

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

AMERICAN HOME MORTGAGE
SERVICING, INC.

CASE NO. 502008CA027495XXXMB

Plaintiffs,

vs.

JESSICA CADWELL

Defendant.

**DEFENDANT'S OBJECTION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Defendant JESSICA CADWELL files this objection to the plaintiff's motion for summary judgment currently set for April 20, 2010 and shows:

Introduction

In any summary judgment to foreclose an interest in a mortgage the plaintiff is "required to establish, through admissible evidence that it held the note and mortgage and so had standing to foreclose the mortgage before it would be entitled to summary judgment in its favor. Whether (the plaintiff) does so through evidence of a valid assignment, proof of purchase of the debt, or evidence of an effective transfer, it (is) nevertheless required to prove that it validly held the note and mortgage it sought to foreclose. *BAC Funding Consortium Inc. v. Jean-Jacques*, 2010 WL 476641 (Fla. 2d DCA Feb. 12, 2010). "Summary judgment is appropriate only upon record proof-not assumptions. Given the vastly increased number of foreclosure filings in Florida's courts over the last two years, which volume has taxed both litigants and the judicial system and increased the risk of paperwork errors, it is especially important that trial courts abide by the proper burdens of proof when considering a summary judgment motion in a foreclosure proceeding." *BAC Funding*, *supra* at 1.

In this summary judgment motion before the court, there are numerous “missing links” preventing the defendant (and this court) from properly considering this motion. Listed below are some of the most egregious missing links.

Discovery In This Case Is Ongoing

On October 10, 2008, defendant filed a request for production.¹ On February 11, 2010, defendant served plaintiff with a Request for Admissions and a Request to Produce in this matter requesting numerous additional documents from plaintiff critical to defendant’s defense. On that same date, defendant also served a “Notice of Borrower’s Request for Plaintiff’s Disclosure for Mediation” for the same documents suggested by the Supreme Court of Florida in its *Final Report and Recommendations on Residential Mortgage Foreclosure Cases*. In that *Notice*, the defendant requested the following four items from the defendant:

1. Documentary evidence that the plaintiff is the owner and holder in due course of the note and mortgage sued upon.
2. A history showing the application of all payments by the borrower during the life of the loan.
3. A statement of the plaintiff’s position on the present net value of the mortgage loan; and
4. The most current appraisal of the property available to the plaintiff.

Plaintiff has **never** responded to nor objected to **any** of these discovery requests. Defendant submitted a motion and order compelling discovery of the items requested in the Request for Admissions and Request to Produce pursuant to Admin. Order 3.010-2/97 on March 31, 2010 but an Order Compelling Discovery has not been entered.

Plaintiff is a securitized trust and standing/real-party-in-interest issues are very relevant to the case. Without this information concerning the plaintiffs alleged status as a “holder in due course” of the note and mortgage (which the Florida Supreme Court apparently believes is relevant to any resolution of these foreclosure cases, thus #1 above), the defendant cannot

¹ Defendant had been pro se in this matter until February 10, 2010.

adequately prepare for the defense of this motion for summary judgment. Defendant requests that the court continue this matter and not allow plaintiffs to proceed with the summary judgment motion until they produce the items requested and respond to the requests for admissions. "This court has held on many occasions that 'a court should not enter summary judgment when the opposing party has not completed discovery'." *Fleet Finance & Mortgage v. Carey*, 707 So.2d 949 (Fla. 4th DCA 1998). *Brandauer v. Publix Supermarkets, Inc.*, 657 So.2d 932 (Fla. 2d DCA 1995).

Mediation Has Been Requested But Has Not Occurred

On February 11, 2010 defendant served a "Notice of Borrower's Request to Participate in RMFM Program" as suggested by the Supreme Court of Florida in its *Final Report and Recommendations on Residential Mortgage Foreclosure Cases*. To date, mediation has not occurred. Defendant believes that it is patently unfair to allow the plaintiff to proceed with summary judgment without even attempting to mediate this matter.

Plaintiff Never Produced the Original Promissory Note nor Proved Its Right to Enforce the Note Under §673.3091(Fla.Stat.)

Plaintiff alleged in its complaint (Count III, para. 22) that "the Note executed by JESSICA CADWELL has been lost or destroyed." The complaint goes on to state that "plaintiff is unaware of the time and manner of such loss or destruction" (para. 23). Plaintiff has never produced the original note and has never submitted any affidavit required by §673.3091(Fla.Stat.) or a certified copy of the note or mortgage to support enforcement of a lost note under §673.3091(Fla.Stat.). (Under Florida law, mortgagee reestablished lost note associated with mortgage, and thus could enforce note, only where mortgagee provided sworn affidavit claiming that it was in possession of note and was entitled to enforce it when loss of possession occurred, loss of note was not result of transfer or lawful seizure, and mortgagee could not reasonably obtain possession of note because of loss. *Cherry v. Chase Manhattan*

Mortg. Corp., 190 F.Supp.2d 1330 (M.D.Fla.2002). Even if plaintiff attempts to produce the note or affidavit of lost note at the summary judgment hearing, defendant objects to same since the note would need to be authenticated and no such document [sworn or certified copy as required by Fla.R.Civ.P. 1.510(e)] was filed in this case at least 20 days before the summary judgment hearing as required by Fla.R.Civ.P. 1.510(c).

Plaintiff Has Never Authenticated the Alleged Assignment of Mortgage and the Assignment, Even If Authentic Is Not Valid

The plaintiff, in support of its February 18, 2010 *Motion to Substitute Party Plaintiff*, filed an unsubstantiated, unrecorded, and uncertified copy of an Assignment of Mortgage. Since then the plaintiff has done nothing to authenticate the Assignment. Fla.R.Civ.P. 1.510(c) specifically requires that any "summary judgment evidence" upon which movant relies must be admissible as evidence. The Assignment of Mortgage is pure hearsay. Furthermore, the Assignment was signed by someone named "Tonya Hopkins" as "Attorney in Fact" for American Home Mortgage Servicing Inc. but no power of attorney or other document is attached to the Assignment to confirm that Tonya Hopkins is in fact authorized to sign any documents on behalf of American Home Mortgage and the jurat is silent as to effectiveness of the power of attorney.²

²Section 709.08 (Fla.Stat.) requires

(c) An affidavit executed by the attorney in fact must state where the principal is domiciled, that the principal is not deceased, and that there has been no revocation, partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the durable power of attorney, or suspension by initiation of proceedings to determine incapacity or to appoint a guardian of the durable power of attorney at the time the power of attorney is exercised. A written affidavit executed by the attorney in fact under this paragraph may, but need not, be in the following form:

STATE OF _____
COUNTY OF _____

Before me, the undersigned authority, personally appeared (attorney in fact) ("Affiant"), who swore or affirmed that:

1. Affiant is the attorney in fact named in the Durable Power of Attorney executed by (principal) ("Principal") on (date) .
2. This Durable Power of Attorney is currently exercisable by Affiant. The principal is domiciled in (insert name of state, territory, or foreign country) .
3. To the best of the Affiant's knowledge after diligent search and inquiry:
 - a. The Principal is not deceased; and
 - b. There has been no revocation, partial or complete termination by

Plaintiff Has Not Demonstrated That It Is a Holder In Due Course of the Note

A genuine issue of material fact exists concerning the plaintiff's standing in this matter as the holder in due course of the note at issue because the promissory note attached to the plaintiff's complaint shows that it is made payable to someone other than the plaintiff (American Brokers Conduit). Although page 4 of the note has a stamped endorsement in blank, the endorsement is signed by "Renee Bury" as "Asst. Secretary," of American Brokers Conduit. Assignments of notes and mortgages must be made by a "president, any vice president or Chief Executive Officer." §692.01 (Fla.Stat.). *DGG Development Corp. v. Estate of Capponi*, 983 So.2d 1232 (Fla. 5th DCA 2008); *Florida First Nat. Bank of Jacksonville v. Dent*, 350 So.2d 481 (Fla. 1st DCA 1977).

Furthermore, the plaintiff has never shown exactly how it became a holder in due course of the note after it was endorsed by American Brokers Conduit. "A creditor seeking to recover on an obligation has the burden of proof to show that it has the right to seek collection on the debt because it owns the consumer's obligation or State law gives it the right to sue on behalf of the owner....Case law clearly demonstrates that a collector must show a continuous unbroken chain of assignments from the original creditor to the entity collecting on the debt." *Palisades Collection LLC v. Thomas*, 16 Fla. L.Weekly Supp. 783b (17th Judicial Circuit, April 4, 2009).

adjudication of incapacity or by the occurrence of an event referenced in the durable power of attorney, or suspension by initiation of proceedings to determine incapacity or to appoint a guardian.
4. Affiant agrees not to exercise any powers granted by the Durable Power of Attorney if Affiant attains knowledge that it has been revoked, partially or completely terminated, suspended, or is no longer valid because of the death or adjudication of incapacity of the Principal.

(Affiant)

Sworn to (or affirmed) and subscribed before me this ____ day of (month) , (year) , by (name of person making statement)

(Signature of Notary Public-State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification (Type of Identification Produced)

In this case, the plaintiff has never explained the circumstances under which American Brokers Conduit transferred its interest in the note and mortgage to American Home Mortgage Servicing. While American Home Mortgage Servicing allegedly transferred its interest in the mortgage to the plaintiff, the plaintiff never explains how and when it became a holder in due course of the promissory note pursuant to §673.3021(Fla.Stat.).³

Plaintiff Has Not Shown It Provided a Notice of Acceleration

A genuine issue of material fact also exists concerning the failure of the plaintiff (or its predecessor in interest) to provide the notice of acceleration required by paragraph 22 of the mortgage. Nothing in the bank's complaint or affidavits indicate that the bank gave the defendant the notice required by the mortgage and the defendant has filed an affidavit in opposition to the motion for summary judgment expressly denying that she received such notice. *Frost v. Regions Bank*, 15 So.3d 905 (Fla. 4th DCA 2009) (Reversible error to grant summary judgment where lender did not expressly address the notice of acceleration issue in its motion for summary judgment and affidavits.); *Leal v. Deutsche Bank*, 21 So.3d 907(Fla. 3d DCA 2009) (Reversible error to grant summary judgment where lender did not address issue of notice of acceleration)

The Affidavit In Support Of Motion For Final Summary Judgment And Supporting Affidavits In Support Of Motion For Summary Judgment Are Insufficient.

The "records" defined in paragraph 3 of the "Affidavit" upon which the affiant relied are

³ "...the term "holder in due course" means the holder of an instrument if:

(a) 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

(b) The holder took the instrument:

1. For value;

2. In good faith;

3. 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;

4. Without notice that the instrument contains an unauthorized signature or has been altered;

5. Without notice of any claim to the instrument described in s. 673.3061; and

6. Without notice that any party has a defense or claim in recoupment described in s. 673.3051(1)."

not attached to the affidavit and efforts by the defendants to obtain these records by a request for production have been thwarted. *Candler Holdings Ltd. v. Watch Omega Holdings Ltd.*, 947 So.2d 1231 (Fla. 1st DCA 2007) (Affidavit based on review of certain records was insufficient to support entry of summary judgment where records upon which affidavit was based were not attached to affidavit).

The “*corporate resolution*” allegedly giving the affiant the authority to sign “as an officer” for the plaintiff is not attached to the affidavit.

The affiant claims to be the “Assistant Secretary” for the plaintiff’s predecessor in interest (American Home Mortgage Servicing, Inc.) but has (sic) “corporate resolution” to sign as an officer of the current plaintiff, Deutsche Bank, who in turn is the trustee for the Harbor View Mortgage Loan Trust which in turn is the successor in interest to Option One Mortgage Corporation which presumably obtained the defendant’s note and mortgage from the originating lender, American Brokers Conduit. Nevertheless, the affiant never explains or discusses all of these assignments and transfers and how he would have had access to the corporate books and records of any of the plaintiff’s numerous predecessors in interest. *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). *Wms. v. Henderson*, 779 So. 2d 450 (Fla. 2d DCA 2000), *First Mortg. Investors v. Blvd.Nat.Bank of Miami*, 327 So. 2d 830 (Fla 3d DCA 1976).

Also, the jurat at the end of the affidavit is not in accordance with §117.05(13(a) in that the notary does not name the affiant, nor does she indicate that the affiant is signing in a representative capacity. Accordingly, the affidavit in support of the motion for summary judgment should be stricken.

The Plaintiff As Trustee Lacked the Legal Capacity to Take an Assignment of a Non-Performing/Non-Conforming Loan In Default.

The plaintiff is the trustee of a securitized trust, governed by a Pooling and Servicing Agreement (PSA) that sets forth the powers and limitations of the plaintiff. The PSA sets forth all the rights, powers, obligations, and duties of the Trust. The four corners of the pooling and servicing agreement bind the Trust to the only actions which can lawfully be taken with respect to the administration of its assets. Further, the four corners of the PSA establish the only mechanism by which this New York trust may acquire, transfer, dispose of, or sell any asset. The pooling and servicing agreement is filed of record with the Securities and Exchange Commission and is a matter of public record. <http://www.secinfo.com/d12TC3.u166b.d.htm#1stPage>

The terms of the pooling and servicing agreement are filed under oath with the SEC and the parties to the pooling and servicing agreement have represented under oath to the Securities and Exchange Commission and its investors, certificate holders, and counter parties, that the entire agreement of the entities, parties, agents, servants, with respect to the Trust are contained within the pooling and servicing agreement and its exhibits.

Section 9.02 of the PSA titled "**Prohibited Transactions and Activities**" prohibits the Trust from acquiring the subject mortgage in this action because Section 9.02 states:

None of the Depositor, the Servicer, the Securities Administrator, the Master Servicer or the Trustee shall sell, dispose of or substitute for any of the Mortgage Loans (except in connection with (i) the foreclosure of a Mortgage Loan, including but not limited to, the acquisition or sale of a Mortgaged Property

acquired by deed in lieu of foreclosure, (ii) the bankruptcy of REMIC I, (iii) the termination of REMIC I pursuant to Article X of this Agreement, (iv) a substitution pursuant to Article II of this Agreement or (v) a purchase of Mortgage Loans pursuant to Article II of this Agreement), nor acquire any assets for any Trust REMIC (other than REO Property acquired in respect of a defaulted Mortgage Loan), nor sell or dispose of any investments in the Collection Account or the Distribution Account for gain, **nor accept any contributions to any Trust REMIC after the Closing Date (other than a Qualified Substitute Mortgage Loan delivered in accordance with Section 2.03), unless it has received an Opinion of Counsel**, addressed to the Trustee and the Securities Administrator (at the expense of the party seeking to cause such sale, disposition, substitution, acquisition or contribution but in no event at the expense of the Trustee) that such sale, disposition, substitution, acquisition or contribution will not (a) affect adversely the status of any Trust REMIC as a REMIC or (b) cause any Trust REMIC to be subject to a tax on "prohibited transactions" or "contributions" pursuant to the REMIC Provisions.

a. The subject mortgage was not original or qualified for transfer to a Trustee.

The trust of which Plaintiff is or may be trustee is what is known as a Real Estate Mortgage Investment Conduit (REMIC). See 26 USC §860D. Essentially, 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. These securitized trusts are subject to strict regulation to qualify for favorable tax treatment as a REMIC under the IRS Code. 28 USC §§ 860A-860G. The REMIC provisions of the IRS tax code provide explicit instruction with respect to the transfer of mortgage assets into a trust to receive this special tax status pursuant to the IRS tax code. Further, the REMIC portion of the IRS tax code defines the activities that disqualify a trust for REMIC tax treatment. Pursuant to the terms of the pooling and servicing agreement this Trust cannot be the owner of Defendant's loan.

The subject mortgage was not transferred to the trustee until after the foreclosure action had been filed. The complaint in this case was filed on September 8, 2008 and the alleged Assignment of Mortgage was not executed until February 4, 2010. The subject mortgage was not originally part of the mortgage pool and due to the strict REMIC rules, the only way the

trustee could acquire the subject mortgage past the closing date of the trust (7-12-2007)⁴ was (1) to obtain an "Opinion of Counsel", or (2) as a "qualified substitute mortgage" pursuant the REMIC Code as incorporated into the PSA.

A "qualified substitute mortgage" is defined in the REMIC code (26 U.S.C § 860G) and this definition is incorporated into the PSA.

"Qualified Substitute Mortgage Loan": A mortgage loan substituted for a Deleted Mortgage Loan pursuant to the terms of this Agreement which must, on the date of such substitution, (i) have an outstanding principal balance, after application of all scheduled payments of principal and interest due during or prior to the month of substitution, not in excess of the Scheduled Principal Balance of the Deleted Mortgage Loan as of the Due Date in the calendar month during which the substitution occurs, (ii) have a Mortgage Rate not less than (and not more than one percentage point in excess of) the Mortgage Rate of the Deleted Mortgage Loan, (iii) if the mortgage loan is an Adjustable Rate Mortgage Loan, have a Maximum Mortgage Rate not less than the Maximum Mortgage Rate on the Deleted Mortgage Loan, (iv) if the mortgage loan is an Adjustable Rate Mortgage Loan, have a Minimum Mortgage Rate not less than the Minimum Mortgage Rate of the Deleted Mortgage Loan, (v) if the mortgage loan is an Adjustable Rate Mortgage Loan, have a Gross Margin equal to the Gross Margin of the Deleted Mortgage Loan, (vi) if the mortgage loan is an Adjustable Rate Mortgage Loan, have a next Adjustment Date not more than two months later than the next Adjustment Date on the Deleted Mortgage Loan, (vii) have a remaining term to maturity not greater than (and not more than one year less than) that of the Deleted Mortgage Loan, (viii) have the same Due Date as the Due Date on the Deleted Mortgage Loan, (ix) have a Loan-to-Value Ratio as of the date of substitution equal to or lower than the Loan-to-Value Ratio of the Deleted Mortgage Loan as of such date, (x) be secured by the same lien priority on the related Mortgaged Property as the Deleted Loan, (xi) **have a credit grade at least equal to the credit grading assigned on the Deleted Mortgage Loan, (xii) be a "qualified mortgage" as defined in the REMIC Provisions** and (xiii) conform to each representation and warranty set forth in Section 6 of the Mortgage Loan Purchase Agreement applicable to the Deleted Mortgage Loan. In the event that one or more mortgage loans are substituted for one or more Deleted Mortgage Loans, the amounts described in clause (i) hereof shall be determined on the basis of aggregate principal balances, the Mortgage Rates described in clause (ii) hereof shall be determined on the basis of weighted average Mortgage Rates, the terms described in clause (vii) hereof shall be determined on the basis of weighted average remaining term to maturity, the Loan-to-Value Ratios described in clause (ix) hereof shall be satisfied as to each such mortgage loan, the credit grades described in clause (x) hereof shall be

⁴ Article 1, Section 1.01 Pooling and Servicing Agreement, Definitions, "Closing Date"

satisfied as to each such mortgage loan and, except to the extent otherwise provided in this sentence, the representations and warranties described in clause (xii) hereof must be satisfied as to each Qualified Substitute Mortgage Loan or in the aggregate, as the case may be.”

According to Plaintiff’s complaint, the subject mortgage was in default since December 7, 2007, long before the assignment in February, 2010 so that the mortgage loan did not meet the “credit grade” requirement, and was not a “qualified mortgage.” REMIC regulations issued by the IRS state:

Defective obligations—

(1) Defective obligation defined. For purposes of sections 860G(a)(4)(B)(ii) and 860F(a)(2) [26 USCS §§ 860G(a)(4)(B)(ii) and 860F(a)(2)], **a defective obligation is a mortgage subject to any of the following defects:**

(i) The mortgage is in default, or a default with respect to the mortgage is reasonably foreseeable.

(2) Effect of discovery of defect. If a REMIC discovers that an obligation is a defective obligation, and if the defect is one that, had it been discovered before the startup day, would have prevented the obligation from being a qualified mortgage, then, **unless the REMIC either causes the defect to be cured or disposes of the defective obligation within 90 days of discovering the defect, the obligation ceases to be a qualified mortgage at the end of that 90 day period.**

26 CFR 1.860G-2(f)

The subject mortgage in default was a “defective obligation,” not a qualified mortgage and clearly could not have been a “qualified substitute mortgage” when allegedly assigned to Plaintiff.

b. The subject mortgage is not (Real Estate Owned) REO property.

“REO property” is defined in the PSA⁵ as follows:

“Mortgaged Property acquired by the Servicer on behalf of the Trust Fund through foreclosure or deed-in-lieu of foreclosure in accordance with the applicable provisions of the Servicing Agreement.”

⁵ Article 1, Section 1.01 Definitions “REO Property”

REO property is Trust property acquired upon the default of a mortgage loan that is already a part of the mortgage pool. Accordingly, the defendant's property is not REO property.

c. There is no Opinion of Counsel.

A REMIC shall not generally be subject to taxation and pursuant to the PSA, an Opinion of Counsel is required before the trustee could legally acquire the defendant's loan by assignment. 26 USCS § 860A. Section 2.03(B) states:

"the Seller shall obtain at its own expense and deliver to the Trustee an **Opinion of Counsel to the effect that such substitution will not cause (a) any federal tax to be imposed on any Trust REMIC, including without limitation, any federal tax imposed on "prohibited transactions" under Section 860F(a)(1) of the Code or on "contributions after the startup date" under Section 860G(d)(1) of the Code, or (b) any Trust REMIC to fail to qualify as a REMIC at any time that any Certificate is outstanding."**

The PSA defines "Opinion of Counsel" as follows:

"Opinion of Counsel": A written opinion of counsel, who may, without limitation, be salaried counsel for the Depositor, the Servicer, the Securities Administrator or the Master Servicer, acceptable to the Trustee, except that any opinion of counsel relating to (a) the qualification of any REMIC as a REMIC or (b) compliance with the REMIC Provisions must be an **opinion of Independent counsel**; provided however, any Opinion of Counsel provided by the Servicer pursuant to clause (b) above with respect to the continued eligibility of modified Mortgage Loans may be provided by internal counsel, provided that, the delivery of such Opinion of Counsel shall not release the Servicer from any of its obligations hereunder and the Servicer shall be responsible for such contemplated actions or inaction, as the case may be, to the extent it conflicts with the terms of this Agreement.

In this case there could be no opinion of independent counsel because the subject mortgage did not qualify as "foreclosure property" or a "qualified substitute mortgage" and was a "defective obligation" under the REMIC tax provisions.

Without such Opinion the transfer of the subject mortgage to the trustee subjects the Trust to be subject to a tax on prohibited transactions or contributions pursuant to the REMIC Provisions.

As explained below, "Foreclosure property" is a permitted investment but the property must have first been included in the Trust as a qualified mortgage. 26 U.S.C. 860F.

The subject mortgage was not "foreclosure property."

The REMIC Code defines "Foreclosure property," as follows:

"Foreclosure property" means property—

(A) which would be foreclosure property under section 856(e) [26 USCS § 856(e)] (without regard to paragraph (5) thereof) if acquired by a real estate investment trust, and

(B) Which is acquired in connection with the default or imminent default of a qualified mortgage held by the REMIC. 26 USCS § 860G

The term "foreclosure property" does not include property acquired by the real estate investment trust as a result of indebtedness arising from the sale or other disposition of property of the trust described in section 1221(a)(1) [26 USCS § 1221(a)(1)] which was not originally acquired as foreclosure property." 26 USCS § 856(e)

"Property is not eligible for the election to be treated as foreclosure property if the loan or lease with respect to which the default occurs (or is imminent) was made or entered into (or the lease or indebtedness was acquired) by the trust with an intent to evict or foreclose, or when the trust knew or had reason to know that default would occur ("improper knowledge")". 26 CFR 1.856-6.

In this case, the action was filed before transfer to Plaintiff. This clearly indicates that the Plaintiff acquired the indebtedness with the intent to foreclose upon the mortgage.

Plaintiff had no power to acquire or take assignment of the subject mortgage because it is a prohibited transaction.

Section 9.01(b) of the PSA states:

The Closing Date is hereby designated as the "Startup Day" of each Trust REMIC within the meaning of Section 860G(a)(9) of the Code.

Following the Startup Day, neither the Securities Administrator nor the Trustee shall accept any contributions of assets to any Trust REMIC other than in connection with any Qualified Substitute Mortgage Loan delivered

in accordance with Section 2.03 unless it shall have received an Opinion of Counsel to the effect that the inclusion of such assets in the Trust Fund will not cause the related REMIC to fail to qualify as a REMIC at any time that any Certificates are outstanding or subject such REMIC to any tax under the REMIC Provisions or other applicable provisions of federal, state and local law or ordinances.

- d. **The PSA requires the original lender, American Brokers Conduit, to buy back the subject Mortgage when the note is missing.**

Plaintiff could not have accepted the subject mortgage into the trust without the original note. The note in the instant case was lost or destroyed at some undetermined point in time.

Section 2.03(b) of the PSA *Repurchase or Substitution of Mortgage Loans* states:

“the Trustee shall promptly notify the Seller and the Servicer of such defect, missing document or breach and request that the Seller deliver such missing document, cure such defect or breach within ninety (90) days from the date the Seller was notified of such missing document, defect or breach, and if the Seller does not deliver such missing document or cure such defect or breach in all material respects during such period, **the Trustee shall enforce the obligations of the Seller under the Mortgage Loan Purchase Agreement to repurchase such Mortgage Loan from REMIC I at the Purchase Price within ninety (90) days after the date on which the Seller was notified of such missing document,** defect or breach, if and to the extent that the Seller is obligated to do so under the Mortgage Loan Purchase Agreement.”

- e. **The Plaintiff is a securitized trust in this case and the purported assignment is void under controlling New York Law**

Section 12.04 of the Pooling and Servicing Agreement states:

“THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, WITHOUT REFERENCE TO ITS CONFLICT OF LAW PROVISIONS (OTHER THAN SECTION 5-1401 OF THE GENERAL OBLIGATIONS LAW), AND THE OBLIGATIONS, RIGHTS AND REMEDIES OF THE PARTIES HEREUNDER SHALL BE DETERMINED IN ACCORDANCE WITH SUCH LAWS..”

New York Trust law says every sale, conveyance or other act of the trustee in contravention of the trust is void. “ NY CLS EPTL § 7-2.4, Application of Muratori, 183 Misc. 967, 970 (N.Y. Sup. Ct. 1944) *See also Dye v Lewis* (1971) 67 Misc 2d 426, 324 NYS2d 172, mod on other grounds (1972, 4th Dept) 39 App Div 2d 828, 332 NYS2d 968. (The authority of a trustee to whom a mortgage had been delivered under a trust indenture was subject to any

limitations imposed by the trust instrument, and every act in contravention of the trust was void.)

The Plaintiff has not provided a Power of Attorney to this court. Under New York property law, for the Plaintiff to receive a proper assignment of a mortgage by an authorized agent, a power of attorney is necessary to demonstrate how the agent is vested with authority to assign the mortgage. Wells Fargo Bank, N.A. v. Farmer, 2008 NY Slip Op 51133U (N.Y. Sup. Ct. 2008); Deutsche Bank Natl. Trust Co. v. Clouden, 2007 NY Slip Op 51767U, 5 (N.Y. Sup. Ct. 2007); U.S. Bank Natl. Assn. v. Bernard, 2008 NY Slip Op 50247U, 3 (N.Y. Sup. Ct. 2008); HSBC Bank USA, N.A. v. Yeasmin, 2008 NY Slip Op 50924U, 3 (N.Y. Sup. Ct. 2008). The Plaintiff has not provided a valid Power of Attorney to this court showing the signer of the subject assignment was vested with authority to assign the subject mortgage.

Furthermore, the assignment of the mortgage without having possession of the original note is a legal nullity. To constitute a valid assignment there must be a perfected transaction between the parties intended to vest in the assignee a present right in the thing assigned. Donovan v. Middlebrook, 95 A.D. 365, 367-368 (N.Y. App. Div. 1904).

“Invalidity at law imports nothing more than that a mortgage of property thereafter to be acquired is ineffectual as a grant to pass the legal title. A court of equity, in giving effect to such a provision, does not put itself in conflict with that principle. It does not hold that a conveyance of that which does not exist operates as a present transfer in equity, any more than it does in law.” Kribbs v. Alford, 120 N.Y. 519 (N.Y. 1890).

A transfer of the mortgage without the debt is a nullity and no interest is acquired by it. “It thus appears that the right of the plaintiff to foreclose dependent upon his acquiring a title to the bond to secure which the mortgage was given.” Manne v. Carlson, 49 A.D. 276, 278 (N.Y. App. Div. 1900) citing Merritt v. Bartholick (36 N.Y. 44). See also Kluge v Fugazy, 145 A.D.2d 537, 538, 536 N.Y.S.2d 92 (2d Dept 1988), (“foreclosure of a mortgage may not be brought by

one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity.").

The assignment by a mortgagee of the mortgage lien in the land, without an assignment of the debt, is considered in law as a nullity. Flyer v. Sullivan, 284 A.D. 697, 698 (N.Y. App. Div. 1954). An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity. Carpenter v. Longan, 83 U.S. 271, 274 (U.S. 1873).

The reasonableness of Plaintiff's attorney's fees has not been proven

Florida has a long standing practice of requiring testimony of expert fee witnesses to establish the reasonableness of attorney's fees. *Crittenden Orange Blossom Fruit v. Stone*, 514 So.2d 351, 352-53(Fla. 1987) ("[I]t is well settled that the testimony of an expert witness concerning a reasonable attorney fee is necessary to support the establishment of the fee.") "At a minimum, an award for attorney's fees requires a predicate of substantial competent evidence in the form of testimony by the attorney performing the services and by an expert as to the value of those services." *Pridgen v. Agoado*, 901 So.2d 961, 962 quoting *Cooper v. Cooper*, 406 So.2d 1223, 1224 (Fla. 4th DCA 1981). See also, *Snow v. Harlan Bakeries, Inc.*, 932 So.2d 411 (Fla. 2nd DCA 2006). While there was a brief period during 2002 when the Fourth District Court of Appeal wanted to do away with the necessity of expert witness testimony in attorney's fee award [*Island Hoppers Ltd. v. Keith*, 820 So.2d 967 (Fla. 4th DCA 2002)], the Fourth quickly retreated from that position [*Rakusin v. Christiansen & Jacknin, P.A.*, 863 So.2d 442 (Fla. 4th DCA 2003)].

The failure of the Plaintiff to present any such expert testimony requires the denial of the award of attorney's fees to the Plaintiff's attorney.

The Plaintiff's Affidavit of Costs is Similarly Flawed

Counsel for plaintiff signed an affidavit under oath swearing that the plaintiff has incurred no costs in this matter. While defendant will stipulate to this amount, defendant would

point out that this is yet another example of why a summary judgment in this case should not be granted. Accuracy and honesty under oath have not been always possible given the “vastly increased number of foreclosure filings” in Florida as described in the *Jean-Jacques* case cited at the outset of this pleading.

WHEREFORE, defendant request that this court prohibit the hearing on the motion for summary judgment to proceed until such time as the plaintiff fully responds to all of defendant's discovery. Alternatively, defendant requests that this court deny the motion for summary judgment for the grounds stated above. Defendants further request attorney's fees and costs for the preparation of the objection to plaintiff's motion for summary judgment.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy hereof has been furnished to Luciana Ugarte, Esq., Shapiro & Fishman, LLP, 2424 North Federal Highway, Suite 360, Boca Raton, Florida 33431 by mail on April 8, 2010

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