

EXHIBIT 3

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.

**ORDER GRANTING DEFENDANTS' AMENDED MOTION FOR SUMMARY
JUDGMENT, MOTION TO STRIKE AFFIDAVIT OF STEVEN BRAND AND
MOTION TO STRIKE NOTICE OF HEARING AND
DENYING PLAINTIFF'S MOTION TO CONTINUE HEARING**

THIS CAUSE came on to be heard before the Court on August 14, 2007 on the following Motions: (1) Defendants' Amended Motion for Summary Judgment; (2) Defendant's Motion to Strike Affidavit of Steve Brand; (3) Plaintiff's Motion to Continue Hearing and Notice of Same; and (4) Defendants' Motion to Strike Notice of Hearing and Objection to Motion to Continue Hearing on Defendants' Motion for Summary Judgment. The Court has considered the pleadings, heard arguments of counsel, and is otherwise fully advised in the premises. The Court finds as follows:

1. This mortgage foreclosure action was commenced in September, 2004 with the filing of a mortgage foreclosure complaint and Notice of *Lis Pendens* by MTGLQ INVESTORS, LLP, the predecessor in interest to current Plaintiff AMERICAN

RESIDENTIAL EQUITIES, XXXXI, LLC (ARE). The Defendants, JOHN and DEMETRIA KOHN, moved for summary judgment arguing neither MTGLQ nor ARE owned the Note and Mortgage when the action was commenced. In response thereto, ARE filed the Affidavit of Steven Brand, an employee of the originating lender, First NLC Services, LLC, (First NLC) in which Mr. Brand maintained that while no legal assignment was made by First NLC to MTGLQ, an equitable assignment occurred prior to the foreclosure being filed and that this equitable assignment was supported by consideration.

2. At deposition, Mr. Brand admitted, in contrast to the statements made in his Affidavit, that he had no personal knowledge as to whether the Note and Mortgage were sold to MTGLQ or whether any consideration was paid by MTGLQ to First NLC, and also admitted he had no knowledge as to whether the loan documents were physically transferred to MTGLQ. Rather, Mr. Brand testified First NLC sold the Note and Mortgage to Goldman Sachs, an entity not before the Court. Mr. Brand's deposition testimony confirmed his Affidavit was not based upon personal knowledge and confirmed he was not competent to testify to the matters stated therein, as required by Rule 1.510 (e), Florida Rules of Civil Procedure. Accordingly, Mr. Brand's Affidavit as offered by Plaintiff is properly stricken by the Court.

3. Since no evidence was offered confirming an equitable assignment occurred, the only legal assignment giving standing to either MTGLQ or ARE is the assignment from First NLC to ARE dated December 14, 2004, and recorded at Book 12248, Page 1243 of the Official Records of Duval County, a date after the commencement of this action.

4. Based upon the record evidence before the Court, neither ARE nor MTGLQ had standing when the action was commenced and there are no genuine issues of material fact. The KOHNS are therefore 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).

5. The Court has considered Plaintiff's Motion to Continue and Defendants' Objection to Motion to Continue, and finds this action has been pending, at the time of hearing, for almost three years. While Plaintiff asks for more time, arguing it has issued subpoenas attempting to locate more information demonstrating it had standing to sue Defendants, the Court notes almost two months have passed at the time of hearing since Plaintiff was aware its own Affiant, Mr. Brand, confirmed the originating lender did not sell the subject Note and Mortgage to MTGLQ, as alleged in the affidavit, but to a non-party, Goldman Sachs. Nothing was submitted by Plaintiff indicating what evidence it hoped to find in discovery that would otherwise contradict testimony offered by its Affiant, or that this evidence would be material on the issue of standing. Defendants' Amended Motion for Summary Judgment was therefore properly considered by the Court. See, Colby v. Ellis, 562 So.2d 356 (Fla. 2d DCA 1990).

It is, therefore, ORDERED AND ADJUDGED:

1. Defendants' Amended Motion for Summary Judgment is GRANTED and Summary Final Judgment is hereby entered in favor of Defendants. Plaintiff ARE shall take nothing by this action, and the Defendants shall go hence without day.

2. Defendants' Motion to Strike Affidavit of Steven BRAND is GRANTED.

3. Plaintiff's Motion to Continue Hearing on Defendants' Motion for Summary Judgment is DENIED. Defendants' Motion to Strike Notice of Hearing and Objection to Motion to Continue Hearing on Defendants' Motion for Summary Judgment is GRANTED.

DONE AND ORDERED in Chambers, at Jacksonville, Duval County, this _____ day of October, 2007.

ORDER ENTERED

~~OCT 16 2007~~

Circuit Court Judge

/s/ CHARLES O. MITCHELL, JR.

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IN THE CIRCUIT COURT OF THE
4TH JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, FLORIDA
CASE NO. 16-2004-CA-5879
DIV: CV-F

AMERICAN RESIDENTIAL EQUITIES,
XXXI, LLC,

Plaintiff,

v.

JOHN C. KOHN, JR.; DEMETRIA L.
KOHN, et al.,

Defendants.

COPY

AMERICAN RESIDENTIAL EQUITIES,
XXXI, LLC,

Plaintiff,

v.

TICOR TITLE INSURANCE COMPANY OF
FLORIDA f/k/a AMERICAN PIONEER TITLE
INSURANCE COMPANY, MTGLQ INVESTORS,
LLC, and OCWEN FEDERAL BANK, FSB,

Defendants.

888 S.E. 3rd Avenue
Suite 201
Fort Lauderdale, Florida
June 19, 2007
1:04 p.m.

DEPOSITION OF STEVEN R. BRAND

Taken before Lynda Royer, R.P.R. and
Notary Public in and for the State of Florida at
Large, pursuant to Notice of Taking Deposition filed
in the above cause.

1 **Can you trace the connection between**
2 **Goldman Sachs Mortgage and MTGLQ?**

3 A Okay. No, other than it must be an
4 affiliated company of Goldman Sachs. We deal only
5 with the main investor, but each sale may go to
6 different affiliated companies, servicing companies.
7 I mean, I'm not aware about how that works on an
8 individual sales basis.

9 Q Well, then why on paragraph three of your
10 affidavit would you have written MTGLQ Investors, as
11 opposed to Goldman Sachs Mortgage which the document
12 indicates?

13 A I did not research that part. That was
14 added into the document. I presume again that must
15 be the name of the affiliated company to which this
16 loan, pool of loans were sold to.

17 Q Well, did you participate in the research
18 that linked MTGLQ to GSM?

19 A No. My research was on the dates only.

20 Q Then why would you swear to the truth of
21 paragraph three?

22 A Again, I'm not familiar with all the
23 different affiliated companies with which --
24 servicing companies to which each sales transaction
25 goes to. That is executed by our legal department,

1 and again that could have been the one related to
2 that sale.

3 Q You relied on somebody else with regard to
4 paragraph three; is that true?

5 A Correct.

6 Q Was the affidavit produced or drafted by
7 your legal department?

8 A Yes.

9 Q Did you review each paragraph before you
10 signed it?

11 A I reviewed the dates that I had submitted
12 as information that I had provided to this affidavit,
13 yes.

14 Q So you reviewed the spreadsheet, for
15 example, Exhibit 3, you provided some date material
16 to the legal department, and then the legal
17 department drafted an affidavit that they then sent
18 back to you for signature?

19 A That's correct.

20 Q Do you know who in the legal department
21 drafted Exhibit 2?

22 A Yes. I believe it was Susan Fishman.

23 Q Do you have Ms. Fishman's last name
24 spelling?

25 A F-I-S-H-M-A-N.

EXHIBIT 4

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL COURT IN AND
FOR ST. JOHNS COUNTY, FLORIDA

CASE NO.: CA09-0418

DIVISION: 55

M & T BANK,
Plaintiff,

vs.

LISA D. SMITH a/k/a LISA DAVIS
SMITH, et. al.,
Defendants.

**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS SECOND
AMENDED COMPLAINT WITH PREJUDICE**

THIS CAUSE came before the Court on Defendants' Motion to Dismiss Second Amended Complaint with Prejudice. Defendants argue Plaintiff's Complaint and exhibits demonstrate a lack of standing and a fraud upon the Court, because Plaintiff has abandoned its prior claims that (1) Plaintiff is the owner of the Promissory Note and entitled to enforce the Note, but has lost the Note, and (2) Plaintiff now has possession of the Note and is currently the owner of the Promissory Note by virtue of an Assignment from an entity that had already transferred the Note. By contrast, Plaintiff now claims that it is the servicer of the loan, and that Wells Fargo owns the Note pursuant to the Allonge to the Promissory Note. The Court has reviewed the pleadings, considered arguments of counsel, and being otherwise fully advised in the premises finds as follows:

The instant action was filed by the Law Offices of Marshall C. Watson, on behalf of the Plaintiff, M & T Bank, on February 10, 2009. On April 23, 2009, the Defendants, Lisa Davis Smith and Larry Smith, moved to dismiss the Complaint, because the Plaintiff's allegation

that it owned the Note as bearer paper based on an Allonge attached to the Note conveying possession of the Note in blank, was inconsistent with the Plaintiff's allegation the Note was lost. On September 22, 2009, an Order Granting Defendants' Motion to Dismiss was entered. Plaintiff then filed an Amended Complaint on September 22, 2009, alleging that it owned the Note by virtue of an Assignment. On October 6, 2009, the Defendants again moved to dismiss the Amended Complaint, because a foreclosure action cannot be based on an Assignment of a mortgage which did not exist at the time the foreclosure was filed. On February 19, 2010, an Order Granting Defendant's Motion to Dismiss Amended Complaint was entered. On March 3, 2010, Plaintiff filed a Second Amended Complaint, alleging that it is now the servicer of the loan, and that Wells Fargo owns the Note pursuant to the Allonge to the Promissory Note. The Defendants then moved to dismiss the Second Amended Complaint on March 9, 2010, for fraud upon the Court because: (1) the previously blank Allonge to the Note now contains a stamp indicating Wells Fargo, National Association as Trustee, to be the payee of the Note, (2) First National Bank of Nevada could not have added the stamp, since the FDIC closed the First National Bank of Nevada in 2008, and (3) Plaintiff is now alleging that Wells Fargo owns the Note, contradicting all of its previous claims. Defendants' Motion to Dismiss Second Amended Complaint with Prejudice is currently before the Court.

Upon review of Defendants' motion, the Court finds the Plaintiff lacks standing and is not a proper party to the suit. The Court has been misled by the Plaintiff from the beginning. In the initial Complaint, the Plaintiff alleged it owned the Note that was lost. Then Plaintiff alleged that not only was the lost Note found, but that Plaintiff actually owned the Note by Assignment. After both of these Complaints were dismissed, Plaintiff then alleged that Wells Fargo owned the Note, while the Plaintiff was merely a servicer of the loan. Moreover, the

Assignment on which Plaintiff relied in its First Amended Complaint postdates the filing of this foreclosure action and is inconsistent with the Mortgage, Note, stamps allegedly affixed to the Note, and the Allonge. The blank stamp affixed to the Note and the Allonge indicate a transfer from First Bank Mortgage, a division of First Bank of Georgia, to First National Bank of Nevada, and then to an unidentified bearer. In contrast, the Assignment indicates a transfer from First Bank Mortgage, by and through Mortgage Electronic Recording Systems, directly to the Plaintiff. However, First Bank Mortgage had transferred possession of the Note to First National Bank of Nevada prior to the date of Assignment from First Bank Mortgage to Plaintiff, and the Assignment postdates the filing of the foreclosure action. Accordingly, this action will be dismissed with prejudice as to M & T Bank, since M & T Bank has been unable to clarify how it owns the Note, but Wells Fargo may commence a new action, on its own, if it is in fact the owner of the Note.

Additionally, the Court is concerned with the authenticity of the documents filed. Plaintiff is asking the Court to ignore the documents filed in the first two Complaints, and to rule solely on the most recent Complaint. However, all three of these documents appear to be inconsistent with one another and have changed as needed to benefit the Plaintiff. For instance, the blank Allonge as filed on both February 10, 2009, and September 22, 2009, remarkably turned into a stamped Allonge on March 3, 2010, with Wells Fargo's information in the previously blank area. This transformation is most interesting, given that it was argued that the Office of the Comptroller of the Currency closed the First National Bank of Nevada on July 25, 2008, and the stamp did not appear in either of the February or September 2009 filings. Similarly, Assignments appeared and vanished as needed, and the Allonge changed to fit the Plaintiff's particular purpose at that moment. Accordingly, an evidentiary hearing will be held to

determine the authenticity of the Allonge and the appearance of the Assignment.

Rule 4-3.3(a)(1) of the Rules Regulating the Florida Bar provides that “[a] lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.” As officers of the Court, attorneys should ensure the facts they represent and contained in their motions filed before the Court are correct and accurate. The Court has not yet had an evidentiary hearing to determine whether the various actions in this case were intentional efforts to misdirect the Court, or simply the result of inartful legal work, and therefore, the Court cannot yet determine whether sanctions should be imposed. However, this issue will be clarified at the evidentiary hearing. Accordingly, it is:

ORDERED AND ADJUDGED that:

1. The instant cause of action, *M & T Bank v. Lisa D. Smith, et al.*, St. Johns County case number CA09-0418, is and the same is hereby **DISMISSED WITH PREJUDICE**. (However, this order shall not prevent a proper plaintiff, possibly Wells Fargo, from bringing a new action on the Mortgage and Note.)

2. The Court reserves jurisdiction to determine the amount of fees and costs, if any, to which Defendants are entitled upon the filing of a motion and a hearing on the matter.

3. An evidentiary hearing is hereby scheduled for Thursday, August 19, 2010, at 1:45 p.m. in Room 305 of the Richard O. Watson Judicial Center, 4010 Lewis Speedway, St. Augustine, Florida 32084, to determine why the Allonge has changed from blank to specific, why the Assignment appeared and then disappeared, and whether sanctions should be imposed against the Plaintiff and/or Plaintiff’s counsel in this action, and the Court specifically reserves jurisdiction to consider this matter.

DONE AND ORDERED in Chambers, in St. Johns County, St. Augustine,

Florida, this ____ day of June, 2010.

Conformed Copy

~~JUN 10 2010~~
J. MICHAEL TRAYNOR
Circuit Court Judge
C. Michael Traynor
Circuit Court Judge

Copies to:

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ATTENTION: PERSONS WITH DISABILITIES:

In accordance with the Americans With Disabilities Act, if you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the Office of the Deputy Court Administrator, 904-827-5617 not later than two (2) days prior to the proceeding. If you are hearing or voice impaired, call 1-800-955-8771.

1 IN THE CIRCUIT COURT, SEVENTH
2 JUDICIAL CIRCUIT, IN AND FOR
3 ST. JOHNS COUNTY, FLORIDA

4 CASE NO.: 55-2009-CA-000418

5 M&T BANK,

6 Plaintiff,

7 vs.

8 LISA D. SMITH a/k/a LISA DAVIS
9 SMITH; JANICE BROWN; JOHN VONASEK;
10 UNKNOWN SPOUSE OF LISA D. SMITH
11 a/k/a LISA DAVIS SMITH; UNKNOWN
12 TENANT(S); UNKNOWN(S) IN
13 POSSESSION OF THE SUBJECT PROPERTY,

14 Defendants.

15 _____ /
16 TRANSCRIPT OF PROCEEDINGS

17 DATE TAKEN: June 2, 2010

18 TIME: 9:15 a.m.

19 PLACE: Richard O. Watson Judicial Center
20 4010 Lewis Speedway
21 St. Augustine, Florida 32084

22 BEFORE: HONORABLE J. MICHAEL TRAYNOR
23 Circuit Judge

24 This cause came on to be heard at the time and
25 place aforesaid, when and where the following
26 proceedings were **stenographically reported** by:

27 Carman L. Gaetanos
28 Florida Professional Reporter
29 Coastal Court Reporters, LLC
30 3940 Lewis Speedway, Suite 2102
31 St. Augustine, FL
32 (904) 824-3525

33 **CERTIFIED**
34 **COPY**

A P P E A R A N C E S

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3 SHARI N. HINES, Esquire
4 Law Offices of Marshall C. Watson, P.A.
5 1800 NW 49th Street, Suite 120
6 Fort Lauderdale, FL 33309
7 Appearing telephonically for the
8 Plaintiff.

9
10
11 JAMES A. KOWALSKI, JR., Esquire
12 Law Office of James A. Kowalski, Jr., PL
13 12627 San Jose Boulevard, Suite 203
14 Jacksonville, Florida 32223
15 Appearing for the Defendants -
16 Lisa and Larry Smith.

17
18
19 ANDREA N. WRIGHT, Esquire
20 The Wright Firm
21 1260 North Ponce de Leon Boulevard
22 St. Augustine, Florida 32084
23 Appearing for the Defendants -
24 John Vonasek and Janice Brown.
25

P R O C E E D I N G S

1
2 THE COURT: This is Judge Traynor.

3 MS. HINES: Good morning. Attorney Shari
4 Hines calling in for a hearing on M&T Bank versus
5 Lisa Smith.

6 THE COURT: Ms. Hines, good morning. I have
7 Mr. Kowalski here and I have Ms. Wright here. They
8 are just getting set up, so just one second while
9 they get up and we will go ahead with -- when did
10 you send that?

11 MR. KOWALSKI: The 27th, but it was supposed
12 to be hand walked in. That's okay, I made extra
13 copies anyway.

14 THE COURT: All right. Mr. Kowalski, it's
15 your motion to dismiss the Second Amended
16 Complaint, so go ahead. Just speak loud so she can
17 hear you, please.

18 MR. KOWALSKI: Your Honor, this is a Motion to
19 Dismiss with Prejudice for fraud upon the Court.
20 This is the third go around, and what I would like
21 to do with the Court's permission is to take the
22 Court through the three complaints that have been
23 filed. The first one is the Complaint. And what
24 I'm handing the Court is a copy of the first two
25 pages of the Complaint to show the allegations of

1 standing, and then the attachments to the
2 complaint.

3 In the initial complaint M&T alleged it was
4 the owner. M&T alleged it was the holder, but that
5 the original Note had been destroyed. The exhibits
6 consist of a Note, and I've highlighted the portion
7 on the Note where it's stamped True and Certified
8 Copy of Original. There's a signature section
9 there. And then on the stamps which appear on the
10 last page of the Note, we see a transfer from the
11 initial lender which is First Bank Mortgage, a
12 division of First Bank of Georgia to First National
13 Bank of Nevada, and then the very last page we have
14 an allonge that's signed by Amy Hawkins, Shipping
15 Officer for First National Bank of Nevada.

16 So this Complaint alleged M&T was the owner
17 and holder and held the Note as bearer paper, but
18 had forever lost the bearer paper. So this
19 Complaint was dismissed without prejudice, and M&T
20 was allowed to file an Amended Complaint.

21 The Amended Complaint, and I'm handing the
22 Court a copy of the first couple pages of the
23 Complaint, together with the attachments. And the
24 Amended Complaint was filed in September 2009, the
25 initial Complaint was February of 2009. In the

1 Amended Complaint which is now roughly, I guess it
2 would be ten months old, M&T alleges it is the
3 owner. M&T alleges it is now in possession of the
4 original Promissory Note. M&T alleged that it was
5 the owner by virtue of an assignment. And I'm
6 quoting in particular from Paragraphs 3 and 4 of
7 the Complaint. They're the owner of the Note by
8 virtue of an assignment, and they're in possession
9 of the original.

10 We turn to the attachments, we see the same
11 Note with the same True and Certified Copy of
12 Original stamp. We see the same stamp from First
13 Bank Mortgage to First National Bank of Nevada, and
14 we see the same allonge endorsed and blank, First
15 National Bank of Nevada, and now for the first time
16 we see an assignment.

17 Now the assignment is prepared by the law
18 firm. And the assignment states that MERS, as
19 nominee for First Bank Mortgage, in other words, as
20 nominee for an entity that no longer holds the Note
21 according to the stamps affixed to the Note itself
22 transfers this directly to M&T, and I'm reading,
23 quote, together with the Note. And that's at the
24 second full paragraph of the assignment.

25 Unfortunately for M&T, this assignment

1 post-dates the filing of the complaint. Obviously
2 it's dated 10 July '09. The original Complaint was
3 February of 2009, but here we have the law firm
4 itself preparing this assignment which purports to
5 deliver the actual Note from the original lender
6 directly to M&T. And of course because it was
7 post-dated on its face, this does not show standing
8 at the inception which is required, and this was
9 dismissed without prejudice.

10 Now we have what brings us here today, and I'm
11 handing the Court the Second Amended Complaint.
12 For the first time we see that M&T does not own the
13 Note. In fact, Wells Fargo Bank National
14 Association as trustee owns the note. They allege
15 they own it pursuant to an allonge, and that M&T is
16 simply the servicer.

17 We turn to the Note, we have the same without
18 recourse pay to the order of the First National
19 Bank of Nevada, but now for the very first time we
20 have a stamp on the allonge. It's on an allonge
21 that's signed by First National Bank of Nevada. It
22 didn't appear in the true and original copies of
23 the Note that were presented to this Court. So
24 according to the Third Complaint, the assignment
25 attached to the Second Complaint was a fraud

1 perpetrated upon this Court as a fiction to show
2 standing from First Bank Mortgage directly to M&T
3 prepared by the lawyers.

4 According to the First and the Second
5 Complaint, the allonge is a fraud perpetrated upon
6 this Court where a stamp appears for the very first
7 time. The assignment is now completely forgotten
8 in the Third Complaint. There is no mention at all
9 of the assignment, of the fact that the law firm
10 itself alleged that MERS as nominee for First Bank
11 Mortgage, a division of First Bank of Georgia
12 delivered the Note and Mortgage directly to M&T in
13 July of 2009.

14 Your Honor, the Court is permitted to dismiss
15 a case with prejudice. Oh, and by the way, First
16 National Bank of Nevada was closed by the FDIC in
17 July of 2008, so First Bank of Nevada isn't putting
18 any stamps on anything for some time.

19 The Court is permitted to dismiss an action
20 with prejudice if the fraud appears to be so
21 pervasive as to permeate the proceedings. Now,
22 either M&T or Wells Fargo, or whoever the heck owns
23 this Note can still file a new complaint and can
24 still foreclose, but the defendants would strongly
25 urge this Court to find fraud based upon these

1 three complaints which are each internally
2 inconsistent with each other, and which each show
3 indicia of fraud between the two others.

4 We would ask for a dismissal with prejudice of
5 this action. And I have also asked in the motion
6 for dismissal with prejudice. I've also asked for
7 an evidentiary hearing before the Court to
8 determine whether in fact the firm itself, or M&T
9 or Wells Fargo -- I certainly think the record
10 shows the firm is complicit. The firm prepared the
11 assignment, which appears to be, according to the
12 Third Complaint, a complete fiction. And the
13 question then becomes whether M&T and Wells Fargo
14 were complicit in the firms' actions, or whether
15 it's simply the firm. But in any event, it appears
16 that fraud upon the Court is pervasive between
17 these three documents, and we would ask for a
18 dismissal with prejudice. With M&T or Wells Fargo
19 or whoever it is, they obviously can file a new
20 action if they wish based upon a new date of
21 breach.

22 THE COURT: Ms. Hines.

23 MS. HINES: Your Honor, there has been no
24 fraud committed on the Court. Upon filing of the
25 Second Amended -- the First Amended Complaint was

1 filed based on information received from the
2 client. And with that information that the facts
3 were as provided to our firm in order to file said
4 Complaint. When the Court dismissed that First
5 Amended Complaint, we went back to the client,
6 requested that a search be made for any and all
7 original documents relating to this file, and
8 that's when we received the original Note and
9 original Mortgage which has since been filed with
10 the Court.

11 Upon review of those original documents we
12 were able to assert the true chain of title of the
13 Note, and that information is what was given in the
14 Second Amended Complaint. And the information was
15 given in detail in the Second Amended Complaint to
16 show the correct chain, and to correct any mistakes
17 that had been made in the prior complaint.

18 What you have before you, Your Honor, the
19 Second Amended Complaint is the chain of title and
20 shows what entity has standing to bring this
21 Foreclosure Complaint before the Court.

22 I -- the last hearing that we had, counsel
23 stated that standing was not the issue, it was
24 something else. Now he's stating that it is
25 standing and he's unsure which entity in truth has

1 standing to bring this action.

2 The court file shows that M&T Bank as
3 servicer, which we now learned is the true -- the
4 true standing of M&T as servicer has the right to
5 file this foreclosure action on behalf of the
6 owner, which is Wells Fargo Bank. And that's what
7 was done. There has been no fraud committed on the
8 Court, Your Honor. What you have before you is the
9 truth.

10 THE COURT: Mr. Kowalski, is it your -- I have
11 one question, and then I'm going back to Ms. Hines
12 with a couple of questions. Is it your position
13 that a servicer cannot bring an action on behalf of
14 the owner of a Note?

15 MR. KOWALSKI: A servicer can bring an action
16 on behalf of the owner.

17 THE COURT: I just wanted to make sure.

18 MR. KOWALSKI: No. If the Second Amended
19 Complaint stood on its own, and we hadn't had
20 anything for the year and four months --

21 MS. HINES: I can't hear him, sir, I'm sorry.

22 MR. KOWALSKI: If the Second Amended Complaint
23 stood on its own and we hadn't had anything for the
24 year and a half before today, then the Second
25 Amended Complaint states a cause of action. The

1 concern is that everything I've said before, we
2 have a new stamp placed on what before was
3 maintained to this Court as an original copy of the
4 Note, or we have an allonge that was completely
5 made up by the law firm in order to perpetrate a
6 fiction upon this Court, a fiction of standing.
7 Either one of those two --

8 MS. HINES: But that --

9 MR. KOWALSKI: Either one of those two has to
10 be true.

11 MS. HINES: Actually that isn't true, Your
12 Honor. The original document -- the document that
13 we had before that did not have the stamp is what
14 was originally sent to us. When we requested all
15 original documents from the client, what we got was
16 that allonge with the stamp on it. And I noted
17 after we received all the original documents that
18 there was a discrepancy, and the firm did not put
19 that stamp there, and I doubt that the client did
20 either because it's -- if the original documents
21 are reviewed and they're in the court file, you
22 will see that that stamp is rather old. So I'm not
23 sure why or where opposing counsel is going with
24 this. That stamp was not put there by the firm.

25 THE COURT: All right. Anything else?

1 MR. KOWALSKI: Nothing from the defense.

2 MS. HINES: I just want to say, Your Honor,
3 that I think at this point, I think the Second
4 Amended Complaint is complete and alleges enough
5 facts in order to proceed with the foreclosure
6 action. If we were to proceed with this Motion to
7 Dismiss, then you know the Court must view, you
8 know, the Motion to Dismiss as it pertains to the
9 four corners of the Complaint. What opposing
10 counsel is proposing is an evidentiary hearing
11 which is outside of the purview of a Motion to
12 Dismiss.

13 THE COURT: Well, I agree that that's not a
14 motion to dismiss hearing, but he wasn't asking me
15 to conduct a motion to dismiss hearing with an
16 evidentiary component. He was asking me to have an
17 evidentiary hearing to determine whether or not --
18 what parties are responsible for what he believes
19 to be fraud on the Court, and then to determine
20 what sanctions are appropriate.

21 I do have a question though, this person
22 Devesa who is the assistant vice-president of MERS
23 and that assignment, I mean how did y'all prepare
24 an assignment in '09, in '09 for a bank that wasn't
25 in existence? That does concern me a little bit to

1 say the least.

2 MR. KOWALSKI: Well, Judge, the point there is
3 that the assignment is prepared on behalf of an
4 entity that no longer exists, but it's First Bank
5 of Nevada that was seized, and it's First Bank of
6 Nevada whose stamp is modified from the two exactly
7 identical allonges that were filed with the Court
8 before.

9 THE COURT: Georgia was the initiating bank?

10 MR. KOWALSKI: Georgia is the initial lender,
11 and then they sold it to First Bank of Nevada
12 according to the stamp on the Note. I mean, there
13 is so much wrong with the assignment which is the
14 second complaint.

15 THE COURT: The thing that I'm showing on its
16 face is this, and if I just take the Second Amended
17 Complaint and then try to get to the third, the
18 Second Amended Complaint shows that on the date of
19 the assignment -- if I don't ask any other
20 questions -- on the date of the assignment, it was
21 owned by Georgia going to M&T Bank, and that's in
22 '09. The lawsuit -- the lawsuit was -- and that
23 was in July of '09. The lawsuit was brought in
24 February of '09.

25 Now I've got a Second Amended Complaint that

1 kind of ignores the fact that I've got a recorded
2 assignment in the public records. I mean, you
3 know, I'm supposed to take judicial notice of my
4 files at least, and I don't know how you get by
5 that assignment to the next step. But even if you
6 do, how do you -- how do you have a bank, and you
7 know without a date, I'm just saying without a
8 date, a bank that no longer exists paying it to
9 the order of somebody, Wells Fargo, and I don't
10 have any dates on any of these documents.

11 I know banks for some reason have this fear of
12 putting dates on their allonges and their
13 assignments, I'm not sure why they do. You know,
14 I've got an initial -- the third page of the
15 original document has got an assignment to First
16 National Bank of Nevada, so I know it went at least
17 there. And then I've got it to First National Bank
18 of Nevada and then to Wells Fargo, but I've got no
19 dates when that happened.

20 I will take a look at it and I will send out
21 an order. I'm not sure what I will do yet until I
22 take a look at it, but I appreciate it.

23 Y'all take care. Have a good day.

24 MS. HINES: Thank you, Your Honor.

25 MR. KOWALSKI: Thank you.

(Proceedings concluded.)

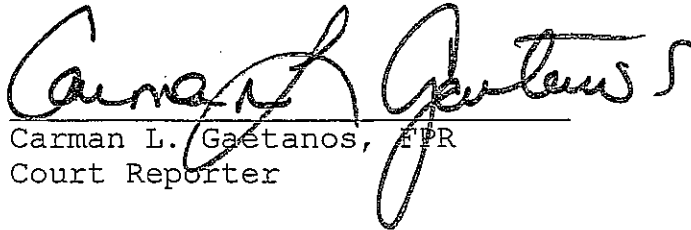
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1 CERTIFICATE OF REPORTER

2
3 STATE OF FLORIDA)
4)
5 COUNTY OF ST. JOHNS)

6 I, Carman L. Gaetanos, FPR, Court Reporter, do
7 hereby certify that I was authorized to and did
8 transcribe report the foregoing proceedings,
9 and that the transcript is a true and correct record
10 of my **stenographic notes**.

11 Dated this 16th of June, 2010,
12 St. Augustine, St. Johns County, Florida.

13
14 
15 Carman L. Gaetanos, FPR
16 Court Reporter

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT IN AND
FOR ST. JOHNS COUNTY, FLORIDA

CASE NO.: CA09-0418

DIVISION: 55

M&T BANK,

Plaintiff,

vs.

LISA D. SMITH, etc., et al.,

Defendants.

AFFIDAVIT ON BEHALF OF M&T BANK
IN SUPPORT OF MOTION FOR REHEARING

STATE OF NEW YORK

COUNTY OF ERIE

Joseph Morrison, being first duly sworn, makes the following statements of fact of his own personal knowledge.

1. Affiant is administrative Vice President and Manager, Real Estate Collection and Recovery, for the Plaintiff in this matter, M&T Bank, a New York Banking Corporation, and held that position at the time this foreclosure was instituted. Affiant has been employed with M&T Bank for approximately fifteen (15) years. His duties include oversight and administration of mortgage foreclosures around the country.

2. Affiant, or another equally knowledgeable representative of M&T Bank, will appear at the evidentiary hearing scheduled herein for August 19, 2010 to testify in person as to the matter set forth in this Affidavit. This Affidavit is offered in support of M&T Bank's

pending Motion for Rehearing in regard to that Order entered June 10, 2010 dismissing M&T Bank's Second Amended Complaint with Prejudice, in order to (1) respond to the questions raised by the Court in that Order, (2) document for the Court the chain of documentation establishing the right and standing of M&T Bank to foreclose the subject mortgage, and (3) establish for the Court that while this action reflected significant confusion in regard to the relatively complex chain of documents, there was no fraud or falsification whatsoever in regard to this proceeding.

The Allonge Issue

(Discrepancy between Complaint and Second Amended Complaint)

3. The mortgage note, attached to each complaint filed herein, includes a stamped endorsement from First Bank of Georgia to First National Bank of Nevada.

4. Attached to the initial Complaint filed in this action was an Allonge to Note, reflecting an endorsement in blank from First National Bank of Nevada, the assignee of the note. A copy of this Allonge is attached hereto as Exhibit A.

5. Attached as an exhibit to the Second Amended Complaint is a copy of the Allonge to Note endorsed by First National Bank of Nevada, but this copy of the Allonge included a stamp in the place of the blank endorsement, making the note payable to Wells Fargo Bank, National Association, as Trustee, in trust for the Registered Holders of Nomura Asset Acceptance Corporation Alternative Loan Trust. A copy of this Allonge is attached hereto as Exhibit B.

6. At the time M&T Bank is retained by a financial institution or other entity to service a group of loans, M&T Bank receives, along with an electronic loan servicing file, two paper files: (1) a servicing file, and (2) a custodial file. The servicing file includes the loan application, closing documents, appraisals, title insurance documents and various other loan-

related documents. This file commonly includes multiple copies of certain documents, including copies of documents in various stages of completion, such as drafts and unsigned copies. The custodial file contains various original documents, including the note and mortgage. When a loan is in default and to be foreclosed, the servicing file is provided electronically to foreclosure counsel. Thereafter, original documents from the custodial file are physically delivered to counsel by overnight mail.

7. A copy of the blank/unstamped Allonge to Note referenced in paragraph 4 above was included in M&T Bank's servicing file, and was transmitted electronically to foreclosure counsel, along with other pertinent documents from the servicing file, immediately upon counsel's engagement.

8. The stamped/endorsed Allonge to Note, in its original form, was maintained in M&T Bank's custodial file, and was separately provided to foreclosure counsel, along with other original documents, ten days after transmission of the servicing file.

9. In short, a copy of the unstamped/endorsed-in-blank Allonge to Note, and the original stamped/endorsed Allonge to Note, both existed in M&T Bank's files as separate documents. There was no alteration to the Allonge to Note in the course of this foreclosure action. Instead, the unstamped/endorsed-in-blank copy of the Allonge was erroneously attached to the additional complaint, instead of the stamped/endorsed Allonge.

The Assignment of Mortgage Issue

(From Amended Complaint)

10. Attached to the Amended Complaint filed herein was an Assignment of Mortgage from Mortgage Electronic Registration Systems, Incorporated (commonly known as "MERS"), as nominee for First Bank of Georgia, assigning the mortgage to M&T Bank. A copy of that

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT IN AND
FOR ST. JOHNS COUNTY, FLORIDA

CASE NO.: CA09-0418
DIVISION: 55

M&T BANK,

Plaintiff,

vs.

LISA D. SMITH, etc., et al.,

Defendants.

STIPULATED ORDER
MODIFYING JUNE 10, 2010 ORDER DISMISSING SECOND AMENDED
COMPLAINT WITH PREJUDICE, CANCELLING AUGUST 19, 2010 EVIDENTIARY
HEARING, AND VACATING ORDER SCHEDULING OCTOBER 5, 2010
REHEARING

After consideration by the Court and upon the stipulation of the parties, it is

ORDERED:

1. This Court's Order Granting Defendant's Motion to Dismiss Second Amended Complaint with Prejudice entered June 10, 2010 in this action ("the June 10, 2010 Order") is reinstated and is modified herewith, in the following manner:

(a) After the first sentence of the second paragraph on page 2 of the subject Order, which reads "[u]pon review of Defendants' motion, the Court finds the Plaintiff lacks standing and is not a proper party to this suit," the following sentence is inserted:

This finding is limited to this specific action and the default alleged therein, and should not be construed as a bar - by way of res judicata, collateral estoppel, or otherwise - to commencement of a new foreclosure action by M&T Bank in its capacity as servicer of the subject mortgage, upon the proper allegations regarding same.

(b) The last sentence of the first paragraph on page 3 of the Order is deleted. That paragraph reads as follows:

Accordingly, this action will be dismissed with prejudice as to M&T Bank, since M&T Bank has been unable to clarify how it owns the Note, but Wells Fargo may commence a new action, on its own, if it is in fact the owner of the Note.

(c) The following sentence shall be substituted for the sentence deleted above, as the last sentence of the first paragraph on page 3 of the Order:

Accordingly, this action will be dismissed with prejudice as to M&T Bank, but M&T Bank, or any other entity who has the right to foreclose the subject Mortgage, may commence a new foreclosure action.

(d) The following words are deleted from the parenthetical sentence at the end of paragraph number 1 on page 4 of the Order: "a proper Plaintiff, possibly Wells Fargo, from bringing" That sentence shall now read as follows: "(However, this Order shall not prevent a new action on the Mortgage and Note.)"

(e) Otherwise, the June 10, 2010 Order shall remain in full force and effect.

2. This Court's Order of July 20, 2010 scheduling a rehearing on Defendants' Motion to Dismiss Second Amended Complaint with Prejudice for Fraud Upon the Court is vacated as moot in light of the preceding paragraph. The rehearing scheduled for October 5, 2010 at 3:15 p.m. is cancelled and shall be removed from the calendar.

3. The Evidentiary Hearing scheduled by the Court in this action for August 19, 2010 at 1:45 p.m. is cancelled in light of the matters resolved in this Order, and shall be removed from the calendar.

4. The Plaintiff herein, M&T Bank, shall reimburse the Smith defendants their reasonable attorneys fees incurred in the defense of this action. The Court reserves jurisdiction

to determine the amount of such reasonable fees, in the event the parties are unable to agree upon same.

DONE AND ORDERED in Chambers, in St. Johns County, St. Augustine, Florida, this _____ day of _____, 2010.

Conformed Copy

SEP 01 2010
J. MICHAEL TRAYNOR
CIRCUIT COURT JUDGE
Circuit Court Judge

STIPULATION

The undersigned do hereby stipulate and agree to entry of the Stipulated Order Modifying June 10, 2010 Order Dismissing Second Amended Complaint With Prejudice, Cancelling August 19, 2010 Evidentiary Hearing, and Vacating Order Scheduling October 5, 2010 Rehearing, set forth above.

ROGERS TOWERS, P.A.

By: 

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ATTORNEYS FOR M&T BANK

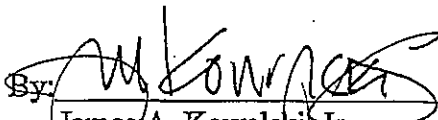
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LISA AND LARRY SMITH**

**CONROY, SIMBERG, GANON,
KREVANS, ABEL, LURVEY,
MORROW & SCHEFER, P.A.**

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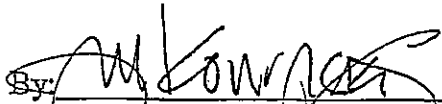
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MARSHALL C. WATSON, P.A.**

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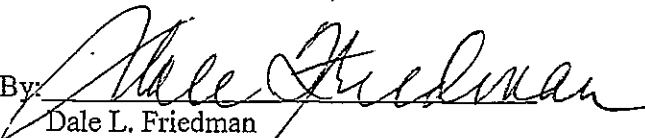
By: _____

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VONASEK AND JANICE BROWN**

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KREVANS, ABEL, LURVEY,
MORROW & SCHEFER, P.A.**

By: _____


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**ATTORNEYS FOR LAW OFFICES OF
MARSHALL C. WATSON, P.A.**

EXHIBIT 5

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

Case No.: 16-2006-CA-1564

Division: CV-G

THE BANK OF NEW YORK, AS TRUSTEE FOR
THE HOLDERS OF THE EQCC ASSET BACKED
CERTIFICATES, SERIES 2001-2,

Plaintiff,

vs.

PAULETTE WILLIAMS; MERCURY FINANCE
COMPANY OF FLORIDA, A DISSOLVED
CORPORATION,

Defendants.

**ORDER GRANTING DEFENDANT'S/COUNTER-PLAINTIFF'S
MOTION TO AMEND AMENDED COUNTERCLAIM AND TO
ASSERT A CLAIM FOR PUNITIVE DAMAGES**

This cause came on before the Court May 20, 2008 on the Motion by Defendant /
Counter-Plaintiff PAULETTE WILLIAMS to Amend Amended Counterclaim and to Assert a
Claim for Punitive Damages. The Court has reviewed the pleadings, reviewed the authority
cited, and is otherwise fully advised in the premises. The Court finds as follows:

The Evidence Proffered by WILLIAMS

1. In July, 2004, THE BANK OF NEW YORK filed an action against Defendant
WILLIAMS in Case No. 2004-4918-CA; Division CV-G (Circuit Court, Duval County, Florida),
2. The chain of recorded assignments appearing in the Official Books and Records
of Duval County is as follows:

First Assignment

May 21, 1999: Assignment from One Stop Mortgage to AAMES Capital Corporation, recorded July 26, 1999.

Second Assignment

June 13, 2000: Second Assignment from One Stop Mortgage to AAMES Capital Corporation recorded July 6, 2000.

Third Assignment

June 13, 2000: Assignment from AAMES Capital Corporation to NationsCredit Home Equity Services, recorded July 6, 2000.

Lis Pendens (2004 case)

July 17, 2004: Notice of *Lis Pendens* recorded by Plaintiff, The Bank of New York, acting solely in its capacity as Trustee for the Holders of the EQCC Asset Backed Certificates, Series 2001-2, in Case No. 2004-4918-CA.

Fourth Assignment

September 24, 2004: Assignment from NationsCredit Mortgage Corporation of Florida to the current Plaintiff, The Bank of New York, acting solely in its capacity as Trustee for the Holders of the EQCC Asset Backed Certificates, Series 2001-2, recorded October 26, 2004.

Fifth Assignment

October 13, 2004: Assignment from AAMES Capital Corporation to NationsCredit Financial Services Corporation, recorded November 23, 2004.

Lis Pendens (2006 case)

February 24, 2006 Notice of *Lis Pendens* recorded by Plaintiff.

3. The proffered evidence, in the form of records from the State of Florida Secretary of State, coupled with Admissions from Plaintiff, confirms NationsCredit Mortgage Corporation of Florida did not exist as a corporate entity as of the date of the Fourth Assignment. This Assignment (the Fourth Assignment, above) also post-dates the commencement of the 2004

action. WILLIAMS also proffered testimony from THE BANK's corporate representative, who relied upon the September 24, 2004 assignment to confirm ownership of the Note and Mortgage by THE BANK (Deposition of Mindy Leetham, p. 19-20) – as referenced above, this Assignment post-dated the commencement of the 2004 action and was from an company which did not exist as a corporate entity at the time.

4. In addition to the record evidence, which reflects a lack of standing at the time the 2004 action was commenced, THE BANK OF NEW YORK has admitted and argued strenuously in pleadings before the First District Court of Appeal (First DCA Case Number: ID07-2626) that its lack of standing was glaring, straightforward and clear, and doomed THE BANK's case from the outset. THE BANK OF NEW YORK is bound by the position it has taken on appeal in the 2004 case. Parties are not permitted to take inconsistent positions in litigation, pursuant to the doctrine of judicial estoppel. The doctrine is intended to prevent a litigant from "playing fast and loose with the courts." *Smith v. Avatar Properties, Inc.*, 714 So.2d 1103, at 1107 (Fla. 5th DCA 1998), citing *Russell v. Rolfs*, 893 F.2d 1033, at 1037 (9th Cir. 1990). *See also, Montero v. Compugraphic Corp.*, 531 So.2d 1034 (Fla. 3d DCA 1988).

The Standard for Review of a Motion to Amend to Assert Punitive Damages

5. The Court is permitted to consider a proffer of evidence in support of a Motion for Leave to Amend pursuant to Section 768.72, Florida Statutes. *Strasser v. Yalamanchi*, 677 So.2d 2 (Fla. 4th DCA 1996). The burden is upon the moving party to show a "reasonable basis for recovery of such damages" (*Will v. Systems Engineering Consultants*, 554 So.2d 591, at 592 (Fla. 3d DCA 1989) accepting all facts reasonably established by the moving party as true. *State of Wisconsin Investment Board v. Plantation Square Associates, Ltd.*, 761 F.Supp. 1569 (S.D. Fla. 1991). THE BANK is permitted to assert facts which would show WILLIAMS' factual

basis to be patently false or irrelevant (*Id.*, at 1581), but has not proffered any evidence, offering instead only arguments of counsel.

The Standard for Review in This Case

6. WILLIAMS has already pled counts alleging violations of Florida's Consumer Collection Practices Act (Count I) Malicious Prosecution (Count II), and Abuse of Process (Count III).

7. The Court is allowed to award punitive damages under the Consumer Collection Practices Act pursuant to Section 559.77(2), Florida Statutes. As to Counts II and III, both intentional torts, the presence of legal malice based upon a showing of gross misconduct or willful and wanton disregard of a Plaintiff's rights is sufficient to support a punitive damages award. Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352 (Fla. 1994).

The Standard for Review as Applied to the Proffer

8. The evidence proffered by PAULETTE WILLIAMS, as set forth herein, sets forth a reasonable basis from which a jury could conclude THE BANK OF NEW YORK was, at least, grossly negligent in suing PAULETTE WILLIAMS and acted with willful and wanton disregard to the rights of PAULETTE WILLIAMS. It is, therefore,

ORDERED:

Defendant / Counter-Plaintiff's Motion for Leave to Amend Amended Counterclaim so as to Assert a Claim for Punitive Damages is GRANTED, as to THE BANK OF NEW YORK only. The Second Amended Counterclaim attached to Defendant / Counter-Plaintiff's Motion for Leave is deemed filed as of the date of this Order, and THE BANK OF NEW YORK is permitted twenty (20) days within which to file a response thereto.

DONE AND ORDERED, in Chambers, at Jacksonville, Duval County, Florida, this

day of May 2008.

ORDER ENTERED

JUN 1 0 2008

LANCE M. DAY

CIRCUIT COURT JUDGE

Copies to:

John H. Dannecker, Esq.
Shutts & Bowen LLP
300 South Orange Avenue, Suite 1000
PO Box 4956
Orlando, FL 32802-4956

James A. Kowalski, Jr., Esq.
Law Offices of James A. Kowalski, Jr., PL
12627 San Jose Blvd. Suite 203
Jacksonville, FL 32223

EXHIBIT 6

COPY

Prepared by: DAVID J. STERN, ESQ
Record & Return to: 900 South Pine Island Road Suite 400
Plantation, FL 33324-3920
08-70131 (FTN)
MERS MIN: 1-00083200614045708
MERS PHONE: 1-888-679-6377

This space is for recording purposes only

ASSIGNMENT OF MORTGAGE

KNOW ALL MEN BY THESE PRESENTS:

THAT MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

Residing or located at c/o FIRST HORIZON HOME LOAN CORPORATION 4000 HORIZON WAY, IRVING, TX 75063, 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 FIRST HORIZON HOME LOANS, A DIVISION OF FIRST TENNESSEE BANK NATIONAL ASSOCIATION residing or located at: C/O FIRST HORIZON HOME LOAN CORPORATION 4000 HORIZON WAY, IRVING, TX 75063 herein designated as the assignee, the mortgage executed by CHARLES H. MEISELMAN, A MARRIED MAN JOINED BY HIS WIFE, MERRIE G. MEISELMAN recorded in ST. JOHNS County, Florida at book 2952 and page 1259 encumbering the property more particularly described as follows:

LOT 9, BLOCK 156, ST. AUGUSTINE SHORES, UNIT 5, A SUBDIVISION ACCORDING TO THE PLAT THEREOF RECORDED IN MAR BOOK 14, PAGE 21, OF THE PUBLIC RECORDS OF SAINT JOHN'S 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.

Pursuant to the provisions of Sec. 689.071, Florida Statutes, the within named Trustee has the power and authority to protect, conserve and to sell, or to lease, or to encumber, or otherwise to manage and dispose of the above-described mortgage and the real property encumbered thereby.

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 3 day of March, 2009, being effective as of the 21st day of July, 2008.

Signed in the presence of:

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

ATTEST:

BY: PRINT NAME: CHERYL SAMONS

WITNESS: Print Name: ANNA CLARKE

TITLE: ASSISTANT SECRETARY

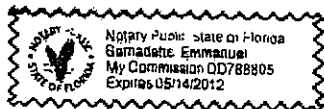
WITNESS: Print Name: B. Emmanuel

STATE OF Florida
COUNTY OF Broward

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the aforesaid county and state, on this the 3 day of March, 2009 within my jurisdiction, the within named CHERYL SAMONS who is personally known to me and who acknowledged to me that (s)he is ASSISTANT SECRETARY and that for and on behalf of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. 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, INC. to do so.

WITNESS my hand and official seal in the County and State last aforesaid this 3 day of March, 2009.

NOTARY PUBLIC



This Instrument Was Prepared By:

DAVID J. STERN, ESQ.
LAW OFFICES OF DAVID J. STERN, P.A.
801 S. University Drive, Suite 500
Plantation, FL 33324

INSTR # 101904643
OR BK 33143 Pages 791 - 792
RECORDED 05/16/02 15:51:48
BROWARD COUNTY COMMISSION
DEPUTY CLERK 2030
#1

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS: That FIRST HORIZON HOME LOAN CORPORATION, a TEXAS corporation (A Client), with its principal offices located at 4000 HORIZON WAY, IRVING, TX 75063, does hereby make, constitute and appoint the following:

DAVID J. STERN, MIRIAM L. MENDIETA, CHERYL SAMONS, FORREST G. MCSURDY, BEVERLY A. MCCOMAS or WENDY J. WASSERMAN of the LAW OFFICES OF DAVID J. STERN, P.A.,

as attorneys-in-fact, any one (1) of the same to be authorized to act, do and perform, on behalf of Client, with full power and authority to act for it, in its name, place and stead, any and all lawful acts, matters and things whatsoever requisite, necessary, proper or convenient to be done, as fully as Client might or could do itself for all intents and purposes, with regard to the matters listed below and performed in connection with the management and prosecution of foreclosure, bankruptcy, eviction or related litigation matters:

1. To execute, acknowledge, seal, deliver and revoke:
 - a. any Affidavit in Support of Plaintiff=s Motion for Summary Judgment that may be required by a Florida state or federal court for entry of Final Summary Judgment of Foreclosure;
 - b. any Affidavit in Support of Creditor=s Motion for Relief from Stay that may be required by a Florida state or federal court for entry of an Order lifting a bankruptcy stay.
2. This Power of Attorney shall be effective from the date of execution hereof and shall remain in full force and effect until such time as it is revoked, in writing, by Client. The revocation of this Power of Attorney may be in whole or in part, and if such revocation shall be in part, it shall only affect the specific individual or individuals named in such revocation and shall not affect or impair the powers of any individual not named. Any such revocation shall not affect the validity of a transaction initiated, but not completed, prior to such revocation.
3. By exercise of this Power of Attorney, the LAW OFFICES OF DAVID J. STERN, P.A. shall indemnify and hold harmless Client from and against any and all claims, demands, suits, penalties or actions, and from and against any and all attendant losses, costs and expenses for any claims against, or losses or liability of, Client for any cause arising out of, or resulting from, default in the performance of, or the gross negligent performance of, any obligations of an attorney-in-fact under this Power of Attorney. Client agrees to not hold the LAW OFFICES OF DAVID J. STERN, P.A. liable for any incorrect information supplied by the Client to the LAW OFFICES OF DAVID J. STERN, P.A. if the same is provided to any court pursuant to this Power of Attorney.
4. This Power of Attorney is made pursuant to authorization for making of same, which has

been duly adopted by the governing body of Client.

IN WITNESS WHEREOF, Client has caused this instrument to be executed in its corporate name by its officer thereunto duly authorized this ____ day of _____, 20

In the presence of:

Client: _____

Print Name: _____

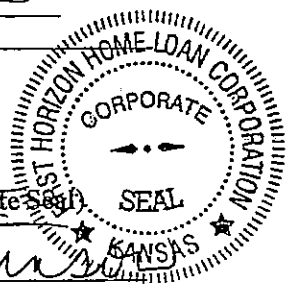
Print Name: _____

By: Michael Fisher
Michael Fisher
[Print Name]

Its: Vice-President

(Corporate Seal)
Attest: Sherry Stinson
SHERRY STINSON
[Print Name]

Its: Assistant Secretary



STATE OF TEXAS
COUNTY OF DALLAS

I hereby certify that on this day, before me, an officer duly authorized in the State aforesaid and in the County aforesaid to take acknowledgments, personally appeared MICHAEL FISHER and SHERRY STINSON, as Vice-President and Assistant Secretary, respectively, of _____, a _____ corporation, to me known to be the persons described in and who executed the foregoing instrument and who are personally known to me or who produced _____ as identification and who acknowledged before me that they executed the same on behalf of the said corporation and for the purposes therein set forth.

WITNESS my hand and official seal in the County and State last aforesaid this ____ day of _____, 20

Lori Jones
Notary Public, State of TX

Print Name: Lori Jones

My commission expires:

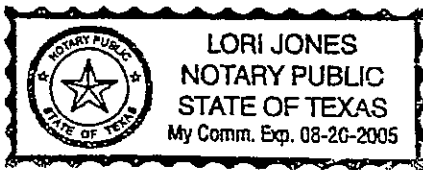


EXHIBIT 7

1 .IN THE CIRCUIT COURT,
2 JUDICIAL CIRCUIT, IN AND FOR
COUNTY, FLORIDA.

3 CASE NO.: 2010-CA-
4 DIVISION:

5 BANK OF AMERICA, N.A.,

6 vs.

7 , ET AL,

8 Defendant.
9 _____/

10
11 DEPOSITION OF _____

12 DATE TAKEN: _____, 2010

13 TIME:

14 PLACE: County Court Administration Bldg.

15 Florida

16
17 This cause came on to be heard at the time and place
18 aforesaid, when and where the following proceedings were
19 reported by:

20
21 Florida Professional Reporter
22
23
24
25

CERTIFIED
COPY

1 borrowers listed applicable for Options 2, 4, 6, B, D,
2 F, H, J or L only, in which and
3 elect.

4 Q And you said you reviewed Exhibit 2 before
5 today?

6 A That's correct.

7 Q Okay. So Exhibit 2 certainly refers to an
8 election of the Borrowers Protection Plan by both the
9 husband and wife in this case?

10 A That's correct.

11 Q And the Borrowers Protection Plan is similar
12 to credit life or credit disability insurance; is that
13 correct?

14 A I wouldn't know.

15 Q Is the Borrowers Protection Plan monitored or
16 supervised by a unit of BOA?

17 A I wouldn't know. I would assume that it's
18 monitored by one of our insurance divisions.

19 Q One of "our" meaning Bank of America?

20 A One of Bank of America's insurer's divisions.

21 Q Let me show you what I will mark as Exhibit 4
22 which is in fact -- I'm sorry there may be two there,
23 let me see.

24 (Defendants' Exhibit 4 marked for identification.)

25 THE WITNESS: Yeah, there is.

1 BY MR. KOWALSKI:

2 Q If you can hand one to your lawyer.

3 Let me ask you to take a look at Exhibit 4 for
4 just a second.

5 First off on the coversheet it bears a Bank of
6 America stamp; is that correct?

7 A That's correct.

8 Q Indicating that Bank of America sent this to
9 ?

10 A That's correct.

11 Q If Bank of America sent the Borrowers
12 Protection Plan to Mr. , do you have a reason why
13 you don't know about it?

14 A During my review of the case, I wasn't able to
15 find this information.

16 Q Do you have access to the Borrowers Protection
17 Plan interface?

18 A No, I do not.

19 Q Why not?

20 A I don't know.

21 Q Did you ask for it since you were coming here
22 to talk about it as a spokesperson for BOA?

23 A I didn't know where to obtain it.

24 Q Well, who did you ask who told her, I don't
25 know where to obtain this either? Did you ask your

1 boss?

2 A Yes, I actually did ask my boss where I would
3 be able to find this.

4 Q Okay. You said, Hey, boss, I've got to go to
5 where one of the three things I'm being
6 asked to talk about is the Bank of America Borrowers
7 Protection Plan that our borrowers signed up for and
8 paid for, can you tell me where to find it? Did you ask
9 her that?

10 A Yes.

11 Q And her answer was?

12 A That she would have to do more research into
13 it, but she hadn't heard about it.

14 Q When did that conversation take place?

15 A Probably a month ago.

16 Q And when did your boss get back with you and
17 say, I've done my additional research and I don't have a
18 clue where to find the Bank of America Borrowers
19 Protection Plan that our borrowers bought and paid for,
20 when did she come back and tell you that?

21 A Probably a little bit less than a month ago.

22 Q How long ago?

23 A I don't know offhand.

24 Q So as you sit here today as the corporate
25 spokesperson of Bank of America, your testimony is that

1 you were not able to find any information about the Bank
2 of America issued product that's specifically referred
3 to in the documents that your lawyers filed with the
4 Court; is that your testimony here today?

5 A That's correct. The only information that I
6 was able to find was the sheets that were attached to
7 the back of the Note.

8 Q Okay. Did the Borrowers Protection Plan in
9 this case pay money on behalf of Mr. and Mrs. ?

10 A Not that I'm aware of.

11 Q Let me show you what I will mark as 5 which is
12 a letter by which Bank of America confirmed they were
13 paying under the Borrowers Protection Plan, and take a
14 look at that.

15 (Defendants' Exhibit 5 marked for identification.)

16 THE WITNESS: Okay.

17 BY MR. KOWALSKI:

18 Q It's a letter dated , 2010, it
19 says: Dear Bank of America Customer -- and you see it's
20 on Bank of America letterhead -- your request -- by the
21 way, it references Bank of America Borrowers Protection
22 Plan, Line Protection Plan Services in Santa Ana,
23 California, you see that at the bottom?

24 A Yes.

25 Q It says: Dear Bank of America Customer --

1 referring to -- Your request for Disability
2 benefits under the Borrowers Protection Plan has been
3 approved. Do you see that?

4 A Yes.

5 Q Referring back to Exhibit 4 which is the plan
6 itself, Paragraph 16, it says, The lender cannot attempt
7 to foreclose upon or repossess, or initiate any
8 foreclosure proceedings or repossession activities upon
9 any collateral until 35 days after the benefits request
10 is rejected. Do you see that at Paragraph 16, Page 7 of
11 8 of the Bank of America Borrower's Protection Plan?
12 It's all capitalized.

13 A Yes.

14 Q Can you tell me a reason why Bank of America
15 instituted foreclosure proceedings on
16 2010 when -- I'm sorry, what did I say?

17 MS. EINSTEIN: 2010.

18 BY MR. KOWALSKI:

19 Q 2010. Can you tell me why Bank
20 of America instituted foreclosure proceedings against
21 Mr. and Mrs. on , 2010 when their
22 request for Disability benefits under the Borrowers
23 Protection Plan was approved by letter from Bank of
24 America dated , 2010? Can you explain that
25 to us today as the corporate representative of Bank of

1 America, or do you think Exhibit 5 is a forgery?

2 A I don't know. I would have to do further
3 research in that.

4 Q Do you understand that the research was
5 supposed to be done before today?

6 A Yes.

7 Q Do you understand that we've got a room full
8 of people here, including Mr. , who by the way is
9 disabled and awaiting surgery, all of whom arranged
10 their schedules so that you could answer questions about
11 Area of Inquiry 3 in a deposition notice that's been in
12 existence for months, do you understand that?

13 A Yes.

14 Q Can you explain to us then why you're wasting
15 the time of everybody else in this room --

16 MS. HENKE: Objection; form.

17 BY MR. KOWALSKI:

18 Q -- including apparently yourself?

19 A Again, you know, this information right here,
20 I have not seen.

21 Q I understand that. But why didn't you go look
22 for it when apparently it's being issued by another
23 department of your employer?

24 MS. HENKE: Objection; form.

25 THE WITNESS: I have looked for it.

1 Again, Bank of America, extremely large
2 company, lots of departments, you know, this might
3 have been something that was missed. I can look
4 further into it though.

5 BY MR. KOWALSKI:

6 Q As you sit here today, do you know anything at
7 all about Area of Inquiry 3?

8 A No.

9 Q All right. I'm going to mark -- we were
10 provided documents here today. I'm going to mark the
11 first packet -- we only have one copy, although I think
12 your lawyer has a copy -- of something. Let me describe
13 it better. Okay. Do you have your copy?

14 (Defendants' Exhibit 6 marked for identification.)

15 MS. HENKE: Yes, I do.

16 BY MR. KOWALSKI:

17 Q It's 15 pages, and I marked it as Exhibit 6.
18 At the top there is the numbers 1 through 7 separated by
19 dots and in between two arrows, and at the top it says
20 , next line , Retained by
21 Litigation Management and assigned to . . .

22 What is Exhibit 6, these what did I say, 15
23 pages? What is Exhibit 6?

24 A Those are servicing notes.

25 Q And are these servicing notes maintained by

EXHIBIT 8

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

CASE NUMBER: 16-2004-CA-4835-XXXX-MA

DIVISION: CV-E

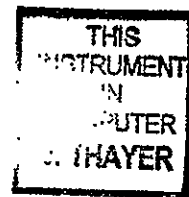
TCIF REO2, LLC,

Plaintiff,

v.

MARTIN L. LEIBOWITZ, AS TRUSTEE,
etc., et al.,

Defendants.



ORDER GRANTING DEFENDANTS' MOTION FOR SANCTIONS

This cause came before the Court on April 5, 2006 on Defendants Robert Jackson and Lillian Jackson's Motion for Sanctions for Fraud Upon the Court. The Court has reviewed the pleadings, considered arguments of counsel, and is otherwise fully advised in the premises.

The Court finds Plaintiff, through its servicing entity, GMAC Mortgage Corporation, submitted false testimony to the Court in the form of Affidavits of Indebtedness signed and subscribed by Margie Kwiatanowski, a "Limited Signing Officer" with GMAC Mortgage Corporation. The submission of the false Affidavits was pursuant to protocols and procedures wherein Ms. Kwiatanowski, as Limited Signing Officer, would attest to review of the relevant loan documents, the Complaint, and the loan payment records, when in fact (as sworn to by Ms. Kwiatanowski in her deposition) she neither reviewed the referenced records nor was familiar with the manner in which the records were created by GMAC on behalf of Plaintiff. In her deposition, Ms. Kwiatanowski admitted none of the Affidavits were signed before a Notary, and that Affidavits of the sort filed by Plaintiff would be signed and then left in a folder, to be notarized at a different

FILED 05/02/06 PM 01:00 JIM FULLER

time. The admissions by Ms. Kwiatanowski in her deposition directly contradict the sworn testimony to the Court in the form of the referenced Affidavits, both as to the substance of the Affidavits and with regard to whether the Affidavits were sworn to before a notary.

The Court recognizes the statements made by Plaintiff's counsel at the hearing to the effect that the procedures in place at GMAC with regard to servicing of this Plaintiff's loans were being corrected. The Court finds the submission of false testimony to the Court in the manner described does not rise to the level required in order for this Court to dismiss the action. Cox v. Burke, 706 So.2d 43 (Fla. 5th DCA 1998.) The Court will not condone Plaintiff's actions in filing false testimony, however, and the Court has both the inherent authority to sanction Plaintiff's actions, based upon the findings set forth above, and finds sanctions to be appropriate. It is therefore:

ORDERED AND ADJUDGED:

1. Defendants' Motion for Sanctions for Fraud Upon the Court is GRANTED.
2. The subject Affidavits as completed by Ms. Kwiatanowski are and same be stricken.
3. The Court orders Plaintiff to pay Defendants' attorneys' fees and costs for the efforts related to the taking of Ms. Kwiatanowski's deposition. Based upon a review of the record and the Affidavit filed by Defendants' counsel, the Court finds a reasonable sanction to be 30 hours of attorney's time and further finds a reasonable, local hourly rate to be \$250.00, and further awards costs in the amount of \$634.55. Therefore, the Plaintiff, TCIF REO2, LLC, Inc. shall forward to defense counsel payment of \$ 8,134.55 in sanctions for the reasons set forth above within 30 days from the date of this Order.
4. Counsel for Plaintiff shall file with the Court GMAC's written explanation and confirmation, on behalf of Plaintiff, that GMAC's policies and procedures with regard to the servicing of all of this Plaintiff's loans within the State of Florida have been modified, in accord with

representations made by counsel to the Court that such modifications were being made, to confirm the affidavits filed in future foreclosure actions in Florida accurately memorialize the actions and conduct of the affiants. The written confirmation of policy changes, and an explanation for the policies now in place, shall be filed with the Court within 30 days of the date of this Order.

DONE AND ORDERED, in Chambers, at Jacksonville, Duval County, Florida, this 15th day of May, 2006.



Circuit Court Judge

Copies to: James A. Kowalski, Jr., Esquire
Roy A. Diaz, Esquire

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

CASE NUMBER: 16-2004-CA-4835-XXXX-MA
DIVISION: CV-E

TCIF REO2, LLC,

Plaintiff,

v.

MARTIN L. LEIBOWITZ, AS TRUSTEE,
etc., et al.,

Defendants.

_____ /

MOTION FOR SANCTIONS FOR FRAUD UPON THE COURT

COME NOW, Defendants Robert and Lillian Jackson, by and through their undersigned counsel, and pursuant to Rule 1.140, Florida Rules of Civil Procedure, hereby move the Court to enter sanctions against the Plaintiff, including Dismissal of the pending matter with prejudice and such other sanctions as the Court deems appropriate. In support of this Motion, Defendants would state as follows:

1. On or about August 6, 2004, Plaintiff filed a Motion for Summary Judgment with this Court. In support of the Motion for Summary Judgment, Plaintiff contemporaneously filed an Affidavit of Indebtedness signed and subscribed by Margie Kwiatanowski, a "Limited Signing Officer" with GMAC Mortgage Corporation ("GMAC"), the servicing agent for Plaintiff. Plaintiff filed subsequent Amended Motions for Summary Judgment on March 10, 2005 and November 3, 2005, and again filed Affidavits of Indebtedness signed and subscribed by Ms. Kwiatanowski, as a Limited Signing Officer.

2. The Affidavits of Indebtedness contains Ms. Kwiatanowski's statements, allegedly under oath, on behalf of GMAC, that she:

(a) has "personal knowledge of the status of all mortgages and notes owned and held by said corporation." (Affidavit, paragraph 1).

(b) has "examined the relevant loan documents and the Complaint, and each allegation of the Complaint is correct." (Affidavit, paragraph 2).

(c) is familiar with the loan payment records, which are regularly compiled and maintained as business records: "These records properly reflect loan payments, charges, and advances that are noted in the records at the time of the applicable transactions by persons whose regular duties include recording this information." (Affidavit, paragraph 3).

(d) swore and subscribed to the statements before a Notary.

3. The Affidavits additionally detail the alleged facts as the status of the mortgage, including the material dates, the amount owed and the fees and charges.

4. Ms. Kwiatanowski was deposed at GMAC's facility in Horsham, Pennsylvania, on January 31, 2006. See, Notice of Deposition, attached hereto as Exhibit "A" and incorporated by reference. During the deposition, Ms. Kwiatanowski admitted the above statements under oath were false:

(a) has "personal knowledge of the status of all mortgages and notes owned and held by said corporation." (Affidavit, paragraph 1).

Ms. Kwiatanowski admitted that, while she can *access* other loan documents, the statement regarding personal knowledge was false:

Q. All right. Let me ask you to go to the Amended Affidavit, which is Jackson 00006. And we'll start with page - - I'm sorry, paragraph 1.

It states that you're a limited signing officer and that you have personal knowledge of the status of all mortgages and notes owned and held by said corporation.

Do you see that?

A. Yes, I do.

Q. How is that true?

A. Well, generally, I understand what a note and a mortgage is, and how - - how the loan is originated.

Q. Right. But this says you have personal knowledge of the status of all mortgages owned and held by said corporation; corporation being TCIF RE02, LLC?

A. Well, actually, we're the servicing agent for them. We would not have originated the loan.

I'm not quite sure how to answer your question, though.

Q. Well, how is it that you have personal knowledge of the status of all mortgages serviced by GMAC for this claimant?

A. Again, I'm not - - I don't know.

Q. **Do you have personal knowledge of the status of all mortgages and notes serviced by GMAC for this claimant?**

A. **No, I do not.**

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 30 line 9 - p. 31 line 15) (emphasis added)

(b) has "examined the relevant loan documents and the Complaint, and each allegation of the Complaint is correct." (Affidavit, paragraph 2).

Ms. Kwiatanowski testified she reviewed only a single computer screen prepared by someone else. She did not review any loan documents, much less the "relevant" ones, and did not read the Complaint:

Q. Now, paragraph 2 - - and I'm just jumping ahead to your affidavit. But your affidavits, as you may be familiar, referenced the fact that you reviewed certain things in order to sign the affidavits?

A. That's correct.

Q. Okay. The records in paragraph 2 that are requested are: Any and all documents, electronic memoranda, policy manuals, servicing manuals, or other items of any kind reviewed in preparation for completion of the Affidavit of Indebtedness dated July 15, 2004, and Amended Affidavit of Indebtedness dated October 20, 2005. And your affidavits are then attached after this.

But my next question is: Is there anything other than what's sitting to your left, that you recall reviewing in order to prepare the two affidavits?

A. I would have - - excuse me, I'm sorry. I would have reviewed a screen in our system that populates what the total indebtedness is. And I don't believe a copy of that screen is within this pile.

Q. Okay. Are you saying that you reviewed a single screen?

A. Yes.

Q. And when I'm picturing a screen, I'm picturing a single page of information; or is there more than one page of information that appears on your screen?

A. There is one page of information.

Q. What is that page of information called?

A. It's called the foreclosure work screen.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 19 line 13 - p. 20 line 24)

* * *

Q. Okay. Did you review the payment history separately?

A. I would have no reason to review it separately.

Q. Okay. In other words, you did not review the payment history before completing your affidavit?

A. That's correct.

Q. Would you have reviewed the actual note of mortgage before completing your affidavit?

A. No, I would not have.

Q. Would you have reviewed any of the customer history log, the document, the discussions back and forth between the mortgagors and the servicing company?

A. No, I would not have.

Q. **Is it fair to say, then, that in completing an affidavit such as the ones we have attached as Bates stamped Jackson 3 through 5, and Jackson 6 through 8, that you would have reviewed one computer screen called the foreclosure work screen?**

A. **That's correct.**

Q. And nothing else?

A. That's correct.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 22 line 16 - p. 23 line 17) (emphasis added)

* * *

Q. Paragraph 2, it says: I have examined the relevant loan documents and the Complaint, and each allegation of the Complaint is correct.

Is the Complaint part of the foreclosure work screen?

A. No, it is not.

Q. Would you have actually read the Complaint before signing the Amended Affidavit of Indebtedness?

A. No, I would not. I could have reviewed it because generally they are downloaded in a system that we have linked to our attorneys.

Q. Scanned?

A. Yes. Imaged.

Q. Imaged?

A. Um-hmm.

Q. Do you know whether it's general practice to bring up the image of the Complaint when you're reviewing the foreclosure work screen?

A. No, I would not.

Q. So typically you would not examine the Complaint before signing the affidavit?

A. That's correct.

Q. We've already covered that you review the foreclosure work screen.

What are the "relevant loan documents" that are referenced in paragraph 2?

A. I would think that they would have been anything that is supplied to the foreclosing attorney; it would be the mortgage, the note, the title policy.

Q. And did you review the relevant loan documents consisting of the mortgage and the note and the title policy before signing the Amended Affidavit of Indebtedness?

A. No, I did not.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 31 line 16 - p. 33 line 6) (emphasis added)

(c) "These records properly reflect loan payments, charges, and advances that are noted in the records at the time of the applicable transactions by persons whose regular duties include recording this information." (Affidavit, paragraph 3).

Ms. Kwiatanowski admitted that she had no knowledge of whether the information kept was recorded "at the time of the applicable transaction by persons whose regular duties include recording this information," and simply relies on the "system" without having any idea how or whether the "system" confirms entries are made accurately and timely:

Q. Do you agree that that sentence, the last sentence of paragraph 3 of your affidavit, indicates that the entries are made at the time of the transactions?

A. Yes, I do.

Q. Okay. So then, let me step back and re-ask the question. How is the system set up to confirm that those entries are made accurately and timely?

A. I wouldn't be able to answer that. That's not my area of expertise.

Q. Well, you swore to this affidavit.

A. Well –

Q. You swore to the truth of the fact that the history is noted in the record at the time of the transaction.

How do you know that to be true?

A. Because I – I have to rely on our system of record.

Q. Right. I agree that it's set up for you to rely on that, but that's not what this says. It says you're swearing to the fact that that record is accurate and timely.

A. I just would have to have confidence in my system that it is true and correct.

Q. Okay. Is there any – let me go back to my hypothetical that I asked you, where a mortgagor has a conversation with a loan specialist or work-out specialist, or whatever their title is, and reaches some sort of payment plan. Okay?

A. Okay.

Q. How is the system set up to confirm, number one, that that conversation is entered that day, for example, versus an employee taking a note and entering it a week later when they come back from vacation; and now is it set up to confirm that the data is entered accurately, that the employee has the payment numbers and times of payment and method of payment entered accurately?

A. I wouldn't be able to answer that because that's not in my unit.

Q. As part of your unit, have you ever gone back to confirm how you can swear to the truth of this sentence?

A. There are times when I might have to review a loan as far as conversations, if a borrower was disputing something. There would be those times that I would review the notes and the account at that point.

But in – in this particular affidavit, I had no reason to go back to review anything.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 34 line 13 - p. 36 line 20)

The record in the instant case demonstrates why some minimal scrutiny (as otherwise sworn to in the subject Affidavits, but never actually completed by the Affiant) would be necessary:

Q. And is it fair to say that as of November 25, 2003, the Jacksons were completely paid up with GMAC, according to that entry?

A. I would – I would have to confirm that by looking at the payment history.

Q. Well, tell me what else that entry would mean; in other words, why would that entry be made in the comment history if the payment history didn't reflect it as true?

A. Well, as it should, it should agree. I don't – I'm not disputing that. But my feeling would be I would look to see how the payments were applied, to see if they were applied correctly, if I had a reason to review this account.

Q. Which you did not?

A. That's correct.

Q. Well, isn't it fair to say that your affidavit indicates that the payment due February 1, 2004, is the one that placed this loan in default, correct?

A. That's correct.

Q. And that would be a payment due for December, a payment due for January, and a payment due for February of '04, correct?

A. That's correct.

Q. Did you ever go back to confirm whether those were the payments that threw this loan into default?

A. I would only know what the due date is in the system.

Q. Just based on what the foreclosure work screen says?

A. That's correct.

Q. Would you know who the person – because I want to be fair, now that I have an understanding of your role in this.

Would you know who the person would be who would be most familiar with the entries on the comment history that we're going over right now?

A. I don't think I could give you a specific person, no.

Q. Okay. If I told you that Mr. and Mrs. Jackson have canceled checks showing payments cashed by GMAC on January 5th of '04 and February 14, of '04, you have no explanation for that; that's not your role in reviewing this?

A. That's correct. That's something payment research would handle.

Q. Okay. With regard to whether the payments were accurately allotted to principal and interest as opposed to paid from suspense or pay to suspense, that would not be your role?

A. That's correct.

Q. Allotting the payments accurately is not your role?

A. That's correct.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 49 line 10 - p. 51 line 21)

Unfortunately, while the Affidavit reflecting sworn testimony to the Court indicates the Affiant has conducted a complete review of the file, GMAC's system is designed so that other departments within GMAC are responsible for reviewing the data:

Q. All right. Ms. Kwiatanowski, let me ask you this: Is there any reason or any way in the system that is set up within GMAC for the foreclosure work screen to indicate any problems or issues or disputes prior to the day you review it?

A. No.

Q. If there are comments in the – I forget what we called them – the comment history, if there are comments here that note, for example, that the borrower is having problems trying to get someone to resolve escrow and payment applications issues, if there are comments that say Account escrow payment may not be correct, sent for explanation, that type of thing, are any of those – or do any of those result in any sort of flags that get to the foreclosure work screen?

A. If there were any reason, if there was a dispute prior to a loan being referred, they would put what we call a CIT on the loan; that would prevent it from being referred while it was being researched.

Q. Okay. And I do see that, the listing for CIT, throughout this history.

What then, stops that CIT trigger and sends it on to your department, or stops the CIT hold and then sends it on to your department?

A. I believe there's -- I believe there's two different CITs for different lengths of time to keep it on hold. I believe – and also it would fall into someone's queue to see whether or not that should be removed prior to removing it; to see, for example, to see if the research has been completed. And if it has been and they find no error of GMAC's, then they would remove that CIT and that would move forward to foreclosure.

Q. Okay. Which department conducts that analysis –

A. It would –

Q. – is it done before it gets to your department or your unit?

A. Yes.

Q. Okay. How's that get done?

A. It would be through customer service. It would really depend on what the issue was as to what unit would be handling it.

Q. Okay. Well, for example, here we have – and I'm just summarizing this, and just because I think it is accurate – but there are entries here throughout with regard to a dispute in how the payments are being applied; you know, one notation here made by a GMAC individual that the account escrow payment may not be correct, sent for explanation.

How can you – or can you tell from that which unit is handling the review?

A. No, I cannot.

Q. What are the names of the units that do the reviews; you said there were two?

A. Well, there's a payment – there's payment research. There's an escrow unit if it were a dispute with taxes or insurance, they would need to review it. For an MI issue, that area would review it. It would all depend on the issue –

Q. Okay.

A. – who would be researching it.

Q. Is there a way to tell from the comment histories which units resolve the dispute?

A. It would show by that teller number on there who the associate was.

Q. Okay.

A. And then you would know from there what unit they would come from.

Q. And again, that gets done on the DocTrac – I'm sorry.

A. The XNet.

Q. XNet?

A. Preconversion, on the XNet.

Q. Okay.

A. Postconversion, we can do it right on our system.

Q. Is there a review process to make sure that the conclusion is accurate?

A. I wouldn't be able to answer that.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 58 line 7 - p. 61 line 24)

(d) swore and subscribed to the statements before a Notary.

Finally, Ms. Kwiatanowski admitted at the deposition she did not sign the Affidavits in front of a notary, but that it was "our" regular practice for the Affidavits to be placed in a folder and sent across the building to be signed by the notary, sometimes on another day:

Q. On Ms. Holmes' notary section, do you see there that she does not fill out the name of the person who is taking the oath?

A. I see that now, yes.

Q. And do you see that she also does not have a notary stamp?

A. I see that also, yes.

Q. Are you familiar with Pennsylvania's notary statute?

A. I realize that they have to have a stamp to notarize.

Q. And that both of those are violations of Pennsylvania's notary statute?

A. I would think so, yes.

Q. How is it that you and Ms. Holmes ended up in the same place at the same time for completion of the affidavit, how does that physically work?

A. Well, all documents that we sign already sworn in, she would hand me personally. So she would just sign off – she would notarize it after I signed off.

Q. Are you two in the same room when that's done?

A. Yes.

Q. Okay. How is that physically done, is what I am asking?

A. We would – anything that I would sign over to – anything I would sign off, I would give to her to notarize.

Q. Okay. And how – again, how is that physically done; do you and she meet in the same room, at the same time in the same place?

A. She is in the same building. I – I would leave – it could be more than just one affidavit in a folder and I waited for her to notarize.

Q. Okay. But by then, I'm taking it that she notarizes it at a different time than you sign it?

A. That's correct.

Q. Okay. Is that also true for the signature on Jackson 00008?

A. Yes, that's correct.

Q. And that appears to be a Brenda Staehle?

A. Brenda Staehle.

Q. Staerle, S-T-A-E-R-L-E.

A. Actually it's S-T-A-E-H-L-E.

Q. Okay. Thank you.

And she does indicate that you are the person swearing, and she does have her notary stamp here. But what you're indicating is you signed the document –

For example, the Amended Affidavit of Indebtedness, which is 6 through 8 on our Bates stamp, you sign the document, you put it in a folder, it gets routed to Ms. Staehle and then she signs it at a later time?

A. That's correct.

Q. Do you know if she signs it on the same day that you do?

A. Generally, yes, she would.

Q. How do you know that, what's the control for that?

A. Because they would try to complete something within the same day; as we have our guidelines to follow and our time frames to get it back to the processor, to supply it back to the attorney.

Q. Okay. But there's no doubt that she doesn't notarize it – or she doesn't witness your signing?

She does not witness or did not witness you placing your signature on Bates stamp 8; is that correct?

A. That's correct.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 27 line 4 - p. 30 line 8) (emphasis added)

Clearly, the notary statutes of both Pennsylvania (57 P.S. 158) and Florida (Section 117.05, Florida Statutes) are violated by the process used by GMAC in the instant case (and in all other cases, given the procedure outlined by Ms. Kwiatanowski.) Violation of Florida's notary statutes in the manner described (notarizing a signature if the person whose signature is being notarized is not in the presence of the notary at the time) constitutes malfeasance and misfeasance in the conduct of official duties, pursuant to Section 117.107(9), Florida Statutes. Under Pennsylvania law, when a notary certifies a document, the notary attests that the document has been executed, that the notary *was confronted by the signor*, that the signor is the person whose name is subscribed, and that the notary is *verifying the date of execution*. In Re Fisher, 320 B.R. 52, at 63 (E.D. Penn. 2005) (emphasis added.)

5. As referenced above, the Affidavits of Indebtedness filed by GMAC in furtherance of the foreclosure constitute sworn testimony to this Court in validation of the debt and GMAC's right to collect the debt. Unfortunately, the Affidavits are rife with falsehoods and misstatements; GMAC's system does not allow the Affiant (or her entire department, for that

matter) any opportunity to review the actual history of the loan or any of the loan document, as the Affidavit otherwise maintains to the Court. Defendants assert the filing of such false sworn testimony is a fraud upon this Court.

6. It is appropriate for the trial court to dismiss an action based on fraud, provided that 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).

7. Misrepresentations in the Affidavit are willful fraud, interfering with the Court's "ability to impartially adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." *Id.*

8. This Court should dismiss the pending action with prejudice and award such other relief as the Court deems just and appropriate.

WHEREFORE, Defendants Robert and Lillian Jackson, respectfully request this Court enter sanctions against Plaintiff, including entry of a Dismissal with Prejudice and such other relief as the Court deems just and appropriate.

DATED at Jacksonville, Duval County, Florida, this 3 day of March, 2006.

**LAW OFFICES OF TROMBERG
& KOWALSKI**



Fred Tromberg, Esquire (FBN: 246514)
James A. Kowalski, Jr., Esquire (FBN: 852740)
Charlie F. Schmitt (FBN: 0012803)
4925 Beach Boulevard
Jacksonville, FL 32207
Telephone: (904) 396-5321
Facsimile: (904) 396-5730
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 3 day of March, 2006, to Diana B. Matson, Esq., 2691 East Oakland Park, Suite 303, Ft. Lauderdale, FL 33306.


James A. Kowalski, Jr., Esquire

EXHIBIT "A"

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

CASE NUMBER: 16-2004-CA-4835-XXXX-MA

DIVISION: CV-E

TCIF REO2, LLC,

Plaintiff,

v.

MARTIN L. LEIBOWITZ, AS TRUSTEE ,
etc., et al.,

Defendants.

NOTICE OF DEPOSITION
OF MARGIE KWIATANOWSKI WITH REQUEST
TO PRODUCE DOCUMENTS AT DEPOSITION
(BY VIDEOTAPE RECORDING)

TO: Diana B. Matson, Esq.
2691 East Oakland Park Blvd.
Suite 303
Fort Lauderdale, FL 32306

PLEASE TAKE NOTICE that on **Tuesday, January 31, 2005, at 12:30 p.m. and continuing thereafter until complete**, at 500 Enterprise Road, Horsham, Pennsylvania, 19044, the Defendants, Robert Jackson and Lillian Jackson, will take the videotaped deposition of the following:

MARGIE KWIATANOWSKI

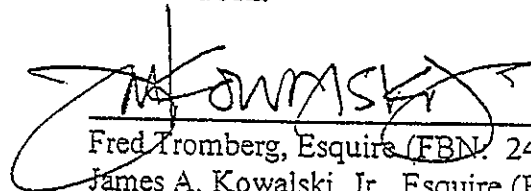
upon oral and video examination pursuant to the Florida Rules of Civil Procedure before Esquire Deposition Services, or before some other officer authorized by law to take depositions. Said deposition is being taken for the purpose of discovery, for use at trial, or both.

At the date, time and place of the deposition, the witness shall have with her the following:

1. All books, records, and documents kept or maintained by Plaintiff and or its agents or employees which relate in any way to Robert and Lillian Jackson.
2. Any and all documents, electronic memoranda, policy manuals, servicing manuals, or other items of any kind reviewed in preparation for completion of that certain Affidavit of Indebtedness, dated July 15, 2004 and Amended Affidavit of Indebtedness dated October 20, 2005, copies of which are attached hereto.

DATED, at Jacksonville, Duval County, Florida, this 8 day of December, 2005.

LAW OFFICES OF TROMBERG &
KOWALSKI



Fred Tromberg, Esquire (FBN: 246514)

James A. Kowalski, Jr., Esquire (FBN: 852740)

Charlie F. Schmitt, Esquire (FBN: 12803)

4925 Beach Boulevard

Jacksonville, FL 32207

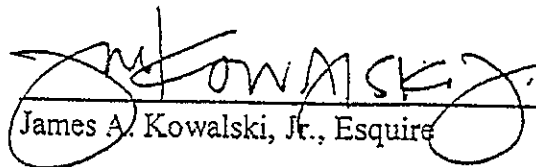
Telephone: (904) 396-5321

Facsimile: (904) 396-5730

Counsel for Defendants Robert and Lillian Jackson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail delivery, this 8 day of December, 2005, to Diana B. Matson, Esq., 2691 East Oakland Park, Suite 303, Ft. Lauderdale, FL 33306.



James A. Kowalski, Jr., Esquire

cc: Esquire Deposition Services
1600 JFK Boulevard, Suite 1210
Philadelphia, PA 19103

IN THE CIRCUIT COURT FOR DUVAL
COUNTY, FLORIDA. CIVIL DIVISION

CASE NO. 162004CA004835XXXXMA

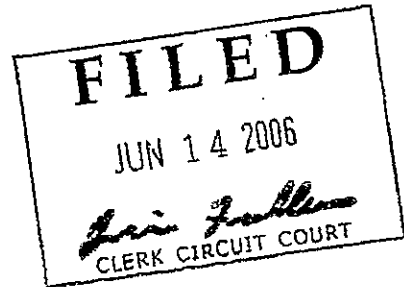
TCIF REO2, LLC,

Plaintiff,

vs.

MARTIN L. LEIBOWITZ, AS TRUSTEE UNDER THE
JACKSON FAMILY LAND TRUST DATED NOVEMBER
18, 2002; ROBERT L. JACKSON; LILLIAN M. JACKSON;
WILLIAM W. MASSEY, III; STATE OF FLORIDA
DEPARTMENT OF REVENUE; UNKNOWN TENANT
NO. 1; UNKNOWN TENANT NO. 2, et. al.,

Defendants.



CV-E

THIS INSTRUMENT
IN COMPUTER
J.T.

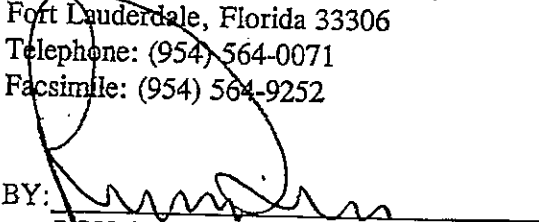
**PLAINTIFF'S NOTICE OF COMPLIANCE WITH THIS COURT'S
ORDER DATED MAY 1, 2006**

COMES NOW, the Plaintiff, TCIF REO2, LLC., by and through its undersigned counsel, and files this Notice of Compliance with this Court's Order dated May 1, 2006, and states that the Plaintiff has forwarded a check to opposing counsel as required pursuant to paragraph 3 of said Order, and has simultaneously herewith submitted the Directive to the Court, as required pursuant to paragraph 4 .

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Compliance has been sent via U.S. Mail this 12th day of June, 2006 to all parties on the attached Service List.

SMITH, HIATT & DIAZ, P.A.
Attorneys for Plaintiff
2691 East Oakland Park Boulevard, Suite 303
Fort Lauderdale, Florida 33306
Telephone: (954) 564-0071
Facsimile: (954) 564-9252

BY: 
ROY A. DIAZ
Florida Bar No. 767700

SERVICE LIST

Case No. 162004CA004835XXXXMA

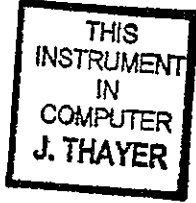
Martin L. Leibowitz, as Trustee under
the Jackson Family Land Trust
2120 Oak Street
Jacksonville, FL 32204

Fred Tromberg, Esq.
4925 Beach Blvd.
Jacksonville, FL 32207
Attorney For Robert L. Jackson
And Lillian M. Jackson

William W. Massey, III
2254 Riverside Ave
Jacksonville, FL 32204

State of Florida Department of Revenue
c/o Dr. Dr. James A. Zingale, Executive Director
501 South Calhoun Street, Carlton Building, Room 104
Tallahassee, FL 32399

Smith,
Hiatt &
Diaz, P.A.
ATTORNEYS



2691 E. Oakland Park Blvd.
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Fort Lauderdale, Florida 33306
(954) 564-0071 Telephone
(954) 564-9252 Facsimile

Mailing Address:
PO Box 11438
Fort Lauderdale, Florida 33339-1438

June 12, 2006

RECEIVED
JUN 13 2006

Via Overnight UPS

BERNARD NACHMAN

The Honorable Bernard Nachman
Duval County Courthouse
330 E. Bay Street, Room 202
Jacksonville, FL 32202-

File in

RE: TCIF REO2, LLC v. MARTIN LEIBOWITZ, as Trustee, et al.
Case No. 162004CA004835XXXXMA

CV-E

Dear Judge Nachman:

Enclosed with this correspondence is a courtesy copy of the Plaintiff's Notice of Compliance with this Court's Order dated May 1, 2006, and the original signed Directive from GMAC regarding its policies on Affidavits being filed with the court in connection with mortgage foreclosure cases.

Thank you for your consideration.

Respectfully submitted,
SMITH, HIATT & DIAZ, P.A.

Roy A. Diaz
For the Firm

Enclosures

cc: James A. Kowalski, Jr., Esq

FILED 06/14/06 PM 02:45 JIM FULLER

A POLICY DIRECTIVE FROM THE LEGAL STAFF
DOCUMENT SIGNATURE PRACTICES

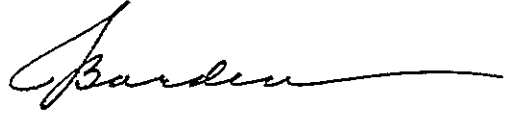
The Legal Staff and its retained outside counsel present evidence to the courts in probably all jurisdictions. This evidence takes the form of written documentation signed by authorized corporate representatives. Some of these documents are notarized either as a simple notarial certificate and others notarized as sworn instruments before the notary. The following directives make not only good business sense but are commanded by statute. Thus, besides financial impact in the cases we handle, the signing process may invoke sanctions by a court. It is the integrity of our cases that is at stake and we cannot afford anything less than full accuracy.

1. Any signatory in behalf of the corporation must read and fully understand the instrument that is being signed. Do not sign unless you have that comfort level.
2. Any signatory in behalf of the corporation must be properly authorized by the corporation. When in doubt, consult with your manager or the Legal Staff for guidance.
3. Do not sign verifications on court pleading documents unless you have independently reviewed and checked the facts.
4. Sign instruments *only in the presence of* the witnessing notary public.
5. If the text of the notarial certificate contains an oath (e.g. "Subscribed and sworn to before me. . ." or similar words) the notary must affirmatively say to the signer, "Do you so swear?".
6. Pre-signing notarial certificates before the signer are prohibited by law everywhere.

CERTIFICATION

The undersigned certifies that as of June 1, 2006, the attached Policy Directive on Document Signature Procedure has been distributed to the associate general counsel and associate counsel of the respective business units of GMAC Mortgage Corporation for distribution to authorized signatories within the enterprise. This Policy Directive is a reaffirmation of existing procedures incorporating the statutory mandates to notaries public of the respective residence states of such notaries public.

June 6, 2006

A handwritten signature in cursive script, appearing to read "James J. Barden", written over a horizontal line.

James J. Barden
Associate Counsel – Legal Staff

STATE OF MAINE
CUMBERLAND, ss.

BRIDGTON DISTRICT COURT
DOCKET NO. BRI-RE-09-65

FEDERAL NATIONAL MORTGAGE ASSOC.)
)
Plaintiff)
)
)
v.)
)
)
NICOLLE BRADBURY)
)
Defendant)
and)
)
GMAC MORTGAGE, LLC d/b/a DiTech, LLC)
.com and BANK OF AMERICA, NA)
)
Parties-in-Interest)

ORDER ON FOUR
PENDING MOTIONS

STATE OF MAINE
Cumberland, ss. Clerk's Office
SEP 24 2010
RECEIVED

The Court has reviewed each of the four pending motions before it, as well as all supporting materials, including supporting affidavits and statements of material fact. The Court held oral argument on September 1, 2010. Those present were attorneys Tom Cox, Esq. and Geoffrey Lewis, Esq. for Defendant, and attorney John Aromando, Esq. for Plaintiff and Party-in-Interest GMAC. Attorneys Cox and Aromando argued capably for their positions.

On the question of summary judgment, before the Court is Plaintiff's Renewed Motion for Summary Judgment, as well as Defendant's Motion for Revision and Reversal of the Partial Summary Judgment Order. By its motion, Plaintiff asks that the Court affirm its previously issued order of January 27, 2010 granting summary judgment in its favor on the issue of liability, and further seeks summary judgment in its favor on the issue of the amounts owed. The Defendant's motion seeks to set aside this Court's previous order granting partial summary judgment for Plaintiff.

Defendant urges that this Court set aside its order on the ground that in so ruling, the Court relied upon the affidavit of Jeffrey Stephan, which was deficient under M. R. Civ. P. 56(e) because Mr. Stephan had signed the affidavit outside the presence of a notary and without reading its contents. The Plaintiff contends that the order can stand even putting aside the Stephan affidavit, and in any event has sought to cure the irregularities in its filing by submitting a properly sworn affidavit to support its motion.

There are, however, deficiencies in Plaintiff's filing which are not cured by the newly-submitted affidavit, namely deficiencies in its statement of material facts (SMF). The Law Court has made clear that in ruling on a summary judgment motion, Maine courts are "neither required *nor permitted* to search outside the facts properly referenced in the statements of material facts" See, e.g., *Camden Nat'l Bank v. Peterson*, 2008 ME 85 ¶ 26, 948 A.2d 1251, 1258 (emphasis added). In *Chase Home Finance LLC v. Higgins*, 2009 ME 136, 985 A.2d 508, the Law Court set forth a list of those facts which "must be included in the mortgage holder's statement of material facts." *Id.* at ¶ 11, 985 A.2d at 511. Plaintiff was bound to abide by this mandate, because both its initial and renewed summary judgment motions were filed after the June 15, 2009 effective date noted in *Chase*. See *id.* at ¶ 11 n.2, 985 A.2d at 510 n. 2 (explaining that new statutes and rules will apply to summary judgment motions filed after their effective dates, regardless of when the foreclosure action was commenced, and adding: "We include the new requirements here for future reference of parties moving for summary judgment in residential foreclosure actions").

Neither Defendant's initially-filed statement of material facts nor its revised statement of material facts comports with *Chase*. For example, the mortgage holder's statement of facts must include "the existence of the mortgage, including the book and page number of the mortgage, and an adequate description of the mortgaged premises, including the street number, if any." *Id.* at ¶ 11, 985 A.2d at 511 (citing P.L. 2009, ch. 402 §§ 9, 17, effective June 15, 2009). Plaintiff's initial and subsequently filed statement of facts provide the book and page number, but fail to include the street address. See Plaintiff's SMFs at ¶ 2. Failure to include the street address is enough in itself to preclude the granting of summary judgment. See *Mortgage Elec. Registration Sys. v. Saunders*, 2010 ME 79 ¶ 25 (explaining that "While the book and page number – but not the mortgaged property's address – were included in the affidavit supporting one of MERS's original statements of material fact, facts not set forth in the parties' statements of material facts are not part of the summary judgment record").

Plaintiff's SMFs contain other omissions as well. It is not enough to state, as Plaintiff does, that "Demand has been made upon Defendant for payment of all amounts due" Plaintiff's SMFs at ¶ 5. 14 M.R.S.A. § 6111 requires that a mortgagee's default notice set forth the mortgagor's right to cure, and specifies the requisite content of such notices as well as the procedures which must be followed. As the Law Court stated in discussing compliance with the statutory written notice requirements of foreclosure, "For a mortgagee to legally foreclose, all steps mandated by statute must be strictly enforced." *Camden Nat'l Bank*, 2008 ME at ¶ 21, 948 A.2d at 1257. Plaintiff's statements of fact fail to set forth facts showing compliance with § 6111. Granting summary judgment despite such an omission would contravene the Law Court's clear pronouncements on this issue.

Accordingly, this Court's Partial Summary Judgment Order dated January 27, 2010 is hereby vacated per the request in the Defendant's Motion for Revision and Reversal, and Plaintiff's Renewed Motion for Summary Judgment is denied. No further summary judgment motions will be heard, as the deadline for filing dispositive motions

has long passed and Plaintiff has already been given a second bite of the apple. The parties have twenty days to file an agreed pre-trial order so that this matter may promptly be placed on the trial list in Portland. This file is now transferred to the Portland District Court for further filings and trial.

In addition to renewing its Motion for Summary Judgment, Plaintiff has also filed a Motion for Entry of Protective Order pursuant to M.R. Civ. P. 26(c). This motion is likewise denied.

Rule 26(c) provides that “for good cause shown” a court may enter a protective order “which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” M.R.Civ. P. 26(c). Plaintiff seeks a protective order “prohibiting the dissemination of discovery materials obtained in this case.” Plaintiff’s Motion for Entry of Protective Order at 7. As grounds for its motion, Plaintiff points to the embarrassment GMAC and its employees have suffered, and will continue to suffer, from the posting of excerpts from Stephan’s deposition transcript on an Internet blog. The Court is not persuaded that the Plaintiff has shown the requisite “good cause” to justify entry of a protective order in this case. *See, e.g., Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 789 (1st Cir. 1988) (agreeing with Second Circuit in noting that “the party seeking a protective order has the burden of showing that good cause exists for issuance of that order.... [and] the obverse is also true, i.e. if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection”) (citation omitted).

Stephan’s deposition was taken to advance a legitimate purpose, and the testimony elicited has direct probative value to this dispute. Attorney Cox did not himself take action other than to share the deposition transcript with an attorney in Florida. That the testimony reveals corporate practices that GMAC finds embarrassing is not enough to justify issuance of a protective order. Further, Plaintiff has failed to establish that GMAC has been harmed specifically as a result of the dissemination of the June 7, 2010 deposition transcript, given that similarly embarrassing deposition testimony from Stephan’s December 10, 2009 Florida deposition also appears on the Internet, and will remain even were this Court to grant Plaintiff’s motion. Accordingly, because Plaintiff has failed to satisfy its burden of persuasion under Rule 26(c), its Motion for Entry of Protective Order is denied.

In addition to seeking the reversal of this Court’s previously granted Order for Partial Summary Judgment, the Defendant has moved for sanctions pursuant to M.R. Civ. P. 56(g). This motion is granted in part, as explained below.

The facts underlying Defendant’s motion are for the most part undisputed. Plaintiff does not dispute that its affiant, Jeffery Stephan, in his role as limited signing officer for GMAC, Plaintiff’s servicing agent, signed the affidavit which Plaintiff submitted in support of its Motion for Summary Judgment without even reading it and without signing in the presence of a notary. These facts came into the record because the

Defendant went to the time and expense of traveling to Pennsylvania to take Stephan's deposition. In that deposition, which took place on June 7, 2010, Stephan testified that he signs some 400 documents per day, and that the process he follows in signing summary judgment affidavits is consistent with GMAC's policies and procedures.

The Court is particularly troubled by the fact that Stephan's deposition in this case is not the first time that GMAC's high-volume and careless approach to affidavit signing has been exposed. Stephan himself was deposed six months earlier, on December 10, 2009, in Florida. His Florida testimony is consistent with the testimony given in this case: except for some limited checking of figures, he signs summary judgment affidavits without first reading them and without appearing before a notary. Even more troubling, in addition to that Florida action, in May, 2006 another Florida court not only admonished GMAC, it sanctioned the Plaintiff lender for GMAC's affidavit signing practices. As part of its order, the Florida court required GMAC to file a Notice of Compliance, indicating its commitment to modify its affidavit signing procedures to conform to proper practices. The experience of this case reveals that, despite the Florida Court's order, GMAC's flagrant disregard apparently persists. It is well past the time for such practices to end.

Accordingly, Defendant asks that this Court impose sanctions pursuant to M.R. Civ. P. 56(g), which provides:

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Although there are no Maine Law Court cases applying it, the plain language of Rule 56(g) makes clear that the Court must determine, first, whether it appears "to the satisfaction of the court" that an affidavit submitted for summary judgment purposes was presented "in bad faith or solely for the purpose of delay." The Law Court has defined "bad faith", albeit in a different context: "Bad faith 'imports a dishonest purpose and implies wrongdoing or some motive of self-interest.' Bad faith means 'dishonesty of belief or purpose'" *Seacoast Hangar Condo. II Ass'n. v. Martel*, 2001 ME 112 ¶ 21, 775 A.2d 1166, 1171-72 (citing a Utah case and Black's Law Dictionary).¹ It is left to the Court's discretion to determine whether offending conduct rises to the level of "bad faith" such that Rule 56(g) sanctions are warranted. *See, e.g., Cobell v. Norton*, 214 F.R.D. 13, 20 (D.D.C. 2003) (noting that "as a practical matter a court has wide discretion in deciding what constitutes 'bad faith'" (citing Wright & Miller, Federal Practice and Procedure § 2742 (3d ed. 1998)). If a Court is satisfied that the affidavit was

¹ *Seacoast Hangar's* definition of "bad faith" occurred in the context of discussing the business judgment rule, which "does not insulate directors from liability for breach of their fiduciary duties if they 'acted primarily through bad faith or fraud'" *Id.* at ¶ 20 n. 1, 775 A.2d at 1171 n.1 (citation omitted).

submitted in bad faith, then the mandatory language of Rule 56(g) requires that the Court forthwith order “the party employing [the affidavit] to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney’s fees.” M.R.Civ. P. 56(g).

Both parties cite *Fort Hill Builders, Inc. v. National Grange Mut. Ins. Co.*, 866 F.2d 11 (1st Cir. 1989), in which the First Circuit analyzed the cases applying the Federal Rule 56(g) to conclude that the matters in which sanctions were imposed involved “particularly egregious” conduct. Characterizing its misconduct as a mere “procedural deficiency,” Plaintiff urges the Court to find no bad faith; Defendant, on the other hand, argues that, on the spectrum of egregiousness, the conduct at issue more than meets the standard for bad faith under the rule.

The Court agrees with Defendant, and finds to its satisfaction that the Stephan affidavit was submitted in bad faith. Rather than being an isolated or inadvertent instance of misconduct, the Court finds that GMAC has persisted in its unlawful document signing practices long after and even in the face of the Florida Court’s order, and that such conduct constitutes “bad faith” under Rule 56(g). These documents are submitted to a court with the intent that the court find a homeowner liable to the Plaintiff for thousands of dollars and subject to foreclosure on the debtor’s residence. Filing such a document without significant regard for its accuracy, which the court in ordinary circumstances may never be able to investigate or otherwise verify, is a serious and troubling matter. Accordingly, the Court orders Plaintiff² to compensate Defendant’s counsel for his attorney’s fees and costs “which the filing of the Affidavit caused [him] to incur” – in other words, that Plaintiff pay Defendant’s counsel for his time and expenses in preparing for and taking Stephan’s deposition, as well as for his time and expenses in preparing for, filing, and prosecuting Defendant’s Rule 56(g) motion.³

² As the Florida court imposed sanctions on the Plaintiff lender for GMAC’s conduct, the Court likewise finds it appropriate to hold Plaintiff responsible for the conduct of its servicing agent, GMAC. Requiring Plaintiff to pay Defendant counsel’s attorney’s fees comports both with the language of Rule 56(g) (award of expenses should be ordered against party “employing” affidavits) as well as with principles of agency law. *See, e.g., Dupuis v. Federal Home Loan Mortgage Corp.*, 879 F. Supp. 139, 144 (D. Me. 1995) (holding that “[a]s a matter of agency law, it would be unfair for [the note and mortgage holder] to have the benefit of [the servicing agent’s] servicing of the note and mortgage without also making [the note and mortgage holder] responsible for [the servicing agent’s] excesses and failures”).

³ The Court declines to award fees for opposing Plaintiff’s summary judgment or protective order motions, because those tasks were not “caused” by the bad faith affidavit. Because the Court finds its award of attorney’s fees and costs to be a sufficient sanction for Plaintiff’s bad faith conduct, the Court declines to explore the issue of contempt in this case as requested by Defendant.

Defendant has ten days from the date of this order to file an affidavit setting forth his time spent, usual hourly rate,⁴ and expenses incurred in taking Stephan's deposition and filing and pursuing Defendant's Rule 56(g) motion. Plaintiff's written objection to Defendant's counsel's claimed expenses, if any, must be filed within seven days thereafter, and shall only address the sums claimed. The Court will thereupon issue an order setting forth the reasonable sum Plaintiff owes to Defendant's counsel.

The clerk shall docket this order by reference under Rule 79(a).

DATED: _____

9/29/10



Hon/Keith A. Powers, Judge
Maine District Court

⁴ That Defendant's counsel is entitled to an award of attorney's fees is not affected by the fact that he has labored in this case on a pro bono basis. *Cf., Foster v. Mydas Assoc., Inc.*, 943 F.2d 139, 144 n.7 (1st Cir. 1991) (noting that civil rights attorneys who work pro bono and prevail are usually awarded attorney's fees under civil rights statutes).