

IN THE CIRCUIT COURT OF THE 15th JUDICIAL CIRCUIT  
OF FLORIDA, IN AND FOR PALM BEACH COUNTY

Deutsche Bank National Trust Company, as  
Trustee for HarborView Mortgage Loan Trust  
Mortgage Loan Pass-Through Certificates, Series  
2007-5

Plaintiff,

-vs.-

Jessica Cadwell

Defendant(s).

Case #: 2008 CA 027495

Division #:

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Plaintiff, Deutsche Bank National Trust Company, as Trustee for HarborView Mortgage Loan Trust Mortgage Loan Pass-Through Certificates, Series 2007-5, pursuant to Fla. R. Civ. P. 1.510, and moves this Court for the entry of a Summary Judgment of Foreclosure, and in support thereof would state as follows:

1. There is no genuine issue of material fact and the Plaintiff is entitled to the entry of a Summary Judgment of Foreclosure as a matter of law.
2. That under Florida Law when a mortgage contains an acceleration clause, upon breach of a mortgagor's covenant to make the required payments, a mortgagee may sue to foreclose the mortgage before the due date. Treb Trading Company v. Green, 102 Fla. 238, 135 So. 510, (1931).
3. That one purpose of a foreclosure is to subject the security to the payment of the obligation involved. Bobby Jones Garden Apartments v. Connecticut Mutual Life Insurance, 202 So. 2d. 226 (Fla. 2d D.C.A. 1967).

4. That the institution of a foreclosure suit is the exercise of a mortgagee's option to declare the remaining principal sum and interest due there on. Kreiss Potassium Phosphate Co. v. Night, 98 Fla. 1004, 124 So. 751 (1929).

5. That a mortgagee has a right to accelerate upon default in conditions of the security agreement, such as payment of interest, installments of principal, taxes and insurance. Clark v. Lachenmeier, 237 So. 2d 583 (Fla. 2d D.C.A. 1970).

6. That an acceleration clause in an installment note and mortgage confers a contract right on the note and mortgage holder which holder may elect to invoke upon default and to seek enforcement, thereof. Federal Home Loan Mortgage Corp. v. Taylor, 318 So. 2d 203 (Fla. 1st D.C.A. 1975).

7. The Mortgage of the Plaintiff is a lien superior in dignity to any prior or subsequent right, title, claim lien or interests arising out of mortgagor or the mortgagor's predecessors in interest. Sarmiento v. Stockton, Whatley, Davin & Company, 399 So. 2d 1057 (3d DCA 1981).

8. The rights of other bona fide lenders or purchasers will not be prejudiced by Plaintiff's reformation attempts, if such relief is needed. Nall v. Raybon, 451 So. 2d 923 (Fla. 1<sup>st</sup> DCA 1984); W.W. Burleson v. Brogdon, 364 So. 2d 491 (Fla. 1<sup>st</sup> DCA 1978), where mistake is a ground for reformation when the mistake is mutual. Hardaway Timber Co. v. R.B. Hansford, 245 So. 2d 911 (Fla. 1st DCA 1971), Alexander v. Kirkham, 365 So. 2d 1038 (Fla. 3d DCA 1978).

9. Defendant Jessica Cadwell raised several affirmative defenses all of which are legally insufficient and unsupported by fact or evidence. Defendant's affirmative defenses contain assertions, but do not supply specific facts, documents, or affidavits to support these

defenses. “[T]he requirement of certainty will be insisted upon in the pleading of a defense; and the certainty required is that the pleader must set forth the facts in such a manner as to reasonably inform his adversary of what is proposed to be proved in order provide the latter with a fair opportunity to meet it and prepare his evidence.” Zito v. Washington Federal Savings & Loan Association of Miami Beach, 318 So. 2d 175, 176 (Fla. 3rd DCA, 1975).

10. Defendant’s first affirmative defense that Plaintiff failed to comply with the foreclosure prevention loan servicing requirement imposed on Plaintiff pursuant to the National Housing Act (NHA), 12 U.S.C. 1701x(c)(5) fails to state a valid affirmative defense. The NHA offers no private right of action for failure to provide notice regarding homeownership counseling. *See Fouche’ v. Shapiro & Massey, LLP*, 575 F. Supp. 2d. 776 (S.D. Miss. 2008). Rather, it contains guidelines and not mandatory procedures constituting conditions precedent to foreclosure of mortgages federally insured as part of a federal program.

11. Defendant’s second affirmative defense alleging noncompliance with the applicable pooling and servicing agreement is without merit. Defendant is not a third party beneficiary to the pooling and servicing agreement and therefore does not have standing to raise non-compliance therewith. As a general rule, one who is not a party to an agreement cannot sue for its breach. *See Greenacre Properties v. Rao*, 933 So. 2d 19 (Fla. 2<sup>nd</sup> DCA 2006). To have standing, the party must establish either: (1) that the contract expressly creates rights for them as a third party; or (2) that the provisions of the contract primarily and directly benefit the third party or a class of persons of which the third party is a member. *Id.* at 23. *See also Caretta Trucking v. Cheoy Lee Shipyards, Ltd.*, 647 So. 2d 1028, 1031 (Fla. 4th DCA 1994).

12. Defendant’s third affirmative defense alleges in conclusory fashion that illegal charges not authorized by the terms of the Note and Mortgage were added to the amount Plaintiff

claims due and owing. However, Defendant fails to identify a single fee or charge upon which her defense relies. Just as a Plaintiff is required to support its claims with statements of ultimate fact, a Defendant must also support its affirmative defenses with allegations of ultimate fact. *See Bliss v. Carmona*, 418 So. 2d 1017 (Fla. 3d DCA 1982). Allegations consisting of mere conclusions, without any supporting allegations of ultimate fact, do not constitute legally sufficient affirmative defenses. *See Cady v. Chevy Chase Savings and Loan, Inc.*, 528 So. 2d 136, 138 (Fla. 4<sup>th</sup> DCA 1988).

13. Moreover, paragraph 7(e) of the Note and paragraphs 14 and 22 of the Mortgage provide for the recovery of attorneys' fees, property inspection and valuation fees, and other costs incurred in connection with foreclosure or the borrowers' default under the Note and Mortgage.

14. Defendant's fourth affirmative defense that Plaintiff breached an implied covenant of good faith and fair dealing is without merit. Under Florida law, there can be no such breach absent an allegation that an express term of the contract has been breached. *See Ins. Concepts and Design, Inc. v. Healthplan Services, Inc.*, 785 So. 2d 1232 (Fla. 4<sup>th</sup> DCA 2001). Defendant has failed to identify a single express term of a contract that was allegedly breached. As such, this defense fails.

15. Defendant's fifth affirmative defense that Plaintiff has unclean hands is without merit. "One who comes into equity must come with clean hands else all relief will be denied him regardless of the merits of his claim..." *Ocean View Towers, Inc. v. First Fid. Sav. and Loan Ass'n*, 521 So. 2d 325, 327 (Fla. 4<sup>th</sup> DCA 1988). Here, the Defendant herself has not paid and is in default of her express mortgage agreement – since 2007.

16. Additionally, the Supreme Court of Florida has confined the doctrine of unclean hands to fraud or deceit to the extent it would constitute a defense to an action at law. A party guilty of over-reaching, unscrupulous acts, or one whom has concealed important facts or is guilty of trickery or unconscionable conduct, is guilty of unclean hands. *See Dale v. Jennings*, 90 Fla. 234 (Fla. 1925).

17. In the context of mortgages and foreclosures, unclean hands was found in cases where a foreclosing plaintiff refused to honor the junior lienor's right of redemption of property valued at \$1,000,000.00 and then proceeded to foreclose the junior lien totaling only \$20,000.00, in *Sponder v. Equity Capital Company*, 2428 So. 2d 251 (Fla. 3d DCA 1971); where there was no bona fide purchase of property and a scheme in the execution of the mortgage, in *Pelle v. Glantz*, 349 So.2d 732 (Fla. 3d DCA 1977), in a case of a usurious note, in *Wasman v. Rubinson*, 341 So. 2d 802 (Fla. 3d DCA 1977), where an agreement was reached and a foreclosure was filed prior to the expiration of the deadline to meet the terms of the agreement, in *Knight Energy Services, Inc. v. Amoco Oil*, 660 So. 2d 786 (Fla. 4<sup>th</sup> DCA 1995), and in a case of where the Court found the foreclosing party engaged in a series of transactions involving fraud, in *Goodman v. Aldrich & Ramsey Enterprises, Inc.*, 804 So.2d 544 (Fla. 2d DCA 2002).

18. Defendant has not alleged any specific intentional acts or other conduct to suggest a scheme or fraud by the Plaintiff to constitute unclean hands.

19. Defendant's sixth affirmative defense that Plaintiff lacks standing to maintain this foreclosure action is without merit. Prior to the filing of this action, Plaintiff acquired the right to enforce the Note and Mortgage from the party entitled to enforce the Note and Mortgage. The Plaintiff is the holder and equitable owner of the Note and Mortgage and has authority to enforce such documents. Furthermore, being the holder of a negotiable instrument is all that is necessary

for a party to have standing to enforce it and the mortgage Note is a negotiable instrument as defined by Florida Statute 673.1041(1)(c). As such, Plaintiff has standing to pursue this foreclosure action.

20. WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in its favor and against Defendant, and also respectfully requests that the Court award Plaintiff its attorneys' fees and costs incurred in bringing the lawsuit pursuant to the applicable provisions of the Note and Mortgage.

**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that a true and correct copy of the foregoing Motion for Summary Judgment was mailed to the following on this 4 day of March, 2011 to wit:

JESSICA CADWELL, C/O W. TRENT STEELE, ESQ., 8902 S.E. BRIDGE RD, HOBE SOUND, FL 33455

DOE, JOHN, [REDACTED]

DOE, JANE, [REDACTED]

By: [Signature]  
Danielle S. Bolton, Esq.  
FL Bar # 58248  
SHAPIRO & FISHMAN, LLP  
Attorneys for Plaintiff

[REDACTED]  
Telephone: [REDACTED]

Fax: [REDACTED]

09-148425

IN THE CIRCUIT OF THE 15th JUDICIAL CIRCUIT  
OF FLORIDA, IN AND FOR PALM BEACH COUNTY

Deutsche Bank National Trust Company, as  
Trustee for HarborView Mortgage Loan Trust  
Mortgage Loan Pass-Through Certificates,  
Series 2007-5,

Plaintiff,

-vs.-

Jessica Cadwell; et al.

Defendant(s).

Case #: 2008 CA 027495

Division #:

NO:

**AMENDED AFFIDAVIT OF PLAINTIFF'S COUNSEL**

STATE OF FLORIDA :  
: SS.  
COUNTY OF PALM BEACH :

BEFORE ME, the undersigned notary public, this date appeared your Affiant, personally known to me and having taken an oath, an associate member of the law firm of SHAPIRO & FISHMAN, LLP attorneys for the Plaintiff in the above referenced foreclosure action, and who would respectfully petition this Honorable Court to award attorney's fees pursuant to the applicable provisions of the mortgage being foreclosed, who deposes and says that the statements contained herein are true and correct and based upon affiant's personal knowledge, and the following has been, or is reasonably expected to be expended.

Plaintiff's contractual fee obligation for uncontested cases is \$1,300.00. In addition to its contractual fee obligation of \$1,300.00 for uncontested proceedings, Plaintiff's contractual fee includes \$125.00 per hour for contested foreclosure proceedings prior to April 12<sup>TH</sup> 2010. Plaintiff's contractual fee after April 12<sup>TH</sup> 2010 is \$175.00 per hour for contested foreclosure proceedings. Contested billing is as follows:

**\*SEE ATTACHED EXHIBIT "A"**

TOTAL CONTESTED HOURS:	8.5
CONTRACTUAL FEE (Uncontested)	\$1,300.00
CONTESTED FEE	\$1,387.50
TOTAL	\$2,687.50

Therefore, the undersigned counsel respectfully petitions the court for an award of attorney's fees in the amount of \$2,687.50.

SHAPIRO & FISHMAN, LLP  
Attorneys for Plaintiff



By: [Handwritten Signature]  
Danielle Stacy Bolton, Esq.  
FL Bar # 58248

Sworn to and subscribed before me this 3<sup>rd</sup> day of March, 2011. The undersigned notary public specifies that affiant's signature is the signature being notarized and that the affiant personally appeared before the notary public at the time of notarization. Affiant personally known.

[Handwritten Signature]  
Notary Public, State of Florida

My Commission Expires:  
09-148425











IN THE CIRCUIT COURT OF THE 15th JUDICIAL CIRCUIT  
OF FLORIDA, IN AND FOR PALM BEACH COUNTY

Deutsche Bank National Trust Company, as  
Trustee for HarborView Mortgage Loan Trust  
Mortgage Loan Pass-Through Certificates,  
Series 2007-5,

Plaintiff,

-vs.-

Jessica Cadwell

Defendant(s).

Case #: 2008 CA 027495

Division #:

**AMENDED AFFIDAVIT OF COSTS**

STATE OF FLORIDA :  
 : SS.  
COUNTY OF PALM BEACH :

BEFORE ME, the undersigned notary public, this date appeared Affiant, being personally known to me and having taken an oath, deposes and says:

1. That the Affiant is a practicing attorney of the law firm of SHAPIRO & FISHMAN, LLP, licensed to practice in Florida and is the attorney for the Plaintiff, Deutsche Bank National Trust Company, as Trustee for HarborView Mortgage Loan Trust Mortgage Loan Pass-Through Certificates, Series 2007-5, in this cause.

2. That the Plaintiff has expended the following sums as costs in this action:  
Title Report \$325.00

TOTAL

\$325.00

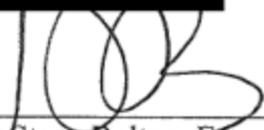
FURTHER AFFIANT SAYETH NAUGHT.

SHAPIRO & FISHMAN, LLP  
Attorneys for Plaintiff

[REDACTED]

Telephone: ([REDACTED])

[REDACTED]

By: 

Daniëlle Stacy Bolton, Esq.  
FL Bar # 58248

Sworn to and subscribed before me this 3<sup>rd</sup> day of March, 2011.

The undersigned notary public specifies that affiant's signature is the signature being notarized and that the affiant personally appeared before the notary public at the time of notarization. Affiant personally known.

  
Name of Notary:

09-148425



IN THE CIRCUIT OF THE 15th JUDICIAL CIRCUIT  
OF FLORIDA, IN AND FOR PALM BEACH COUNTY

Deutsche Bank National Trust Company, as  
Trustee for HarborView Mortgage Loan Trust  
Mortgage Loan Pass-Through Certificates,  
Series 2007-5,

Plaintiff,

-vs.-

Jessica Cadwell; et al.

Defendant(s).

Case #: 2008 CA 027495

Division #:

**CERTIFICATE OF COMPLIANCE WITH  
ADMINISTRATIVE ORDER 3.308**

The undersigned attorney certifies:

This action was filed before July 12, 2010 and compliance with Administrative Order  
3.308 was not ordered by the court.

Signed on 3/3/11.

SHAPIRO & FISHMAN, LLP  
Attorneys for Plaintiff



By: [Signature]  
Danielle Stacy Bolton, Esq.  
FL Bar # 58248

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the above and foregoing was mailed on this 4  
day of March, 2011, by 1st Class U.S. Mail to the following:

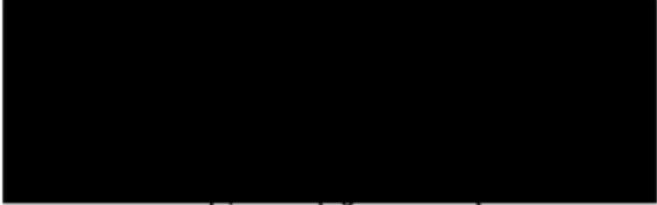
Jessica Cadwell, c/o W. Trent Steele, Esq., 

Doe, John,

Doe, Jane,



SHAPIRO & FISHMAN, LLP  
Attorneys for Plaintiff



By:   
Danielle Stacy Bolton, Esq.  
FL Bar # 58248

09-148425

IN THE CIRCUIT COURT OF THE 15th JUDICIAL CIRCUIT  
OF FLORIDA, IN AND FOR PALM BEACH COUNTY

Deutsche Bank National Trust Company, as  
Trustee for HarborView Mortgage Loan Trust  
Mortgage Loan Pass-Through Certificates, Series  
2007-5

Plaintiff,

-vs.-

Jessica Cadwell; et al.

Defendant(s).

Case #: 2008 CA 027495

**NOTICE OF FILING PLAINTIFF'S AFFIDAVIT OF INDEBTEDNESS**

PLAINTIFF, Deutsche Bank National Trust Company, as Trustee for HarborView  
Mortgage Loan Trust Mortgage Loan Pass-Through Certificates, Series 2007-5, hereby gives  
Notice of Filing its **Affidavit of Indebtedness**.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the above and foregoing Notice of Filing was  
mailed on this 14 day of March, 2011, by 1st Class U.S. Mail to the following:

Jessica Cadwell, c/o W. Trent Steele, Esq., [REDACTED]

Doe, John, [REDACTED]

Doe, Jane, [REDACTED]

SHAPIRO & FISHMAN, LLP  
Attorneys for Plaintiff

By: [Signature]  
Danielle S. Bolton, Esq.  
FL Bar # 58248

09-148425

EFTA00610687

IN THE CIRCUIT OF THE 15th JUDICIAL CIRCUIT  
OF FLORIDA, IN AND FOR PALM BEACH COUNTY

Deutsche Bank National Trust Company, as  
Trustee for HarborView Mortgage Loan Trust  
Mortgage Loan Pass-Through Certificates, Series  
2007-5,

Plaintiff,

-vs.-

Jessica Cadwell

Defendant(s).

CASE NO: 2008 CA 027495

**AFFIDAVIT OF INDEBTEDNESS**

STATE OF FLORIDA :  
 : SS.  
COUNTY OF DUVAL :

BEFORE ME, the undersigned authority, this date personally appeared  
CYNTHIA STEVENS who, being first duly sworn or affirmed, deposes and states:

1. Affiant has obtained personal knowledge of events described below through his/her review of business records during the normal course of business, and is competent to make this Affidavit.

2. It is the regular practice of American Home Mortgage Servicing, Inc. to record acts, transactions, payments, escrow account activity, disbursements, and events with respect to the mortgage. These records are prepared by persons with knowledge of, or from information transmitted from persons with knowledge of and at or near the time of the acts, transactions, payments, escrow account activity, disbursements, and events maintained in the ordinary course of regular business activity.

3. Plaintiff is the holder of the subject Mortgage Note and Mortgage, and has the right to enforce the same.

4. Prior to the filing of this action, Plaintiff acquired the right to enforce the Note and Mortgage from the party entitled to enforce the Note and Mortgage. The Plaintiff is the holder and equitable owner of the Note and Mortgage and has authority to enforce such documents. True and correct copies of the Note and Mortgage are attached hereto as **Exhibits A and B**, respectively.

5. All amounts charged to Defendant or collected from Defendant are for fees and costs authorized by and in conformity with paragraph 7(e) of the Note and paragraphs 14 and 22 of the Mortgage. True and correct copies of the Note and Mortgage are attached hereto as **Exhibits A and B**, respectively.

6. Defendant was provided with a Notice of Default as required under the terms of the Note and Mortgage. A true and accurate copy of the Notice of Default is attached hereto as **Exhibit C**.

7. All payments made by Defendant were applied and properly credited by Plaintiff. A true and accurate copy of the loan payment history is attached hereto as **Exhibit D**. The loan remains due for the December 1, 2007 payment and all payments thereafter.

8. That American Home Mortgage Servicing, Inc.'s records show the payment due December 1, 2007 and all payments thereafter have not been paid.

9. That the amount presently due upon said Note and Mortgage, as shown by the business record as of February 2, 2011, is as follows; to wit;

Principal Due on Note and Mortgage	\$366,757.39
Pre-Acceleration Late Charges:	\$587.60





























































































