, Inc., 455 So.2d 1126, 1127 (4th DCA 1984).

¹³ Berkley Multi-Unit, Inc., 464 So.2d at 1357.

¹⁴ FLA. STAT. § 697.02 (2008) (states, “A mortgage shall be held to be a specific lien on the property therein described, and not a conveyance of the legal title or of the right of possession”).

¹⁵ FLA. STAT. § 695.01 (2008).

¹⁶ Berkley Multi-Unit, Inc., 464 So.2d at 1357.

¹⁷ Berkley Multi-Unit, Inc., 464 So.2d at 1357.

¹⁸ FLA. STAT. § 48.23(3) (2008).

¹⁹ Chiusolo v. Kennedy, 614 So.2d 491, 492 (1993).

²⁰ Id.

²¹ Id.

²² Feinstein, 455 So.2d at 1128.

²³ Id.

hearing, the titleholder may demand a bond if he is able to show the existence of a danger of irreparable harm, in the case that the lis pendens is unjustified.²⁴ Some courts have held that the titleholder must only show that damages are likely to result; the damages may be monetary.²⁵

It is also within the courts authority to take evidence as they would in a hearing to dissolve an injunction, if the initial pleading fails to show that the action is founded upon a duly recorded instrument.²⁶ In fact, an evidentiary hearing is required on a motion to discharge lis pendens when plaintiff's action were not founded on a duly recorded instrument, but did allege a claim that directly affected the real property in dispute.²⁷ This was the case in Perdomo v. Cabrera, during which the appellant argued that the trial court was without authority to look beyond the four corners of the complaint when making its decision on the lis pendens.²⁸ In fact, the court is entitled to look outside the complaint and conduct an evidentiary hearing in making its decision to dissolve lis pendens, where the action was not founded on a duly recorded instrument or a construction lien.²⁹ The purpose of the evidentiary hearing is to allow the plaintiff to establish a "fair nexus between the apparent legal or equitable ownership of the property and the dispute embodied in the lawsuit." The burden of proof in a hearing to discharge lis pendens is on the proponent of the lis pendens to show a "fair nexus."³⁰

In order to establish a "fair nexus" and thus support a lis pendens, the plaintiff must provide a good faith, viable claim concerning the legal or equitable ownership of the subject property.³¹ In looking for a "fair nexus", the relevant inquiry by the court is "whether alienation of the property or the imposition of intervening liens, if either actually occurred, conceivably could disserve the purposes for which lis pendens exists."³² If the answer to this inquiry is yes, the court shall rule that the fair nexus is established.³³ In Acapulco Construction, Inc. v. Redavo Estates, Inc., the plaintiff had filed a lis pendens on a piece of property, which through the then current lawsuit, they wanted to impose a constructive trust on the subject property.³⁴ The court held that the suit was brought in good faith and asserted a viable claim that called into question the property's apparent legal or equitable ownership of the subject property.³⁵ Given that the lawsuit was challenging the legal or equitable ownership of the subject property, the court held that dissolving the lis pendens on the subject property could "(1) jeopardize the rights of subsequent purchasers or encumbrancers by drawing them into the instant dispute, and (2) jeopardize the viability of the plaintiff's unrecorded equitable claim as against

²⁴ Id.

²⁵ Med. Facilities Dev., Inc. v. Little Arch Creek Props., Inc., 675 So.2d 915 (1996).

²⁶ Perdomo v. Cabrera, 963 So.2d 736 (3d DCA 2007).

²⁷ Chiusolo, 614 So.2d at 492.

²⁸ Perdomo, 963 So.2d at 737.

²⁹ Perdomo, 963 So.2d at 737.

³⁰ Chiusolo, 614 So.2d at 491.

³¹ Nu-Vision, LLC v. Corporate Convenience, Inc., 965 So.2d 232, 234 (5th DCA 2007).

³² Chiusolo, 614 So.2d at 492.

³³ Chiusolo, 614 So.2d at 492.

³⁴ Acapulco Constr., Inc. v. Redavo Estates, Inc., 645 So.2d 182 (3d DCA 1994).

³⁵ Acapulco Constr., Inc., 645 So.2d at 183.

subsequent intervening liens on the property.”³⁶ The court stated “it was not the plaintiffs’ burden to establish their constructive trust claim by the greater weight of the evidence . . . only a good faith, viable claim.”³⁷ It is not necessary that the trial court determine the likelihood of the property becoming alienated or subjected to intervening liens during the pendency of the litigation.³⁸ If the proponent of the lis pendens establishes a fair nexus between the legal or equitable interest in the property and the dispute, the court cannot dissolve the lis pendens.³⁹

Example of When the Court has Found Proponent Failed to Show a “Fair Nexus”

In Conseco Services, LLC v. Cuneo, the court ruled that Conseco Services failed to show the required “fair nexus.”⁴⁰ In this case, Conseco Services alleged that the Cuneos had fraudulently transferred their own finances in order to purchase homestead property in Florida.⁴¹ Conseco Services claimed that the sole purpose behind this was for the Cuneos to avoid paying a judgment against them in favor of Conseco Services. Conseco Services did not claim it had provided funds to the Cuneos, fraudulent behavior by the Cuneos in obtaining their loan, or that the Cuneos used funds provided by Conseco Services to buy the Florida property.⁴² The court ruled that since they had failed to claim one of those three actions that “Conseco Services had not demonstrated the requisite fraud or egregious conduct in the absence of any allegation that the Cuneos wrongfully or fraudulently obtained Conseco Services’ funds to purchase, invest in, or improve the Florida home.”⁴³ Simply because a debtor chooses to acquire a homestead property in order to hinder, delay or defraud a creditor, does not mean that they lose the protection of Florida’s constitutional homestead protection.⁴⁴ Thus, Conseco Services had “not shown a good faith viable equitable lien claim that would call into question the legal or equitable ownership of the homestead property.”⁴⁵ If Conseco Services had made a good faith claim that the Cuneos had either used funds provided by Conseco Services to purchase their Florida home or that the Cuneos had used fraud to obtain a loan from Conseco Services, then Conseco Services would have been able to establish a fair nexus connecting their equitable ownership of the property and the dispute embodied in the lawsuit.⁴⁶ By making either of those good faith claims,

³⁶ Acapulco Constr., Inc., 645 So.2d at 183.

³⁷ Id.

³⁸ Fla. W. Realty Partners, LLC v. MDG Lake Trafford, LLC, 975 So.2d 479, 480 (2nd DCA 2007).

³⁹ Chiusolo v. Kennedy, 614 So.2d 491 (1993); See also, Carran v. Morgan, 510 F.Supp.2d 1053 (S.D.Fla. 2007) (stating that under Florida law, the court shall not dissolve a lis pendens if the proponent establishes a fair nexus between the apparent legal or equitable ownership of the property and the dispute embodied in the lawsuit; to make this determination, the court may conduct an evidentiary hearing.); See also, Fisher v. Fisher, 873 So.2d 534 (4th DCA 2004).

⁴⁰ Conseco Servs, LLC v. Cuneo, 904 So.2d 438 (3d DCA 2005).

⁴¹ Id.

⁴² Conseco Servs, LLC, 904 So.2d at 439.

⁴³ Id.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id.

Conseco Services would have established that they had an equitable claim to the property in question.⁴⁷

Review

Certiorari is the proper vehicle to review an order denying a motion to discharge a lis pendens.⁴⁸ The standard of review when a court has dissolved a lis pendens is the same standard that is employed with reviewing injunctions.⁴⁹ Thus, the trial court's decision should only be reversed if the reviewing court finds a manifest abuse of discretion.⁵⁰

Answers to Questions Presented

Can a Lis Pendens be Discharged when the Lis Pendens was Recorded Prior to the Recording of the Assignment?

Assuming that the mortgage assignment was valid, the action in this case will be considered properly founded upon the mortgage. This assumes that the mortgage provided for foreclosure by the mortgagee in the event that the mortgagor was in default. However, since the assignment was not recorded until after the lis pendens, the lis pendens, though founded upon the mortgage, was not founded upon a duly recorded instrument within the context of Florida Statute § 48.23. Yet, if the prior mortgage was properly filed, then there was already notice to potential purchasers or encumbrancers that the mortgagee has authority to bring an action to foreclose the mortgage if the mortgagor fails to make payments or otherwise defaults under the terms of the mortgage and underlying promissory note.⁵¹ This would serve the policy reasons behind a lis pendens, because though the assignment was not recorded, it would appear to others that Company A still held the mortgage and note on the property. It is my opinion that it is irrelevant who the mortgagee is, it is just necessary that the public have notice that there is a mortgage on the subject property.

Either way, given that the lis pendens was not based upon a duly recorded instrument, the defendant may motion for a hearing to discharge the lis pendens.⁵² According to Chiusolo v. Kennedy, the court must provide the parties with an evidentiary hearing since the action was not founded upon a duly recorded instrument, but does allege that the plaintiff has a legal claim to the property in dispute.⁵³ The evidentiary hearing will allow the plaintiff an opportunity to establish a fair nexus between the legal

⁴⁷ Id.

⁴⁸ Sheehan v. Reinhardt, 988 So.2d 1289, 1290 (2nd DCA 2008).

⁴⁹ Haisfield v. ACP Fla. Holdings, Inc. 629 So.2d 963 (4th DCA 1993).

⁵⁰ Id.

⁵¹ FLA. STAT. § 697.02 (2008).

⁵² Perdomo, 963 So.2d at 736.

⁵³ Chiusolo v. Kennedy, 589 So.2d 420 (5th DCA 1991), approved in part, quashed in part 614 So.2d 491 (1991).

ownership of the property and the dispute embodied in the lawsuit.⁵⁴ Assuming that the assignment from Company A to Company B is valid, the plaintiff will be able to show a fair nexus, because the mortgage and note will show that the plaintiff has a contractual right to foreclose upon the property if the defendant is in default.

This situation presented here, more than any other I have been able to find in case law, seems to go to the heart of the policy considerations behind requiring the plaintiff to show a fair nexus in order to maintain the lis pendens. A lis pendens serves to protect not only the plaintiff but unwary property purchasers as well. In this situation, it appears that the plaintiff has a legal claim, but has simply missed a technical step. If the lis pendens were to be discharged, the defendant would only be gaining a little extra time, but that is about it unless the defendant has the financial capabilities to strike a deal with the mortgage company. However, this would also jeopardize the rights of subsequent purchasers or encumbrancers by not giving them notice that the property is entangled in a legal dispute. Though I do not think it would jeopardize the viability of the plaintiff's claim since the plaintiff at this point has recorded the mortgage assignment. If the lis pendens were to be discharged the plaintiff would just turn around and refile another lis pendens, and this time it would be based upon a duly recorded instrument. Anyone who happens to purchase an interest in the property between when the lis pendens is discharged and when it is refilled, would be caught unaware, which is exactly what the lis pendens is supposed to prevent. After reviewing the available case law, I am of the opinion that the court would not discharge the lis pendens in this situation.

Is there any case law with a similar fact situation in Florida or in another state?

Unfortunately, I have been unable to find any analogous case law concerning mortgages in Florida or other states. The cases cited in this memorandum are analogous only on one or two issues, not the basic scenario of the case.

⁵⁴ Perdomo, 963 So.2d at 736; Med. Facilities Dev., Inc. v. Little Arch Creek Props., Inc., 656 So.2d 1300 (3d DCA 1995).



**Max Gardner's Dirty Dozen Rules
For The
Proof of Ownership in a Mortgage Note
With Respect to a Simple
Residential Mortgage-Backed Securitized Trust**

1. In the case of a Residential Mortgage-Backed Securitized Trust, it is always necessary for the Trust to establish an unbroken chain of transfers of the mortgage note from the originator to the trust. The objective of the securitization process is to make the mortgage notes as "bankruptcy remote" as is legally possible from any claims against the originator. Such claims would include those of a Trustee in a bankruptcy proceeding or the FDIC as a conservator in the case of a bank failure. The operative document for the mandatory note transfer rules in connection with mortgage notes is the Pooling and Servicing Agreement. The applicable statutory law includes Articles 3 and 9 of the Uniform Commercial Code, the Pooling and Servicing Agreement, any applicable special local statutes related to real estate law. Also, a mortgage note is transferred by negotiation. Negotiation means the transfer of possession by a person other than the issuer to a person who thereby becomes the holder. A note is therefore transferred when it is delivered to a third-person for the purpose of giving that person the right to enforce the note. Under the UCC, a holder-in-due course is a party who purchases a note for consideration without notice of any claims. If there is lack of adequate consideration for the transfer, or the transfer is made at the time the note is in default, then the transferee may not claim holder-in-due course status.

2. In the simplest securitized model, the parties to the mandatory chain of transfers include the originator, the sponsor, the depositor and the designated Trustee for the Trust. Almost every Trust is organized as a common law trust under the laws of Delaware or New York. The legal rights of common law trust are limited to the rights granted in the statutory enabling instrument. Those rights will be discussed below. Under this basic model, the typical players are as follows:
 - a. The originator is normally the party who wrote and funded the original mortgage transaction for the consumer;
 - b. The warehouse lender is generally the entity that provides the interim funding for the originator (the warehouse lender normally just files a UCC-1 financing statement as to the notes or claims perfection by possession and is rarely an actual transferee of the note);
 - c. The sponsor is the party who organized the securitization of the mortgage and submitted the original registration statements to the Securities and Exchange Commission;
 - d. The depositor is the last party in the chain to own the note before it is transferred to the Trust; and
 - e. The Trustee through a named Trust is the entity that owns the notes for the benefit of the parties who invested in the various tranches of bonds issued by the Trust.
 - f. Each tranche of bond holders has a different interest in the principal and interest income streams generated by the mortgage notes in the Trust or from fees and charges recovered by the servicers from the consumers. The originator may also have a residual interest in the Trust by virtue of acquiring the lowest-rated tranches of bonds. The rights of these bond holders are specified in the Pooling and Servicing Agreement, the Prospectus and the Prospectus Supplement.
 - g. The issue of ownership of the mortgage notes is not the same as whether or not the Trust has a perfected security interest in the residential real estate of the consumers who executed the notes. Perfection should not be confused with transfer, assignment and ownership rights in the mortgage notes on the one hand and in the deed of trust and mortgage on the other.
3. The original mortgage notes may be endorsed to a named transferee by each necessary party in the chain of transfers but:

- a. Generally, endorsements must appear at foot of the note if there is room for such endorsements (some cases have held substantial compliance is sufficient);
 - b. If there is not sufficient room at foot or end of the note for such endorsements, then they may appear on an allonge, which must be permanently affixed to the note;
 - c. The endorsements are not required to be notarized;
 - d. The Endorsements do not have to be dated but must be signed by an authorized agent of transferor;
 - e. If endorsed by an authorized agent, then some proof of the agency should be referenced and/or attached to the note; and
 - f. The Trust should have a designated document custodian who holds the original notes for the Trust as well as all of the delivery and receipt certificates regarding the notes.
- 4. Original notes may be endorsed in blank by the originator but:
 - a. If the first endorsement is in "blank" (no payee is named or designated) then the note becomes a bearer instrument by operation of law;
 - b. There must be both a delivery and an acceptance receipt to document the transfer and delivery of the bearer note from the originator to the sponsor;
 - c. There must be a delivery and an acceptance receipt to document the transfer and delivery of the bearer note from the sponsor to the depositor ;
 - d. There must be a delivery and an acceptance receipt to document the transfer and delivery of the bearer note from the depositor to the Trust; and
 - e. The designated document custodian for the Trust should maintain possession of all such documents including the original bearer note. There should only be one original note.
- 5. The Pooling and Servicing Agreement includes origination and cut-off dates for mortgage notes and transfer and delivery dates for the notes to the Trust but:
 - a. The Trust has no authority to accept an equitable transfer of a note. Since each transfer must be a true sale for purposes of creating the bankruptcy remote structure, all transfers must following the steps designated in the structure;
 - b. The Trust has no authority to claim an equitable interest in a note that has not been transferred to the Trust pursuant to strict terms and guidelines of the Pooling and Servicing Agreement;

- c. All steps in the transfer process must be true and complete sales between the parties in order to qualify the Trust for what is called REMIC qualification under the Internal Revenue Code;
 - d. The Trust has no authority to accept a note for no consideration as collateral for a mortgage loan obligation since each transfer must be a true and bona fide sale between the parties; and
 - e. The transfers must be to the Trust and the Trustee as the sole designated agent for the Trust (for example the transfer must be to John Smith as Trustee for REMIC Trust 2007-5).
- 6. Assignments relate to real property instruments and have nothing to do with negotiable instruments or other non-negotiable instruments, which are regulated by Article 3 of the Uniform Commercial Code.
- 7. Assignments are strictly regulated by applicable state law. The following are important concepts as they apply to assignments:
 - a. Statute of Frauds applies to assignments since these are real property instruments. You cannot assign a mortgage or deed of trust in blank. There is no such thing as a bearer assignment with respect to a mortgage or deed of trust. An "incomplete instrument" is a real estate document that would fail to transfer any statutory rights to the grantee.
 - b. Assignments in the context of Residential Mortgage-Backed Securitized Trusts apply only to mortgages and deeds of trust. You cannot assign a note, just like you cannot assign a mortgage or deed of trust in blank. There is no such thing as a "bearer" mortgage or a "bearer" deed of trust.
 - c. The authority of the assignor must be independently established of record for the assignment of a mortgage or deed of trust to be valid. If a party is executing an assignment as a agent for the true assignor of record, then the document evidencing such authority (such as a Power of Attorney) must be duly executed and in many cases of record.
 - d. Since we are dealing with real estate instruments, the mortgages and deeds of trust must be properly assigned to the Trust. In the most simple securitized trust, you would have the following:
 - i. Assignment from Originator to Sponsor;
 - ii. Assignment from Sponsor to Depositor;
 - iii. Assignment from Depositor to the Trust.
 - e. Since the mortgage or deed of trust follows the note under Articles 3 and 9 of the Uniform Commercial Code, the

assignments do NOT have to be recorded with the designated land registry unless such recording is required by applicable real estate law. In those states where assignments must be recorded, this is a matter of perfection between the Trust and third-parties and has nothing to do with the physical delivery of the assignments up the proper chain to the Trustee for the Trust.

- f. The Pooling and Servicing Agreement has specific time-lines for the execution and delivery of the assignments to the Trust. The fact that an assignment does not have to be recorded to maintain perfection does not mean the assignments do not have to be properly delivered in an unbroken chain to the Trustee for the Trust.
 - g. The Trust has no authority to accept assignments executed or delivered outside of the mandatory time-lines established in the Pooling and Servicing Agreement. As a common law entity, the Trust has no authority to act outside of the specific authority granted by the instrument that created and governs the activities of the Trust.
 - h. The Trust has no authority to assert a claim for an equitable assignment of a mortgage or deed of trust.
 - i. The Trust has no authority to claim an equitable mortgage or deed of trust on any real property.
8. The Holder in due course doctrine relates to the notes and has nothing to do with the mortgage or deed of trust. In order to assert a holder in due course status, the transfer of the note to the Trust via the required chain must occur before the note is in default and the transferee must take the note without knowledge or notice of any claims or defects in the document. If the note is in default during any link in the transfer process, the holder in due course status is lost.
9. Any assignment of a mortgage or deed of trust from the originator directly to the Trust is per se invalid. This is the case because such an assignment would disregard two essential players in the chain of assignments—the sponsor and the depositor. Since this aspect of the securitization process is controlled by applicable state real estate law, the Trust would have to be able to establish “good title” to the mortgage or deed of trust from the depositor. This could never be established with an originator assignment directly to the Trust assignment.

10. Any transfer of the mortgage note from the originator directly to the Trust would likewise be per se invalid. This is the case because such a transfer would disregard the “true sale” of the same note from the originator to the sponsor and the subsequent true sale from the sponsor to the depositor. Any “late” transfer of the note from the originator to the Trust would also be invalid because at that point in time the originator would have no ownership rights in the note. Under the Pooling and Servicing Agreement, the Trust may only purchase the note from the depositor. And, since each transfer must constitute a true and complete sale between the parties, consistent with the Pooling and Servicing Agreement, the Trust must be able to establish an unbroken chain of transfers and deliveries from the originator to the Trust. These rules apply whether or not the notes are endorsed to a named payee in each instance or are endorsed in blank at any process in the chain of transfers.
11. With respect to affidavits, simply attaching documents without first laying a proper evidentiary foundation for the admission of the documents is simply hearsay. Statements such as a person collects and maintains records and documents of a third-party do not satisfy the business records exception to the hearsay rule. The affiant must be able to state that the attached documents are created or maintained in the regular course of the affiant’s business, that their creation and maintenance are part of the regular course of the affiant’s business, and that the records are from or about the time the transaction was recorded. The mere filing of records or documents maintained by other entities is insufficient to qualify the documents as business records. The need for such authentication applies to the assignments of the mortgages and deeds of trust and to the endorsements, transfer and delivery receipts for the mortgage notes. In addition, if any part of the affidavit is based on data that is stored in a computer then the data must be further authenticated as to the type of computer, security systems associated therewith, regular maintenance, limited access to the data, etc.
12. The enforcement of lost or destroyed or stolen mortgage notes is another issue that comes up in many of these cases. Under Section 3-309 of the UCC, a person not in possession of a mortgage note is entitled to enforce the instrument if the person seeking to enforce the instrument was in possession of the instrument before it was lost or who has directly or indirectly acquired ownership of the note

from a person who was entitled to enforce the note when the loss of possession occurred and:

- a. The loss of possession was not the result of a transfer; or
- b. The loss of possession was not the result of a lawful seizure of the note; or
- c. The person cannot reasonably obtain possession of the note because:
 - i. It was destroyed;
 - ii. Its whereabouts cannot be determined;
 - iii. It is in the wrongful possession of an unknown party;
 - iv. The unknown party cannot be found;
 - v. The unknown party is not amenable to service of process;
 - vi. A reasonable search has been made for the note; and
 - vii. The note cannot be found after such a search.
- d. The person seeking enforcement of the lost note must prove the terms of the instrument AND the person's rights to enforce the instrument. Such proof would require a complete and unbroken chain of endorsements, transfers and deliveries from the originator to the current party seeking enforcement.
- e. Court must find that the person against whom enforcement is sought is adequately protected by reason of a claim by some other person holding the note. Such adequate protection may be provided by any reasonable means.



Max Gardner's Top 200 Signs that You have a False Document

(Mortgage Affidavits & Assignments & Endorsements)

1. The document has notarized in Dakota County, Minnesota.
2. The document was notarized in Hinnepin County, Minnesota.
3. The document was notarized in Duval County, Florida.
4. The document was notarized in San Diego, California.
5. The document was executed the same day it was filed with the court.
6. The party who signed the document executed it as "an authorized agent" for the servicer or the creditor.
7. The party who signed the document executed it as "an attorney in fact" for the servicer or the creditor.
8. The name of the signing party is stamped on the document in block letters.

9. The name of the servicer or creditor is stamped on the document in block letters.
10. The document appears to be a standard form with "fill-in-the-blanks" for the names of the signors and entities.
11. The paragraph numbers are not consistent (for example the first page may end with paragraph number 7 and the second page may start with number 10).
12. The party who signed the document and the notary are one in the same.
13. You cannot read the signature of the signor and the name is not printed out on the document. Some people refer to these as "squiggle marks." The bottom line is you cannot decipher any name or word from the same.
14. The signature on the document consists of one loop in the shape of an S or something that looks like an 8.
15. The date the signature was affixed and the date of the notarization are not the same.
16. The same "officer" or "vice president" of a bank or lender is also the "vice president" or "officer" of many other banks or lenders in the chain of assignments or endorsements
17. The same "officer" or "vice president" of a bank or lender signing the documents turns out to be located in various cities across the United States.
18. The document includes numerous pre-stamped names and signatures.

19. The document includes a second or last page notarization that does not conform in type font or style to the format or font on the primary pages of the document.
20. Backdating of dates on assignments or the signatures of officers are dated years after an entity has been out of business, merged with another entity, or filed for bankruptcy.
21. Any document signed by an officer of MERS. MERS states at www.mersinc.org that: "Employees of the servicer will be certifying officers of MERS. This means they are authorized to sign any necessary documents as an officer of MERS. The certifying officer is granted this power by a corporate resolution from MERS. In other words, the same individual that signs the documents for the servicer will continue to sign the documents, but now as an officer of MERS.
22. The party who signed the document executed it as a representative of the servicer.
23. The notary failed to attach a notarial seal.
24. The notary failed to sign the notarization.
25. The name of the party appearing before the notary is blank.
26. The endorsement is not at the foot of the note but on a separate allonge to the note. If there is room at the foot of the note, the endorsement must appear here. An allonge may only be used if there is insufficient room at the foot of the note for the endorsement.
27. The document is signed on say June 1, 2008 with an effective date of say April 1, 2005.

28. The document purports to assign the mortgage or the deed of trust from the originator directly to the trust.
29. The document that purports to assign the mortgage or the deed of trust to the trust is dated BEFORE the trust was registered with the SEC.
30. The document that purports to assign the mortgage or the deed of trust to the trust was signed AFTER the cut-off date for the transfer of all such instruments to the trust pursuant to the Pooling and Servicing Agreement.
31. The document that purports to assign the mortgage or the deed of trust to the trust was signed AFTER the date for the acceptance of any final conveyance to the trust as provided for by the Pooling and Servicing Agreement.
32. The origination date on the mortgage note is not within the origination and cut-off dates provided for the by terms of the Pooling and Servicing Agreement.
33. The mortgage note is "assigned" rather than endorsed from party "A" to party "B" or from any party to another party or entity.
34. The mortgage or deed of trust is "endorsed" rather than "assigned" from party "A" to party "B" or from any party to another party or entity.
35. The mortgage note is endorsed from the originator to the securitized mortgage trust.
36. The mortgage note is endorsed from the originator to the current mortgage servicer.
37. The mortgage note is endorsed from the originator to the depositor for the securitized trust.

38. The endorsement of the mortgage note is not at the "foot" or the "bottom" of the note.
39. The affidavit is a "Lost Note Affidavit" filed by the mortgage servicer.
40. The affidavit is a "Lost Note Affidavit" filed by the Trustee for the securitized trust and claims they never received the original note. You can only file a lost note affidavit under the UCC if you possessed the note before it was lost.
41. The affidavit is a "Lost Note Affidavit" period.
42. The assignment of the mortgage or the deed of trust was filed or signed after the filing of the bankruptcy case.
43. The assignment of the mortgage or the deed of trust was filed or signed after the filing of the foreclosure proceeding.
44. The assignment of the mortgage or the deed of trust was filed or signed after the filing of the motion for relief from stay.
45. The affidavit was signed by an employee of MR Default Servicers or has the MR Default Servicers information on the document as an identification number.
46. The affidavit was signed by an employee of Promiss Solutions or has the Promiss Solutions information of the document as identification number.
47. The affidavit was signed by an employee of NDEx Technologies, LLC, or has the NDEx information on the document as an identification number.

48. The affidavit was signed by the same attorney who signed the complaint.
49. The affidavit was signed by the same attorney who signed the foreclosure petition.
50. The affidavit was signed by the same attorney who filed the motion for relief from stay.
51. The affidavit was filed by an employee of the attorney who signed the complaint.
52. The affidavit was signed by an employee of the attorney who signed the foreclosure petition.
53. The affidavit was signed by an employee of the attorney who signed the motion for relief from stay.
54. The affidavit or certification was signed by Steve Kane.
55. The affidavit or other document was signed by Scott Anderson.
56. The documents are clearly two photocopies of the same document with different information filled in regarding the names of the assignor and assignee.
57. The note is stamped with the following: "Certified True Copy."
58. The signature of the Vice President states that he or she is a VP of say Lehman Brothers Holding Company but the printed or stamped name on the document is Lehman Brothers Bank, FSB.
59. The document is signed by a "Bank Officer" without any designation of the office held.

60. The affidavit includes the following language on the bottom of each page: "This is an attempt to collect a debt. Any information obtained will be used for that purpose."

This normally always indicates that the document was produced by a debt collector's law firm as their systems automatically default this data onto any document.

61. The affidavit is signed by the "designated agent" of any entity or party.

62. The document is signed by any person who identifies himself or herself as a "media supervisor" or a "media coordinator."

63. The affidavit includes one or more bar codes like you see on items purchased at the grocery store.

64. The affidavit is signed by an individual who states that they are the "legal coordinator" for the creditor.

65. The date of the signature on the affidavit and the date of the notarization are not the same.

66. The printed notary representation is marked through and some type of handwritten notation appears regarding the type of identification submitted by the alleged signor.

67. The affidavit is signed by the "designated or appointed agent" for the creditor or debt collector.

68. The return address on the Assignment or affidavit is to a third party provider such as Financial Dimensions, Inc, FANDO or FNFS.

69. The transferor and the transferee have the exact same physical address including the same street and post office box numbers.

70. The signor of the document states that he or she is acting "solely as nominee" for some other party.
71. The document bears the following image: "This is not a certified copy."
72. The document refers to a Power of Attorney but no POA is attached or otherwise filed or recorded.
73. The signor is an "Assistant" anything.
74. The party who signed the document is John Cody.
75. The party who signed the document is Tamara Price
76. The party who signed the document is Dory or Dorey Goebel.
77. The party who signed the document is Bernice Thell.
78. The party who signed the document is Sarah Rubin.
79. The party who signed the document is Amy Payment.
80. The document is signed by Joseph Alvarado.
81. The document is signed by Felix Amenumey.
82. The document is signed by Pam Anderson.
83. The document is signed by Sarah Block.
84. The document is signed by Janette Boatman.
85. The document is signed by Sheri Bongaarts.
86. The document is signed by Christopher Bray.

87. The document is signed by Tammy Brooks-Saleh or Tammy Saleh.
88. The document is signed by Jacqueline Brown.
89. The document is signed by Paul Bruha.
90. The document is signed by Rodney Cadwell.
91. The document is signed by Hari Charagundla.
92. The document is signed by Robyn Colburn.
93. The document is signed by Frank Coon.
94. The document is signed by Julie Coon.
95. The document is signed by Jeremy Cox.
96. The document is signed by Yvette Day.
97. The document is signed by Teresa DeBaker.
98. The document is signed by Larry Dingmann.
99. The document is signed by Jason Dreher.
100. The document is signed by Kimbretta Duncan.
101. The document is signed by Salena Edwards.
102. The document is signed by Fedelis Fondungallah.
103. The document is signed by Fanessa Fuller.
104. The document is signed by Elizabeth Geretschlaeger.
105. The document is signed by Peggy Glass.

106. The document is signed by Steven Grout.
107. The document is signed by Cathy Hagstrom.
108. The document is signed by Michelle Halyard.
109. The document is signed by Craig Hanlon.
110. The document is signed by Craig Hinson.
111. The document is signed by Chrys Houston.
112. The document is signed by Paul Hunt.
113. The document is signed by Etsuko Kabeya.
114. The document is signed by Jamil Kahin.
115. The document is signed by Pam Kammerer.
116. The document is signed by Gloria Karau.
117. The document is signed by Scott Keller.
118. The document is signed by Kyurstina Lawton.
119. The document is signed by Lindsey Lesch.
120. The document is signed by Whitney Lewis.
121. The document is signed by Brock Martin.
122. The document is signed by Joel Martinson.
123. The document is signed by Donna McNaught.
124. The document is signed by Marisa Menza.

125. The document is signed by Steve Moe.
126. The document is signed by Taylor Moore.
127. The document is signed by Annmarie Morrison.
128. The document is signed by Melissa Mosloski.
129. The document is signed by Kim Mullins.
130. The document is signed by Susan Nightingale.
131. The document is signed by Richard Olasande.
132. The document is signed by Ingrid Pittman.
133. The document is signed by Rona Ramos.
134. The document is signed by Paige Sahr.
135. The document is signed by Kimberly Sanford.
136. The document is signed by Erika Spencer.
137. The document is signed by Renae Stanton.
138. The document is signed by Maya Stevenson.
139. The document is signed by September Stoudemire.
140. The document is signed by Emmanuel Tabot.
141. The document is signed by Keo Maney Kue Vang.
142. The document is signed by Rebecca Verdeja.
143. The document is signed by Kim Waldroff.

144. The document is signed by Katrina Whitfield-Bailey or by Katrina Whitfield or by Katrina Bailey.
145. The document is signed by Jerry Yang.
146. The document is signed by Jerry Yang.
147. The document is signed by Mellisa Ziertman.
148. The document is signed by Katie Zrust.
149. The document is signed by Roy Stringfellow.
150. The document is signed by Amie Davis.
151. The document is signed by Andrew Keardy.
152. The document is signed by Tina Jones.
153. The document is signed by Jamie Bilot.
154. The document is signed by Vicki Kyle.
155. The document is signed by Bernadette Polux.
156. The document is signed by Charmaine Marchesi.
157. The document is signed by Verdine A. Freeman.
158. The document is signed by Hang Luu.
159. The document is signed by Vishal Karingada.
160. The document is signed by Dulce Diaz.
161. The document was prepared by Butler & Hosch, P.A.

162. The document was signed by R.P. Umali.
163. The document was signed by Michele Boiko.
164. The document was signed by Eileen J. Gonzales.
165. The document is signed by Jeff Rivas.
166. The document is signed by Marcia Medley.
167. The document is signed by Laura Hescott.
168. The document is signed by Treva Moreland.
169. The document is signed by Kim Kinney.
170. The document is signed by Peter Read.
171. The document is signed by Judith Stone.
172. The document is signed by Shivani L. Ram.
173. The document is signed by Amy Jo Cauthern-Munoz.
174. The document is signed by Dawn L. Reynolds.
175. The document is signed by Sara Rubin.
176. The document is signed by Bharati Lengade.
177. The document is signed by Melody Moore.
178. The document is signed by Angela L. Freckman.
179. The document is signed by Kim Kenney.
180. The document is signed by Jennifer Duncan.

181. The document is signed by Jan Zimmerman.
182. The document is signed by Steve Ballman.
183. The document is signed by Anne Sutcliffe.
184. The document is signed by Judy Faber.
185. The document is signed by Martha Kunkle.
186. The document is signed by Natalie Anderson.
187. The document is signed by Scott Anderson or by Scott W. Anderson.
188. The document is signed by Joseph Lutz.
189. The document is signed by Varsha Thakkar.
190. The document is signed by Michael Hanna.
191. The document is signed by Ann Pinto.
192. The document is signed by Toccoa Lenair.
193. The document is signed by Vinod Vishwakarma.
194. The document is signed by Leticia Arias.
195. The document is signed by Mutru Kumar.
196. The document is signed by Sukhada Lad.
197. The document is signed by Fifi Volgarakis.
198. The document is signed by Silvia Marchan.
199. The document is signed by Sue Filiczkowski.

- | 200. ~~200.~~ The document is signed by Janice M. Baker.
- 201. The document is signed by Aimee Austin.
- 202. The document is signed by Keith Chapman.
- 203. The document is signed by Richard Delgado.
- 204. The document is signed by Neil E. Dyson.
- 205. The document is signed by Renee L. Hensley.
- 206. The document is signed by Joseph P. Hillery.
- 207. The document is signed by Robert E. Kaltenbach.
- 208. The document is signed by Brian J. LaForest.
- 209. The document is signed by Michael H. Moreland.
- 210. The document is signed by Steve A. Nielsen.
- 211. The document is signed by Keith S. Reno.
- 212. The document is signed by Margery A. Rotundo.
- | 213. The document is signed by Denise A. Marvel.

LOST NOTE, DESTROYED NOTE: SEE EARLY AMORTIZATION EVENT, TOXIC WASTE, SECURITIZATION

In prior times, the possibility of a note being accidentally lost or destroyed was protected by statutes providing for proving the note and mortgage without the original. These statutes and rules of procedure are now being invoked by nominal lenders and assignees of nominal lenders to escape or navigate around a much deeper problem for them.

It is the opinion of this editor that the original notes were not accidentally destroyed or lost. They were either intentionally destroyed or hidden in some trustee's vault in an off shore structured investment vehicle. The reason is simple: the terms of the note and mortgage do not match the narrative or representations of the parties in the securitization process culminating in the sale of ABS instruments.

The nominal lender or assignee will claim that they did not lose or destroy the note and that might be true. That is why the SINGLE TRANSACTION theory must be invoked in foreclosure defense. Someone in the securitization process was responsible for the fact that between 40%-90% of the notes have vanished, whereas prior to the Mortgage Meltdown era the percentage of lost notes was less than 1/2 of one percent.

Since the promissory note is a thing of value and in fact is considered "money" in many economic models, it is a challenge to come up with reasons why anyone would "rip up a ten dollar bill." The only reasonable answer is that if someone actually saw the \$10 bill they would know it wasn't a \$100 bill, which is what they thought it was when they bought a piece of paper that referred back to the fictional "\$100" bill.

The effect of this destruction and the reasons for it add considerable weight to the argument that there is no longer any enforceable mortgage, that the rescission rights of the borrower have been deflected into an abyss for lack of a real party in interest, and that the SINGLE TRANSACTION theory is the only one that accounts for everything that went bad in the Mortgage Meltdown era. In the context of multiple assignments and parsing of the notes and mortgage in the securitization, the lost or destroyed note takes on a whole new meaning.

NOMINAL LENDER: SEE LENDER, ASSET BACKED SECURITY (ABS), CDO, Early Amortization Event

A conduit or party acting as Mortgage Broker under false pretenses to the borrower giving the impression that it has performed ordinary due diligence and applied ordinary underwriting standards to the approval of the loan, the appraisal, the borrower's qualifications and ability to pay and the fees at closing.

The Nominal Lender is the party named on the mortgage as the mortgagee and named on the note secured by the mortgage as the payee. It is usually a front for some larger entity or financial institution. In virtually all cases from 2001-2008 the party so named on the closing documents was a Nominal Lender. The nominal lender abandoned virtually all underwriting standards and assessment of risk of loss or default because the nominal lender was not assuming those risks. In all cases, the nominal lender had already pre-sold the or assigned rights under the mortgage and note before execution of the underlying documents (mortgage and note) or immediately after under the expectation and agreement, tacit or written, that the nominal lender would receive a fee or profit from closing the loan and that the actual funds would come from third parties involved in the securitization process eventually culminating in the issuance of ABS instruments.

Thus the nominal lender lacks legal standing to pursue enforcement of the note or mortgage because the nominal lender has no financial interest in the note or the mortgage. It is equally true, however, that the claim under TILA, RESPA, RICO etc. might not be addressed to the correct party when the mortgage audit is completed and rendered with a proper request under RESPA for resolution.

The nominal lender lacks legal authority to settle anything since it is no longer a holder in due course of the note or mortgage. In addition, the removal of the nominal lender from the actual underwriting and funding process probably extends the time for rescission indefinitely because the real parties in interest are never disclosed to the borrower. Similarly it is unlikely that the nominal lender has the authority to negotiate a settlement or even execute a satisfaction of mortgage, since it cannot return the original note (see Lost, Destroyed Note).

Early Amortization Event (EAE) — SEE LOST OR DESTROYED NOTE

A type of credit “enhancement” used in asset backed securities. One or more triggers, defined in the asset backed security’s documentation require the termination of revolving periods, controlled amortization periods and/or accumulation periods.

Once triggered, the early amortization provision requires that the monthly principal payments be distributed to investors as they are received. This “enhancement” was in actuality a massive risk factor and contributed greatly to the Mortgage Meltdown period of 2001-2008. It also may have caused certain parties to be motivated to “lose” or “destroy” the original note.

The most common trigger is a measure of how the portfolio yield net of charge-offs exceeds the base rate of servicing plus the investor coupon rate. Also called a pay-out event. Another event potentially within this category is the actual payoff of the mortgage. An analysis of the the concept of an EAE demonstrates several peculiarities and a possible explanation of the promissory note being lost or destroyed:

Given that an ABS is a derivative instrument and that traders in derivatives are comfortable with the value of these securities being “derived” by “reference” to something else, the traders are accustomed to examining not the actual “asset” or evidence of the asset (e.g. the note and mortgage) but rather a narrative describing the note and mortgage (which from 2003-2008 was, for the most part, at variance with the actual terms expressed in the note — the the existence of the original physical note put the CDO a manager at risk of discovery of having misled, lied or withheld vital information (like actual cash flow based upon negative amortization versus the stated rate on the note or the elimination of escrow for taxes and insurance which degrades the safety of the an investment based upon that mortgage and note)). Hence, the traders in derivatives relied upon summaries or narratives that were not scrutinized by any securities agencies for compliance with disclosure requirements, the most important of which were the risks of the investment in an ABS.

THEY RELIED INSTEAD ON THE RATING “AGENCIES” (ACTUALLY PRIVATE COMPANIES THAT WERE THEMSELVES UNREGULATED BUT ASSUMING THE MANTLE OF PSEUDO-GOVERNMENTAL OBJECTIVITY). And of course the rating agencies, by relying upon narratives prepared by CDO managers rather than examining the underlying documentation (the notes and mortgages) didn’t see the original note or mortgage either, much less analyze, examine or otherwise perform the due diligence that constituted the condition precedent to issuing a rating of “investment grade” on any security. This failure was prompted by monetary incentives and negotiation between the “client” (the issuer of the securities being rated and the rating company (Moody’s, Fitch etc.))

The actual projected charge-off rate was known to anyone who actually saw the loan application of the borrower, and the original note and mortgage. The narrated charge-off rate upon which the ABS derived its value was based upon the opinion of the CDO manager at the investment banking firm who had no expertise in appraising or underwriting loans. Nonetheless it is certainly an arguable position that the CDO manager knew or should have known that underwriting standards at the level of the nominal lender at closing had collapsed into a rubber stamp, since the nominal lender was in actuality playing the role of a conduit or mortgage broker. See Nominal Lender.

The structure of the SPV (see Special Purpose Vehicle) was a more formal replay of the pattern of misrepresenting the terms, risks and attributes of the note and mortgage. “Tranches” (see TRANCHE) were created within each SPV, wherein each tranche behaved more or less as separate entities providing protection to the tranche above and moving the brunt of the risk of total loss down lower and lower to the lowest tranche which in the parlance of the finance world is called “toxic waste.” (see Toxic Waste). ABS instruments were issued not on the entire SPV “portfolio” but on selected groupings of tranches within the SPV and further complicated by the trading of credit default swaps, the cross

guarantees, assurances and liability of other SPVs, other individual SPV tranches, and other third parties, insurers and assurers.

Thus the EAE represented in reality an astonishing array and number of variables that could not be quantified or analyzed by purchasers of ABS instruments except on faith and confidence of the issuers, rating agencies and other parties or by performing their own due diligence (which is now proposed under new SEC rules as of the the date of this entry, June 24, 2008).

At the root of the EAE phenomenon was the conflict between the truth of what was actually presented to the borrower at closing of the loan transaction and what was represented up-line (in the securitization process) eventually to the purchasers of the ABS instruments that provided the capital to fund the alleged "loans" which are editorialized in these pages as securities in actuality that were issued by the nominal lender under false pretenses and without compliance with banking and securities laws, rules and regulations that applied.

TOXIC WASTE: SEE SPV, ABS, SINGLE TRANSACTION

The lower tranche levels of an SPV (see Special Purpose Vehicle) whose main characteristic is to take whatever revenue or principal is paid on the high-risk debt obligations contained within that tranche and pay for any short-fall in higher tranches within the same SPV or through credit default swaps effecting other SPVs. It is difficult if not impossible to trace any specific mortgage or note to any specific one or more SPVs, tranches or other cross collateralization agreements and other instruments that distributed and parsed interests in individual loans in multiple parts to multiple parties and joined co-obligors at various levels before and during the securitization process (based upon the clearance procedures and record keeping of those involved in the SINGLE TRANSACTION).

TRUTH-IN-LENDING

DISCLOSURE REQUIREMENTS, VIOLATIONS, AND REMEDIES

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PURPOSE OF THE TRUTH-IN-LENDING ACT (TILA)

TILA seeks to assure meaningful disclosure of credit terms and conditions that the consumer will be informed with accurate costs and benefits of their credit transaction, allowing them to shop for the best credit terms available on the market. 15 U.S.C. § 1601(a).

STANDARD OF LAW

Since TILA specifically remedial in nature, its provisions must be strictly construed. A creditor must comply with TILA in all credit transactions and “misleading disclosure is as much a violation of TILA as a failure to disclose at all.” Smith v. Chapman, 614 F.2d 968, 977 (5th Cir. 1980). It is not sufficient to attempt to comply with the Act, but rather, creditors are required to strictly comply with all the requirements of the Act. There is no need to show that the consumer was misled or deceived by ambiguous credit terms in order to prevail. Noel v. Fleet Finance, Inc., 971 F. Supp. 1102 (E.D. Mich. 1997).

Congress did not intend for creditors to escape liability for merely technical violations, that even minor or technical violations impose liability upon the creditors. Huff v. Steward-Gwinn Furniture Co., 713 F.2d 67, 69 (4th Cir. 1983). See also, Washington v. Ameriquet Mortg. Co., 2006 W.L. 1980201 (N.D. Ill.).

SCOPE

TILA applies to most consumer credit transactions and was specifically enacted to ensure accurate and meaningful disclosure of the charges involved in a transaction, allowing consumers to make their own decisions about obtaining a loan.

A lawsuit for violation of TILA may be based upon a lenders failure to comply with disclosure requirements. U.S.C. §§ 1631-34. Most of TILA violations involve the creditor’s failure to charge the correct amount, failure to disclose all the material terms, or failure to provide necessary forms or documents required by the Act.

TILA does not apply to the following transactions:

1. Transactions that are made for business, commercial, or agricultural purposes. 15 U.S.C. § 1603(1); Reg. Z § 226.3(a)(1).
2. Extensions of Credit to Organizations as opposed to natural persons. U.S.C. §

1603(1); Reg. Z. § 2026.3(a)(2).

3. Credit over \$25,000 Not Secured by Real Property or a Dwelling. U.S.C. § 1603(3); Reg. Z. § 226.3(b).

4. Student Loans. U.S.C. § 1603(7); Reg. Z. § 226.3(f).

5. Transactions under Public Utility Tariffs. U.S.C. § 1603(4); Reg. Z. § 226.3(c).

6. Securities or Commodities transactions that are registered with the Securities and Exchange Commission. U.S.C. § 1603(2); Reg. Z. § 226.3(d).

STATUTE OF LIMITATIONS

When a violation of TILA occurs, the one-year limitations period applicable to actions for statutory and actual damages begins to run. U.S.C. § 1641(e).

A TILA violation may occur at the consummation of the transaction between a creditor and its consumer if the transaction is made without the required disclosures.

A creditor may also violate TILA by engaging in fraudulent, misleading, and deceptive practices that conceal the TILA violation occurring at the time of closing. Often consumers do not discover any violation until after they have paid excessive charges imposed by their creditors. Consumers who later learn of the creditor's TILA violations can allege an equitable tolling of the statute of limitations. When the consumer has an extended right to rescind or pursue other statutory remedies because a violation occurs, the statute of limitations for all the damages the consumers seek extends to three years from the date the violation is revealed.

McIntosh v. Irwin Union Bank & Trust Co., 215 F.R.D. 26, 30 (D. Mass. 2003).

TILA AND REGULATION Z

Congress delegated authority for the implementation of TILA to the Federal Reserve Board (FRB). The Board of Governors (the Board) of the FRB interpreted TILA and promulgated a detailed and comprehensive set of rules that sets out the Board's interpretation known as Regulation Z. Regulation Z is an official set of rules and most pleadings alleging TILA violations also alleging violations of Regulation Z as well.

DISCLOSURE REQUIREMENTS AND VIOLATIONS

1. **Form Of Disclosure**

TILA requires specific disclosures before the closing of a credit transaction. Disclosures must be “clear and conspicuously, in writing, in a form that the consumer may keep.” § 1632(a); § 226.5(a)(1).

Disclosure statement is a written document that a creditor is required to provide the consumer prior to closing, which contains TILA required material terms¹ related to the costs of the credit transaction. In this statement, a creditor must disclose to the person who is obligated on a consumer credit transaction the information required under TILA.

The Act calls for disclosures to be made in a manner that is reasonably to understand by ordinary persons. Most courts agree that “sufficiency of TILA mandated disclosures is to be viewed from the standpoint of an ordinary consumer, not the perspective of a Federal Reserve Board member, federal judge, or English professor.” Smith v. Cash Store Mgmt., 195 F.3d 325, 328 (7th Cir. 1999). Edmondson v. Allen-Russell Ford, Inc., 577 F.2d 291, 296 (5th Cir. 1978) (“we must assess the adequacy of disclosure [...] by the audience for which disclosure was intended).

a. Required Disclosures Must be Clear and Conspicuous. U.S.C. § 1632(a). Courts usually look at the particular Disclosure Statement and its content to determine whether it was sufficiently clear and conspicuous.

1) Creditor violates TILA for failure to clearly and conspicuously disclose the requirements by disclosing required information in fine print. There was “nothing in the disclosure statement that would call a person’s attention to the relevant clause.” Violation found when disclosures were buried near the bottom of the form. Re Wright, 11 B.R. 590, 592 (S.D. Miss. 1981).

2) TILA violation found where a financial company fails to disclose the cost of credit life and disability insurance in the disclosure statement, making the interest of the loan appear less than its actual cost. Woods v. Beneficial Finance Co. of Eugene, 395 F. Supp. 9, 12 (DC Or 1975).

3) Disclosures are not clear and conspicuous when the disclosure

¹ Material terms are annual percentage rate, finance charge, method of determining the finance charge and the balance, amount financed, total of payments, the number and amount of payments, due dates or periods of payments scheduled to repay the indebtedness. U.S.C. § 1602(u); Reg. Z. § 226.23 n. 48.

statement includes contradicting terms. Varner v. Century Finance Co. Inc., 738 F.2d 1143 (11th Cir. 1984) (disclosing two different dollar amounts under the same heading is confusing). See also Andrews v. Chevy Chase Bank, 240 F.R.D 612, 618 (E.D. Wis. 2007) (Disclosure found unclear where the Truth-In-Lending Disclosure Statement shows the APR is 4.047 percent and other disclosure that “strongly implie[s] that the cost of the loan expressed as a yearly rate” at 1.950 percent); Ralls v. Bank of N.Y., 230 B.R. 508, 516 (E.D. Pa. 1999) (where there is a contradiction between TILA disclosures and other information provided by the lender, the disclosures are unclear).

b. The terms “finance charge” and “annual percentage rate” (APR) shall be more conspicuous than any other terms. U.S.C. § 1632(a). These terms can be disclosed more conspicuously by using a contrasting type size or boldness and/or placing borders around them. Commentary § 226.5(a)(2)-2.

1) Violate for printing the terms “finance charge” and annual percentage rate” in the same typeface as other material terms. Brown v. Payday Check Advance, Inc., 202 F.3d 987, 990 (7th Cir. Ill. 2000). See also, Herrera v. First Northern Sav. & Loan Asso’n, 805 F.2d 896, 898 (NM 1986) (TILA violated when the term “annual percentage rate” appeared on the disclosure statement in identical size, style, and boldness with over 30 other terms and phrases).

2) No violation where the term “annual percentage rate” appears in a bolded box and is highlighted by all capital and bolded letter.” Robinson v. First Franklin Financial Corp., 2006 WL 2540777 (E.D. Pa.).

c. TILA disclosures must be grouped together and segregated from all unrelated information. U.S.C. § 1632(a). Disclosures must be organized in the contrast so that each section of the disclosure statement is complete without any extra information that confuses the consumers. Reg. Z. § 226.5(b)(1).

1) A paragraph at the bottom of the contract referring to the “property described above” is ambiguous and does not comply with the requirement that disclosures be grouped together. Leathers v. Toyota-Volvo, 824 F.

Supp. 155 (C.D. Ill. 1993). See also, In re Cook, 76 B.R. 661, 663 (C.D. Ill. 1987) (information in the disclosure statement referred back and forth violates TILA, because the required disclosures must be simplified and grouped in a single location and segregated from everything else).

2) Failure to disclose time of payment in the disclosure statement violates TILA because “the timing of payments [...] must be grouped with the other required disclosure” such as number of payments and amount of payments. Jones v. Ameriquest Mort. Co., 2006 WL 273545 (N.D. Ill.). See Andrews v. Chevy Chase Bank, 240 F.R.D at 617 (the creditor listed the period of payments in a different place than the number and amount of payments violate TILA requires to group related information together).

d. Additional information. Lenders can include additional information on the disclosure statement so long as the additional information relates to the required disclosures. U.S.C. § 1632(b).

1) Disclosure of an additional interest rate of 1.950 percent, which only applied to the first monthly payment, in the disclosure statement is violation, because it causes the loan to “appear more attractive than it actually was and serve no useful purpose.” Andrews v. Chevy Chase Bank, 240 F.R.D at 620.

2) Additional information setting out the Note Rate disclosed on the Disclosure Statement found “helpful and important to consumers.” Smith v. Anderson, 801 F.2d 661, 663 (Ct. App. Va. 1986).

e. The home equity brochure published by the Board or a suitable substitute shall be provided. U.S.C. § 1637A(e). Creditors are required to provide the consumer with a brochure prepared by the FRB describing the home equity plans. If a creditor provides a substitute brochure, the brochure must be comparable to the Board’s brochure in substance and comprehensiveness. Reg. Z. § 226.5b(e)-1. When a third party has provided the consumer with a brochure, the creditor does not have to give the consumer a second copy of the brochure. Reg. Z. § 226.5b(e)-2.

2. Time of Disclosures: “The disclosures and brochure required ... shall be

provided at the time an application is provided to the consumer.”

a. Creditor failed to provide the consumer disclosure statement at the consummation of the credit transaction violates TILA. Family Fed. Sav. & Loan v. Davis, 172 B.R. 437 (D.C. 1994); In re Schweizer, 354 B.R. 272, 281 (Id. 2006).

b. No Violation where the creditor presents to the consumer, prior to the consummation of the credit transaction, a contract with multiple copies and allows the consumer to keep one of the copies before signing the contract. Queen v. Lynch Jewelers, LLC, 55 P.3d 914, 916 (Kan. App. 2002).

3. **Required Disclosures for Open-End Credit Plan**

TILA requires the following information to be disclosed, to the extent applicable. U.S.C. § 1637(a).

a. **Disclosure of the Finance Charge Accrual Date:** The conditions under which a finance charge may be imposed together with either the time period, if any in which the customer may pay without incurring additional finance charges or there is no free ride period. Reg. Z. § 226.6(a)(1).

b. **Disclosure of the Periodic Rate, Range of Balances, and APR:** For each period, a creditor must disclose the periodic rate that will be used to compute the finance charge; the balances to which the rate is applied; the corresponding nominal annual percentage rate; if deferent rates apply to different types of transactions, they must be disclosed; and penalty rate and possible conditions that trigger the penalty rate. Reg. Z. § 226.6(a)(2).

c. **Disclosure of the Periodic Rate, Range of Balances, and APR:** The method used to determine the balance on which the finance charged is imposed, and a complex method calls for a more detailed explanation. Reg. Z. § 226.6(a)(3).

d. **Disclosure of the Finance Charge Amount:** The method used to determine the amount of finance charge, including any minimum or fixed amount. Reg. Z. § 226.6(a)(4).

e. **Disclosure of Charges Other than Finance Charge:** Identification of other charges which may be imposed and their method of computation in

accordance with the FRB regulations. Significant charges such as membership fees, late charges, default charges, charges for exceeding the credit limit of an account, fee for providing copies of documents, taxes imposed on the credit transaction, real estate charges, and other charges must be disclosed. Reg. Z. §§ 226.6(b), 226.4.

f. Disclosure of Security Interest: If a security interest will be secured in connection with the transaction, the collateral must be identified, even if the property is not owed by the consumer. Reg. Z. § 26.2(a)(25).

g. Disclosure of Billing Error Right: A statement as to billing error rights and the right to assert claims and defenses in a form prescribed by the FRB must be provided to the consumer at the consummation of a transaction. Reg. Z. § 226.2(a)(d).

4. Required Disclosures of Residential Mortgage Transactions

Most home mortgages are subject to the disclosure requirements of TILA. U.S.C. § 1638. The required disclosures must be provided to the homeowner prior to the consummation of a credit transaction. Homeowners have the right to rescind most credit transactions, including home equity loans and home improvement loans, in which the home is taken as collateral.

a. Disclosure of the Creditor: The name of the creditor must be provided and the address and/or telephone number are not required but may be included. U.S.C. § 1602(f); Reg. Z. § 226.2(a)(17).

Failure to disclose of the creditor's identity properly entitles the consumer only actual damages, if any.

b. Amount Financed: This term must be used in disclosure statement, and a brief description of the amount financed must be provided. U.S.C. § 1638(a)(2)(A).

Failures to properly disclose the amount financed gives rise to statutory damages, attorney's fees, and any actual damages. Reg. Z. § 1640(a)(3). Its violation may also extend the consumer's right to rescind. U.S.C. § 1602(u); Reg. Z. § 226.23 n. 48.

c. Finance Charge: The term "finance charge" must be used and A brief

description must be provided. U.S.C. § 1638(a)(3); Reg. Z. § 226.18(d). It can be disclosed only as a total amount, and there is no requirement to itemize finance charge, and overstating finance charge does not violate TILA. Vandenbroeck v. Commonpoint Mortg. Co., 22 F.Supp. 2d 677 (W.D. Mich. 1998).

In real estate closing charges, fees may be excluded from the finance charge are real property and title-related fees; document fees; closing agent, attorney fees; and notary, appraisal, and credit report fees. U.S.C. § 1605(e); Reg. Z. § 226.4(c)(7).

d. APR: The term must be used and disclosure must be accurate. U.S.C. §1638(a)(4); Reg. Z. §§ 226.18(e). The APR is accurately disclosed when it is not more than 1/8 of 1 percentage point (.125%) above or below the actual APR. In variable-rate transactions, the description must inform the consumer that the interest rate is subject to change. A historical example illustrating the effects of interest rate changes implemented according to the loan program may be provided to the borrowers. U.S.C. § 1638(a)(14); Reg. Z. § 226.18(f).

Improper disclosure of the APR is a material violation of TILA that extends the consumer's right to rescind. U.S.C. § 1602(u); Reg. Z. § 226.23 n 48. Statutory damage, attorney's fee, and actual damage are also available. U.S.C. § 1640(a)(3).

e. Payment Schedule: Payment schedule includes the number of payments, the amount of each payment, and the timing of payments scheduled to repay the obligation. U.S.C. § 1638(5)-(6); Reg. Z. § 226.18(g). Failure to disclose that payments were due monthly violates TILA. Andrews v. Chevy Chase Bank, 240 F.R.D. at 617.

Violation of these requirements entitles the consumer statutory damages, attorney's fees, and actual damages. U.S.C. § 1640(a)(3) Improper disclosure is also a material violation for purposes of rescission. U.S.C. § 1602(u); U.S.C. § 1602(u); Reg. Z. § 226.23 n 48.

f. Total Sale Price in a Sale of Property: The total of the cash price of the property or services, additional charges, and the finance charge must be disclosed. U.S.C. § 1638(a)(7). Reg. Z. § 226.18(j). Actual damages may be available for

violation to disclose this factor. U.S.C. § 1640(a).

g. A statement regarding the taking of the security interest in the property: The creditor must disclose whether it acquires a security interest in the property being purchased, or in other property, as part of the transaction.

Violate this requirement will give rise to statutory damages, attorney's fees, and actual damages. U.S.C. § 1640(a)(3).

h. Late charges: The dollar amount or the percentage charge may be imposed for late charge. U.S.C. § 1638(a)(10); Reg. Z. § 226.18(l). Actual damages may be available for failure to state the late charges. U.S.C. § 1640(a).

i. Any Rebate Available: Any funds given to the consumer must be disclose whether it is in the form of cash, check, deposit in a savings or checking account. Reg. Z. § 226.18(r). Actual damages may be available for this violation. U.S.C. § 1640(a).

j. Disclosure of Reference to Additional Documents: Information regarding nonpayment, default, and the right to accelerate the maturity of the debt. Prepayment rebates and penalties are not required to be disclosed to simplify the closing process. Instead, the creditor can provide appropriate documents that consumer could refer to. Reg. Z. § 226.17(a)(4). Actual damages may be available for failure to disclose this requirement. U.S.C. § 1640(a).

5. Required Disclosures for Adjustable Rate Mortgages

Adjustable rate mortgages (ARMs), which secured by the borrower's principal dwelling with a maturity longer than one year, are required to be disclosed with additional information. To simplify disclosure requirements for variable rate loans, creditors may disclose any variable rate transaction applying the ARMs disclosure rule. However, the reverse is not allowed. Reg. Z. § 226.18(f); 52 Fed. Reg. 48665 (Dec. 24, 1987).

Failure to disclose properly and accurately the requirements of variable rate loans entitles the consumer statutory and actual damages and also rescission right. In re Fidler, 210 B.R. 411 (D. Mass. 1997).

a. Rate Cap Disclosure: The maximum interest rate that may be imposed during the term of the obligation must be disclosed to the borrower. Reg. Z. §

226.30(a); Fed. Reg. 45611 (Dec. 1, 1987).

b. ARM brochure: The *Consumer Handbook on Adjustable Rate Mortgages*, published by the Board and the Federal Home Loan Bank Board, may be provided to the consumer to fulfill this requirement. Creditors can also provide a suitable consumer handbook that is comparable to the Board's Consumer Handbook in substance and comprehensiveness. Reg. Z. § 226.19(b)(1).

c. Timing of Disclosures: The required disclosures and the Consumer Handbook must be provided to the borrower when an application form is furnished or before the payment of a non-refundable fee is made, whichever earlier. Reg. Z. § 226.19(b). Where the borrower receives the application by mail or a third party agent, the required information must be placed in the mail or delivered within three business days. Reg. Z. § 226.19 (b), n. 45b.

d. Specific Disclosures Required for Variable Rate Loan: Major aspects of the variable rate loan program, which the consumer is considering, must be specifically disclosed.

1) The Index: Identification of the index will be used to calculate the interest rate and a brief description of the method used in calculating the interest rate are required by the Regulation. § 226.19(b)(2)(ii).

2) Current Margin Value and Interest Rate: A statement must be provided to the consumer suggesting the consumer ask for the current margin and interest rate. Reg. Z. § 226.19(b)(2)(iv).

3) Frequency of rate change and payment adjustment must be disclosed. Reg. Z. § 226.19(b)(2)(vi).

4) Negative Amortization: A statement to inform the consumer the consequences of negative amortization. A creditor must disclose the rules relating to the option, including the effects of exercising the option such as the increase of interest rate will occur and the payment amount will increase. Reg. Z. § 226.19(b)(2)(vii); commentary § 226.19(2). Andrews v. Chevy Chase Bank, 240 F.R.D at 620 (no violation found where the creditor informs the borrowers what will occur when the interest rate increases).

5) Conversion Feature: If the loan has a conversion feature, the amount of fees will be charge and the method of the fixed rate interest to be determined must be disclosed. Reg. Z. § 226.19(b)(2)(vii)-3.

e. **Historical Example Disclosure**: Creditors have the option to disclose the maximum interest rate and payment amount for a \$10,000 loan amount or the historical example of changes in the index being used. U.S.C. § 1638; Reg. Z. 226.9(b)(2)(viii). If the former method is used, a statement that the periodic payment may increase or decrease substantially. Reg. Z. § 226.19(b)(2)(viii)(B).

f. **Subsequent Disclosures**: Disclosures concerning rate adjustments are required for all variable rate loans. Reg. Z. § 226.19(b). Notice of the adjusted payment amount, interest rate, index rate, and loan balance is required to disclose to the borrower in a timely manner. Reg. Z. § 226.20(c)(1)-(4).

If payment adjustment may accompany interest rate adjustment, creditors are required to send borrowers notice at least 25, but not more than 120, days prior to the due date of a payment at the new interest rate. Notice is required to be sent to borrowers whenever there is an adjustment in interest rate. Reg. Z. § 226.20(c).

If interest rate adjustments are made without a corresponding payment adjustment, the notice can be sent to the borrower once a year. Id.

Incorrect adjustment or used of index value or incorrect disclosing the new payment amount that does not comport with the contract terms violate TILA requirements, giving rise to statutory and actual damages. U.S.C. § 1640(a).

Statue of limitations for an affirmative violation is “one year from the date of the occurrence of the violation” that starts running when the erroneous notice is sent. U.S.C. § 1604(e).

6. **Required Disclosure of Rescission Rights**: Rescission rights arise when the transaction is a consumer credit transaction, in which a non-purchase lien or security interest is placed on the consumer’s principal dwelling unit. TILA rescission remedies reflect Congress’ intent to keep homeowners from placing their homes in jeopardy without a reasonably clear understanding of the financial risks and benefits of the transaction.

- a. Rescission right** is vested in the owner of the property that is the subject of the security interest. Reg. Z. §§ 226.15(a)(1)(i), 226.15(b), 226.23(a)(1).
- b. The security interest** must be the principal residence of the owner of the interest. Reg. Z. § 226.2(a)(11).
- c. Time of Delivery:** The rescission notice may be given after consummation, though the rescission period does not begin to run until it is effectively delivered. Official Staff Commentary § 226.23(b)-4. It is not effectively delivered until it is given in a form the consumer can keep. Reg. Z. § 226.15(b). A written acknowledgement of receipt of rescission notice creates a rebuttable presumption of delivery. Cole v. Lovett, 672 F. Supp. 947 (S.D. Miss. 1987).
- d. Providing Rescission Notice:** Each person who has the right to rescind a credit transaction must be provided two copies of rescission notice and the required disclosures in a credit transaction. U.S.C. § 1635(a); Reg. Z. §§ 226.5(b), 226.15(b). Notice of the right to rescind is also required for non-purchase money mortgages. U.S.C. § 1635(a). Giving the TILA notice and another notice of rescission at the same time, which have different rescission dates, confuses an ordinary consumer, violating the “clear and conspicuous” disclosure requirement. Jones v. Ameriquest.
- e. Time to Exercise Rescission Right:** The consumers have until midnight of the third business day following the delivery of the rescission notice, the transaction, or the receiving of the Truth-In-Lending statement, whichever occurs last. See, Jones v. Ameriquest. Right to rescind can be exercised prior to the consummation of the loan. Community Mutual Sav. Bank v. Gillen, 655 N.Y.S.2d 271 (City Ct. 1997) (the consumer properly rescinds her loan at closing recovering fees paid to the creditor).
- If the creditor fails to deliver the required notice of material disclosures, the consumer’s right to rescind is automatically extended from three business days to three years. Reg. Z. § 226.23(a)(3).
- f. Assignee’s Liability:** An assignee is liable for statutory damages for violations by failure to disclosure TILA requirements by its predecessors and its

own violation if it fails to respond properly to a rescission notice. Palmer v. Champion Mortg., 465 F.3d 24, 27 (1st Cir. 2006) (“if a creditor does not respond to a rescission request within twenty days, the debtor may file suit in federal court to enforce the rescission right”). See also U.S.C. § 1635(b).

g. Rescission Process: The consumer must send a written notice to the creditor to trigger the rescission process. When the notice of rescission has been mailed, the notice is considered given. Reg. Z. §§ 226.15(a)(2), 226.23(a)(2).

When the consumer rescinds, the security interest automatically becomes void. The consumer is relieved of any obligation to pay any finance charge or any other charge. U.S.C. § 1635(b); Reg. Z. §§ 226.15(d)(1), 226.23(d)(1). Rescission voids the mortgage and is a complete defense to foreclosure. Yslas v. K.K. Guenther Builders, Inc., 342 So.2d 859 (Fla.2d D.C.A. 1977). See Beach v. Great Western Bank, 670 So.2d 986 (Fla. 4th D.C.A. 1996).

The creditor has twenty days from receipt of the consumer’s rescission notice to return any money or property given to anyone and to take appropriate and necessary action to reflect the termination of the security interest. U.S.C. § 1635(b); Reg. Z. §§ 226.15(d)(2), 226.23(d)(2).

After the creditor has complied with the preceding mandate, the consumer tenders back to the creditor any money or property received. U.S.C. § 1635(b); Reg. Z. §§ 226.15(d)(3), 226.23(d)(3).

OTHER AVAILABLE REMEDIES

Only creditors are subject to the civil penalties of TILA. U.S.C. § 1640(a). Civil damages are appropriate when disclosure requirements have been violated, and liability is imposed despite the creditor’s alleged good faith and reasonableness. Ratner v. Chemical Bank N.Y. Trust Co., 329 F. Supp. 270 (S.D.N.Y. 1971).

1. Statutory Damages

Violations of the general requirements and rescission requirements give rise to statutory damage claims. U.S.C. § 1640(a). For open-end credit transactions, statutory damages are awarded in the amount twice of the amount of finance charge. If the action arises out of a credit transaction secured by a dwelling, the consumer is entitled to a

minimum award of \$200 but not more than \$2,000. U.S.C. § 1640(a)(2)(A)(i-iii). Only one statutory recovery is allowed even there are multiple disclosure violations in a transaction. U.S.C. § 1640(g).

2. Attorney's Fees

Consumers are awarded attorney's fees in a successful action or when they are "determined to have a right of rescission under section 1635," even if the consumer is not obligated to pay his or her attorney. U.S.C. § 1640(3); Andrews v. Chevy Chase Bank, 240 F.R.D. at 621 ("because [...] plaintiffs have a right of rescission, they are entitled to attorneys' fees"); Kessler v. Associates Financial Servs. Co. of HI, Inc., 639 F.2d 498, 499 (C.A. Hi. 1981) (attorney's fees are awarded even the plaintiffs are represented without charge by legal services attorneys). Attorney's fees include the cost of the action and "a reasonable attorney's fee as determined by the court." U.S.C. § 1640(3).

3. Actual Damages

A consumer is entitled for actual damages when a creditor fails to comply with the requirements imposed by TILA, in the amount equal to the sum of any actual damage sustained by the consumer as a result of the creditor's violation. U.S.C. § 1640(a)(1). Courts may require the consumer to show actual reliance upon the accuracy of the disclosures in order to claim actual damages. Perrone v. General Motors Acceptance Corp., 232 F.3d 433, 435-439 (5th Cir. 2000); Peters v. Jim Lupient Oldsmobile Co., 220 F.3d 915, 917 (8th Cir. 2000) (detrimental reliance is established when the plaintiff shows that she read and understood the disclosures and that if the disclosures have been accurate, she would have sought and obtained a lower loan).

TRUTH IN LENDING SCREENING

INSTRUCTIONS & CHECKLIST

PURPOSE OF ANALYSIS

CONTACT INFORMATION

Full Name			
Mailing Address			
Street Address			
Telephone Numbers	Home:	Work:	Cell:
Facsimile Number			
E-Mail Address			
Best Time To Call	☐ 9:00 AM – 12:00 PM Eastern		☐ 12:00 PM – 6:00 PM Eastern

QUESTIONNAIRE

Is this a purchase money mortgage or a refinance? ☐ Purchase Money Mortgage ☐ Refinance			
Did you already own your home when you took out this loan? ☐ Yes ☐ No			
Did you receive early disclosures within three days after you applied for the loan? ☐ Yes ☐ No			
Who is your present Mortgage Servicing Company?			
What is the current status of your loan? ☐ Current ☐ Default ☐ Foreclosure ☐ Bankruptcy			
Do you have any urgent deadlines? ☐ Yes ☐ No			
Please explain:			
How did you hear about us?			

Required	APPLICATION TO CLOSING	Missing	Received
	Good Faith Estimate Of Settlement Charges (Initial Disclosure)		
	Truth In Lending Disclosure Statement (Estimated)		
	Mortgage Broker Agreement (If Available)		
	Initial Uniform Residential Loan Application (If Available)		
Required	SETTLEMENT DOCUMENTS	Received	Missing
✓	HUD-1 Settlement Statement-1 or HUD-1A Settlement Statement		
✓	Truth In Lending Disclosure Statement (All Copies)		
✓	Truth in Lending Itemization of Amount Financed		
	Mortgage Insurance Disclosure (If Applicable)		
✓	Note		
	Mortgage/Deed of Trust		
✓	Notice of Right to Cancel (All Copies)		
	Riders to Note and Mortgage/Deed of Trust		
	Final Uniform Residential Loan Application		
	Home Ownership and Equity Protection Act Notice (Section 32 Notice)		
	Affiliated Business Arrangement Disclosure		
Required	POST-CLOSING SERVICING RECORDS	Received	Missing
✓	Life of Loan Transaction History		

	Three Consecutive Monthly Mortgage Statements		
	Correspondence To And From Lender		

Client Name:

Closing Date:

TILA Worksheet

Staff: _____

A. Note Principal
B. Finance Charges: look to Reg. Z, §226.4(a) & (b), Finance charge. 1st look at (c)(7) Real-estate related fees that are excluded from the finance charge. If you **don't** find the charge listed there, look to: (b) Example of finance charge. Also add total amt. of (c)(7) unreasonable fees. Also add any overcharge (only) of any recording fee.
C. Amount Financed
D. TILA Amount Financed
E. Difference
F. $.005 \times A$

_____ Lender provided itemization

[illegible]

Total: \$_____ (add amounts in section B)

C. \$_____ (subtract the "Total" amount in B from A)

D. \$ Note: If C is a larger number than D, stop. No violation. If C is smaller than D

E. \$ _____ (subtract the amount in C from D) There is a violation, b/c the Finance Charge has been underdisclosed, but it still may be w/in the acceptable tolerance, listed below.

F. \$_____ (If E is not equal to or greater than F, no actionable violation for most loans.)

Lender:

Broker:

Title Company:

Appraiser:

Recording fees overcharged?
NO YES:

PMM: NO YES

Tolerance:

* Rescission: \$35 tolerance level in foreclosure. **Check here if client is in foreclosure:** _____

**** Rescission:** Generally, \$100 or .005 (half of 1%) of the principal, whichever is greater. (In some rare circls, \$100 or 1% of the principal (whichever is greater); see TILA manual 4.6.3.2.3.)

*** Damages (affirmative claim): \$100

Continued... APR Calculations

F. APR per TILA _____ %

G. APR per MVFHC _____ % (Calculate with APR software using our numbers.)

H. APR Difference _____ % (Subtract F from G) If the difference is greater than .125 or 1/8 (- or +), there is a violation if the difference is **not** caused by an incorrect FC. If it is, has to meet the tolerance level for an incorrect Finance Charge, above.

I. APR per Lender % (Calculate with APR software using the lender's numbers on the TILA.)

J. APR Difference _____ % (Subtract F from I) If the difference is greater than .125 or 1/8 (- or +), there is a violation, which is subject to several defenses by the lender.

Other issues:

SAMPLE RESPA QUALIFIED WRITTEN REQUEST SAMPLE LETTER

Dear Sir/Madam:

Please treat this letter as a “qualified written request” under the Federal Servicer Act, which is a part of the Real Estate Settlement Procedures Act, 12 U.S.C. 2605(e). Specifically, I am requesting the following information:

1. A complete and itemized statement of the loan history from the date of the loan to the date of this letter including, but not limited to, all receipts by way of payment of otherwise and all charges to the loan in whatever form. This history should include the date of each and every debit and credit to any account related to this loan, and the nature and purpose of each such debit and credit, and the name and address of the payee of any type of disbursement related to this account.

2. A complete and itemized statement of all advances or charges against this loan for any purpose that are not reflected on the loan history transaction statement provided in answer to question #1.

3. A complete and itemized statement of the escrow account of the loan, if any, from the date of the loan to the date of this letter, including, but not limited to, any receipts for disbursements with respect to real estate property taxes, fire or hazard insurance, flood insurance, mortgage insurance, credit insurance, or any other insurance product.

4. Have you purchased and charged to the account any Vendor’s Single Interest Insurance?

5. A complete and itemized statement from the date of the loan to the date of this letter of any forced-placed insurance and expenses related thereto, related in any way to this loan.

6. A complete and itemized statement from the date of the loan to the date of this letter of any suspense account entries and/or any corporate advance entries related in any way to this loan.

7. A complete and itemized statement from the date of the loan to the date of this letter of any property inspection fees, property preservation fees, broker opinion fees, appraisal fees, bankruptcy monitoring fees, or other similar fees or expenses related in any way to this loan.

8. Identify the provision under the Deed of Trust and/or note that authorizes charging each and every such fee against the loan of the debtors.

9. Please attach copies of all property inspection reports and appraisals.

10. A complete and itemized statement of any and all arrears including each month in which the default occurred, and the amount of each monthly default.

11. A complete and itemized statement of any late charges to this loan from the date of this loan to the date of this letter.

12. The current amount needed to pay-off the loan in full.

13. A full and complete comprehensible definitional dictionary of all transaction codes and other similar terms used in the statements requested above.

14. A complete and itemized statement of any funds deposited in any suspension account(s) or corporate advance account(s), including, but not limited to, the balance in any such account or accounts and the nature, source, and date of any and all funds deposited in such account or accounts.

15. A complete and itemized statement from the date of this loan to the date of this letter of the amount, payment date, purpose and recipient of all foreclosure expenses, NSF check charges, legal fees, attorney fees, professional fees, and other expenses and costs that have been charged against or assessed to this mortgage.

16. The full name, address, and phone number of the current holder of this debt including the name, address, and phone number of any trustee or fiduciary.

17. The name, address, and phone number of any master servicers, servicers, sub-servicers, contingency servicers, back-up servicers, or special servicers for the underlying mortgage debt.

18. The full name, address, and phone number of the current owner of this debt including the name, address, and phone number of any trustee or fiduciary.

19. Copies of all servicing, master servicing, sub-servicing, contingency servicing, special servicing, or back-up servicing agreements with respect to this account.

20. All written loss-mitigation rules and work-out procedures related to any defaults regarding this loan and similar loans.

21. The procedural manual used with respect to the servicing or sub-servicing of this loan.

22. A summary of all fixed or standard legal fees approved for any form of legal services rendered in connection with this account.

23. A copy of the Transaction History Report for the debtors' mortgage loan account, with a detailed description of all fee codes.

You should be advised that you must acknowledge receipt of this qualified written request within 20 business days, pursuant to 12 U.S.C. Section 2605(e)(1)(A) and Reg. X Section 3500.21(e)(1).

THE LAW OFFICES OF
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Telephone: (704) 487-0616
Facsimile: (888) 870-1644

16 January 2008

Creditor
Creditor Address
City, State, Zip

**Re: Exclusive RESPA Address for a Qualified Written Request under HUD
Regulation X, Section 3500.21(e)(1)**

As you are aware, HUD Regulation X, Section 3500.21(e)(1) states, "By notice either included in the notice of transfer or separately delivered by first-class mail, postage pre-paid, a servicer may establish a separate and exclusive office address for the receipt and handling of qualified written requests."

This letter will serve as a request for your exclusive RESPA address for the receipt and processing of all Qualified Written Requests. Please note that any failure on your part to provide my office with your exclusive address will be considered to constitute a waiver of the requirements under HUD Regulation X, Section 3500.21(e)(1), including, but not limited to, any defenses or claims related to alleged "insufficient notice."

Sincerely,



O. Max Gardner, III

YOUR EXCLUSIVE RESPA ADDRESS FOR A QUALIFIED WRITTEN REQUEST:



*The Law Offices of O. Max Gardner III, designated as a Federal Debt Relief Agency by an Act of Congress and the President of the United States, has proudly assisted consumers seeking relief under the US Bankruptcy Code for over 30 years.



O. Max Gardner III, CEO, Vice President of Litigation Management
Gardner.Botes PLLC - National Consumer Bankruptcy Litigation Center
403 South Washington Street, Shelby, North Carolina 28150
mgardner@ncblc.com - (704) 481-1403 (voice) - (888) 870-1647 (fax)

NAME
ADDRESS
CITY/STATE/
AREA CODE/PHONE

DATE

MORTGAGE COMPANY/SERVICER
MORTGAGE CO. ADDRESS
MORTGAGE CO CITY/ST/ZIP

Loan #XXXXXXX
Borrower(S) Name: XXXXXXX
Property Address: ADDRESS, CITY, ST, ZIP

**RE: RESPA QUALIFIED WRITTEN REQUEST, COMPLAINT, DISPUTE OF DEBT & VALIDATION
OF DEBT LETTER**

Dear Madam or Sir:

I am writing to you to complain about the accounting and servicing of my mortgage and my need for understanding and clarification of various charges, credits, debits, transactions, actions, payments, analyses, and records related to the servicing of my loan from its inception to the present date. As such, please treat this letter as a **“Qualified Written Request”** under the Real Estate Settlement Procedures Act, codified as Section 2605 (e) of Title 12 of the United States Code. As you may know, RESPA provides substantial penalties and fines for non-compliance or answers to my questions provided in this letter within sixty [60] days!

Due to the recent mortgage market meltdown and your involvement in this market, I am concerned that my loan has not been properly credited, amortized, calculated, and serviced properly. I am also concerned with the ownership of my promissory note; to whom my actual obligation is owed to; who is my actual lender; and your authority to collect payments and/or negotiate the purchase/repurchase of my promissory note from my actual lender.

The meltdown of the mortgage market and the effects of any financial manipulation may have affected the current amount you claim I owe as the principal balance due on my loan which may not be correct and may not have been properly amortized. In addition, I am concerned that my escrow payments and/or my monthly payments may have been adversely affected and that I may be paying more than what I owe or less than is necessary to properly amortize my mortgage over its term.

Upon receipt of this letter, please refrain from reporting any negative credit information to any credit reporting agencies until you respond to the “requests” in this letter.

Due to the current economic climate, I am exploring various options to protect my property and finances. My home is a very important and valuable asset to me that I desire to protect. Please don't infer any negative connotation by my letter, but the industry-wide practices employed in recent years

trouble me and I am seeking information to not only alleviate my concerns, but to guard against future problems.

I am examining my finances and making determinations as to how best to payoff, reduce, and/or refinance my mortgage and/or sell my property to one interest or another. I executed a promissory note that is a contract between myself and whoever owns that contract now. The United States government may actually own my promissory note. If so I or investors I know, may desire to purchase back my promissory note from the government or my actual current lender, at a profit, as part of a purchase of my property and/or restructuring of my finances.

I have contracted a firm to audit my mortgage loan that you service as well as explore various purchase, sale, refinancing, loan, business, and financial options for me. In order to conduct this examination and audit, I need to have full and immediate disclosure including copies of all pertinent information related to my loan. As such, please send to me, at the address above, copies of the following documents and answers to my servicing related questions below within the 60-day time frame.

I have enclosed a check in the amount of \$50.00 to help defray any costs associated with my request, if any. If there is no cost, or the \$50.00 is in excess of any proper fee you may charge, kindly attribute and credit the \$50.00 or the remaining portion to reduce my principal balance.

DOCUMENTS NEEDED TO CONDUCT AUDIT

- All “master” transaction registers/ledgers of my loan in your servicing files or backup files with you or any sub-servicer, including but not limited to the Fidelity mortgage servicing system, FiServ or any mortgage servicing system you use. Please provide all information residing in any data field in the system or any component that supports the system that deals with any of the questions listed below. (no screen or partial dumps or spreadsheets please)
- Also, please provide and include all descriptions and legends of all Codes used in your mortgage servicing and accounting system so that the examiners, auditors and experts I have retained to audit and review my mortgage account may properly conduct their work.
- A certified copy of the front and back portion of my promissory note as it exists today along with all endorsements, affixed or un-affixed allonges, and assignments whether recorded or not.
- A certified copy of the front and back portion of my deed of trust as it exists today along with all assignments whether recorded or not.
- Cancelled checks, wire transmittals or other evidence of payment for each assignment of my promissory note.
- All executed, recordable and “non-recordable” assignments associated with my loan including, but not limited to assignments, transfers, allonges, or other documents evidencing a transfer, sale or assignment of my mortgage, deed of trust, promissory note or other document that secures payment by me to my obligation in this account from the inception of my loan to the present date.
- All records, electronic or otherwise, of assignments of my mortgage, promissory note, or servicing rights to my mortgage.

- All escrow analyses conducted on my account from the inception of my loan until the date of this letter.

SERVICING RELATED QUESTIONS I NEED ANSWERED

After the recent problems in the mortgage market, I have many servicing related questions in addition to the questions enumerated above. I worry that I do not have good and proper title to my property and that the amounts you claimed owed by me are incorrect. Please answer the following questions for me.

1. What is your actual servicing relationship with my loan? Are you the servicer, master servicer, interim servicer, private label servicer, default servicer, sub-servicer, and/or special servicer of my loan?
2. Has my promissory note ever been securitized? If so kindly inform me of the following information:
 - a. All trusts, SPVs, QSPEs, REMICS, and entities that my note has been assigned to from its inception to the current date?
 - b. The current trust, SPV, QSPE, SPE, REMIC or entity my note is owned by?
3. Is there any Fannie Mae, Freddie Mac, Ginnie Mae, FHA, HUD, VA, or private guarantee related to my loan?
 - a. If yes, who has provided this guarantee and what portion of my payment goes to this guarantee?
4. Who is the document custodian that safeguards and holds my "original" promissory note that I/we signed in ink?
5. Does my original promissory note currently have any "blank endorsements" on it? [Yes/No]
 - a. If yes, can you kindly explain why?
 - b. If yes, can you kindly tell me as of the date written above:
 - i. Who owns my note and is the actual current "lender" and not servicer of my note?
 - ii. Who claims to be the holder of my note?
 - iii. Has the United States government
6. Does my original promissory note properly reflect the chain of title from one interest to another? [Yes/No]
7. Are there any missing assignments? [Yes/No]
 - a. If yes, can you kindly explain why?

8. Has any due diligence and/or quality control services conducted by you or any other entity on my loan identified any red flags, frauds, misrepresentations, misstatements, errors, or problems?
 - a. If yes, can you kindly detail for me?
9. Has my loan ever been classified as a “scratch and dent” loan?
 - a. If yes, can you kindly detail for me why?
10. Will I receive my original (signed in ink) promissory note stamped “Cancelled & Paid In Full” when it is paid off or refinanced?
 - a. If no, can you tell me why not?
11. Have any BPOs, property inspections, and/or appraisals by you or any investor been conducted on my property since the inception of my loan? [Yes/No]
 - a. If yes, have I been charged or assessed any fee for any BPOs, property inspections or appraisals after the inception of my loan? [Yes/No]
 - i. If yes, kindly tell me the date of such BPO, property inspections or appraisal, the amount paid and provide me with copies of all documents related to each BPO, property inspections or appraisal conducted on my property including, but not limited to reports, orders, invoices and cancelled checks for payments.
12. Who may I contact to negotiate the purchase and/or repurchase of my promissory note?
13. What is the name and date of the pooling and servicing agreement that governs your servicing of my loan?
 - a. Where can I secure a copy of this agreement?
14. Is there any power of attorney (“POA”) filed in my property’s county or any other county that governs your relationship with my loan?
 - a. If yes, kindly identify for me the country where the POA is filed and the filing number, name, and date of the POA?

SUSPENSE/UNAPPLIED ACCOUNT QUESTIONS

For purposes of this section, please treat the term “suspense account” and “unapplied account” as one in the same.

1. Has there been any suspense or unapplied account transactions on my account from the inception of my loan until present date?
 - a. If yes, why? If no, please skip the questions in this section dealing with suspense and unapplied accounts.

- b. In a spreadsheet or in letter form in a columnar format, please detail for me each and every suspense or unapplied transaction, both debits and credits that has occurred on my account from the inception of my loan until present date?
- c. What is my current suspense account balance?
- d. Why was my money placed into suspense and how will it be allocated to my loan?

LATE FEE QUESTIONS

For purposes of my questions below dealing with late fees, please consider the terms “late fees” and “late charges” to be one in the same.

1. Has there been any late fee transactions on my account from the inception of my loan until the present date?
 - a. If yes, why? If no, please skip the questions in this section dealing with late fees.
 - b. In a spreadsheet or in letter form in a columnar format, please detail for me each and every late fee transaction, both debits and credits that has occurred on my account from the inception of my loan until present date?
 - c. What is my current late fee balance?
2. Have you reported the collection of late fees on my account as interest in any statement to me or to the IRS? Yes or No?
3. Do you consider the payment of late fees as liquidated damages to you for not receiving my payment on time? Yes or No?
4. Are late fees considered interest? Yes or No?
5. Please detail for me in writing what expenses and damages you incurred for any payment I made that was late.
6. Were any of these expenses or damages charged or assessed to my account in any other way? Yes or No?
7. If yes, please describe what expenses or charges were charged or assessed to my account?
8. Please describe for me in writing what expenses you or others undertook due to any payment I made that was late?
9. Please identify for me in writing the provision, paragraph, section or sentence of any note, mortgage, deed of trust or any agreement I signed authorized the assessment or collection of late fees?

Thank you in advance for addressing the questions and issues above. Upon receipt of the documents and answers, an exam and audit will be conducted that may lead to a further document requests and answers to questions under an additional QWR letter.

It is my hope that my immediate questions and audit will validate my debt to the penny. If not, we will need to correct and adjust any errors or abuses identified. I also want to negotiate a purchase price for my note from my actual lender.

I anxiously await your prompt response to this request.

Sincerely,

XXXXXX, XXXXXXX

Certified Return Receipt Mail XXXXX-XXXX-XXXX

H-8—Rescission Model Form (General)

NOTICE OF RIGHT TO CANCEL

Your Right to Cancel

You are entering into a transaction that will result in a [mortgage/lien/ security interest] [on/in] your home. You have a legal right under federal law to cancel this transaction, without cost, within three business days from whichever of the following events occurs last:

- (1) the date of the transaction, which is _____; or
- (2) the date you received your Truth in Lending disclosures; or
- (3) the date you received this notice of your right to cancel.

If you cancel the transaction, the [mortgage/lien/security interest] is also cancelled. Within 20 calendar days after we receive your notice, we must take the steps necessary to reflect the fact that the [mortgage/lien/security interest] [on/in] your home has been cancelled, and we must return to you any money or property you have given to us or to anyone else in connection with this transaction.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address below. If we do not take possession of the money or property within 20 calendar days of your offer, you may keep it without further obligation.

How to Cancel

If you decide to cancel this transaction, you may do so by notifying us in writing, at

(creditor's name and business address).

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of _____ (date) (or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL

Consumer's Signature

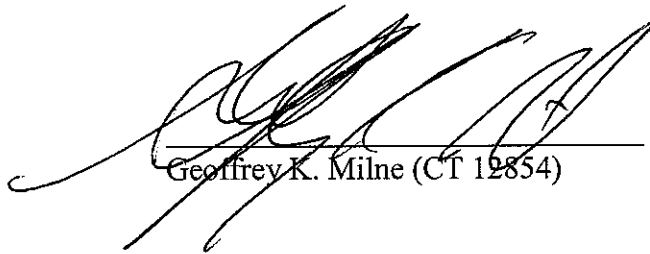
Date

Exhibit B

CERTIFICATION

This is to certify that a copy of the foregoing Memorandum of Law in Support of Motion to Dismiss was mailed via first class United States mail, postage prepaid, on the 5th day of February, 2008 to the following:

Daniel S. Blinn, Esq.
Consumer Law Group, LLC
35 Cold Spring Road, Suite 512
Rocky Hill, CT 06067



Geoffrey K. Milne (CT 12854)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

THOMAS HUBBARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.: 05-CV-389
	)	
AMERIQUEST MORTGAGE COMPANY,	)	Judge Robert M. Dow Jr.
DEUTSCHE BANK NATIONAL TRUST and	)	
AMC MORTGAGE SERVICES, INC.	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Thomas Hubbard (“Hubbard”) filed an amended complaint against Defendants Ameriqurest Mortgage Company (“Ameriqurest”), Deutsche Bank National Trust (“Deutsche Bank”), and AMC Mortgage Services, Inc. (“AMC”) alleging violations of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* (“TILA”), seeking rescission of his mortgage and statutory damages. This matter is now before the Court on Plaintiff’s renewed motion for summary judgment [103]. For the reasons set forth below, that motion is granted as to Ameriqurest and Deutsche Bank and denied as to AMC. Also before the Court is Defendants’ motion to strike portions of Plaintiff’s renewed motion for summary judgment [113]. That motion is denied as moot, although the Court will disregard the portions of Plaintiff’s submissions that Defendants find objectionable.

I. Background

This case was originally assigned to Judge Mark Filip. While still before Judge Filip, Plaintiff moved for summary judgment on liability and Defendants filed a cross-motion for summary judgment. Judge Filip struck those motions to allow for final determination of a case

then before the Seventh Circuit that potentially was dispositive of one of the principal issues in this case.¹ As expected, the Seventh Circuit provided instruction on the issue in *Hamm v. Ameriquest Mortgage Co.*, 506 F.3d 525 (7th Cir. 2007), and Plaintiff subsequently filed a renewed motion for summary judgment.

A. Local Rules on Summary Judgment

The Court takes the relevant facts from the Plaintiff's Local Rule 56.1 ("L.R. 56.1") statements ("Pl. SOF") and Defendants' Response ("Def. Resp. SOF"). The Court construes the facts and draws all reasonable inferences in Defendants', as the non-movant, favor. See *Foley v. City of Lafayette, Ind.*, 359 F.3d 925, 928 (7th Cir. 2004).

L.R. 56.1 requires that statements of fact contain material allegations and the factual allegations must be supported by admissible record evidence. See L.R. 56.1; *Malec v. Sanford*, 191 F.R.D. 581, 583-85 (N.D. Ill. 2000). Where a party has offered a legal conclusion or a statement of fact without offering proper evidentiary support, the Court will not consider that statement. See, e.g., *Malec*, 191 F.R.D. at 583. Additionally, where a party improperly denies a statement of fact by failing to provide adequate or proper record support for the denial, the Court deems admitted that statement of fact. See L.R. 56.1(a), (b)(3)(B); see also *Malec*, 191 F.R.D. at 584. The Court disregards any additional statements of fact contained in a party's response rather than its statement of additional facts. See, e.g., *Malec*, 191 F.R.D. at 584 (citing *Midwest Imports, Ltd. v. Coval*, 71 F.3d 1311, 1317 (7th Cir. 1995)).

¹ MINUTE entry before Judge Mark Filip: The Court strikes without prejudice Plaintiff Thomas Hubbard's motion for summary judgment on liability (D.E. 62) and Defendants' cross-motion for summary judgment. (D.E.72.) The parties are directed to notify the Court when the Seventh Circuit resolves the appeal in *Hamm v. Ameriquest Mortgage Co.*, Seventh Circuit Appeal No. 05 C 3984 (District Court case No. 05 C 227, 2005 WL 2405804 (N.D. Ill. Sept. 27, 2005)), in which a decision is expected shortly. At that time, the parties may move to have their motions reinstated, although the briefs likely will need to be supplemented to address the applicable Seventh Circuit teaching.

B. Pertinent Facts

The facts of this case are straightforward. Prior to April 10, 2002, Plaintiff applied for a loan from Ameriquest that was secured by a mortgage on his home at 7249 South Princeton in Chicago, Illinois. Pl. SOF ¶¶ 2, 10. Ameriquest closed that loan on April 12, 2002. Pl. SOF ¶ 12. At the closing, Plaintiff received several documents including a Truth in Lending Act (“TILA”) Disclosure Statement. Pl. SOF ¶ 13. The TILA Disclosure Statement stated that “payments shall be due beginning” “6/1/2002,” it listed the number of payments (360), and the due date of the final payment (5/1/2032). Pl. SOF ¶ 16. The TILA Disclosure Statement did not “expressly state,” “in words,” that the loan payments were due “monthly.”² Pl. SOF ¶ 17. The TILA Disclosure Statement did not list the due date of each and every payment under the loan.³ Pl. SOF ¶ 18. After Ameriquest closed the loan, it sold or assigned the loan to Deutsche Bank. Pl. SOF ¶ 19. The servicing rights to Plaintiff’s loan were transferred or assigned to AMC. Pl. SOF ¶ 20.

On January 18, 2005 Plaintiff’s Counsel sent a letter to Ameriquest indicating Plaintiff’s intent to rescind the loan for Defendant’s alleged violations of the TILA.⁴ Pl. SOF ¶ 21.

² Defendant denies this fact but an examination of the document referenced in Pl. SOF ¶17 (Exhibit D to the Amended Complaint) provides no basis for Defendant’s denial. While it may be a reasonable assumption, based on the TILA Disclosure Statement, that payments were due monthly, the Disclosure Statement did not “expressly” “in words” include the word “monthly.” See *Hamm*, 506 F.3d 525; *Malec*, 191 F.R.D at 584.

³ Defendants deny this fact for the same reason as the previous fact, and the Court rejects the denial for the same reason. See *Hamm*, 506 F.3d 525; *Malec*, 191 F.R.D. at 584.

⁴ Defendant admits that “Plaintiff’s counsel sent a letter to Argent Mortgage Company.” However, the document referenced in Plaintiff’s SOF ¶21 (Pl. SOF, Appendix K) indicates that it was addressed to Ameriquest Mortgage Company. See *Malec*, 191 F.R.D. at 584

Although Plaintiff refinanced the mortgage at issue, the original loan was never rescinded.⁵ Pl. SOF ¶¶ 23, 24.

II. Analysis

A. Standard of Review

Summary judgment is proper where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). In determining whether there is a genuine issue of fact, the Court “must construe the facts and draw all reasonable inferences in the light most favorable to the nonmoving party.” *Foley*, 359 F.3d at 928. To avoid summary judgment, the opposing party must go beyond the pleadings and “set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (internal quotation marks and citation omitted). Summary judgment is proper against “a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). “The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant].” *Anderson*, 477 U.S. at 252.

⁵ In Response to Pl. SOF ¶24, Defendant responds “Admitted that Plaintiff paid off his loan subsequent to the filing of his lawsuit.” (Def. Resp. SOF ¶24). As explained below, it is irrelevant to the disposition of this case whether the loan was “paid off” or “refinanced.”

B. Motion to Strike Portions of Plaintiff's Renewed Motion for Summary Judgment

Defendants have moved to strike certain portions of Plaintiff's renewed motion for summary judgment. Those portions include terms used by Plaintiff to describe Defendants, reports issued by third parties that Plaintiff referenced in the memorandum in support of this motion and included in the appendices, and "facts" included in Plaintiff's motion that were not included in his statement of undisputed material facts. As noted above, LR 56.1 requires the parties to include statements of *material* fact. In accordance with that rule, the Court has ignored any facts included in Plaintiff's statement of facts that are not material to the disposition of this motion. In addition, this opinion will not refer to Defendants using any terms employed by Plaintiff in his summary judgment motion that Defendants found objectionable.

To the extent Defendants seek a formal striking of portions of Plaintiff's motion for summary judgment, Defendant's motion is denied as moot. However, the Court's decision not to consider the portions of Plaintiff's motion, memoranda, and appendices that Defendants found objectionable essentially provides Defendants with all the relief that they seek.

C. *Hamm v. Ameriquest*

TILA imposes upon lenders, among other obligations, an explicit obligation to include "[t]he number, amount, and due dates or period of payments scheduled to repay the total of payments," in their Disclosure Statements to borrowers. 15 U.S.C. § 1638(a)(6); see also 12 C.F.R. § 226.18(g)(1). Defendants concede in their response to Plaintiff's renewed motion for summary judgment that under *Hamm*, "a Truth in Lending Act Disclosure Statement which disclosed the date of the first loan payment, the date of the last loan payment, and the number of total payments due failed to satisfy the TILA requirement to disclose the period of payments scheduled." Defendants further concede that Plaintiff in the present action received a TILA

disclosure that provided just such information. Therefore, Defendants concede that Plaintiff received a TILA disclosure that violated the statute and that “the violation was apparent on the face of the disclosure statement.” Def. Supp. Br. [132] at 4.

D. AMC Mortgage Services, Inc.

Defendant AMC argues that as a “servicer” of Plaintiff’s loan, TILA does not allow a judgment for rescission or statutory damages against it. A “servicer” is not generally liable for rescission or other damages. See *Payton v. New Century Mortgage Corp.*, 2003 WL 22349118 (N.D. Ill. Oct. 14, 2003). While assignees of loans may be liable for TILA violations, the statute draws a distinction between mere servicers of loans and assignees. See 15 U.S.C. § 1641(f)(1). A servicer may be treated as an assignee only if the servicer is or was the owner of the obligation. See *id.* However, a servicer is not treated as an owner on the “basis of an assignment of the obligation from the creditor or another assignee to the servicer solely for the administrative convenience of the servicer in servicing the obligation.” 15 U.S.C. § 1641(f)(2). “Servicing” is defined as “receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan” and “making the payments of principal and interest * * * as may be required.” 12 U.S.C. § 2605(2), (3) (cross-referenced in 15 U.S.C. § 1641(f)(3)).

Plaintiff’s statement of facts alleges, and Defendant admits, that “the servicing rights to Plaintiff’s loan were transferred or assigned to AMC.” Despite use of the term “assigned,” it is clear when contrasted with the description of Deutsche Bank’s role in the Plaintiff’s Statements of Fact, that even Plaintiff was aware of AMC’s limited function. Plaintiffs uncontested facts state that Ameriquest “sold or assigned the loan” to Deutsche Bank. When viewed together, Plaintiff himself has set out the delineation between the “servicing” done by AMC and the

assignment of the loan itself to Deutsche Bank. There is nothing that would support treating AMC as anything other than a “servicer”.

Neither of the exceptions to the general rule that servicers of loans are not liable for TILA violations applies here. The “owner of the obligation” exception does not apply because AMC acted solely in an administrative role. See 15 U.S.C. § 1641(f)(1), (2); *Payton*, 2003 WL 22349118, at *5. The other potential exception may come into play when the servicer possesses or possessed an interest in the loan. *Conner v. Moss, Codilis, Stawiarski Morris, Schneider & Prior, LLP*, 2003 WL 21267093 (N.D. Ill. June 2, 2003). That interest must be separate from the interest that all servicers possess simply by providing their role in the administration of the loan, so that the exception does not swallow the rule. No such interest is alleged here. While some courts have allowed servicer defendants to remain in the case under the theory they are necessary parties under Fed. R. Civ. P. 19, the reasoning behind those decisions extends only to current servicers for rescission purposes. See *Bills v. BNC Mortgage, Inc.*, 502 F. Supp. 2d 773, 775 (N.D. Ill. 2007). But here the loan no longer is being serviced by AMC.

In sum, because AMC’s role in the transaction was as a servicer only and none of the exceptions permitting liability to a servicer applies Plaintiff’s motion for summary judgment against AMC must be denied.⁶

E. Remedies Against Ameriquest and/or Deutsche Bank

Having established that the disclosures provided by Ameriquest to Plaintiff violated the TILA, the question of available remedies remains. TILA’s civil liability provisions, relevant to the present facts, state that a creditor who fails to comply with 15 U.S.C. § 1635 is liable for (i)

⁶ Defendants state in Supplemental Response Pursuant to the Court’s July 14, 2008 Order that “the parties agree that this Court cannot enter any judgment against AMC Mortgage Services.”

“not less than \$400 or greater than \$4,000” in statutory damages⁷ (15 U.S.C. § 1640(a)(2)(A)(iii)) and (ii) “in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under § 1635 of this title, the costs of the action, together with a reasonable attorney’s fee as determined by the court” (15 U.S.C. § 1640(a)(3)). The TILA also provides, under certain circumstances, the opportunity to rescind the transaction. If rescission is proper, a debtor is entitled to the return of money or property. See 15 U.S.C. § 1635(b). While Ameriquest has conceded its liability for statutory damages and costs and attorney’s fees for the failure to rescind the transaction, Defendants dispute whether rescission is a proper remedy at all because the loan at issue has been paid off and whether Plaintiff has any remedies against Deutsche Bank.

1. Rescission

The TILA was created “to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.” 15 U.S.C. § 1601(a). When lenders violate the TILA, Congress provided consumers the right to rescind a consumer credit transaction in which a security interest is retained in the consumer’s home. 15 U.S.C. § 1635(a). The right to rescind generally extends until the third business day after the later of the: (i) closing of the transaction or (ii) the delivery of the information and rescission forms together with the statements of

⁷ At the time of the parties’ initial briefing, the pertinent statute provided that “any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 (right of rescission) of this title * * * is liable * * * in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than \$200 or greater than \$2,000.” 15 U.S.C. § 1640(a)(2)(A)(iii). However, Section 1640(a)(2)(iii) was amended effective July 30, 2008, to double the minimum and maximum amounts of statutory damages. The relevant language now states that “in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling,” the creditor is liable in an amount “not less than \$400 or greater than \$4,000.”

material disclosures. *Id.* However, if the creditor fails to provide the required material disclosures, the right to rescind extends until three years after consummation, upon transfer of all of the consumer's interest in the property, or upon the sale of the property, whichever appears first. 15 U.S.C. § 1635(f)(3); 12 C.F.R. § 226.23(a)(3)⁸.

Defendants concede that the TILA disclosure provided to Hubbard failed to properly include the payment periods and that such information is “material” under the implementing regulations of TILA. See 12 C.F.R. § 226.23(a)(3) n.48. Therefore, Plaintiff had three years in which to rescind the credit transaction at issue. The loan was closed on April 12, 2002, and notice of rescission was provided to Ameriquest within the three year window, on January 18, 2005. Despite timely notice to Ameriquest, Defendants make two principal arguments to limit their liabilities: (i) by refinancing the loan, rescission is no longer possible as to either defendant; and (ii) even if rescission is still possible generally, Deutsche Bank cannot be held liable because it did not receive notice of the rescission request within the three year window. Those issues will be discussed in turn.

a. Rescission as to Ameriquest

While the parties quibble as to whether the loan at issue has been “refinanced” or “paid off,” it is undisputed that the Defendants have released the mortgage securing the loan. Regardless of the terminology chosen by the parties, the Seventh Circuit has held a right of rescission exists in this situation. See *Handy v. Anchor*, 464 F.3d 760 (7th Cir. 2006). *Handy* followed an opinion from the Sixth Circuit in which the court construed the TILA and its implementing regulations to encompass a right to rescind the transaction itself and not just the security interest. See *Handy*, 464 F.3d at 765 (quoting *Barrett v. JP Morgan Chase Bank, N.A.*,

⁸ TILA's implementing regulations, 12 C.F.R. § 226 *et seq.*, known as “Regulation Z” are promulgated by the Federal Reserve Board.

445 F.3d 874, 878 (6th Cir. 2006)). Regulation Z enumerates two specific ways to extinguish a borrower's right to rescind: (1) complete transfer of interest in the property or (2) sale of the property. See 12 C.F.R. § 226.23(a)(3). "Nowhere do[es] the legislation or regulations add that the act of refinancing an existing loan transaction by itself cuts off the right of rescission." *Handy*, 464 F.3d at 765 (quoting *Barrett*, 445 F.3d at 878). Based on this plain reading of the statute, the right of rescission outlives the refinancing of the loan. Therefore, "the remedies associated with rescission remain available even after the subject loan has been paid off." *Handy*, 464 F.3d at 765. That outcome, *Barrett* and *Handy* agreed, prevents lenders from insulating themselves from responsibility for their noncompliance. See *Handy*, 464 F.3d at 766 (quoting *Barrett*, 445 F.3d at 879).

The fact that the loan has been refinanced is the only defense that Ameriquest raised to its liability for rescission. Since Seventh Circuit precedent requires the Court to reject that argument, Plaintiff was entitled to rescission and Ameriquest must honor all of Plaintiff's rescission remedies and pay the statutory damages, costs, and attorney's fees that it concedes are its responsibility.

b. Rescission as to Deutsche Bank

Although the right to rescind outlives repayment, Deutsche Bank still maintains that it cannot be liable for rescission because Plaintiff did not give notice of its request for rescission to *Deutsche Bank* as well within the three years allowed under Section 1635. Although Plaintiff plainly gave timely notice to Ameriquest, it appears from the record that Deutsche Bank first received notice of Plaintiff's intent to rescind the loan when it was added as a party to this lawsuit in Plaintiff's Amended Complaint.⁹ The question raised by Deutsche Bank's argument is whether Plaintiff's timely notice to the original lender is sufficient to effectuate rescission as to

⁹ The Summons from the Amended Complaint was returned executed on October 26, 2005.

assignees who did not receive timely notice. Upon examination of the statutory language, its implementing regulations, the pertinent case law, and the role that rescission plays within the TILA scheme, the Court concludes that Hubbard's timely rescission request as to Ameriquest is equally effective against Deutsche Bank as assignee, despite lack of notice to Deutsche Bank within the three year window.

The TILA and Regulation Z lay out the steps that an obligor must take to invoke its right of rescission. Significantly, both the statute and the regulation only require notification to the "creditor." 15 U.S.C. § 1635(a) ("[T]he obligor shall have the right to rescind the transaction * * * by notifying the creditor * * * of his intention to do so"); 12 C.F.R. § 226.23(a)(2) ("[T]he consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication"). The use of "creditor" is significant, because that word has a defined meaning under TILA. A "creditor" "refers only to a person who * * * is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the indebtedness * * *." 15 U.S.C. § 1602(f). Under the plain language of the statute, Hubbard fulfilled his obligation to rescind when he notified Ameriquest, "the "creditor," that he wanted to rescind.

The use of the word "transaction" in the statute provides further supports for the Court's conclusion that rescission is effective to all subsequent assignees upon timely notice to the "creditor." See 15 U.S.C. § 1635(a) ("The obligor shall have the right to rescind the *transaction* * * *") (emphasis added). As the Seventh Circuit recognized in *Handy*, rescission terminates the entire *transaction* and thus "encompasses a right to return to the status quo that existed before the loan." *Handy*, 464 F.3d at 765 (quoting *Barrett* 445 F.3d at 878). Accordingly, upon timely invocation of the right of rescission, a borrower must be put back in the position that it occupied prior to the loan agreement. *Handy*, 464 F.3d at 765 (quoting *Barrett*, 445 F.3d at 877).

Applying these principles, when Plaintiff notified Ameriquest that he wished to exercise his right to rescission, Plaintiff terminated the transaction itself, and was entitled to return to the status quo prior to the loan. The only way to effectuate the statutory right to be returned to the status quo is to involve the original lender and all subsequent assignees – parties that would not have been involved in the transaction or received any of the obligor’s interest payments were it not for the original loan. Therefore, Plaintiff must return everything that he received on the closing date (to the extent that it has not already been returned) and Ameriquest and Deutsche Bank must release any security interest they might have asserted. See *Handy*, 464 F.3d at 766. Because the original loan has been refinanced, Plaintiff has no principal to return and Defendants have no security interest to release. Finally, Defendants forfeit their right to collect interest upon rescission and therefore must reimburse Plaintiff for any interest or other finance charges that he paid while the loan was outstanding. See *Handy*, 464 F.3d at 766; 15 U.S.C. § 1635(b). To the extent that interest payments were made to Deutsche Bank as assignee, Deutsche Bank must participate in the rescission process in order to achieve the statutory goal of returning all parties to the position that existed prior to the transaction.

The statutory language specifically addressing assignees and rescission is fully consistent with this outcome. It states “[a]ny consumer who has a right to rescind a transaction under section 1635 of this title may rescind the transaction against any assignee of the obligation.” 15 U.S.C. § 1641(c). Reading that provision in light of the text, structure, and purpose of the TILA as a whole and the Seventh Circuit’s relevant precedents, the Court concludes that Section 1641(c) simply clarifies that assignees may not hide behind an assignment and that as long as the borrower has properly rescinded the transaction by giving notice to the “creditor” within the three year statutory period, the rescission of the transaction is effective against any assignee.

This reading also supports the notion that assignees can be necessary parties in TILA litigation, for they may be essential to fully unwinding the “transaction” as required under *Handy*.

Defendants contend, relying principally on a bankruptcy court decision, *In re Meyer*, 379 B.R. 529 (Bankr. E.D. Pa. 2007), that the three year statute of repose in the TILA bars any action against Deutsche Bank because Plaintiff did not give notice of the rescission request to Deutsche Bank within that time frame. However, given the Seventh Circuit’s determination that rescission takes place on a transactional basis, this Court cannot accept the view that the notice given to Ameriquest was not sufficient to effectuate rescission as to Deutsche Bank. By giving notice to Ameriquest within the three year period, Plaintiff timely exercised his unitary rights to “rescind the transaction” (15 U.S.C. § 1635(a)) and to “return to the status quo that existed before the loan.” *Hardy*, 464 F.3d at 765.¹⁰

In sum, to properly effectuate Plaintiff’s timely invoked right to rescission, Ameriquest and Deutsche Bank each must determine the amounts of interest and fees that they received from Plaintiff while the loan was outstanding and reimburse Plaintiff in those amounts. See *Handy*, 464 F.3d at 766 (“Given the statute, [Defendant] forfeits its right to collect interest, and so it must reimburse [Plaintiff] for any interest paid while the loan was outstanding”); see also

¹⁰ Plaintiff also complains that he was hampered in his ability even to learn that Deutsche Bank was the current holder of the loan by Ameriquest’s refusal to respond to Plaintiff’s Interrogatory Requests in a timely fashion. Specifically, Plaintiff asked Ameriquest to “[s]tate whether defendant owns all legal and beneficial interests in plaintiff’s loan. If not, identify each other person or entity who owns or claims to own any interest in plaintiff’s loan and describe their claimed interest.” Plaintiff argues that Ameriquest’s refusal to identify Deutsche Bank in response to that interrogatory deprived Plaintiff of any opportunity to request rescission of Deutsche Bank within the three year period, as Defendants contend Plaintiff was required to do. The Court need not explore that dispute any further in view of the conclusion that, under the statute, Plaintiff only was required to give notice to the “creditor” – Ameriquest – within the three year period in order to invoke the right to rescind the transaction as a whole, including as to assignees such as Deutsche Bank. By requiring notice only to the “creditor,” Congress prevented lenders from hiding behind assignments to avoid rescission and protected borrowers from the need to obtain information on, and to provide notice to, any number of assignees to accomplish Congress’ objective of making borrowers whole after terminating the transaction.

Miranda v. Universal Financial Group, Inc., 459 F. Supp. 2d 760, 765 (N.D. Ill. 2006) (“Under § 1635(b), a borrower who exercises the right to rescind is entitled to the return of any payments made on the loan”). Only then can the parties be returned to the status quo that existed before the loan was made.

2. Statutory Damages, Costs, and Attorney’s Fees for Failure to Rescind

Plaintiff acknowledges that he is not entitled to statutory damages for the underlying TILA disclosure violation. Ameriquest admits that it is liable for statutory damages, as well as costs and attorney’s fees,¹¹ as a result of its failure to rescind the transaction when requested to do so by Plaintiff. Def. Supp. Br. at 3, 6. The remaining question is whether such liability also may be imposed on Deutsche Bank.

The question of assignee liability for statutory damages, costs, and attorney’s fees has arisen in several recent cases in this district. See, e.g., *Lippner v. Deutsche Bank National Trust Co.*, 544 F. Supp. 2d 695 (N.D. Ill. 2008); *Ware v. IndyMac Bank, FSB*, 534 F. Supp. 2d 835 (N.D. Ill. 2008); *Bills v. BNC Mortgage, Inc.*, 502 F. Supp. 2d 773 (N.D. Ill. 2007); *Walker v. Gateway Financial Corp.*, 286 F. Supp. 2d 965 (N.D. Ill. 2003); *Payton v. New Century Mortgage Corp.*, 2003 WL 22349118 (N.D. Ill. Oct. 14, 2003); *Fairbanks Capital Corp. v. Jenkins*, 225 F. Supp. 2d 910 (N.D. Ill. 2002). Having reviewed those cases thoroughly, the Court discerns a reasonably clear demarcation in which assignees generally have not been on the hook for statutory damages, costs, or attorney’s fees where the underlying TILA violation was not apparent on the face of the document in question (see *Bills*, 502 F. Supp. 2d at 776-77; *Walker*, 286 F. Supp. 2d at 968-69), but have been found liable as to those remedies where the

¹¹ “Any creditor who fails to comply with any requirement [under TILA] * * * is liable * * * in the case of any successful action to enforce the foregoing liability * * * [for] the costs of the action, together with reasonable attorney’s fees as determined by the court.” 15 U.S.C. § 1640(a)(3).

underlying violation was facially apparent (see *Lippner*, 544 F. Supp. 2d at 704).¹² The parties have not cited, nor has the Court's research located, a case in this district in which a court has held that an assignee is *not* liable for statutory damages, costs, and attorney's fees for failure to rescind when the underlying TILA violation was *apparent on the face* of the offending document, as the parties have agreed is the case here.

The Court concludes that the distinction drawn by other courts in this district between TILA violations that are clear on the face of the underlying document and those that are not facially apparent is sensible and comports with the statutory scheme. As in *Lippner*, this Court concludes "[a]fter taking the entire statutory scheme of TILA into consideration," that "an assignee of a mortgage should be held liable for statutory damages and attorney's fees for failing to honor a demand for rescission when the underlying TILA violation is apparent on its face," because in those circumstances "the assignee has fair notice of the underlying TILA violation." 544 F. Supp. 2d at 704-05.

III. Conclusion

Based on the foregoing analysis, the Court denies Plaintiff's motion for summary judgment [103] as to AMC and grants Plaintiff's motion for summary judgment [103] as to Ameriquest and Deutsche Bank, finding both Ameriquest and Deutsche Bank liable for rescission, statutory damages, and costs and attorneys' fees. Plaintiff is given until October 14, 2008, in which to submit supplemental briefing, consistent with this decision, on the appropriate damage calculations and how to properly unwind the transaction for rescission purposes. Ameriquest and Deutsche Bank will have until October 25, 2008, in which to respond to

¹² In *Payton*, the court concluded that statutory damages could not be imposed on the assignee because the violation was not apparent on its face, but that an award of attorney's fees against the assignee was appropriate because the plaintiff had brought a successful action for rescission. 2003 WL 22349118, at *7-*8.

Plaintiff's calculation of damages and briefing on rescission. Finally, the Court denies Defendants' motion to strike portions of Plaintiff's renewed motion for summary judgment [113] as moot in light of the discussion above.

A handwritten signature in black ink, appearing to read "Robert M. Dow, Jr.", with a stylized flourish at the end.

Dated: September 30, 2008

Robert M. Dow, Jr.
United States District Court

Beach v. Ocwen: Rescission SOL

In the Beach case the U.S. Supreme Court affirmed the Florida Supreme Court's decision that after the 3 year period provided in §1635(f) was up, the right of rescission completely expired. However, the Court does say this:

FN6. Since there is no claim before us that Florida law purports to provide any right to rescind defensively on the grounds relevant under the Act, we have no occasion to explore how state recoupment law might work when raised in a foreclosure proceeding outside the 3-year period. *Beach v. Ocwen Federal Bank* 523 U.S. 410, *419, 118 S.Ct. 1408, **1413 (U.S.Fla.,1998)

The Beach court did say:

[W]hen Congress amended the Act in 1995 to soften certain restrictions on rescission as a defense in § 8, 109 Stat. 275-276, 15 U.S.C. §§ 1635(i)(1) and (2) (1994 ed., Supp. I), it took care to provide that any such liberality was “subject to the [three year] time period provided in subsection (f),” *ibid.*, and it left a borrower's only hope for further recoupment in the slim promise of § 1635(i)(3), that “[n]othing in this subsection affects a consumer's right of rescission in recoupment under State law.” 523 U.S. 410, 418

15 U.S.C. §1635

(f) Time limit for exercise of right

An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor, except that if (1) any agency empowered to enforce the provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.

15 U.S.C. § 1635

(i)(3) – Right of recoupment under State Law

Nothing in this subsection affects a consumer's right of rescission in recoupment under State law.

you can listen to the oral arguments before the U.S. Supreme Court in Beach at:
http://www.oyez.org/cases/1990-1999/1997/1997_97_5310/argument/

HOME EQUITY LINE OF CREDIT ACCOUNT MANAGEMENT GUIDANCE

A home equity line of credit (HELOC) is a form of revolving credit in which the borrower's home serves as collateral. With a HELOC, an applicant will be approved for a specific amount of credit that can be borrowed.¹ Since HELOCs often have long-term or interest-only payment features, OTS expects associations to actively manage their home equity portfolios. To do so, associations should:

- Maintain effective risk management systems, as explained in the 2005 Credit Risk Management Guidance for Home Equity Lending² (2005 HELOC Guidance), and
- Comply with the OTS real estate lending standards rule³ and related guidance.

The goal of managing credit risk is important from a safety and soundness perspective. Therefore, associations often structure HELOC plans so that the available credit limit can be reduced, suspended, or terminated. When taking such actions, associations must follow the federal laws and rules designed to protect HELOC customers. OTS will review associations' HELOC account management policies and practices to ensure compliance with these requirements, which are explained below.

TERMINATING, REDUCING, OR SUSPENDING A HELOC: LEGAL RISKS

Truth in Lending Act (TILA) / Regulation Z

Regulation Z, which implements TILA, sets forth the circumstances under which a HELOC⁴ can be terminated, suspended, or reduced.⁵ Savings associations are responsible under Regulation Z for timely reinstatement of lines of credit which cease to meet the criteria for suspension or reduction. These requirements are discussed in the following sections.

Termination of Line / Demand of Full Repayment

With limited exceptions, Regulation Z prohibits creditors from terminating a HELOC and accelerating repayment of the outstanding balance before the scheduled expiration of the

¹ For more information about HELOC's, see *The Federal Reserve Board, "What You Should Know About Home Equity Lines of Credit,"* June 12, 2007, available at http://www.federalreserve.gov/Pubs/equity/equity_english.htm.

² See "Credit Risk Management Guidance for Home Equity Lending", May 16, 2005, available at <http://www.ots.treas.gov/docs/2/25222.pdf>. The agencies provided additional guidance for managing risks associated with HELOCs that contain interest-only features in 2006. See Addendum to 2005 HELOC Guidance, September 29, 2006, available at <http://www.ots.treas.gov/docs/4/480269.pdf>.

³ 12 C.F.R. § 560.101

⁴ The relevant provisions of Regulation Z apply to all open-end credit plans secured by the consumer's dwelling, not just those secured by a consumer's principal dwelling. 12 C.F.R. pt. 226, Supp. I, commentary to section 226.5b, comment 1.

⁵ When a borrower applies for a HELOC, Regulation Z requires a lender to disclose the possibility that it may take such action later. 12 C.F.R. § 226.5b(d)(4)(i). When such action is actually taken, Regulation Z also requires that the borrower be given notice. 12 C.F.R. § 226.9(c)(3).

plan.⁶ HELOC agreements must conform to these restrictions and may not contain provisions that authorize termination unless an exception applies.⁷

Exceptions include situations that involve the following action/inaction by the borrower:⁸

- Fraud or material misrepresentation;
- Failure to meet repayment terms for any outstanding balance; or
- Actions adversely affecting the property pledged as security or the creditor's security interest in the property.

If an event permitting termination and acceleration occurs, OTS encourages associations to work with borrowers to determine an appropriate strategy for mitigating risk. For example, an association could suspend or "freeze" further advances, reduce the credit limit, or change payment terms.

Suspension or Reduction of Line

With some exceptions, Regulation Z prohibits a creditor from changing any term of a HELOC account.⁹ Notably, however, a creditor may prohibit additional extensions of credit or reduce the credit limit during certain periods,¹⁰ as long as any reduction in a borrower's credit limit below the outstanding balance does not require the borrower to make a higher payment.¹¹ Consistent with Regulation Z, creditors may freeze or reduce a HELOC account when:¹²

- ***The value of the collateral declines significantly below the appraised value.***
Although a "significant decline" will vary according to individual circumstances, Regulation Z has been interpreted to mean that such decline in value has occurred when the difference between the credit limit and available equity at the time that the HELOC account was granted has been reduced by fifty percent from the difference between these values at the time that the HELOC account was granted.¹³ An association's action to suspend or reduce a HELOC must be based on an assessment of the value of "the dwelling that secures the plan."¹⁴ Consequently, an association would violate Regulation Z if it attempted to suspend or reduce the credit limits of all HELOC accounts in a geographic area in which real estate values are generally declining without assessing the value of the collateral that secures each affected

⁶ 12 C.F.R. § 226.5b(f)(2).

⁷ 12 C.F.R. pt. 226, Supp. I, commentary to paragraph 226.5b(f)(2), comment 1.

⁸ 12 C.F.R. § 226.5b(f)(2).

⁹ 12 C.F.R. § 226.5b(f)(3).

¹⁰ 12 C.F.R. § 226.5b(f)(3)(vi).

¹¹ 12 C.F.R. pt. 226, Supp. I, commentary to paragraph 226.5b(f)(3)(vi), comment 1.

¹² 12 C.F.R. § 226.5b(f)(3)(vi).

¹³ 12 C.F.R. pt. 226, Supp. I, commentary to paragraph 226.5b(f)(3)(vi), comment 6 provides the following example: Assume that a house with a first mortgage of \$50,000 is appraised at \$100,000 and a \$30,000 HELOC account is opened. The difference between the HELOC limit and available equity is \$20,000, half of which is \$10,000. The creditor could prohibit further advances or reduce the credit limit if the value of the property declines from \$100,000 to \$90,000.

¹⁴ 12 C.F.R. § 226.5b(f)(3)(vi)(A)

HELOC account.¹⁵ While Regulation Z does not require a savings association to obtain an appraisal to determine whether collateral value has significantly declined,¹⁶ an association should have a sound factual basis for reaching this conclusion. OTS expectations for prudent collateral monitoring practices are addressed in the 2005 HELOC Guidance noted above.

- ***The creditor reasonably believes that the consumer will be unable to make payments as agreed because of a material change in the consumer's financial circumstances.*** It is important to recognize that this exception requires both a material change in a borrower's financial situation and the creditor's reasonable belief that the borrower will not be able to repay the HELOC account as agreed.¹⁷
- ***The consumer is in default on a material obligation of the HELOC agreement.*** An association may specify events that would qualify as a default in a HELOC account.¹⁸ For example, an association may provide that default on a material obligation will exist if the consumer moves out of the dwelling or permits an intervening lien to be filed that would take priority over future advances made by the association.¹⁹

Reinstatement of Credit Privileges

Regulation Z permits an association to suspend or reduce a HELOC account only when the designated circumstances exist, and the regulatory commentary emphasizes that credit privileges must be timely reinstated when those circumstances cease.²⁰ One way that an association can meet this responsibility is by monitoring an affected line of credit frequently enough to assure itself that the condition permitting the suspension or reduction continues to exist.²¹ Alternatively, an association may require borrowers to request reinstatement of credit privileges.²² When a consumer requests such reinstatement, the association must promptly determine whether the condition allowing the suspension remains in effect.²³ In doing so, an association may charge the consumer bona fide, reasonable fees for services actually used to make this determination.²⁴ An association may not impose a fee to reinstate a credit line once the condition has been determined not to exist.²⁵

¹⁵ For example, the data provided in the Office of Federal Housing Enterprise Oversight House Pricing Index, see <http://www.ofheo.gov/HPL.aspx>, could not be used as the sole basis for a decision to reduce or freeze the credit limits of all borrowers in a specific geography.

¹⁶ 12 C.F.R. pt. 226, Supp. I, commentary to paragraph 226.5b(f)(3)(vi), comment 6.

¹⁷ *Id.* at comment 7.

¹⁸ *Id.* at comment 8.

¹⁹ *Id.*

²⁰ *Id.* at comment 2.

²¹ *Id.* at comment 4.

²² *Id.* If the association requires the consumer to request reinstatement of credit privileges, it must notify the consumer of that fact under 12 C.F.R. § 226.9(c)(3).

²³ 12 C.F.R. pt. 226, Supp. I, commentary to paragraph 226.5b(f)(3)(vi), comment 4.

²⁴ *Id.* at comment 3.

²⁵ *Id.*

Fair Lending: Substantive Concerns about Reducing the Availability of Credit

The Equal Credit Opportunity Act (ECOA) and its implementing Regulation B, the Fair Housing Act and its implementing regulation, and the OTS Nondiscrimination rule all prohibit associations from discriminating based on race, sex/gender, or other protected characteristics when making credit decisions.²⁶ Notably, associations that suspend or reduce HELOCs based on declining property values should take responsible steps to avoid the possibility of redlining.²⁷ Moreover, to help ensure that actions to terminate, reduce, or suspend HELOCs are carried out in a non-discriminatory manner, associations should follow policies that are based on prudent risk management principles and carry them out without regard to prohibited factors.²⁸

Adverse Action Notices

Requirements under Regulation B

When an action is determined to be “adverse” under Regulation B, a creditor is responsible for providing a borrower with a timely adverse action notice that contains specific information about the reasons for the action taken.²⁹ The termination, suspension, or reduction of a HELOC account is not treated as an adverse action under Regulation B if an applicant has expressly agreed to a change in terms³⁰ or when an action is taken due to the “inactivity, default, or delinquency” of the account.³¹

Applying these rules together with the provisions of Regulation Z discussed above, the termination, suspension, or reduction of an individual HELOC permitted by Regulation Z would not constitute an adverse action in a number of contexts. For example, these actions would not be viewed as “adverse” under Regulation B where an applicant has signed a HELOC agreement that permits an association to suspend or reduce a HELOC when the value of the collateral securing the HELOC has significantly declined below the appraised value or where a material change in a borrower’s financial situation has occurred.

²⁶ See 15 U.S.C. § 1501 *et seq.*; 12 C.F.R. pt. 202; 42 U.S.C. § 3601 *et seq.*; 24 C.F.R. pt. 100 *et seq.*; and 12 C.F.R. pt. 528.

²⁷ Redlining is a form of illegal disparate treatment in which a lender provides unequal access to credit, or unequal terms of credit, because of the race, color, national origin, or other prohibited characteristic(s) of the residents of the area in which the credit seeker resides or will reside or in which the residential property to be mortgaged is located. OTS’s Examination Handbook, section 1201.5 (March 2007) and Interagency Fair Lending Examination Procedures, page iv, available at <http://www.ffiec.gov/pdf/fairlend.pdf>.

²⁸ See 12 C.F.R. §§ 528.2a (OTS Nondiscriminatory appraisal and underwriting rule) and 528.9 (OTS Guidelines relating to nondiscrimination in lending). See also 12 C.F.R. § 560.101 (real estate lending standards).

²⁹ For more information about adverse action notice requirements, see 12 C.F.R. § 202.9.

³⁰ 12 C.F.R. § 202.2(c)(2)(i).

³¹ 12 C.F.R. § 202.2(c)(2)(ii).

Requirements Under the Fair Credit Reporting Act (FCRA)

A savings association must also provide an adverse action notice under FCRA if it takes adverse action³² based on information contained in a consumer report from a consumer reporting agency or on information obtained from others that bears on credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.³³ For example, if an association relies on information in a consumer report to conclude that a consumer's financial circumstances have changed so materially that the consumer will be unable to fulfill HELOC repayment obligations, the association must provide a FCRA adverse action notice if it suspends or reduces the HELOC account.

Unfair or Deceptive Acts or Practices

As discussed above, there are circumstances in which an association is permitted to terminate, suspend, or reduce a HELOC. Nevertheless, Section 5 of the Federal Trade Commission Act (FTC Act) prohibits associations from taking such actions in an unfair or deceptive manner.³⁴ A practice is "unfair" when it causes or is likely to cause substantial injury that consumers cannot avoid and which is not outweighed by countervailing benefits to consumers or to competition.³⁵ A practice is "deceptive" when it involves a material representation or omission that is likely to mislead a reasonable consumer.³⁶ Notably, the FTC Act prohibition against unfair or deceptive practices applies to all aspects of a loan transaction, including servicing and collection.³⁷

In addition, OTS has long prohibited inaccurate representations or advertising,³⁸ including both material misstatements and omissions.³⁹ Statements that are technically accurate, but misleading, are included in this prohibition.⁴⁰ Consequently, associations should avoid promoting HELOC accounts as a means to easily obtain credit without also indicating that access to such credit can be frozen, reduced, or terminated.

CONCLUSION

A HELOC is an attractive product for many homeowners and lenders. While sound underwriting and effective risk management systems are essential, associations must employ these strategies in a manner that complies with applicable consumer protection laws and regulations. To effectively address both credit and legal risk, associations must appropriately

³² The definition of "adverse action" is the same under FCRA and ECOA. See 15 U.S.C. § 1681a(k).

³³ 15 U.S.C. § 1681m.

³⁴ 15 U.S.C. § 45.

³⁵ See 73 Fed. Reg. 28904, 28907-08 (May 19, 2008).

³⁶ See 73 Fed. Reg. at 28908-09.

³⁷ See, e.g., United States v. Fairbanks Capital Corp., No. 03-12219 (D. Mass. 2003) and FTC v. Capital City Mortgage Corp., No. 98-00237 (D.D.C. 1998).

³⁸ 12 C.F.R. § 563.27.

³⁹ FHLBB Memorandum R-51a (September 9, 1981), available at 1981 FHLBB LEXIS 33.

⁴⁰ FHLBB Inter-Office Communication (January 18, 1977), available at 1977 LEXIS 219.

integrate safety and soundness and compliance measures. Questions about how to strike this balance should be directed to OTS regional offices.

For further information about the specifics of this guidance, please contact:

- April Breslaw (202-906-6989) (compliance/consumer protection issues); or
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Borrowers Have Successfully Sued Based on Allegations of Over-escrowing, Unauthorized Charges and Brokers' Fees, Improper Private Mortgage Insurance Procedures, and Incorrectly Adjusted ARMS. The Author Analyzes Such Lending Practices, and the Litigation They Have Spawned.

BODY:

This article surveys current trends in litigation brought on behalf of residential mortgage borrowers against mortgage originators and servicers. The following types of litigation are discussed: (i) over-escrowing; (ii) junk charges; (iii) payment of compensation to mortgage brokers and originators by lenders; (iv) private mortgage insurance; (v) unauthorized servicing charges; and (vi) improper adjustments of interest on adjustable rate mortgages. We have omitted discussion of abuses relating to high-interest and home improvement loans, a subject that would justify an article in itself.¹

OVER-ESCROWING In recent years, more than 100 class actions have been brought against mortgage companies complaining about excessive escrow deposit requirements.

Requirements that borrowers make periodic deposits to cover taxes and insurance first became widespread after the Depression. There were few complaints about them until the late 1960s, probably because until that time many lenders used the "capitalization" method to handle the borrowers' funds. Under this method, escrow disbursements were added to the principal balance of the loan and escrow deposits were credited in the same manner as principal payments. The effect of this "capitalization" method is to pay interest on escrow deposits at the note rate, a result that is fair to the borrower. When borrowers could readily find lenders that used this method, there was little ground for complaint.

The "capitalization" method was almost entirely replaced by the current system of escrow or impound accounts in the 1960s and 1970s. Under this system, lenders require borrowers to make monthly deposits on which no interest is paid. Lenders use the deposits as the equivalent of capital by placing them in non-interest-bearing accounts at related banks or at banks that give "fund credits" to the lender in return for custody of the funds.² Often, surpluses greatly in excess of the amounts actually required to make tax and insurance payments as they came due are required. In effect, borrowers are required to make compulsory, interest-free loans to their mortgage companies.

One technique used to increase escrow surpluses is "individual item analysis." This term describes a wide variety of practices, all of which create a separate hypothetical escrow account for each item payable with escrow funds. If there are multiple items payable from the escrow account, the amount held for item A is ignored when determining whether there are sufficient funds to pay item B, and surpluses are required for each item. Thus, large surpluses can be built up. Individual item analysis is not per se illegal, but can readily lead to excessive balances.³

During the 1970s, a number of lawsuits were filed alleging that banks had a duty to pay interest on escrow deposits or conspired to eliminate the "capitalization" method.⁴ Most courts held that, in the absence of a statute to the contrary, there was no obligation to pay interest on escrow deposits.⁵ The only exception was Washington. Following these decisions, some 14 states enacted statutes requiring the payment of interest, usually at a very low rate.⁶

Recent attention has focused on excessive escrow deposits. In 1986, the U.S. District Court for the Northern District of Illinois first suggested, in *Leff v. Olympic Fed. S & L Assn.*,⁷ that the aggregate balance in the escrow account had to be examined in order to determine if the amount required to be deposited was excessive. The opinion was noted by a number of state attorneys general, who in April 1990 issued a report finding that many large mortgage servicers were requiring escrow deposits that were excessive by this standard.⁸ The present wave of over-escrowing cases followed.

Theories that have been upheld in actions challenging excessive escrow deposit requirements include breach of contract,⁹ state consumer fraud statutes,¹⁰ RICO,¹¹ restitution,¹² and violation of the Truth in Lending Act ("TILA").¹³ Claims have also

been alleged under section 10 of the Real Estate Settlement Procedures Act ("RESPA"),¹⁴ which provides that the maximum permissible surplus is "one-sixth of the estimated total amount of such taxes, insurance premiums and other charges to be paid on dates . . . during the ensuing twelve-month period." However, most courts have held that there is no private right of action under section 10 of RESPA.¹⁵ Most of the overescrowing lawsuits have been settled. Refunds in these cases have totalled hundreds of millions of dollars.

On May 9, 1995, in response to the litigation and complaints concerning over-escrowing, HUD issued a regulation implementing section 10 of RESPA.¹⁶ The HUD regulation: 1. Provides for a maximum two-month cushion, computed on an aggregate basis (i.e., the mortgage servicer can require the borrower to put enough money in the escrow account so that at its lowest point it contains an amount equal to two months' worth of escrow deposits); 2. Does not displace contracts if they provide for smaller amounts; and 3. Provides for a phase-in period, so that mortgage servicers do not have to fully comply until October 27, 1997.

Meanwhile, beginning in 1990, the industry adopted new forms of notes and mortgages that allow mortgage servicers to require escrow surpluses equal to the maximum two-month surplus permitted by the new regulation. However, loans written on older forms of note and mortgage, providing for either no surplus¹⁷ or a one-month surplus, will remain in effect for many years to come. "JUNK CHARGES" AND RODASH In recent years, many mortgage originators attempted to increase their profit margins by breaking out overhead expenses and passing them on to the borrower at the closing. Some of these "junk charges" were genuine but represented part of the expense of conducting a lending business, while others were completely fictional. By breaking out the charges separately and excluding them from the finance charge and annual percentage rate, lenders were able to quote competitive annual percentage rates while increasing their profits.

Most of these charges fit the standard definition of "finance charge" under TILA.¹⁸ A number of pre-1994 judicial and administrative decisions held that various types of these charges, such as tax service fees,¹⁹ fees for reviewing loan documents,²⁰ fees relating to the assignment of notes and mortgages,²¹ fees for the transportation of documents and funds in connection with loan closings,²² fees for closing loans,²³ fees relating to the filing and recordation of documents that were not actually paid

over to public officials,²⁴ and the intangible tax imposed on the business of lending money by the states of Florida and Georgia,²⁵ had to be disclosed as part of the "finance charge" under TILA.

The mortgage industry nevertheless professed great surprise at the March 1994 decision of the U.S. Court of Appeals for the Eleventh Circuit in *Rodash v. AIB Mtge. Co.*,²⁶ holding that a lender's pass-on of a \$ 204 Florida intangible tax and a \$ 22 Federal Express fee had to be included in the finance charge, and that Martha Rodash was entitled to rescind her mortgage as a result of the lender's failure to do so. The court found that "the plain language of TILA evinces no explicit exclusion of an intangible tax from the finance charge," and that the intangible tax did not fall under any of the exclusions in regulation Z dealing with security interest charges.²⁷ Claiming that numerous loans were subject to rescission under *Rodash*, the industry prevailed upon Congress and the Federal Reserve Board to change the law retroactively through a revision to the FRB Staff Commentary on regulation Z28 and the Truth in Lending Act Amendments of 1995, signed into law on September 30, 1995.²⁹ The amendments:

1. Exclude from the finance charge fees imposed by settlement agents, attorneys, escrow companies, title companies, and other third party closing agents, if the creditor neither expressly requires the imposition of the charges nor retains the charges;³⁰
 2. Exclude from the finance charge taxes on security instruments and loan documents if the payment of the tax is a condition to recording the instrument and the item is separately itemized and disclosed (i.e., intangible taxes);³¹
 3. Exclude from the finance charge fees for preparation of loan-related documents;³²
 4. Exclude from the finance charge fees relating to pest and flood inspections conducted prior to closing;³³
 5. Eliminate liability for overstatement of the annual percentage rate.
 6. Increase the tolerance or margin of error;³⁴
 7. Provide that mortgage servicers are not to be treated as assignees.³⁵
- The constitutionality of the retroactive provisions of the Amendments is presently under consideration.

The FRB Staff Commentary amendments dealt primarily with the question of third-party charges, and provided that they were not finance charges unless the creditor required or retained the charges.³⁶

The 1995 Amendments substantially eliminated the utility of TILA in challenging "junk charges" imposed by lenders. However, "junk charges" are also subject to

challenge under RESPA, where they are used as devices to funnel kickbacks or referral fees or excessive compensation to mortgage brokers or originators. This issue is discussed below.

"UPSELLING," "OVERAGES," AND REFERRAL FEES TO MORTGAGE ORIGINATORS A growing number of lawsuits have been brought challenging the payment of "upsells," "overages," "yield spread premiums," and other fees by lenders to mortgage brokers and originators.

During the last decade it became fairly common for mortgage lenders to pay money to mortgage brokers retained by prospective borrowers. In some cases, the payments were expressly conditioned on altering the terms of the loan to the borrower's detriment by increasing the interest rate or "points." For example, a lender might offer brokers a payment of 50 basis points (0.5 percent of the principal amount of the loan) for every 25 basis points above the minimum amount ("par") at which the lender was willing to make the loan. Industry publications expressly acknowledged that these payments were intended to "compensate[] mortgage brokers for charging fees higher than what the borrower would normally pay."³⁷ In other instances, brokers were compensated for convincing the prospective borrower to take an adjustable-rate mortgage instead of a fixed-rate mortgage, or for inducing the purchase of credit insurance by the borrower. ³⁸

In the case of some loans, the payments by the lender to the broker were totally undisclosed. In other cases, particularly in connection with loans made after the amendments to regulation X discussed below, there is an obscure reference to the payment on the loan documents, usually in terms incomprehensible to a lay borrower. For example, the HUD-1 form may contain a cryptic reference to a "yield spread premium" or "par plus pricing," often abbreviated like "YSP broker (POC) \$ 1,500."³⁹

The burden of the increased interest rates and points resulting from these practices is believed to fall disproportionately on minorities and women.⁴⁰ These practices are subject to legal challenge on a number of grounds.

Breach of Fiduciary Duty Most courts have held that a mortgage broker is a fiduciary. One who undertakes to find and arrange financing or similar products for another becomes the latter's agent for that purpose, and owes statutory, contractual, and

fiduciary duties to act in the interest of the principal and make full disclosure of all material facts. "A person who undertakes to manage some affair for another, on the authority and for the account of the latter, is an agent."⁴¹

Courts have described a mortgage loan broker as an agent hired by the borrower to obtain a loan.⁴² As such, a mortgage broker owes a fiduciary duty of the "highest good faith toward his principal," the prospective borrower.⁴³ Most fundamentally, a mortgage broker, like any other agent who undertakes to procure a service, has a duty to contact a variety of providers and attempt to obtain the best possible terms.⁴⁴

Additionally, a mortgage broker "is 'charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision'."⁴⁵ The duty to disclose extends to the agent's compensation. ⁴⁶ Thus, a broker may not accept secret compensation from adverse parties.⁴⁷

Furthermore, the duty to disclose is not satisfied by the insertion of cryptic "disclosures" on documents. The obligation is to "make a full, fair and understandable explanation" of why the fiduciary is not acting in the interests of the beneficiary and of the reasons that the beneficiary might not want to agree to the fiduciary's actions.⁴⁸

The industry has itself recognized these principles. The National Association of Mortgage Brokers has adopted a Code of Ethics which requires, among other things, that the broker's duty to the client be paramount. Paragraph 3 of the Code of Ethics states:

In accepting employment as an agent, the mortgage broker pledges himself to protect and promote the interest of the client. The obligation of absolute fidelity to the client's interest is primary.

Thus, a lender who pays a mortgage broker secret compensation may face

liability for inducing the broker to breach his fiduciary or contractual duties, fraud, or commercial bribery.

Mail/Fraud/ Wire Fraud/ RICO The payment of compensation by a lender to a mortgage broker without full disclosure is also likely to result in liability under the

federal mail and wire fraud statutes and RICO. It is well established that a scheme to corrupt a fiduciary or agent violates the mail or wire fraud statute if the mails or interstate wires are used in furtherance of the scheme.⁴⁹

Real Estate Settlement Procedures Act Irrespective of whether the broker or other originator of a mortgage is a fiduciary, lender payments to such a person may result in liability under section 8 of RESPA,⁵⁰ which prohibits payments or fee splitting for business referrals, if the payments are either not fully disclosed or exceed reasonable compensation for the services actually performed by the originator.

Prior to 1992, the significance of section 8 of RESPA was minimized by restrictive interpretations. The Sixth Circuit Court of Appeals held that the origination of a mortgage was not a "settlement service" subject to section 8.⁵¹ In addition, cases construing the pre-1992 version of implementing HUD regulation X required a splitting of fees paid to a single person.⁵² Finally, the payment of compensation in secondary market transactions was excluded from RESPA, and there was no distinction made between genuine secondary market transactions and "table funded" transactions, where a mortgage company originates a loan in its own name, but using funds supplied by a lender, and promptly thereafter assigns the loan to the lender.⁵³

In 1992, RESPA and regulation X were amended to close each of these loopholes. The amendments did not have practical effect until August 9, 1994, the effective date of the new regulation X.⁵⁴

First, RESPA was amended to provide expressly that the origination of a loan was a "settlement service." P.L. 102-550 altered the definition of "settlement service" in Section 2602(3) to include "the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans)." This change and a corresponding change in regulation X were expressly intended to disapprove the Sixth Circuit's decision in *United States v. Graham*

Mtge. Corp.⁵⁵

Second, regulation X was amended to exclude table funded transactions from the definition of "secondary market transactions." Regulation X addresses "table funding"

in sections 3500.2 and 3500.7. Section 3500.2 provides that "table funding means a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds. A table-funded transaction is not a secondary market transaction (see Section 3500.5(b)(7))." Section 3500.5(b)(7) exempts from regulation by RESPA fees and charges paid in connection with legitimate "secondary market transactions," but excludes table funded transactions from the scope of legitimate secondary market transactions. Under the current regulation X, RESPA clearly applies to table funded transactions.⁵⁶ Amounts paid by the first assignee of a loan to a "table funding" broker for "rights" to the loan — i.e., for the transfer of the loan by the broker to the lender — are now subject to examination under RESPA.⁵⁷

Third, any sort of payment to a broker or originator that does not represent reasonable compensation for services actually provided is prohibited. 58

Whatever the payment to the originator or broker is called, it must be reasonable. Another mortgage industry publication states: [A]ny amounts paid under these headings [servicing release premiums or yield spread premiums] must be lumped together with any other origination fees paid to the broker and be subjected to the referral fee/ market value test in Section 8 of RESPA and Section 3500.14 of Regulation X. If the total of this compensation exceeds the market value of the services performed by the broker (excluding the value of the referral), then the compensation does not pass the test, and both the broker and the lender could be subject to the civil and criminal penalties contained in RESPA.⁵⁹

Normal compensation for a mortgage broker is about one percent of the principal amount of the loan. Where the broker "table funds" the loan and originates it in its name, an extra .5 percent or one percent may be appropriate.⁶⁰ This level of reasonableness is recognized by agency regulations. For example, on February 28, 1996, in response to allegations of gouging by brokers on refinancing VA loans, the VA promulgated new regulations prohibiting mortgage lenders from charging more than two points in refinanced transactions.⁶¹

The amended regulation makes clear that a payment to a broker for influencing the borrower in any manner is illegal. "Referral" is defined in Section 3500.14(f)(1) to include "any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement

service or business incident to or part of a settlement service when such person will pay for such settlement service or business incident thereto or pay a charge attributable in whole or in part to such settlement service or business. . . .” The amended regulation also cannot be evaded by having the borrower pay the originator. An August 14, 1992 letter from Frank Keating, HUD’s General Counsel, states unequivocally: “We read ‘imposed upon borrowers’ to include all charges which the borrower is directly or indirectly funding as a condition of obtaining the mortgage loan. We find no distinction between whether the payment is paid directly or indirectly by the borrower, at closing or outside the closing. . . . I hereby restate my opinion that RESPA requires the disclosures of mortgage broker fees, however denominated, whether paid for directly or indirectly by the borrower or by the lender.”

Thus, “yield spread premiums,” “service release fees,” and similar payments for the referral of business are no longer permitted. The new regulation was specifically intended to outlaw the payment of compensation for the referral of business by mortgage brokers, either directly or through the imposition of “junk charges.” Thus, it provides that payments may not be made “for the referral of settlement service business” (Section 3500.14(b)).

The mortgage industry has recognized that types of fees that were once viewed as permissible in the past are now “prohibited and illegal.” The legal counsel for the National Second Mortgage Association acknowledged: “Even where the amount of the fee is reasonable, the more persuasive conclusion is that RESPA does not permit service release fees.” “Also, if . . . the lender is ‘table funding’ the loan, he is violating RESPA’s Section 8 anti-kickback provisions.”⁶²

In the first case decided under the new regulation, *Briggs v. Countrywide Funding Corp.*,⁶³ the U. S. District Court for the Middle District of Alabama denied a motion to dismiss a complaint alleging the payment of a “yield spread premium” by a lender to a broker in connection with a table funded transaction. Plaintiffs alleged that the payment violated RESPA as well as several state law doctrines. The court acknowledged that RESPA applied to the table funded transactions and noted that whether or not disclosed, the fees could be considered illegal.

Truth in Lending Act Implications Many of the pending cases challenging the payment of “yield spread premiums” and “upselling” allege that the payment of

compensation to an agent of the lender is a TILA "finance charge." The basis of the TILA claims is that the commission a borrower pays to his "broker" is a finance charge because the "broker" is really functioning as the agent of the lender. The claim is not that the "upsell" payment made by the lender to the borrower's broker is a finance charge.

Decisions under usury statutes uniformly hold that a fee charged to the borrower by the lender's agent is interest or points.⁶⁴ The concept of the "finance charge" under TILA is broader than, but inclusive of, the concept of "interest" and "points" at common law and under usury statutes. Regulation Z specifically provides that the "finance charge" includes any "interest" and "points" charged in connection with a transaction.⁶⁵ Therefore, if the intermediary is in fact acting on behalf of the lender, as is the case where the intermediary accepts secret compensation from the lender or acts in the lender's interest to increase the amount paid by the borrower, all compensation received by the intermediary, including broker's fees charged to the borrower, are finance charges.

Unfair and Deceptive Acts and Practices The pending "upselling" cases also generally allege that the payment of compensation to the mortgage broker violates the general prohibitions of most state "unfair and deceptive acts and practices" ("UDAP") statutes. The violations of public policy codified by the federal consumer protection laws create corresponding state consumer protection law claims.⁶⁶

Civil Rights and Fair Housing Laws The Department of Justice brought two cases in late 1995 alleging that the disproportionate impact of "overages" and "upselling" on minorities violated the Fair Housing Act⁶⁷ and Equal Credit Opportunity Act.⁶⁸ Both cases alleged disparate pricing of loans according to the borrower's race and were promptly settled.⁶⁹ Other investigations are reported to be pending.⁷⁰ The principal focus of enforcement agencies appears to be on the civil rights implications of overages.⁷¹

It is likely that such a practice would also violate 42 U.S.C. Section 1981. While Section 1981 requires intentional discrimination, a lender that decides to take advantage of the fact that other lenders discriminate by making loans to minorities at higher rates is also engaging in intentional discrimination. In *Clark v. Universal Builders*,⁷² the Seventh Circuit held that one who exploits and preys on the discriminatory hardship of minorities does not occupy a more protected status than

the one who created the hardship in the first instance; that is, a defendant cannot escape liability under the Civil Rights Act by asserting it merely "exploited a situation created by socioeconomic forces tainted by racial discrimination."⁷³

PRIVATE MORTGAGE INSURANCE LITIGATION Another group of pending lawsuits is based on claims of misrepresentation of or failure to disclose the circumstances under which private mortgage insurance ("PMI") may be terminated. PMI insures the lender against the borrower's default — the borrower derives no benefit from PMI. It is generally required under a conventional mortgage if the loan to value ratio exceeds about 80 percent.⁷⁴ Approximately 17.4 percent of all mortgages have PMI.⁷⁵

Standard form conventional mortgages provide that if PMI is required it may be terminated as provided by agreement. Most servicers and investors have policies for terminating PMI. However, the borrower is often not told what the policy is, either at the inception of the mortgage or at any later time. As a result, people pay PMI premiums unnecessarily. Since there is about \$ 460 billion in PMI in force,⁷⁶ this is a substantial problem. The failure accurately and clearly to disclose the circumstances under which PMI may be terminated has been challenged under RICO and state consumer fraud statutes.

UNAUTHORIZED SERVICING CHARGES Another fertile ground of litigation concerns the imposition of charges that are not authorized by law or the instruments being serviced. The collection of modest charges is a key component of servicing income.⁷⁷ For example, many mortgage servicers impose charges in connection with the payoff or satisfaction of mortgages when the instruments either do not authorize the charge or affirmatively prohibit it.

The imposition of payoff and recording charges has been challenged as a breach of contract, as a deceptive trade practice, as a violation of RICO, and as a violation of the Fair Debt Collection Practices Act ("FDCPA").⁷⁸ In *Sandlin v. State Street Bank*,⁷⁹ the U. S. District Court for the Middle District of Florida held that the imposition of a payoff statement fee is a violation of the standard form "uniform instrument" issued by the Federal National Mortgage Association and Federal Home Loan Mortgage Corporation, and when imposed by someone who qualifies as a "debt collector" under the FDCPA,⁸⁰ violates that statute as well.⁸¹ However, attempts to

challenge such charges under RESPA have been unsuccessful, with courts holding that a charge imposed subsequent to the closing is not covered by RESPA.⁸²

ADJUSTABLE RATE MORTGAGES Adjustable rate mortgages ("ARMs") were first proposed by the Federal Home Loan Bank Board in the 1970s. They first became widespread in the early 1980s. At the present time, about 25 to 30 percent of all residential mortgages are adjustable rate mortgages ("ARMs").⁸³

The ARM adjustment practices of the mortgage banking industry have been severely criticized because of widespread errors.⁸⁴ Published reports beginning in 1990 indicate that 25 to 50 percent of all ARMs may have been adjusted incorrectly at least once.⁸⁵ The pattern of misadjustments is not random: approximately two-thirds of the inaccuracies favor the mortgage company.⁸⁶

Grounds for legal challenges to improper ARM adjustments include breach of contract, TILA,⁸⁷ the Uniform Consumer Credit Code,⁸⁸ RICO,⁸⁹ state unfair and deceptive practices statutes,⁹⁰ failure to properly respond to a "qualified written request" under section 6(e) of RESPA, and usury.⁹¹

Substantial settlements of ARM claims have been made by Citicorp Mortgage,⁹² First Nationwide Bank,⁹³ and Banc One.⁹⁴ On the other hand, several cases have rejected borrower claims that particular ARM adjustment actions violated the terms of the instruments. For example, a Connecticut case held that a mortgage that provided for an interest rate tied to the bank's current "market rate" was not violated when the bank failed to take into account the rate that could be obtained through the payment of a "buydown."⁹⁵ A Pennsylvania case held that the substitution of one index for another that had been discontinued was consistent with the terms of the note and mortgage.⁹⁶

A major issue in ARM litigation is whether what the industry erroneously terms "undercharges" — the failure of the servicer to charge the maximum amount permitted under the terms of the instrument — can be "netted" or offset against overcharges — the collection of interest in excess of that permitted under the terms of the instrument. Fannie Mae has taken the position that "netting" is appropriate.⁹⁷

The validity of this conclusion is questionable. First, nothing requires a financial institution to adjust interest rates upward to the maximum permitted, and there are

in fact often sound business reasons for not doing so. On the other hand, the borrower has an absolute right not to pay more than the instrument authorizes. Thus, what the industry terms an "undercharge" is simply not the same thing as an "overcharge."

Second, the upward adjustment of interest rates must be done in compliance with TILA. An Ohio court held that failure to comply made the adjustment unenforceable.⁹⁸ "Where a bank violates the Truth-in-Lending Act by insufficient disclosure of a variable interest rate, the court may grant actual damages. . . . If the actual damage is the excess interest charge over the original contract term, the court may order the mortgage to be recalculated at its original terms, and refuse to enforce the variable interest rate provisions."⁹⁹

Third, if the borrower is behind in his payments, "netting" may violate state law requiring the lender to proceed against the collateral before undertaking other collection efforts. A decision of the California intermediate appellate court concluded that the state's "one-action rule" had been violated when a lender obtained an offset of interest overcharges against amounts owed by the borrower under an ARM.¹⁰⁰

1. E.g., G. Marsh, *Lender Liability for Consumer Fraud Practices of Retail*

Dealers and Home Improvement Contractors, 45 Ala. L. Rev. 1 (1993); D. Edelman, *Second Mortgage Frauds*, Nat'l Consumer Rights Litigation Conference 67 (Oct. 19-20, 1992).

2. The lender would deposit the escrow funds in a non-interest-bearing account at a bank which made loans to the lender. The lender would receive a "funds credit" against the interest payable on its borrowings based on the value of the escrow funds deposited at the bank.

3. *Aitken v. Fleet Mtge. Corp.*, 1991 U.S. Dist. LEXIS 10420 (ND Ill., July 30, 1991), and 1992 U.S. Dist. LEXIS 1687 (ND Ill., Feb. 12, 1992); *Attorney General v. Michigan Nat'l Bank*, 414 Mich. 948, 325 N.W.2d 777 (1982); *Burkhardt v. City Nat'l Bank*, 57 Mich.App. 649, 226 N.W.2d 678 (1975).

4. See generally, *Class Actions Under Anti-Trust Laws on Account of Escrow and Similar Practices*, 11 Real Prop., Probate & Trust Journal 352 (Summer 1976).

5. *Buchanan v. Century Fed. S. & L. Ass'n*, 306 Pa. Super. 253, 452 A.2d 540(1982), later opinion, 374 Pa. Super. 1, 542 A.2d 117 (1986); *Carpenter v. Suffolk Franklin Savs. Bank*, 370 Mass. 314, 346 N.E.2d 892 (1976); *Brooks v. Valley Nat'l Bank*, 113 Ariz. 169, 548 P.2d 1166 (1976); *Petherbridge v. Prudential S. & L. Ass'n*, 79 Cal.App.3d 509, 145 Cal.Rptr. 87 (1978); *Marsh v. Home Fed. S. & L. Ass'n*, 66 Cal.App.3d 674, 136 Cal.Rptr. 180 (1977); *LaThrop v. Bell Fed. S. & L. Ass'n*, 68 Ill.2d 375, 370 N.E.2d 188 (1977); *Sears v. First Fed. S. & L. Ass'n*, 1 Ill.App.3d 621, 275 N.E.2d 300 (1st Dist. 1973); *Durkee v. Franklin Savings Ass'n*, 17 Ill.App.3d 978, 309 N.E.2d 118 (2d Dist. 1974); *Zelickman v. Bell Fed. S. & L. Ass'n*, 13 Ill.App.3d 578, 301 N.E.2d 47 (1st Dist. 1973); *Yudkin v. Avery Fed. S. & L. Ass'n*, 507 S.W.2d 689 (Ky. 1974); *First Fed. S. & L. Ass'n of Lincoln v. Board of Equalization of Lancaster County*, 182 Neb. 25, 152 N.W.2d 8 (1967); *Kronisch v. Howard Savings Institution*, 161 N.J.Super. 592, 392 A.2d 178 (1978); *Surrey Strathmore Corp. v. Dollar Savings Bank of New York*, 36 N.Y.2d 173, 366 N.Y.S.2d 107, 325 N.E.2d 527 (1975); *Tierney v. Whitestone S. & L. Ass'n*, 83 Misc.2d 855, 373 N.Y.S.2d 724 (1975); *Cale v. American Nat'l Bank*, 37 Ohio Misc. 56, 66 Ohio Ops.2d 122 (1973); *Richman v. Security S. & L. Ass'n*, 57 Wis.2d 358, 204 N.W.2d 511 (1973); *In re Mortgage Escrow Deposit Litigation*, 1995 U.S.Dist. LEXIS 1555 (ND Ill. Feb. 8, 1995).

6. *National Mortgage News*, Nov. 11, 1991, p. 2.

7. *Leff v. Olympic Fed. S & L Ass'n*, 1986 WL 10636 (ND Ill 1986).

8. *Overcharging on Mortgages: Violations of Escrow Account Limits by the Mortgage Lending Industry: Report by the Attorneys General of California, Florida, Iowa, Massachusetts, Minnesota, New York & Texas* (24 Apr 1990).

9. *Leff v. Olympic Fed. S. & L. Ass'n*, n. 7 *supra*; *Aitken v. Fleet Mtge.Corp.*, 1992 U.S.Dist. LEXIS 1687 (ND Ill., Feb. 12, 1992); *Weinberger v. Bell Federal*, 262 Ill.App.3d 1047, 635 N.E.2d 647 (1st Dist. 1994); *Poindexter v. National Mtge. Corp.*, 1995 U.S.Dist. LEXIS 5396 (ND Ill., April, 24, 1995); *Markowitz v. Ryland Mtge. Co.*, 1995 U.S.Dist. LEXIS 11323 (ND Ill. Aug. 8, 1995); *Sanders v. Lincoln Service Corp.*, 1993 U.S.Dist. LEXIS 4454 (ND Ill. Apr. 9, 1993); *Cairns v. Ohio Sav. Bank*, 1996 Ohio App. LEXIS 637 (Feb. 22, 1996). See generally, *GMAC Mtge. Corp. v. Stapleton*, 236 Ill.App.3d 486, 603 N.E.2d 767 (1st Dist. 1992), leave to appeal denied, 248 Ill.2d 641, 610 N.E.2d 1262 (1993).

10. Leff v. Olympic Fed. S. & L. Ass'n, n. 7 supra; Aitken v. Fleet Mtge. Corp., n.9 supra; Poindexter v. National Mtge. Corp., n.9 supra; Sanders v. Lincoln Service Corp., n. 9 supra.

11. Leff v. Olympic Fed. S. & L. Ass'n, Aitken v. Fleet Mtge. Corp., n.9 supra; Robinson v. Empire of America Realty Credit Corp., 1991 U.S. Dist. LEXIS 2084 (ND Ill., Feb. 20, 1991); Poindexter v. National Mtge. Corp., n. 9 supra. 12. Poindexter v. National Mtge. Corp., n. 9 supra.

13. Martinez v. Weyerhaeuser Mtge. Co., 1995 U.S. Dist. LEXIS 11367 (ND Ill. Aug. 8, 1995). The theory is that the excessive portion of the escrow deposit is a finance charge.

14. 12 U.S.C. Section 2609.

15. State of Louisiana v. Litton Mtge. Co., 50 F.3d 1298 (5th Cir. 1995); Allison v. Liberty Savings, 695 F.2d 1086, 1091 (7th Cir. 1982); Herrman v. Meridian Mtge. Corp., 901 F.Supp. 915 (ED Pa. 1995); Campbell v. Machias Savings Bank, 865 F.Supp. 26, 31 (D.Me. 1994); Michels v. Resolution Trust Corp., 1994 U.S. Dist. LEXIS 6563 (D.Minn. Apr. 13, 1994); Bergkamp v. New York Guardian Mortgagee Corp., 667 F.Supp. 719, 723 (D.Mont. 1987). Contra, Vega v. First Fed. S. & L. Ass'n, 622 F.2d 918, 925 (6th Cir. 1980).

16. 24 C.F.R. 3400.17, issued at 60 FR 24734.17. The pre-1990 "uniform instrument" issued by the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation did not provide for any surplus. The pre-1990 FHA form and the VA form provided for a one-month surplus.

18. The finance charge includes "any charge, payable directly or indirectly by the consumer, imposed directly or indirectly by the creditor, as an incident to or a condition of the extension of credit." regulation Z, 12 C.F.R. 226.4(a). The definition is all-inclusive: any charge that meets this definition is a finance charge unless it is specifically excluded by TILA or regulation Z. R. Rohner, *The Law of Truth in Lending*, section 3.02 (1984). There are exclusions from the finance charge which apply only in mortgage transactions. 12 C.F.R. 226.4(c)(7). However, the exclusions require that the charges be bona fide and reasonable in amount, *id.*, and the exclusions are narrowly construed to protect consumers from underdisclosure of the cost of credit.

Equity Plus Consumer Fin. & Mtge. Co. v. Howes, 861 P.2d 214, 217 (NM 1993). See also *In re Celona*, 90 B.R. 104 (Bankr.ED Pa. 1988), *aff'd* 98 B.R. 705 (Bankr. ED Pa. 1989). "Only those charges specifically exempted from inclusion in the 'finance charge' by statute or regulation may be excluded from it." *Buford v. American Fin. Co.*, 333 F.Supp. 1243, 1247 (ND Ga. 1971). 19. *In re Souders*, 1992 U.S.Comp.Gen. LEXIS 1075 (Sept. 29, 1992); *In re Barry*, 1981 U.S.Comp.Gen. LEXIS 1262 (April 16, 1981); *In re Bayer*, 1977 U.S.Comp.Gen. LEXIS 2116 (Sept. 19, 1977); *In re Wahl*, 1974 U.S.Comp.Gen. LEXIS 1610 (Oct. 1, 1974); *In re Ray*, 1973 U.S.Comp.Gen. LEXIS 1960 (March 13, 1973). A tax service fee represents the purported cost of having someone check the real estate records annually to make sure that the taxes on the property securing the loan are shown as having been paid.

20. *In re Celona*, 90 B.R. 104, 110-12 (Bankr. E.D.Pa. 1988), *aff'd*, 98 B.R. 705 (ED Pa. 1989) (lender violated TILA by passing on \$ 200 fee charged by attorney to review certain documents without including fee in "finance charge"); *Abel v. Knickerbocker Realty Co.*, 846 F.Supp. 445 (D.Md. 1994) (lender violated TILA because "origination fee" of \$ 290 excluded from "finance charge"); *Brodo v. Bankers Trust Co.*, 847 F.Supp. 353 (ED Pa. 1994) (lender violated TILA by imposing charge for preparing TILA disclosure documents without including them in the "finance charge").

21. *Cheshire Mtge. Service, Inc. v. Montes*, 223 Conn. 80, 612 A.2d 1130 (1992) (lender violated TILA by imposing fee for assigning the mortgage when it was sold on the secondary market without including it in the "finance charge"); *In re Brown*, 106 B.R. 852 (Bankr. E.D.Pa. 1989) (same); *Mayo v. Key Fin. Serv., Inc.*, 92-6441-D (Mass.Super.Ct., June 22, 1994) (same).

22. *In re Anibal L. Toboas*, 1985 U.S.Comp.Gen. LEXIS 854 (July 19, 1985) ("The relevant part of Regulation Z expressly categorizes service charges and loan fees as part of the finance charge when they are imposed directly or indirectly on the consumer incident to or as a condition of the extension of credit. The finance charge, therefore, is not limited to interest expenses but includes charges which are imposed to defray a lender's administrative costs. [citation] A messenger service charge paid to the mortgage lender may not be reimbursed because it is part of the lender's overhead, a charge for which is considered part of the finance charge under Regulation Z."); *In re Schwartz*, 1989 U.S. Comp. Gen. LEXIS 55 (Jan. 19, 1989) ("a

messenger service charge or fee is part of the lender's overhead, a charge which is deemed to be a finance charge and not reimbursable").

23. Decision of the Comptroller General No. B-181037, 1974 U.S.Comp.Gen. LEXIS 1847 (July 16, 1974) (loan closing fee was part of the finance charge under TILA); Decision of the Comptroller General, No. B-189295 1977, U.S. Comp.Gen. LEXIS 2230 (Aug. 16, 1977) (same); In the Matter of Real Estate Expenses — Finance Charges, No. B-179659, 54 Comp. Gen. 827, 1975 U.S.Comp.Gen. LEXIS 180 (April 4, 1975) (same).

24. *Abbey v. Columbus Dodge*, 607 F.2d 85 (5th Cir. 1979) (purported \$ 37.50 "filing fee" that creditor pocketed was a finance charge); *Therrien v. Resource Finan. Group. Inc.*, 704 F.Supp. 322, 327 (DNH 1989) (double-charging for recording and discharge fee and title insurance premium constituted undisclosed finance charges).

25. Decision of the Comptroller General, B-174030, 1971 U.S. Comp. Gen. LEXIS 1963 (Nov. 11, 1971).

26. 16 F.3d 1142 (11th Cir. 1994).

27. *Id.* at 1149.

28. 60 FR 16771, April 3, 1995.

29. See Jean M. Shioji, Truth in Lending Act Reform Amendments of 1995, Rev. of Bank. and Finan. Serv., Dec. 13, 1995, Vol. 11, No. 21; at 235. 30. P.L. 104-29, sections 2(a), (c), (d), and (e), to be codified at 15 U.S.C. 1605(a), (c), (d) and (e).

31. P.L. 104-29, section 2(b), to be codified at 15 U.S.C. 1605(a)(6). 32. The amendment broadened the language in 15 U.S.C. 1605(e)(2), which previously excluded "fees for preparation of a deed, settlement statement, or other documents."

33. P.L. 104-29, sections 2(a), (c), (d), and (e), to be codified at 15 U.S.C. 1605(a), (c), (d) and (e).

34. P.L. 104-29, section 3(a), to be codified at 15 U.S.C. 1605(f)(2); P.L. 104-29, section 4(a), to be codified at 15 U.S.C. 1649(a)(3); P.L. 104-29, section 8, to be codified at 15 U.S.C. 1635(i)(2); 15 U.S.C. 1606(c). 35. P.L. 104-29, section 7(b), to

be codified at 15 U.S.C. 1641(f). The apparent purpose of this provision was to alter the result in *Myers v. Citicorp Mortgage*, 1995 U.S. Dist. LEXIS 3356 (MD Ala., March 14, 1995). 36. The amendments were applied to existing transactions in *Hickey v. Great W. Mtge. Corp.*, 158 F.R.D. 603 (ND Ill. 1994), later opinion, 1995 U.S. Dist. LEXIS 405 (ND Ill., Jan. 3, 1995), later opinion, 1995 U.S. Dist. LEXIS 3357 (ND Ill., Mar. 15, 1995), later opinion, 1995 U.S. Dist. LEXIS 4495 (ND Ill., Apr. 4, 1995), later opinion, 1995 U.S. Dist. LEXIS 6989 (ND Ill., May 1, 1995); and *Cowen v. Bank United*, 1995 U.S. Dist. LEXIS 4495, 1995 WL 38978 (ND Ill., Jan. 25, 1995), *aff'd*, 70 F.3d 937 (7th Cir. 1995).

37. Jonathan S. Hornblase, Fleet Unit Discontinues Overages on Loans to the Credit-Impaired, *American Banker*, June 9, 1995, p. 8. See also, Kenneth R. Harney, Loan Firm to Refund \$ 2 Million in 'Overage' Fees, *Los Angeles Times*, Nov. 6, 1994, part K, p. 4, col. 1 ("Yield spread premiums" or "overages" are paid "to brokers when borrowers lock in or sign contracts at rates or terms that exceed what the lender would otherwise be willing to deliver"); Ruth Hepner, Risk-based loan rates may rate a look, *Washington Times*, Nov. 4, 1994, p. F1 (such fees are paid to mortgage brokers "to bring in borrowers at higher-than-market rates and fees"); Jonathan S. Hornblase, Focus on Overages Putting Home Lenders in Legal Hot Seat, *American Banker*, May 24, 1995, p. 10 (giving examples of how the fees affect the borrower).

38. The extra fees — known in the trade as overages or yield-spread premiums — typically are paid to local mortgage brokers by large lenders who purchase their home loans. The concept is straightforward: If a mortgage company can deliver a loan at higher than the going rate, or with higher fees, the loan is worth more to the large lender who buys it. For every rate notch above "par" — the lender's standard rate — the lender will pay a local originator a bonus. Kenneth R. Harney, Suit Targets Extra Fees Paid When Mortgage Rate Inflated, *Sacramento Bee*, Aug. 13, 1995, p. J1.

39. Prior to 1993, according to industry experts, back-end compensation of this type rarely was disclosed to consumers. More recently, however, some brokers and lenders have sharply limited the size of the fees and disclosed them. They often appear as one or more line items on the standard HUD-1 settlement sheets used for closings nationwide. *Id.*

40. Jonathan S. Hornblass, Focus on Overages Putting Home Lenders In Legal Hot Seat, *American Banker*, May 24, 1995, p. 10; K. Harney, U. S. Probes Higher Fees for Women, Minorities, *Los Angeles Times*, Sept. 24, 1995, p. K4. 41. *In re Estate of Morys*, 17 Ill.App.3d 6, 9, 307 N.E.2d 669 (1st Dist. 1973).

42. *Wyatt v Union Mtge. Co.*, 24 Cal.3d 773, 782, 157 Cal.Rptr. 392, 397, 598 P.2d 45 (1979); accord: *Pierce v. Hom*, 178 Cal. Rptr. 553, 558 (Ct. App. 1981) (mortgage broker has duty to use his expertise in real estate financing for the benefit of the borrower); *Allabastro v. Cummins*, 90 Ill.App.3d 394, 413 N.E.2d 86, 82 (1st Dist. 1980); *Armstrong v. Republic Rlty. Mgt. Corp.*, 631 F.2d 1344 (8th Cir. 1980); *In re Dukes*, 24 B.R. 404, 411-12 (Bankr. ED Mich. 1982) ("the fiduciary, Salem Mortgage Company, failed to provide the borrower-principal with any sort of estimate as to the ultimate charges until a matter of minutes before the borrower was to enter into the loan agreement"); *Community Fed. Savings v. Reynolds*, 1989 U.S. Dist. LEXIS 10115 (N.D.Ill., Aug. 18, 1989); *Langer v. Haber Mortgages, Ltd.*, *New York Law Journal*, August 2, 1995, p. 21 (N.Y. Sup.Ct.). See also, *Tomaszewski v. McKeon Ford, Inc.*, 240 N.J.Super. 404, 573 A.2d 101 (1990) *Browder v. Hanley Dawson Cadillac Co.*, 62 Ill.App.3d 623, 379 N.E.2d 1206 (1st Dist. 1978) *Fox v. Industrial Cas. Co.*, 98 Ill.App.3d 543, 424 N.E.2d 839 (1st Dist. 1981); *Hlavaty v. Kribs Ford Inc.*, 622 S.W.2d 28 (Mo.App. 1981), and *Spears v. Colonial Bank*, 514 So.2d 814 (Ala. 1987) (Jones, J., concurring), dealing with the duty of a seller of goods or services who undertakes to procure insurance for the purchaser. See generally 12 Am Jur 2d, Brokers, Section 84.

43. *Wyatt v. Union Mtge. Co.*, 24 Cal.3d 773, 782, 157 Cal.Rptr. 392, 397, 598 P.2d 45 (1979).

44. *Brink v. Da Lesio*, 496 F.Supp. 1350 (D.Md. 1980), modified, 667 F.2d 420 (4th Cir. 1981)

45. *Wyatt v Union Mtge. Co.*, 24 Cal.3d 773, 782, 157 Cal.Rptr. 392, 397, 598 P.2d 45 (1979).

46. *Martin v. Heinold Commodities, Inc.* 139 Ill.App.3d 1049, 487 N.E.2d 1098. 1102-03 (1st Dist. 1985), *aff'd in part and rev'd in part*, 117 Ill.2d 67, 510 N.E.2d 840 (1987), *appeal after remand*, 240 Ill.App.3d 536, 608 N.E.2d 449 (1st Dist. 1992), *aff'd in part and rev'd in part*, 163 Ill.2d 33, 643 N.E.2d 734 (1994).

47. An agreement between a seller and an agent for a purchaser whereby an increase in the purchase price was to go to the agent unbeknownst to the purchaser, constitutes fraud. *Kuntz v. Tonnele*, 80 N.J.Eq. 372, 84 A. 624, 626 (Ch. 1912). The buyer may sue both his agent and the seller. *Id.* 48. *Starr v. International Realty, Ltd.*, 271 Or. 296, 533 P.2d 165, 167-8 (1975).

49. *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272 (7th Cir. 1983); *Hellenic Lines, Ltd. v. O'Hearn*, 523 F.Supp. 244 (SDNY 1981); *CNBC, Inc. v. Alvarado*, 1994 U.S.Dist. LEXIS 11505 (SDNY 1994). *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941), *United States v. George*, 477 F.2d 508, 513 (7th Cir. 1973); *Formax, Inc. v. Hostert*, 841 F.2d 388, 390-91 (Fed. Cir. 1988); *United States v. Shamy*, 656 F.2d 951, 957 (4th Cir. 1981); *United States v. Bruno*, 809 F.2d 1097, 1104 (5th Cir. 1987); *United States v. Isaacs*, 493 F.2d 1124, 1150 (7th Cir. 1974); *United States v. Mandel*, 591 F.2d 1347, 1362 (4th Cir. 1979); *United States v. Keane*, 522 F.2d 534, 546 (7th Cir. 1975); *United States v. Barrett*, 505 F.2d 1091, 1104 (7th Cir. 1974); *GLM Corp. v. Klein*, 684 F.Supp. 1242, 1245 (SDNY 1988); *United States v. Procter & Gamble Co.*, 47 F.Supp. 676, 678-79 (D.Mass. 1942); *United States v. Aloj*, 449 F.Supp. 698, 718 (EDNY 1977); *United States v. Fineman*, 434 F.Supp. 189, 195 (EDPa. 1977). 50. U.S.C. Section 2607.

51. *United States v. Graham Mtge. Corp.*, 740 F.2d 414 (6th Cir. 1984). 52. *Durr v. Intercounty Title Co.*, 826 F.Supp. 259, 262 (ND Ill. 1993), *aff'd*, 14 F.3d 1183 (7th Cir. 1994); *Campbell v. Machias Savings Bank*, 865 F.Supp. 26, 31 n. 5 (D.Me. 1994); *Mercado v. Calumet Fed. S. & L. Ass'n*, 763 F.2d 269, 270 (7th Cir. 1985); *Family Fed. S. & L. Ass'n v. Davis*, 172 B.R. 437, 466 (Bankr. DDC 1994); *Adamson v. Alliance Mtge. Co.*, 677 F.Supp. 871 (ED Va. 1987), *aff'd*, 861 F.2d 63 (4th Cir. 1988); *Duggan v. Independent Mtge. Corp.*, 670 F.Supp. 652, 653 (ED Va. 1987).

53. The Alabama Supreme Court described the "table funding" relationship as

follows: Under this arrangement, the mortgage broker or correspondent lender performs all of the originating functions and closes the loan in the name of the mortgage broker with funds supplied by the mortgage lender. The mortgage broker depends upon "table funding," the simultaneous advance of the loan funds from the mortgage lender to the mortgage broker. Once the loan is closed, the mortgage broker immediately assigns the mortgage to the mortgage lender. The essence of

the table funding relationship is that the mortgage broker identifies itself as the creditor on the loan documents even though the mortgage broker is

not the source of the funds. (Emphasis added). *Smith v. First Family Financial Services Inc.*, 626 So.2d 1266, 1269 (Ala. 1993). 54. 57 FR 49607, Nov. 2, 1992; 57 FR 56857, Dec. 1, 1992; 59 FR 6515, Feb. 10, 1994.

55. N. 51 *supra*. In conjunction with amending regulation X, the Department of Housing and Urban Development made the following statement regarding the Sixth

Circuit's interpretation of RESPA and regulation X: HUD has consistently taken the position that the prohibitions of Section 8 of RESPA (12 U.S.C. 2607) extended to loan referrals. Although the making of a loan is not delineated as a "settlement service" in Section 3(3) of RESPA (12 U.S.C. 2602(3)), it has always been HUD's position, based on the statutory language and the legislative history, that the section 3(3) list was not an inclusive list of all settlement services and that the origination, processing and funding of a mortgage loan was

a settlement service. In *U.S. v. Graham Mortgage Corp.*, 740 F.2d 414 (6th Cir. 1984), the Sixth Circuit Court of Appeals stated that HUD's interpretation that the making of a mortgage loan was a part of the settlement business was unclear for purposes of criminal prosecution, and based on the rule of lenity, overturned a previous conviction. In response to the *Graham* case, HUD decided to amend its regulations to state clear and specifically that the making and

processing of a mortgage loan was a settlement service. Accordingly, HUD restates its position unequivocally that the originating, processing, or funding

of a mortgage loan is a settlement service in this rule. 57 F.R. 49600 (Nov. 2, 1992).

56. *Table Funding Rebuffed Again*, National Mortgage News, Feb. 21, 1994, p. 6; *HUD May Grant Home Equity Reprieve*, Thomson's International Bank Accountant, Dec. 13, 1993, p. 4; *HUD Wants Expansion of Mortgage Broker Fee Disclosure*, National Mortgage News, p. 25 (Sept. 14, 1992).

57. *Table Funding, Fee Rulings Near*, Banking Attorney, Dec. 13, 1993, vol. 3, no. 47, p. 5; *Table Funding to Be Disclosed*, International Bank Accountant, Dec. 13, 1993, vol. 93, no. 47, p. 4.

58. The current version of regulation X, 24 C.F.R. Section 3500.14, provides,

in part, as follows: Prohibition against kickbacks and unearned fees. (a)Section 8 violation. Any violation of this section is a violation of section 8 of RESPA (12 U.S.C. Section 2607) and is subject to enforcement as such under

Section 3500.19(b). . . (b) No referral fees. No person shall give and no person shall accept any fee, kickback, or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a settlement service involving a federal-related mortgage loan shall be

referred to any person. (c) No split of charges except for actual services performed. No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a settlement service in connection with a transaction involving a federally-related mortgage loan other than for services actually performed. A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this Part be avoided by creating an arrangement wherein the purchaser of services splits the fee. (Emphasis added)

59. Robert P. Chamness, Compliance Alert: What Changed the Face of the Mortgage Lending Industry Overnight?, ABA Bank Compliance, Spring 1993, p. 23. Accord, Heather Timmons, U.S. Said to Plan Crackdown on Referral Fees, American Banker, Dec. 20, 1995, p. 10. ("Section 8 [of RESPA] has prompted close scrutiny of back-end points, mortgage fees paid to a broker by the lender after closing. Federal attorneys are concerned that some lenders are improperly hiding referral fees in the rates charged to consumers"); HEL Lenders May Be Sued on Broker Referrals, National Mortgage News, April 3, 1995, p. 11 *supra*, ("there no longer is any possible justification for paying back-end points . . . [because] the very essence is that the compensation is paid for referral").

60. Mary Sit, Mortgage Brokers Can Help Borrowers. Boston Globe, Oct. 3, 1993, p. A13; Jeremiah S. Buckley and Joseph M. Kolar, What RESPA has Wrought: Real Estate Settlement Procedures, Savings & Community Banker, Feb. 1993, vol. 2, no. 2, p. 32.

61. 61 F.R. 7414 (February 28, 1996). See also Kenneth Harney, Nation's Housing: VA Eyes Home-Loan Abuses, *Newsday* p. D02 (Mar. 15, 1996). See also See Leonard A. Bernstein, RESPA Invades Secondary Mortgage Financing, *New Jersey Lawyer*, Aug. 1, 1994. HUD Stepping Up RESPA Inspections, *American Banker Washington Watch*, May 3, 1993.

62. HEL Lenders May Be Sued on Broker Referrals, *National Mortgage News*, April 3, 1995, p. 11.

63. 95-D-859-N (MD Ala., Mar. 8, 1996),

64. *Fowler v. Equitable Trust Co.*, 141 U.S. 384 (1891); *In re West Counties Construction Co.*, 182 F.2d 729, 731 (7th Cir. 1950) ("Calling the \$ 1,000 payment to Walker a commission did not change the fact that it was an additional charge for making the loan"); *Union Nat'l Bank v. Louisville, N. A & C. R. Co.*, 145 Ill. 208, 223, 34 N.E. 135 (1893) ("There can be no doubt that this payment, though attempted to be disguised under the name of 'commission, was in legal effect an agreement to pay a sum additional to the [lawful rate of interest], as the consideration or compensation for the use of the money borrowed, and is to be regarded as, to all intents and purposes, an agreement for the payment of additional interest"); *North Am. Investors v. Cape San Blas Joint Venture*, 378 So.2d 287 (Fla. 1978); *Feemster v. Schurkman*, 291 So.2d 622 (Fla.App. 1974); *Howes v. Curtis*, 104 Idaho 563, 661 P.2d 729 (1983); *Duckworth v. Bernstein*, 55 Md.App. 710, 466 A.2d 517 (1983); *Coner v Morris S. Berman, Unltd.*, 65 Md.App. 514, 501 A.2d 458 (1985) (violation of state secondary mortgage and finders' fees laws); *Julian v Burrus*, 600 S.W.2d 133 (Mo.App. 1980); *DeLee v. Hicks*, 96 Nev. 462, 611 P.2d 211(1980); *United Mtge. Co. v. Hilldreth*, 93 Nev. 79, 559 P.2d 1186 (1977); *O'Connor v Lamb*, 593 S.W.2d 385 (Tex.Civ.App. 1979) (purported broker was the actual lender); *Terry v. Teachworth*, 431 S.W.2d 918 (Tex.Civ.App. 1968); *Durias v. Boswell*, 58 Wash.App. 100, 791 P.2d 282 (1990) (broker's fee is interest where broker is agent of lender; factors relevant to determining agency include lender's reliance on broker for information concerning creditworthiness of borrower, preparation of documents necessary to close and adequately secure the loan, and performing record keeping functions; not relevant whether lender knew of broker's fee, as Washington law provides that where broker acts as agent for both borrower and lender, it is deemed lender's agent for purposes of usury statute); *Sparkman & McLean Income Fund v.*

Wald, 10 Wash.App. 765, 520 P.2d 173 (1974); *Payne v Newcomb*, 100 Ill. 611, 616-17 (1881) (where intermediary was agent of lender, fees exacted by the intermediary on borrowers made loans usurious); *Meers v. Stevens*, 106 Ill. 549, 552 (1883) (borrower approaches A for loan, A directs borrower to B, a relative, who makes the loan in the name of A and charges a "commission" for procuring it; court held transaction was an "arrangement to charge usury, and cover it up under the claim of commissions"); *Farrell v. Lincoln Nat'l Bank*, 24 Ill.App.3d 142, 146, 320 N.E.2d 208 (1st Dist. 1974) ("if a fee is paid to a lender's agent for making the loan, with the lender's knowledge, the amount of the fee is treated as interest for the purposes of determining usury").

65. 12 C.F.R. Section 226.4(b)(1), (3).

66. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 (1972); *Cheshire Mtge. Service, Inc. v. Montes*, 223 Conn. 80, 107, 612 A.2d 1130 (1992) (court found a TILA violation to violate the Connecticut Unfair Trade Practices Act because the violation of TILA was contrary to its public policy of accurate loan disclosure).

67. 42 U.S.C. Section 3601 et seq.

68. 15 U.S.C. Section 1691 et seq.

69. Consent decree, *United States v. Security State Bank of Pecos*, WD Tex., filed Oct. 18, 1995; consent decree, *United States v. Huntington Mortgage Co.*, ND Ohio, filed Oct. 18, 1995.

70. *Bank Said to Face Justice Enforcement Action*, Mortgage Marketplace, Mar. 25, 1996, v. 6, no. 12, p. 5.

71. M. Hill, *Banks Revise Overage Lending Policies*, Cleveland Plain Dealer, July 14, 1994, p. 1C; Jonathan S. Hornblase, *Focus on Overages Putting Home Lenders in Legal Hot Seat*, American Banker, May 24, 1995, p. 10; John Schmeltzer, *Lending investigation expands; U.S. wants to know if minorities are paying higher fees*, Chicago Tribune, May 19, 1995, Business section, p. 1. 72. 501 F.2d 324, 330-31 (7th Cir. 1974).

73. See also *DuFlambeau v. Stop Treaty Abuse-Wisconsin, Inc.*, 41 F.3d 1190, 1194 (7th Cir. 1994). See *Mescall v. Burrus*, 603 F.2d 1266 (7th Cir. 1979); *Ortega v.*

Merit Insurance Co., 433 F.Supp. 135 (ND Ill. 1977) (plaintiff's allegations that a de facto system of discriminatory credit insurance pricing exists, and that defendant is exploiting this system is sufficient to withstand the defendant's motion to dismiss); Stackhouse v. DeSitter, 566 F.Supp. 856, 859 (N.D.Ill. 1983) ("Charging a black buyer an unreasonably high price for a home where a dual housing market exists due to racial segregation also violates this section . . .").

74. John D'Antona Jr., Lenders requiring more mortgage insurance, Pittsburgh Post-Gazette, Feb. 18, 1996, p. J1.

75. Duff & Phelps Credit Rating Co. report on the private mortgage insurance industry, Dec. 7, 1995. The figure is for 1994.

76. No Bump in December MI Numbers, National Mortgage News, Feb. 5, 1996, p. 2. The figure is as of the end of 1995.

77. Charting the Two Paths to Profitability, American Banker, September 13, 1994, p. 11; Tallying Up Servicing Performance in 1993, Mortgage Banking, June 1994, p. 12.

78. 15 U.S.C. Section 1692 et seq.

79. 1996 U.S.Dist.LEXIS 3430 (MD Fla., Feb. 23, 1996). 80. One who regularly acquires and attempts to enforce consumer obligations that are delinquent at the time of acquisition qualifies as an FDCPA "debt collector" with respect to such obligations. Kimber v. Federal Fin. Corp., 668 F.Supp. 1480, 1485 (M.D.Ala. 1987); Cirkot v. Diversified Systems, 839 F.Supp. 941 (D.Conn. 1993); Coppola v. Connecticut Student Loan Foundation, 1989 U.S.Dist. LEXIS 3415 (D.Conn. 1989); Commercial Service of Perry v. Fitzgerald, 856 P.2d 58 (Colo.App. 1993).

81. The FDCPA defines as a "deceptive" practice — (2) The false representation of — (A) the character, amount, or legal status of any debt; or 15 U.S.C. Section 1692e. The FDCPA also prohibits as an "unfair" practice the collection or attempted collection of "any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. Section 1692f(1).

82. *Bloom v. Martin*, 865 F.Supp. 1377 (ND Cal. 1994), *aff'd*, 77 F.3d 318 (9th Cir., 1996). See also, *Siegel v. American S. & L. Ass'n*, 210 Cal.App.3d 953, 258 Cal.Rptr. 746 (1989); and *Goodman v. Advance Mtge. Corp.*, 34 Ill.App.3d 307, 339 N.E.2d 257 (1st Dist. 1981) (state statute construed to permit charge for recording release, at least where mortgage is silent).

83. John Lee, John Mancuso and James Walter, *Survey: Housing Finance: Major Developments in 1990*, 46 *Business Lawyer* 1149 (May 1991). 84. Nelson and Whitman, *Real Estate Finance Law*, Section 11.4 at 816.

85. *Thriffs Paying Big Bucks for ARM Errors*, *American Banker* — Bond Buyer, May 23, 1994, p. 8; J. Shiver, *Adjustable-Rate Mortgage Mistakes Add Up*, *Los Angeles Times*, Sept. 22, 1991, p. D3.

86. *A Call To Arms on ARMs*, *Business Week*, Sept. 6, 1993, p. 72. 87. *Hubbard v. Fidelity Fed. Bank*, 824 F.Supp. 909 (CD Cal. 1993). 88. The UCCC has been enacted in Colorado, Idaho, Iowa, Kansas, Maine, Oklahoma, Utah and Wyoming. It imposes the same disclosure obligations as TILA, but does not cap class wide statutory damages at the lesser of 1 percent of the net worth of the creditor or \$ 500,000.

89. *Michaels Building Co. v. Ameritrust Co., N.A.*, 848 F.2d 674 (6th Cir. 1988); *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984); *Morosani v. First Nat'l Bank of Atlanta*, 703 F.2d 1220 (11th Cir. 1983). 90. Systematic overcharging of consumers in and of itself constitutes an unfair practice violative of state UDAP statutes. *Leff v. Olympic Federal*, n. 7 *supra* (overescrowing); *People ex rel. Hartigan v. Stianos*, 131 Ill.App.3d 575, 475 N.E.2d 1024 (1985) (retailer's practice of charging consumers sales tax in an amount greater than that authorized by law was UDAP violation); *Orkin Exterminating Co.*, 108 F.T.C. 263 (1986), *aff'd*, 849 F.2d 1354 (11th Cir. 1988) (Orkin entered into form contracts with thousands of consumers to conduct annual pest inspections for a fixed fee and, without authority in the contracts, raised the fees an average of \$ 40).

91. The usury claim is that charging interest at a rate in excess of that agreed upon by the parties is usury. See *Howes v. Donart*, 104 Idaho 563, 661 P.2d 729 (1983); *Garrison v. First Fed. S. & L. Ass'n of South Carolina*, 241 Va. 335, 402 S.E.2d 25 (1991). Each of these decisions arose in a state which had "deregulated" interest rates with respect to some or all loans. There was no statutory limit on the rate of

interest the parties could agree upon. However, in each case the court held that a lender that charged more interest than the parties had agreed to violated the usury laws.

92. Barbara Ballman, Citibank mortgage customers due refunds on rate "maladjustments," Capital District Business Review, Apr. 5, 1993, p. 2 (\$ 3.27 million); Israel v. Citibank, N.A. and Citicorp Mortgage, Inc., No. 629470 (St. Louis County (Mo.) Circuit Court); Englard v. Citibank, N.A., Index No. 459/90 (N.Y.C.S.C. 1991).

93. Whitford v. First Nationwide Bank, 147 F.R.D. 135 (W.D.Ky. 1992). 94. "A call to arms on ARMs," Business Week, Sept. 6, 1993, p. 72. 95. Crowley v. Banking Center, 1994 Conn. Super. LEXIS 3026 (Nov. 29, 1994). 96. LeBourgeois v. Firsttrust Savings Bank, 27 Phila. 42, 1994 Phila. Cty. Rptr. 15 (CP 1994).

97. Jacob C. Gaffey, Managing the risk of ARM errors, Mortgage Banking, Apr. 1995, p. 73.

98. Preston v. First Bank of Marietta, 16 Ohio App. 3d 4, 473 N.E.2d 1210, 1215 (1983).

99. Baxter v. First Bank of Marietta, 1992 Ohio App. LEXIS 5956 (Nov. 6, 1992).

100. Froland v. Northeast Savings, reported in Lender Liability News, Feb.20, 1996, and American Banker, Jan. 4, 1996, p. 11.

**Assignee Liability in Residential Mortgage Transactions and The
Case For Denying Holder in Due Course Status in Defense of Homeownership**

Holder in due course means the holder of an instrument if:

1. the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and
2. the holder took the instrument for value; in good faith; without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series; without notice that the instrument contained an unauthorized signature or has been altered; without notice of any claim to the instrument and without notice that any party has a defense or claim in recoupment.

UCC Article 3 Section 3-302(a)

Based on what is known about the securitized mortgage transaction, it is likely that very few secondary market foreclosing entities will have hdc status under these standards, all of which have to be met for the status to apply. When there is no hdc status, the foreclosing entity takes its interest in the mortgage subject to all claims and defenses that the borrower/homeowner has against the originating lender, its agents and assigns.

Imputing Knowledge

There is a good faith opportunity to present a borrower's claims and defenses based on the sharp business practices that occurred in origination and servicing of the loan against the foreclosing entity based on a record of unusual close connectedness such as to persuade a court to impute knowledge of the bad actors' activities, concealments, misrepresentations and omissions that occurred in origination and likely continue to occur in the servicing of the loan. The argument can be made in good faith that the foreclosing entity was an integral and necessary participant in the cold-blooded shark-like predatory attack that accurately characterizes the lending and servicing schemes forced on the borrowers that includes the foreclosure process.

There is support for these claims against the foreclosing entities in the case law. In the role of financier, the foreclosing entity had knowledge of the fraudulent practices and tacitly or directly approved the unfair, deceptive and often unconscionable practices that its partners engaged in in the course of origination and servicing of the most important economic product that most consumers in this country will ever buy: the loan securing their home and home represents sanctuary and privacy, the loss of which represent a deep and forever kind of damage. The loss of the ability to ever feel confident in control over and access to one's privacy and shelter is lifelong.

Willful blindness is a weak and insulting defense especially when the fraudulent loan lending products and servicing schemes resulted in the obvious : the immediate and systemic diversion of large amounts of borrower funds as unearned profit directly into the hands of risk avoiding loan origination crews. The systemic failure of these borrower funds being applied to legitimate down payments is more clear evidence that absent the participatory arrangements and relationship of the mortgage makers, servicers and financiers, the criminal and fraudulent loan practices would not have been possible.

It is only through the complex and integrated structural relations and arrangements between the securitized mortgage participants that these loans even existed to be spewed like so much acid rain on our communities. The vast marketing of the toxic loan products their financing propelled into existence that was directed toward consumers across the land was not something that the foreclosing entities were not involved in or aware of.

I am sure that the irony of seeing the Ameriquest blimp fly over Jacksonville, Florida during Superbowl 2005 was not spotted just by me.

A good faith argument can be made that the foreclosing entities that purchased these thousands of loans gained through predatory tactics and literally serviced into the ground are merely alter egos of the wrongdoers considered under the law to have per se knowledge of and liability for the circumstances surrounding the financing and servicing of the loans which could not have occurred but for their role as financiers. The special position occupied by the foreclosing entities as the funder and purchaser of these toxic consumer products either knew or should have know of the bad acts and sharp practices of its partners: the originators and servicer; raters, accountants, underwriters; warehouse lenders, arrangers, aggregators, depositors, custodians, etc. each played an integral and necessary part of the activation and production of this stream of financial filth.

Sham Transactions on the Secondary Market

The sales of the mortgages on the secondary market are nothing more than sham transactions designed to hide the purchaser's role as the real loan maker. These sales are nominally originated by lenders and are not bona fide in any respect and are intended to feature the complex form of securitization over the substances of the transactions in a greedy and deceitful effort of the secondary market to evade legal liability; economic risk and moral hazard.

The secondary marketeers caused their own harm. Any claim that these assignees are entitled to the certainty of the limits of their legal liability that is provided by hdc status should be rejected. It should be clear that these marketeers gave up the status as a result of their own failure to police their practices and curb their ways. Any certainty in the market that the foreclosing

entities claim they have a right to rely upon was eroded and destroyed by their own aggressive participation in the gouging of consumers through the predatory lending and servicing of the home loans now in foreclosure and debt collection.

The secondary market has only itself to blame for any resulting loss of liquidity in the market; for the lack of access to capital, for the failure of economic certainties, confidence and goodwill.

The time is now to ask the foreclosing entities what did they know, when did they know it and what knowledge was available to them during the time they engaged in these market transactions.

Florida and other cases on negotiability

Ederer v. Fisher, 183 So.2d 39 (Fla.App., 1966)

Instrument payable to order is negotiable by endorsement of holder, plus delivery. F.S.A. §§ 674.01, 674.33, 674.61.

Genuineness of endorsements of prior holders of negotiable instrument is not presumed and, when properly put in issue by pleadings, party seeking to establish status of holder of order paper must prove validity of those endorsements on which his status depends. F.S.A. §§ 674.01, 674.31, 674.33, 674.61.

Endorsement of negotiable note by employee having no authority to sign or authorize endorsement for corporation was wholly inoperative to establish status of transferee as holder entitled. F.S.A. §§ 674.01, 674.25, 674.31, 674.33.

by paying value for note,

Transfer of negotiable note by payee without authorized endorsement prevented any party subsequent to transferee from becoming a holder. F.S.A. §§ 674.01, 674.25, 674.31, 674.33, 674.60, 674.61.

Where parties suing on negotiable note failed to establish that either they or payee's transferee from whom plaintiffs derived title to note enjoyed status of holder in due course, note was vulnerable to defense of failure of consideration. F.S.A. §§ 674.01, 674.25, 674.31, 674.33, 674.60, 674.61.

Recognizing the clear distinction between negotiable notes and nonnegotiable notes as they relate to the duties dispersed through assignment by the payee.

Birmingham Trust & Sav. Co. v. Jackson County Mill Co., 41 Fla. 498, 27 So. 43 (Fla. 1899)

The obligation sued on contains many stipulations, and we assume, without discussion, that it is not negotiable, according to the law merchant.

As to obligations to pay money not negotiable according to the law merchant, it may be conceded, under the construction of the statute in this state, up to the time of the commencement of this suit, that an assignee or indorsee stands upon the same footing as the assignor would have stood if the assignment had not been made. Cotten v. Williams, 1 Fla. 37; *503 White v. Camp, Id. 94; Sinclair v. Gray, 9 Fla. 71; Bellas v. Keyser, 17 Fla. 100.

Guaranty Mortg. & Ins. Co. v. Harris, 182 So.2d 450 (Fla.App., 1966) : The notes and mortgages described in the contract were neither formally assigned, nor was actual possession of them delivered to the Harrises. The original mortgagors were never notified that the indebtedness owed by them and evidenced by their notes and mortgages had been pledged as collateral security by Florida Homecraft to the Harrises. During the one year period of the loan, and at a time when each of the notes and mortgages was in default, Florida Homecraft sold and assigned them to a third person, which notes and mortgages by subsequent assignments finally became vested in plaintiff, assignees including the plaintiff herein, had either actual or constructive knowledge that the notes and mortgages assigned to them had theretofore been pledged by Florida Homecraft as collateral security for the indebtedness owed by it to the Harrises.

'While an agreement to pledge property may be binding on the parties thereto although there has not been a delivery of possession of the security, it is essential to a consummated contract of pledge that there shall have been a delivery of the pledged property to the pledgee or pledge holder. Until the act of delivery has been performed, the special property that the pledgee is entitled to hold does not vest in him. 25 Fla.Jur. 313, Pledge, etc., § 7.

'Negotiable paper which is overdue carries on its face notice of infirmities and defects, ordinarily is not entitled to protection as a holder in due course, Which means that he holds the instrument subject to defenses based on infirmities in the instrument or defects in the title of the person transferring it. Fla.Jur. 435, 436, Bills, Notes and Checks, § 113.

From the foregoing principle it appears that the assignee of defaulted negotiable paper occupies the status of the holder of a nonnegotiable instrument. As to those occupying this status, the rule appears to be:

* * * There cannot be a holder in due course of a nonnegotiable instrument, and the doctrine of protecting a bona fide holder for value without notice and before maturity does not apply, no matter how widely or how narrowly the instrument may miss being negotiable or how the parties themselves may have regarded the instrument. * * *

'The purchaser of a nonnegotiable instrument is a mere assignee. His position is the same as that of his assignor, whether he holds by assignment or indorsement. He receives only such rights or title as the assignor possessed and ordinarily takes title subject to all equities and defenses which would be available as between the original parties or which could be urged against the payee and his assignor, even though he is given the right to sue in his own name.¹¹ Am.Jur.2d 402, 403, Bills and Notes, § 377; See also Stegemann v. Emery, 108 Fla. 672, 146 So. 650.

Because plaintiff was not a holder in due course of the notes and mortgages sued upon in this proceeding, it was not protected against the equities

of intervenor Harris, and stands in the same shoes with respect to Harris' claim of priority as would its original assignor had not the notes and mortgages been assigned by it. Hulet v. Denison, 146 Fla. 478, 1 So.2d 467.

The decision of the district court was that the petitioner occupied the status of an assignee of choses in action or the holder of non-negotiable instruments and its interest would be subject to the equitable claim of respondent against petitioner's assignor.

Mason v. Flowers, 91 Fla. 224, 107 So. 334 (Fla. 1926) : raising the question of negotiability of the note; payment, the defendants were lawfully entitled to the benefits of each and every defense that would have been applicable had the action been brought by the original payee named in the instrument.

Citizens State Bank v. Pauly, 152 Kan. 152, 102 P.2d 966 (Kan. 1940.)

The primary test to be applied in determining whether a disputed provision in a note renders the amount that will be due on the note uncertain, and therefore destroys negotiability, is whether the provision leaves a possibility of reduction in the amount collectible on the note. Gen.St.1935, 52-201 to 52-205.

Technically, the word "indorsement" is confined to theory of negotiability, and although it is commonly used when one writes his name on back of nonnegotiable instrument, such an indorser is no more than an assignor. SDC 33.0404; SDC Supp. 51.0803.

In other words, a holder may not attain the status of a holder in due course unless the instrument involved is one that is negotiable. Barnes v. Rowles, 84 Mont. 393, 276 P. 15, 79, A.L.R. 717; 10 C.J.S. Bills and Notes § 12 and § 301; 8 Am.Jur., Bills & Notes, § 337.

assignee subject to all equities and defenses**

The word indorsement is not in strictness applicable to such a transaction. Rather it is a technical word that has its origin in and is confined to the theory of negotiability.

Cassetta v. Baima, 106 Cal.App. 196, 288 P. 830 (Cal.App. 2 Dist. 1930.)

"Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. ***" There is no question about the right of respondent to fill in the blanks. The general rule is that, if one signs an instrument containing blanks, he must intend it to be filled in by the person to whom it is delivered." The foregoing rule is just as applicable to a nonnegotiable instrument as it is to a negotiable instrument. Johnston Harvester Co. v. McLean, 57 Wis. 258, 15 N.W. 177, 46 Am.Rep. 39.

by mere delivery. In such cases, however, the transferee is vested with such title only as his transferor has, and is not protected against equities which exist against such transferor.” Vance v. Gilbert, 178 Cal. 574, 174 P. 42; More v. Finger, 128 Cal. 313, 60 P. 933; Shoenhair v. Jones, 33 Cal.App. 545, 165 P. 971.

When the creation of the debt is complete, on account of a pre-existing debt and executed upon a sufficient consideration.

Under the provisions of Section **673.306**, Florida Statutes, 1973, unless a holder in due course, a person takes an instrument subject to all defenses available in an action on a simply contract, as well as the defense of want or failure of consideration, non-performance of any condition precedent, or non-delivery.

Federal Deposit Ins. Corp. v. Barness, 484 F.Supp. 1134 (D.C.Pa., 1980.)

Under ordinary principles of contract law, the assignee of a nonnegotiable instrument is subject to all defenses, setoffs and counterclaims that the obligor might assert against the assignor.

Because the validity of the transfer of a nonnegotiable contract right is part of the assignee's case, the invalidity of the transfer by reason of illegality is a defense.

Requirement that an assignee plead and prove the validity of his assignment necessarily gives the defendant an opportunity to show that the assignment is invalid and ineffective.

Our threshold task is to determine whether to use the Uniform Commercial Code or the common law of assignment in analyzing the issues in this case.

We readily conclude that the common law of assignment must be applied, for Barness's note to the Centennial Bank is not a negotiable instrument

note would be subject to “all defenses of any party which would be available in an action on a simple contract there was no consideration for the note, would be available to defendant in an action brought by Centennial to enforce the note as a simple contract.

Montrose Sav. Bank v. Claussen, 137 Iowa 73, 114 N.W. 547 (Iowa 1908.)

It is alleged that the note was never legally delivered to the payee, and because thereof that his title to the same was defective, and that plaintiff took the

note with knowledge of such defect; that the note was without consideration, and that it was transferred to the plaintiff fraudulently and in pursuance of a conspiracy between the payee and the plaintiff.

Nusbaum v. Riskin, 136 So.2d 1 (Fla.App. 1961)

It is true that an assignee takes the assignment of a non-negotiable chose subject to any defenses the debtor has against the assignor. This principle also extends to counterclaims and set-offs against an assignor which a debtor can establish to reduce the sum recoverable against him connected with the obligation assigned

First Inv. Co. v. Andersen, 621 P.2d 683 (Utah, 1980.) :Defendants were awarded a judgment of no cause of action

In re Wrentham Mfg Co, 2 Low. 119, 30 F.Cas. 654 (D.C.Mass. 1872.)

The authority of an officer to sign and indorse promissory notes for the company does not imply authority to sign or indorse notes for the accommodation of third persons.

Huntington v. Harvey, 4 Conn. 124, 1821 WL 45 (Conn. 1821.)

Secondly, the defendant was, in effect, a stranger to Bushnell's note; and his promise was entirely without consideration. Thirdly, the promise to pay the debt of another person, not being in writing, was void by the statute of Frauds and Perjuries. King v. Wilson, 2 Stra. 873. Rothery v. Curry, Bul. N. P. 281. Fish v. Hutchinson, 2 Wils. 94. 1 Saund. 211. a. Sears v. Brink, 3 Johns. Rep. 210. Peabody v. Harvey, 4 Conn. 119

Castle v. Candee, 16 Conn. 223, 1844 WL 488 (Conn. 1844.) : In the case of a blank endorsement of a promissory note, whether negotiable or not, whether indorsed by the payee or a third person, the law declares the contract; and generally, the blank need not be filled up, before or on the trial

Bear Stearns "Types of Mortgage Fraud"

John L. Gray
Fraud Prevention

Georgia (First State to make Mortgage Fraud a Felony)

September 28, 2007 Friday
Main Edition

My favorite prison sentence of the week: Phillip E. Hill, a white-collar criminal, was sentenced by a federal judge to 28 years in prison and ordered to pay more than \$41 million in restitution for running a massive mortgage scheme that generated \$112 million in fraudulent loans. His take from the scheme, involving inflated sales prices to straw borrowers who paid him kickback, was \$14 million. If my band of right-wingers need to work a few hours overtime to pay for his prison upkeep, send the bill. I hate armed robbers, child abusers and white-collar crooks. Armed robbers have made up their minds that they'll kill you before they walk in the door.

Definitions Of Mortgage Fraud

Institutional Fraud - cases in which Brokers/TPO (third party originators), Branches/Loan Officers or organized groups of individuals (realtors/title agents/sellers, etc) commit fraud

Financial Fraud - air loans and double sold notes/loans and others

Loan Level Frauds – puffing, flips, straw-buys, builder bail-outs and others

New Trends “Puffing”, Investment Straw Buys (Clubs), Shot-gunning and Foreclosure Bail-outs

- Puffing-Seller List Property for Real Value \$100,000
- Purchaser/Borrower says I want to Purchase Home but will Purchase it for \$150,000 and wants the \$50,000 difference (\$150,000 Inflated Value-\$100,000 Real Value) need an appraiser to inflate value to \$150,000
- Similar to “Flip” but only One Loan, This Type of Fraud is Useful to Perpetrators in Slow Market

Investment Straw Buys (Clubs)

- “Get Rich Schemes” where Borrowers Think They are Joining an Investment Group or Club
- They are Promised They will be Paid at Closing (normally \$5,000 to as High as \$15,000 a Loan)
- The Facilitator will Manage the Properties and Make the Mortgage Payments
- Dividends or Sale of Property at a Later date will Make Everyone “Rich”

Shot-gunning

- Perpetrator obtains subject property through variety of different ways, foreclosure fraud , "flip", quit claim deed
- Perpetrator applies or has "straw-buyer" apply to obtain Equity Lines (2nd mtgs) on subject property all at the same time (as many as 8-10 applications for Equity lines to different lenders)
- There are numerous inquiries on Credit Report but there is a letter in file stating "I am shopping for the best rate".
- Numerous lenders approve their Equity Lines
- Lenders do not find out until later that they are in 6th or 8th or even 10th lien position on a piece of property that cannot conceivably cover the amount of liens recorded with its market value

Foreclosure Bail-out

Consumer normally in Foreclosure or going into Foreclosure (scheme works better in Judicial foreclosure states)

Perpetrator tells consumer he will take care of everything, has consumer quit claim property back to perpetrator

Foreclosure Bail-out Specialist puts tenant in property or does lease buy back with consumer telling consumer that they can get house back 2 or sometimes 3 years later.

Perpetrator reinstates loan and sells property without telling consumer and then evicts consumer. Sometimes if there is enough equity, perpetrator will do equity skimming of the property.

Seller/Correspondent/Broker Approval Process

“You must know who you are doing business with in today’s market”

- 1. Review Financials**
- 2. Conduct Criminal/Civil background search (Lexis/Nexis, Accurant, ChoicePoint, online public records) on entity and principals of the entity**
- 3. Review Resumes**
- 4. Check Business Reports/Newspaper searches**

Fraud Program

Prevention

- 1. Fraud Training to All Employees**
- 2. Pre-Funding Fraud Detection (manual reviews of high risk loans or use of systems such as Interthinx or Data-verify)**
- 3. Fraud Hotline**
- 4. Exclusionary List**

Detection

- 1. FPD/EPD Team**
- 2. Data-mining**

Fraud Program continued

Resolution

- 1. Suspensions/Terminations of Sellers/Brokers**
- 2. Repurchases/Indemnifications**
- 3. Civil Referrals When Appropriate**
- 4. Criminal Referrals “SARS”**

Financial Frauds- Devastating

1. “Air Loans”
2. Double Sold Notes
3. Non Remittance of Payoff Funds
4. Theft of Escrows
5. Alteration of Public Records
6. Title Scams

Amerifunding “Air Loan” Case

January 2007

The alleged mastermind of the scheme, Gerald P. Small III, was sentenced in March 2006 by a judge in the Federal District Court of Colorado to 101 months in jail and to pay over \$37 million in restitution.

The companies involved in the scheme were Amerifunding and 20th Century Mortgage Inc.

Amerifunding placed help-wanted ads, but used the applicants' information to fraudulently obtain mortgage loans. Besides Mr. Small, six others have been convicted in this case. Four were sent to prison and one other is awaiting sentencing.

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“Air Loans”

- **Mortgages sold to in which there is no house (no collateral)**
- **Large losses-entire unpaid principal balance is charged off**
- **Various methods to perpetrate this type of fraud**

Double Sold Mortgages

- **Authentic looking copies made of 1 original mortgage**
- **As many as 5-7 mortgage copies sold into marketplace at the same time (investors do not talk to each other)**
- **As long as payments are made, fraud goes undetected**
- **Identical to “Air Loans,” no collateral, entire balance must be charged off**

CHL

October 25, 2006 Wednesday
FINAL Edition

A San Ramon man was sentenced Tuesday to more than five years in prison for generating millions in fraudulent loans.

Laurence Seidenfeld, 63, must serve 67 months in federal prison and an additional year behind bars because of a previous fraud conviction, U.S. District Judge Sandra Brown Armstrong said during a hearing in Oakland.

Armstrong also ordered Seidenfeld to pay \$281,992 in restitution.

Seidenfeld was convicted of conspiracy, bank fraud and income-tax evasion. He previously served a day in prison in a separate federal bank-fraud case in which he altered and submitted false credit reports to obtain loans for people with bad credit, records show.

Seidenfeld and his company, CHL Mortgage Group Inc. of San Ramon, fraudulently obtained mortgage loans on property without the owner's consent, FBI agent Christine Hemje wrote in an affidavit filed in U.S. District Court in Oakland.

The mortgage loans were then sold multiple times to warehouse banks, lenders and investors without their knowledge, authorities said. More than \$20 million in fraudulent loans was generated, according to the FBI, although the precise figure is being calculated.

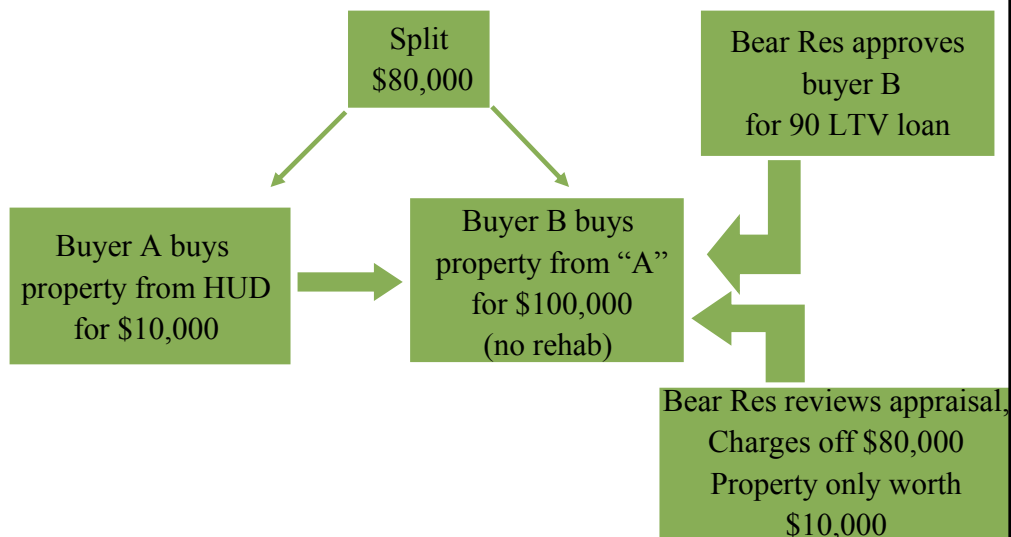
Detection of "Air Loans" and Double Sold

1. Check the party making the payments (perpetrator, CEO/President of Company usually makes the payments)
2. Check MERS and Title Records for correct 1st or 2nd lien position (especially Double-Sold cases)
3. Check www.zillow.com or www.earth.google.com for satellite pictures to prove existence of subject property (especially "Air Loans")
4. Run data-mining report for all properties in your own portfolio for property addresses in which you have more than 1 first lien on same property. (Double-Sold)

"Flips"

- Property purchased for a low sales price (foreclosure sale)
- New purchase/sale to new buyer for inflated amount (100-500% higher)
- Both transactions closed at the same time or within 30-60 days
- No rehabilitation done on property, appraisal falsified/inflated

Example of Flipping



Baltimore "Flipping" Case

March 25, 2000, Saturday ,FINAL

SECTION: LOCAL ,IB

LENGTH: 798 words

HEADLINE: FBI agents seize records in 'flip' probe; Warrants target five mortgage and realty companies; 2nd action in a month; Investigators focus on quick turnaround of city properties

BYLINE: John B. O'Donnell

SOURCE: SUN STAFF

BODY:

FBI agents investigating property flipping in Baltimore searched five locations in Anne Arundel and Prince George's counties yesterday seizing financial and other records as part of a probe of more than 100 real estate transactions in the city.

Two Pasadena title companies, a Lanham mortgage brokerage firm, an Accokeek real estate company and the Davidsonville headquarters of a web of corporations that buy and sell properties were targets of the search-and-seizure warrants.

The searches marked the second major action this month in a stepped-up federal effort to combat property flipping in Baltimore. Two weeks ago, in a case investigated by postal inspectors, a federal grand jury indicted five people in an alleged mortgage fraud scheme involving Baltimore houses that were purchased and then resold at greatly inflated prices.

State records show that more than 2,000 city properties have been bought in the last four years and quickly resold for at least twice the purchase price -- sometimes for an increase of 1,000 percent. The deals often are accompanied by inflated appraisals and falsified paperwork. Usually, the properties are in poor condition and sometimes are uninhabitable.

Straw Buyer

➤ **Straw Buy:** To substitute a person's credentials for someone else's. Straw buying is not only used in mortgages but in stocks, corporate transfers and other financial transactions

➤ **Two Types of Straw Buys:**

- Relative/friend/employer who is trying to help someone who may lack positive credit to get their own loan
- The paid straw buyer who is normally associated with "flips," builder bail-outs and other schemes

Builder Bailout

Market has slowed and the builder has a construction loan on a condo project

The Builder is also the seller and the appraiser uses other units in the development as comps and Builder either goes into default or comes up with “ingenious financing”

Advertises “buy a unit, no money down, get rental income”
increases values

The “No Money Down” becomes a silent 2nd (normally a 3 or 5 year balloon)

Borrowers go to refinance the balloon at a later date

- Value not supported
- Project defaults

Foreclosure Bail-out and Builder Bail-out

Nov. 19--HOLIDAY FEAST OF HOUSING HOAXES: With the holiday season's arrival this Thursday, let's welcome a festive break from the housing doldrums.

But before we do, let's assemble a list of the rogues and dupes who have made the real estate market such an unwholesome place for the holidays.

You're behind on your house payment. A postcard arrives in the mail. A company promises to fix your foreclosure for \$1,200. One condition: Don't call your lender. The foreclosure fixers will handle everything.

Who could refuse such an offer? The company must have spent at least a quarter on postage. Many people forked over \$1,200. How did it work out? Let's say quite a few homeowners are now not-so-happy renters.

The TV show Inside Edition savaged one of those self-proclaimed rescuers, Clearwater's Foreclosure Assistance Solutions. Nothing says subtlety like the juxtaposition of homeless customers with the owner's \$2-million waterfront mansion.

A special niche in the rogue's gallery goes to the people who manipulated the market at The Club at Brickell, a 43-story condo tower in Miami. They committed deception on such a scale that bankers are calling it a national epicenter of mortgage fraud.

Phony appraisals and lax underwriting let crooks arrange sales of \$400,000 condos for \$800,000. The cheaters paid the sellers \$400,000 per condo, cashed out the remaining \$400,000 and let the empty condo fall in foreclosure. Investigators said about 200 of the deals were shady. Wonder why Florida leads the nation in mortgage fraud?

Detecting a Straw-buy

Borrower buying down

No realtor involved in transaction

Other party on purchase agreement but not on 1003

Additional name to be added on legal Down payment from someone other than borrower

documents

Credit Bureau in file for someone other than borrower

Unrealistic distance for job commute

Detection of a "FLIP"

Excessive down payment on 1003

Seller not in title (refer to Title Commitment, Schedule B)

Seller recently took title (refer to Title Commitment, Schd B)

Recent sales with much lower amounts

- HUD transfer (refer to Title Commitment, Schedule B and Appraisal Report, Page 2 - transfers in last 12 months)

Large amounts for recent deposits on VOD's or Bank Statements

Large gift funds or gifts of equity

Large seller concessions

Numerous loans to one borrower in same neighborhood

Loans with same borrower, loan officer, realtor, appraiser, seller, closing agent/attorney

Detection of a Builder Bail-out

Excessive down payment

Sometimes owner occupied in investment market

Gifts

Condo sales in slow to medium market

Usually all 80% LTVs

Inflated values

All comps are in same condo project

Numerous loans to one borrower

**Sometimes loans to builder's
employees**

Closing Comments and Questions

- 1. Should Your Bank Have a Fraud Unit?**
- 2. Are They Aware of All The Schemes and Trends?**
- 3. Are You Pursuing Civil Remedies?**
- 4. Any Questions??**

Twenty One Flavours of Mortgage Fraud by Howard Lax for iTulip.com

Mortgage fraud is now a part of our lexicon, but few people understand what this means and the harm it causes. Mortgage fraud is a catch all phrase that encompasses schemes allowing one or more parties to a real estate transaction to obtain money through illegal or unethical means. Mortgage fraud cost us, as a society, somewhere between \$946 million and \$4.2 billion in 2006, and the cost will increase.

Residential mortgage transactions are particularly susceptible to fraud, since the mortgage lending industry relies on patterned transactions to simplify home sales and mortgage financing with as little cost and time as possible.

In a “normal” residential sale transaction, the buyer, seller, and real estate broker(s) negotiate a sale using a model purchase agreement. The buyer meets with a loan officer from a mortgage broker or lender, and chooses a standard loan product to finance the transaction. The lender obtains an appraisal of the property and a credit report for the borrower. An investor underwrites the loan with the assistance of an automated system, conditionally commits to purchase the loan after closing, and “locks” the loan terms. The mortgage broker or lender obtains a title insurance commitment and schedules the closing after the loan is approved. A closing agent (usually a title insurance agency) explains the closing documents, acknowledges the parties’ signatures, accounts for the parties’ funds, distributes the proceeds of the transaction, sends the deed and mortgage to the Register of Deeds for recording, and issues title insurance policies for the buyer and lender. The lender sells the loan to an investor, and the borrower makes monthly payments to the servicing agent selected by the investor. Because the documents are standard, and the roles of the parties are very uniform, nobody spends the time or money to perform much due diligence on the transaction. Hence, it is relatively easy to interject false documents or parties into the transaction to obtain money.

Mortgage fraud schemes are extensive, ranging from the simple to the complex, and are far too common. It is possible to stop mortgage fraud if one of the parties recognizes the fraudulent features of a transaction before the proceeds of the transaction are disbursed. Some of the more common schemes are:

Inflated income or assets: Some of the most misrepresented facts on an application for credit are borrower income and assets. Recent audits by one lender found actual income was significantly overstated in two thirds of the applications submitted for credit on a “stated income” basis (i.e. the borrower’s income is not verifiable and the loan is approved based on the borrower’s credit score and statement of income).

Assets are often misrepresented to make the lender believe that the buyer has funds to make a down payment and to pay closing costs. Sometimes the buyer borrows the down payment without revealing the obligation to repay the funds. A debt may be characterized on the settlement statement as an unrecorded lien, or an invoice for unidentified management services, to hide the fact that the down payment was borrowed.

Making false representations in a loan application, or providing false documents to verify income or assets, is a crime. It is also a crime for a mortgage broker or lender to knowingly process a false loan application.

False Social Security Numbers: Borrowers sometimes use the social security number of another person, or fake identification documents of a person with “good credit” to obtain a loan. More sophisticated thieves use a good social security number and a fake name (“synthetic ID theft”) to make it harder to detect and identify the thief. The first five digits of a social security number indicate the area of the country where the card was issued and the year of issue. These values can be checked against the area of the country where the borrower was raised and the age of the borrower.

Altered documents: W-2 forms, bank statements, title commitments, leases, and all manner of documents used to verify income and asset information can be altered or forged. Fake employment verification forms can be purchased over the Internet. Some borrowers forge discharges from their prior lender, or erase the loan from the schedule of exceptions on a title commitment, to avoid paying the balance of their prior loan. Accepting these documents or verification forms from the borrower saves time, but invites fraud. Asking the source of these documents for a separate copy is safer.

Multiple loans: Lenders rely on the credit report and title commitment to locate the borrower’s obligations. There is always a “gap period” between the date that documents are submitted to the Register of Deeds for recording, and the date that these documents are available for inspection. There is also a gap between the date of a loan payment (or a missed payment) and the date that information is listed in a credit report. Some borrowers will close two or three refinance loans on a property with different lenders during a “gap period,” knowing that the credit report and title commitment will not reveal recent loan transactions and missed payments. Mandatory electronic recording and universal reporting of consumer loan payments to credit bureaus may some day eliminate gap periods.

Inflated Deposits and Soft Second Mortgages: Consumers who have an equity interest in their home are less likely to default on their mortgage payments. Hence, most loan programs require a minimum down payment. A buyer may give a false purchase agreement to the lender, showing an earnest money deposit twice as large as the real deposit and an inflated purchase price. A buyer and seller sometimes inflate the purchase price of a home, and offer seller financing

in lieu of a down payment, so that the buyer may obtain a larger loan than would be permitted by the lender's underwriting standards. The seller's note and mortgage are torn up after the closing. Insisting that all loans be documented and that mortgages must be recorded will reduce fraudulent seller financing.

Identity theft: The closing agent relies on the borrower's driver license or other forms of identification to verify that persons who physically sign the deed, note, mortgage, and other documents have the authority to sell the home and borrow money. Buyers, sellers and closing agents must remember that a forged mortgage is void. Use a "black light" to locate the reflective seal on a valid driver license card. If a person's identity is stolen, it is important that one of the parties files a police report. The police report also entitles the victim to obtain a copy of any fraudulent financial documents that used the victim's identity.

Straw buyer: A real estate investor may ask a friend or relative, or a stranger, to be a straw buyer (usually for compensation). The real estate investor promises to make monthly loan payments, and to pay off the loan within a year or two. In some cases, a land speculator purchases a home at a low price, and conspires with a straw buyer to sell a home for an excessive price. The net proceeds are used to make monthly payments on the loan and/or the parties split the net sale proceeds and disappear. Besides the criminal liabilities mentioned above for making a false loan application, the straw buyer's credit rating is ruined when the real estate investor stops making loan payments.

Inflated appraisal: The homeowner, seller, or mortgage broker may have an illegal arrangement with an appraiser to inflate the true value of the property, or provide improper comparable sales information to the appraiser so that a loan will be approved for an amount that exceeds the home's market value. Excessive valuations may be justified using fake pictures of the subject property or property values from other fraudulent transactions. Appraisers should thoroughly inspect the subject property and use comparable property data that they independently verify. Federally chartered lenders must review the appraisal if it is provided by another mortgage lender or by a mortgage broker.

Money laundering: It is very easy to prepare and record a forged deed. To launder money, a straw buyer uses illegally obtained funds to buy the home. The title agency unknowingly takes the illegally obtained funds, and issues its own check to the fake seller with good funds. The object of exchanging tainted funds for good funds is to hide the trail of money from its illegal source. The property may be subject to a forfeiture action if the source of the purchase money is discovered.

Foreclosure rescue: Avoid offers to "help" a homeowner in a difficult financial situation. The purpose of "saving" a borrower that nobody else considers a fair credit risk is often to "strip" the homeowner's equity. A homeowner who is facing loss of a home through foreclosure may deed the home to a rescuer, who

promises to sell it back at a higher price in a year or two through a land contract or lease with an option to purchase. The rescuer or a straw party (described above) obtains a conventional loan to buy the home. The rescuer may even convince the homeowner to sign over the proceeds of the sale of the home with a promise to pay off other debts owed by the homeowner. The rescuer knows that the homeowner has no means of obtaining a new loan to buy the home back at its inflated price. The investor does not provide any disclosures required by law for these transactions. Courts have held that a deed given as security, and not as a true sale, must be treated as an equitable mortgage. The difference between the amount paid by the rescuer to buy the loan and the price demanded to repurchase the home is interest, subject to state usury laws. Furthermore, these transactions are subject to federal Truth-in-Lending Act disclosure requirements. The homeowner may be able to rescind the transaction and seek the return of the home.

Servicing transfers: Federal law requires a lender to send a Notice of Transfer of Servicing to the borrower when mortgage payments must be sent to a different entity or address. Since the content of this Notice is proscribed by federal regulations, a thief can send a convincing Notice of Transfer of Servicing to a borrower, instructing the borrower to send mortgage payments to the thief.

Flipping: Frequent sales of a property are not illegal. Higher sale prices may be justified when the property is rehabilitated. However, frequent sales at increasing prices between parties with a hidden relationship can make the property appear more valuable than it is. Sometimes the parties attempt to justify the price increase with cosmetic improvements that hide more serious problems. Flipping is often accomplished with the help of an improper appraisal, a false title commitment, or intentional misrepresentation of the condition of the property. The FBI website highlights the case of a collapsed Detroit home sold one day for \$25,000, and the next day for ten times that amount.

Occupancy fraud: Mortgage lenders require higher down payments for second homes and investment properties than for a loan secured by a principal residence. To obtain better loan terms, borrowers will state that a second home or investment property is or will become their principal residence after the closing.

Inflated Credit History: Borrowers with poor credit payment histories may purchase the right to become a “co-borrower” on good credit accounts (“tradelines”). Good tradelines dilute the impact of the borrower’s poor tradelines, and raise the borrower’s credit score. This scheme is not illegal (yet). Companies that produce credit scoring software are trying to identify these borrowers, to eliminate the impact of the purchased tradelines.

Misleading Disclosures: Federal rules require disclosure of a good faith estimate of closing costs within three days after the mortgage broker or lender receives an

application for a residential mortgage loan. Borrowers also receive an estimate of the annual percentage rate and monthly payments within three days after providing a purchase money loan application to a lender. However, there is no requirement that this information must be redisclosed if the actual closing costs are different. Some brokers will arrange a subprime loan for the borrower, even though the borrower would qualify for a conventional conforming loan. This does not violate federal law, and the borrower has nobody to blame but himself if he accepts a loan that is not advantageous. However, engaging in fraud, deceit or material misrepresentation is illegal. Providing an estimate of costs to originate a “prime” loan, knowing that the borrower will only qualify for a “subprime” loan with higher origination fees misrepresents closing costs and the cost of credit. A lender or broker violates state law if disclosures are provided for low cost credit, or low cost credit is promised, when such credit is not available to the applicants.

Required Use of Affiliates: A seller and his/her real estate broker cannot require the borrower to use a particular title agency for the lender’s title policy if the buyer pays the insurance premium. Hence, it is illegal for a real estate broker or for the seller to require a documentation fee solely if the buyer does not use the seller’s preferred title agency. It is also illegal to require a borrower to use the services of an affiliated settlement service provider if the borrower will pay for the services.

Illegal Kickbacks: It is illegal to directly or indirectly pay or receive something of value under an agreement or understanding that the payment is for the referral of settlement service business. It is also illegal to split a fee for settlement services without doing any work to earn a portion of the fee. Some mortgage brokers, lenders and title agencies find it more expedient to pay kickbacks “under the table” to assure business referrals than to generate business based on the merit of their services. These kickbacks, in theory, increase the cost of credit.

Failing to Disburse: Some lenders wait until after the loan has closed to finish underwriting a loan. If the borrower fails to meet underwriting requirements, or the loan cannot be sold at a profit, the lender refuses to fund the loan. State law requires that a lender satisfy its lending commitments.

Selling Fake Loans: Some unscrupulous lenders create documents for loans that do not exist, and sell the loans to raise capital or hide losses. A lender may also sell a loan more than once to hide losses at the company, or to satisfy credit obligations. The proceeds of the sale may be used to make monthly payments on behalf of a non-existent borrower. Perpetrators of these schemes typically receive stiff prison sentences.

Closing Agent Defalcation: Licensed title insurance agencies are required to keep transaction funds in a trust account. There is no requirement that a notary closing service (a “signing service”) maintain trust accounts. Employees may steal these funds, resulting in the failure of the closing agent to pay transaction proceeds.

Mortgage Elimination: Some borrowers send an "International Commercial Claim in Admiralty Administrative Remedy" to their lender, and file a frivolous lawsuit to discharge their mortgage. This scheme evolved from the repudiated "Bonded Bill of Exchange" given to payoff mortgage loans.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ERNEST HARRIS § CASE NO. 03-44826-H4-13
and MATTIE HARRIS, §

§

Debtors, §

§

ERNEST HARRIS §

and MATTIE HARRIS, on behalf §

of themselves §

and all other similarly situated §

Chapter 13 debtors, §

§ ADVERSARY NO. _____

Plaintiffs, §

§

vs. §

§

FIDELITY NATIONAL INFORMATION §

SERVICES INC. D/B/A FIDELITY §

NATIONAL FORECLOSURE §

& BANKRUPTCY SOLUTIONS, §

§

Defendants. §

COMPLAINT

Plaintiffs, Ernest Harris and his wife, Mattie Harris, individually and on behalf of all other similarly situated Chapter 13 debtors, allege as follows:

NATURE OF THE CASE

1. This case involves the undisclosed kickback/sharing of bankruptcy creditor attorney fees to a non-law firm corporate entity.
2. Mortgage servicers routinely appear in this Court seeking relief from the automatic stay or in opposition to proposed chapter 13 plans. The Mortgage servicers appear through counsel who announce their appearance on behalf of those mortgage servicers.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

STANDING ORDER 07-4

**STATEMENTS CREDITORS SHALL PROVIDE TO CONSUMER DEBTORS
WHO ARE REPAYING DEBT SECURED BY A MORTGAGE
ON REAL PROPERTY OR A LIEN ON PERSONAL PROPERTY
THE DEBTOR OCCUPIES AS THE DEBTOR'S PERSONAL RESIDENCE**

(a) Purpose

(1) The purpose of this Standing Order is to maintain, to the greatest degree possible, the routine flow of information from secured creditors to debtors with respect to secured loans constituting consumer debt (as that term is defined by 11 U.S.C. §101(8)) where the debtor is retaining possession of the collateral and continuing to make the regular installment payments directly to the secured creditor during a bankruptcy case. It is the intent of the order to support the normal issuance of regular monthly statements typically issued by secured creditors to consumer borrowers who are not in bankruptcy and to provide consumer debtors with a creditor contact point so that a debtor can obtain specific information on the status of such loans, as needed.

(2) This order also makes clear that a creditor's good faith attempt to comply with this order in furnishing information to the consumer debtor shall not expose the secured creditor to claims of violating the automatic stay.

(3) This Standing Order applies in Chapters 7, 12 and 13; applies only to consumer loan relationships; and applies only as long as the debtor is in bankruptcy and protected by the automatic stay.

(b) Scope: Consumer Debts Secured by a Mortgage on Real Property, or Secured by Personal Property that the Debtor Occupies as the Debtor's Personal Residence.

(1) For purposes of this subsection, the term "Mortgage Creditor" shall include all creditors whose claims represent consumer debts secured in whole or in part by a mortgage on real property, including a personal property interest in manufactured housing, the debtor occupies as the debtor's personal residence.

(2) Except as provided in paragraphs (3) and (4) below, if the Mortgage Creditor provided monthly statements to the consumer debtor pre-petition, the Mortgage Creditor shall provide monthly statements to all Chapter 12 and Chapter 13 consumer debtors who have indicated an intent to retain the Mortgage Creditor's collateral in their Chapter 12 or 13 plan, and to all Chapter 7 consumer debtors whose Statement of Intent indicates an intent to reaffirm the debt secured by the Mortgage Creditor's collateral. Such statements shall be provided unless and until the Mortgage Creditor has been granted relief from the automatic stay under 11 U.S.C. §362(d). The monthly statements shall

contain at least the following information concerning post-petition mortgage payments to be made outside the plan:

- (A) The date of the statement and the date the next payment is due,
- (B) The amount of the current monthly payment,
- (C) The portion of the payment attributable to escrow, if any,
- (D) The post-petition amount past due, if any, and from what date,
- (E) Any outstanding post-petition late charges,
- (F) The amount and date of receipt of all payments received since the date of the last statement,
- (G) A telephone number and contact information that the debtor or the debtor's attorney may use to obtain reasonably prompt information regarding the loan and recent transactions, and
- (H) The proper payment address.

(3) No monthly statement shall be required in a Chapter 12 or Chapter 13 case where post-petition mortgage payments are to be made to the trustee through the plan, unless the amount of the monthly payment is scheduled to change (because of adjustable interest rate, charges paid by lender for taxes, insurance, attorney's fees, or other expense). If a Mortgage Creditor does send a monthly statement to a debtor or trustee in such a case and the statement complies with subsection (c)(2), below, the Mortgage Creditor is entitled to the protections set out in such subsection.

(4) If pre-petition the Mortgage Creditor provided the debtor with "coupon books" or some other pre-printed, bundled evidence of payments due, the Mortgage Creditor shall not be required to provide monthly statements under subsection (2) of this Section. The Mortgage Creditor shall, however, be required to supply the debtor with additional coupon books as needed or requested in writing by the debtor.

(5) The Mortgage Creditor shall provide the following information to the debtor upon the reasonable written request of the debtor:

- (A) The principal balance of the loan;
- (B) The original maturity date,
- (C) The current interest rate,
- (D) The current escrow balance, if any,

(E) The interest paid year to date, and

(F) The property taxes paid year to date, if any.

(6) The Mortgage Creditor shall provide the following information to the debtor and to the Chapter 13 Trustee in a Chapter 13 case when the debtor is making ongoing mortgage payments through the Chapter 13 Trustee, at least quarterly, or upon reasonable written request of the debtor or the trustee.

(A) Any other amounts due, or proposed change in payments, due to an adjustable interest rate, charges paid by lender for taxes, insurance, attorney's fees, or other expense, the nature of the expense, and the date of the payment. The information shall be served upon the debtor, debtor's counsel and the case trustee.

(7) If the case is a Chapter 12 or 13 case where the secured consumer debt is not modified by or paid through the Plan, and the Mortgage Creditor believes the debtor to be in default, the Mortgage Creditor shall send a letter alleging such default to the debtor and debtor's attorney upon any perceived or actual default by the debtor not less than 10 days before taking any steps to modify the automatic stay.

(c) Form of Communication; Issuance of Monthly Statements is not a Stay Violation; and Motions to Show Cause

(1) For the purposes of this Order, creditors shall be considered to have sent the requisite documents or monthly statements to the debtor when the creditor has placed the required document in any form of communication, which in the usual course would result in the debtor receiving the document, to the address that the debtor last provided to the Court. The form of communication may include, but is not limited to, electronic communication; United States Postal Service; or use of a similar commercial communications carrier.

(2) Creditors who provide account information or monthly statements under subsections (b) (1-6) above shall not be found to have violated the automatic stay by doing so, and secured creditors may contact the debtor about the status of insurance coverage on property that is collateral for the creditor's claim, may respond to inquiries and requests for information about the account from the debtor and may send the debtor statements, payment coupons, or other correspondence that the creditor sends to its non-debtor customers, without violating the automatic stay. In order for communication to be protected under this provision, the communication must indicate it is provided for information purposes and does not constitute a demand for payment.

(3) As a result of creditor's alleged non-compliance with this Standing Order, a debtor may file a Motion for the Creditor to Show Cause no earlier than sixty days after the creditor's failure to comply with sections (b), (c), or (d). Before filing the motion, the debtor must make good faith attempts in writing to contact the creditor and to determine the cause of any omission, and must indicate in the Motion for the Creditor to Show Cause the good faith steps taken, together with a summary description of any response provided by the creditor.

(4) If a creditor's regular billing system can provide a statement to a debtor that substantially complies with this standing order, but does not fully conform to all of its requirements, the creditor may request that the debtor accept such statement. If a debtor declines to accept the non-conforming statement, a creditor may file a motion, on notice to the debtor and the debtor's attorney, seeking a declaration of the Court that cause exists to allow such non-conforming statements to satisfy the creditor's obligations under this standing order. For good cause shown, the Court may grant a waiver for purposes of a single case or multiple cases, and for either a limited or unlimited period of time. No waiver will be granted, however, unless the proffered statement substantially complies with the Standing Order.

IT IS HEREBY ORDERED that this Standing Order rescinds D. Kan. Bk. S.O. 07-3 and shall become effective December 17, 2007, and shall remain in effect until further order of the court.

Dated this 17th day of December, 2007.

s/ Robert E. Nugent
ROBERT E. NUGENT, CHIEF JUDGE

s/ Janice Miller Karlin
JANICE MILLER KARLIN, JUDGE

s/ Dale L. Somers
DALE L. SOMERS, JUDGE

s/ Robert D. Berger
ROBERT D. BERGER, JUDGE

MEMORANDUM

TO: All bankruptcy lawyers who file Motions for Relief from Stay

FROM: Judge Pat E. Morgenstern-Clarren

RE: Additional Guidance on Motions for Relief from Stay

DATE: July 9, 2008

This memorandum supplements both the court's memorandum of February 12, 2008 ("Tips for How a Motion for Relief from Stay Can Proceed Smoothly Through the Court") and the ongoing dialogue being held with counsel in the special dockets relating to motions for relief from stay.¹ I hope that this additional memo will help to explain the court's expectations.

For the most part, the motions at issue allege that the movant is entitled to enforce a note given by the debtor, which note is secured by a mortgage on real estate owned by the debtor. The motions allege that the debtor is in default under the note and seek relief from stay to pursue state court remedies, including foreclosure.

As the bar knows, many motions for relief from stay are not opposed by the debtor. The court's practice is to sign a default order granting an unopposed motion for relief from stay or to sign an agreed order if:

(A) the motion has been properly served on the appropriate parties; and

(B) the motion states a *prima facie* case for relief from stay, meaning that it sets out a factual and legal basis for the relief requested.

Generally, a *prima facie* case requires that the movant show that it is entitled to enforce the note, either because (1) it is the original payee in possession of the original note; or (2) it is the payee because it is in possession of the original note and the note is endorsed to it; or (3) the note is endorsed in blank and the movant has possession of the original note; or (4) the movant has physical possession of the note, without an endorsement, but the movant has the rights of a holder; or (5) the note is lost but Ohio Revised Code § 1303.38 ("Enforcement of lost, destroyed, or stolen instrument") is satisfied. The movant must also show that its lien is properly perfected (establishing its position as a secured creditor) and that it is entitled to proceed against the collateral. In addition, the movant must show that the debtor owes money under the note or has otherwise failed to perform under the note or security agreement.

¹ Those dockets were held on May 2, May 16, June 12, June 19, and July 26, 2008. Additional dockets are scheduled for July 10, July 16, and July 18, 2008.

If the motion does not state a *prima facie* case for relief, the court will not sign an order lifting the stay, whether it is by default or otherwise.

Over the last few years, an increasing number of motions for relief have been filed that do not state a *prima facie* case for relief. This causes delay and expense to all parties, and also consumes a great deal of the court's time. The court set the special dockets to address these recurring issues:²

1. Motions filed by an entity that, according to the supporting documents, has not established standing to file the motion. *See In re Foreclosure Cases*, No. 1:07CV2282, 2007 WL 3232430 (N.D. Ohio Oct. 31, 2007); *see also In re Parrish*, 326 B.R. 708 (Bankr. N.D. Ohio 2005).
2. Motions that add attorney fees to the amount due from the debtor when those fees are not recoverable under Ohio law. *See Dollar Bank v. Petroff (In re Petroff)*, No. 00-8085, 2001 WL 34041797 (B.A.P. 6th Cir. July 25, 2001); *In re Lake*, 245 B.R. 282 (Bankr. N.D. Ohio 2000). A sub-issue is where counsel acknowledges at the hearing that the fees are not recoverable under Ohio law, but states that he or she does not have authority from the client to delete the fees from the amount due. *See* FED. R. BANKR. P. 9011(b)(2).
3. Motions that include hundreds to thousands of dollars in "costs" or "other charges" or "advances" lumped together. In many cases, as the facts are developed, it turns out that amounts are included that do not fall within the language of the note and mortgage at issue and/or that are not provided for by statute. *See* OHIO REVISED CODE § 5301.233 ("Mortgage may include unpaid balance; lien on property"). Common examples are charges incurred for the benefit of third-party investors, such as a filing fee for filing an assignment of the mortgage to a trust or charges for broker's price opinions or charges for a servicer's activities that "are not for the protection of the mortgaged premises." *Id.*
4. Motions with affidavits attached that contain conflicting statements as to the entity in possession of the note, with no explanation for the conflict.
5. Affidavits seeking relief following an alleged default under an agreed order, which affidavits are deficient because, for example, (1) they appear to be signed by the affiant in one state and

² These comments are intended as an overview of secured transaction issues.

notarized in a different state; (2) they do not state the date and amount of each payment that has not been made; (3) they identify unpaid payments that were not provided for in the agreed order; or (4) the affiant has no demonstrated connection to the parties who entered into the agreed order.

6. Motions alleging that the underlying note is lost, but that attach “lost note” affidavits that do not comply with Ohio Revised Code § 1303.38.
7. Local counsel appearing at hearings on motions for relief from stay who have not been in direct contact with their clients and who do not have access to the information needed to move the motion forward.
8. Motions alleging that the movant is entitled to enforce a note secured by a mortgage, but the mortgages and assignments of mortgages attached do not demonstrate that the documents were recorded with the county recorder’s office.
9. Motions seeking relief from stay with respect to a motor vehicle without attaching the certificate of title showing that the movant either owns the vehicle or has a lien on it (or attaching a certificate of title that is illegible). Increasingly, movants have attached documents that are apparently obtained from a web site, but that are not titles, electronic or otherwise.
10. Motions filed without notice being given to other parties with an interest in the property, such as other lienholders.
11. Failure to add additional information to the motion in bold, as required by the local rules, that would clarify any irregularities or the way in which the motion deviates from the form.
12. Motions filed alleging the movant is entitled to enforce a note, where the note is purportedly “transferred” by assignment rather than as prescribed by Ohio Revised Code Chapter 1303. *See* OHIO REVISED CODE §§ 1303.22(A) and 1301.01(N)).
13. Motions seeking relief in a case where the debtor has no interest in the property, or where the debtor is not obligated on the note, and where no other legal basis is stated for seeking relief from stay.

By holding the special dockets and sending this memo, my hope is that the problems will be corrected so that entities entitled to relief from stay will be able to obtain relief in a more

efficient manner and also so that debtors who are entitled to keep the stay in place will not have to needlessly spend time and energy on relief issues.

I will be glad to address any questions at the town hall meeting that Judges Baxter, Harris, and I will be holding on July 22, 2008 at 8:00 a.m. If you have questions in the meantime, please feel free to call or email my chambers.

Westlaw Delivery Summary Report for FREEMAN, DONALD 1750220

Date/Time of Request:	Saturday, November 1, 2008 20:13 Central
Client Identifier:	GENE DUNN
Database:	ALLCASES
Citation Text:	2008 WL 4717448
Lines:	375
Documents:	1
Images:	0

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--- B.R. ---, 2008 WL 4717448 (Bankr.S.D.Fla.)
(Cite as: 2008 WL 4717448 (Bankr.S.D.Fla.))

Only the Westlaw citation is currently available.

United States Bankruptcy Court, S.D. Florida,
 Fort Lauderdale Division.
 In re Fazlul HAQUE, Debtor.
No. 08-14257-BKC-JKO.

Oct. 28, 2008.

Background: After creditor filed motion for stay relief, evidentiary hearings were held regarding charge of \$2,114.10 in "penalty interest" which ultimately was conceded to have been made in error.

Holding: The Bankruptcy Court, [John K. Olson, J.](#), held that creditor's counsel, which acknowledged that it had filed on behalf of creditor "less than 50" false stay relief affidavits claiming entitlement to default interest, including the affidavit filed in the present case, would be assessed sanctions in the amount of \$2,114.10 for each of the 45 affidavits which the court assumed that it had filed, for a total sanction of \$95,130.45, and because creditor shared culpability with its counsel, such sanctions would be imposed jointly and severally. Sanctions imposed.

West Headnotes

[\[1\] Bankruptcy](#)

[51k0](#) k.

Bankruptcy court has an independent responsibility to ensure that the relief it grants is both procedurally and substantively proper.

[\[2\] Bankruptcy](#)

[51k0](#) k.

Bankruptcy court's power to sanction resides both in the section of the Bankruptcy Code authorizing the court to issue any order necessary or appropriate to carry out the provisions of title 11 and in the inherent power of the federal courts to sanction improper conduct. [11 U.S.C.A. § 105\(a\)](#).

[\[3\] Federal Courts](#)

[170Bk0](#) k.

Inherent power of the federal court to sanction parties is well established, and reaches both conduct before the court and that beyond the court's confines.

[\[4\] Contempt](#)

[93k0](#) k.

Underlying concern that gave rise to the contempt power of the federal court was not merely the disruption of court proceedings; rather, it was disobedience to the orders of the judiciary, regardless of whether such disobedience interfered with the conduct of trial.

[\[5\] Courts](#)

[106k0](#) k.

Judicial branch has the overall ability to control judicial proceedings, that is, to maintain the decorum of the institution, which includes the conduct of parties involved.

[\[6\] Federal Courts](#)

[170Bk0](#) k.

Inherent powers of the federal court include the court's ability to investigate and vacate its own judgment upon proof that a fraud has been perpetrated upon the court, to bar from the courtroom a criminal defendant who disrupts a trial, and to dismiss an action on grounds of forum non conveniens, and it may act sua sponte to dismiss a suit for failure to prosecute.

[\[7\] Federal Courts](#)

[170Bk0](#) k.

Circumstances which may dictate the exercise of a federal court's inherent power to assess attorney fees against counsel include those where a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

[\[8\] Federal Courts](#)

[170Bk0](#) k.

Behavior must be tantamount to "bad faith," that is,

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(Cite as: 2008 WL 4717448 (Bankr.S.D.Fla.))

it must be knowing or reckless behavior, for a federal court to exercise its inherent power to assess attorney fees against counsel.

[9] Federal Courts 🔑0

170Bk0 k.

Federal court must exercise caution in invoking its inherent power to sanction.

[10] Bankruptcy 🔑0

51k0 k.

Section of the Bankruptcy Code authorizing the court to issue any order necessary or appropriate to carry out the provisions of [title 11](#) gives bankruptcy courts the broad power to implement the provisions of the Code and to prevent an abuse of the bankruptcy process. [11 U.S.C.A. § 105](#).

[11] Bankruptcy 🔑0

51k0 k.

Where creditor's counsel acknowledged that, apparently due to human error, it had prepared and filed on behalf of creditor "less than 50" false stay relief affidavits claiming entitlement to default interest, including the affidavit filed in the Chapter 7 case currently before the bankruptcy court, which sought \$2,114.10 in "penalty interest," the court would assess sanctions in the amount of \$2,114.10 for each of the 45 affidavits which the court assumed that counsel had filed, for a total sanction of \$95,130.45, and, because creditor shared culpability, such sanctions would be imposed jointly and severally. [11 U.S.C.A. § 105\(a\)](#).

Andrew M. Bellinson, Esq., Miami, FL, for Debtor.

***ORDER GRANTING WELLS FARGO BANK,
N.A.'S MOTION FOR RELIEF FROM STAY
AND
IMPOSING SANCTIONS FOR NEGLIGENT
PRACTICE AND FALSE REPRESENTATIONS***

[JOHN K. OLSON](#), Judge.

*1 **THIS MATTER** came on for continued hearing on September 18, 2008, pursuant to the Motion For Relief From Stay (the "Motion") [DE 14] filed by Wells Fargo Bank, N.A. (the "Creditor"). Since

the Creditor has provided sufficient evidence to support the relief requested the Motion will be granted. However, given the nature of the circumstances surrounding the fictitious claim for money owed, sanctions are warranted.

The Motion was filed on April 21, 2008, under the Court's negative notice procedures pursuant to Local Rule 4001-1(C), to which there was no response. *See* Certificate of No Response [DE 15]. After reviewing the Motion, I was concerned about certain charges listed in the affidavit signed by a representative of the Creditor, and accordingly set an evidentiary hearing for June 24, 2008. Of specific worry was a charge for \$2,114.10 in "penalty interest." [FN1] At the June 24th hearing it became abundantly clear that neither the Creditor's representative nor its counsel, the Florida Default Law Group, P.L. ("FDLG"), could explain this charge. *See* Transcript of 6/24/2008 Hearing [DE 39]. At the request of Creditor's counsel I continued the evidentiary hearing on the Motion so as to provide the Creditor and its counsel ample time to explain the basis for the "penalty interest" charge. *Id.*

For reasons relating in part to the Chapter 7 Trustee's independent investigation into this issue, the second hearing did not take place until September 18, 2008, or approximately three months after the original hearing. At that September 18th hearing the Creditor was represented by Niall T. McLachlan, a very able lawyer who works for Carlton Fields, P.A., a well respected firm of a high reputation. FDLG represented itself at the hearing. [FN2] As to the "penalty interest," both the Creditor and FDLB conceded at the hearing that this was an erroneous charge and that the Creditor was never entitled to payment on this sum. Penalty interest under the terms of the loan in question is a fee chargeable for prepayment of the loan during the first three years of the loan term. Since the Debtor is in bankruptcy and the Motion was filed based on the Debtor's default, the notion that the Debtor paid off his loan in full to the Creditor is absurd. It is utterly perplexing to me how the Creditor or its law

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firm could or did assert such a claim.

Christine L. Herendeen, a lawyer at FDLG, testified as to the circumstances encompassing this case. Creditor's new counsel examined Ms. Herendeen, and provided a disclaimer prior to her testimony that, "[s]he has independently done a brief review and has a rough idea of the numbers and she can testify to that, but she won't be able to say with exactitude the cases that these were filed in ..." Transcript of 9/18/2008 Hearing *at* pg. 44. I asked Ms. Herendeen who at FDLG had prepared the false affidavit; she could not tell me. I asked her in how many cases penalty interest charges had falsely been included in stay relief affidavits the firm prepared for Wells Fargo. She informed me that FDLG "had run a search on all of the districts. I don't remember the exact numbers even close to this district, because, of course, I was most focused on the Southern; however, I can tell you that it was--there was a spreadsheet that had been prepared and it was less than one page.

***2** "It was not--for example, I could tell you it was definitely less than 50. I feel confident that the number had been less than 50 out of hundreds of cases that we would have filed, hundreds of stay relief motions." Transcript of 9/18/2008 Hearing *at* pg. 48, 11. 10-20. As to what she described as around "five to ten" cases in this district in which penalty interest was included, she was unable to describe whether the debtors in those cases had any equity in the properties in question. Transcript of 9/18/2008 Hearing *at* pgs. 45-47. She did claim that at no point "on the foreclosure side in State Court" would that penalty interest be included since, "no payoff quote would be generated with penalty interest without going through the attorney for review and that attorney would review the state of the case, as well as the specific language in the note and mortgage to determine whether or not it was permissible to be included in the payoff quote." Transcript of 9/18/2008 Hearing *at* pg. 52. She did not, however, make any representation that she (or anyone else at FDLG) had, in fact, reviewed any of the

state court files in any of the foreclosure cases in which FDLG had filed false affidavits on behalf of Wells Fargo in the bankruptcy courts to assure the accuracy of that assertion. I accordingly take her assurance on this point with a certain skepticism.

[1] Of perhaps greater relevance is the question as to whether the lawyers at FDLG are examining any of the documents they are filing "on the bankruptcy side." FDLG seems to suggest that state court foreclosure actions are real and important proceedings but that the bankruptcy court is merely an administrative hurdle that warrants no particular consideration as a legal body, and that filing any old pleading without undertaking any investigation into its accuracy is perfectly acceptable practice. That position is unacceptable. A bankruptcy court has an independent responsibility to ensure that the relief it grants is both procedurally and substantively proper. That obligation becomes extraordinarily difficult when law firms like FDLG treat the stay relief process with casual disdain.

Wells Fargo and FDLG chalk this mistake up to human error in that an FDLG employee pulled information from "one particular screen that is utilized when generating payoff statements pursuant to the note or, in this case, the addendum, and it was simply a mistake." Transcript of 9/18/2008 Hearing *at* pg. 47. What is evident is that FDLG prepared the affidavit in this case and the Creditor's employee signed it without any review. *See* Transcript of 6/24/2008 Hearing [DE 39] *at* pg. 29-34. I asked both the Creditor and FDLG what measures they have undertaken to rectify this problem, to which both stated that the professionals at all levels have been notified of the problem and the ramifications for including such improper charges. Transcript of 9/18/2008 Hearing *at* pgs. 48-49.

***3** Although I applaud such remedial actions, I remain troubled that neither FDLG nor the Creditor thought it necessary to undertake any thorough analysis as to the extent or the ramifications of their incompetent behavior. Three months is more than a sufficient time period to undertake an internal in-

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vestigation, draw conclusions, and provide a complete and detailed report as to the injurious conduct which I uncovered only because something didn't seem right in the stay relief motion filed in this case. The actual ramifications of this conduct are still unclear to me. What is even more troublesome is that this conduct was not unique to this case. Once counsel and Creditor realized their wayward accounting, it should have set off alarms, not just a "brief review." Instead, a lackadaisical approach was taken in which the parties threw up their hands and said "no harm, no foul," but without, in fact, determining either the full extent of the false affidavit problem in the bankruptcy court stay relief motions or that no false affidavits had been filed in the subsequent state court foreclosure proceedings. And the "no harm, no foul" assertion is itself premised on Wells Fargo's contention that since there was no equity in the properties in question--which neither Wells Fargo nor FDLG could confirm--and the Creditor was thus never going to collect penalty interest. Again, it is unclear to this court whether there is no harm to the debtors involved or to their estates. If the properties sold for more than the alleged debt, then there would indeed be harm. If the Creditor was able to write off the "loss" of spurious penalty interest on its books (and perhaps on its tax returns) then that would appear to constitute harm. And so on.

Since FDLG has provided no more than a cursory estimate as to the cases in which FDLG filed false affidavits claiming "penalty interest" and vaguely fleshed out an analysis as to this conduct, I am left baffled by FDLG's lack of appreciation for the severity of the problem presented and by its casual response. It is well worth noting that this is not the first occasion in which I have witnessed sloppy and unprofessional conduct in FDLG's practice of law. On numerous occasions I have confronted FDLG lawyers about incomplete and insufficient motions for relief from stay. Based on this discussion, sanctions will be levied for purposes of deterrence.

11 U.S.C. § 105(a), *Hardy v. Internal Revenue Service (In re Hardy)*, 97 F.3d 1384, 1390 (11th Cir.1996); *Placid Refining Co. v. Terrebonne Fuel & Lube, Inc. (In re Terrebonne Fuel & Lube, Inc.)*, 108 F.3d 609 (5th Cir.1997), and in the inherent power of the federal courts to sanction improper conduct, *Glatter v. Mroz (In re Mroz)*, 65 F.3d 1567, 1574-75 (11th Cir.1996); *Eck v. Dodge Chemical Co.*, 950 F.2d 798 (1st Cir.1991). [FN3]

[3][4] The inherent power of the federal court to sanction parties is well established and this power reaches both conduct before the court and that beyond the court's confines, for "the underlying concern that gave rise to the contempt power was not ... merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial." *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 798, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987) (citations omitted).

*4 [5][6][7][8] In *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), the Supreme Court addressed the nature and scope of the inherent power vested in the federal courts. The judicial branch has the overall ability to control judicial proceedings, *i.e.*, to maintain the decorum of the institution, which includes the conduct of parties involved. *Chambers*, at 501 U.S. at 43-44. Such inherent powers, for example, include a federal court's ability to investigate and vacate its own judgment upon proof that a fraud has been perpetrated upon the court, to bar from the courtroom a criminal defendant who disrupts a trial, to dismiss an action on grounds of *forum non conveniens*, and it may act *sua sponte* to dismiss a suit for failure to prosecute. *Id.* at 44. In *Chambers*, the Supreme Court discussed the ability of the judiciary to sanction counsel by awarding attorney's fees as a penalty for inappropriate conduct. 501 U.S. at 42-43. For example, circumstances which may dictate the exercise of inherent power to assess attorney fees against counsel, include those where a party has ac-

[2] The Court's power to sanction resides both in

--- B.R. ---, 2008 WL 4717448 (Bankr.S.D.Fla.)

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ted in "bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 45-46 (internal citations omitted). Thus, the behavior must be tantamount to bad faith, i.e., be knowing or reckless behavior. *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306, 1320 (11th Cir.2002).

[9] However, the Supreme Court, in *Chambers*, warned that a court must "exercise caution in invoking its inherent power," stating:

Because of their very potency, inherent powers must be exercised with restraint and discretion. A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process.

501 U.S. at 44 (internal citations omitted). The Court goes on to note:

[W]hen there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.

Id. at 50.

Sanctions under my inherent powers would be warranted given the filing of such reckless papers. However, in light of my clear authority to sanction the conduct under § 105, I will heed the Supreme Court's and the Eleventh Circuit's caution in utilizing inherent powers where statutory authority exists under which I may act, thus, I choose to look solely to § 105 for the following sanctions imposed. [FN4]

[10] Section 105 of the Bankruptcy Code grants statutory powers in the bankruptcy context, stating, "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Section 105 gives bankruptcy courts the broad power to implement the provisions of the bankruptcy code and to prevent an abuse of the bankruptcy process. See *Karsch v. LaBarge (In re Clark)*, 223 F.3d 859, 864 (8th Cir.2000); *In re Volpert*, 110 F.3d 494, 500 (7th Cir.1997); *Caldwell v. Uni-*

fied Capital Corp. (In re Rainbow Magazine, Inc.), 77 F.3d 278, 284 (9th Cir.1996).

*5 [11] I stated the following at the September 18th hearing: "my concern is with the integrity of the process and whether people are viewing what gets filed as a serious matter or whether it's sort of being done on the fly and with all of the diligence and attention that goes into sausage making." Transcript at pp. 52-3. After carefully reviewing the transcript of that hearing I conclude that Wells Fargo and FDLG parties have engaged in the systematic process of churning out unrefined and unexamined form pleadings, instead of producing and filing carefully considered legal papers. This has resulted in an abuse of the system and sanctions to deter continued recklessness are warranted.

FDLG has acknowledged that it filed on behalf of Wells Fargo "less than 50" false affidavits claiming entitlement to default interest. The amount of such interest wrongfully claimed in this case is \$2,114.10. Having provided me with no greater detail as to the number of such affidavits actually filed or the amount of default interest falsely claimed in each, I shall assume for purposes of assessing sanctions that FDLG filed 45 such false affidavits on behalf of Wells Fargo and that the amount of default interest in each was equal to the amount falsely claimed here. Therefore, I shall impose sanctions in an amount equal to \$2,114.10 for each such false affidavit, for a total sanction amount of \$95,130.45. Because both FDLG (which prepared and filed the false affidavits) and Wells Fargo (whose employees swore to their accuracy without any review) have culpability here, the sanctions will be imposed jointly and severally.

Accordingly, having reviewed the Motion, the file, the evidence presented and considering the argument of counsel, it is **ORDERED** that:

1. The Motion [DE 14] is **GRANTED**.
2. The automatic stay provided by 11 U.S.C. § 362 is modified as to Wells Fargo Bank, N.A., its Suc-

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cessors and Assigns. Accordingly, the automatic stay is modified to permit the Movant to continue its pending mortgage foreclosure action in state court against real property, the legal description of which is described below.

COMMENCE AT THE SOUTHEAST CORNER OF SAID TRACT A; THENCE NORTH 0 DEGREES 00 MINUTES 37 SECONDS EAST FOR 602.35 FEET TO THE CENTER LINE OF SOUTHWEST 2ND STREET, THENCE SOUTH 89 DEGREES 53 MINUTES 38 SECONDS WEST FOR 344.72 FEET; THENCE NORTH 15 DEGREES 06 MINUTES 22 SECONDS WEST FOR 30.35 FEET; THENCE NORTH 74 DEGREES 53 MINUTES 38 SECONDS EAST FOR 42.50 FEET; THENCE NORTH 15 DEGREES 06 MINUTES 22 SECONDS WEST FOR 24.335 FEET TO THE POINT OF BEGINNING; THENCE CONTINUE NORTH 15 DEGREES 06 MINUTES 22 SECONDS WEST FOR 24.00 FEET; THENCE NORTH 74 DEGREES 53 MINUTES 38 SECONDS EAST FOR 50.0 FEET; THENCE SOUTH 15 DEGREES 07 MINUTES 22 SECONDS EAST FOR 24.00 FEET; THENCE SOUTH 74 DEGREES 53 MINUTES 38 SECONDS WEST FOR 50.00 FEET TO THE POINT OF BEGINNING.

3. This Order is entered to allow Wells Fargo Bank, N.A., its Successors and/or Assigns, to commence, prosecute and complete through judgment, sale, certificate of title and possession, a mortgage foreclosure against the property described above. Wells Fargo Bank, N.A., its Successors and/or Assigns, shall not seek or obtain an *in personam* judgment against the Debtor(s).

*6 4. The Florida Default Law Group, P.L. and Wells Fargo Bank, N.A., are **DIRECTED**, jointly and severally, to pay a monetary fine in the amount of **\$95,130.45** to the Clerk of this Court for their repeated misrepresentations to this court and to other bankruptcy courts in Florida. Payment shall be made within ten days of this order and Florida De-

fault Law Group, P.L. and Wells Fargo Bank, N.A., are directed to file a notice of compliance on the docket.

FN1. There were other charges claimed by the Creditor which initially concerned the court, however, those concerns have been resolved through further disclosures by the Creditor. Thus, no further action is needed as to those matters.

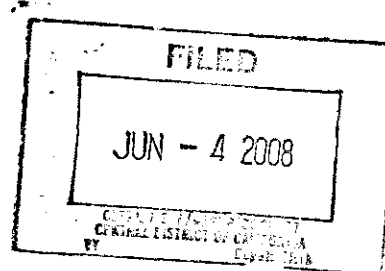
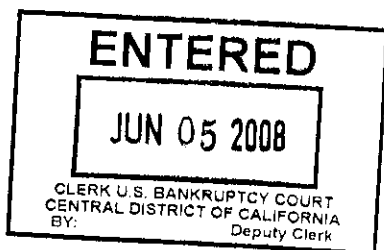
FN2. This brings to mind the classic aphorism that "A lawyer who represents himself has a fool for a client." It would have been prudent for FDLG to have hired counsel. Its decision not to do so is a reflection of the firm's casual attitude toward this matter.

FN3. Some courts have taken the position that [Section 105\(a\)](#) was intended to imbue the bankruptcy courts with the inherent power to sanction recognized in other federal courts. *See, e.g., Jones v. Bank of Santa Fe (In re Courtesy Inns)*, 40 F.3d 1084, 1089 (10th Cir.1994).

FN4. The practical effect of the distinction between the inherent power of courts to sanction and the [section 105\(a\)](#) authority, may be illusory.

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END OF DOCUMENT



**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA**

In re:

FERNANDO CABRERA-MEJIA,
Debtor.

ROCKY LYN EDWARDS,
Debtor.

SUSI R. ZECENA,
Debtor.

JOSE FIDENCIO DE LA ROSA,
Debtor.

ROBERTO M. MENEZES &
OLIVIA P. MENEZES,
Debtors,

CHARR ANTUAN GAHAGAN &
BRANDYE MICHELL GAHAGAN,
Debtors.

Case No. LA 08-13505-SB

Consolidated for purposes
of this hearing with:

Case No. LA 08-11531-SB
Case No. LA 08-11939-SB
Case No. LA 08-13172-SB
Case No. LA 08-12279-SB
Case No. LA 08-13350-SB
Case No. LA 08-13986-SB
Case No. LA 08-10454-SB
Case No. LA 08-12432-SB
Case No. LA 08-13248-SB
Case No. LA 07-19023-SB
Case No. LA 08-13643-SB
Case No. LA 08-12648-SB
Case No. LA 08-12337-SB
Case No. LA 08-13771-SB
Case No. LA 08-14915-SB
Case No. LA 08-15000-SB
Case No. LA 08-12195-SB
Case No. LA 08-13131-SB
Case No. LA 08-14709-SB

CHAPTER 7

AMENDED ORDER TO SHOW CAUSE
RE SANCTIONS
(AMENDING CAPTION)

DATE: July 8, 2008
TIME: 2:00 p.m.
CTRM: 1575

1 RENE A. CRUZ,

2 Debtor.

3 RONNITA V. DARNELL,

4 Debtor.

5
6 EDGARDO C. GLINOCA &
7 HELEN M. GLINOCA,

8 Debtors.

9 SERGIO LEAL,

10 Debtor.

11 DEATRA CLINTON, JR.,

12 Debtor.

13
14 MARIAN LAJUAN SPARLING,

15 Debtor.

16 HAENAM DAVID LEE,

17 Debtor.

18
19 JAMES Z. PESCASIO,

20 Debtor.

21 DE JAUN BLACKBURN,

22 Debtor.

23
24 DAVID CARDENAS &
25 IDALIA MALDONADO,

26 Debtors.

1 LAWRENCE MARTIN VILLALOBOS &)
2 RENEE ROSE NEWELL-VILLALOBOS,)

3 Debtors.
4

5 REGINALD TINSLEY,
6

Debtor.
7

8 NERY WALTER SON,
9

Debtor.
10

11 GABRIEL RAUL CABRERA &
12 MARIA LARA CABRERA,
13

Debtors.
14

15 TO PITE DUNCAN LLP AND ITS CLIENTS:

16 DEUTSCHE BANK NATIONAL TRUST CO. AS TRUSTEE FOR
17 SOUNDVIEW HOME LOAN TRUST 2006-WF1

18 ENCORE CREDIT CORP.

19 MONEYLINE LENDING SERVICE, INC.

20 OPTION ONE MORTGAGE CORPORATION

21 NEW CENTURY MORTGAGE CORPORATION

22 JP MORGAN CHASE BANK, N.A.

23 GOLDEN EMPIRE MORTGAGE, INC.

24 U.S. BANK NATIONAL ASSOCIATION, TRUSTEE FOR LEHMAN
25 BROTHERS STRUCTURED ASSET INVESTMENT LOAN TRUST

SAIL 2005-5
26

CASA BLANCA MORTGAGE INC.
27

INDYMAC BANK, F.S.B.
28

WACHOVIA MORTGAGE

HOMEcomings FINANCIAL, LLC

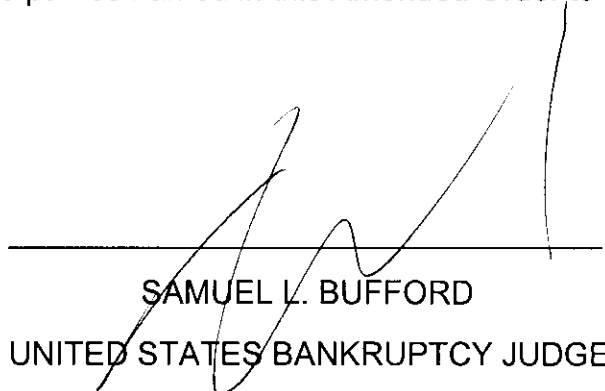
1 JUST MORTGAGE INC.
2 DB HOME LENDING, LLC
3 FIRST FRANKLIN
4 WELLS FARGO BANK, N.A.
5 ARGENT MORTGAGE COMPANY, LLC
6 WILMINGTON FINANCE
7 SUNTRUST MORTGAGE, INC.
8 WASHINGTON MUTUAL BANK

9 YOU ARE HEREBY ORDERED TO APPEAR before this court on July 8, 2008 at
10 11:00 a.m. and to show cause, and if any you have, why sanctions should not be imposed
11 on you in the amount of \$5,000 for each of the above cases for filing relief from stay
12 motions, as to which you were a party or counsel, with no intent to proceed to a hearing
13 on the merits, as shown on the attached list. Such lack of intent appears from the failure
14 to produce a witness, as required by Local Rule 9013-1(a)(13)(A) and court orders issued
15 pursuant thereto in each of these cases, and the subsequent withdrawal (or attempted
16 withdrawal) of each motion before or at the hearing on the merits.

17 This Amended Order is based on the court's inherent authority to impose sanctions
18 for misconduct before the court, 11 U.S.C. §105, 28 U.S.C. §1927 and Fed. R. Bankr. P.
19 9011(b)(1) and (3).

20 Any opposition to this Amended Order to Show Cause re Sanctions shall be filed,
21 with a copy delivered to chambers, on or before June 24, 2008, and shall be served on the
22 United States Trustee and on each of the parties named in this Amended Order to Show
23 Cause re Sanctions.

24
25
26 Dated: June 4, 2008

27
28


SAMUEL L. BUFFORD
UNITED STATES BANKRUPTCY JUDGE

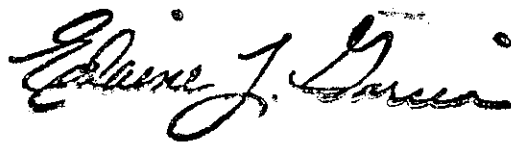
CERTIFICATE OF MAILING

I certify that a true copy of this **AMENDED ORDER TO SHOW CAUSE RE**
SANCTIONS was mailed on **JUN - 5 2008** to the parties listed below:

Steven W. Pite, Esq.
David E. McAllister, Esq.
Eddie R. Jimenez, Esq.
Daniel L. Hembree, Esq.
Alison J. Maloof, Esq.
Brian A. Paino, Esq.
Pite Duncan LLP
525 East Main Street
Post Office Box 12289
El Cajon, California 92022-2289

U.S. Trustee
Department of Justice
725 South Figueroa Street
26th Floor
Los Angeles, California 90017

DATED: **JUN - 5 2008**



DEPUTY CLERK

Pite Duncan, LLP: Motions for Relief of Stay

Case No.	Debtor	Movant	Date Filed	Date of Hearing	Date of Order	Disposition
08-13131	Nery Walter Son	Suntrust Mortgage, Inc.	5/05/08	6/03/08	5/08/08	Withdrawal filed 5/30/08
08-14709	Gabriel Raul Cabrera and Maria Lara Cabrera	Washington Mutual Bank	5/06/08	6/03/08	5/13/08	Withdrawal filed 5/30/08
08-12195	Reginald Tinsley	Wilmington Finance	4/30/08	05/27/08	5/08/08	Withdrawal filed 5/22/08
08-14915	David Cardenas and Idalia Maldonado	Wells Fargo Bank, N.A.	4/28/08	05/27/08	5/08/08	Withdrawal filed 5/23/08
08-15000	Lawrence Martin Villalobos and Rene Rose Newell-Villalobos	Argent Mortgage Company, LLC	4/29/08	05/27/08	5/08/08	Withdrawal filed 05/22/08
07-19023	Deatra Clinton, Jr.	Wachovia Mortgage, fka World Savings Bank, FSB	4/17/08	5/20/08	4/28/08	Withdrawal filed 5/14/08
08-10454	Ronnita V. Darnell	U.S. Bank Nat'l Ass'n, Tr. for Lehman Brothers Structured Asset Inv. Loan Trust Sail 2005-5	4/16/08	5/20/08	4/28/08	Withdrawal filed 5/13/08
08-12279	Roberto M. Menezes and Olivia P. Menezes	New Century Mortgage Corporation	4/11/08	5/20/08	4/25/08	Withdrawal filed 5/13/08
08-12337	James Z. Pescasio	DB Home Lending, LLC	4/24/08	5/20/08	5/13/08	Denied on 5/20/08 Order 5/23/08
08-12432	Edgardo C. Glinoga and Helen M. Glinoga	Casa Blanca Mortgage, Inc., dba Shearson Mortgage	4/16/08	5/20/08	4/28/08	Withdrawal filed 5/19/08
08-12648	Haenam David Lee	Just Mortgage, Inc.	4/21/08	5/20/08	4/24/08	Withdrawal filed 5/08/08
08-13172	Jose Fidencio De La Rosa	Option One Mortgage Corporation	4/10/08	5/20/08	4/28/08	Withdrawal filed 5/14/08
08-13248	Sergio Leal	Indymac Bank, FSB	4/16/08	5/20/08	4/24/08	Withdrawal filed 5/15/08
08-13350	Charr Antuan Gahagan and Brandye Michell Gahagan	JP Mortgage Chase Bank, N.A.	4/11/08	5/20/08	4/24/08	Order denied on 5/23/08

Case No.	Debtor	Doc No.	Date Filed	Date of Hearing	Date of Order	Disposition
08-13643	Marian Lajuan Sparling; Re: 3466 North Greenbrier Road, Long Beach, California 90808; \$150k	Homecomings Fin., LLC, fka Homecomings Fin. Network, Inc.	4/17/08	5/20/08	4/24/08	Withdrawal filed 5/13/08
08-13643	Marian Lajuan Sparling; Re: 3466 North Greenbrier Road, Long Beach, California 90808; \$566k	Homecomings Fin., LLC, fka Homecomings Fin. Network, Inc.	4/30/08	5/27/08	5/08/08	Withdrawal filed 5/22/08
08-13771	De Jaun Blackburn	First Franklin A Division of Nat. City Bank IN	4/28/08	5/20/08	5/13/08	Withdrawal filed 5/12/08
08-13986	Rene A. Cruz	Golden Empire Mortgage, Inc.	4/11/08	5/20/08; 5/27/08	4/24/08; 5/22/08	Withdrawal filed 5/23/08
08-11531	Rocky Lyn Edwards; Re: 6245 Huntington Ridge Avenue, Las Vegas, Nevada 89139	Alliance Bancorp	2/29/08	4/01/08	3/20/08	Granted on 4/03/08
	Rocky Lyn Edwards; Re: 1037 Arroyo Verde Road, #G, Pasadena, California 91030	Encore Credit Corp.	4/04/08	4/29/08	4/21/08	Withdrawal filed 4/28/08
08-11613	John Allen Youngblood	Wells Fargo Bank, N.A. as Tr. for the MLMI Trust Series 2006-WMC1	3/26/08	4/29/08	4/24/08	Withdrawal filed 4/28/08
08-11791	Edgar Florian	Wash. Mutual Bank, F.A.	3/06/08	4/08/08	3/31/08	Withdrawal filed 4/28/08
08-11939	Susi R Zecena	Moneyline Lending Serv., Inc.	4/04/08	4/29/08	4/21/08	Withdrawal filed 4/28/08 Denied 5/08/08
08-13505	Fernando Cabrera-Mejia	Deutsche Bank Nat'l Trust Co., as Tr. for Soundview Home Loan Trust 2006-WF1	4/03/08	4/29/08	4/24/08	Withdrawal filed 4/28/08

Case No.	Debtor	Doc No.	Date Filed	Date of Hearing	Date of Order	Disposition
06-15911	Lorece Wright	SCME Mortgage Bankers, Inc.	1/31/08	3/11/08; 4/29/08	2/12/08	Denied on 5/09/08
07-20408	Daryll John Stevens and Serena Fawn Stevens	Fin. Am., LLC	1/31/08	3/11/08; 4/29/08	2/12/08	Withdrawal filed 4/24/08
08-10768	Cynthia Ann Kalina	LaSalle Bank Midwest, NA	3/14/08	4/08/08	3/31/08	Withdrawal filed 4/17/08
08-11640	Anita Marie Clark	Wells Fargo Bank, N.A.	3/12/08	4/08/08	3/31/08	Withdrawal filed 4/23/08
08-11791	Edgar Florian	Wash. Mutual Bank, F.A.	3/06/08	4/08/08	3/31/08	Withdrawal filed 4/28/08
08-11612	Daniel Mucu and Sayra Leon	New Century Mortgage Corp.	2/28/08	4/01/08; 5/20/08	3/20/08; 5/13/08	Withdrawal filed 5/14/08
07-18651	Dwight A. Penn	U.S. Bank Nat'l Ass'n, solely as Tr. for the Holder of Bear Stearns Asset Backed Sec.	1/04/08	2/05/08; 3/25/08; 4/15/08	3/20/08	Withdrawal filed 4/14/08
07-21194	Sigrid Falcon Zandate	Wash. Mutual Bank, F.A.	1/11/08	2/05/08; 3/25/08; 4/15/08	3/20/08	Withdrawal filed 4/10/08
07-21348	Leonardo Q. Marin	Argent Mortgage Co., LLC	1/03/08	2/14/08; 3/25/08	3/20/08	Withdrawal filed 4/10/08
07-21486	Vidal Vega	People's Choice Home Loan, Inc.	1/02/08	2/05/08; 3/25/08; 4/15/08	3/20/08	Withdrawal filed 4/14/08
07-21488	Benjamin Silva	Bank of America, N.A.	1/31/08	3/11/08	2/12/08	Withdrawal filed 2/28/08
07-15768	Clifford Wayne Maddox	Homecoming Fin. Network, Inc.	1/22/08	2/26/08	2/12/08	Withdrawal filed 2/2508
07-19623	Billy Ray Michael Brock and Andrea Maria Lomento-Brock	Mortgageit, Inc.	1/16/08	2/26/08	2/12/08	Withdrawal filed 2/2508
07-19639	Noel Charros and Ana L. Charros	Argent Mortgage Co.	12/24/07	1/22/08; 2/26/08	2/12/08	Withdrawal filed 2/22/08

Case No.	Debtor	Doc No.	Date Filed	Date of Hearing	Date of Order	Disposition
07-20660	Kanika Lashaun Johnson	US Bank Nat'l Ass'n, as Tr.	12/26/07	1/22/08; 2/26/08	2/12/08	Withdrawal filed 2/22/08
07-20689	Misael Hernandez and Blanca Lilian Hernandez	The Chase Manhattan Bank, as Indenture Tr.	12/28/07	1/22/08; 2/26/08	2/12/08	Withdrawal filed 2/25/08
07-20978	Louis James Salcido	BNC Mortgage, Inc.	12/21/07	1/22/08; 2/26/08	2/12/08	Withdrawal filed 2/22/08
07-21055	Maximino G. Lopez	HSBC Bank USA, Nat. Ass'n, as Tr. for Home Equity Loan Trust Series Ace 2005-HE7	12/21/07	1/22/08; 2/26/08	2/12/08	Withdrawal filed 2/22/08

Disposition Summary	
38	Withdrawn
3	Denied
1	Granted

**IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA**

**CASE NUMBER: XXXX-MA
Div. CV-**

**TRUSTEE, ON BEHALF OF THE HOLDERS OF
Plaintiff,**

vs.

, et. al.,

Defendants.

_____ /

MOTION TO DISSOLVE / DISCHARGE LIS PENDENS AND FOR ATTORNEYS' FEES

Defendant, , by and through her undersigned counsel, files this Motion To Dissolve/Discharge Lis Pendens and for Attorneys' Fees and states as follows:

1. Plaintiff, ____, filed this mortgage foreclosure action on _____.
2. Plaintiff, as TRUSTEE, recorded a Lis Pendens, with respect to the real property at issue in this case on _____.
3. Florida Statutes 48.23(3) states as follows:

Lis pendens.—(3) When the initial pleading does not show that the action is founded on a duly recorded instrument or on a lien claimed under part I of Chapter 713, the court may control and discharge the notice of lis pendens as the court may grant and dissolve injunctions. (emphasis supplied).

4. Plaintiff's Complaint reveals the following allegation in Paragraph 4:

The Mortgage was recorded on _____ in Official Records Book ____ at page ____, of the Public Records of DUVAL County, Florid, and mortgaged the property described in it, then owned by and possessed by the Mortgagors, a copy of the Mortgage AND NOTE ARE attached hereto as "Exhibit A". Said mortgage was subsequently assigned to _____ AS TRUSTEE by virtue of an assignment to be recorded.

5. The only "duly recorded instrument", at the time the lis pendens was recorded, in this case is the Mortgage attached to the Complaint as Exhibit A. Such instrument identifies the Mortgagee as Mortgage Lenders Network, Inc. This entity is not the Plaintiff that filed this action and is not the entity that recorded the lis pendens that is the subject of this motion.

6. Further, the Complaint alleges that there was an assignment of mortgage to the Plaintiff but clearly states that such assignment was “by virtue of an assignment to be recorded.”

7. Review of the public records of Duval County with respect to the real property that is the subject of this action reveals that there is no assignment of mortgage in favor of the Plaintiff recorded in the public records of Duval County.

8. As such, the initial pleading by _____ AS TRUSTEE, is not founded on a duly recorded instrument and the Court should discharge/dissolve the subject lis pendens filed by the Plaintiff.

9. Further, the Defendant, _____, is entitled to recover attorneys’ fees for the preparation and filing of this Motion and for the time spent arguing same at any hearing. *S & T Builders v. Globe Props.*, 944 So. 2d 302 (Fla. 2006). An order on a motion to dissolve a lis pendens is treated as a final order. *Loidl v. I&E Group, Inc.*, 927 So. 2d 1016 (Fla. 2nd DCA 2006).

WHEREFORE, the Defendant, _____, respectfully requests this Honorable Court GRANT her Motion To Discharge/Dissolve the subject Lis Pendens, award reasonable attorneys’ fees and costs, and award any other relief this Court believes to be fair, just and equitable under Florida Law.

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, FLORIDA

CASE NUMBER: 16-2004-CA-004918

DIVISION: CV-G

THE BANK OF NEW YORK, ACTING SOLELY IN
ITS CAPACITY AS TRUSTEE FOR EQUICREDIT
CORPORATION TRUST 2001-2,

Plaintiff,

v.

PAULETTE WILLIAMS; THE UNKNOWN
SPOUSE OF PAULETTE WILLIAMS; ANY
AND ALL UNKNOWN PARTIES CLAIMING
BY, THROUGH, UNDER, AND AGAINST THE
HEREIN NAMED INDIVIDUAL DEFENDANT(S)
WHO ARE NOT KNOWN TO BE DEAD OR ALIVE,
WHETHER SAID UNKNOWN PARTIES MAY
CLAIM AN INTEREST AS SPOUSES, HEIRS,
DEVISEES, GRANTEEES, OR OTHER CLAIMANTS;
MERCURY FINANCE COMPANY OF FLORIDA;
TENANT #1, TENANT #2, TENANT #3 and TENANT
#4 the names being fictitious to account for parties in possession,

Defendant(s).

**ORDER GRANTING DEFENDANT PAULETTE WILLIAMS' MOTION FOR
ATTORNEY'S FEES AND COSTS AND FOR MULTIPLIER**

THIS CAUSE came to be heard before the Court on March 6, 2007, upon Defendant PAULETTE WILLIAMS' Renewed Motion for Award of Attorney's Fees and Costs and Motion for Order Determining Entitlement to Multiplier. The Court has considered the testimony offered at the hearing by fee expert Michael G. Tanner, Esq. and by Plaintiff's counsel, James A. Kowalski, Jr., Esq. Plaintiff presented no evidence. The Court has considered arguments of

counsel, reviewed the pleadings, and is otherwise fully advised in the premises. The Court finds as follows:

Attorney's Fees and Costs

1. Defendant PAULETTE WILLIAMS is the prevailing party by virtue of the Order Granting Motion to Dismiss with Prejudice entered by Circuit Judge Jean Johnson on October 16, 2006.

2. The Court has reviewed the factors to be considered in determining reasonable fees and costs as set forth in Rule 4-1.5, Rules of Professional Conduct, and as otherwise discussed in *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985) and *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So.2d 828 (Fla. 1990).

3. The testimony of trial counsel James A. Kowalski, Jr., Esq., indicated a total of 42.6 hours had been expended. Plaintiff sought an hourly rate of \$250.00 per hour.

4. The testimony of fee expert Michael G. Tanner, Esq., a local attorney dual Board-Certified in Civil Trial Law and Business Litigation, confirmed an hourly rate of \$250.00 to be reasonable, based upon the factors set forth in Rule 4-1.5, Florida Rules of Professional Conduct. Specifically, the Court finds:

(A) This mortgage foreclosure defense case presented both complex and difficult issues relating to standing and the ability of the Plaintiff to demonstrate ownership of the Note and Mortgage, and required a high degree of skill on the part of Defendant's counsel;

(B) As the foreclosure action had already been commenced against Ms. WILLIAMS when she sought the services of counsel, the action was already in litigation and limited the ability of Mr. Kowalski and his (then) law firm to take on other, potentially more lucrative litigation cases;

(C) The \$250.00 per hour attorney's fee sought by Plaintiff is in the range of the fees customarily charged for comparable or similar cases in the local area;

(D) The subject matter of this action was significant to Defendant WILLIAMS as it involved the potential loss of her home, placing a high level of responsibility on Defense counsel. The result obtained, a Dismissal of this action, was substantial;

(E) Time limitations: none other than those involved in the defense of this action;

(F) Length of professional relationship: this action is the first involving Ms. WILLIAMS and her current counsel;

(G) Mr. Kowalski has been an attorney in Florida since 1990 and has substantial experience in the field of consumer litigation, particularly mortgage foreclosure defense. The skill, expertise and efficiency of effort is reflected in the focused work, resulting in 42.6 hours expended over more than a two-year period. According to Mr. Tanner, no duplication of effort was involved;

(H) Based on the unrefuted testimony of Mr. Kowalski, coupled with the clear issues presented by this action (Ms. WILLIAMS was a defendant in a mortgage foreclosure action, with Plaintiff alleging non-payment), Ms. WILLIAMS did not have an ability to pay, resulting in a contingent fee arrangement.

5. The Court therefore finds 42.6 hours to be a reasonable number of hours expended and finds \$250.00 per hour to be a reasonable hourly rate. The lodestar amount is \$10,650.00.

6. The Court finds the costs of \$1,126.05 to be reasonable, and further finds the expert fee for Mr. Tanner (six hours expended at \$300.00 per hour) to be reasonable and necessary. Mr. Tanner spent substantial time reviewing the file and meeting with Plaintiff's

counsel to confirm the factual basis for his expert testimony. Total costs, therefore, are \$2,926.05.

Multiplier

7. The Court has reviewed the considerations for applying a contingency risk multiplier, as set forth in *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So.2d 828 (Fla. 1990), *Bell v. U.S.B. Acquisition Co., Inc.*, 734 So.2d 403 (Fla. 1999) and *McCarthy Brothers v. Tilbury Construction, Inc.*, 849 So.2d 7 (Fla. 1st DCA 2003), and has also considered the testimony of fee expert Michael G. Tanner, Esq., who testified extensively regarding the propriety of applying a contingency risk multiplier in this case.

8. The Court may consider applying a contingency risk multiplier as a “useful tool” in determining reasonable attorney fees if the relevant market requires a contingency multiplier to obtain competent counsel; the attorney was unable to mitigate the risk of non-payment; and the use of the multiplier is justified based on factors such as the amount of risk involved, the results obtained, and the type of fee arrangement between attorney and client. *Bell*, 734 So.2d at 408.

9. The Court finds the risk involved in this contingency fee case to be substantial and the results obtained to be excellent. The testimony of Mr. Tanner that few, if any other attorneys, (much less other competent attorneys such as Mr. Kowalski and Mr. Tromberg,) were available in the local area to take on a substantial risk of the type involved in this mortgage foreclosure defense case on a contingent fee basis, without the opportunity to seek a multiplier, was persuasive and not refuted by any other evidence. The facts of this case, coupled with the testimony of Mr. Kowalski, have confirmed to this Court there was no way to mitigate the risk of non-payment other than by the limited, focused efforts of counsel (which had the benefit to

Plaintiff of *lowering* the number of hours expended, despite the fact Plaintiff strongly contested this case, as reflected in the pleadings).

10. According to *Bell* and *McCarthy*, a 2.0 multiplier is appropriate where the likelihood of success was approximately even at the outset and a 2.5 multiplier is appropriate where the evidence supports a finding that success was unlikely at the outset.

11. The Court finds, based upon the testimony of Mr. Tanner and Mr. Kowalski, as summarized above, that success was unlikely at the outset. A multiplier of 2.5 is therefore appropriate. It is, therefore,

ORDERED:

1. Defendant PAULETTE WILLIAMS' Renewed Motion for Award of Attorney's Fees and Costs and Motion for Order Determining Entitlement to Multiplier is GRANTED.

2. Having found a lodestar of \$10,650.00 to be appropriate and a multiplier of 2.5 to be reasonable and necessary, the Court awards attorney's fees to Defense counsel in the amount of \$26,625.00.

3. The Court awards costs to Defense counsel in the amount of \$2,926.05.

DONE AND ORDERED, in Chambers, at Jacksonville, Duval County, Florida, this

_____ day of _____, 2007.

ORDER ENTERED

APR 12 2007

LANCE M. DAY

CIRCUIT COURT JUDGE

Copies to:

Mitchell B. Rothman, Esquire
Echevarria Codilis & Stawiarski
Post Office Box 25018
Tampa, Florida, 33622-5018

Fred Tromberg, Esquire
4925 Beach Blvd.
Jacksonville, FL 32207

James A. Kowalski, Jr., Esquire
12627 San Jose Blvd., Suite 203
Jacksonville, FL 32223

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

THE BANK OF NEW YORK,
acting solely in its capacity as
trustee for EQUICREDIT
CORPORATION TRUST 2001-2,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED.

Appellant,

v.

CASE NO.: 1D07-2626

PAULETTE WILLIAMS, et al.,

Appellees.

_____ /

Opinion filed April 10, 2008.

An appeal from the Circuit Court for Duval County.
Lance Day, Judge.

Mitchell B. Rothman of Echevarria, Codilis & Stawiarski, Tampa; and John H. Dannecker, Eric C. Reed, David J. Markese, and Temple Fett Kearns of Shutts & Bowen, Orlando, for Appellant.

James A. Kowalski, Jr., Jacksonville, for Appellees.

PER CURIAM.

The Bank of New York, acting solely in its capacity as trustee for Equicredit Corporation Trust 2001-2, appeals an order awarding Paulette Williams, appellee, attorney's fees and costs following the dismissal with prejudice of the Bank's

residential mortgage foreclosure complaint against Williams and others. The Bank argues that Williams was not entitled to an award of attorney's fees because she was not a prevailing party under section 57.105(7), Florida Statutes (2006); and that, even if Williams was entitled to attorney's fees, the trial court erred in using a multiplier in setting the fee award. We affirm.

The Bank's complaint and amended complaint were dismissed without prejudice on the ground that, because the Bank failed to show that it owned the mortgage and associated promissory note, the Bank lacked standing to institute the foreclosure action. When the Bank declined to file a second amended complaint, the trial court dismissed the amended complaint with prejudice. The Bank did not appeal this order, but instituted a new foreclosure action against Williams. The Bank argues that because the same factual and legal issues raised in the dismissed action are also the subject of the new litigation, Williams cannot be the prevailing party under section 57.105(7).¹ We have expressly rejected the Bank's argument in the context of a

¹Section 57.105(7), Florida Statutes (2006) provides in pertinent part:

(7) If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract.

plaintiff's voluntary dismissal without prejudice. State ex rel. Marsh v. Doran, 958 So. 2d 1082 (Fla. 1st DCA 2007). There we explained:

We hold that a defendant is entitled to recover attorney's fees under section 68.086(3), which awards fees to the prevailing party, after the plaintiff takes a voluntary dismissal without prejudice. The refiling of the same suit after the voluntary dismissal does not alter the appellees' right to recover prevailing party attorney's fees incurred in defense of the first suit. Caufield v. Cantele, 837 So. 2d 371 (Fla. 2002); Alhambra Homeowners Ass'n, Inc. v. Asad, 943 So. 2d 316 (Fla. 4th DCA 2006).

Id. Here, since the complaint was dismissed with prejudice, it is clear that Williams was the prevailing party. Rule 1.420(b), Florida Rule of Civil Procedure, provides that, in the case of an involuntary dismissal:

Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication on the merits.

Further, we find no abuse of discretion in the trial court's use of a multiplier of 2.5 in establishing the attorney's fees. In its order setting the attorney's fees, the trial court fully analyzed the factors under rule 4-1.5, Florida Rules of Professional Conduct, Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), and Standard Guarantee Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990); and made

detailed findings of fact which are supported by competent substantial evidence in the un rebutted testimony of both Williams' counsel and her expert witness.

AFFIRMED.

WOLF, KAHN, AND VAN NORTWICK, JJ., CONCUR.