

# Bankruptcy Litigation Model

## VOLUME 4

### MAX GARDNER'S GUIDE TO FALSE DOCUMENTS

#### For Ipad

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# Volume 4 – False Documents

## Table of Contents

Tabs	Page
<b>Dexia Holdings v Countywide</b>	Dexia Holding v Countrywide NY Superior 6
<b>IBANEZ</b>	Max's Notes on Ibanez 201 Slip Opinion on Appeal 202 Memo Opinion March 2009 218 Amicus Affidavit of Marie McDonnell 240 Securitization Flow Chart 247 Timeline 248 Apocalypse Now? 249 Amer Banker WF US Bank 253 National Mortgage News 256 K&L Gates 259 11 Tips on Special Servicing after Ibanez 269
<b>Kemp v Countrywide</b>	Summary of Wizmur Opinion 274 Wizmur Opinion 275 Transcript of DeMartini Hearing 297 Max's Comments on DeMartini Testimony 347 Profile of David Spector 348 Max on the Allonges –Nov 29, 2010 350 Allonge, Exhibit A 352 Max on Compliance Report 356 BAC Ten Big Problems 360 Failure to Transfer Notes 364 NakedCap 368 Testimony Pokes holes in BOA's Defense 370 B of A Disowns Its Own 375 Moody's Countrywide Review 379 Testimony in BK Case 381 Kemp v Countrywide in Graphic Form 385 Critical Case Comment in Re Kemp 386 Market Update 389
<b>Foreclosures Gone Wild</b>	Subprime Mortgage 392 Letter to FSOC Calling Halt 393 The Rot from With the Mortgage Servicing 396

	Foreclosures Gone Wild	399
	Mike Konacal –Foreclosure for Dummies	406
	Robo Signers	413
	Title Management	415
	Bank Disinformation I and II	418
	5 Things David Axelrod must have Missed	426
	OBAMA Victim of Robo Signers	429
	FUBAR Mortgage Behavior	435
	LPS Comments on Robo Signers	439
	Freddie Mac Industry Letter	442
	Deutsche Memo: Allegations Re Loan Servicer Practices	443
<b>Senate and House Hearings</b>	12.02.2010 Deutsche Congress Hearing on FC crisis	454
	Levitin Written Testimony	509
<b>It's Elementary</b>	Max's Document Road Signs	537
	Max's Dirty Dozen Proof of Ownership	554
	Tables of Red Flag Review	562
<b>A to D Transfers</b>	LPS Employee Activities	568
	Recently Discovered Flaw in Recording System Clouds Title	571
	Max's Notes on Indymac v Machado	573
<b>Sample of Fake Documents</b>	The What It Talking Points	633
	Highlights of Deposition of Jeffrey Stephan	634
	Deposition of Beth Ann Cottrell	637
	Samples of Fake Allonges, Assignments, ETC	640
<b>PSA Samples</b>	Waiver of Equity of Redemption NCGS 53- 426	700
	Are you PSA Literate?	701
	Mortgage backed Security Pooling and Servicing Agreements Explained	705
	Prohibition of Mortgage Loan Modification	726
<b>Sample Document Custody Agreements</b>	Example Document Custody Agreement – American Home Mortgage as Seller	731
<b>Freddie Mac Handbook</b>	Freddie Mac Document Custody Procedures Handbook	766

<b>Freddie Mac Handbook (Cont'd)</b>	Freddie Mac Document Custody Procedures Overview	815
	Document Custody Endorsements	848
	Document Custody Assignments	851
	Defects with Freddie Mac	853
	Freddie Mac Document Custody Contacts	856
	Freddie Mac Investor Reporting & Accounting	857
	Freddie Mac Investor Accounting Manager	859
	Freddie Mac Annual Doc Custody Certification Report	861
	Freddie Mac Form 1034s	870
	Freddie Mac Form 1036	880
	Freddie Mac Execution of Legal Documents	881
	Freddie Bulletin 09.16	882



DEXIA HOLDINGS V.  
COUNTRYWIDE HOME LOANS

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

DEXIA HOLDINGS, INC.; FSA ASSET MANAGEMENT LLC; DEXIA CRÉDIT LOCAL, NEW YORK BRANCH; NEW YORK LIFE INSURANCE COMPANY; NEW YORK LIFE INSURANCE AND ANNUITY CORPORATION; THE MAINSTAY FUNDS; MAINSTAY VP SERIES FUND, INC.; TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA; TIAA-CREF LIFE INSURANCE COMPANY; TIAA GLOBAL MARKETS, INC.; COLLEGE RETIREMENT EQUITIES FUND; and THE TIAA-CREF FUNDS,

Plaintiffs,

v.

COUNTRYWIDE FINANCIAL CORPORATION; COUNTRYWIDE HOME LOANS, INC.; COUNTRYWIDE HOME LOANS SERVICING LP; CWALT, INC.; CWMBBS, INC.; CWABS, INC.; CWHEQ, INC.; COUNTRYWIDE SECURITIES CORPORATION; COUNTRYWIDE CAPITAL MARKETS, LLC; ANGELO MOZILO; DAVID A. SAMBOL; BANK OF AMERICA CORP.; BAC HOME LOANS SERVICING, L.P.; NB HOLDINGS CORPORATION; STANFORD L. KURLAND; DAVID A. SPECTOR; ERIC P. SIERACKI; N. JOSHUA ADLER; RANJIT KRIPALANI; JENNIFER S. SANDEFUR; THOMAS K. McLAUGHLIN; THOMAS H. BOONE; and JEFFREY P. GROGIN,

Defendants.

Index No.

**SUMMONS****Date Index No. Purchased:**

January 24, 2011

TO THE ABOVE-NAMED DEFENDANTS:

<b>Countrywide Financial Corporation</b> 4500 Park Granada Calabasas, CA 91302	<b>Countrywide Homes Loans, Inc.</b> 4500 Park Granada Calabasas, CA 91302	<b>Countrywide Homes Loans Servicing LP (now doing business as BAC Home Loans Servicing, LP)</b> 1 Bryant Park New York, NY 10036
<b>CWALT, Inc.</b> 4500 Park Granada Calabasas, CA 91302	<b>CWMBS, Inc.</b> 4500 Park Granada Calabasas, CA 91302.	<b>CWABS, Inc.</b> 4500 Park Granada Calabasas, CA 91302
<b>CWHEQ, Inc.</b> 4500 Park Granada Calabasas, CA 91302	<b>Countrywide Securities Corporation</b> 4500 Park Granada Calabasas, CA 91302	<b>Countrywide Capital Markets, LLC</b> 4500 Park Granada Calabasas, CA 91302
<b>Angelo Mozilo</b> 2816 Ladbroke Way Thousand Oaks, CA 91361	<b>David A. Sambol</b> 23807 Long Valley Road Hidden Hills, CA 91302	<b>Bank of America Corp.</b> 1 Bryant Park New York, NY 10036
<b>BAC Home Loans Servicing, LP</b> 1 Bryant Park New York, NY 10036	<b>NB Holdings Corporation, c/o The Corporation Trust Company</b> Corporation Trust Center 1209 Orange Street Wilmington, DE 19801	<b>Stanford L. Kurland</b> 6005 William Bent Road Hidden Hills, CA 91302
<b>David A. Spector</b> 1404 Bernard Way Martinez, CA 94553	<b>Eric P. Sieracki</b> 3761 Berry Drive Studio City, CA 91604	<b>N. Joshua Adler</b> 3400 Cordova Drive Calabasas, CA 91302
<b>Ranjit Kripalani</b> 815 John Street Manhattan Beach, CA 90266	<b>Jennifer S. Sandefur</b> 6885 Coyote Canyon Road Somis, CA 93066	<b>Thomas H. Boone</b> 4163 Oak Place Drive Westlake Village, CA 91362-5129
<b>Thomas K. McLaughlin</b> 1336 Lynnmere Drive Thousand Oaks, CA 91360-1945	<b>Jeffrey P. Grogan</b> 25080 Ashley Ridge Road Hidden Hills, CA 91302-1100	

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or if the complaint is not served with this summons, to serve notice of appearance,

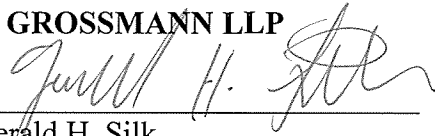
on the plaintiff's attorneys within twenty (20) days after the service of this summons, exclusive of the day of service (or within thirty (30) days after service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for relief demanded herein.

Venue is proper in this Court because Plaintiffs and certain Defendants maintain their principal places of business in New York County.

Dated: January 24, 2011

Respectfully submitted,

**BERNSTEIN LITOWITZ BERGER  
& GROSSMANN LLP**



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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

DEXIA HOLDINGS, INC.; FSA ASSET  
MANAGEMENT LLC; DEXIA CRÉDIT  
LOCAL, NEW YORK BRANCH; NEW YORK  
LIFE INSURANCE COMPANY; NEW YORK  
LIFE INSURANCE AND ANNUITY  
CORPORATION; THE MAINSTAY FUNDS;  
MAINSTAY VP SERIES FUND, INC.;  
TEACHERS INSURANCE AND ANNUITY  
ASSOCIATION OF AMERICA; TIAA-CREF  
LIFE INSURANCE COMPANY; TIAA  
GLOBAL MARKETS, INC.; COLLEGE  
RETIREMENT EQUITIES FUND; and THE  
TIAA-CREF FUNDS,

Plaintiffs,

v.

COUNTRYWIDE FINANCIAL  
CORPORATION; COUNTRYWIDE HOME  
LOANS, INC.; COUNTRYWIDE HOME  
LOANS SERVICING LP; CWALT, INC.;  
CWMBS, INC.; CWABS, INC.; CWHEQ,  
INC.; COUNTRYWIDE SECURITIES  
CORPORATION; COUNTRYWIDE  
CAPITAL MARKETS, LLC; ANGELO  
MOZILO; DAVID A. SAMBOL; BANK OF  
AMERICA CORP.; BAC HOME LOANS  
SERVICING, L.P.; NB HOLDINGS  
CORPORATION; STANFORD L. KURLAND;  
DAVID A. SPECTOR; ERIC P. SIERACKI; N.  
JOSHUA ADLER; RANJIT KRIPALANI;  
JENNIFER S. SANDEFUR; THOMAS K.  
McLAUGHLIN; THOMAS H. BOONE; and  
JEFFREY P. GROGIN,

Defendants.

Index No.

**COMPLAINT**

**JURY TRIAL DEMANDED**



## **TABLE OF CONTENTS**

	<u>Page</u>
I. SUMMARY OF THE ACTION .....	1
II. JURISDICTION AND VENUE .....	6
III. THE COMMON LAW FRAUD PARTIES .....	7
A. Plaintiffs .....	7
B. Countrywide Defendants .....	9
C. Bank Of America Defendants .....	13
IV. FACTS RELEVANT TO PLAINTIFFS' COMMON LAW FRAUD CLAIMS .....	14
A. Countrywide Misrepresents Its Mortgage Loan Underwriting Guidelines.....	14
B. The Securitization Process .....	18
C. Countrywide Abandoned Its Underwriting Guidelines By Approving Extremely Risky Loans Through "Shadow Guidelines" And Other Undisclosed Exceptions .....	24
1. Countrywide's "Matching" Strategy Ensured That Countrywide's Underwriting Guidelines Were The "Most Aggressive" Guidelines In The Market .....	30
2. Countrywide's Secondary Markets Structured Loan Desk Abandoned All Underwriting Standards, Approving Any Loan, Regardless Of Its Credit Risk, As Long As The Loan Could Be Resold and Securitized.....	33
3. The Risky Use Of Exceptions Was Well Known Within Countrywide But Was Concealed From Plaintiffs And Other Investors In The Certificates .....	36
D. Defendants Knew That Countrywide's Stated Income Loan Products, Including "Prime" Pay-Option ARM Loans, Were Not Prudently Underwritten And Were Likely To Suffer Significant Defaults And Deficiencies, But Concealed These Facts From Plaintiffs And Other Investors In The Certificates .....	41
E. Countrywide Retained The Best Quality Loans For Its Own Portfolio, Selling Only The Riskiest Loans To Plaintiffs And Other Investors.....	51
F. Countrywide Pressured Appraisers To Submit Falsified Appraisal Reports.....	52

G.	The Credit Ratings Assigned To Countrywide’s Certificates Materially Misrepresented The Credit Risk Of The Certificates .....	58
H.	Countrywide Failed To Ensure That Title To The Underlying Loans Was Effectively Transferred .....	62
V.	PLAINTIFFS’ INVESTMENT IN THE COUNTRYWIDE CERTIFICATES .....	66
VI.	DEFENDANTS’ FALSE AND MISLEADING MATERIAL MISSTATEMENTS AND OMISSIONS IN THE OFFERING DOCUMENTS .....	71
A.	Defendants Made False And Misleading Statements Regarding Countrywide’s Underwriting Guidelines .....	72
B.	Defendants Made Untrue Statements And Omissions Regarding Appraisals And LTV Ratios.....	76
C.	Defendants Materially Misrepresented The Accuracy Of The Credit Ratings Assigned To The Certificates .....	79
D.	Defendants Materially Misrepresented Countrywide’s Transfer Of Good Title To The Mortgage Loans To The Issuing Trusts.....	80
VII.	BECAUSE OF DEFENDANTS’ FRAUDULENT CONDUCT, PLAINTIFFS HAVE SUFFERED LOSSES ON THEIR PURCHASES OF CERTIFICATES .....	80
VIII.	AS COUNTRYWIDE’S SUCCESSOR, BANK OF AMERICA IS VICARIOUSLY LIABLE FOR COUNTRYWIDE’S ACTIONS .....	84
IX.	CAUSES OF ACTION FOR FRAUD.....	87
	FIRST CAUSE OF ACTION (Common Law Fraud Against Countrywide Financial, Countrywide Home Loans, Countrywide Securities, And The Depositor Defendants) .....	87
	SECOND CAUSE OF ACTION (Fraudulent Inducement Against Countrywide Financial, Countrywide Home Loans, Countrywide Securities, And The Depositor Defendants) .....	89
	THIRD CAUSE OF ACTION (Aiding And Abetting Fraud Against Countrywide Financial, Countrywide Home Loans, Countrywide Securities, Countrywide Home Loans Servicing, Countrywide Capital Markets, The Depositor Defendants, Mozilo And Sambol).....	91
	FOURTH CAUSE OF ACTION (Successor And Vicarious Liability Against The Bank Of America Defendants) .....	92
X.	CLAIMS FOR RELIEF UNDER THE SECURITIES ACT AND FOR NEGLIGENT MISREPRESENTATION .....	94

A.	Overview Of The Securities Act Claims .....	95
B.	Additional Defendants .....	96
C.	Tolling Of The Statute Of Limitations.....	99
D.	Defendants’ Materially False Misstatements And Omissions In The Offering Documents.....	102
1.	Defendants Made False And Misleading Statements Regarding Countrywide’s Underwriting Guidelines.....	103
2.	Defendants Made Untrue Statements And Omissions Regarding Appraisals And LTV Ratios.....	105
3.	Defendants Materially Misrepresented The Accuracy Of The Credit Ratings Assigned To The Certificates .....	107
4.	Defendants Materially Misrepresented Countrywide’s Transfer Of Good Title To The Mortgage Loans To The Issuing Trusts .....	108
FIFTH CAUSE OF ACTION For Violation Of Section 11 Of The Securities Act (Against The Individual Securities Act Defendants, The Depositor Defendants, And Countrywide Securities Corporation) .....		109
SIXTH CAUSE OF ACTION For Violation Of Section 12(a)(2) Of The Securities Act (Against Countrywide Securities Corporation And The Depositor Defendants) .....		111
SEVENTH CAUSE OF ACTION For Violation Of Section 15 Of The Securities Act (Against The Individual Securities Act Defendants, Mozilo, Sambol, Countrywide Financial Corp., Countrywide Securities Corporation, Countrywide Home Loans, Countrywide Servicing, And Countrywide Capital Markets).....		113
EIGHTH CAUSE OF ACTION (Negligent Misrepresentation Against Mozilo, Sambol, Countrywide Financial Corp., Countrywide Securities Corporation, Countrywide Home Loans, Countrywide Servicing, And Countrywide Capital Markets) .....		114
NINTH CAUSE OF ACTION (Successor And Vicarious Liability Against The Bank Of America Defendants For The Securities Act And Negligent Misrepresentation Claims).....		117
PRAYER FOR RELIEF .....		119

Plaintiffs Dexia Holdings, Inc., FSA Asset Management LLC, Dexia Crédit Local, New York Branch, New York Life Insurance Company, New York Life Insurance and Annuity Corporation, The MainStay Funds, MainStay VP Series Fund, Inc., Teachers Insurance and Annuity Association of America, TIAA-CREF Life Insurance Company, TIAA Global Markets, Inc., College Retirement Equities Fund and the TIAA-CREF Funds (collectively, the “Plaintiffs”), by their attorneys Bernstein Litowitz Berger & Grossmann LLP, for their Complaint herein against Countrywide Financial Corporation (“Countrywide Financial”), Countrywide Home Loans, Inc. (“Countrywide Home”), Countrywide Home Loans Servicing, LP (“Countrywide Servicing”), Countrywide Securities Corporation (“Countrywide Securities”), Countrywide Capital Markets, LLC (“Countrywide Capital Markets”), CWALT, Inc., CWMBBS, Inc., CWABS, Inc., CWHEQ, Inc., Angelo Mozilo, David A. Sambol (collectively, “Countrywide” or the “Countrywide Defendants”), Bank of America Corp., BAC Home Loans Servicing, L.P., NB Holdings Corp. (collectively, the “Bank of America Defendants”), Stanford L. Kurland, David A. Spector, Eric P. Sieracki, N. Joshua Adler, Ranjit Kripalani, Jennifer S. Sandefur, Thomas K. McLaughlin, Thomas H. Boone and Jeffrey P. Grogin (collectively, the “Individual Securities Act Defendants”) allege as follows:

## **I. SUMMARY OF THE ACTION**

1. This action concerns a massive fraud perpetrated by Defendant Countrywide Financial and certain of its officers and affiliates against the Plaintiffs, which are investors in mortgage-backed securities (“MBS”) issued by Countrywide’s subsidiaries. The Plaintiffs are institutional investors that wanted conservative, low-risk investments and thus bought Countrywide MBS (the “Certificates”) that were represented to be backed by mortgages issued pursuant to specific underwriting guidelines and rated investment-grade (primarily AAA). In purchasing the Certificates, the Plaintiffs and their investment managers relied on term sheets,

prospectuses and other materials prepared by and provided to them by the Defendants, which made representations about the Countrywide Defendants' purportedly conservative mortgage underwriting standards, the appraisals of the mortgaged properties, the mortgages' loan-to-value ("LTV") ratios, and other facts that were material to Plaintiffs' investment decisions. Plaintiffs and their investment managers also relied on Defendants' public statements concerning the Countrywide Defendants' adherence to prudent underwriting guidelines and careful credit analysis. These representations by Defendants were recklessly or knowingly false when made. In reality, Countrywide was an enterprise driven by only one purpose – to originate and securitize as many mortgage loans as possible into MBS to generate profits for the Countrywide Defendants, without regard to the investors that relied on the critical, false information provided to them with respect to the related Certificates.

2. The scope of the Countrywide Defendants' fraud is reflected by, among other things: (i) a securities fraud action brought by the United States Securities and Exchange Commission ("SEC") against three former senior executives of Countrywide Financial, in which the Court denied those Defendants' motion for summary judgment and which then culminated in an historic settlement (the "SEC Action"); (ii) regulatory actions initiated by multiple state attorneys general which resulted in settlements worth over eight billion dollars; (iii) other fraud actions brought against the Countrywide Defendants by other MBS investors and insurers related to the same wrongdoing alleged herein, along with federal securities fraud claims brought against Countrywide for its misstatements to the investing public regarding the company's mortgage loan underwriting standards; and (iv) the enormous number of defaults and foreclosures in the underlying mortgages supporting the MBS resulting in substantial damages to investors in Countrywide's MBS.



3. Plaintiffs also separately assert claims for violations of Sections 11, 12(a)(2) and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77l(a)(2) and 77o, and common law negligent misrepresentation. These claims are pled separately herein and are based solely on strict liability and negligence.

4. Plaintiffs purchased between 2005 and 2007 hundreds of millions of dollars in Countrywide MBS in 148 Offerings issued pursuant or traceable to various Registration Statements, Prospectuses and Prospectus Supplements (the “Offering Documents”), all of which contained materially untrue statements and omissions. Plaintiffs’ purchases are set forth in Exhibit 1.

5. The Offering Documents for the Certificates at issue, which were relied upon by Plaintiffs, represented, among other things, that (i) the loans packaged into the Certificates were underwritten pursuant to the Countrywide Defendants’ specific loan origination guidelines; (ii) Countrywide Home (defined below) evaluated the prospective borrowers’ credit standing and repayment ability prior to approving any loan; (iii) when the Countrywide Defendants’ made an exception to the stated underwriting guidelines, they did so on “a case-by-case basis” and only if “compensating factors” justifying the exception were present; (iv) almost every mortgaged property received an independent appraisal which conformed to acceptable standards and formed the basis of its loan-to-value (“LTV”) ratio, an important metric to MBS investors; (v) the loans selected for securitization were chosen “in a manner [not] intended to affect the interests of the certificateholders adversely”; (vi) the “AAA” or other investment-grade ratings assigned to the Certificates were accurate reflections of the Certificates’ credit quality; and (vii) the Certificates’ issuing trusts possessed good title to the underlying mortgage loans. Each of these material representations was false when made, and Defendants knew or recklessly

disregarded the falsity of these representations. Plaintiffs relied on the misrepresentations and suffered losses as a result.

6. In June 2009, the SEC brought securities fraud and insider trading charges against Countrywide Financial's three most senior executives, Defendants Angelo Mozilo (Countrywide Financial's Chief Executive Officer ("CEO")), David Sambol (Countrywide Financial's Chief Operating Officer ("COO")), and Eric Sieracki (Countrywide Financial's Chief Financial Officer ("CFO")). The court in the SEC Action held that Mozilo and Sambol "were aware that Countrywide routinely ignored its underwriting guidelines and that Defendants understood the accompanying risks"; that "Sambol was aware that Countrywide's matching strategy resulted in Countrywide's composite guidelines being the most aggressive guidelines in the industry"; that Countrywide would grant an exception for any loan, no matter what the risk, as long as it could be resold for securitization; and that neither Mozilo nor Sambol believed Countrywide had prudently underwritten its prominent adjustable rate mortgage loans because they knew that borrowers' false stated incomes enormously increased the risk of default on these products. On October 15, 2010, the SEC announced an historic settlement of the action against the three individuals. Mozilo agreed to pay a \$22.5 million penalty, "the SEC's largest ever financial penalty against a public company's senior executive," and an additional \$45 million in disgorgement of ill-gotten gains, for a total of \$67.5 million. Sambol and Sieracki agreed to pay an additional \$5.65 million in penalties and disgorgement.

7. As a result of the SEC Action, numerous internal Countrywide documents have become available that evidence the falsity of the statements in the Certificates' Offering Documents and the Countrywide Defendants' knowledge or recklessness in making these false statements, and are quoted herein.

8. In addition to the SEC Action, numerous State Attorneys General have brought lawsuits or initiated investigations against the Countrywide Defendants based on Countrywide's lending, underwriting, and appraisal practices for mortgage loans. For example, the California Attorney General has charged that "Countrywide's deceptive scheme had one primary goal – to supply the secondary market with as many loans as possible, ideally loans that would earn the highest premiums. Over a period of several years, Countrywide constantly expanded its share of the consumer market for mortgage loans through a wide variety of deceptive practices, undertaken with the direction, authorization, and ratification of Sambol and Mozilo, in order to maximize its profits from the sale of those loans to the secondary market."

9. Courts in at least two similar actions have already sustained claims of fraudulent and negligent misrepresentations against the Countrywide Defendants for their issuance of MBS. Last year, the New York Supreme Court sustained fraudulent inducement claims brought by MBIA Insurance Corporation ("MBIA"), a guarantor of Countrywide's MBS, against the Countrywide Defendants based on Countrywide's misrepresentations in ten MBS offering documents. *MBIA Insurance Corporation v. Countrywide Home Loans, Inc.*, 2009 WL 2135167 (N.Y. Sup. July 8, 2009). Similarly, on November 29, 2010, a Pennsylvania state court sustained claims brought by the Federal Home Loan Bank of Pittsburgh against Countrywide for fraudulent and negligent misrepresentation based on the purchase of five Countrywide MBS. *FHLB Pittsburgh v. Countrywide Securities Corporation*, No. GF09-018482 (Court of Common Pleas of Allegheny County, Nov. 29, 2010).

10. As a result of the Defendants' failure to follow their underwriting standards and guidelines set forth in the Certificates' Offering Documents, delinquencies and defaults in the loan pools underlying the Certificates have skyrocketed. As of December 2010 over 31% of the mortgage loans underlying the Certificates are over 30 days delinquent, in foreclosure,

bankruptcy, or repossession. This figure does not include the substantial losses suffered by Plaintiffs since the Certificates' issuance due to foreclosures and the removal of those mortgage loans from the current loan pool and current delinquency figures. The underlying loan performance and significant foreclosures have caused Plaintiffs' Certificates to have their credit ratings downgraded. At the time they were issued, 93% of the Certificates were given the highest credit rating – “AAA” – and the remainder was given investment-grade ratings. Today, over 90% of the Certificates' ratings have been slashed to below investment-grade, or junk, and the remainder has largely been downgraded at least one level. Accordingly, the Certificates are no longer marketable at or near the prices Plaintiffs paid for them, and Plaintiffs have suffered significant losses.

11. Plaintiffs seek compensatory and/or rescissory damages against Defendants for fraud and negligent misrepresentation and statutory damages under the Securities Act.

## **II. JURISDICTION AND VENUE**

12. Jurisdiction is proper because Plaintiffs' principal places of business are located in New York County. This Court has jurisdiction over each of the non-domiciliary Defendants because each of them transacts business within the State of New York within the meaning of CPLR § 302(a)(1) and each of them committed a tortious act inside the State of New York or outside the State of New York causing injury within the State of New York within the meaning of CPLR §§ 302(a)(2) and 302(a)(3). The amount in controversy exceeds \$150,000.

13. This Court has jurisdiction over the subject matter of the federal Securities Act claims alleged herein pursuant to Section 22 of the Securities Act, 15 U.S.C. § 77v, which provides that “[e]xcept as provided in section 16(c) [15 U.S.C. § 77p(c)] no case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court

of the United States.” This action is not removable under Sections 16(c) and 22 of the Securities Act.

14. Venue is proper in this Court because Plaintiffs and some Defendants maintain their principal places of business in New York County.

### **III. THE COMMON LAW FRAUD PARTIES**

#### **A. Plaintiffs**

15. Dexia Holdings, Inc. (“DHI”), is a Delaware corporation with its principal place of business in New York, New York. FSA Asset Management LLC (“FSAM”) is a Delaware limited liability company and has its principal place of business in New York, New York. FSAM is an indirect, wholly owned subsidiary of DHI. FSAM acquired Countrywide Certificates pursuant or traceable to the Offering Documents. A complete list of FSAM’s purchases is set forth in the accompanying Exhibit 1. FSAM and DHI are both affiliates of Dexia Crédit Local, New York Branch (“DCLNY”), a French banking institution having a branch in New York which is licensed by the New York State Banking Department. DHI and DCLNY have economic interests in the Certificates purchased and held by FSAM in accordance with intercompany agreements among these plaintiffs. DHI, FSAM and DCLNY are collectively referred to as the “Dexia Plaintiffs.”

16. New York Life Insurance Company (“NYL”) is a New York mutual life insurance company with its principal place of business in New York, New York. New York Life Insurance and Annuity Corporation (“NYLIAC”) is a Delaware corporation with its principal place of business in New York, New York. NYL and NYLIAC acquired Countrywide Certificates pursuant to or traceable to the Offering Documents on their own behalf or through accounts maintained within and on behalf of NYL and NYLIAC. The MainStay Funds is a Massachusetts business trust with its principal place of business in New York, New York. The



MainStay Income Builder Fund (f/k/a MainStay Income Manager Fund, which was f/k/a MainStay Asset Manager Fund) (“CFI”), a series of the MainStay Funds, acquired Countrywide Certificates. The MainStay VP Series Fund, Inc. (“QAM”), a series of MainStay VP Series Fund, Inc., acquired Countrywide Certificates. CFI and QAM are both mutual funds with principal place of business in New York, New York. The above-identified Plaintiffs NYL, NYLIAC, QAM and CFI are collectively referred to as the “New York Life Plaintiffs.” The New York Life Plaintiffs acquired Countrywide Certificates pursuant or traceable to the Offering Documents. A complete list of the New York Life Plaintiffs’ purchases is set forth in the accompanying Exhibit 1. All of the investment decisions related to the New York Life Plaintiffs’ acquisition of Countrywide Certificates were made by the New York Life Plaintiffs’ investment manager, non-party New York Life Investment Management LLC.

17. Teachers Insurance and Annuity Association of America (“TIAA”) is a New York corporation with its principal place of business in New York, New York. TIAA’s purpose is to provide annuities, life and other insurance, and pension plan counseling to the employees of nonprofit colleges, universities, institutions engaged primarily in education and research and other nonprofit institutions. TIAA-CREF Life Insurance Company (“TIAA-CREF LIC”) is a New York corporation with its principal place of business in New York, New York. TIAA Global Markets, Inc. (“TGM”) is a Delaware corporation with its principal place of business in New York, New York. TGM is a wholly-owned subsidiary of TIAA. All of the investment decisions related to the acquisition of Countrywide Certificates by Plaintiffs TIAA, TIAA-CREF LIC and TGM were made by internal investment personnel. College Retirement Equities Fund (“CREF”) is a nonprofit corporation created through an act of the New York state legislature in 1952, and is also a registered investment company under the Investment Company Act of 1940. CREF’s purchases of Countrywide Certificates were made through two CREF

accounts: the “Bond Market Account” and the “Social Choice Account.” All of the investment decisions related to CREF’s acquisition of Countrywide Certificates were made by non-party TIAA-CREF Investment Management, LLC, a Delaware limited liability company. The TIAA-CREF Funds is a Delaware statutory trust which purchased Countrywide Certificates through three different fund series: the “Bond Fund,” the “Bond Plus Fund” and the “Short Term Bond Fund.” All of the investment decisions related to the TIAA-CREF Funds’ acquisition of Countrywide Certificates were made by non-party Teachers Advisors, Inc., a Delaware corporation and registered investment adviser. TIAA, TIAA-CREF LIC, TGM, CREF, and the TIAA-CREF Funds are collectively referred to as the “TIAA-CREF Plaintiffs.” The TIAA-CREF Plaintiffs acquired Countrywide Certificates pursuant or traceable to the Offering Documents. A complete list of the TIAA-CREF Plaintiffs’ purchases is set forth in the accompanying Exhibit 1.

**B. Countrywide Defendants**

18. Defendant Countrywide Financial Corporation (“Countrywide Financial” or the “Company”) was, at all relevant times, a Delaware corporation with its principal executive offices located at 4500 Park Granada, Calabasas, California. Countrywide Financial was a holding company which, through its subsidiaries, engaged in mortgage lending, mortgage banking, banking and mortgage warehouse lending, dealing in securities and insurance underwriting throughout the United States. As discussed below, Countrywide Financial merged with and became a wholly owned subsidiary of Bank of America in 2008.

19. Defendant Countrywide Home Loans, Inc. (“Countrywide Home”), a direct wholly owned subsidiary of Countrywide Financial, is a New York corporation with its principal place of business in Calabasas, California. Countrywide Home originates and services residential home mortgage loans. Countrywide Home served as the “Seller” of the mortgage

loans comprising the security for each of the Certificates purchased by Plaintiffs, meaning that it played a central role in providing the pools of mortgage loans upon which the Certificates were based to the issuing trusts. Countrywide Home was acquired by Bank of America on July 1, 2008, and is now doing business as Bank of America Home Loans, a division of Bank of America.

20. Defendant Countrywide Home Loans Servicing LP (“Countrywide Servicing”), a wholly owned subsidiary of Countrywide Capital Markets which is in turn a wholly-owned subsidiary of Countrywide Financial, is a limited partnership organized under the laws of Texas with offices in Plano, Texas and Calabasas, California. Countrywide Servicing services residential home mortgage loans. Countrywide Servicing was acquired by Bank of America on July 1, 2008, and is now doing business as BAC Home Loan Servicing, LP. Countrywide Servicing was the Servicer of every Certificate purchased by Plaintiffs.

21. Defendant Countrywide Securities Corporation (“Countrywide Securities”), a wholly owned subsidiary of Countrywide Financial, is a California corporation with its principal place of business in Calabasas, California. During times relevant to this Complaint, Countrywide Securities had an office in New York, New York. Countrywide Securities is a registered broker-dealer and was an underwriter of the offerings of MBS. Countrywide Securities was acquired by Bank of America on July 1, 2008.

22. Defendant Countrywide Capital Markets, LLC (“Countrywide Capital Markets”), a wholly-owned subsidiary of Countrywide Financial, is a corporation organized under the laws of the State of California with its principal place of business at 4500 Park Granada, Calabasas, California. Countrywide Capital Markets (now a subsidiary of Bank of America) operates through its two main wholly-owned subsidiaries, Defendant Countrywide Securities and Countrywide Servicing Exchange.

23. Defendant CWALT, Inc. was, at times relevant to this Complaint, a Delaware corporation and a limited-purpose subsidiary of Countrywide Financial. CWALT's principal executive offices were located at 4500 Park Granada, Calabasas, California. CWALT served in the role of the "Depositor" and was an "Issuer" of the Certificates within the meaning of the Securities Act, 15 U.S.C. § 77b(a)(4) and 17 CFR §230.191. CWALT acted as Depositor for the Registration Statements and Certificates identified in Exhibit 1.

24. Defendant CWABS, Inc. was, at times relevant to this Complaint, a Delaware corporation and a limited-purpose subsidiary of Countrywide Financial. CWABS's principal executive offices were located at 4500 Park Granada, Calabasas, California. CWABS served in the role of the "Depositor" and was an "Issuer" of the Certificates within the meaning of the Securities Act, 15 U.S.C. § 77b(a)(4) and 17 CFR §230.191. CWABS acted as Depositor for the Registration Statements and Certificates identified in Exhibit 1.

25. Defendant CWMBS, Inc. was, at times relevant to this Complaint, a Delaware corporation and a limited-purpose subsidiary of Countrywide Financial. CWMBS's principal executive offices were located at 4500 Park Granada, Calabasas, California. CWMBS served in the role of the "Depositor" and was an "Issuer" of the Certificates within the meaning of the Securities Act, 15 U.S.C. § 77b(a)(4) and 17 CFR §230.191. CWMBS acted as Depositor for the Registration Statements and Certificates identified in Exhibit 1.

26. Defendant CWHEQ, Inc. was, at times relevant to this Complaint, a Delaware corporation and a limited-purpose subsidiary of Countrywide Financial. CWHEQ's principal executive offices were located at 4500 Park Granada, Calabasas, California. CWHEQ served in the role of the "Depositor" and was an "Issuer" of the Certificates within the meaning of the Securities Act, 15 U.S.C. § 77b(a)(4) and 17 CFR §230.191. CWHEQ acted as Depositor for the Registration Statements and Certificates identified in Exhibit 1.

27. Defendants CWALT, CWMBS, CWABS, and CWHEQ are collectively referred to herein as the “Depositor Defendants.” The Depositor Defendants were controlled directly by Countrywide Financial, including by the appointment of Countrywide Financial executives as directors and officers of these entities. Revenues flowing from the issuance and sale of MBS issued by CWALT, CWMBS, CWABS and CWHEQ and the Issuing Trusts were passed through to Countrywide and consolidated into Countrywide Financial’s financial statements. Defendant Countrywide Financial, therefore, exercised actual day-to-day control over Defendants CWALT, CWMBS, CWABS, and CWHEQ.

28. Each time the Depositor Defendants publicly offered and sold MBS, they filed publicly-available prospectus supplements with the SEC. Between 2005 and 2007, Countrywide’s four Depositor Defendants issued 447 prospectus supplements. Plaintiffs purchased Certificates issued pursuant to 148 of those prospectus supplements.

29. Defendant Angelo R. Mozilo (“Mozilo”), Countrywide’s co-founder, was Chairman of Countrywide’s Board of Directors starting in March 1999 and Chief Executive Officer (“CEO”) starting in February 1998. He was also President of Countrywide Financial from March 2000 through December 2003. Mozilo was a member of Countrywide Financial’s Board beginning in 1969, when the Company was founded, and served in other executive roles since then. He left Countrywide on July 1, 2008. In October 2010, Mozilo settled securities fraud claims brought against him by the SEC for \$67.5 million in penalties and forfeiture of ill-gotten gains, the largest penalty ever paid by a senior corporate executive in an SEC settlement. At all relevant times, Mozilo directed, authorized, and participated in the Countrywide Defendants’ wrongdoing, as alleged herein.

30. Defendant David Sambol (“Sambol”) joined Countrywide Financial in 1985 and was Countrywide Financial’s President and Chief Operating Officer (“COO”) from September



2006 until Countrywide Financial was acquired by Bank of America in 2008. Sambol was Countrywide Financial's executive managing director for business segment operations and Chief Production Officer from April 2006 until September 2006, and executive managing director and chief of mortgage banking and capital markets from January 2004 until April 2006. Sambol was also Chairman, CEO and a member of the Board of Directors of Countrywide Home beginning in 2007. In October 2010, Sambol settled securities fraud claims brought against him by the SEC. At all relevant times, Sambol directed, authorized, and participated in the Countrywide Defendants' wrongdoing, as alleged herein.

31. The Defendants identified in ¶¶ 18-30 are hereinafter collectively referred to as the "Countrywide Defendants."

**C. Bank Of America Defendants**

32. Defendant Bank of America Corp. ("Bank of America") is a successor to Defendant Countrywide, as described in ¶¶ 205-211. On July 1, 2008, Countrywide Financial Corporation completed a merger with Red Oak Merger Corporation ("Red Oak"), a wholly owned subsidiary of Bank of America that was created for the sole purpose of facilitating the acquisition of Countrywide, pursuant to an Agreement and Plan of Merger, dated as of January 11, 2008, by and among Bank of America, Red Oak, and Countrywide Financial. The acquisition was an all-stock transaction. Bank of America has assumed Countrywide's liabilities, having paid to resolve other litigation arising from misconduct such as predatory lending allegedly committed by Countrywide. At the time of Bank of America's purchase of Countrywide, a Bank of America spokesperson publicly stated: "We bought the company and all of its assets and liabilities . . . . We are aware of the claims and potential claims against the company and have factored these into the purchase." Bank of America is a successor-in-interest

to the Countrywide Defendants and is thus vicariously liable for the conduct of the Countrywide Defendants alleged herein.<sup>1</sup>

33. Defendant BAC Home Loans Servicing, LP is a limited partnership and subsidiary of Bank of America with its principal offices at 4500 Park Granada, Calabasas, CA. BAC Home Loans Servicing, LP is identified in mortgage contracts and other legal documents as “BAC Home Loans Servicing, LP FNA Countrywide Home Loans Servicing, LP,” meaning it was formerly known as Countrywide Home Loans Servicing, LP, the Countrywide subsidiary responsible for servicing Countrywide’s mortgage loans after they are originated.

34. Defendant NB Holdings Corporation is a Delaware corporation. NB Holdings Corporation is one of the shell entities used to effectuate the Bank of America-Countrywide merger, and is a successor to Defendant Countrywide Home Loans. On July 3, 2008, Defendant Countrywide Home completed the sale of substantially all of its assets to NB Holdings Corporation, a wholly-owned subsidiary of Bank of America.

35. The Defendants identified in ¶¶ 32-34 are hereinafter collectively referred to as the “Bank of America Defendants.”

#### **IV. FACTS RELEVANT TO PLAINTIFFS’ COMMON LAW FRAUD CLAIMS**

##### **A. Countrywide Misrepresents Its Mortgage Loan Underwriting Guidelines**

36. Countrywide was co-founded in 1969 by Mozilo and grew to become the largest mortgage lender in the United States by 2005. Countrywide originated, sold, and serviced both prime and subprime (which Countrywide's periodic filings referred to as “nonprime”) mortgage

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<sup>1</sup> The federal court in the SEC Action against Mozilo and Sambol recently noted that “Countrywide’s remaining operations and employees have been transferred to Bank of America, and Bank of America ceased using its Countrywide name in April 2009.” *Securities and Exchange Commission v. Mozilo*, No. 09-CV-3994, 2010 WL 3656068, at \*2 n.2 (C.D. Cal. Sept. 16, 2010).

loans. According to its 2005 10-K, 90% of Countrywide's loans were "prime," which, Countrywide stated, meant that these loans were "prime credit quality first-lien mortgage loans secured by single-family residences."

37. Prior to 2005, a substantial majority of the mortgage loans that Countrywide originated each year were traditional long-term, fixed-rate, first-lien and fully documented mortgage loans to prime borrowers. These so-called "conforming loan" mortgages met the guidelines for sale to the government-sponsored enterprises ("GSEs"), the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"), and were traditionally limited to mortgage loans no greater than \$417,000 for a single family residence. Conforming loans, if properly underwritten and serviced, historically were the most conservative loans in the residential mortgage industry, with the lowest rates of delinquency and default. During the period 2001-2003, more than 50% of Countrywide's loans were conforming loans. During 2001-2003, Countrywide originated \$124 billion, \$252 billion, and \$435 billion in loans, respectively.

38. Mortgage loans that do not meet the GSEs' guidelines are known in the industry as "non-conforming loans." Countrywide's proportion of nonconforming loans significantly increased in 2005. As discussed in detail below, however, Countrywide continued to represent that it complied with strict underwriting guidelines even while it underwrote increasing amounts of non-conforming loans. In July 2003, during a conference call with analysts, Mozilo announced that Countrywide's new goal was "to dominate the purchase market and to get [Countrywide's] overall market share to the ultimate thirty percent by 2006-2007." Starting no later than 2004, Countrywide began offering a broader array of products in an attempt to effectuate this goal and retain its title as top mortgage lender. Countrywide Home originated over \$499 billion in mortgage loans in 2005, \$468 billion in 2006, and \$416 billion in 2007.

Countrywide recognized pre-tax earnings of \$2.4 billion and \$2 billion in its loan production divisions in 2005 and 2006, respectively.

39. As shown on Table 1, below, in terms of product mix, in 2005, only 32% of Countrywide's loan originations were prime conforming loans, down from over 50% during earlier periods. At the same time, the percentage of non-conforming loans, including prime, subprime and home equity, had increased to over 50% of total loan originations. By 2006, its mix of business had changed even more, with only 31.9% of the dollar value of its originations conforming conventional loans, 45.2% nonconforming conventional loans, 8.7% subprime, and 10.2% home equity.

**Table 1**  
**Countrywide Loan Production**  
**Share of Dollar Value of Loans by Loan Type (2001-2007)<sup>2</sup>**

	2001	2002	2003	2004	2005	2006	2007
<b><u>Traditional Loans</u></b>							
Prime Conforming Loans	61.7	59.2	53.9	37.1	32.0	31.9	52.1
FHA/VA Loans	<u>11.4</u>	<u>7.6</u>	<u>5.6</u>	<u>3.6</u>	<u>2.1</u>	<u>2.8</u>	<u>5.4</u>
<b>Traditional Sub-Total</b>	<b>73.0</b>	<b>66.8</b>	<b>59.5</b>	<b>40.7</b>	<b>34.1</b>	<b>34.6</b>	<b>57.6</b>
<b><u>Nontraditional Loans</u></b>							
Prime Nonconforming Loans	17.9	24.9	31.7	39.8	47.2	45.2	28.3
Prime Home Equity Loans	4.5	3.7	4.2	8.5	9.0	10.2	8.3
Nonprime Mortgage Loans	4.5	4.6	4.6	10.9	8.9	8.7	4.1
Commercial Real Estate Loans	<u>0.0</u>	<u>0.0</u>	<u>0.0</u>	<u>0.1</u>	<u>0.8</u>	<u>1.2</u>	<u>1.8</u>

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<sup>2</sup> Countrywide 10-K reports: 2007, page 29; 2006 page 28; and 2005, page 24. All figures are shown as % of total value of Countrywide loan production.

<b>Nontraditional Sub-Total</b>	<b>27.0</b>	<b>33.2</b>	<b>40.5</b>	<b>59.3</b>	<b>65.9</b>	<b>65.4</b>	<b>42.4</b>
<b>TOTAL</b>	100.0	100.0	100.0	100.0	100.0	100.0	100.0

40. Despite taking on new risks to participate in the non-GSE mortgage-backed securities market, Countrywide continued to extol its underwriting standards, conveying to Plaintiffs and other interested parties that it was a successful, trustworthy company characterized by high professional standards. Countrywide’s Annual Reports for 2005, 2006, and 2007 stated that the company “establishe[d] standards for the determination of acceptable credit risks” and that it “manage[d] credit risk through credit policy, underwriting, quality control and surveillance activities.” The Annual Reports also promoted Countrywide’s “proprietary underwriting systems . . . that improve the consistency of underwriting standards, assess collateral adequacy and help prevent fraud.” In its 2005 10-K, for example, which was filed in March 2006, Countrywide stated that “[w]e ensure our ongoing access to the secondary mortgage market by consistently producing quality mortgages . . . . We are focused on ensuring the quality of our mortgage loan production . . . .”

41. Countrywide claimed that its disciplined underwriting standards not only distinguished it from other lenders in the industry, but reflected enviable best practices. For example, in a Fixed Income Investor Forum hosted by Countrywide in September 2006, Mozilo explained that Countrywide led the industry in responsible lending: “[A]s an industry leader we served as a role model to others in terms of responsible lending. We take seriously the role of a responsible lender for all of our constituencies . . . . *To help protect our bond holder customers, we engage in prudent underwriting guidelines.*”<sup>3</sup> At the same forum, Sambol stated that:

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<sup>3</sup> Emphasis in quotations is added throughout this Complaint, except as otherwise noted.

We're extremely competitive in terms of our desire to win, and we have a particular focus on offense, which at the same time is supplemented by a strong defense as well, meaning that we have an intense and ongoing focus on share growth while at the same time maintaining a very strong internal control environment and what we believe is best-of-class governance . . . . *[O]ur culture is also characterized by a very high degree of ethics and integrity in everything that we do.*

42. Countrywide represented to Plaintiffs that these prudent underwriting guidelines were used in originating the loans packaged into the Certificates. According to the Prospectus Supplements for each Certificate purchased by Plaintiffs, Countrywide's high quality underwriting standards were applied to the underlying loans originated by Countrywide for each Offering, because "all" or some portion of the mortgage loans "will have been originated or acquired by Countrywide Home Loans in accordance with its credit, appraisal and underwriting standards." As explained herein, these representations were false and misleading and omitted material facts because they directly contradicted the reality that Countrywide was knowingly originating an increasing number of poor-quality loans that did not comply with its stated underwriting guidelines, without the safeguards and standards that Countrywide described. Plaintiffs relied upon Countrywide's representation that it applied its "prudent underwriting guidelines" to the loans packaged into the Certificates, and were induced to purchase the Certificates by these and the Countrywide Defendants' other statements, to their enormous financial detriment.

## **B. The Securitization Process**

43. The vast majority of the loans underwritten and originated by Countrywide were resold to investors in the secondary market, through either whole loan sales or MBS securitizations. Despite Countrywide's statement that it "ensure[d] . . . ongoing access to the secondary mortgage market by consistently producing quality mortgages," and unbeknownst to

Plaintiffs, it became increasingly difficult for Countrywide to meet the market demand for MBS using its stated underwriting guidelines. In order to originate more loans, Countrywide created and approved riskier loan products not only by implementing looser stated underwriting guidelines, but by applying numerous exceptions to its already weakened standards.

44. Mortgage loan securitizations were vital to Countrywide's financial success. Unlike major banking institutions that could hold significant assets on their balance sheets long term, Countrywide needed to engage in mortgage loan securitizations so that it could remove the mortgage loan assets and potential liabilities from its balance sheet. Not only did Countrywide's securitizations and whole loan sales generate well over \$1 billion in pre-tax earnings, but the sale of these loans transferred the risk of the borrowers' default from Countrywide's balance sheet to investors, including Plaintiffs.

45. Mortgage securitization involves the conversion of illiquid whole loans into bond-like instruments that trade in capital markets. Mortgage loan "pass-through" securities entitle the investor to payments from pools of mortgage loans. Although the structure and underlying collateral of each offering varies, the basic principle remains the same: When borrowers make payments on the underlying mortgages, the cash flow is pooled and "passed through" to investors. Accordingly, the value of an MBS depends primarily on the underlying mortgage borrowers' ability to make principal and interest payments and, secondarily, on the adequacy of the collateral in the event of default. If the loans underlying a Certificate suffer defaults and delinquencies in excess of the assumptions built into the payment structure, or the underlying properties cannot be sold at sufficient value following default, investors suffer greater than expected losses.

46. The first step in creating each of the Certificates was the acquisition by one of the four Depositor Defendants of an inventory of loans from the seller, Defendant Countrywide

Home Loans, which either originated all of the underlying loans or combined loans it originated with loans acquired from other mortgage originators, in exchange for cash. The Depositor Defendants then transferred, or deposited, the acquired pool of loans to an “issuing trust.”

47. The Depositor Defendants securitized the pool of loans in the issuing trust so that the rights to the cash flows from the loans could be sold to investors. The securitization transactions are structured such that the risk of loss is divided among different levels of investment, or “tranches.” Tranches consist of multiple series of related MBS offered as part of the same offering, each with a different level of risk and reward, including different levels of credit enhancement. One form of credit enhancement is overcollateralization, which means that the total principal balance of the mortgage loans in the pool for a securitization (and therefore presumably the total value of the underlying properties) exceeds the aggregate amount of Securities issued and sold in the securitization. Another example of credit enhancement is excess interest, which means that the amount of interest collected on the mortgage loans underlying a securitization for each payment period is expected to be greater than the interest distributable on the Securities and fees and expenses payable by the trust for that period; excess interest may be applied both to absorb any interest shortfalls and to pay principal on the Securities to the extent needed to maintain the required level of overcollateralization. Both of these credit enhancements serve to protect the investor against loss to varying degrees. Any losses on the underlying loans – whether due to default, delinquency, or otherwise – are generally applied in reverse order of seniority.

48. Because these tranches have different claims on the cash flow generated by the pool of mortgages, credit rating agencies assign different ratings to them and issuers can price them differently. The most senior tranches of the Certificates received “AAA” credit ratings or their equivalent from the three leading rating agencies, which indicated the lowest risk and



highest quality. Junior tranches – which were not purchased by Plaintiffs – usually obtained lower ratings and were less insulated from risk, but offered greater potential returns.<sup>4</sup> For example, a pool of loans with an overall weighted-average coupon of 7% might be divided into multiple tranches where the lower-risk, higher-quality senior certificates are expected to yield less than 7% and are rated investment grade (“AAA,” “AA,” “A” or “BBB”), while the higher-risk, lower-quality subordinate certificates bear coupons that are higher than 7%. Only if credit losses exceed the amount of the subordinate tranche balances will the senior certificate tranches face credit losses, as the subordinate tranches will absorb initial losses.

49. The credit rating agencies received the information about the mortgage loan pools for each securitization and about the structure of the securitization from the sponsor, *i.e.*, Countrywide Home. Countrywide worked closely with the rating agencies to structure the securitizations to ensure that each tranche of MBS received the desired rating. Countrywide knew or recklessly disregarded that the information it provided to the rating agencies materially misrepresented and omitted the true facts about the credit quality of the mortgage pools and that the ratings therefore did not accurately reflect the credit risk of the MBS.

50. Plaintiffs purchased only investment-grade tranches of the Certificates, with over 90% of the Certificates rated AAA at the time of purchase. A purchaser of AAA-rated residential MBS should have virtually no risk of incurring loss, while a purchaser of other investment-grade Certificates should have only a minimal risk of loss.

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<sup>4</sup> Moody’s highest investment rating is “Aaa.” S&P’s highest rating is “AAA.” Fitch’s highest rating is “AAA.” These ratings signify the highest investment-grade, and are considered to be of the “best quality,” and carry the smallest degree of investment risk. Ratings of “AA,” “A,” and “BBB” are also investment-grade and represent high credit quality, upper-medium credit quality, and medium credit quality, respectively. Any instrument rated lower than BBB is considered below investment-grade. All of the Certificates purchased by Plaintiffs were investment grade and most were AAA.

51. Credit ratings are intended to be comparable across different types of fixed income instruments. In 1994, a Moody's executive stated that "no matter what types of instruments the ratings apply to, no matter where the issuer resides, and no matter what currency or market in which the security is issued, Moody's ratings are intended to have the same relative meanings in terms of expected credit loss." Similarly, in a May 29, 2007 publication, S&P stated: "Our ratings represent a uniform measure of credit quality globally and across all types of debt instruments. In other words, an 'AAA' rated corporate bond should exhibit the same degree of credit quality as an 'AAA' rated securitized issue."

52. Once the tranches were established, the issuing trusts passed the securities back to the Depositor Defendants, who became the issuers of the Certificates. The Depositor Defendants then passed the Certificates to Countrywide Securities and one or more other underwriters, who in turn offered the Certificates to Plaintiffs and other investors in exchange for cash that was then passed back to the Depositor Defendants, minus any fees owed to the underwriters. Following the sale of the Certificates, Countrywide Home Loan Servicing LP was responsible for the collection of borrower payments, and the trustee participates in the subsequent distribution of those payments to investors at regular intervals in accordance with the offering's structure.

53. In contrast, in the traditional mortgage model, a mortgage originator originated loans to borrowers, held the loans to maturity, and therefore retained the credit default risk. As such, under the traditional model, the mortgage originator had a financial incentive to ensure that (i) the borrowers had the financial ability to repay the loans, and (ii) the underlying properties had sufficient value to enable the mortgage originator to recover its principal and interest if the borrowers defaulted on the loans.

54. Traditionally, mortgage lenders financed their mortgage business primarily using funds from depositors, retained ownership of the mortgage loans they originated, and received a direct benefit from the income flowing from the mortgages. When a lender held a mortgage through the term of the loan, it received revenue from the borrower's payment of interest and fees, and also bore the risk of loss if the borrower defaulted and the value of the collateral was not sufficient to repay the loan. As a result of this "originate to hold" model, the lender had an economic incentive to verify the borrower's creditworthiness through prudent underwriting and to obtain an accurate appraisal of the value of the underlying property before issuing the mortgage loan.

55. With the advent of securitization, the traditional "originate to hold" model gave way to the "originate to distribute" model, in which mortgage originators sold the mortgages and transferred credit risk to investors through the issuance and sale of MBS. Securitization concurrently provided lenders like Countrywide with an incentive to increase the number of mortgages they issued and reduced their incentive to ensure the mortgages' credit quality. However, the contractual terms of the securitization transactions and adherence to good business practices obligate mortgage originators to underwrite loans in accordance with their stated underwriting and origination policies and to obtain accurate appraisals of the mortgaged properties.

56. During the 1980s and 1990s, the mortgage securitization business grew rapidly, making it possible for mortgage originators to make more loans than would have been possible using only the traditional primary source of funds from deposits. During that period, Countrywide made loans in accordance with its stated underwriting and appraisal standards. In the early 2000s, however, Countrywide began to systematically disregard its stated underwriting standards in an effort to originate an unprecedented number of loans for securitization.

**C. Countrywide Abandoned Its Underwriting Guidelines By Approving Extremely Risky Loans Through “Shadow Guidelines” And Other Undisclosed Exceptions**

57. Defendants made affirmative representations in the Offering Documents about Countrywide’s underwriting guidelines, all of which were intended to induce Plaintiffs and other investors to invest in the Certificates. For example, Countrywide represented in many of the Certificate Offering Documents that that all or a portion of the underlying loans were “originated or acquired in accordance with Countrywide’s underwriting standards,” noting only that “exceptions to Countrywide Home Loans’ underwriting guidelines may be made if compensating factors are demonstrated by a prospective borrower.” Countrywide also represented generally that “Countrywide Home Loans’ underwriting standards are applied by or on behalf of Countrywide Home Loans to evaluate the prospective borrower’s credit standing and repayment ability and the value and adequacy of the mortgaged property as collateral.” Countrywide also made representations and warranties that the selection of the underlying loans “was not made in a manner intended to affect the interests of the certificateholders adversely.” Plaintiffs relied on these representations about Countrywide’s mortgage underwriting guidelines, which were critical to Plaintiffs’ decisions to purchase the Certificates.

58. Because its loan-origination guidelines were ostensibly designed to ensure that loans would perform over time, Countrywide knew that the rigorousness of its guidelines—and its adherence to those guidelines—would materially affect the risk of investing in the Certificates. Throughout Countrywide’s expansion, Defendant Mozilo consistently represented that Countrywide would not sacrifice its strict and disciplined underwriting standards. In a January 2004 call with analysts, Mozilo pledged that Countrywide’s goal of achieving 30% market share would not compromise the Company’s strict underwriting standards, stating that Countrywide would target the safest borrowers in the market in order to maintain its

commitment to quality. *“Going for 30% mortgage share here is totally unrelated to quality of loans we go after.... There will be no compromise in that as we grow market share. Nor is there a necessity to do that.”*

59. Countrywide reassured investors that the Company’s underwriting procedures and credit risk management remained highly rigorous in the following years. For example, in its 2005 10-K, filed with the SEC on February 28, 2006, and thereafter, Countrywide represented that:

*[Countrywide] ensure[s] . . . ongoing access to the secondary mortgage market by consistently producing quality mortgages and servicing those mortgages at levels that meet or exceed secondary mortgage market standards . . . . [W]e have a major focus on ensuring the quality of our mortgage loan production and we make significant investments in personnel and technology in this regard.*

60. During a March 15, 2005 conference call with analysts, Mozilo responded to a question about Countrywide’s strategy dating back to 2003, for increasing market share by assuring Countrywide’s constituents:

*Your question is 30 percent, is that realistic, the 30 percent [market share] goal that we set for ourselves in 2008? . . . Is it achievable? Absolutely . . . . But I will say this to you, that under no circumstances will Countrywide ever sacrifice sound lending and margins for the sake of getting to that 30 percent market share.*

61. Other senior Countrywide officers reiterated that the Company had not strayed from its underwriting standards, and would not do so in the future. For example, in an April 2005 conference call with analysts, Defendant Sieracki, Countrywide’s CFO, responded to a question about whether Countrywide had changed its underwriting protocols: “I think [Fair Isaac Corporation (“FICO”) credit scores, combined loan-to-value ratios, and debt-to-income ratios] will remain . . . consistent with the first quarter and most of what we did in 2004. We don’t see any change in our protocol relative to the volume [of] loans that we’re originating.”

62. As explained herein, at the time the Certificates were offered between 2005 through 2007, Countrywide knew that its statements regarding its underwriting guidelines and credit risk management processes were false, and that it had no intention of abiding by its representations and warranties to investors. Under the direction of Mozilo and Sambol, Countrywide adopted a new corporate culture of writing as many mortgage loans as possible—and at the highest interest rates and fees possible—regardless of the creditworthiness or evident fraud of the borrower. Once Mozilo and Sambol had determined that profit growth through securitization required accelerating loan origination, Countrywide motivated its loan officers and external brokers to drive up loan volume regardless of material deviations from stated underwriting guidelines.

63. As stated above, documents produced in the SEC Action – including internal emails, committee notes, memos and deposition testimony – were disclosed to the public during the litigation of the individual Defendants’ unsuccessful motion for summary judgment in that action. These materials provide detailed evidence of Countrywide’s complete abandonment of its stated underwriting standards through its rampant use of “exceptions” to those guidelines. Between 2005 and 2007, Defendants falsely reassured Plaintiffs and other MBS investors that Countrywide was primarily an originator and seller of high-quality mortgages, qualitatively different from its competitors who primarily engaged in riskier lending practices. In fact, however, Countrywide’s deteriorating underwriting practices enabled loan applications that reflected borrower fraud, inadequate documentation, missing verifications (for example, of borrower assets and income), title defects, excessive debt to income ratios, inadequate FICO scores, and other material violations of guidelines. These violations made Countrywide’s related representations regarding its adherence to stated underwriting guidelines materially false and misleading because, in reality, Countrywide undertook an undisclosed and unprecedented

loosening of its underwriting guidelines such that the exceptions became the standard without compensating factors.

64. Although Countrywide disclosed that the underlying loan pool for each Certificate could contain loans originated pursuant to “exceptions” to the Company’s stated underwriting guidelines if “compensating factors” existed, Countrywide nowhere disclosed what percentage of (or in many cases, whether any) securitized loans were actually approved pursuant to exceptions, nor did it define anywhere the types of exceptions that Countrywide employed generally in the loan pool, or specifically for each loan. In fact, as confirmed by several senior executives at Countrywide, including executives directly involved in loan securitizations, Countrywide never disclosed in any of the relevant Offering Documents or in any other public filings the amount of loans it was underwriting on an exceptions basis for any loan product or division. Paul Liu, an attorney who worked for Countrywide and participated in the preparation of the Offering Documents, testified in the SEC Action that the Prospectus Supplements did not disclose the number or percentage of loans included in each securitization that were underwritten pursuant to exceptions, or even in many cases whether any loans within that securitization were underwritten pursuant to exceptions – just that exceptions “may be made.”

65. According to Countrywide’s Chief Risk Officer, John McMurray, Countrywide’s level of exceptions was higher than other mortgage lenders. At a June 28, 2005 Credit Risk Committee meeting, senior executives including CFO Sieracki and McMurray received a presentation informing the attendees that nonconforming exceptions loans accounted for a staggering 40% of Countrywide’s loan originations. By June 2006, a Credit Risk Leadership package reported that Countrywide underwrote, on an exceptions basis, 44.3% of its Pay-Option ARMs, 37.3% of its subprime first liens, 25.3% of its subprime second liens, and 55.3% of its

standalone home equity loans. Despite this high level of exceptions, Countrywide assured investors that the level of exceptions was low. According to Christopher Brendler, an analyst for Stifel Nicholas who covered Countrywide beginning in January 2006 and was deposed in the SEC Action, Countrywide repeatedly told investors during conference calls and at investor forums that the company's policy was to "keep our exceptions low." Brendler also testified that a low exception rate for the industry would have been 5% to 10% of total loans, and most certainly not upwards of 25% to 55%, such as Countrywide actually had.

66. Subsequent press reports and articles highlight the excessive focus on lending volume and failure to follow stated underwriting standards that existed throughout Countrywide during the time the Depositor Defendants were issuing Certificates with underlying Countrywide loans. For example, In February 2009, in an article entitled "25 People to Blame for the Financial Crisis," *Time* magazine described how Mozilo's and Countrywide's focus on loan volume and the practice of offering mortgages to "practically any adult" ignored a borrower's "questionable ability to repay" those mortgage loans. Thus, Countrywide steered borrowers to loans with higher interest rates and the most fees, resulting in greater delinquencies.

67. Lawsuits filed by insurers of some of Countrywide's mortgage loans have confirmed Countrywide's deviation from its stated underwriting practices, and material deficiencies prevalent in the loans underwritten pursuant to these deviations. On September 30, 2008, MBIA filed a complaint against Countrywide in New York state court, entitled *MBIA Insurance Corp. v. Countrywide, et al.*, No. 08/602825. The MBIA complaint alleges that Countrywide fraudulently induced MBIA to provide insurance for certain Certificates. Through an investigation of approximately 19,000 loan files, MBIA discovered that there was "an extraordinarily high incidence of material deviations from the underwriting guidelines



Countrywide represented it would follow.” MBIA discovered that many of the loan applications “lack[ed] key documentation, such as a verification of borrower assets or income; include[d] an invalid or incomplete appraisal; demonstrate[d] fraud by the borrower on the face of the application; or reflect[ed] that any of borrower income, FICO score, or debt, or DTI [debt-to-income] or CLTV, fail[ed] to meet stated Countrywide guidelines (without any permissible exception).” Significantly, “MBIA’s re-underwriting review . . . revealed that almost 90% of defaulted or delinquent loans in the Countrywide Securitizations show material discrepancies.” The court sustained MBIA’s common law fraud claims against Countrywide. *See MBIA Insurance Corporation v. Countrywide Home Loans, Inc.*, 2009 WL 2135167 (N.Y. Sup. July 8, 2009). Other complaints filed by bond insurers Ambac Assurance Corporation (*Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, Index No. 641612/2010 (filed in the Supreme Court of the State of New York on May 6, 2010), Syncora Guarantee Incorporated (*Syncora Guarantee Inc. v. Countrywide Home Loans, Inc.*, Index No. 650042/09E (Amended Complaint filed in the Supreme Court of the State of New York on May 6, 2010 after the initial Complaint was largely sustained on March 31, 2010); and Mortgage Guaranty Insurance Corporation (arbitration) also reveal shocking fraud by Countrywide loan officers.

68. Two of Countrywide’s widely used exceptions to its represented underwriting guidelines were the focus of the SEC Action, and exemplify the extreme undisclosed risks posed by such practices. From the beginning of 2005, it was Countrywide’s policy to “match” any product offered by any of its competitors, regardless of risk, making its composite “matching” guidelines, internally referred to as “shadow guidelines,” the “most aggressive in the industry.” Another of Countrywide’s “exceptions” to its stated underwriting guidelines destroyed any remaining safeguards with respect to loans slated to be resold and securitized. Knowing that it could unload the risk of borrower default by selling and securitizing the riskiest

loans, Countrywide instituted a policy to accept *any loan – regardless of the risk level or likelihood of default* – as long as the loan could be resold for securitization, a policy that directly and adversely affected the interests of Plaintiffs and other investors in the Certificates.

**1. Countrywide’s “Matching” Strategy Ensured That Countrywide’s Underwriting Guidelines Were The “Most Aggressive” Guidelines In The Market**

69. One of the most egregious examples of Countrywide’s use of exceptions was institutionalized in the Company’s “matching strategy.”

70. When processing loan applications, Countrywide first applied its standard underwriting guidelines to all applications using an automated underwriting system known as “CLUES” (Countrywide Loan Underwriting Expert System). To the public and the participants in the securitizations, including Plaintiffs, Countrywide extolled the integrity and consistency of its automated CLUES system. Countrywide claimed that it made exceptions to CLUES only when specific and strong compensating factors were present, but this was false. In fact there were three levels of exceptions, with a threshold for risk that surpassed that of any of Countrywide’s competitors.

71. First, if CLUES found problems with an application because it failed to meet one of the standard criteria, the application was sent to a loan officer for further consideration or manual underwriting in the “Exception Processing System” “because it busted one or more of the program guidelines or because of these red flags,” according to Chief Risk Officer McMurray. If the loan officer could not rectify the problems and approve the loan in accordance with Countrywide’s stated underwriting guidelines or some limited exceptions, the loan officer did not reject the application. Rather, he or she would request an “exception” from the guidelines from more senior underwriters at Countrywide’s loan production structured lending desks (“Production SLD”), otherwise known as “the exception desk.”

72. The Production SLD, the second level of exception review, granted exceptions, in large part, pursuant to Countrywide's "matching strategy." From at least the beginning of 2005, Countrywide implemented a program which allowed loan officers to "match" the most aggressive product or policy of any loan origination competitor, including purely subprime lenders such as New Century and First Franklin, even if that product or policy violated Countrywide's stated underwriting guidelines. Countrywide's liberal use of any competitor's "composite guideline" made the Company's loan origination practices "the most aggressive in the industry" according to Countrywide's own Chief Risk Officer, John McMurray. Countrywide's matching strategy was not limited to one single loan product, or limited to subprime loans.

73. In 2005, 2006 and 2007, McMurray repeatedly expressed his concern over the potential impact of the "matching strategy," warning Defendant Sambol in a June 14, 2005 email that: "As a consequence of CW's strategy to have the widest product line in the industry, we are clearly out on the 'frontier' in many areas. While I'm sure you already know this, I think we should be very deliberate since the outer boundaries are potentially controversial and have high expected default rates and losses."

74. Ten days later, on June 24, 2005, McMurray sent another email to Defendant Sambol, expressing his strong reservations regarding Countrywide's practice of matching the "outer boundaries" of any competitor's most aggressive mortgage loan offerings, a practice which he noted was a "critical component of [Countrywide's] corporate strategy." McMurray explained that, because Countrywide mixed and matched the most aggressive guidelines from various lenders in the industry, Countrywide's "composite guides are likely among the *most aggressive* in the industry." McMurray later testified in the SEC Action that the matching

strategy at Countrywide was a “corporate principle and practice that had a profound effect on credit policy” at Countrywide.

75. McMurray explained why Countrywide’s “matching strategy” ensured that Countrywide was the most aggressive originator in the market: “And so, . . . if you match one lender on – on one – on certain guidelines or for certain products and then you match a separate lender on a different product or a different set of guidelines, then in my view the composite of that – of that two-step match would be more – would be *more aggressive* than either one of those competitor reference points viewed in isolation.” McMurray repeatedly explained his view and the risks of the “matching strategy” to others within Countrywide, including Defendant Sambol, but these concerns were ignored.

76. After being ignored for over one and a half years, McMurray restated his concerns in a November 2, 2006 email that was forwarded to Defendant Sambol, in which McMurray explained that when the composite matching strategy “is done across multiple lenders, across products and across guidelines, the composite set of guidelines will be the most aggressive credit in the market.” He continued: “With this approach, our credit policy is ceded, on both a product-by-product as well as item-by-item basis, to the most aggressive lenders in the market. Do we want to effectively cede our policy and is this approach ‘saleable’ for a risk perspective to those constituents who may worry about our risk profile?” Again, Sambol ignored these concerns and Countrywide continued to employ this strategy.

77. Countrywide never disclosed to Plaintiffs or other investors that it had a matching strategy that caused the Company to cede its credit policy to the most aggressive lenders in the market. Executives knew – and kept it a secret – that the quality of loans originated by Countrywide was deteriorating, and would continue to worsen. Indeed, a February 11, 2007 email from McMurray to Sambol confirms that this strategy was not

disclosed to anyone outside Countrywide when he wrote that he doubted Countrywide's composite matching strategy "would play well with regulators, investors, rating agencies, etc. *To some, this approach might seem like we've simply ceded our risk standards and balance sheet to whoever has the most liberal guidelines.*" Information that Countrywide was actually the most aggressive lender in the industry would have been extremely material to Plaintiffs and other investors. As Stifel Nicholas analyst Brendler testified in the SEC Action, disclosure of the "matching strategy" "would have been a very disturbing disclosure" because "to know that [Countrywide was] basically seeking out the most aggressive policies and underwriting guidelines of [its] competitors without consideration for other factors" meant that Countrywide was "essentially creating a worst of the worst."

**2. Countrywide's Secondary Markets Structured Loan Desk Abandoned All Underwriting Standards, Approving Any Loan, Regardless Of Its Credit Risk, As Long As The Loan Could Be Resold And Securitized**

78. In an effort to maximize its ability to create more MBS, Countrywide implemented a third, even riskier tier of exceptions in early 2005 through which *any* loan application would be approved as long as it met a single criterion: Could the loan be completely resold in the secondary markets such that Countrywide could transfer all of the risk? If the answer was yes, the loan would be approved, regardless of the fact that it did not meet Countrywide's underwriting guidelines or the most aggressive of any competitor's guidelines.

79. When a loan application was rejected using both the "shadow" exceptions guidelines applied by the Production SLD, the application was sent to the Secondary Markets SLD, a desk set up specifically to approve last-ditch exceptions. Defendant Sambol summarized the theory behind the Secondary Markets SLD in a February 13, 2005 email explaining that Countrywide "*should be willing to price virtually any loan that we reasonably*

*believe we can sell/securitize without losing money, even if other lenders can't or won't do the deal."* In contrast to his public statements, as far back as September 2004, Defendant Mozilo circulated an email expressing concern over the "clear deterioration in the credit quality of loans being originated over the past several years" and his opinion that "the trend is getting worse." In reaction to the worsening trend, he stated that Countrywide should "*seriously consider securitizing and selling a substantial portion of our current and future subprime residuals.*"

80. Before July 2005, the Secondary Markets SLD approved any loan which it believed could be resold and securitized, as long as that loan was a 30-year fixed rate mortgage or an 80/20 adjustable rate mortgage ("ARM").<sup>5</sup> This changed in the summer of 2005. In a July 28, 2005 email sent by David Spector, Vice President and a board member of each Depositor Defendant, to Countrywide's Managing Directors and Secondary Markets senior executives, including Joshua Adler, another Depositor Defendant board member, Spector stated that, as a result of "increased demand from Production for exceptions on all products in general and on Pay Option loans in particular," he wanted to update them on "the changes we will be implementing going forward":

As indicated in a previous note, when we first started the SLD, the intent was to be able to offer at least one option for borrowers who wanted exceptions to our underwriting guides. The thought was that we would offer borrower exceptions in our two major loan programs: 30-year fixed rate and 5/1 ARMs. In addition, both of these programs were set up for Alt A and as such we could price and sell under these programs. *While this process seemed to have worked well in the past, we have been recently seeing increased demand from Production for exceptions on all products in general and Pay Option loans in particular.* In addition, Production has been expressing frustration that we were only offering major

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<sup>5</sup> 80/20 ARMs, are also referred to as "piggyback" mortgages because two loans are taken out simultaneously for the same home, one for 80% of the mortgage and the other for the remaining 20% of the mortgage, the latter being sold at a higher interest rate because the buyer is putting out none of his own cash.

exceptions for 5/1 ARMs and 30-year fixed rates. *As such, to the widest extent possible, we are going to start allowing exceptions on all requests, regardless of loan programs, for loans less than \$3 million effective immediately.*

The pricing methodology we will use will be similar to that which we use for 30-year fixed rates and 5-1 Hybrids. *We will assume securitization in all cases.*

\* \* \*

The methodology from a saleability point of view will also be similar to that used for 30-year fixed rates and 5-1 Hybrids. We will view the exception assuming securitization and will no longer take into account whole loan buyers. In the past, this has caused some exceptions to be declined for Ratios, Balances and LTV/CLTV combinations. *Provided we can sell all of the credit risk (i.e. not be forced to retain a first loss place due to a 80% LTV, 60 Back-end ratios \$3 million loan) we will approve the loan as a salable loan.* Finally, we will not be reviewing loans from an underwriting point of view but will rather be relying on Production to make certain that the loan [sic] meet all other underwriting Guideline and well [sic] have been reviewed for compliance acceptability and fraud.

81. Individual Defendant Adler, a Depositor Defendant board member and Secondary Markets Managing Director, confirmed in an SEC Action deposition that the Secondary Markets SLD did not review loans from an underwriting point of view, but reviewed them for their securitization potential only:

Q. Do you know whether Countrywide sometimes originated loans that were considered to be exceptions to its underwriting guidelines?

A. We did.

Q. To your knowledge, was there a process by which such loans were approved?

\* \* \*

THE WITNESS: There generally was, yes.

Q. And what is your understanding of that process?

A. Well, I was -- I was at the tail end of that process. *There was -- we had guidelines, we had kind of core guidelines, and then we had these shadow guidelines, which were the kind of the second tier guideline, if you will. And then there was this third tier which would come to me.* But essentially there were -- the tiering of guidelines related to the kind of the exception process. And there was an underwriting, they called it, Structured Loan Desk process in the divisions where loans would get referred to the Structured Loan Desk if they were outside, I believe, of kind of the core guidelines. *And then if those loans were outside of even the shadow guidelines, then they would be referred to Secondary Marketing to determine if the loan could be sold given the exception that was being asked for.*

\* \* \*

Q. *Was one of the criteria for granting exceptions at the Secondary Loan Desk in Secondary Marketing whether or not the loan could be sold into the secondary market?*

A. *That was the only criteria that we followed.*

**3. The Risky Use Of Exceptions Was Well Known Within Countrywide But Was Concealed From Plaintiffs And Other Investors In The Certificates**

82. Countrywide's internal documents and its employees' admissions provide evidence that, under management's direction, approval of "exceptions" was the rule – regardless of the risk associated with the loan – and in contravention of (i) its own policy that exceptions could be considered and approved only in moderation, and (ii) the Defendants' public statements about Countrywide's underwriting standards.

83. A June 28, 2005 Corporate Credit Risk Committee presentation revealed to senior executives that one-third of the loans rejected by Countrywide's own underwriting guidelines and approved pursuant to exceptions missed "major" underwriting guidelines, and another one-third missed "minor" underwriting guidelines. The presentation also informed the committee that exceptions-based loans greater than \$650,000 were performing 2.8 times worse than similar loans underwritten within guidelines.



84. According to Confidential Witness (“CW”) 1, an underwriter for Countrywide in the Jacksonville, Florida, processing center between June 2006 and April 2007, as much as 80% of the loans originated at Countrywide involved significant variations from the underwriting standards that necessitated a signoff by management. According to CW 1, Countrywide was very lax when it came to underwriting guidelines. Management pressured underwriters to approve loans and this came from “up top” because management was paid based, at least in part, on the volume of loans originated. CW 1’s manager told CW1 to approve as many loans as possible and push loans through. According to CW1, most loans declined by underwriters would “come back to life” when new information would “miraculously appear” – which indicated to CW 1 that Countrywide was not enforcing its underwriting standards.

85. An internal Countrywide presentation created by former Countrywide President and Chief Operating Officer, David Sambol, submitted in a criminal prosecution of a former Countrywide loan officer (*United States v. Partow*, No. 06-CR-00104 (HRH) (D. Alaska 2006)), listed the following objectives for the Exception Processing System:

- Approve *virtually every borrower and loan profile* with pricing add-on when necessary.
- Identify alternative program to meet borrower needs.
- Process and price exceptions on standard products for high-risk products.
- Process exceptions for:
  - Credit Scores
  - LTV (loan-to-value) amount
  - Cash out amounts
  - Property types

86. Former Countrywide loan officer, Kourosh Partow, told an interviewer for Dateline NBC that if a borrower had a pulse, Countrywide would give the borrower a loan.

87. Mozilo was acutely aware of the breakdown in Countrywide’s procedures and the lack of compliance with Countrywide’s underwriting guidelines. For example, in early

2006, HSBC exercised its contractual rights and forced Countrywide to “buy-back” many of the subprime 80-20 loans that it had purchased from Countrywide. Many of the HSBC “kick-outs” of defaulted loans were due to the fact that many of the underlying loans had been originated outside of Countrywide’s underwriting guidelines. Following the HSBC incident, on April 13, 2006, Mozilo sent an e-mail to Sieracki and Sambol, stating that he had “personally observed a serious lack of compliance with our origination system as it relates to documentation and generally a deterioration in the quality of loans originated versus the pricing of those loan[s]. In my conversations with Sambol he calls the 100% subprime seconds as the ‘milk’ of the business. Frankly I consider that product line to be the poison of ours.”

88. At a March 12, 2007 Corporate Credit Risk Committee meeting, attended by Sambol, Risk Management reported that 12% of the loans reviewed through Countrywide's internal quality control process were rated severely unsatisfactory or high risk, and that one of the principal causes for such a rating was that loans had debt-to-income, loan to value, or FICO scores outside Countrywide's underwriting guidelines.

89. On May 29, 2007, Sambol attended a Credit Risk Committee Meeting, during which he was informed that even as Countrywide had been purportedly tightening guidelines, “loans continue[d] to be originated outside guidelines” primarily via the Secondary Structured Lending Desk without “formal guidance or governance surrounding Secondary SID approvals.” The presentation also included a recommendation from the credit management department that two divisions “cease to grant exceptions where no major competitor is offering the guideline.”

90. Countrywide’s admission of its secret, rampant, and unjustified use of the exceptions process is further corroborated by the particularized allegations in a lawsuit by another financial guarantor—*Financial Guaranty Insurance Company v. Countrywide Home Loans, Inc.* The plaintiff in that lawsuit states that at two separate meetings between the parties

at Countrywide's headquarters on April 24, 2007 and December 13, 2007, Countrywide admitted "that it had, apparently since sometime in 2006, undertaken a deliberate practice to routinely make increased exceptions to and expansion of its underwriting guidelines . . . ." According to Countrywide, "[t]he reason . . . for these undisclosed exceptions and expansion of the guidelines was to try to retain [its] existing share of the mortgage origination market." Countrywide also informed Financial Guaranty Insurance Company that it had discovered borrower misrepresentation, speculation, and fraud at an increasing rate in 2006, which it admitted "had been a significant factor in the underperformance of the 2006 securitized HELOC portfolios."

91. In other recent lawsuits, Countrywide employees have confirmed the prevalence of these practices. One former Countrywide employee quoted in a class action complaint filed by Countrywide debt holders, *Argent Classic Convertible Arbitrage Fund v. Countrywide Financial Corp.*, stated that Countrywide routinely approved loans through the Exception Processing System that violated its underwriting guidelines. And another former Countrywide employee, a former Assistant Vice President of Risk Management with Countrywide's Structured Loan Desk in Plano, Texas and an underwriter from 2004 until 2006 responsible for evaluating credit risk, stated that Countrywide's management "encouraged more and more loans" to be processed through the Exception Processing System beginning in 2004. During 2006, Countrywide processed between 15,000 and 20,000 loans a month through the Exception Processing System.

92. Similarly, in a wrongful dismissal lawsuit against Countrywide – *Zachary v. Countrywide Financial Corp. d/b/a Countrywide Home Loans Inc.* – former Countrywide Regional Vice President Mark Zachary alleged that Countrywide regularly approved stated income or reduced-documentation loans for applicants Countrywide had previously rejected

under its full-documentation loan program. In fact, Countrywide's loan officers would assist applicants in switching from full-documentation loans to reduced-documentation loans. Zachary alleges that Countrywide discharged him because he refused to engage in this activity.

93. Zachary's allegations, and those of many other former Countrywide employees, are also featured in a shareholders derivative complaint – *In re Countrywide Fin. Corp. Derivative Litigation*, Lead Case No. 07-CV-06293 (C.D. Cal. 2007). In denying Countrywide's motion to dismiss the derivative complaint, the court highlighted Countrywide's dramatic loosening of its underwriting standards in branches across the United States. Specifically, the court held that the "numerous confidential witnesses support a strong inference of a Company-wide culture that, at every level, emphasized increased loan origination volume in derogation of underwriting standards." In drawing this inference, the court noted that the allegations of misconduct came from Countrywide employees (i) located throughout the United States, (ii) in varying levels of the Countrywide hierarchy (including underwriters, senior underwriters, senior loan officers, vice presidents, auditors, and external consultants), and (iii) employed at varying times. In the court's words, these witnesses "tell what is essentially the same story - a rampant disregard for underwriting standards from markedly different angles."

94. The court's holding was supported by references to, among other things, the particular allegations of a longtime Countrywide executive who stated "that particularly risky loans that were routed out of the normal underwriting process (because they violated underwriting standards) were in fact regularly being approved" with the knowledge of Defendant Sambol. The court similarly noted that "underwriters at various levels and offices attested to egregious instances of underwriting, involving, for example, previously declined loans that would 'come back to life' when new information qualifying the applicants would

‘miraculously appear,’ and loans that were provided pursuant to borrowers’ patently ridiculous ‘stated incomes.’”

95. The complaint in a shareholder class action, *In re Countrywide Financial Corporation Securities Litigation* (C.D. Cal., Jan. 6, 2009), similarly alleges, based on statements from a loan underwriter in Countrywide’s Consumer Markets Division, that “loan applications that should never have been approved were constantly kicked further up the corporate ladder until they reached a level where they would be approved by those driven solely by corporate profits and greed.”

96. The United States District Court denied Countrywide’s motion to dismiss the federal scienter-based claims in the shareholder class action, holding that the allegations “present the extraordinary case where a company’s essential operations were so at odds with the company’s public statements that many statements that would not be actionable in the vast majority of cases are rendered cognizable to the securities laws.” The court explained that descriptions like “‘high quality’ are generally not actionable; they are vague and subjective puffery not capable of being material as a matter of law.” But here, the complaint “adequately alleges that Countrywide so departed from its public statements that even ‘high quality’ became materially false or misleading.” Countrywide recently agreed to settle this lawsuit by paying \$600 million.

**D. Defendants Knew That Countrywide’s Stated Income Loan Products, Including “Prime” Pay-Option ARM Loans, Were Not Prudently Underwritten And Were Likely To Suffer Significant Defaults And Deficiencies, But Concealed These Facts From Plaintiffs And Other Investors In The Certificates**

97. Countrywide’s fraudulent loan originations did not end with its abandonment of its stated underwriting guidelines. Countrywide normally approved loans in which a borrower’s income and/or assets were not verified. Such loans were called “limited” or “reduced”

documentation loans, and a large subset of those loans were called “stated income” loans. It is now clear that Countrywide covertly inflated the stated income of borrowers on loan applications for the loans that fueled its securitizations. These fraudulent practices materially affected every Certificate purchased by Plaintiffs; on average, 49% of the underlying loans per Certificate were approved using limited documentation, which included stated income loans.

98. Many of these inflated incomes were in the loan files of Pay Option loans, an adjustable rate mortgage loan product that was ostensibly a “prime” or near prime product. Countrywide represented to Plaintiffs that a large percentage of the underlying loans originated by Countrywide Home and contained within the Certificates were “prime,” or “conventional,” indicating that these loans were of high credit quality. Included within this “prime” category of loans were Pay-Option ARM loans. Pay-Option ARM loans are adjustable rate mortgages which provide borrowers with the option of fully-amortizing, interest-only, or “negative amortizing” payments. Pay-Option loans increased from approximately 6% of loan production by year-end 2004 to approximately 19% by year-end 2005. In its 10-K for 2005, Countrywide assured the public that its Pay-Option loan portfolio had “a relatively high initial loan quality,” and that it “only originate[d] pay-option loans to borrowers who [could] qualify at the loan’s fully-indexed interest rates.” Adjustable rate mortgage loans comprised a significant percentage of the Certificates’ underlying loans; on average, 20% of the Certificates’ underlying loans were adjustable rate mortgages.

99. Defendants repeatedly assured Plaintiffs and other investors that Pay-Option ARM loans were prudently underwritten and of high quality. In 2005 and 2006, Mozilo made public statements touting Countrywide’s Pay-Option ARM loans, stating, for example, that: “We are a big player in the pay-option and I/O product. *I’m not aware of any loosening of underwriting standards that creates any less of a quality of loan than we did in the past*” (July

26, 2005 Second Quarter Earnings call); “*pay option loan quality remains extremely high*” (April 27, 2006 First Quarter Earnings call); Countrywide’s “origination activities are such that, the consumer is underwritten at the fully adjusted rate of the mortgage and is capable of making a higher payment, should that be required, when they reach their reset period” (*id.*); “Countrywide *views the product as a sound investment* for our Bank and a sound financial management tool for customers” (May 31, 2006 Sanford Bernstein Conference); “Performance profile of [the Pay-Option ARM loan] is well-understood because of its 20-year history, which includes ‘stress tests’ in difficult environments” (*id.*); “[t]o help protect our bond holder customers, *we engage in prudent underwriting guidelines*” with respect to Pay-Option loans (September 13, 2006 Fixed Income Investor Forum). In addition, Countrywide’s 2006 Form 10-K stated that “[w]e believe we have *prudently underwritten*” Pay-Option ARM loans.

100. Contrary to Defendant’s statements in 2005, 2006 and 2007 characterizing Pay-Option ARM loans as being of “high credit quality,” “prudently underwritten” and “prime,” Defendants knew that a large percentage of these Pay-Option ARM loans were originated based on the borrowers’ stated income, meaning that the borrowers provided no documentation proving their income. Despite touting the security of the Pay-Option ARM loan products in public, Defendant Mozilo raised resounding alarms within Countrywide regarding the Company’s risky reliance on stated income and reduced documentation for these loans but concealed his concerns from Plaintiffs and other investors. For example, on April 4, 2006, in an internal email to Sambol regarding Pay-Option ARM loans, Mozilo stated “[s]ince over 70% [of borrowers] have opted to make the lower payment it appears that *it is just a matter of time that we will be faced with much higher resets and therefore much higher delinquencies.*” Shortly thereafter, on May 19, 2006, Mozilo wrote an email to Sambol and Sieracki, stating that Pay-Option loans presented a long term problem “unless [interest] rates are reduced dramatically

from this level and there are no indications, absent another terrorist attack, that this will happen.” On June 1, 2006, Mozilo advised Sambol in an email that he had become aware that the Pay-Option ARM portfolio was largely underwritten on a reduced documentation basis and that there was evidence that borrowers were lying about their income in the application process. On September 25, 2006, Mozilo wrote another email to Sambol and Sieracki, stating that “[w]e have no way with reasonable certainty, to assess the real risk of holding these loans on our balance sheet.” Indeed, in the fall of 2006, Mozilo even recommended selling Countrywide’s portfolio of Pay-Option ARM loans, recognizing the risks of retaining them on Countrywide’s balance sheet.

101. By early 2006, the management at Countrywide had been informed that the borrowers for one-third of the Pay Option loans held for investment at Countrywide had overstated their income by 50% or more. Countrywide’s Quality Control group performed a “4506 Audit” for the 10-month period ended on April 30, 2006, comparing the stated income from a borrower’s loan application to the income reported by that borrower to the Internal Revenue Service, and concluded that *one-third of the Pay Option loans held for investment at Countrywide had income that was overstated by 50% or more*. This audit report was distributed to Countrywide’s management and was discussed at an April 24, 2006 Credit Risk Management Committee meeting. Countrywide’s Credit Risk Officer, Clifford Rossi, testified before the SEC that the “vast majority” of the income discrepancies revealed in the 4506 Audit were the result of fraud and misrepresentation.

102. The results of the 4506 Audit were widely known within Countrywide, having been reported to the Credit Risk Committee, Countrywide’s Chief Risk Officer, and Defendant Sambol, then head of loan production. Sambol also shared the results of the audit with Mozilo, as reflected in a June 1, 2006 email from Mozilo, in which he wrote:



In a discussion with both Stan [Kurland] and Dave [Sambol] it came to my attention that *the majority of pay options being originated by us both wholesale and retail are based upon stated income. There is also some evidence that the information that the borrower is providing us relative to their income does not match up with IRS records.*

103. Countrywide did not reveal in either the Offering Documents or in other public disclosures the number or proportion of Pay-Option ARM loans that were based on stated income. Moreover, although Countrywide did disclose the percentage of loans that were approved based on reduced documentation, including stated income, it did not disclose the results of the 4506 Audit demonstrating that a large percentage of the stated income information was misstated.

104. Countrywide was not surprised by the results of the 4506 audit because the Company knew that its underwriting practices allowed, and in many cases encouraged, fraudulent information regarding income and employment. An investigation initiated by bond insurer MBIA prior to suing Countrywide for fraudulent representations related to Countrywide's mortgage loan practices, discussed above in ¶67, revealed that Countrywide's representations that its loan officers obtained at least telephonic verification of employment and salary with respect to its stated income loans were false. MBIA discovered that Countrywide did not, in fact, obtain independent verification of income for borrowers who applied for these loans, which constituted a significant percentage of the total number of mortgage loans within the Certificates.

105. The Mortgage Guaranty Insurance Corporation, an insurer of mortgage lenders against borrower defaults, is also embroiled in litigation with Countrywide. Mortgage Guaranty filed an arbitration demand against Countrywide seeking to exercise its right to refuse to pay insurance claims on stated-income loans on which the borrowers defaulted, claiming that

Countrywide's representations regarding the loans were "riddled with materially false information" (the "*Mortgage Guaranty Action*"). In order to support its demand, Mortgage Guaranty hired investigators to root out representative examples of Countrywide's fraud, and provided ten of these representative examples in the complaint. In one example ("MGIC Certificate No. 25797915"), a borrower's application listed his occupation as a dairy foreman with a monthly stated income of \$10,500. With those credentials, he qualified for a \$350,000 primary residence mortgage loan with a reported debt-to-income ("DTI") ratio of 43.26%, within Mortgage Guaranty's eligibility threshold. After the borrower defaulted and Countrywide submitted a claim to Mortgage Guaranty, the insurer investigated the claim and uncovered the following facts: the borrower was actually a dairy milker making \$1,100 per month who was not purchasing the home as a primary residence, and had a DTI of 403.40%, nearly ten times higher than what was represented by Countrywide. What is most shocking is that the borrower disclosed all of this information to the Countrywide loan officer:

[The borrower] disclosed his true employment, his actual income, and his intention to help [borrower's son] purchase the property to loan officer [redacted]. [Loan officer] falsely informed [borrower] that [borrower] could help his son buy the home without bearing responsibility for the monthly mortgage payments. [Loan officer] described the transaction to [borrower] as "lending your son your credit." [Borrower], who cannot read English, signed the closing documents where [loan officer] told him to. [Loan officer] knew that [borrower] never intended to live at the property or to make any mortgage payments " The mortgage broker was completely aware of this fraud, according to the complaint. Nonetheless, the borrower got a \$350,000 mortgage.

106. The other examples in the *Mortgage Guaranty Action* provide similar evidence of misfeasance, including inflated debt to income based on falsified income and loan-to-value ratios due to falsified appraisals, along with other deficiencies, all stemming from stated or reduced documentation loan applications which made it easy for the borrower and loan officer

to falsify information. The complaint by Mortgage Guaranty reads: “By about 2006, Countrywide’s internal risk assessors knew that in a substantial number of its stated-income loans — fully a third — borrowers overstated income by more than 50 percent.” The complaint adds, “Countrywide deliberately disregarded these and other signs of fraud in order to increase its market share.”

107. Additional sources further confirm Countrywide’s knowledge of the false information supplied by borrowers’ for loan approval in stated income loans. According to Mark Zachary, a former Countrywide executive who has filed suit against Countrywide for wrongful termination, in and around 2006, Countrywide loan officers engaged in a practice known within Countrywide as “flipping” an application. Loan officers who learned that a loan application submitted under the full documentation program was unlikely to be approved “flipped” the application for consideration under a reduced documentation application program. According to Zachary, loan officers coached applicants on the level of employment income needed to qualify for a mortgage loan, and then accepted revised loan applications containing inflated reported incomes. The loan officers submitted the revised loan applications under a reduced documentation program for consideration by the Structured Loan Desk in Plano, Texas and Calabasas, California. According to Zachary, he complained to Countrywide’s regional management about these practices, but his complaints were ignored.

108. Zachary’s complaint also describes an instance where a Countrywide loan officer inflated an applicant’s income on a loan application without the applicant’s knowledge. According to Zachary, the customer sent an e-mail to Countrywide stating: “I was told that my loan had been turned over to Countrywide’s internal fraud department for review because a loan officer increased my income figures without authorization in order to get me approved for a

stated income loan. I was told by several people at Countrywide that this was done just to get me qualified and that nobody would check on it.”

109. Audrey Sweet of Maple Heights, Ohio, a victim of Countrywide’s predatory lending practices, told a similar story of falsified loan documents in her testimony before the Joint Economic Committee of Congress on July 25, 2007. Ms. Sweet stated that when she reviewed her loan application after her loan had closed, she

discovered several things [she] had apparently overlooked until then. The first was that my gross monthly income was recorded as \$726 dollars more than it actually was. Secondly, I have two sets of loan documents, one that was created 10 days before we closed and one that was created the day of closing. The closing day documents list my assets as \$9,400 in my Charter One Bank Account. I have never had \$9,400 in the bank. Indeed, coming up on payday, I am fortunate to have \$94 left. The final item I noticed was that the tax amount listed on the appraisal report was \$1981.34, which comes to about \$165.00 per month but Countrywide listed \$100 as the tax amount.

110. These individual cases of inflated borrower income are not isolated incidents. Instead, they are the product of Countrywide’s corporate culture, as former Countrywide employees have made clear in related litigations.

111. For example, the complaint in *In re Countrywide Financial Corp. Derivative Litigation* alleges, based on statements from a compliance officer who worked at Countrywide from 2001 to mid-2007, an external home loan consultant who worked at Countrywide from 2000 to 2007 and was responsible for originating prime loans for the residential market, and a former senior loan officer from Countrywide’s Consumer Markets division in Atlanta Georgia, that Countrywide’s no documentation loan process lacked independent verification and was openly abused.

112. The second consolidated class action complaint in *In re Countrywide Financial Corporation Securities Litigation* alleges, based on statements from a Countrywide corporate-level Senior Vice President involved in financial reporting and analysis until 2007, that it was

generally known at Countrywide that “there was a lot of lying going on” in connection with stated income and stated asset loans.

113. And in an NBC News report, one former Countrywide loan officer said that he had seen Countrywide supervisors stand by and watch as loan officers repeatedly entered fictitious income figures into Countrywide’s system until it approved the borrower for a loan. A borrower stated in the same report that a Countrywide loan officer advised her to double her salary when completing her own loan application.

114. Since 2008, Attorneys General from various states have investigated Countrywide’s lending practices and charged that Countrywide systematically departed from the underwriting standards it professed to use for originating residential loans. The substantiated allegations in the complaints filed as part of these investigations further confirm the internal Countrywide documents and insider testimony discussed above. For example, the Illinois Attorney General investigated Countrywide’s loan practices and, on June 25, 2008, filed an action in the Chancery Division of the Circuit Court of Cook County, Illinois, entitled *Illinois v. Countrywide Financial Corp., et al.*, No. 08CH22994 (the “Illinois AG Complaint”). The California Attorney General also investigated Countrywide’s lending activities and filed a complaint in the Northwest District of the Superior Court for Los Angeles County, entitled *California v. Countrywide Financial Corp., et al.*, No. LC081846 (the “California AG Complaint”). Many of the allegations in the Illinois and California AG Complaints were confirmed by investigations in other states such as Connecticut, Washington, West Virginia, Indiana and Florida. Significantly, on October 6, 2008, Countrywide announced that it had settled the claims brought by 11 states, including California and Illinois, agreeing to implement an estimated \$8.4 billion program to modify pre-2008 Countrywide-originated mortgages.

115. According to the Illinois AG Complaint, Countrywide employees whom the Illinois AG interviewed stated that Countrywide originated loans that did not meet its underwriting criteria because Countrywide employees were incentivized to increase the number of loan originations without concern for whether the borrowers were able to repay the loans. With respect to stated income loans, Countrywide employees explained to the Illinois AG that, while the Company had a “reasonableness standard” in order to check fraudulent stated income, employees were only required to use their judgment in deciding whether or not a stated income loan seemed reasonable. To supplement an employee’s judgment as to whether or not a potential borrower’s income was “reasonable,” beginning in 2005, Countrywide required its employees to utilize a website, [www.salary.com](http://www.salary.com), to determine the reasonableness of a potential borrower’s stated income. However, this website was actually used by Countrywide employees to gauge how much income needed to be “stated” in order to approve the loan, regardless of whether that stated income was legitimate. Even if the stated salary was outside of the range provided by the website, Countrywide employees could still approve the loan.

116. A former California loan officer for Countrywide quoted in the California AG Complaint further explained that Countrywide’s loan officers typically explained to potential borrowers that “with your credit score of X, for this house, and to make X payment, X is the income that you need to make,” after which the borrower would state that he or she made X amount of income.

117. The Illinois AG Complaint also alleges that Countrywide employees did not properly ascertain whether a potential borrower could afford the offered loan, and many of Countrywide’s stated income loans were based on inflated estimates of borrowers’ income. For example, according to the Illinois AG Complaint: (i) a Countrywide employee estimated that approximately 90% of all reduced documentation loans sold out of a Chicago office had inflated

incomes; and (ii) one of Countrywide's mortgage brokers, One Source Mortgage Inc., routinely doubled the amount of the potential borrower's income on stated income mortgage applications.

118. Similar to the Illinois AG Complaint, the California AG Complaint also alleged that Countrywide departed from its stated underwriting standards. For example, the Complaint alleged that employees were pressured to issue loans to unqualified borrowers by permitting exceptions to underwriting standards, incentivizing employees to extend more loans without regard to the underwriting standards for such loans, and failing to verify documentation and information provided by borrowers that allowed them to qualify for loans.

119. The absence of readily obtainable income verifications was also reported in an April 6, 2008 article in the *New York Times*. The article noted that even though Countrywide had the right to verify stated income on an application through the IRS (and this check took less than one day to complete), income was verified with the IRS on only 3%-5% of all loans funded by Countrywide in 2006. As the 4506 Audit demonstrated, had Countrywide made any attempt to verify borrowers' stated income with the IRS at the time of application, it would have shown that at least one-third of the Pay Option loan applications were overstated by 50% or more.

**E. Countrywide Retained The Best Quality Loans For Its Own Portfolio, Selling Only The Riskiest Loans To Plaintiffs And Other Investors**

120. Countrywide represented in the Prospectus Supplements that it would not select loans for securitization "in a manner intended to affect the interests of the certificateholders adversely." This representation was material to Plaintiffs because they relied on Countrywide's assurance that the loans included in the pools for the Certificates were high-quality loans with low credit risk. However, it was Countrywide's practice to act adversely to the interests of Plaintiffs and other Certificate investors. First, as described above, Countrywide's Secondary Markets SLD was created for the sole purpose of approving otherwise unapprovable loans as

long as they could be sold in their entirety through securitizations. Second, Countrywide protected its own investment portfolio, choosing only the best quality loans for retention, while unloading the riskiest loans to secondary market investors, including Plaintiffs. Countrywide's former Chief Risk Officer, Clifford Rossi, confirmed, in testimony before the SEC, that Countrywide generally tried to "cherry-pick" the best of the Countrywide Home loan production for its "Held for Investment" portfolio:

Q. Now, the loans that the bank was portfolioing [sic], was there a particular strategy that the bank was using to select those loans?

A. Yeah. So -- so the general strategy that had been provided to me from people like Carlos Garcia [Executive Managing Director of Banking and Insurance at Countrywide] and Jim Furash [President of Countrywide Bank] and that would have been conveyed back again from -- from the parent was that -- and this is when I first started there, was that *the bank was to originate and to cherry pick the better quality assets*.

121. Defendants knew that this practice of cherry-picking the higher quality loans for Countrywide's portfolio would adversely affect the secondary market securitizations. In an August 2, 2005 email from Defendant Sambol to Defendants Mozilo and Kurland (CEO, President and Chairman of each of the Depositor Defendants) and to Carlos Garcia, Sambol wrote: "While it makes sense for us to be selective as to the loans which the Bank retains, we need to analyze the securitization implications on what remains if the bank is only cherry picking and *what remains to be securitized/sold is overly concentrated with higher risk loans*."

#### **F. Countrywide Pressured Appraisers To Submit Falsified Appraisal Reports**

122. An accurate appraisal performed pursuant to a legitimate appraisal process is critical to calculating the loan-to-value ("LTV") ratio, a financial metric commonly used to evaluate the price and risk of MBS certificates. The LTV ratio expresses the amount of the



mortgage or loan as a percentage of the appraised value of the collateral property. For example, if a borrower seeks to borrow \$90,000 to purchase a home worth \$100,000, the LTV ratio is equal to \$90,000 divided by \$100,000, or 90%. If, however, the appraised value of the house has been artificially inflated to \$100,000 from \$90,000, the real LTV ratio would be 100% (\$90,000 divided by \$90,000). The “value” of the mortgaged property, other than with respect to refinance loans, is generally the lesser of: (i) the appraised value determined in an appraisal by the loan originator at the time of the origination, or (ii) the sale price for such property.

123. From an investor’s perspective, a high LTV ratio represents a greater risk of default on the loan. First, borrowers with a small equity position in the underlying property have “less to lose” in the event of a default. Second, even a slight drop in housing prices might cause a loan with a high LTV ratio to exceed the value of the underlying collateral, which might cause the borrower to default and would prevent the issuing trust from recouping its expected return in the case of foreclosure and subsequent sale of the property. Third, a high LTV means that, in the event of default or foreclosure, there is no remaining equity to pay for the fees and expenses related to a foreclosure.

124. Consequently, the LTV ratios of the loans underlying MBS are important to investors’ assessment of the value of the MBS. Indeed, prospectuses typically provide information regarding the LTV ratios, and even guarantee certain LTV ratio limits for the loans that will support the MBS. All of the Certificates represented that no LTV would exceed 100%, and many promised an even lower threshold of 95%.

125. The Offering Documents represented that the underlying mortgaged properties would provide adequate security for the mortgage loans, based in part on the appraised value of the properties securing the mortgage loans. In each Prospectus Supplement, Countrywide represented that one or more appraisals were obtained for nearly every mortgage loan, and that

these appraisals were “independent.” As originator and securitizer of the loans, Countrywide had an incentive to inflate the value of properties if that inflation would allow a loan to be approved when it otherwise would not have been. But loans based on inflated appraisals are more likely to default and less likely to produce sufficient assets to repay the MBS investor in foreclosure. An independent appraisal is necessary to ensure that appraisals are not inflated.

126. Many mortgage loan originators, including Countrywide, allowed the sales personnel or account executives to order and control the appraisal process. These personnel were typically on a commission-only pay structure and were therefore motivated to close as many loans as possible. These sales personnel and account executives would pressure appraisers to appraise properties at artificially high levels or they would not be hired again.

127. According to the April 7, 2010 FCIC testimony of Richard Bitner, a former executive of a subprime mortgage originator for 15 years and the author of the book *Confessions of a Subprime Lender*, “the appraisal process [was] highly susceptible to manipulation, lenders had to conduct business as though the broker and appraiser couldn’t be trusted, [and] either the majority of appraisers were incompetent or they were influenced by brokers to increase the value.” He continued:

To put things in perspective, during my company’s history, half of all the loans we underwrote were overvalued by as much 10%. This meant one out of two appraisals were still within an acceptable tolerance for our end investors. Our experience showed that 10% was the most an appraisal could be overvalued and still be purchased by these investors. Another quarter that we reviewed were overvalued by 11-20%. These loans were either declined or we reduced the property value to an acceptable tolerance level. The remaining 25% of appraisals that we initially underwrote were so overvalued they defied all logic. ***Throwing a dart at a board while blindfolded would’ve produced more accurate results.***

128. Mr. Bitner testified about the implications of inflated appraisals:

If multiple properties in an area are overvalued by 10%, they become comparable sales for future appraisals. The process then repeats itself. We saw it on several occasions. We'd close a loan in January and see the subject property show up as a comparable sale in the same neighborhood six months later. Except this time, the new subject property, which was nearly identical in size and style to the home we financed in January, was being appraised for 10% more. Of course, demand is a key component to driving value, but the defective nature of the appraisal process served as an accelerant. In the end, the subprime industry's willingness to consistently accept overvalued appraisals significantly contributed to the run-up in property values experienced throughout the country.

\* \* \*

If the appraisal process had worked correctly, a significant percentage of subprime borrowers would've been denied due to a lack of funds. Inevitably, this would have forced sellers to drop their exorbitant asking prices to more reasonable levels. The rate of property appreciation experienced on a national basis from 1998 to 2006 was not only a function of market demand, but was due, in part, to the subprime industry's acceptance of overvalued appraisals, coupled with a high percentage of credit-challenged borrowers who financed with no money down.

Mr. Bitner testified that the engine behind the increased malfeasance was the Wall Street Banks: "[T]he demand from Wall Street investment banks to feed the securitization machines coupled with an erosion in credit standards led the industry to drive itself off the proverbial cliff."

129. Alan Hummel, Chair of the Appraisal Institute, testified before the Senate Committee on Banking that the dynamic between mortgage originators and appraisers created a "terrible conflict of interest" where appraisers "experience[d] systemic problems of coercion" and were "ordered to doctor their reports" or they might be "placed on exclusionary or 'do-not-use' lists." Too often, this pressure succeeded in generating artificially high appraisals and appraisals being done on a "drive-by" basis by which appraisers issued their appraisal without reasonable bases for doing so.

130. A 2007 survey of 1,200 appraisers conducted by October Research Corp., which publishes *Valuation Review*, found that 90% of appraisers reported that mortgage brokers and others pressured them to raise property valuations to enable deals to go through. This figure was nearly double the findings of a similar study conducted just three years earlier. The 2007 study also “found that 75% of appraisers reported ‘negative ramifications’ if they did not cooperate, alter their appraisal, and provide a higher valuation.”

131. The representative loan file investigation performed in the *Mortgage Guaranty* Action also corroborates the prevalence of a corrupt appraisal process which resulted in inflated appraisals on Countrywide’s mortgaged properties. For example, the mortgaged property in MGIC Certificate No. 25616578 was a home in Atlanta, Georgia, with a reported appraisal value of \$395,500. Based on the appraised value and a 10% down payment of \$39,500, that borrower’s \$355,500 loan carried a LTV ratio of 90%. After the borrower defaulted and Mortgage Guaranty received Countrywide’s insurance claim, Mortgage Guaranty discovered that there was no reasonable basis for the appraisal based on past home prices, and that the fair market value was actually \$277,000, with a LTV ratio of 128.34%.

132. In *Capitol West Appraisals, LLC v. Countrywide Financial Corp.*, *Clark v. Countrywide Home Loans, Inc.*, and *Johnson v. KB Home* – putative class actions filed on behalf of real estate appraisers and homeowners nationwide – the plaintiffs allege that Countrywide engaged in widespread appraisal-related misconduct by inflating the value of properties in order to support the loans that it wished to make. Plaintiffs in *Clark* allege that Countrywide often required the borrower to have the property appraised by its affiliates, LandSafe, Inc. and LandSafe Appraisal Services, Inc. This way, Countrywide was able to control the appraisal process and influence and inflate the appraised values assigned to properties on which it was lending. Plaintiffs in these lawsuits allege that this conduct violated

the federal law requiring appraisals prepared by an in-house or “staff appraiser” at a bank – as opposed to an independent contractor – to “be independent of the lending, investment, and collection functions and not involved, except as an appraiser, in the federally related transactions, and have no direct or indirect interest, financial or otherwise, in the property.” Further, Countrywide “engaged in a practice of pressuring and intimidating appraisers into using appraisal techniques that meet Countrywide’s business objectives even if the use of such appraisal technique is improper and in violation of industry standards.” Countrywide allegedly black-listed appraisers who did not provide appraisal reports consistent with Countrywide’s expectations.

133. The allegations in *Capitol West Appraisals*, *Clark*, and *Johnson* are consistent with the allegations of former Countrywide Regional Vice President Mark Zachary, who alleges that Countrywide loan officers were permitted to discard appraisals that did not support loan transactions in favor of appraisals by replacement appraisers that would support a qualifying loan-to-value ratio. Indeed, Zachary’s lawsuit details systematic appraisal fraud perpetrated by Countrywide with the knowledge and acquiescence of Countrywide executives. Specifically, Zachary alleges that an appraiser known to Countrywide executives was strongly encouraged to inflate the appraised value of homes by as much as six percent to allow the homeowners to “roll up” all closing costs. As Zachary noted, this conduct misled the buyer and the secondary mortgage market by overstating the value of the property securing the mortgage note. Zachary alleges that Countrywide executives rebuffed his persistent overtures to address this issue.

134. As a result of the appraisal process misconduct described above, the appraised value of properties that secured the loans underlying the Certificates was inflated.

**G. The Credit Ratings Assigned To Countrywide's Certificates  
Materially Misrepresented The Credit Risk Of The Certificates**

135. The AAA and otherwise investment grade credit ratings of the Certificates were a factor in Plaintiffs' purchase of the Certificates. Because Plaintiffs are conservative institutional investors, they purchased only investment-grade Certificates, over 90% of which were rated AAA. They therefore purchased purportedly low-risk securities that were high in the capital structure of the Certificate offerings. Thus, Plaintiffs relied to their detriment on the ratings and the Defendants' representations regarding the ratings in the Offering Documents.

136. "Investment grade" products are understood in the marketplace to be stable, secure and safe. Using S&P's scale, "investment grade" ratings are AAA, AA, A and BBB, and represent, high credit quality (AAA), upper-medium credit quality (AA and A) and medium credit quality (BBB). Any instrument rated below BBB is considered below investment grade or "junk bond."

137. The Defendants well understood (and banked on) the important role the credit ratings played in the MBS markets. They featured the ratings prominently in the Offering Documents and discussed at length the ratings received by the different tranches of the Certificates, and the bases for the ratings. Yet, the Defendants knew that the ratings were not reliable because those ratings were bought and paid for, and were supported by, flawed information provided by the Defendants to the credit rating agencies.

138. Each prospectus supplement states that the issuance of each tranche of the Certificates was conditioned on the assignment of particular, investment-grade ratings, and listed the ratings in a chart. Over 93% of the Certificates purchased by Plaintiffs were AAA-rated tranches, and the remainder were investment grade. The AAA rating denotes "high credit-quality," and is the same rating as those typically assigned to bonds backed by the full faith and

credit of the United States Government, such as Treasury Bills. Historically, before 2007, investments with AAA ratings had an expected cumulative loss rate of less than 0.5 percent, with an annual loss rate of close to nil. According to Standard and Poors, the default rate on all investment grade corporate bonds (including AA, A and BBB) from 1981 to 2007, for example, averaged about .094% per year with no year higher than 0.41%. The Certificates did not deserve these investment grade ratings, as evidenced most clearly by the fact that over 90% of the Certificates have now been downgraded to junk, a vast number of the underlying loans have been foreclosed upon, and the remaining underlying loans are suffering from crippling deficiencies and face serious risks of default.

139. The credit rating agencies received enormous revenue from the issuers who paid them for rating the products they sold. Because the desired rating of a securitized product was the starting point for any securities offering, the credit rating agencies were actively involved in helping Countrywide structure the products to achieve the requested rating. As a result, the credit rating agencies essentially worked backwards, starting with Countrywide's target rating and thereafter working toward a structure that could conceivably yield the desired rating. To estimate the expected losses or probability of default, the credit rating agencies used historical data to estimate the likely sensitivity of the expected loss or probability of default to underwriting characteristics of the loan, the experience of the originator and servicer, and the local and national economic conditions. Based on the expected losses or the probability of default, the cash flows available to each of the tranches were simulated. Once the cash flows were simulated, the rating agencies and Countrywide then determined how much credit enhancement would be made available to each tranche of the Certificates, with an ultimate goal of maximizing Countrywide's profit.

140. A 2008 SEC Report entitled, “Summary Report of Issues Identified in the Commission Staff’s Examinations of Select Credit Rating Agencies” (“Summary Report”) revealed that the issuers and the credit rating agencies worked together so that securities would receive the highest ratings:

[T]ypically, if the analyst concludes that the capital structure of the RMBS does not support the desired ratings, this preliminary conclusion would be conveyed to the arranger. The arranger could accept that determination and have the trust issue the securities with the proposed capital structure and the lower rating or adjust the structure to provide the requisite credit enhancement for the senior tranche to get the desired highest rating. Generally, arrangers aim for the largest possible senior tranche, i.e., to provide the least amount of credit enhancement possible, since the senior tranche -- as the highest rated tranche -- pays the lowest coupon rate of the RMBS’ tranches and, therefore, costs the arranger the least to fund.

141. As a result of this collaboration with the credit rating agencies, Countrywide was able to manipulate the system to achieve inflated ratings. For example, through repeated interactions with the credit rating agencies, Countrywide could effectively reverse engineer aspects of the ratings models and then modify the structure of a financing to improve its ratings without actually improving its credit quality.

142. This rating process was further compromised by the practice of “rating shopping.” Countrywide did not pay for the credit rating agencies’ services until after the agencies submitted a preliminary rating. This practice created, essentially, bidding wars where the issuers would hire the agency that provided the highest rating for the lowest price. The credit rating agencies were paid only if they provided the desired investment grade ratings, and only in the event that the transaction closed with those ratings. “Ratings shopping” jeopardized the integrity and independence of the rating process.



143. The credit ratings of the Certificates were further compromised by misinformation provided by Countrywide regarding the abandonment of its underwriting standards, rampant use of aggressive exceptions, the company's knowledge of pervasive fraud in the stated income loan programs, and the inflated appraisals assigned to the underlying collateral, as described above.

144. Subsequent downgrades confirm that the investment grade ratings reported in the Offering Documents were unjustifiably high and misstated the true credit risk of the Certificates purchased by Plaintiffs. Beginning in the spring of 2008, the Certificates purchased by Plaintiffs also became subject to these rating agency downgrades. Today, well over 90% of the Certificates – all initially awarded investment grade ratings (mostly AAA) – have been downgraded to junk, and the vast majority of the remainder have been downgraded at least one level. The *en masse* downgrade of AAA-rated Certificates indicates that the ratings set forth in the Offering Documents were false, unreliable and inflated.

145. The Countrywide Defendants knew that the AAA and other investment grade ratings assigned to the Certificates were false because, unbeknownst to Plaintiffs, the underwriting and appraisal standards of Countrywide Home had been abandoned and, as such, no reliable estimate could be made concerning the level of enhancement necessary to ensure that the top tranches purchased by Plaintiffs were of AAA quality. By including and endorsing these AAA ratings in the Prospectus Supplements, Defendants were making a false representation that they actually believed that the AAA ratings were an accurate reflection of the credit quality of the Certificates.

## **H. Countrywide Failed To Ensure That Title To The Underlying Loans Was Effectively Transferred**

146. An essential aspect of the mortgage securitization process is that the issuing trust for each MBS offering must obtain good title to the mortgage loans comprising the pool for that offering. This is necessary in order for the MBS holders to be legally entitled to enforce the mortgage loans in case of default. Two documents relating to each mortgage loan must be validly transferred to the trust as part of the securitization process – a promissory note and a security instrument (either a mortgage or a deed of trust).

147. The rules for these transfers are governed by the law of the state where the property is located, by the terms of the pooling and servicing agreement (“PSA”) for each securitization, and by the law governing the issuing trust (with respect to matters of trust law). Generally, state laws and the PSAs require the promissory note and security instrument to be transferred by indorsement, in the same way that a check can be transferred by indorsement, or by sale. In addition, state laws generally require that the trustee have physical possession of the original, manually signed note in order for the loan to be enforceable by the trustee against the borrower in case of default.

148. In order to preserve the bankruptcy-remote status of the issuing trusts in RMBS transactions, the notes and security instruments are generally not transferred directly from the mortgage loan originator to the trust. Rather, the notes and security instruments are generally initially transferred from the originator (*e.g.*, Countrywide Home) to the depositor (*e.g.*, CWALT), either directly or via one or more special-purpose entities established by Countrywide Financial. After this initial transfer to the depositor, the depositor transfers the notes and security interests to the issuing trust for the particular securitization. Each of these transfers must be valid under applicable state law in order for the trust to have good title to the mortgage loans.

149. In addition, the PSA generally requires the transfers of the mortgage loans to the trust to be completed within a strict time limit after formation of the trust in order to ensure that the trust qualifies as a tax-free real estate mortgage investment conduit (“REMIC”).

150. The applicable state trust law generally requires strict compliance with the trust documents, including the PSA, so that failure to comply strictly with the timeliness, indorsement, physical delivery, and other requirements of the PSA with respect to the transfers of the notes and security instruments means that the transfers would be void and the trust would not have good title to the mortgage loans.

151. The Offering Documents for each offering of the Certificates represented in substance that the issuing trust for that offering had obtained good title to the mortgage loans comprising the pool for the offering. In reality, however, Countrywide routinely failed to comply with the requirements of applicable state laws and the PSAs for valid transfers of the notes and security instruments to the issuing trusts. In *Kemp v. Countrywide Home Loans, Inc.*, Bkrtcy. No. 08-18700 (D.N.J.), Countrywide sought to prove that the Bank of New York, as trustee for an RMBS issuing trust that purportedly held Mr. Kemp’s mortgage, was entitled to enforce the mortgage. Countrywide presented testimony by Linda DeMartini, who had been employed by Countrywide Servicing for almost ten years as of August 2009 and was then a supervisor and operational team leader for the Litigation Management Department of Countrywide Servicing. Ms. DeMartini testified that, in her extensive career in the mortgage loan servicing business of Countrywide, “I had to know about everything . . . .” She testified that Countrywide Home originated Kemp’s loan in 2006 and transferred it to the Bank of New York as trustee for the issuing trust, but that Countrywide Servicing retained the original note in its own possession and never delivered it to the Bank of New York because Countrywide Servicing was the servicer for the loan.

152. Even though DeMartini was presented by Countrywide as a witness in an attempt to prove that the loan documents had been validly transferred to the issuing trust, her testimony actually proved that the loan documents were never validly transferred. She testified that an allonge to the promissory note, which purported to transfer the note to the trust by indorsement, was prepared only in preparation for the litigation in 2009, long after the purported transfer of the note to the trust in 2006, and was never delivered to the trustee. Indeed, she testified that there was no ordinary business practice of signing an allonge at the time a note was purportedly transferred.

153. DeMartini also testified that the original note was retained by Countrywide and was never delivered to the trustee. Most significantly, she testified on direct examination that not delivering the original note to the trustee was Countrywide's standard business practice:

Q. Ms. DeMartini, is it generally the custom to – for your investor [*i.e.*, the issuing trust] to hold the documents?

A. No. They would stay with us as the servicer.

Q. And are documents ever transferred to the investor?

A. If we service-release them they would be transferred to whomever we're service-releasing them to.

Q. So I believe you testified Countrywide was the originator of this loan?

A. Yes.

Q. So Countrywide had possession of the documents from the outset?

A. Yes.

Q. And subsequently did Countrywide transfer these documents by assignment or an allonge?

A. Yes.

Q. And –

A. Well, transferred the rights, yes, transferred the ownership, not the physical documents.

Q. So the physical documents were retained within the corporate entity Countrywide or Bank of America?

A. Correct.

Q. Okay. And would you say that this is standard operating procedure in the mortgage banking business?

A. Yes. It would be normal – the normal course of business as the reason that we are the servicer, as we’re the ones that are doing all the servicing, and that would include retaining the documents.

154. In response to questioning by the Bankruptcy Judge, DeMartini again testified that “I do know that it is our normal course of action with the loans that we service that we are the ones that retain the – that we retain those documents.” In response to the Court’s question whether the documents are “ever moved to follow the transfer of ownership,” DeMartini testified that “it is not customary for them to move.”

155. At a subsequent hearing in September 2009, Countrywide’s counsel stated that

[A]lthough . . . the UCC and the Master Servicing Agreement apparently requires that, procedure seems to indicate that they don’t physically move documents from place to place because of the fear of loss and the trouble involved and the people handling them. They basically execute the necessary documents and retain them as long as servicing’s retained. The documents only leave when servicing is released.

156. Based on the evidence quoted above, Chief Bankruptcy Judge Judith H. Wizmur held in November 2010 that the Bank of New York, as trustee for the issuing trust, could not enforce the mortgage loan for two reasons:

First, under New Jersey’s Uniform Commercial Code (“UCC”) provisions, the fact that the owner of the note, the Bank of New York, never had possession of the note, is fatal to its enforcement. Second, upon the sale of the note and mortgage to the Bank of New York, the fact that the note was not properly indorsed to the new owner also defeats the enforceability of the note.

*Kemp v. Countrywide Home Loans, Inc.*, No. 08-18700-JHW, Slip Op., at \*10-11 (Bkrcty. D.N.J. Nov. 16, 2010). Judge Wizmur further held that Countrywide Servicing also could not enforce the mortgage loan, because as an agent for the owner of the note, Countrywide Servicing had no more authority to enforce the note than its principal, the Bank of New York. *Id.* at \*21.

157. As DeMartini testified, Countrywide routinely did not transfer the original mortgage loan documents to the issuing trusts for MBS transactions, but rather retained the original documents itself. Thus, Defendants failed to validly transfer the promissory notes and security instruments for many of the mortgage loans underlying the Certificates purchased by Plaintiffs to the issuing trusts for the Certificates.

#### **V. PLAINTIFFS' INVESTMENT IN THE COUNTRYWIDE CERTIFICATES**

158. The Certificates for all offerings were issued pursuant to the Offering Documents, and in a few instances, private placement memoranda. These documents generally explained the structure and provided an overview of the Certificates. The Depositor Defendants and Countrywide Securities prepared the Offering Documents, and the Securities Act Individual Defendants signed the Registration Statements.

159. The Prospectus Supplements filed with the SEC contained detailed descriptions of the mortgage pools underlying the Certificates. The respective Prospectus Supplements provided the specific terms of the particular Certificate offering. Each Prospectus Supplement included tabular data concerning the loans underlying the Certificates, including (but not limited to) the type of loans; the number of loans; the mortgage rate and net mortgage rate (the mortgage rate net of the premium for any lender paid mortgage insurance less the sum of the master servicing fee and the trustee fee on the mortgage loan); the aggregate scheduled principal balance of the loans; the weighted average original combined LTV ratio; occupancy rates; credit enhancement; and the geographic concentration of the mortgaged properties. The Prospectus

Supplements also contained a summary of Countrywide's underwriting and appraisal standards, guidelines and practices. The Registration Statements incorporated by reference the subsequently filed Prospectuses and Prospectus Supplements.

160. The chart in Exhibit 1 identifies (i) each Certificate Offering and tranche in which Plaintiffs purchased; (ii) the full name of the Offering; (iii) the issuing entity; (iv) the corresponding Registration Statement file number; (v) the Depositor Defendant who issued each Certificate; (vi) the issue date of the Certificate; (vii) the purchasing Plaintiff; and (viii) the date of the purchase. Countrywide Home was the Seller/Sponsor for each Offering, Countrywide Servicing was the servicer of each Offering, and Countrywide Securities was an underwriter of each Offering,

161. The Dexia Plaintiffs, TIAA, TIAA-CREF LIC and TGM made their investment decisions using internal investment personnel. All investment decisions for the New York Life Plaintiffs, CREF and the TIAA-CREF Funds were made by their investment managers, identified in ¶¶ 16-17. In deciding to purchase the Certificates, Plaintiffs or their respective investment managers relied on the Countrywide Defendants' false representations and omissions of material fact regarding Countrywide's underwriting standards and the characteristics of the mortgage loans underlying the Certificates. But for the Countrywide Defendants' fraudulent representations and omissions, Plaintiffs would not have purchased the Certificates.

162. Plaintiffs or their investment managers reasonably relied upon the Countrywide Defendants' representations in the Offering Documents and in Defendants' public statements regarding loan quality and Countrywide's reputation. Plaintiffs did not know at the time they purchased the Certificates, and could not have known, that Countrywide had stopped following its underwriting guidelines to the point of abandoning those guidelines, leading to a drastic

increase in the origination of risky loans, nor did they know that the property appraisals secured by Countrywide were not independent and resulted in false appraisal values. Plaintiffs also did not know that Countrywide knowingly or recklessly accepted false information about material facts such as borrowers' stated income and intention to live in the mortgaged properties, which caused the Countrywide Defendants' representations to Plaintiffs to be false. If Plaintiffs had known these and other material facts regarding the Countrywide Defendants' fraudulent misrepresentations and omissions of material fact, Plaintiffs would not have purchased the Certificates.

163. The Countrywide Defendants' misrepresentations and omissions of material facts caused Plaintiffs to suffer losses on the Certificates, because the Certificates were in fact far riskier—and their rate of default far higher—than the Countrywide Defendants had described them to be. The mortgage loans underlying the Certificates experienced defaults and delinquencies at a much higher rate due to Countrywide's abandonment of its loan-origination guidelines.

164. Plaintiffs are located and headquartered in New York and they or their investment managers made the decisions to purchase the Certificates.

165. Plaintiffs or their investment managers decided to purchase each Certificate identified in Exhibit 1 on the basis of the information contained in the applicable Offering Documents filed with the SEC (or the applicable private placement memoranda), and based on additional information provided to each Plaintiff's investment personnel or managers by Defendant Countrywide Securities or other brokers involved in the sale of the Certificates, including Defendants' public statements, as described herein. In connection with the offers and sales of the Certificates to Plaintiffs, Countrywide Securities provided directly or indirectly to each Plaintiff's investment personnel or managers in New York the Offering Documents and



additional documents, such as statistical tables to be included in the Prospectus Supplements. These documents included term sheets, pooling and servicing agreements, computational material, data regarding the LTV and debt-to-income ratios of the pools, and computer models of the financial structures of the securitizations. Similar information was sent to and analyzed by Plaintiffs' investment personnel and managers if the Certificate was sold to them in the secondary market.

166. Investment personnel of or investment managers for each Plaintiff reviewed and analyzed the information provided directly or indirectly by Countrywide Securities with respect to each offering of Certificates and performed various analyses of the Certificate-specific data for each offering before deciding to purchase Certificates in the offering. The analyses conducted by each Plaintiff before deciding to purchase a Certificate included various credit analyses based on the information provided by Countrywide Securities with respect to both the credit characteristics of the mortgage loan pool (including, for example, geographic concentration; weighted average life; fixed- or floating-rate loans; full-, low-, or no-documentation "stated income" loans; and owner-occupied, second home, or investment properties), and the structure of the securitization with respect to the seniority and risk characteristics of the particular tranche of Certificates (including, for example, position in the payment "waterfall").

167. Thus, each Plaintiff relied on the information in the term sheets, computational material, and other data provided directly or indirectly by Countrywide Securities for each offering of the Certificates. Each Plaintiff also relied on the Offering Documents' representations and Defendants' public statements about the underwriting guidelines that were purportedly followed in originating the mortgage loans for Countrywide's Certificates.

168. These documents contained numerous statements of material facts about the Certificates, including statements concerning: (i) Countrywide Home's and any other applicable mortgage originators' underwriting guidelines that were purportedly applied to evaluate the ability of the borrowers to repay the loans underlying the Certificates; (ii) the appraisal guidelines that were purportedly applied to evaluate the value and adequacy of the mortgaged properties as collateral; (iii) the LTV ratios, debt to income ratios, and purported occupancy status of the mortgaged properties, including whether the properties were "owner occupied," "second homes," or "investment properties"; (iv) Countrywide Securities' due diligence of the loans and the mortgage originators' – specifically Countrywide Home's – underwriting practices; and (v) various forms of credit enhancement applicable to certain tranches of Certificates.

169. These statements of material facts were untrue because: (i) Countrywide Home and the other mortgage originators violated their stated underwriting guidelines and did not consistently evaluate the borrowers' ability to repay the loans; (ii) inflated appraisals caused the listed LTV ratios and levels of credit enhancement to be untrue; and (iii) the actual numbers of riskier "second home" and "investment property" mortgagees were higher than the stated numbers. In addition, metrics such as debt-to-income ratios were untrue as a result of Countrywide Home's and the other mortgage originators' acceptance of untrue information from mortgage applicants. For example, Countrywide Home and the other mortgage originators allowed applicants for "stated income" loans to provide untrue income information and did not verify the applicants' purported income. Stated income loans were therefore known among personnel of Countrywide Home and the other mortgage originators as "liar loans."

170. In addition to the untrue statements and omissions in the documents provided to each Plaintiff, Countrywide Securities and Countrywide Financial often made additional untrue

oral statements about the Certificates to each Plaintiff or its investment managers during face-to-face meetings and telephone conversations in connection with the offer and sale of the Certificates between 2005 and 2007, and through investor conference calls discussing the quality of Countrywide's loan portfolios. For example, Countrywide Securities and Countrywide Financial personnel represented to each Plaintiff or its investment manager that Countrywide performed due diligence on the loans in its securitizations, re-underwrote the loans, performed good loan servicing, and thus offered a superior MBS platform than Countrywide's competitors. Each Plaintiff relied on these representations in deciding to purchase Certificates from Countrywide. Plaintiffs also relied on the public statements made by the individual Defendants Mozilo and Sambol to the public regarding Countrywide's prudent underwriting and adherence to the highest origination standards.

**VI. DEFENDANTS' FALSE AND MISLEADING MATERIAL MISSTATEMENTS AND OMISSIONS IN THE OFFERING DOCUMENTS**

171. The Offering Documents pursuant to which Plaintiffs purchased their Certificates contained untrue statements of material fact, or omitted to state material facts necessary to make the statements therein not misleading, regarding: (i) Countrywide's and other originators' underwriting processes and guidelines by which the loans were originated, including the prevalence and type of exceptions to those guidelines being applied to the underlying loans, and the rampant fraud in stated income loans; (ii) the value of the underlying real estate securing the loans, in terms of LTV ratios and the appraisal standards by which such real estate values were measured; (iii) the credit ratings of the Securities; and (iv) the adequacy of Countrywide's transfer of good title and legal ownership of the underlying loans to the issuing trusts.

**A. Defendants Made False And Misleading Statements Regarding Countrywide's Underwriting Guidelines**

172. Countrywide Home Loans originated and/or packaged the mortgage loans that were included in the pools for the Certificates. The Prospectus Supplements for the Certificates all contained identical or materially similar statements of material fact regarding Countrywide's underwriting standards and practices.

173. Depositor Defendants CWALT and CWMBS issued approximately 73% of the Certificates at issue in this action. Nearly 78% of the CWALT Prospectus Supplements and 70% of the CWMBS Prospectus Supplements made the following misrepresentations regarding Countrywide's underwriting guidelines and practices:

*All of the mortgage loans in the trust fund will have been originated or acquired by Countrywide Home Loans in accordance with its credit, appraisal and underwriting standards. Countrywide Home Loans' underwriting standards are applied in accordance with applicable federal and state laws and regulations.* Except as otherwise provided in this prospectus supplement, the underwriting procedures are consistent with those identified under "Mortgage Loan Program — Underwriting Process" in the prospectus.

The remaining 22% of the CWALT Prospectus Supplements and 30% of the CWMBS Prospectus Supplements contained identical disclosures regarding the loans, but qualified that Countrywide originated "a portion," "substantially all" or a specific percentage "of the mortgage loans in the trust fund." The remaining 27% of the Certificates were issued by Depositor Defendants CWABS and CWHEQ. Those Prospectus Supplements contained similar misstatements, generally stating that the mortgage loans to be included in the Offering "will have been originated substantially in accordance with Countrywide Home Loans' underwriting criteria" for closed-end second lien mortgage loans or for credit blemished mortgage loans.

174. All of the Prospectus Supplements issued by Depositor Defendants CWALT, CWMBS and CWHEQ and 13% of the Prospectus Supplements issued by Depositor Defendant CWABS made the following material misrepresentations:

***Countrywide Home Loans’ underwriting standards are applied by or on behalf of Countrywide Home Loans to evaluate the prospective borrower’s credit standing and repayment ability and the value and adequacy of the mortgaged property as collateral.***

Under those standards, a prospective borrower must generally demonstrate that the ratio of the borrower’s monthly housing expenses (including principal and interest on the proposed mortgage loan and, as applicable, the related monthly portion of property taxes, hazard insurance and mortgage insurance) to the borrower’s monthly gross income and the ratio of total monthly debt to the monthly gross income (the “debt-to-income” ratios) are within acceptable limits. The maximum acceptable debt-to-income ratio, which is determined on a loan-by-loan basis varies depending on a number of underwriting criteria, including the Loan-to-Value Ratio, loan purpose, loan amount and credit history of the borrower. In addition to meeting the debt-to-income ratio guidelines, each prospective borrower is required to have sufficient cash resources to pay the down payment and closing costs.

The remaining CWABS Prospectus Supplements contained similar misstatements, stating that “[t]he underwriting guidelines are primarily intended to assess the value of the mortgaged property and to evaluate the adequacy of the mortgaged property as collateral for the Mortgage Loan.”

175. All of the CWALT, CWMBS and CWHEQ Prospectus Supplements, and 13% of the CWABS Prospectus Supplements represented that: ***“Exceptions to Countrywide Home Loans’ underwriting guidelines may be made if compensating factors are demonstrated by a prospective borrower.”*** The remaining 87% of the CWABS Prospectus Supplements represented that “On a case by case basis, Countrywide Home Loans may determine that, based upon compensating factors, a prospective borrower not strictly qualifying under the underwriting risk category guidelines described below warrants an underwriting exception. . . .

It is expected that a significant number of the Mortgage Loans will have been originated based on these types of underwriting exceptions.”

176. All of the CWALT and CWMBBS Prospectus Supplements, 71% of the CWABS Prospectus Supplements and 75% of the CWHEQ Prospectus Supplements represented that “Countrywide Home Loans *will represent and warrant to the depositor in the pooling and servicing agreement . . . the selection was not made in a manner intended to affect the interests of the certificateholders adversely.*”

177. The above statements of material facts were untrue when made because, as explained above in ¶¶ 36-145, they failed to disclose that Countrywide: (i) systematically failed to follow its stated underwriting standards; (ii) allowed pervasive exceptions to its stated underwriting standards in the absence of compensating factors; (iii) disregarded credit quality in favor of generating increased loan volume for securitizations; (iv) routinely allowed fraudulent representations of an applicant’s stated income and, in many cases, knowingly falsified the stated income; and (v) violated its stated appraisal standards and in many instances materially inflated the values of the underlying mortgaged properties in the loan origination and underwriting process. Moreover, Defendants routinely acted adversely to the interests of Plaintiffs and other Certificate holders by knowingly selecting risky loans for the Certificates while “cherry picking” the best loans for Countrywide’s own portfolio. ¶¶ 120-121.

178. On September 1, 2004, Mozilo wrote an e-mail to Stan Kurland and Keith McLaughlin in which he stated: “As I look at production trends, not only at Countrywide, but also with other lenders, there is a clear deterioration in the credit quality of loans being originated over the past several years. In addition, from my point of view, the trend is getting worse as the competition for sub-prime, Alt-A and nonconforming in general continues to accelerate.” However, in a March 15, 2005 Piper Jaffray Investor Conference quotes Mozilo as

saying: “I will say this to you that under no circumstances, will Countrywide ever sacrifice sound lending and margins for the sake of getting to that 30% market share.” Mozilo once again defended Countrywide’s underwriting standards in Countrywide’s Second Quarter 2005 Earnings call held on July 26, 2005, when he stated: “I am not aware of any change of substance in underwriting policies. If they are referring to the fact that we are participating in pay-option and I/O product and they are defining that as a loosening of standards, if that is the definition, then that would be correct. We are a big player in the pay-option and I/O product. I’m not aware of any loosening of underwriting standards that creates a less of a quality of loan than we did in the past.”

179. At a Q2 2004 meeting of Countrywide’s Corporate Credit Risk Committee (“CCRC”), Countrywide’s Chief Credit Officer, John McMurray, delivered a presentation entitled “Credit Risk is Increasing,” explaining to senior executives, including Defendant Sambol, that Countrywide’s underwriting standards had become more aggressive, and more loans were being originated under riskier loan programs, with riskier features and at higher CLTVs. During his presentation, McMurray explained to Countrywide’s senior executives that as underwriting guidelines expand, the probability of a loan going into default or serious delinquency increase.

180. In a September 9, 2004 email memorandum from McMurray to Mozilo, McMurray explained that “[l]oan quality is a significant credit risk factor[,]” and noted that Countrywide’s “move to more aggressive underwriting guidelines have increased risk.” This memorandum was widely shared within Countrywide.

181. In response to the rampant use of Countrywide’s “matching strategy” and its approval of any loan as long as it could be securitized, Countrywide’s Credit Risk Management department futilely attempted to rein in some of these abuses by issuing a “no exceptions

policy” with respect to the underwriting guidelines applicable to the subprime 80/20 loan products in January 2006. This policy was directed in response to Countrywide’s “buy-back” in early 2006 of many 80/20 loans in default that had been sold to HSBC and were “kicked out” by HSBC because they had been underwritten outside of Countrywide’s underwriting guidelines. However, according to the testimony of McMurray, Countrywide’s Chief Risk Officer, the “no exceptions policy” for 80/20 loans was completely ignored by Countrywide’s SLD personnel who continued to originate 80-20 loans pursuant to exceptions. Ultimately, Frank Aguilera, a Managing Director in Secondary Marketing at Countrywide, wrote in a June 12, 2006 email to other Managing Directors, including Chief Risk Officer John McMurray, that “there was no real effort to impose the new controls at the production end.”

182. Defendant Mozilo understood the risks of these products to the Company and to investors, yet did not stop them. In a March 27, 2006, email from Mozilo to several Countrywide executives, including Defendant Sambol, Mozilo wrote that the 80/20 loans were “the most dangerous product in existence and there can be nothing more toxic and therefore requires that no deviation for guidelines be permitted irrespective of the circumstances.” However, Countrywide’s production and secondary marketing divisions continued to ignore the policy and continued granting these exceptions with respect to 80/20 loans, as reflected by Chief Risk Officer McMurray on a September 7, 2007 email explaining that the secondary and production SLDs “basically continued to operate as though they never received this policy.”

**B. Defendants Made Untrue Statements And Omissions Regarding Appraisals And LTV Ratios**

183. The adequacy of the mortgaged properties as security for repayment of the loans was purportedly determined by appraisals. The Prospectus Supplements represented that independent appraisals were prepared for each mortgaged property and that reports were



prepared to substantiate these appraisals. For example, all of the Prospectus Supplements for the CWALT and CWMBBS Certificates contained the following representation:

***Countrywide Home Loans obtains appraisals from independent appraisers or appraisal services for properties that are to secure mortgage loans . . . The appraisers inspect and appraise the proposed mortgaged property and verify that the property is in acceptable condition. Following each appraisal, the appraiser prepares a report which includes a market data analysis based on recent sales of comparable homes in the area and, when deemed appropriate, a replacement cost analysis based on the current cost of constructing a similar home. All appraisals are required to conform to Fannie Mae or Freddie Mac appraisal standards then in effect.***

184. The Prospectus Supplements for the CWABS and CWHEQ Certificates made similar statements about appraisals of the real estate securing the loans underlying the Certificates, with most including the following statement:

Countrywide Home Loans' underwriting standards are applied in accordance with applicable federal and state laws and regulations and ***require an independent appraisal of the mortgaged property prepared on a Uniform Residential Appraisal Report (Form 1004) or other appraisal form as applicable to the specific mortgaged property type.*** Each appraisal includes a market data analysis based on recent sales of comparable homes in the area and, where deemed appropriate, replacement cost analysis based on the current cost of constructing a similar home and generally is required to have been made not earlier than 180 days prior to the date of origination of the mortgage loan. ***Every independent appraisal is reviewed by a representative of Countrywide Home Loans before the loan is funded, and an additional review appraisal is generally performed in connection with appraisals not provided by Landsafe Appraisals, Inc., a wholly owned subsidiary of Countrywide Home Loans*** ... Variations in maximum loan amount limits are permitted based on compensating factors.

185. The Prospectus Supplements provided information regarding LTV ratios, in association with various loan groupings, including by loan type and documentation level, property type and geographical location. All of the Prospectus Supplements for the CWALT

Certificates, 70% of the CWABS Certificates, 20% of the CWMBS Certificates and 75% of the CWHEQ Certificates stated that, with respect to non-conforming loans, Countrywide Home's standard guidelines:

generally allow Loan-to-Value Ratios at origination of up to 95% for purchase money or rate and term refinance mortgage loans with original principal balances of up to \$400,000, up to 90% for mortgage loans with original principal balances of up to \$650,000, up to 75% for mortgage loans with original principal balances of up to \$1,000,000, up to 65% for mortgage loans with original principal balances of up to \$1,500,000, and up to 60% for mortgage loans with original principal balances of up to \$2,000,000.

186. Certain Prospectus Supplements also stated that “[n]o Initial Mortgage Loans had a Loan-to-Value Ratio at origination or on the closing date of more than 100.00%”:

Countrywide Home Loans' underwriting standards permit first mortgage loans with loan-to-value ratios at origination of up to 100% and second mortgage loans with combined loan-to-value ratios at origination of up to 100% depending on the program, type and use of the property, documentation level, creditworthiness of the borrower, debt-to-income ratio and loan amount.

187. The representations regarding appraisals and LTV ratios were materially false and misleading in that they omitted to state that the appraisals were inaccurate because: (i) the appraisers were not independent from Countrywide, which exerted pressure on appraisers to come back with pre-determined, preconceived, inflated and false appraisal values; (ii) the actual LTV ratios for numerous mortgage loans underlying the Certificates would have exceeded 100% if the underlying properties had been appraised by an independent appraiser as represented in the Offering Documents; and (iii) the forms of credit enhancement applicable to certain tranches of the Certificates were affected by the total value of the underlying properties, and thus were inaccurate as stated.

**C. Defendants Materially Misrepresented The Accuracy Of The Credit Ratings Assigned To The Certificates**

188. Defendants represented in the Offering Documents that over 93% of the Certificates purchased by Plaintiffs were worthy of being rated “AAA,” signifying that the risk of loss was virtually non-existent. Defendants represented that the remaining Certificates were worthy of being rated investment grade – “AA” or “A” – signifying that the risk of loss was minimal.

189. By providing ratings, Defendants represented that they believed that the information provided to the rating agencies to support these ratings accurately reflected Countrywide’s underwriting guidelines and practices, and the specific qualities of the underlying loans. As stated in detail above, ¶¶ 36-145, this representation was false.

190. Defendants further represented in the Prospectus Supplements, in sum or substance, that:

It is a condition to the issuance of the senior certificates that they be rated AAA by Standard & Poor’s, a division of The McGraw-Hill Companies, Inc. (“S&P”) and “Aaa” by Moody’s Investors Service, Inc. (“Moody’s”). It is a condition to the issuance of the Class M, Class B-1 and Class B-2 Certificates that they be rated at least “AA”, “A” and “BBB”, respectively, by S&P and that they be rated at least “Aa3,” “A3” and “Baa2”, respectively, by Moody’s.

*The ratings assigned . . . to mortgage pass-through certificates address the likelihood of the receipt of all distributions on the mortgage loans by the related certificateholders under the agreements pursuant to which the certificates are issued. S&P’s ratings take into consideration the credit quality of the related mortgage pool, including any credit support providers, structural and legal aspects associated with the certificates, and the extent to which the payment stream on the mortgage pool is adequate to make the payments required by the certificates.*

191. These statements regarding the ratings assigned to the Certificates were false because Defendants stated the assigned ratings while knowing that misleading information was

provided to the rating agencies by Countrywide to ensure AAA or otherwise investment grade ratings.

192. The falsity of these statements is further evidenced by the rapid downgrades of nearly all of the Certificates within a few years of issuance, with over 90% of the Certificates downgraded to junk. *See Exhibit 2.*

**D. Defendants Materially Misrepresented Countrywide's Transfer Of Good Title To The Mortgage Loans To The Issuing Trusts**

193. In sum or substance, Defendants stated in each Prospectus Supplement that:

In addition, each of the sellers will represent and warrant that, prior to the sale of the related mortgage loans to the depositor, the applicable seller had good title to the mortgage loans sold by it. . . . Under the pooling and servicing agreement, *the depositor will assign all its right, title and interest in the representations, warranties and covenants (including the sellers' repurchase or substitution obligation) to the trustee for the benefit of the certificateholders.*

194. These representations were false because, as alleged in detail in ¶¶ 146-157, Defendants routinely failed to physically deliver the original promissory notes and security instruments for the mortgage loans to the issuing trusts, as required by applicable state laws and the PSAs. These representations were also false because Defendants routinely failed to execute valid indorsements of the documents at the time of the purported transfer, as also required by applicable state laws and the PSAs. The issuing trusts therefore did not possess good title to many of the mortgage loans and lacked legal authority to enforce many of the mortgage loans against the borrowers in case of default.

**VII. BECAUSE OF DEFENDANTS' FRAUDULENT CONDUCT, PLAINTIFFS HAVE SUFFERED LOSSES ON THEIR PURCHASES OF CERTIFICATES**

195. The ratings on virtually all of the Certificates have since been downgraded and they are no longer marketable at the prices paid for them by Plaintiffs. As reflected in the

attached Exhibit 2, which reflects the Certificates in which the Plaintiffs purchased interests, over 90% of the Certificates that were originally rated “AAA” have been downgraded to junk.

196. Further, the delinquency, bank ownership and foreclosure rates on the underlying mortgages have soared since issuance. As reflected in the attached Exhibit 3, the average percentage of loans that are currently 30 days or more delinquent, in foreclosure, or bank-owned exceeds 31%. In 31 of the Certificates in which the Plaintiffs purchased interests, the percentage of loans that are currently 30 days or more delinquent, in foreclosure, or bank-owned exceeds 50%, with an average delinquency of over 60%. Moreover, these current performance numbers do not reflect the number of loans which have been foreclosed since issuance and which are no longer included within the loan pools. Exhibit 3 reflects the original number of loans in the loan pools and the total number of loans which have been removed from the pools, largely due to either foreclosure or early payout, negatively impacting the income payable to Certificate-holders.

197. Statistical studies by others have similarly revealed that the problems in mortgage loans were tied to the abandonment of underwriting standards. The F.B.I. Mortgage Fraud Reports of 2007 (published in April 2008) reported on the results of a study of three million residential mortgages that found that between 30% and 70% of early payment defaults were linked to significant misrepresentations in the original loan applications. Loans containing egregious misrepresentations like the misrepresentations documented in the Countrywide loan pools were five times as likely to default in the first six months than loans that did not.

198. Other parties’ reviews of Countrywide’s full loan files have revealed even greater deviations. Third parties with access to the complete loan files for certain Countrywide securitizations have performed additional analysis of the mortgage loans underlying Countrywide’s offerings. These include, among others, MBIA and Syncora Insurance

Company (“Syncora”). Their analyses provide additional strong evidence that essential characteristics of the mortgage loans underlying Countrywide’s MBS were misrepresented and omitted material information, and that the problems in Countrywide’s underwriting practices were systemic.

199. MBIA is a New York-based monoline insurer that wrote insurance on certain Countrywide mortgage-backed securities offerings. MBIA conducted an investigation into Countrywide’s loan files after it was asked to make payments to certain other investors.

200. MBIA’s analysis included an analysis of securitizations issued by two of the Depositor Defendants: CWHEQ and CWABS. MBIA found that the defective loans span Countrywide’s securitizations from 2004 to 2007, demonstrating the consistency of Countrywide’s disregard for its own underwriting guidelines over this period, the same period at issue in this case. Because Countrywide’s violation of its underwriting guidelines was a systemic problem, MBIA’s findings are applicable to all of Plaintiffs’ Certificates.

201. In carrying out its review of the approximately 19,000 Countrywide loan files, MBIA found that 91% of the defaulted or delinquent loans in those securitizations contained material deviations from Countrywide’s underwriting guidelines. MBIA’s report showed that the loan applications frequently “(i) lack key documentation, such as verification of borrower assets or income; (ii) include an invalid or incomplete appraisal; (iii) demonstrate fraud by the borrower on the face of the application; or (iv) reflect that any of borrower income, FICO score, debt, DTI [debt-to-income,] or CLTV [combined loan-to-value] ratios, fails to meet stated Countrywide guidelines (without any permissible exception).”

202. Syncora, another insurance company that insured Countrywide’s securitizations, has conducted a similar re-review analysis of defaulted loans in the securitizations that it insured to determine whether the loans had been originated in accordance with Countrywide’s

representations. Syncora found that 75% of the loans it reviewed “were underwritten in violation of Countrywide’s own lending guidelines, lack any compensating factors that could justify their increased risk, and should never have been made.” Syncora’s review is probative of the problems underlying Plaintiffs’ Certificates because it again demonstrates that Countrywide’s failures during this key period of 2004 to 2007 were systemic.

203. Syncora gave examples of individual loans that diverged from Countrywide’s guidelines. The individual defective loans analyzed by Syncora reflected a long list of misstatements by Countrywide. Many loans violated the DTI ratios and LTV ratios set forth in Countrywide’s underwriting guidelines, without adequate compensating factors to justify the increased risk of default, due in part to borrowers’ exaggerated incomes and exaggerated property values. Loan amounts routinely exceeded the maximum amounts permitted under the Company’s guidelines for each given borrower, based on a borrower’s credit score, documentation, and property values. Countrywide also improperly issued loans to borrowers when their loan files lacked adequate documentation of the borrowers’ income, assets, credit, employment, cash reserves, or property values.

204. In addition, the Illinois Attorney General reviewed the sales of Countrywide loans by an Illinois mortgage broker and found that the vast majority of the loans had inflated incomes stated in the documentation, almost all without the borrowers’ knowledge. This study covered the time period of 2004 to 2007, again the same time period during which Countrywide was generating the loans at issue here. Likewise, a review of 100 stated-income loans by the Mortgage Asset Research Institute revealed that 60% of the income amounts were inflated by more than 50% and that 90% of the loans had inflated income figures of at least 5%. Again, this is highly probative of the problems underlying Plaintiffs’ Countrywide Certificates as it covers the time period of 2004 to 2007.

**VIII. AS COUNTRYWIDE'S SUCCESSOR, BANK OF AMERICA IS VICARIOUSLY LIABLE FOR COUNTRYWIDE'S ACTIONS**

205. As Countrywide's successor in liability, Bank of America is jointly and severally liable for any and all damages resulting to Plaintiffs from the wrongful actions of Countrywide. Bank of America itself has acknowledged that its acquisition of all of Countrywide's assets through an all-stock transaction on July 1, 2008 was a "merger." In a July 2008 press release, Barbara Desoer, identified as the head of the "combined mortgage, home equity and insurance businesses" of Bank of America and Countrywide, said: "Now we begin to combine the two companies and prepare to introduce our new name and way of operating." According to Bank of America, it "anticipates substantial cost savings from combining the two companies," from eliminating employment positions, and from reducing overlapping technology, vendor and marketing expenses. Desoer added that "the company is expected to benefit by leveraging its broad product set to deepen relationships with existing Countrywide customers." Desoer was also interviewed for the May 2009 issue of *Housing Wire*, which reported that one of the assets [Bank of America] acquired with Countrywide was a vast technology platform for originating and servicing loans, and Desoer says that the bank will be migrating some aspects of BofA's mortgage operations over to Countrywide's platforms. Desoer was quoted as saying, "[w]e're done with defining the target, and we're in the middle of doing the development work to prepare us to be able to do the conversion of the part of the portfolio going to the legacy Countrywide platforms." Mozilo stated in another press release that "the combination of Countrywide and Bank of America will create one of the most powerful mortgage franchises in the world." And in its 2008 Annual Report, Bank of America confirmed that by acquiring Countrywide it became the "No. 1 provider of both mortgage originations and servicing" and "as a combined



company,” it would be recognized as a “responsible lender who is committed to helping our customers become successful homeowners.”

206. Bank of America has reported to the SEC that on November 7, 2008, Countrywide Financial and Countrywide Home “transferred substantially all of their assets and operations to [Bank of America].” This transfer of assets was “in connection with the integration of Countrywide Financial Corporation with [Bank of America’s] other businesses and operations.” A California federal court recently found that since the merger, “Countrywide’s remaining operations and employees have been transferred to Bank of America, and Bank of America ceased using the Countrywide name in April 2009.” And the New York Supreme Court has denied the defendants’ motion to dismiss MBIA’s and Syncora’s – both monoline bond insurers – successor and vicarious liability claims against Bank of America based on Countrywide MBS. Countrywide also ceased submitting filings to the SEC, which are now submitted as part of Bank of America’s filings. Further, Bank of America has taken responsibility for Countrywide’s pre-merger liabilities, including restructuring hundreds of thousands of loans created and serviced by Countrywide and paying billions of dollars in settlements.

207. A spokesperson for Bank of America confirmed: “We bought the company and all of its assets and liabilities.” Similarly, a January 23, 2009 *New York Times* article quoted Kenneth D. Lewis (who at the time was Bank of America’s Chairman and CEO), acknowledging that Bank of America had factored Countrywide’s liabilities into the price it paid to acquire Countrywide: “We looked at every aspect of the deal, from their assets to potential lawsuits and we think we have a price that is a good price.”

208. Consistent with its assumption of Countrywide’s liabilities, on October 6, 2008, Bank of America settled lawsuits brought against Countrywide by state Attorneys General by

agreeing to loan modifications for 390,000 borrowers, an agreement valued up to \$8.4 billion. Bank of America also agreed to pay \$150 million to help Countrywide customers who were already in or were at serious risk of foreclosure, and an additional \$70 million to help Countrywide customers who had already lost their homes to make the transition to other living arrangements. In 2008, Bank of America restructured 300,000 home loans of which 87% had been originated or serviced by Countrywide. In announcing that its loan modification program, known as the National Homeowners Retention Program (“NHRP”), will now have a “principal forgiveness” component, Bank of America noted that it “developed and launched the NHRP to provide assistance to Countrywide borrowers.”

209. On January 3, 2011, Bank of America paid \$2.8 billion to GSEs Freddie Mac and Fannie Mae to settle claims of misrepresentations on billions of dollars in loans that went sour after Fannie and Freddie bought them from Countrywide. In exchange for the payments, Freddie Mac and Fannie Mae agreed to drop their demands that Bank of America buy back the mortgages. The payment of \$1.28 billion to Freddie Mac settled 787,000 loan claims (current and future) sold by Countrywide through 2008. The payment of \$1.34 billion (after applying credits to an agreed upon settlement amount of \$1.52 billion) to Fannie Mae settled repurchase claims on 12,045 Countrywide loans (with approximately \$2.7 billion of unpaid principal balance) and other specific claims on 5,760 Countrywide loans (nearly \$1.3 billion of unpaid principal balance).

210. Upon information and belief, Bank of America has been operating Countrywide Home effectively as a division of Bank of America. To that end, on April 27, 2009, Bank of America announced that “[t]he Countrywide brand has been retired.” Bank of America advised that it is operating the Countrywide home loan and mortgage business as a “division” named Bank of America Home Loans, which “represents the combined operations of Bank of

America's mortgage and home equity business and Countrywide Home Loans." The Bank of America Home Loans division is headquartered at Countrywide's offices in Calabasas, California.

211. Further, Bank of America's website states that "Countrywide customers ... have access to Bank of America's 6,100 banking centers." Countrywide's former website redirects customers to Bank of America's website.

## **IX. CAUSES OF ACTION FOR FRAUD**

### **FIRST CAUSE OF ACTION**

#### **(Common Law Fraud Against Countrywide Financial, Countrywide Home Loans, Countrywide Securities, And The Depositor Defendants)**

212. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.

213. As alleged above, in the Offering Documents and in their public statements, Countrywide Financial, Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants made fraudulent and false statements of material fact, and omitted material facts necessary in order to make their statements, in light of the circumstances under which the statements were made, not misleading.

214. As a corporate parent, Countrywide Financial directed the activities of Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants.

215. Countrywide Financial, Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants knew at the time they sold and marketed each of the Certificates that the foregoing statements were false or, at the very least, made recklessly, without any belief in the truth of the statements.

216. Countrywide Financial, Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants made these materially misleading statements and omissions for the purpose of inducing Plaintiffs to purchase the Certificates. Furthermore, these statements related to these Defendants' own acts and omissions.

217. Countrywide Financial, Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants knew that Plaintiffs were relying on their expertise, and they encouraged such reliance through the Offering Documents, private placement memoranda, and their public representations, as described herein. Countrywide Financial, Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants knew that Plaintiffs would rely upon their representations in connection with Plaintiffs' decision to purchase the Certificates. Countrywide Financial, Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants were in a position of unique and superior knowledge regarding the true facts concerning the foregoing material misrepresentations and omissions.

218. It was only by making such representations that Countrywide Financial, Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants were able to induce Plaintiffs to buy the Certificates. Plaintiffs would not have purchased or otherwise acquired the Certificates but for Countrywide Financial's, Countrywide Home Loans', Countrywide Securities', and the Depositor Defendants' fraudulent representations and omissions about the quality of the Certificates.

219. Plaintiffs justifiably, reasonably, and foreseeably relied on Countrywide Financial's, Countrywide Home Loans', Countrywide Securities', and the Depositor Defendants' representations and false statements regarding the quality of the Certificates.

220. As a result of the false and misleading statements and omissions, as alleged herein, Plaintiffs have suffered substantial damages.

221. Because Countrywide Financial, Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants committed these acts and omissions maliciously, wantonly and oppressively, and because the consequences of these acts knowingly affected the general public, including but not limited to all persons with interests in the Certificates, Plaintiffs are entitled to recover punitive damages.

## **SECOND CAUSE OF ACTION**

### **(Fraudulent Inducement Against Countrywide Financial, Countrywide Home Loans, Countrywide Securities, And The Depositor Defendants)**

222. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.

223. As alleged above, in the Offering Documents and in their public statements, Countrywide Financial, Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants made fraudulent and false statements of material fact, and omitted material facts necessary in order to make their statements, in light of the circumstances under which the statements were made, not misleading.

224. This is a claim for fraudulent inducement against Countrywide Financial, Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants. As a corporate parent, Countrywide Financial directed the activities of Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants.

225. Countrywide Financial, Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants knew at the time they sold and marketed each of the Certificates that the foregoing statements were false or, at the very least, made recklessly, without any belief in the truth of the statements.

226. Countrywide Financial, Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants made these materially misleading statements and omissions for the purpose of inducing Plaintiffs to purchase the Certificates. Furthermore, these statements related to these Defendants' own acts and omissions.

227. Countrywide Financial, Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants knew that Plaintiffs were relying on their expertise, and they encouraged such reliance through the Offering Documents and their public representations, as described herein. Countrywide Financial, Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants knew that Plaintiffs would rely upon their representations in connection with Plaintiffs' decision to purchase the Certificates. Countrywide Financial, Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants were in a position of unique and superior knowledge regarding the true facts concerning the foregoing material misrepresentations and omissions.

228. It was only by making such representations that Countrywide Financial, Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants were able to induce Plaintiffs to buy the Certificates. Plaintiffs would not have purchased or otherwise acquired the Certificates but for Countrywide Financial's, Countrywide Home Loans', Countrywide Securities', and the Depositor Defendants' fraudulent representations and omissions about the quality of the Certificates.

229. Plaintiffs justifiably, reasonably, and foreseeably relied on Countrywide Financial's, Countrywide Home Loans', Countrywide Securities', and the Depositor Defendants' representations and false statements regarding the quality of the Certificates.

230. By virtue of Countrywide Financial's, Countrywide Home Loans', Countrywide Securities', and the Depositor Defendants' false and misleading statements and omissions, as

alleged herein, Plaintiffs have suffered substantial damages and are also entitled to a rescission of the sale of the Certificates.

### **THIRD CAUSE OF ACTION**

**(Aiding And Abetting Fraud Against Countrywide Financial, Countrywide Home Loans, Countrywide Securities, Countrywide Home Loans Servicing, Countrywide Capital Markets, The Depositor Defendants, Mozilo And Sambol)**

231. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.

232. This is a claim against the above-named aiding and abetting Countrywide Defendants for aiding and abetting the fraud by Countrywide Financial, Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants. Each of these Defendants aided and abetted the fraud committed by all of the others among these Defendants.

233. The above-named aiding and abetting Countrywide Defendants knew of the fraud perpetrated by Countrywide Financial, Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants on Plaintiffs. As alleged in detail above, each of the above-named aiding and abetting Countrywide Defendants knew that the Certificates were not backed by high quality loans and were not underwritten according to Countrywide Home Loans' underwriting standards, received internal reports about the violations of Countrywide Home Loan' mortgage loan underwriting and appraisal standards, participated in those violations and had actual knowledge of their own acts, or participated in and had actual knowledge of Defendants' failure to convey good title to the mortgage loans underlying the Certificates to the issuing trusts.

234. Furthermore, the above-named aiding and abetting Countrywide Defendants provided Countrywide Financial, Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants with substantial assistance in advancing the commission of the fraud. As

alleged in detail above, each of the above-named aiding and abetting Countrywide Defendants participated in the violations of Countrywide Home Loans' mortgage loan underwriting and appraisal standards, made false public statements about Countrywide Home Loans' mortgage loan underwriting and appraisal standards, provided false information about the mortgage loans underlying the Certificates to the credit rating agencies, provided false information for use in the Offering Documents, or participated in the failure to properly endorse and deliver the mortgage notes and security documents to the issuing trusts.

235. It was foreseeable to the above-named aiding and abetting Countrywide Defendants at the time they actively assisted in the commission of the fraud that Plaintiffs would be harmed as a result of their assistance.

236. As a direct and natural result of the fraud committed by Countrywide Financial, Countrywide Home Loans, Countrywide Securities, and the Depositor Defendants and the above-named aiding and abetting Countrywide Defendants' knowing and active participation therein, Plaintiffs have suffered substantial damages.

#### **FOURTH CAUSE OF ACTION**

##### **(Successor And Vicarious Liability Against The Bank Of America Defendants)**

237. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.

238. The Bank of America Defendants – BAC Home Loans Servicing, and NB Holdings – are jointly and severally liable for any and all damages resulting from the wrongful actions of Countrywide Financial, Countrywide Home Loans, Countrywide Securities, Countrywide Servicing, and Countrywide Capital Markets, as alleged herein, because it is the successor-in-interest to Countrywide Financial and is vicariously liable for the conduct of



Countrywide Financial, Countrywide Home Loans, Countrywide Securities, Countrywide Servicing, and Countrywide Capital Markets as a result of a de facto merger of the two entities.

239. This acquisition was a de facto merger because Bank of America intended to take over and effectively took over Countrywide Financial and its subsidiaries in their entirety and, thus, should carry the liabilities of Countrywide Financial, Countrywide Home Loans, Countrywide Securities, Countrywide Servicing, and Countrywide Capital Markets as a concomitant to the benefits it derived from the purchase.

240. The acquisition resulted in continuity of ownership – a hallmark of a de facto merger – because the shareholders of Countrywide Financial became shareholders of Bank of America as a result of Bank of America’s acquisition of Countrywide Financial on July 1, 2008 through an all-stock transaction involving a wholly-owned Bank of America subsidiary that was created for the sole purpose of facilitating the acquisition of Countrywide Financial. Bank of America has described the transaction as a merger, and has actively incorporated the Countrywide’s mortgage business into Bank of America.

241. Bank of America assumed the liabilities ordinarily necessary for the uninterrupted continuation of the business of Countrywide Financial, Countrywide Home Loans, Countrywide Securities, Countrywide Servicing, and Countrywide Capital Markets – another hallmark of a de facto merger. Among other things, the Countrywide brand has been retired and the old Countrywide website redirects customers to the mortgage and home loan sections of Bank of America’s website. On April 27, 2009, Bank of America announced that “[t]he Countrywide brand has been retired.” Instead, Bank of America operated its home loan and mortgage business through a new division named Bank of America Home Loans, which “represents the combined operations of Bank of America’s mortgage and home equity business and Countrywide Home Loans.” The integration of Countrywide Financial, Countrywide Home

Loans, Countrywide Securities, Countrywide Servicing, and Countrywide Capital Markets into Bank of America is complete.

242. The ordinary business of Countrywide Financial was ceased and the Company dissolved soon after the acquisition – another hallmark of a de facto merger. On November 7, 2008, Bank of America acquired substantially all of the assets of Countrywide Financial. And, at that time, Countrywide Financial ceased submitting filings to the SEC; Countrywide Financial's assets and liabilities are now included in Bank of America's filings.

243. Bank of America has also taken responsibility for the pre-merger liabilities of Countrywide Financial, Countrywide Home Loans, Countrywide Securities, Countrywide Servicing, and Countrywide Capital Markets, including restructuring hundreds of thousands of loans created and serviced by these Defendants. As a spokesperson for Bank of America admitted: "We bought the company and all of its assets and liabilities."

244. Because Bank of America has merged with Countrywide Financial, and acquired substantially all of the assets of Countrywide Home Loans, Countrywide Securities, Countrywide Servicing and Countrywide Capital Markets, through BAC Home Loans Servicing, NB Holdings and others, the Bank of America Defendants are the successors in liability to Countrywide Financial, Countrywide Home Loans, Countrywide Securities, Countrywide Servicing, and Countrywide Capital Markets, and are jointly and severally or otherwise vicariously liable for the wrongful conduct, as alleged herein, of these Defendants.

**X. CLAIMS FOR RELIEF UNDER THE SECURITIES ACT AND FOR NEGLIGENT MISREPRESENTATION**

245. The following allegations are in effect a separate complaint. For the following claims there is no allegation of fraud, scienter or recklessness. These claims, brought under Sections 11, 12 and 15 of the Securities Act of 1933 (the "Securities Act") and the common

law, are based solely on claims of strict liability and/or the absence of any affirmative defense based on the reasonableness of the pertinent defendants' investigation into the true facts.

**A. Overview Of The Securities Act Claims**

246. From 2005 through 2007, Countrywide Securities underwrote numerous offerings of Certificates which were purchased by Plaintiffs. *See* Exhibit 1. The registration statements and prospectuses that Countrywide Securities filed with the U.S. Securities and Exchange Commission ("SEC") pursuant to these offerings contained untrue statements of material fact or omitted material facts. For example, the registration statements and prospectuses represented that (i) the loans packaged into the Certificates were underwritten pursuant to Countrywide's specific loan origination guidelines; (ii) Countrywide Home evaluated the prospective borrowers' credit standing and repayment ability prior to approving any loan; (iii) when Countrywide made an exception to its stated underwriting guidelines, it did so on "a case-by-case basis" and only if "compensating factors" justifying the exception were present; (iv) almost every mortgaged property received an independent appraisal which conformed to acceptable standards and formed the basis of its LTV ratios, an important metric to MBS investors; (v) the loans selected for securitization were chosen "in a manner [not] intended to affect the interests of the certificateholders adversely"; (vi) the "AAA" or other investment-grade ratings assigned to the Certificates were accurate reflections of the Certificates' credit quality; and (vii) the Certificates' issuing trusts possessed good title to the underlying mortgages. Each of these material representations was untrue when made.

247. Plaintiffs purchased Certificates issued under or traceable to the registration statements and prospectuses, which are identified in Exhibit 1.

248. Countrywide Securities, which underwrote the Certificates and was identified as the underwriter in the Offering Documents; the Individual Securities Act Defendants, who

signed the Registration Statements; and the Depositor Defendants, which were the issuers of the Certificates pursuant to the Offering Documents, are all liable under the Securities Act of 1933 for the material misstatements and omissions in the Offering Documents. These Defendants, Mozilo, Sambol, and Bank of America are also liable under the Securities Act as control persons with respect to the primary violations of the Securities Act by persons under their control. Countrywide Securities and the Depositor Defendants are also liable for common law negligent misrepresentation for the material misstatements and omissions in the registration statements.

249. The Securities Act and negligent misrepresentation claims expressly do not make any allegations of fraud or scienter and do not incorporate any of the allegations of scienter and fraud contained in ¶¶ 36-157.

#### **B. Additional Defendants**

250. The parties to the Securities Act Claims include all of the Plaintiffs and Defendants identified in ¶¶ 15-35, above. The following parties are Defendants for the Securities Act Claims only. Plaintiffs allege that each and every Securities Act Defendant is, to the maximum extent permitted by law, jointly and severally liable for the misconduct alleged herein.

251. Defendant Stanford L. Kurland (“Kurland”) was, at relevant times, the Chief Executive Officer (“CEO”), President and Chairman of the Board of Directors for CWALT, CWMBS, CWABS and CWHEQ. Defendant Kurland signed the following CWALT Registration Statements: File No. 333-110343 (issued on January 13, 2004); File No. 333-117949 (issued on September 23, 2004); File No. 333-123167 (issued on April 21, 2005); 333-125902 (issued on July 25, 2005); File No. 333-131630 (issued on March 6, 2006); CWMBS Registration Statements: File No. 121249 (issued on February 8, 2005); File No. 333-125963

(issued on July 25, 2005); File No. 333-131662 (issued on March 6, 2006); CWABS Registration Statements: File No. 333-92152 (issued on August 15, 2002); File No. 333-105643 (issued on June 18, 2003); File No. 333-109272 (issued on October 9, 2003); File No. 333-118926 (issued on October 18, 2004); File No. 333-125164 (issued on June 10, 2005); File No. 333-131591 (issued on February 21, 2006); File No. 333-135846 (issued on August 8, 2006); and CWHEQ Registration Statements: File No. 333-126790 (issued on August 4, 2005); and File No. 333-132375 (issued on April 12, 2006). Defendant Kurland was concurrently the Executive Vice President and Chief Operating Officer (“COO”) of Defendant Countrywide.

252. Defendant David A. Spector (“Spector”) was, at relevant times, Vice President and a member of the Board of Directors for CWALT, CWMBS, CWABS and CWHEQ. Defendant Spector signed the following CWALT Registration Statements: File No. 333-110343 (issued on January 13, 2004); File No. 333-117949 (issued on September 23, 2004); File No. 333-123167 (issued on April 21, 2005); 333-125902 (issued on July 25, 2005); File No. 333-131630 (issued on March 6, 2006); CWMBS Registration Statements: File No. 121249 (issued on February 8, 2005); File No. 333-125963 (issued on July 25, 2005); File No. 333-131662 (issued on March 6, 2006); CWABS Registration Statements: File No. 333-118926 (issued on October 18, 2004); File No. 333-125164 (issued on June 10, 2005); File No. 333-131591 (issued on February 21, 2006); File No. 333-135846 (issued on August 8, 2006); and CWHEQ Registration Statements: File No. 333-126790 (issued on August 4, 2005); and File No. 333-132375 (issued on April 12, 2006). Defendant Spector was concurrently the Senior Managing Director of Secondary Marketing of Defendant Countrywide.

253. Defendant Eric P. Sieracki (“Sieracki”) was, at relevant times, the Executive Vice President, CFO, Treasurer and member of the Board of Directors for CWALT, CWMBS, CWABS and CWHEQ. Defendant Sieracki signed the following CWALT Registration

Statements: CWALT's File No. 333-123167 (issued on April 21, 2005); 333-125902 (issued on July 25, 2005); File No. 333-131630 (issued on March 6, 2006); File No. 333-140962 (issued on April 24, 2007); CWMBBS Registration Statements: File No. 333-125963 (issued on July 25, 2005); File No. 333-131662 (issued on March 6, 2006); File No. 333-140958 (issued on April 24, 2007); CWABS Registration Statements: File No. 333-125164 (issued on June 10, 2005); File No. 333-131591 (issued on February 21, 2006); File No. 333-135846 (issued on August 8, 2006); CWHEQ Registration Statements: File No. 333-126790 (issued on August 4, 2005); and File No. 333-132375 (issued on April 12, 2006). Defendant Sieracki was concurrently the Executive Vice President and CFO of Defendant Countrywide.

254. Defendant N. Joshua Adler ("Adler") was, at relevant times, President, CEO and a member of the Board of Directors for CWALT, CWMBBS, CWABS and CWHEQ. Defendant Adler signed the following CWALT Registration Statements: CWALT's File No. 333-140962 (issued on April 24, 2007); and the following CWMBBS Registration Statement: File No. 333-140958 (issued on April 24, 2007).

255. Defendant Ranjit Kripalani ("Kripalani") was, at relevant times, a member of the Board of Directors for CWALT, CWMBBS, CWABS and CWHEQ. Defendant Kripalani signed the following CWALT Registration Statements: CWALT's File No. 333-140962 (issued on April 24, 2007); and the following CWMBBS Registration Statement : File No. 333-140958 (issued on April 24, 2007).

256. Defendant Jennifer S. Sandefur ("Sandefur") was, at relevant times, a member of the Board of Directors for CWALT, CWMBBS, CWABS and CWHEQ. Defendant Sandefur signed the following CWALT Registration Statements: CWALT's File No. 333-140962 (issued on April 24, 2007); and the following CWMBBS Registration Statement: File No. 333-140958

(issued on April 24, 2007). Defendant Sandefur was concurrently the Senior Managing Director and Treasurer of Countrywide Home.

257. Defendant Thomas K. McLaughlin (“McLaughlin”) was, at relevant times, a member of the Board of Directors for CWALT, CWMBBS, and CWABS. McLaughlin signed the following CWALT Registration Statements: File No. 333-110343 (issued on January 13, 2004); File No. 333-117949 (issued on September 23, 2004); CWMBBS Registration Statements: File No. 121249 (issued on February 8, 2005); CWABS Registration Statements: File No. 333-92152 (issued on August 15, 2002); and File No. 333-118926 (issued on October 18, 2004).

258. Defendant Thomas H. Boone (“Boone”) was, at relevant times, a member of the Board of Directors for CWALT and CWMBBS. Boone signed CWABS Registration Statement: File No. 333-92152 (issued on August 15, 2002) and CWALT Registration Statement: File No. 333-110343 (issued on January 13, 2004).

259. Defendant Jeffrey P. Grogin (“Grogin”) was, at relevant times, a member of the Board of Directors for CWALT and CWMBBS. Grogin signed CWABS Registration Statement: File No. 333-92152 (issued on August 15, 2002) and CWALT Registration Statement: File No. 333-110343 (issued on January 13, 2004).

260. Defendants Kurland, Spector, Sieracki, Adler, Kripalani, Sandefur, McLaughlin, Boone, and Grogin are collectively referred to herein as the “Individual Securities Act Defendants.”

### **C. Tolling Of The Statute Of Limitations**

261. Plaintiffs are members of the proposed classes in *Luther v. Countrywide Financial Corporation*, Superior Court for the State of California County of Los Angeles No. BC 380698, filed on November 11, 2007; and *Maine State Retirement System Countrywide*

*Financial Corp., et al.*, 10-cv-00302-MRP (C.D. Cal.), filed January 14, 2010. The pendency of these actions has tolled the statute of limitations on causes of action alleged in this complaint.

262. The *Luther* complaint alleges claims under Sections 11, 12(a)(2), and 15 of the Securities Act of 1933. Among the 148 Certificates that Plaintiffs invested in, 55 were included in the November 2007 *Luther* class action. See Exhibit 4. Plaintiffs were expressly stated to be part of the defined class in *Luther*, as of November 14, 2007, with respect to these Offerings.

263. On June 12, 2008, a different securities class action was filed against Countrywide in California state court, *Washington State Plumbing & Pipefitting Pension Trust v. Countrywide Financial Corp.*, BC392571 (Cal. Super. Ct. 2008). Like *Luther*, this action also alleged Section 11, 12(a)(2), and 15 claims against Countrywide, its former officers, and underwriters, although *Washington State Plumbing* based its claims on different securitizations than those in *Luther*.

264. Among the 148 Certificates that Plaintiffs invested in, 107 were included in the June 12, 2008 *Washington State Plumbing* class action. See Exhibit 4. As in *Luther*, Plaintiffs were expressly stated to be part of the defined class in *Washington State Plumbing*, as of June 12, 2008, with respect to those Certificates.

265. On September 9, 2008, the *Luther* complaint was amended to add the securitizations from *Washington State Plumbing* to the *Luther* class. The *Washington State Plumbing* action was consolidated with the original *Luther* action, and a consolidated and amended complaint was filed on October 16, 2008. Plaintiffs were included in the defined class in the *Luther/Washington State Plumbing* consolidated complaint with respect to investments in 122 Certificates. See Exhibit 4.

266. The consolidated *Luther* action was subsequently dismissed on jurisdictional grounds in January 2010 and re-filed that month as *Maine State Retirement System v.*



*Countrywide Financial Corp.*, No. 10 Civ. 0302 (C.D. Cal. 2010). Plaintiffs were included in the defined class in the *Maine State* complaint with respect to investments in the same Offerings in the *Luther/Washington State Plumbing* consolidated complaint. *See* Exhibit 4.

267. In a November 4, 2010 decision, the *Maine State* court held that the named plaintiffs in the class action had standing to sue Countrywide only with respect to 81 of the offerings in which the named plaintiffs themselves invested. *Maine State Retirement System v. Countrywide Financial Corp.*, No. 10 Civ. 0302 (C.D. Cal. Nov. 4, 2010) (opinion), at 7. The court rejected the notion that the plaintiffs could represent class members who bought in other Countrywide offerings, even if the offerings emanated from a common registration statement. The net effect of the court's ruling is to narrow the *Maine State* class and to exclude class members whose investments in Countrywide MBS do not overlap with those of the named plaintiffs. *Id.* at 5-8.

268. Some of Plaintiffs' investments were made in the same Offerings as the named plaintiffs in the *Luther*, *Washington State Plumbing*, and *Maine State*. These Offerings include CWL 2006-3 and CWHL 2005-HYB9.

269. However, certain other of Plaintiffs' Countrywide investments appear not to overlap with the investments of the named plaintiffs (though Plaintiffs cannot be certain of this because the *Luther* complaint does not list the individual purchases of plaintiff David Luther). Nonetheless, it appears that the *Maine State* court's standing ruling may have the effect of involuntarily excluding Plaintiffs from the Countrywide MBS class action, at least with respect to certain of its investments.

270. Because of the uncertainty arising from this ruling, Plaintiffs have chosen to file this separate action and to assert their 1933 Act claims and other claims, which have been tolled by the pendency of the various Countrywide MBS class actions. Plaintiffs have been part of the

putative class in all of the Countrywide MBS class actions, from *Luther* to *Washington State Plumbing* to *Maine State*. Plaintiffs reasonably and justifiably relied on the named plaintiffs in these class actions to protect their rights and they reasonably and justifiably relied on the class action tolling doctrines of *American Pipe* and *WorldCom* to toll the statute of limitations on its 1933 Act claims.

271. Under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), all putative class members are treated as if they filed their own individual actions until they either opt out or until a certification decision excludes them. *Id.* at 255. As the Second Circuit stated in *In re WorldCom Securities Litigation*, 496 F.3d 245, 255 (2d Cir. 2007): “[B]ecause Appellants were members of a class asserted in a class action complaint, their limitations period was tolled under the doctrine of *American Pipe* until such time as they ceased to be members of the asserted class, notwithstanding that they also filed individual actions prior to the class certification decision.” *WorldCom*, 496 F.3d at 256.

272. Plaintiffs were members of the putative class “asserted” in *Luther* and subsequent class actions and their 1933 Act claims are therefore timely pursuant to *American Pipe* and *In re WorldCom*.

273. Except for the three Bank of America Defendants and Mozilo, each Defendant in this Complaint was also a defendant in the *Luther* or *Washington State Plumbing* class actions, for the same causes of action asserted herein.

**D. Defendants’ Materially False Misstatements And Omissions In The Offering Documents**

274. The Offering Documents pursuant to which Plaintiffs purchased their Certificates contained untrue statements of material fact, or omitted to state material facts necessary to make the statements therein not misleading, regarding: (i) Countrywide’s and other

originators' underwriting processes and guidelines by which the loans were originated, including the number and type of exceptions to those guidelines being applied to the underlying loans; (ii) the value of the underlying real estate securing the loans, in terms of LTV averages and the appraisal standards by which such real estate values were measured; (iii) the credit ratings of the Securities; and (iv) the adequacy of Countrywide's transfer of good title and legal ownership of the underlying loans.

**1. Defendants Made False And Misleading Statements Regarding Countrywide's Underwriting Guidelines**

275. Countrywide Home Loans originated and/or packaged the mortgage loans that were included in the pools for the Certificates. The Prospectus Supplements for the Certificates all contained identical or materially similar, statements of material fact regarding Countrywide's underwriting standards and practices.

276. Depositor Defendants CWALT and CWABS issued approximately 73% of the Certificates at issue in this action. Nearly 78% of the CWALT Prospectus Supplements and 70% of the CWABS Prospectus Supplements made the following misrepresentations regarding Countrywide's underwriting guidelines and practices:

*All of the mortgage loans in the trust fund will have been originated or acquired by Countrywide Home Loans in accordance with its credit, appraisal and underwriting standards. Countrywide Home Loans' underwriting standards are applied in accordance with applicable federal and state laws and regulations.* Except as otherwise provided in this prospectus supplement, the underwriting procedures are consistent with those identified under "Mortgage Loan Program — Underwriting Process" in the prospectus.

The remaining 22% of the CWALT Prospectus Supplements and 30% of the CWABS Prospectus Supplements contained identical disclosures regarding the loans, but qualified that Countrywide originated "a portion," "substantially all" or a specific percentage "of the mortgage

loans in the trust fund.” The remaining 27% of the Certificates were issued by Depositor Defendants CWABS and CWHEQ. Those Prospectus Supplements contained similar misstatements, stating that the mortgage loans to be included in the Offering “will have been originated substantially in accordance with Countrywide Home Loans’ underwriting criteria” for closed-end second lien mortgage loans or for credit blemished mortgage loans.

277. All of the Prospectus Supplements made the following material misrepresentations:

***Countrywide Home Loans’ underwriting standards are applied by or on behalf of Countrywide Home Loans to evaluate the prospective borrower’s credit standing and repayment ability and the value and adequacy of the mortgaged property as collateral.***

Under those standards, a prospective borrower must generally demonstrate that the ratio of the borrower’s monthly housing expenses (including principal and interest on the proposed mortgage loan and, as applicable, the related monthly portion of property taxes, hazard insurance and mortgage insurance) to the borrower’s monthly gross income and the ratio of total monthly debt to the monthly gross income (the “debt-to-income” ratios) are within acceptable limits. The maximum acceptable debt-to-income ratio, which is determined on a loan-by-loan basis varies depending on a number of underwriting criteria, including the Loan-to-Value Ratio, loan purpose, loan amount and credit history of the borrower. In addition to meeting the debt-to-income ratio guidelines, each prospective borrower is required to have sufficient cash resources to pay the down payment and closing costs.

278. All of the CWALT, CWMBS and CWHEQ Prospectus Supplements, and 13% of the CWABS Prospectus Supplements represented that: ***“Exceptions to Countrywide Home Loans’ underwriting guidelines may be made if compensating factors are demonstrated by a prospective borrower.”*** The remaining 87% of the CWABS Prospectus Supplements represented that “On a case by case basis, Countrywide Home Loans may determine that, based upon compensating factors, a prospective borrower not strictly qualifying under the underwriting risk category guidelines described below warrants an underwriting exception. . . .

It is expected that a significant number of the Mortgage Loans will have been originated based on these types of underwriting exceptions.”

279. All of the CWALT and CWMBS Prospectus Supplements, 71% of the CWABS Prospectus Supplements and 75% of the CWHEQ Prospectus Supplements represented that “Countrywide Home Loans *will represent and warrant to the depositor in the pooling and servicing agreement . . . the selection was not made in a manner intended to affect the interests of the certificateholders adversely.*”

280. The above statements of material facts were untrue when made because, as explained above in ¶¶ 36-145, they failed to disclose that Countrywide: (i) systematically failed to follow its stated underwriting standards; (ii) allowed pervasive exceptions to its stated underwriting standards in the absence of compensating factors; (iii) disregarded credit quality in favor of generating increased loan volume for securitizations; (iv) allowed false representations of an applicant’s stated income; and (v) violated its stated appraisal standards.

## **2. Defendants Made Untrue Statements And Omissions Regarding Appraisals And LTV Ratios**

281. The adequacy of the mortgaged properties as security for repayment of the loans will have generally been determined by appraisals. The Prospectus Supplements represented that independent appraisals were prepared for each mortgaged property and that reports are prepared to substantiate these appraisals. For example, all of the CWALT and CWMBS Certificates contained the following representation:

*Countrywide Home Loans obtains appraisals from independent appraisers or appraisal services for properties that are to secure mortgage loans . . . The appraisers inspect and appraise the proposed mortgaged property and verify that the property is in acceptable condition. Following each appraisal, the appraiser prepares a report which includes a market data analysis based on recent sales of comparable homes in the area and, when deemed appropriate, a replacement cost analysis based on the current*

*cost of constructing a similar home. All appraisals are required to conform to Fannie Mae or Freddie Mac appraisal standards then in effect.*

282. The CWABS and CWHEQ Certificates made similar statements about appraisals of the real estate securing the loans underlying the Certificates, including the following statement:

Countrywide Home Loans' underwriting standards are applied in accordance with applicable federal and state laws and regulations and *require an independent appraisal of the mortgaged property prepared on a Uniform Residential Appraisal Report (Form 1004) or other appraisal form as applicable to the specific mortgaged property type.* Each appraisal includes a market data analysis based on recent sales of comparable homes in the area and, where deemed appropriate, replacement cost analysis based on the current cost of constructing a similar home and generally is required to have been made not earlier than 180 days prior to the date of origination of the mortgage loan. *Every independent appraisal is reviewed by a representative of Countrywide Home Loans before the loan is funded, and an additional review appraisal is generally performed in connection with appraisals not provided by Landsafe Appraisals, Inc., a wholly owned subsidiary of Countrywide Home Loans ...* Variations in maximum loan amount limits are permitted based on compensating factors.

283. The Prospectus Supplements provided information regarding LTV ratios, in association with various loan groupings, including by loan type and documentation level, property type and geographical location. All of the Prospectus Supplements for the CWALT Certificates, 70% of the CWABS Certificates, 20% of the CWMBS Certificates and 75% of the CWHEQ Certificates stated that, with respect to non-conforming loans, Countrywide Home's standard guidelines:

generally allow Loan-to-Value Ratios at origination of up to 95% for purchase money or rate and term refinance mortgage loans with original principal balances of up to \$400,000, up to 90% for mortgage loans with original principal balances of up to \$650,000, up to 75% for mortgage loans with original principal balances of up to \$1,000,000, up to 65% for mortgage loans with original

principal balances of up to \$1,500,000, and up to 60% for mortgage loans with original principal balances of up to \$2,000,000.

284. Certain Prospectus Supplements also stated that “[n]o Initial Mortgage Loans had a Loan-to-Value Ratio at origination or on the closing date of more than 100.00%.”

Countrywide Home Loans’ underwriting standards permit first mortgage loans with loan-to-value ratios at origination of up to 100% and second mortgage loans with combined loan-to-value ratios at origination of up to 100% depending on the program, type and use of the property, documentation level, creditworthiness of the borrower, debt-to-income ratio and loan amount.

285. The representations regarding appraisals and LTV ratios were materially false and misleading in that they omitted to state that the appraisals were inaccurate because: (i) the appraisers were not independent from Countrywide; (ii) the actual LTV ratios for numerous mortgage loans underlying the Certificates would have exceeded 100%; and (iii) the forms of credit enhancement applicable to certain tranches of the Certificates were affected by the total value of the underlying properties, and thus were inaccurate as stated.

### **3. Defendants Materially Misrepresented The Accuracy Of The Credit Ratings Assigned To The Certificates**

286. Defendants represented in the Offering Documents that over 93% of the Certificates purchased by Plaintiffs were worthy of being rated “AAA,” signifying that the risk of loss was virtually non-existent. Defendants represented that the remaining Certificates were worthy of being rated investment grade – “AA” or “A” – signifying that the risk of loss was minimal.

287. By providing a rating, Defendants represented that they believed that the information provided to the rating agencies to support these ratings accurately reflected Countrywide’s underwriting guidelines and practices, and the specific qualities of the underlying loans. As stated above, ¶¶ 36-145, this representation was false.

288. Defendants further represented in the Prospectus Supplements, in sum or substance, that:

It is a condition to the issuance of the senior certificates that they be rated AAA by Standard & Poor's, a division of The McGraw-Hill Companies, Inc. ("S&P") and "Aaa" by Moody's Investors Service, Inc. ("Moody's"). It is a condition to the issuance of the Class M, Class B-1 and Class B-2 Certificates that they be rated at least "AA", "A" and "BBB", respectively, by S&P and that they be rated at least "Aa3," "A3" and "Baa2", respectively, by Moody's.

*The ratings assigned . . . to mortgage pass-through certificates address the likelihood of the receipt of all distributions on the mortgage loans by the related certificateholders under the agreements pursuant to which the certificates are issued. S&P's ratings take into consideration the credit quality of the related mortgage pool, including any credit support providers, structural and legal aspects associated with the certificates, and the extent to which the payment stream on the mortgage pool is adequate to make the payments required by the certificates.*

289. These statements regarding the ratings assigned to the Certificates were false because Defendants stated the assigned ratings while knowing that misleading information was provided by Countrywide to the rating agencies to ensure a AAA or otherwise investment grade rating.

290. The falsity of these statements is further evidenced by the rapid downgrades of nearly all of the Certificates within a few years of issuance, with over 90% of the Certificates downgraded to junk. *See Exhibit 2.*

#### **4. Defendants Materially Misrepresented Countrywide's Transfer Of Good Title To The Mortgage Loans To The Issuing Trusts**

291. In sum or substance, Defendants stated in each Prospectus Supplement that:

In addition, each of the sellers will represent and warrant that, prior to the sale of the related mortgage loans to the depositor, the applicable seller had good title to the mortgage loans sold by it. . . . Under the pooling and servicing agreement, *the depositor will assign all its right, title and interest in the representations, warranties and covenants (including the sellers' repurchase or*



*substitution obligation) to the trustee for the benefit of the certificateholders.*

292. These representations were false because, as alleged in detail in ¶¶ 146-157, Defendants routinely failed to physically deliver the original promissory notes and security instruments for the mortgage loans to the issuing trusts, as required by applicable state laws and the PSAs. These representations were also false because Defendants routinely failed to execute valid indorsements of the documents at the time of the purported transfer, as also required by applicable state laws and the PSAs. The issuing trusts therefore did not possess good title to many of the mortgage loans and lacked legal authority to enforce many of the mortgage loans against the borrowers in case of default.

#### **FIFTH CAUSE OF ACTION**

##### **For Violation Of Section 11 Of The Securities Act (Against The Individual Securities Act Defendants, The Depositor Defendants, And Countrywide Securities Corporation)**

293. Plaintiffs repeat and reallege each and every allegation above as if set forth in full herein, to the extent that such allegations do not sound in fraud.

294. This Cause of Action is brought pursuant to Section 11 of the Securities Act, on behalf of Plaintiffs, against the Individual Securities Act Defendants, the Depositor Defendants and Countrywide Securities Corporation. This Cause of Action is predicated upon Defendants' strict liability for making false and misleading statements in the Offering Documents.

295. The Registration Statements for the Certificate offerings were materially misleading, contained untrue statements of material fact, omitted to state other facts necessary to make the statements not misleading, and omitted to state material facts required to be stated therein.

296. The Individual Securities Act Defendants, the Depositor Defendants, and Countrywide Securities Corporation are strictly liable to Plaintiffs for making the misstatements and omissions in issuing the Certificates.

297. The Individual Securities Act Defendants each signed the Registration Statements.

298. Countrywide Securities Corporation acted as an underwriter in the sale of the Certificates, directly and indirectly participated in the distribution of the Certificates, and directly and indirectly participated in drafting and disseminating the Offering Documents for the Certificates. Countrywide Securities Corporation was an underwriter for each of the Certificates.

299. The Individual Securities Act Defendants, the Depositor Defendants, and Countrywide Securities Corporation owed to the Plaintiffs the duty to make a reasonable and diligent investigation of the statements contained in the Offering Documents at the time they became effective to ensure that such statements were true and correct and that there was no omission of material facts required to be stated in order to make the statements contained therein not misleading.

300. Each of the Individual Securities Act Defendants, the Depositor Defendants, and Countrywide Securities Corporation failed to possess a reasonable basis for believing, and failed to make a reasonable investigation to ensure, that statements contained in the Offering Documents were true and that there was no omission of material facts necessary to make the statements contained therein not misleading.

301. The Individual Securities Act Defendants, the Depositor Defendants, and Countrywide Securities Corporation issued and disseminated, caused to be issued or disseminated, and participated in the issuance and dissemination of material statements to the

investing public which were contained in the Prospectuses, which made false and misleading statements and misrepresented or failed to disclose material facts, as set forth above.

302. By reason of the conduct alleged herein, each of the Individual Securities Act Defendants, the Depositor Defendants, and Countrywide Securities Corporation violated Section 11 of the Securities Act, and is liable to Plaintiffs.

303. Plaintiffs acquired Certificates pursuant or traceable to the Registration Statements. At the time Plaintiffs obtained their Certificates, they did so without knowledge of the facts concerning the misstatements and omissions alleged herein.

304. Plaintiffs have sustained damages as a result of the wrongful conduct alleged and the violations of the Individual Securities Act Defendants, the Depositor Defendants, and Countrywide Securities Corporation.

305. By virtue of the foregoing, Plaintiffs are entitled to damages, jointly and severally from each of the Individual Securities Act Defendants, the Depositor Defendants, and Countrywide Securities Corporation, as set forth in Section 11 of the Securities Act.

#### **SIXTH CAUSE OF ACTION**

##### **For Violation Of Section 12(a)(2) Of The Securities Act (Against Countrywide Securities Corporation And The Depositor Defendants)**

306. Plaintiffs repeat and reallege each and every allegation above as if set forth in full herein, to the extent that such allegations do not sound in fraud.

307. This Cause of Action is brought pursuant to Section 12(a)(2) of the Securities Act, on behalf of Plaintiffs, against Countrywide Securities and the Depositor Defendants.

308. Countrywide Securities and the Depositor Defendants promoted and sold Certificates pursuant to the defective Prospectuses for their own financial gain. The

Prospectuses contained untrue statements of material fact, omitted to state facts necessary to make statements not misleading, and concealed and failed to disclose material facts.

309. By means of the Prospectuses, Countrywide Securities and the Depositor Defendants sold the Certificates to Plaintiffs in return for proceeds of millions of dollars. Countrywide Securities' and the Depositor Defendants' actions of solicitation consisted primarily of the preparation and dissemination of the Prospectuses.

310. The Depositor Defendants for each Certificate are identified in Exhibit 1. The identity of the Certificates purchased by Plaintiffs directly from Countrywide Securities are identified in Exhibit 5. Moreover, Countrywide Securities is liable to Plaintiffs for the sale of each Certificate identified in Exhibit 1 because Countrywide Securities participated in the planning and pricing of each Certificate, and participated in the drafting of each Prospectus and Prospectus Supplement.

311. Countrywide Securities and the Depositor Defendants owed to Plaintiffs a duty to make a reasonable and diligent investigation of the statements contained in the Prospectuses, to ensure that such statements were true and that there was no omission of material fact necessary to make the statements contained therein not misleading. Countrywide Securities and the Depositor Defendants knew of, or in the exercise of reasonable care should have known of, the misstatements and omissions contained in the Prospectuses, as set forth herein.

312. Plaintiffs purchased or otherwise acquired Certificates pursuant to the defective Prospectuses. Plaintiffs did not know, and in the exercise of reasonable diligence could not have known, of the misrepresentations and omissions contained in the Prospectuses.

313. By reason of the conduct alleged herein, Countrywide Securities and the Depositor Defendants violated Section 12(a)(2) of the Securities Act, and are liable to Plaintiffs.

314. Plaintiffs were damaged by Countrywide Securities' and the Depositor Defendants' wrongful conduct. As to Certificates which Plaintiffs still hold, they have the right to rescind and recover the consideration paid for their Certificates, as set forth in Section 12(a)(2) of the Securities Act. As to Certificates which Plaintiffs have sold, they are entitled to rescissory damages, as set forth in Section 12(a)(2) of the Securities Act.

### **SEVENTH CAUSE OF ACTION**

#### **For Violation Of Section 15 Of The Securities Act (Against The Individual Securities Act Defendants, Mozilo, Sambol, Countrywide Financial Corp., Countrywide Securities Corporation, Countrywide Home Loans, Countrywide Servicing, And Countrywide Capital Markets)**

315. Plaintiffs repeat and reallege each and every allegation above as if set forth in full herein.

316. This Cause of Action is brought against the Individual Securities Act Defendants, Mozilo, Sambol, Countrywide Financial Corp., Countrywide Securities Corporation, Countrywide Home Loans, Countrywide Servicing and Countrywide Capital Markets pursuant to Section 15 of the Securities Act.

317. Each of the Individual Securities Act Defendants, Mozilo, Sambol, Countrywide Financial Corp., Countrywide Securities Corporation, Countrywide Home Loans, Countrywide Servicing, and Countrywide Capital Markets, by virtue of their control, ownership, offices, directorship, and specific acts, was at the time of the wrongs alleged herein a controlling person of the Individual Securities Act Defendants, the Depositor Defendants and Countrywide Securities within the meaning of Section 15 of the Securities Act. Each of the Individual Securities Act Defendants, Mozilo, Sambol, Countrywide Financial Corp., Countrywide Securities Corporation, Countrywide Home Loans, Countrywide Servicing, and Countrywide Capital Markets had the power and influence, and exercised that power and influence, to cause

the Depositor Defendants to engage in violations of the Securities Act, as described herein. The Individual Securities Act Defendants', Mozilo's, Sambol's, Countrywide Financial Corporation's, Countrywide Securities Corporation's, Countrywide Home Loans', Countrywide Servicing's, Countrywide Capital Markets' control, ownership and position made them privy to, and provided them with actual knowledge of, the material facts concealed from Plaintiffs.

318. By virtue of the wrongful conduct alleged herein, the Individual Securities Act Defendants, Mozilo, Sambol, Countrywide Financial, Countrywide Securities, Countrywide Home Loans, Countrywide Servicing, and Countrywide Capital Markets, are liable to Plaintiffs for their sustained damages.

#### **EIGHTH CAUSE OF ACTION**

##### **(Negligent Misrepresentation Against Mozilo, Sambol, Countrywide Financial Corp., Countrywide Securities Corporation, Countrywide Home Loans, Countrywide Servicing, And Countrywide Capital Markets)**

319. Plaintiffs repeat and reallege each and every allegation set forth in the preceding paragraphs above as if fully set forth herein, except any allegations that the Countrywide Defendants made any untrue statements and omissions intentionally or recklessly. For the purposes of this Count, Plaintiff expressly disclaims any claim of fraud or intentional misconduct.

320. This is a claim for negligent misrepresentation against Mozilo, Sambol, Countrywide Financial Corp., Countrywide Securities Corporation, Countrywide Home Loans, Countrywide Servicing, Countrywide Capital Markets (the "Negligent Misrepresentation Defendants").

321. Plaintiffs made 199 separate investments in 148 Offerings of Certificates that the Countrywide Defendants securitized and sold. The Negligent Misrepresentation Defendants also originated or acquired, underwrote, and serviced all the loans in the Offerings. Mozilo and

Sambol were closely involved in the everyday management of the other Negligent Misrepresentation Defendants.

322. Because the Negligent Misrepresentation Defendants arranged the Securitizations, and originated or acquired, underwrote, and serviced all of the underlying mortgage loans, they had unique and special knowledge about the loans in the Offerings. In particular, the Negligent Misrepresentation Defendants had unique and special knowledge and expertise regarding the quality of the underwriting of those loans as well as the servicing practices employed as to such loans.

323. Because Plaintiffs could not evaluate the loan files for the mortgage loans underlying their Certificates, and because Plaintiffs could not examine the underwriting quality or servicing practices for the Mortgage Loans in the Securitizations on a loan-by-loan basis, it was heavily reliant on the Negligent Misrepresentation Defendants' unique and special knowledge regarding the underlying mortgage loans when determining whether to make each investment of Certificates. Plaintiffs were entirely reliant on the Negligent Misrepresentation Defendants to provide accurate information regarding the loans in engaging in that analysis. Accordingly, the Negligent Misrepresentation Defendants were uniquely situated to evaluate the economics of each Certificate.

324. Over the course of more than three years, for 199 separate investments, Plaintiffs relied on the Negligent Misrepresentation Defendants' unique and special knowledge regarding the quality of the underlying mortgage loans and their underwriting when determining whether to invest in the Offerings. This longstanding relationship, coupled with the Negligent Misrepresentation Defendants' unique and special knowledge about the underlying loans, created a special relationship of trust, confidence, and dependence between the Negligent Misrepresentation Defendants and Plaintiffs.

325. The Negligent Misrepresentation Defendants were aware that Plaintiffs relied on their unique and special expertise and experience and depended upon them for accurate and truthful information. The Negligent Misrepresentation Defendants also knew that the facts regarding Countrywide's compliance with its underwriting standards were exclusively within their knowledge.

326. Based on their expertise, superior knowledge, and relationship with Plaintiffs, the Negligent Misrepresentation Defendants owed a duty to Plaintiffs to provide complete, accurate, and timely information regarding the mortgage loans and the Certificates. The Negligent Misrepresentation Defendants breached their duty to provide such information to Plaintiffs.

327. The Negligent Misrepresentation Defendants likewise made misrepresentations which they knew, or were negligent in not knowing at the time to be false, in order to induce Plaintiffs' investment in the Certificates. The Negligent Misrepresentation Defendants provided the Offering Documents to Plaintiffs in connection with the Certificates, for the purpose of informing Plaintiffs of material facts necessary to make an informed judgment about whether to purchase the Certificates in the Offerings. In providing these documents, Countrywide knew that the information contained and incorporated therein would be used for a serious purpose, and that Plaintiffs, like other reasonably prudent investors, intended to rely on the information.

328. As alleged above, the Offering Documents contained materially false and misleading information.

329. The Negligent Misrepresentation Defendants should have known that the information in the Offering Documents was materially false and misleading.



330. Unaware that the Offering Documents contained materially false and misleading statements, Plaintiffs reasonably relied on those false and misleading statements when deciding to purchase the non-secondary Certificates in the Offerings.

331. Plaintiffs purchased Certificates identified in Exhibit 1 from the Depositor Defendants and, where indicated in Exhibit 5, from Countrywide Securities, in the Certificate offerings, and are therefore in privity with Countrywide Securities and the Depositor Defendants.

332. Based on the Negligent Misrepresentation Defendants' expertise and specialized knowledge, and in light of the false and misleading representations in the Offering Documents, the Negligent Misrepresentation Defendants owed Plaintiffs a duty to provide them with complete, accurate, and timely information regarding the quality of the Certificates, and breached their duty to provide such information to Plaintiffs.

333. Plaintiffs reasonably relied on the information provided by the Negligent Misrepresentation Defendants and have suffered substantial damages as a result of their misrepresentations.

### **NINTH CAUSE OF ACTION**

#### **(Successor And Vicarious Liability Against The Bank Of America Defendants For The Securities Act And Negligent Misrepresentation Claims)**

334. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.

335. The Bank of America Defendants – BAC Home Loans Servicing, and NB Holdings – are jointly and severally liable for any and all damages resulting from the wrongful actions of Countrywide Financial, Countrywide Home Loans, Countrywide Securities, Countrywide Servicing, and Countrywide Capital Markets, as alleged herein, because it is the

successor-in-interest to Countrywide Financial and is vicariously liable for the conduct of Countrywide Financial, Countrywide Home Loans, Countrywide Securities, Countrywide Servicing, and Countrywide Capital Markets as a result of a de facto merger of the two entities.

336. This acquisition was a de facto merger because Bank of America intended to take over and effectively took over Countrywide Financial and its subsidiaries in their entirety and, thus, should carry the liabilities of Countrywide Financial, Countrywide Home Loans, Countrywide Securities, Countrywide Servicing, and Countrywide Capital Markets as a concomitant to the benefits it derived from the purchase.

337. The acquisition resulted in continuity of ownership – a hallmark of a de facto merger – because the shareholders of Countrywide Financial became shareholders of Bank of America as a result of Bank of America’s acquisition of Countrywide Financial on July 1, 2008 through an all-stock transaction involving a wholly-owned Bank of America subsidiary that was created for the sole purpose of facilitating the acquisition of Countrywide Financial. Bank of America has described the transaction as a merger, and has actively incorporated the Countrywide’s mortgage business into Bank of America.

338. Bank of America assumed the liabilities ordinarily necessary for the uninterrupted continuation of the business of Countrywide Financial, Countrywide Home Loans, Countrywide Securities, Countrywide Servicing, and Countrywide Capital Markets – another hallmark of a de facto merger. Among other things, the Countrywide brand has been retired and the old Countrywide website redirects customers to the mortgage and home loan sections of Bank of America’s website. On April 27, 2009, Bank of America announced that “[t]he Countrywide brand has been retired.” Instead, Bank of America operated its home loan and mortgage business through a new division named Bank of America Home Loans, which “represents the combined operations of Bank of America’s mortgage and home equity business

and Countrywide Home Loans.” The integration of Countrywide Financial, Countrywide Home Loans, Countrywide Securities, Countrywide Servicing, and Countrywide Capital Markets into Bank of America is complete.

339. The ordinary business of Countrywide Financial was ceased and the Company dissolved soon after the acquisition – another hallmark of a de facto merger. On November 7, 2008, Bank of America acquired substantially all of the assets of Countrywide Financial. And, at that time, Countrywide Financial ceased submitting filings to the SEC; Countrywide Financial’s assets and liabilities are now included in Bank of America’s filings.

340. Bank of America has also taken responsibility for the pre-merger liabilities of Countrywide Financial, Countrywide Home Loans, Countrywide Securities, Countrywide Servicing, and Countrywide Capital Markets, including restructuring hundreds of thousands of loans created and serviced by these Defendants. As a spokesperson for Bank of America admitted: “We bought the company and all of its assets and liabilities.”

341. Because Bank of America has merged with Countrywide Financial, and acquired substantially all of the assets of Countrywide Home Loans, Countrywide Securities, Countrywide Servicing and Countrywide Capital Markets, through BAC Home Loans Servicing, NB Holdings and others, the Bank of America Defendants are the successors in liability to Countrywide Financial, Countrywide Home Loans, Countrywide Securities, Countrywide Servicing, and Countrywide Capital Markets, and are jointly and severally or otherwise vicariously liable for the wrongful conduct, as alleged herein, of these Defendants.

#### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs pray for relief and judgment, as follows:

(a) Awarding compensatory and/or rescissory damages in favor of Plaintiffs against all Defendants, jointly and severally, for all damages sustained as a result of Defendants' wrongdoing, in an amount to be proven at trial, including interest thereon;

(b) Awarding punitive damages for Plaintiffs' common-law fraud claims;

(c) Awarding Plaintiffs their reasonable costs and expenses incurred in this action, including counsel fees and expert fees; and

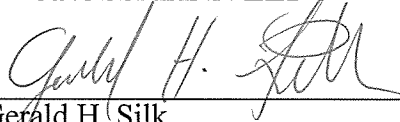
(d) Such other relief as the Court may deem just and proper.

**JURY DEMAND**

Plaintiffs demand a trial by jury on all claims so triable.

Dated: January 24, 2011

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**Exhibit 1: Plaintiffs' Countrywide Certificates**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWALT 2004-13CB A3	Mortgage Pass-Through Certificates, Series 2004-13CB	Alternative Loan Trust 2004-13CB	333-110343	CWALT, Inc.	5/1/2004	TIAA	1/24/2005
CWALT 2004-16CB 1A2	Mortgage Pass-Through Certificates, Series 2004-16CB	Alternative Loan Trust 2004-16CB	333-110343	CWALT, Inc.	6/1/2004	NYL	12/28/2005
CWALT 2004-28CB 1A3	Mortgage Pass-Through Certificates, Series 2004-28CB	Alternative Loan Trust 2004-28CB	333-117949	CWALT, Inc.	11/1/2004	NYL	2/23/2005
CWALT 2004-29CB A7	Mortgage Pass-Through Certificates, Series 2004-29CB	Alternative Loan Trust 2004-29CB	333-117949	CWALT, Inc.	11/1/2004	CREF	12/7/2007
CWALT 2004-29CB A7	Mortgage Pass-Through Certificates, Series 2004-29CB	Alternative Loan Trust 2004-29CB	333-117949	CWALT, Inc.	11/1/2004	CREF	12/7/2007
CWALT 2004-29CB A7	Mortgage Pass-Through Certificates, Series 2004-29CB	Alternative Loan Trust 2004-29CB	333-117949	CWALT, Inc.	11/1/2004	TIAA-CREF Funds	12/7/2007
CWALT 2004-29CB A7	Mortgage Pass-Through Certificates, Series 2004-29CB	Alternative Loan Trust 2004-29CB	333-117949	CWALT, Inc.	11/1/2004	TIAA-CREF Funds	12/7/2007
CWALT 2004-29CB A7	Mortgage Pass-Through Certificates, Series 2004-29CB	Alternative Loan Trust 2004-29CB	333-117949	CWALT, Inc.	11/1/2004	TIAA	12/7/2007
CWALT 2004-30CB 1A15	Mortgage Pass-Through Certificates, Series 2004-30CB	Alternative Loan Trust 2004-30CB	333-117949	CWALT, Inc.	12/1/2004	CREF	12/10/2007
CWALT 2004-30CB 1A15	Mortgage Pass-Through Certificates, Series 2004-30CB	Alternative Loan Trust 2004-30CB	333-117949	CWALT, Inc.	12/1/2004	CREF	12/10/2007

**Exhibit 1: Plaintiffs' Countrywide Certificates**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWALT 2004-30CB 1A15	Mortgage Pass-Through Certificates, Series 2004-30CB	Alternative Loan Trust 2004-30CB	333-117949	CWALT, Inc.	12/1/2004	TIAA-CREF Funds	12/10/2007
CWALT 2004-30CB 1A15	Mortgage Pass-Through Certificates, Series 2004-30CB	Alternative Loan Trust 2004-30CB	333-117949	CWALT, Inc.	12/1/2004	TIAA-CREF Funds	12/10/2007
CWALT 2004-30CB 1A15	Mortgage Pass-Through Certificates, Series 2004-30CB	Alternative Loan Trust 2004-30CB	333-117949	CWALT, Inc.	12/1/2004	TIAA	12/10/2007
CWALT 2004-30CB 1A15	Mortgage Pass-Through Certificates, Series 2004-30CB	Alternative Loan Trust 2004-30CB	333-117949	CWALT, Inc.	12/1/2004	TIAA-CREF LIC	12/10/2007
CWALT 2004-30CB 2A3	Mortgage Pass-Through Certificates, Series 2004-30CB	Alternative Loan Trust 2004-30CB	333-117949	CWALT, Inc.	12/1/2004	NYL	9/1/2006
CWALT 2004-30CB 2A4	Mortgage Pass-Through Certificates, Series 2004-30CB	Alternative Loan Trust 2004-30CB	333-117949	CWALT, Inc.	12/1/2004	NYL	10/27/2006
CWALT 2004-30CB 2A4	Mortgage Pass-Through Certificates, Series 2004-30CB	Alternative Loan Trust 2004-30CB	333-117949	CWALT, Inc.	12/1/2004	NYLIAC	10/27/2006
CWALT 2004-31T1 A2	Mortgage Pass-Through Certificates, Series 2004-31T1	Alternative Loan Trust 2004-31T1	333-117949	CWALT, Inc.	10/25/2004	CREF	4/13/2006
CWALT 2004-31T1 A2	Mortgage Pass-Through Certificates, Series 2004-31T1	Alternative Loan Trust 2004-31T1	333-117949	CWALT, Inc.	10/25/2004	CREF	4/13/2006
CWALT 2004-31T1 A2	Mortgage Pass-Through Certificates, Series 2004-31T1	Alternative Loan Trust 2004-31T1	333-117949	CWALT, Inc.	10/25/2004	TIAA-CREF Funds	4/13/2006

**Exhibit 1: Plaintiffs' Countrywide Certificates**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWALT 2004-31T1 A2	Mortgage Pass-Through Certificates, Series 2004-31T1	Alternative Loan Trust 2004-31T1	333-117949	CWALT, Inc.	10/25/2004	TIAA-CREF Funds	4/13/2006
CWALT 2004-36CB M	Mortgage Pass-Through Certificates, Series 2004-36CB	Alternative Loan Trust 2004-36CB	333-117949	CWALT, Inc.	12/1/2004	TIAA	2/28/2005
CWALT 2004-J4 2A1	Mortgage Pass-Through Certificates, Series 2004-J4	Alternative Loan Trust 2004-J4	333-110343	CWALT, Inc.	4/30/2004	FSAM	3/29/2006
CWALT 2005-10CB 1A5	Mortgage Pass-Through Certificates, Series 2005-10CB	Alternative Loan Trust 2005-10CB	333-117949	CWALT, Inc.	3/1/2005	TIAA	3/31/2005
CWALT 2005-10CB 1A5	Mortgage Pass-Through Certificates, Series 2005-10CB	Alternative Loan Trust 2005-10CB	333-117949	CWALT, Inc.	3/1/2005	TIAA	3/31/2005
CWALT 2005-10CB 1A5	Mortgage Pass-Through Certificates, Series 2005-10CB	Alternative Loan Trust 2005-10CB	333-117949	CWALT, Inc.	3/1/2005	TIAA	3/31/2005
CWALT 2005-11CB 2A2	Mortgage Pass-Through Certificates, Series 2005-11CB	Alternative Loan Trust 2005-11CB	333-123167	CWALT, Inc.	4/1/2005	NYL	7/14/2006
CWALT 2005-11CB 2A4	Mortgage Pass-Through Certificates, Series 2005-11CB	Alternative Loan Trust 2005-11CB	333-123167	CWALT, Inc.	4/1/2005	TIAA	6/17/2005
CWALT 2005-11CB 3A1	Mortgage Pass-Through Certificates, Series 2005-11CB	Alternative Loan Trust 2005-11CB	333-123167	CWALT, Inc.	4/1/2005	TIAA	2/7/2007
CWALT 2005-12R A5	Resecuritization Pass-Through Certificates, Series 2005-12R	Alternative Loan Trust Resecuritization 2005-12R	333-117949	CWALT, Inc.	3/1/2005	TIAA	3/30/2005

**Exhibit 1: Plaintiffs' Countrywide Certificates**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWALT 2005-14 4A1	Mortgage Pass-Through Certificates, Series 2005-14	Alternative Loan Trust 2005-14	333-117949	CWALT, Inc.	3/30/2005	FSAM	3/30/2005
CWALT 2005-18CB A5	Mortgage Pass-Through Certificates, Series 2005-18CB	Alternative Loan Trust 2005-18CB	333-117949	CWALT, Inc.	3/1/2005	TIAA	5/23/2005
CWALT 2005-18CB A5	Mortgage Pass-Through Certificates, Series 2005-18CB	Alternative Loan Trust 2005-18CB	333-117949	CWALT, Inc.	3/1/2005	TIAA	5/31/2005
CWALT 2005-1CB 1A3	Mortgage Pass-Through Certificates, Series 2005-1CB	Alternative Loan Trust 2005-1CB	333-117949	CWALT, Inc.	1/1/2005	TIAA	1/31/2005
CWALT 2005-20CB 1A2	Mortgage Pass-Through Certificates, Series 2005-20CB	Alternative Loan Trust 2005-20CB	333-123167	CWALT, Inc.	5/1/2005	NYL	10/10/2006
CWALT 2005-20CB 1A2	Mortgage Pass-Through Certificates, Series 2005-20CB	Alternative Loan Trust 2005-20CB	333-123167	CWALT, Inc.	5/1/2005	NYL	7/5/2006
CWALT 2005-20CB 1A2	Mortgage Pass-Through Certificates, Series 2005-20CB	Alternative Loan Trust 2005-20CB	333-123167	CWALT, Inc.	5/1/2005	NYLIAC	10/10/2006
CWALT 2005-20CB 2A4	Mortgage Pass-Through Certificates, Series 2005-20CB	Alternative Loan Trust 2005-20CB	333-123167	CWALT, Inc.	5/1/2005	TIAA	7/6/2005
CWALT 2005-21CB A10	Mortgage Pass-Through Certificates, Series 2005-21CB	Alternative Loan Trust 2005-21CB	333-123167	CWALT, Inc.	4/1/2005	NYL	11/15/2005
CWALT 2005-21CB A5	Mortgage Pass-Through Certificates, Series 2005-21CB	Alternative Loan Trust 2005-21CB	333-123167	CWALT, Inc.	4/1/2005	TIAA	6/17/2005



**Exhibit 1: Plaintiffs' Countrywide Certificates**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWALT 2005-22T1 A5	Mortgage Pass-Through Certificates, Series 2005-22T1	Alternative Loan Trust 2005-22T1	333-123167	CWALT, Inc.	4/1/2005	NYL	10/12/2005
CWALT 2005-22T1 A5	Mortgage Pass-Through Certificates, Series 2005-22T1	Alternative Loan Trust 2005-22T1	333-123167	CWALT, Inc.	4/1/2005	NYLIAC	10/12/2005
CWALT 2005-23CB A4	Mortgage Pass-Through Certificates, Series 2005-23CB	Alternative Loan Trust 2005-23CB	333-123167	CWALT, Inc.	4/1/2005	TIAA	5/11/2005
CWALT 2005-25T1 A6	Mortgage Pass-Through Certificates, Series 2005-25T1	Alternative Loan Trust 2005-25T1	333-123167	CWALT, Inc.	5/1/2005	NYL	10/17/2005
CWALT 2005-25T1 A6	Mortgage Pass-Through Certificates, Series 2005-25T1	Alternative Loan Trust 2005-25T1	333-123167	CWALT, Inc.	5/1/2005	NYLIAC	10/17/2005
CWALT 2005-30CB 1A3	Mortgage Pass-Through Certificates, Series 2005-30CB	Alternative Loan Trust 2005-30CB	333-123167	CWALT, Inc.	6/1/2005	NYL	10/17/2005
CWALT 2005-30CB 1A3	Mortgage Pass-Through Certificates, Series 2005-30CB	Alternative Loan Trust 2005-30CB	333-123167	CWALT, Inc.	6/1/2005	NYLIAC	10/17/2005
CWALT 2005-30CB 1A4	Mortgage Pass-Through Certificates, Series 2005-30CB	Alternative Loan Trust 2005-30CB	333-123167	CWALT, Inc.	6/1/2005	NYL	1/6/2006
CWALT 2005-30CB 1A4	Mortgage Pass-Through Certificates, Series 2005-30CB	Alternative Loan Trust 2005-30CB	333-123167	CWALT, Inc.	6/1/2005	NYL	11/10/2005
CWALT 2005-30CB 1A4	Mortgage Pass-Through Certificates, Series 2005-30CB	Alternative Loan Trust 2005-30CB	333-123167	CWALT, Inc.	6/1/2005	NYLIAC	11/10/2005

**Exhibit 1: Plaintiffs' Countrywide Certificates**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWALT 2005-31 2A3	Mortgage Pass-Through Certificates, Series 2005-31	Alternative Loan Trust 2005-31	333-123167	CWALT, Inc.	6/29/2005	FSAM	6/29/2005
CWALT 2005-32T1 A6	Mortgage Pass-Through Certificates, Series 2005-32T1	Alternative Loan Trust 2005-32T1	333-123167	CWALT, Inc.	6/1/2005	NYL	2/13/2006
CWALT 2005-32T1 A6	Mortgage Pass-Through Certificates, Series 2005-32T1	Alternative Loan Trust 2005-32T1	333-123167	CWALT, Inc.	6/1/2005	NYLIAC	2/13/2006
CWALT 2005-34CB 1A4	Mortgage Pass-Through Certificates, Series 2005-34CB	Alternative Loan Trust 2005-34CB	333-125902	CWALT, Inc.	7/1/2005	TIAA	7/29/2005
CWALT 2005-36 2A1B	Mortgage Pass-Through Certificates, Series 2005-36	Alternative Loan Trust 2005-36	333-123167	CWALT, Inc.	6/24/2005	FSAM	6/24/2005
CWALT 2005-4 1A6	Mortgage Pass-Through Certificates, Series 2005-4	Alternative Loan Trust 2005-4	333-117949	CWALT, Inc.	1/1/2005	TIAA	2/28/2005
CWALT 2005-42CB A12	Mortgage Pass-Through Certificates, Series 2005-42CB	Alternative Loan Trust 2005-42CB	333-125902	CWALT, Inc.	8/1/2005	TIAA-CREF Funds	4/19/2006
CWALT 2005-42CB A12	Mortgage Pass-Through Certificates, Series 2005-42CB	Alternative Loan Trust 2005-42CB	333-125902	CWALT, Inc.	8/1/2005	TIAA-CREF Funds	4/19/2006
CWALT 2005-42CB A12	Mortgage Pass-Through Certificates, Series 2005-42CB	Alternative Loan Trust 2005-42CB	333-125902	CWALT, Inc.	8/1/2005	TIAA	4/19/2006
CWALT 2005-42CB A8	Mortgage Pass-Through Certificates, Series 2005-42CB	Alternative Loan Trust 2005-42CB	333-125902	CWALT, Inc.	8/1/2005	NYL	10/18/2006

**Exhibit 1: Plaintiffs' Countrywide Certificates**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWALT 2005-42CB A8	Mortgage Pass-Through Certificates, Series 2005-42CB	Alternative Loan Trust 2005-42CB	333-125902	CWALT, Inc.	8/1/2005	NYL	9/11/2006
CWALT 2005-42CB A8	Mortgage Pass-Through Certificates, Series 2005-42CB	Alternative Loan Trust 2005-42CB	333-125902	CWALT, Inc.	8/1/2005	NYLIAC	10/18/2006
CWALT 2005-46CB A3	Mortgage Pass-Through Certificates, Series 2005-46CB	Alternative Loan Trust 2005-46CB	333-125902	CWALT, Inc.	8/1/2005	NYL	8/30/2005
CWALT 2005-46CB A3	Mortgage Pass-Through Certificates, Series 2005-46CB	Alternative Loan Trust 2005-46CB	333-125902	CWALT, Inc.	8/1/2005	NYL	8/30/2005
CWALT 2005-46CB A3	Mortgage Pass-Through Certificates, Series 2005-46CB	Alternative Loan Trust 2005-46CB	333-125902	CWALT, Inc.	8/1/2005	NYLIAC	8/30/2005
CWALT 2005-46CB A3	Mortgage Pass-Through Certificates, Series 2005-46CB	Alternative Loan Trust 2005-46CB	333-125902	CWALT, Inc.	8/1/2005	NYLIAC	8/30/2005
CWALT 2005-49CB A8	Mortgage Pass-Through Certificates, Series 2005-49CB	Alternative Loan Trust 2005-49CB	333-125902	CWALT, Inc.	9/1/2005	NYL	1/12/2006
CWALT 2005-49CB A8	Mortgage Pass-Through Certificates, Series 2005-49CB	Alternative Loan Trust 2005-49CB	333-125902	CWALT, Inc.	9/1/2005	NYLIAC	1/12/2006
CWALT 2005-51 1A3B	Mortgage Pass-Through Certificates, Series 2005-51	Alternative Loan Trust 2005-51	333-125902	CWALT, Inc.	9/30/2005	FSAM	9/30/2005
CWALT 2005-51 2A3B	Mortgage Pass-Through Certificates, Series 2005-51	Alternative Loan Trust 2005-51	333-125902	CWALT, Inc.	9/30/2005	FSAM	9/30/2005

**Exhibit 1: Plaintiffs' Countrywide Certificates**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWALT 2005-51 3AB2	Mortgage Pass-Through Certificates, Series 2005-51	Alternative Loan Trust 2005-51	333-125902	CWALT, Inc.	9/30/2005	FSAM	9/30/2005
CWALT 2005-57CB 3A5	Mortgage Pass-Through Certificates, Series 2005-57CB	Alternative Loan Trust 2005-57CB	333-125902	CWALT, Inc.	10/1/2005	NYL	1/17/2006
CWALT 2005-57CB 3A5	Mortgage Pass-Through Certificates, Series 2005-57CB	Alternative Loan Trust 2005-57CB	333-125902	CWALT, Inc.	10/1/2005	NYL	2/14/2006
CWALT 2005-57CB 3A5	Mortgage Pass-Through Certificates, Series 2005-57CB	Alternative Loan Trust 2005-57CB	333-125902	CWALT, Inc.	10/1/2005	NYLIAC	2/14/2006
CWALT 2005-57CB 4A5	Mortgage Pass-Through Certificates, Series 2005-57CB	Alternative Loan Trust 2005-57CB	333-125902	CWALT, Inc.	10/1/2005	NYL	10/19/2006
CWALT 2005-57CB 4A5	Mortgage Pass-Through Certificates, Series 2005-57CB	Alternative Loan Trust 2005-57CB	333-125902	CWALT, Inc.	10/1/2005	NYLIAC	10/19/2006
CWALT 2005-61 1A3	Mortgage Pass-Through Certificates, Series 2005-61	Alternative Loan Trust 2005-61	333-125902	CWALT, Inc.	10/27/2005	FSAM	10/27/2005
CWALT 2005-65CB 1A8	Mortgage Pass-Through Certificates, Series 2005-65CB	Alternative Loan Trust 2005-65CB	333-125902	CWALT, Inc.	11/1/2005	NYL	2/10/2006
CWALT 2005-65CB 1A8	Mortgage Pass-Through Certificates, Series 2005-65CB	Alternative Loan Trust 2005-65CB	333-125902	CWALT, Inc.	11/1/2005	NYLIAC	2/10/2006
CWALT 2005-6CB 1A6	Mortgage Pass-Through Certificates, Series 2005-6CB	Alternative Loan Trust 2005-6CB	333-117949	CWALT, Inc.	2/1/2005	NYL	8/26/2005

**Exhibit 1: Plaintiffs' Countrywide Certificates**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWALT 2005-6CB 1A6	Mortgage Pass-Through Certificates, Series 2005-6CB	Alternative Loan Trust 2005-6CB	333-117949	CWALT, Inc.	2/1/2005	NYLIAC	8/26/2005
CWALT 2005-6CB 1A7	Mortgage Pass-Through Certificates, Series 2005-6CB	Alternative Loan Trust 2005-6CB	333-117949	CWALT, Inc.	2/1/2005	TIAA	3/2/2005
CWALT 2005-73CB 1A11	Mortgage Pass-Through Certificates, Series 2005-73CB	Alternative Loan Trust 2005-73CB	333-125902	CWALT, Inc.	11/1/2005	NYLIAC	3/9/2007
CWALT 2005-73CB 1A9	Mortgage Pass-Through Certificates, Series 2005-73CB	Alternative Loan Trust 2005-73CB	333-125902	CWALT, Inc.	11/1/2005	NYL	1/9/2006
CWALT 2005-73CB 1A9	Mortgage Pass-Through Certificates, Series 2005-73CB	Alternative Loan Trust 2005-73CB	333-125902	CWALT, Inc.	11/1/2005	NYLIAC	1/9/2006
CWALT 2005-75CB A5	Mortgage Pass-Through Certificates, Series 2005-75CB	Alternative Loan Trust 2005-75CB	333-125902	CWALT, Inc.	11/1/2005	NYL	1/13/2006
CWALT 2005-7CB 2A3	Mortgage Pass-Through Certificates, Series 2005-7CB	Alternative Loan Trust 2005-7CB	333-125902	CWALT, Inc.	2/1/2005	TIAA	3/11/2005
CWALT 2005-84 1A2	Mortgage Pass-Through Certificates, Series 2005-84	Alternative Loan Trust 2005-84	333-125902	CWALT, Inc.	12/1/2005	NYL	2/3/2006
CWALT 2005-86CB A11	Mortgage Pass-Through Certificates, Series 2005-86CB	Alternative Loan Trust 2005-86CB	333-125902	CWALT, Inc.	12/1/2005	NYL	1/22/2007
CWALT 2005-86CB A11	Mortgage Pass-Through Certificates, Series 2005-86CB	Alternative Loan Trust 2005-86CB	333-125902	CWALT, Inc.	12/1/2005	NYLIAC	1/22/2007

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<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWALT 2005-86CB A11	Mortgage Pass-Through Certificates, Series 2005-86CB	Alternative Loan Trust 2005-86CB	333-125902	CWALT, Inc.	12/1/2005	NYLIAC	1/22/2007
CWALT 2005-86CB A2	Mortgage Pass-Through Certificates, Series 2005-86CB	Alternative Loan Trust 2005-86CB	333-125902	CWALT, Inc.	12/1/2005	NYL	1/31/2006
CWALT 2005-9CB 1A7	Mortgage Pass-Through Certificates, Series 2005-9CB	Alternative Loan Trust 2005-9CB	333-117949	CWALT, Inc.	3/1/2005	TIAA	6/8/2005
CWALT 2005-J12 1A2	Mortgage Pass-Through Certificates, Series 2005-J12	Alternative Loan Trust 2005-J12	333-125902	CWALT, Inc.	10/1/2005	TIAA	10/28/2005
CWALT 2005-J12 1A2	Mortgage Pass-Through Certificates, Series 2005-J12	Alternative Loan Trust 2005-J12	333-125902	CWALT, Inc.	10/1/2005	TIAA	10/28/2005
CWALT 2005-J12 1A3	Mortgage Pass-Through Certificates, Series 2005-J12	Alternative Loan Trust 2005-J12	333-125902	CWALT, Inc.	10/1/2005	TIAA	10/28/2005
CWALT 2005-J12 1A5	Mortgage Pass-Through Certificates, Series 2005-J12	Alternative Loan Trust 2005-J12	333-125902	CWALT, Inc.	10/1/2005	NYL	3/8/2007
CWALT 2005-J12 1A5	Mortgage Pass-Through Certificates, Series 2005-J12	Alternative Loan Trust 2005-J12	333-125902	CWALT, Inc.	10/1/2005	NYLIAC	3/8/2007
CWALT 2005-J12 1A5	Mortgage Pass-Through Certificates, Series 2005-J12	Alternative Loan Trust 2005-J12	333-125902	CWALT, Inc.	10/1/2005	NYL	3/8/2007
CWALT 2005-J14 A7	Mortgage Pass-Through Certificates, Series 2005-J14	Alternative Loan Trust 2005-J14	333-125902	CWALT, Inc.	11/1/2005	NYL	2/17/2006

**Exhibit 1: Plaintiffs' Countrywide Certificates**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWALT 2005-J14 A7	Mortgage Pass-Through Certificates, Series 2005-J14	Alternative Loan Trust 2005-J14	333-125902	CWALT, Inc.	11/1/2005	NYLIAC	2/17/2006
CWALT 2005-J2 1A4	Mortgage Pass-Through Certificates, Series 2005-J2	Alternative Loan Trust 2005-J2	333-117949	CWALT, Inc.	2/1/2005	TIAA	2/28/2005
CWALT 2005-J2 1A4	Mortgage Pass-Through Certificates, Series 2005-J2	Alternative Loan Trust 2005-J2	333-117949	CWALT, Inc.	2/1/2005	TIAA	2/28/2005
CWALT 2005-J6 1A10	Mortgage Pass-Through Certificates, Series 2005-J6	Alternative Loan Trust 2005-J6	333-123167	CWALT, Inc.	5/1/2005	NYL	9/30/2005
CWALT 2006-12CB A10	Mortgage Pass-Through Certificates, Series 2006-12CB	Alternative Loan Trust 2006-12CB	333-131630	CWALT, Inc.	3/25/2006	CREF	4/17/2006
CWALT 2006-12CB A10	Mortgage Pass-Through Certificates, Series 2006-12CB	Alternative Loan Trust 2006-12CB	333-131630	CWALT, Inc.	3/25/2006	CREF	4/17/2006
CWALT 2006-12CB A10	Mortgage Pass-Through Certificates, Series 2006-12CB	Alternative Loan Trust 2006-12CB	333-131630	CWALT, Inc.	3/25/2006	TIAA-CREF Funds	4/17/2006
CWALT 2006-12CB A10	Mortgage Pass-Through Certificates, Series 2006-12CB	Alternative Loan Trust 2006-12CB	333-131630	CWALT, Inc.	3/25/2006	TIAA-CREF Funds	4/17/2006
CWALT 2006-19CB A5	Mortgage Pass-Through Certificates, Series 2006-19CB	Alternative Loan Trust 2006-19CB	333-131630	CWALT, Inc.	6/1/2006	TIAA	6/30/2006
CWALT 2006-19CB A5	Mortgage Pass-Through Certificates, Series 2006-19CB	Alternative Loan Trust 2006-19CB	333-131630	CWALT, Inc.	6/1/2006	TIAA	6/30/2006

**Exhibit 1: Plaintiffs' Countrywide Certificates**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWALT 2006-19CB A6	Mortgage Pass-Through Certificates, Series 2006-19CB	Alternative Loan Trust 2006-19CB	333-131630	CWALT, Inc.	6/1/2006	NYL	1/19/2007
CWALT 2006-19CB A6	Mortgage Pass-Through Certificates, Series 2006-19CB	Alternative Loan Trust 2006-19CB	333-131630	CWALT, Inc.	6/1/2006	NYLIAC	1/19/2007
CWALT 2006-19CB A6	Mortgage Pass-Through Certificates, Series 2006-19CB	Alternative Loan Trust 2006-19CB	333-131630	CWALT, Inc.	6/1/2006	NYLIAC	1/19/2007
CWALT 2006-21CB A3	Mortgage Pass-Through Certificates, Series 2006-21CB	Alternative Loan Trust 2006-21CB	333-131630	CWALT, Inc.	5/1/2006	NYL	6/27/2006
CWALT 2006-32CB A17	Mortgage Pass-Through Certificates, Series 2006-32CB	Alternative Loan Trust 2006-32CB	333-131630	CWALT, Inc.	9/1/2006	NYL	11/15/2006
CWALT 2006-32CB A17	Mortgage Pass-Through Certificates, Series 2006-32CB	Alternative Loan Trust 2006-32CB	333-131630	CWALT, Inc.	9/1/2006	NYLIAC	11/15/2006
CWALT 2006-42 1A4	Mortgage Pass-Through Certificates, Series 2006-42	Alternative Loan Trust 2006-42	333-131630	CWALT, Inc.	11/1/2006	TIAA	11/29/2006
CWALT 2006-42 1A5	Mortgage Pass-Through Certificates, Series 2006-42	Alternative Loan Trust 2006-42	333-131630	CWALT, Inc.	11/1/2006	TIAA	11/29/2006
CWALT 2006-43CB 1A8	Mortgage Pass-Through Certificates, Series 2006-43CB	Alternative Loan Trust 2006-43CB	333-110343	CWALT, Inc.	12/25/2006	TGM	5/11/2007
CWALT 2006-HY11 A2	Mortgage Pass-Through Certificates, Series 2006-HY11	Alternative Loan Trust 2006-HY11	333-131630	CWALT, Inc.	4/28/2006	FSAM	5/5/2006



**Exhibit 1: Plaintiffs' Countrywide Certificates**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWALT 2006-HY13 2A2	Mortgage Pass-Through Certificates, Series 2006-HY13	Alternative Loan Trust 2006-HY13	333-131630	CWALT, Inc.	12/1/2006	NYL	2/28/2007
CWALT 2006-HY13 2A2	Mortgage Pass-Through Certificates, Series 2006-HY13	Alternative Loan Trust 2006-HY13	333-131630	CWALT, Inc.	12/1/2006	NYLIAC	2/28/2007
CWALT 2006-HY13 2A2	Mortgage Pass-Through Certificates, Series 2006-HY13	Alternative Loan Trust 2006-HY13	333-131630	CWALT, Inc.	12/1/2006	NYLIAC	2/28/2007
CWALT 2006-HY13 3A1	Mortgage Pass-Through Certificates, Series 2006-HY13	Alternative Loan Trust 2006-HY13	333-131630	CWALT, Inc.	12/1/2006	NYL	8/31/2007
CWALT 2006-J1 1A10	Mortgage Pass-Through Certificates, Series 2006-J1	Alternative Loan Trust 2006-J1	333-125902	CWALT, Inc.	1/1/2006	NYL	5/5/2006
CWALT 2006-J1 1A10	Mortgage Pass-Through Certificates, Series 2006-J1	Alternative Loan Trust 2006-J1	333-125902	CWALT, Inc.	1/1/2006	NYL	9/1/2006
CWALT 2006-J1 1A10	Mortgage Pass-Through Certificates, Series 2006-J1	Alternative Loan Trust 2006-J1	333-125902	CWALT, Inc.	1/1/2006	NYLIAC	5/5/2006
CWALT 2006-J1 1A10	Mortgage Pass-Through Certificates, Series 2006-J1	Alternative Loan Trust 2006-J1	333-125902	CWALT, Inc.	1/1/2006	NYLIAC	9/1/2006
CWALT 2006-J1 1A11	Mortgage Pass-Through Certificates, Series 2006-J1	Alternative Loan Trust 2006-J1	333-125902	CWALT, Inc.	1/1/2006	NYL	1/29/2007
CWALT 2006-J1 1A11	Mortgage Pass-Through Certificates, Series 2006-J1	Alternative Loan Trust 2006-J1	333-125902	CWALT, Inc.	1/1/2006	NYLIAC	1/29/2007

**Exhibit 1: Plaintiffs' Countrywide Certificates**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWALT 2006-J1 1A11	Mortgage Pass-Through Certificates, Series 2006-J1	Alternative Loan Trust 2006-J1	333-125902	CWALT, Inc.	1/1/2006	NYLIAC	1/29/2007
CWALT 2006-OA16 A4B	Mortgage Pass-Through Certificates, Series 2006-OA16	Alternative Loan Trust 2006-OA16	333-131630	CWALT, Inc.	8/30/2006	FSAM	8/30/2006
CWALT 2006-OA17 1A2C	Mortgage Pass-Through Certificates, Series 2006-OA17	Alternative Loan Trust 2006-OA17	333-131630	CWALT, Inc.	9/29/2006	FSAM	9/29/2006
CWALT 2006-OA2 A2A	Mortgage Pass-Through Certificates, Series 2006-OA2	Alternative Loan Trust 2006-OA2	333-131630	CWALT, Inc.	3/30/2006	FSAM	3/30/2006
CWALT 2006-OA6 1A4C	Mortgage Pass-Through Certificates, Series 2006-OA6	Alternative Loan Trust 2006-OA6	333-131630	CWALT, Inc.	5/17/2006	FSAM	5/17/2006
CWALT 2006-OA8 2A2	Mortgage Pass-Through Certificates, Series 2006-OA8	Alternative Loan Trust 2006- OA8	333-131630	CWALT, Inc.	5/31/2006	FSAM	5/31/2006
CWALT 2006-OA8 2A3	Mortgage Pass-Through Certificates, Series 2006- OA8	Alternative Loan Trust 2006- OA8	333-131630	CWALT, Inc.	5/31/2006	FSAM	5/31/2006
CWALT 2006-OC10 2A1	Mortgage Pass-Through Certificates, Series 2006-OC10	Alternative Loan Trust 2006-OC10	333-131630	CWALT, Inc.	11/30/2006	NYL	11/30/2006
CWALT 2006-OC11 2A2B	Mortgage Pass-Through Certificates, Series 2006-OC11	Alternative Loan Trust 2006-OC11	333-131630	CWALT, Inc.	12/29/2006	FSAM	12/29/2006
CWALT 2006-OC7 2A3	Mortgage Pass-Through Certificates, Series 2006-OC7	Alternative Loan Trust 2006-OC7	333-131630	CWALT, Inc.	8/30/2006	FSAM	8/30/2006

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<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWALT 2006-OC8 2A2C	Mortgage Pass-Through Certificates, Series 2006-OC8	Alternative Loan Trust 2006-OC8	333-131630	CWALT, Inc.	9/29/2006	FSAM	9/29/2006
CWALT 2007-12T1 A6	Mortgage Pass-Through Certificates, Series 2007-12T1	Alternative Loan Trust 2007-12T1	333-140962	CWALT, Inc.	4/1/2007	TIAA	5/14/2007
CWALT 2007-13 A4	Mortgage Pass-Through Certificates, Series 2007-13	Alternative Loan Trust 2007-13	333-140962	CWALT, Inc.	4/1/2007	TIAA	4/30/2007
CWALT 2007-15CB A19	Mortgage Pass-Through Certificates, Series 2007-15CB	Alternative Loan Trust 2007-15CB	333-140962	CWALT, Inc.	5/1/2007	TIAA	9/14/2007
CWALT 2007-17CB 1A1	Mortgage Pass-Through Certificates, Series 2007-17CB	Alternative Loan Trust 2007-17CB	333-140962	CWALT, Inc.	6/1/2007	NYL	7/17/2007
CWALT 2007-17CB 1A1	Mortgage Pass-Through Certificates, Series 2007-17CB	Alternative Loan Trust 2007-17CB	333-140962	CWALT, Inc.	6/1/2007	NYLIAC	7/17/2007
CWALT 2007-17CB 1A1	Mortgage Pass-Through Certificates, Series 2007-17CB	Alternative Loan Trust 2007-17CB	333-140962	CWALT, Inc.	6/1/2007	NYLIAC	7/17/2007
CWALT 2007-18CB 2A18	Mortgage Pass-Through Certificates, Series 2007-18CB	Alternative Loan Trust 2007-18CB	333-140962	CWALT, Inc.	6/1/2007	TIAA	7/30/2007
CWALT 2007-21CB 1A4	Mortgage Pass-Through Certificates, Series 2007-21CB	Alternative Loan Trust 2007-21CB	333-140962	CWALT, Inc.	7/1/2007	TIAA	7/30/2007
CWALT 2007-2CB 1A10	Mortgage Pass-Through Certificates, Series 2007-2CB	Alternative Loan Trust 2007-2CB	333-131630	CWALT, Inc.	1/1/2007	TIAA	1/30/2007

**Exhibit 1: Plaintiffs' Countrywide Certificates**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWALT 2007-4CB 1A10	Mortgage Pass-Through Certificates, Series 2007-4CB	Alternative Loan Trust 2007-4CB	333-131630	CWALT, Inc.	2/1/2007	TIAA	4/23/2007
CWALT 2007-HY4 3A1	Mortgage Pass-Through Certificates, Series 2007-HY4	Alternative Loan Trust 2007-HY4	333-140962	CWALT, Inc.	5/1/2007	NYL	5/31/2007
CWHEL 2004-B 1A	Revolving Home Equity Loan Asset Backed Notes, Series 2004-B	CWABS Master Trust (for the Series 2004-B Subtrust)	333-109272	CWABS, Inc.	3/31/2004	FSAM	2/2/2005
CWHEL 2006-D 2A	Revolving Home Equity Loan Asset Backed Notes, Series 2006-D	CWHEQ Revolving Home Equity Loan Trust, Series 2006-D	333-126790	CWHEQ, Inc.	3/30/2006	FSAM	3/30/2006
CWHEL 2006-D 2A	Revolving Home Equity Loan Asset Backed Notes, Series 2006-D	CWHEQ Revolving Home Equity Loan Trust, Series 2006-D	333-126790	CWHEQ, Inc.	3/30/2006	NYL	3/30/2006
CWHEL 2006-E 2A	Revolving Home Equity Loan Asset Backed Notes, Series 2006-E	CWHEQ Revolving Home Equity Loan Trust, Series 2006-E	333-132375	CWHEQ, Inc.	6/29/2006	FSAM	6/29/2006
CWHEL 2006-H 2A1A	Revolving Home Equity Loan Asset Backed Notes, Series 2006-H	CWHEQ Revolving Home Equity Loan Trust, Series 2006-H	333-132375	CWHEQ, Inc.	9/29/2006	NYL	9/29/2006

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CWHEL 2007-GW A	Revolving Home Equity Loan Asset Backed Notes, Series 2007-G	CWHEQ Revolving Home Equity Loan Trust, Series 2007-G	333-139891	CWHEQ, Inc.	8/15/2007	TGM	9/12/2007
CWHL 2004-12 11A2	Mortgage Pass-Through Certificates, Series 2004-12	CHL Mortgage Pass-Through Trust 2004-12	333-109248	CWMBS, Inc.	6/1/2004	NYL	7/29/2005
CWHL 2004-12 11A3	Mortgage Pass-Through Certificates, Series 2004-12	CHL Mortgage Pass-Through Trust 2004-12	333-109248	CWMBS, Inc.	6/1/2004	NYL	5/27/2005
CWHL 2004-13 1A7	Mortgage Pass-Through Certificates, Series 2004-13	CHL Mortgage Pass-Through Trust 2004-13	333-109248	CWMBS, Inc.	6/1/2004	NYLIAC	3/16/2007
CWHL 2004-13 1A7	Mortgage Pass-Through Certificates, Series 2004-13	CHL Mortgage Pass-Through Trust 2004-13	333-109248	CWMBS, Inc.	6/1/2004	NYLIAC	3/21/2007
CWHL 2005-17 1A10	Mortgage Pass-Through Certificates, Series 2005-17	CHL Mortgage Pass-Through Trust 2005-17	333-125164	CWMBS, Inc.	7/1/2005	CREF	10/5/2005
CWHL 2005-17 1A10	Mortgage Pass-Through Certificates, Series 2005-17	CHL Mortgage Pass-Through Trust 2005-17	333-125164	CWMBS, Inc.	7/1/2005	CREF	10/5/2005
CWHL 2005-17 1A10	Mortgage Pass-Through Certificates, Series 2005-17	CHL Mortgage Pass-Through Trust 2005-17	333-125164	CWMBS, Inc.	7/1/2005	TIAA-CREF Funds	10/5/2005
CWHL 2005-17 1A10	Mortgage Pass-Through Certificates, Series 2005-17	CHL Mortgage Pass-Through Trust 2005-17	333-125164	CWMBS, Inc.	7/1/2005	TIAA-CREF Funds	10/5/2005

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CWHL 2005-17 1A10	Mortgage Pass-Through Certificates, Series 2005-17	CHL Mortgage Pass-Through Trust 2005-17	333-125164	CWMBS, Inc.	7/1/2005	TIAA-CREF Funds	10/5/2005
CWHL 2005-17 1A10	Mortgage Pass-Through Certificates, Series 2005-17	CHL Mortgage Pass-Through Trust 2005-17	333-125164	CWMBS, Inc.	7/1/2005	TIAA	10/5/2005
CWHL 2005-18 A3	Mortgage Pass-Through Certificates, Series 2005-18	CHL Mortgage Pass-Through Trust 2005-18	333-125963	CWMBS, Inc.	8/1/2005	NYL	4/5/2006
CWHL 2005-18 A3	Mortgage Pass-Through Certificates, Series 2005-18	CHL Mortgage Pass-Through Trust 2005-18	333-125963	CWMBS, Inc.	8/1/2005	NYL	4/11/2006
CWHL 2005-19 1A7	Mortgage Pass-Through Certificates, Series 2005-19	CHL Mortgage Pass-Through Trust 2005-19	333-125963	CWMBS, Inc.	7/1/2005	TIAA	6/27/2007
CWHL 2005-21 2A3	Mortgage Pass-Through Certificates, Series 2005-21	CHL Mortgage Pass-Through Trust 2005-21	333-125963	CWMBS, Inc.	8/1/2005	NYL	2/9/2006
CWHL 2005-21 2A3	Mortgage Pass-Through Certificates, Series 2005-21	CHL Mortgage Pass-Through Trust 2005-21	333-125963	CWMBS, Inc.	8/1/2005	NYLIAC	2/9/2006
CWHL 2005-24 A2	Mortgage Pass-Through Certificates, Series 2005-24	CHL Mortgage Pass-Through Trust 2005-24	333-125963	CWMBS, Inc.	9/1/2005	TIAA	1/23/2007
CWHL 2005-24 A37	Mortgage Pass-Through Certificates, Series 2005-24	CHL Mortgage Pass-Through Trust 2005-24	333-125963	CWMBS, Inc.	9/1/2005	NYL	7/24/2006
CWHL 2005-31 1A1	Mortgage Pass-Through Certificates, Series 2005-31	CHL Mortgage Pass-Through Trust 2005-31	333-125963	CWMBS, Inc.	12/1/2005	NYL	1/10/2006

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CWHL 2005-31 1A1	Mortgage Pass-Through Certificates, Series 2005-31	CHL Mortgage Pass-Through Trust 2005-31	333-125963	CWMBS, Inc.	12/1/2005	NYL	12/28/2005
CWHL 2005-4 6A1	Mortgage Pass-Through Certificates, Series 2005-4	CHL Mortgage Pass-Through Trust 2005-4	333-109248	CWMBS, Inc.	1/28/2005	FSAM	1/28/2005
CWHL 2005-HYB10 5A1 (listed on Bloomberg as CWHL 2005-HY10 5A1)	Mortgage Pass-Through Certificates, Series 2005-HYB10	CHL Mortgage Pass-Through Trust 2005-HYB10	333-100418	CWMBS, Inc.	12/1/2005	NYL	5/1/2007
CWHL 2005-HYB2 1A4	Mortgage Pass-Through Certificates, Series 2005-HYB2	CHL Mortgage Pass-Through Trust 2005-HYB2	333-121249	CWMBS, Inc.	3/1/2005	NYL	4/27/2005
CWHL 2005-HYB3 1A1	Mortgage Pass-Through Certificates, Series 2005-HYB3	CHL Mortgage Pass-Through Trust 2005-HYB3	333-121249	CWMBS, Inc.	4/1/2005	NYL	5/3/2005
CWHL 2005-HYB3 2A5B	Mortgage Pass-Through Certificates, Series 2005-HYB3	CHL Mortgage Pass-Through Trust 2005-HYB3	333-121249	CWMBS, Inc.	4/1/2005	NYL	5/31/2006
CWHL 2005-HYB3 2A5B	Mortgage Pass-Through Certificates, Series 2005-HYB3	CHL Mortgage Pass-Through Trust 2005-HYB3	333-121249	CWMBS, Inc.	4/1/2005	NYLIAC	5/31/2006
CWHL 2005-HYB3 2A5B	Mortgage Pass-Through Certificates, Series 2005-HYB3	CHL Mortgage Pass-Through Trust 2005-HYB3	333-121249	CWMBS, Inc.	4/1/2005	NYL	5/31/2006

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<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWHL 2005-HYB7 1A1	Mortgage Pass-Through Certificates, Series 2005-HYB7	CHL Mortgage Pass-Through Trust 2005-HYB7	333-125963	CWMBS, Inc.	9/1/2005	NYL	4/28/2006
CWHL 2005-HYB9 5A2	Mortgage-Backed Notes, Series 2005-HYB9	CWABS Trust 2005-HYB9	333-125963	CWABS, Inc.	11/1/2005	NYL	6/27/2006
CWHL 2005-HYB9 5A2	Mortgage-Backed Notes, Series 2005-HYB9	CWABS Trust 2005-HYB9	333-125963	CWABS, Inc.	11/1/2005	NYLIAC	6/27/2006
CWHL 2005-J1 1A2	Mortgage Pass-Through Certificates, Series 2005-J1 Private Placement	CHL Mortgage Pass-Through Trust 2005-J1	333-117949	CWMBS, Inc.	4/1/2005	NYLIAC	4/29/2005
CWHL 2005-J1 2A1	Mortgage Pass-Through Certificates, Series 2005-J1 Private Placement	CHL Mortgage Pass-Through Trust 2005-J1	333-117949	CWMBS, Inc.	4/1/2005	NYLIAC	4/29/2005
CWHL 2005-J1 B1	Mortgage Pass-Through Certificates, Series 2005-J1 Private Placement	CHL Mortgage Pass-Through Trust 2005-J1	333-117949	CWMBS, Inc.	4/1/2005	NYLIAC	4/29/2005
CWHL 2005-J1 B2	Mortgage Pass-Through Certificates, Series 2005-J1 Private Placement	CHL Mortgage Pass-Through Trust 2005-J1	333-117949	CWMBS, Inc.	4/1/2005	NYLIAC	4/29/2005
CWHL 2005-J1 B3	Mortgage Pass-Through Certificates, Series 2005-J1 Private Placement	CHL Mortgage Pass-Through Trust 2005-J1	333-117949	CWMBS, Inc.	4/1/2005	NYLIAC	4/29/2005



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CWHL 2005-J1 B4	Mortgage Pass-Through Certificates, Series 2005-J1 Private Placement	CHL Mortgage Pass-Through Trust 2005-J1	333-117949	CWMBS, Inc.	4/1/2005	NYLIAC	4/29/2005
CWHL 2005-J1 B5	Mortgage Pass-Through Certificates, Series 2005-J1 Private Placement	CHL Mortgage Pass-Through Trust 2005-J1	333-117949	CWMBS, Inc.	4/1/2005	NYLIAC	4/29/2005
CWHL 2005-J1 M	Mortgage Pass-Through Certificates, Series 2005-J1 Private Placement	CHL Mortgage Pass-Through Trust 2005-J1	333-117949	CWMBS, Inc.	4/1/2005	NYLIAC	4/29/2005
CWHL 2005-J2 1A2	Mortgage Pass-Through Certificates, Series 2005-J2	CHL Mortgage Pass-Through Trust 2005-J2	333-117949	CWMBS, Inc.	6/1/2005	NYLIAC	6/30/2005
CWHL 2005-J2 1A3	Mortgage Pass-Through Certificates, Series 2005-J2	CHL Mortgage Pass-Through Trust 2005-J2	333-117949	CWMBS, Inc.	6/1/2005	NYL	6/30/2005
CWHL 2005-J2 1A4	Mortgage Pass-Through Certificates, Series 2005-J2	CHL Mortgage Pass-Through Trust 2005-J2	333-117949	CWMBS, Inc.	6/1/2005	NYLIAC	6/30/2005
CWHL 2005-J2 2A1	Mortgage Pass-Through Certificates, Series 2005-J2	CHL Mortgage Pass-Through Trust 2005-J2	333-121249	CWMBS, Inc.	6/25/2005	TGM	6/20/2007
CWHL 2005-J2 IB1	Mortgage Pass-Through Certificates, Series 2005-J2	CHL Mortgage Pass-Through Trust 2005-J2	333-117949	CWMBS, Inc.	6/1/2005	NYLIAC	6/30/2005
CWHL 2005-J2 IB2	Mortgage Pass-Through Certificates, Series 2005-J2	CHL Mortgage Pass-Through Trust 2005-J2	333-117949	CWMBS, Inc.	6/1/2005	NYLIAC	6/30/2005

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CWHL 2005-J2 IB3	Mortgage Pass-Through Certificates, Series 2005-J2 Private Placement	CHL Mortgage Pass-Through Trust 2005-J2	333-117949	CWMBS, Inc.	6/1/2005	NYLIAC	6/30/2005
CWHL 2005-J2 IB4	Mortgage Pass-Through Certificates, Series 2005-J2 Private Placement	CHL Mortgage Pass-Through Trust 2005-J2	333-117949	CWMBS, Inc.	6/1/2005	NYLIAC	6/30/2005
CWHL 2005-J2 IB5	Mortgage Pass-Through Certificates, Series 2005-J2 Private Placement	CHL Mortgage Pass-Through Trust 2005-J2	333-117949	CWMBS, Inc.	6/1/2005	NYLIAC	6/30/2005
CWHL 2005-J2 IM	Mortgage Pass-Through Certificates, Series 2005-J2	CHL Mortgage Pass-Through Trust 2005-J2	333-117949	CWMBS, Inc.	6/1/2005	NYLIAC	6/30/2005
CWHL 2005-J4 A5	Mortgage Pass-Through Certificates, Series 2005-J4	CHL Mortgage Pass-Through Trust 2005-J4	333-125963	CWMBS, Inc.	10/1/2005	NYL	2/17/2006
CWHL 2005-J4 A5	Mortgage Pass-Through Certificates, Series 2005-J4	CHL Mortgage Pass-Through Trust 2005-J4	333-125963	CWMBS, Inc.	10/1/2005	NYLIAC	2/17/2006
CWHL 2006-13 1A4	Mortgage Pass-Through Certificates, Series 2006-13	CHL Mortgage Pass-Through Trust 2006-13	333-131662	CWMBS, Inc.	7/1/2006	TIAA	1/8/2007
CWHL 2006-14 A6	Mortgage Pass-Through Certificates, Series 2006-14	CHL Mortgage Pass-Through Trust 2006-14	333-131662	CWMBS, Inc.	7/1/2006	TIAA	8/21/2006
CWHL 2006-15 A4	Mortgage Pass-Through Certificates, Series 2006-15	CHL Mortgage Pass-Through Trust 2006-15	333-131662	CWMBS, Inc.	8/1/2006	TIAA	10/12/2006

**Exhibit 1: Plaintiffs' Countrywide Certificates**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWHL 2006-15 A5	Mortgage Pass-Through Certificates, Series 2006-15	CHL Mortgage Pass-Through Trust 2006-15	333-131662	CWMBS, Inc.	8/1/2006	TIAA	12/15/2006
CWHL 2006-19 1A4	Mortgage Pass-Through Certificates, Series 2006-19	CHL Mortgage Pass-Through Trust 2006-19	333-131662	CWMBS, Inc.	11/1/2006	TIAA	12/4/2007
CWHL 2006-20 1A3	Mortgage Pass-Through Certificates, Series 2006-20	CHL Mortgage Pass-Through Trust 2006-20	333-131662	CWMBS, Inc.	12/1/2006	TIAA	12/29/2006
CWHL 2006-9 A5	Mortgage Pass-Through Certificates, Series 2006-9	CHL Mortgage Pass-Through Trust 2006-9	333-131662	CWMBS, Inc.	3/1/2006	TIAA	3/30/2006
CWHL 2006-HYB5 1A2	Mortgage Pass-Through Certificates, Series 2006-HYB5	CHL Mortgage Pass-Through Trust 2006-HYB5	333-131662	CWMBS, Inc.	7/1/2006	NYL	9/11/2006
CWHL 2006-HYB5 3A1A	Mortgage Pass-Through Certificates, Series 2006-HYB5	CHL Mortgage Pass-Through Trust 2006-HYB5	333-131662	CWMBS, Inc.	7/1/2006	NYL	5/1/2007
CWHL 2006-J1 1A2	Mortgage Pass-Through Certificates, Series 2006-J1	CHL Mortgage Pass-Through Trust 2006-J1	333-125963	CWMBS, Inc.	1/1/2006	TIAA	3/24/2006
CWHL 2006-J3 A3	Mortgage Pass-Through Certificates, Series 2006-J3	CHL Mortgage Pass-Through Trust 2006-J3	333-131662	CWMBS, Inc.	5/1/2006	NYL	9/1/2006
CWHL 2006-J3 A3	Mortgage Pass-Through Certificates, Series 2006-J3	CHL Mortgage Pass-Through Trust 2006-J3	333-131662	CWMBS, Inc.	5/1/2006	NYLIAC	9/1/2006

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<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWHL 2006-J4 A12	Mortgage Pass-Through Certificates, Series 2006-J4	CHL Mortgage Pass-Through Trust 2006-J4	333-131630	CWMBS, Inc.	7/1/2006	TIAA	11/16/2006
CWHL 2006-J4 A6	Mortgage Pass-Through Certificates, Series 2006-J4	CHL Mortgage Pass-Through Trust 2006-J4	333-131630	CWMBS, Inc.	7/1/2006	TIAA	7/28/2006
CWHL 2006-J4 A8	Mortgage Pass-Through Certificates, Series 2006-J4	CHL Mortgage Pass-Through Trust 2006-J4	333-131630	CWMBS, Inc.	7/1/2006	TIAA	11/7/2006
CWHL 2007-1 A8	Mortgage Pass-Through Certificates, Series 2007-1	CHL Mortgage Pass-Through Trust 2007-1	333-131662	CWMBS, Inc.	1/1/2007	TIAA	3/7/2007
CWHL 2007-10 A19	Mortgage Pass-Through Certificates, Series 2007-10	CHL Mortgage Pass-Through Trust 2007-10	333-140958	CWMBS, Inc.	5/1/2007	TIAA	5/31/2007
CWHL 2007-11 A10	Mortgage Pass-Through Certificates, Series 2007-11	CHL Mortgage Pass-Through Trust 2007-11	333-140958	CWMBS, Inc.	6/1/2007	TIAA	9/10/2007
CWHL 2007-13 A2	Mortgage Pass-Through Certificates, Series 2007-13	CHL Mortgage Pass-Through Trust 2007-13	333-140958	CWMBS, Inc.	6/1/2007	TIAA	6/29/2007
CWHL 2007-13 A2	Mortgage Pass-Through Certificates, Series 2007-13	CHL Mortgage Pass-Through Trust 2007-13	333-140958	CWMBS, Inc.	6/1/2007	TIAA	6/29/2007
CWHL 2007-14 A10	Mortgage Pass-Through Certificates, Series 2007-14	CHL Mortgage Pass-Through Trust 2007-14	333-140958	CWMBS, Inc.	7/1/2007	TIAA	8/2/2007
CWHL 2007-14 A15	Mortgage Pass-Through Certificates, Series 2007-14	CHL Mortgage Pass-Through Trust 2007-14	333-140958	CWMBS, Inc.	7/1/2007	TIAA	10/5/2007

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CWHL 2007-15 1A20	Mortgage Pass-Through Certificates, Series 2007-15	CHL Mortgage Pass-Through Trust 2007-15	333-140958	CWMBS, Inc.	7/1/2007	TIAA	10/31/2007
CWHL 2007-4 1A11	Mortgage Pass-Through Certificates, Series 2007-4	CHL Mortgage Pass-Through Trust 2007-4	333-131662	CWMBS, Inc.	3/1/2007	TIAA	11/26/2007
CWHL 2007-5 A2	Mortgage Pass-Through Certificates, Series 2007-5	CHL Mortgage Pass-Through Trust 2007-5	333-131662	CWMBS, Inc.	3/1/2007	NYL	6/14/2007
CWHL 2007-5 A2	Mortgage Pass-Through Certificates, Series 2007-5	CHL Mortgage Pass-Through Trust 2007-5	333-131662	CWMBS, Inc.	3/1/2007	NYLIAC	6/14/2007
CWHL 2007-5 A2	Mortgage Pass-Through Certificates, Series 2007-5	CHL Mortgage Pass-Through Trust 2007-5	333-131662	CWMBS, Inc.	3/1/2007	NYLIAC	6/14/2007
CWHL 2007-7 A8	Mortgage Pass-Through Certificates, Series 2007-7	CHL Mortgage Pass-Through Trust 2007-7	333-140958	CWMBS, Inc.	4/1/2007	NYL	5/25/2007
CWHL 2007-7 A8	Mortgage Pass-Through Certificates, Series 2007-7	CHL Mortgage Pass-Through Trust 2007-7	333-140958	CWMBS, Inc.	4/1/2007	NYLIAC	5/25/2007
CWHL 2007-HY3 4A1	Mortgage Pass-Through Certificates, Series 2007-HY3	CHL Mortgage Pass-Through Trust 2007-HY3	333-140958	CWMBS, Inc.	4/1/2007	NYL	10/19/2007
CWHL 2007-HY3 4A1	Mortgage Pass-Through Certificates, Series 2007-HY3	CHL Mortgage Pass-Through Trust 2007-HY3	333-140958	CWMBS, Inc.	4/1/2007	NYLIAC	10/19/2007
CWHL 2007-HY3 4A1	Mortgage Pass-Through Certificates, Series 2007-HY3	CHL Mortgage Pass-Through Trust 2007-HY3	333-140958	CWMBS, Inc.	4/1/2007	NYL	10/19/2007

**Exhibit 1: Plaintiffs' Countrywide Certificates**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWHL 2007-HY3 4A1	Mortgage Pass-Through Certificates, Series 2007-HY3	CHL Mortgage Pass-Through Trust 2007-HY3	333-140958	CWMBS, Inc.	4/1/2007	QAM	10/19/2007
CWL 2004-15 AF5	Asset-Backed Certificates, Series 2004-15	CWABS Asset-Backed Certificates Trust 2004-15	333-118926	CWABS, Inc.	12/1/2004	NYLIAC	5/1/2006
CWL 2004-15 AF5	Asset-Backed Certificates, Series 2004-15	CWABS Asset-Backed Certificates Trust 2004-15	333-118926	CWABS, Inc.	12/1/2004	NYL	5/1/2006
CWL 2004-3 2A	Asset-Backed Certificates, Series 2004-3	CWABS Asset-Backed Certificates Trust 2004-3	333-109272	CWABS, Inc.	3/30/2004	FSAM	4/25/2005
CWL 2004-S1 A3	Asset-Backed Certificates, Series 2004-S1	CWABS Asset-Backed Certificates Trust 2004-S1	333-118926	CWABS, Inc.	12/1/2004	NYL	10/13/2006
CWL 2005-12 2A5	Asset-Backed Certificates, Series 2005-12	CWABS Asset-Backed Certificates Trust 2005-12	333-125164	CWABS, Inc.	9/1/2005	NYL	9/30/2005
CWL 2005-13 AF4	Asset-Backed Certificates, Series 2005-13	CWABS Asset-Backed Certificates Trust 2005-13	333-125164	CWABS, Inc.	11/1/2005	TIAA	11/21/2005
CWL 2005-16 4AV3	Asset-Backed Certificates, Series 2005-16	CWABS Asset-Backed Certificates Trust 2005-16	333-125164	CWABS, Inc.	12/28/2005	FSAM	12/28/2005

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CWL 2005-17 1AF3	Asset-Backed Certificates, Series 2005-17	CWABS Asset-Backed Certificates Trust 2005-17	333-125164	CWABS, Inc.	12/1/2005	TIAA	12/29/2005
CWL 2005-17 1AF4	Asset-Backed Certificates, Series 2005-17	CWABS Asset-Backed Certificates Trust 2005-17	333-125164	CWABS, Inc.	12/1/2005	TIAA	12/29/2005
CWL 2005-2 2A4	Asset-Backed Certificates, Series 2005-2	CWABS Asset-Backed Certificates Trust 2005-2	333-118926	CWABS, Inc.	3/30/2005	FSAM	3/30/2005
CWL 2005-7 AF3	Asset-Backed Certificates, Series 2005-7	CWABS Asset-Backed Certificates Trust 2005-7	333-125164	CWABS, Inc.	6/1/2005	TIAA	12/22/2005
CWL 2005-IM1 A4	Asset-Backed Certificates, Series 2005-IM1	CWABS Asset-Backed Certificates Trust 2005-IM1	333-125164	CWABS, Inc.	8/30/2005	FSAM	8/30/2005
CWL 2005-IM2 A4	Asset-Backed Certificates, Series 2005-IM2	CWABS Asset-Backed Certificates Trust 2005-IM2	333-125164	CWABS, Inc.	10/28/2005	FSAM	10/28/2005
CWL 2005-IM2 A4	Asset-Backed Certificates, Series 2005-IM2	CWABS Asset-Backed Certificates Trust 2005-IM2	333-125164	CWABS, Inc.	10/28/2005	FSAM	5/15/2006

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CWL 2005-IM3 A3	Asset-Backed Certificates, Series 2005-IM3	CWABS Asset-Backed Certificates Trust 2005-IM3	333-125164	CWABS, Inc.	12/21/2005	FSAM	12/21/2005
CWL 2006-24 2A2	Asset-Backed Certificates, Series 2006-24	CWABS Asset-Backed Certificates Trust 2006-24	333-135846	CWABS, Inc.	12/29/2006	FSAM	8/15/2007
CWL 2006-8 2A3	Asset-Backed Certificates, Series 2006-8	CWABS Asset-Backed Certificates Trust 2006-8	333-131591	CWABS, Inc.	6/28/2006	FSAM	8/7/2007
CWL 2006-ABC1 A2	Asset-Backed Certificates, Series 2006-ABC1	CWABS Asset-Backed Certificates Trust 2006-ABC1	333-131591	CWABS, Inc.	6/29/2006	FSAM	6/29/2006
CWL 2006-BC2 2A3	Asset-Backed Certificates, Series 2006-BC2	CWABS Asset-Backed Certificates Trust 2006-BC2	333-131591	CWABS, Inc.	5/30/2006	FSAM	5/30/2006
CWL 2006-BC4 2A3	Asset-Backed Certificates, Series 2006-BC4	CWABS Asset-Backed Certificates Trust 2006-BC4	333-135846	CWABS, Inc.	9/29/2006	FSAM	9/29/2006
CWL 2006-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S2	CWHEQ Home Equity Loan Trust, Series 2006-S2	333-126790	CWHEQ, Inc.	3/1/2006	NYL	3/30/2006



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CWL 2006-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S2	CWHEQ Home Equity Loan Trust, Series 2006-S2	333-126790	CWHEQ, Inc.	3/1/2006	NYLIAC	3/30/2006
CWL 2006-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S2	CWHEQ Home Equity Loan Trust, Series 2006-S2	333-126790	CWHEQ, Inc.	3/1/2006	NYLIAC	3/30/2006
CWL 2006-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S2	CWHEQ Home Equity Loan Trust, Series 2006-S2	333-126790	CWHEQ, Inc.	3/1/2006	NYL	10/10/2006
CWL 2006-S3 A1	Home Equity Loan Asset Backed Certificates, Series 2006-S3	CWHEQ Home Equity Loan Trust, Series 2006-S3	333-132375	CWHEQ, Inc.	6/29/2006	NYL	6/29/2006
CWL 2006-S3 A1	Home Equity Loan Asset Backed Certificates, Series 2006-S3	CWHEQ Home Equity Loan Trust, Series 2006-S3	333-132375	CWHEQ, Inc.	6/29/2006	NYLIAC	6/29/2006
CWL 2006-S3 A1	Home Equity Loan Asset Backed Certificates, Series 2006-S3	CWHEQ Home Equity Loan Trust, Series 2006-S3	333-132375	CWHEQ, Inc.	6/29/2006	TIAA-CREF Funds	7/5/2007
CWL 2006-S3 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S3	CWHEQ Home Equity Loan Trust, Series 2006-S3	333-132375	CWHEQ, Inc.	6/29/2006	NYLIAC	8/30/2006

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CWL 2006-S3 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S3	CWHEQ Home Equity Loan Trust, Series 2006-S3	333-132375	CWHEQ, Inc.	6/29/2006	NYL	12/4/2006
CWL 2006-S3 A4	Home Equity Loan Asset Backed Certificates, Series 2006-S3	CWHEQ Home Equity Loan Trust, Series 2006-S3	333-132375	CWHEQ, Inc.	6/29/2006	NYL	6/29/2006
CWL 2006-S3 A4	Home Equity Loan Asset Backed Certificates, Series 2006-S3	CWHEQ Home Equity Loan Trust, Series 2006-S3	333-132375	CWHEQ, Inc.	6/29/2006	NYLIAC	6/29/2006
CWL 2006-S3 A4	Home Equity Loan Asset Backed Certificates, Series 2006-S3	CWHEQ Home Equity Loan Trust, Series 2006-S3	333-132375	CWHEQ, Inc.	6/29/2006	NYL	6/29/2006
CWL 2006-S4 A4	Home Equity Loan Asset Backed Certificates, Series 2006-S4	CWHEQ Home Equity Loan Trust, Series 2006-S4	333-132375	CWHEQ, Inc.	8/1/2006	TIAA	9/8/2006
CWL 2006-S5 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S5	CWHEQ Home Equity Loan Trust, Series 2006-S5	333-132375	CWHEQ, Inc.	9/1/2006	NYLIAC	9/28/2006
CWL 2006-S5 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S5	CWHEQ Home Equity Loan Trust, Series 2006-S5	333-132375	CWHEQ, Inc.	9/1/2006	NYLIAC	9/28/2006

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CWL 2006-S5 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S5	CWHEQ Home Equity Loan Trust, Series 2006-S5	333-132375	CWHEQ, Inc.	9/1/2006	NYL	10/6/2006
CWL 2006-S5 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S5	CWHEQ Home Equity Loan Trust, Series 2006-S5	333-132375	CWHEQ, Inc.	9/1/2006	NYL	9/28/2006
CWL 2006-S5 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S5	CWHEQ Home Equity Loan Trust, Series 2006-S5	333-132375	CWHEQ, Inc.	9/1/2006	QAM	10/6/2006
CWL 2006-S5 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S5	CWHEQ Home Equity Loan Trust, Series 2006-S5	333-132375	CWHEQ, Inc.	9/1/2006	CFI	10/6/2006
CWL 2006-S7 A3	Home Equity Loan Asset-Backed Certificates, Series 2006-S7	CWHEQ Home Equity Loan Trust, Series 2006-S7	333-132375	CWHEQ, Inc.	11/1/2006	NYL	11/30/2006
CWL 2006-S8 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S8	CWHEQ Home Equity Loan Trust, Series 2006-S8	333-132375	CWHEQ, Inc.	12/01/2006	NYLIAC	12/28/2006
CWL 2006-S8 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S8	CWHEQ Home Equity Loan Trust, Series 2006-S8	333-132375	CWHEQ, Inc.	12/01/2006	NYLIAC	12/28/2006

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CWL 2006-S8 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S8	CWHEQ Home Equity Loan Trust, Series 2006-S8	333-132375	CWHEQ, Inc.	12/01/2006	NYL	12/28/2006
CWL 2006-S8 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S8	CWHEQ Home Equity Loan Trust, Series 2006-S8	333-132375	CWHEQ, Inc.	12/1/2006	QAM	12/28/2006
CWL 2006-S8 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S8	CWHEQ Home Equity Loan Trust, Series 2006-S8	333-132375	CWHEQ, Inc.	12/1/2006	CFI	12/28/2006
CWL 2007-12 2A2	Asset-Backed Certificates, Series 2007-12	CWABS Asset-Backed Certificates Trust 2007-12	333-140960	CWABS, Inc.	8/13/2007	FSAM	9/10/2007
CWL 2007-12 2A3	Asset-Backed Certificates, Series 2007-12	CWABS Asset-Backed Certificates Trust 2007-12	333-140960	CWABS, Inc.	8/13/2007	FSAM	9/5/2007
CWL 2007-2 2A3	Asset-Backed Certificates, Series 2007-2	CWABS Asset-Backed Certificates Trust 2007-2	333-135846	CWABS, Inc.	2/28/2007	FSAM	8/7/2007
CWL 2007-4 A2	Asset-Backed Certificates, Series 2007-4	CWABS Asset-Backed Certificates Trust 2007-4	333-135846	CWABS, Inc.	3/1/2007	NYLIAC	3/29/2007

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CWL 2007-4 A2	Asset-Backed Certificates, Series 2007-4	CWABS Asset-Backed Certificates Trust 2007-4	333-135846	CWABS, Inc.	3/1/2007	NYLIAC	3/29/2007
CWL 2007-4 A3	Asset-Backed Certificates, Series 2007-4	CWABS Asset-Backed Certificates Trust 2007-4	333-135846	CWABS, Inc.	3/1/2007	NYL	3/29/2007
CWL 2007-4 A3	Asset-Backed Certificates, Series 2007-4	CWABS Asset-Backed Certificates Trust 2007-4	333-135846	CWABS, Inc.	3/1/2007	NYLIAC	3/29/2007
CWL 2007-4 A3	Asset-Backed Certificates, Series 2007-4	CWABS Asset-Backed Certificates Trust 2007-4	333-135846	CWABS, Inc.	3/1/2007	NYLIAC	3/29/2007
CWL 2007-4 A3	Asset-Backed Certificates, Series 2007-4	CWABS Asset-Backed Certificates Trust 2007-4	333-135846	CWABS, Inc.	3/1/2007	NYL	3/29/2007
CWL 2007-4 A6	Asset-Backed Certificates, Series 2007-4	CWABS Asset-Backed Certificates Trust 2007-4	333-135846	CWABS, Inc.	3/1/2007	NYL	3/29/2007
CWL 2007-4 A6	Asset-Backed Certificates, Series 2007-4	CWABS Asset-Backed Certificates Trust 2007-4	333-135846	CWABS, Inc.	3/1/2007	NYLIAC	3/29/2007

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<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWL 2007-4 A6	Asset-Backed Certificates, Series 2007-4	CWABS Asset-Backed Certificates Trust 2007-4	333-135846	CWABS, Inc.	3/1/2007	NYLIAC	3/29/2007
CWL 2007-4 A6	Asset-Backed Certificates, Series 2007-4	CWABS Asset-Backed Certificates Trust 2007-4	333-135846	CWABS, Inc.	3/1/2007	NYL	3/29/2007
CWL 2007-5 2A3	Asset-Backed Certificates, Series 2007-5	CWABS Asset-Backed Certificates Trust 2007-5	333-135846	CWABS, Inc.	3/30/2007	FSAM	8/7/2007
CWL 2007-9 2A3	Asset-Backed Certificates, Series 2007-9	CWABS Asset-Backed Certificates Trust 2007-9	333-140960	CWABS, Inc.	6/8/2007	FSAM	6/8/2007
CWL 2007-S1 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S1	CWHEQ Home Equity Loan Trust, Series 2007-S1	333-132375	CWHEQ, Inc.	2/1/2007	NYL	2/28/2007
CWL 2007-S1 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S1	CWHEQ Home Equity Loan Trust, Series 2007-S1	333-132375	CWHEQ, Inc.	2/1/2007	NYLIAC	2/28/2007
CWL 2007-S1 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S1	CWHEQ Home Equity Loan Trust, Series 2007-S1	333-132375	CWHEQ, Inc.	2/1/2007	NYL	2/28/2007

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CWL 2007-S1 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S1	CWHEQ Home Equity Loan Trust, Series 2007-S1	333-132375	CWHEQ, Inc.	2/1/2007	NYL	2/28/2007
CWL 2007-S1 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S1	CWHEQ Home Equity Loan Trust, Series 2007-S1	333-132375	CWHEQ, Inc.	2/1/2007	QAM	2/28/2007
CWL 2007-S1 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S1	CWHEQ Home Equity Loan Trust, Series 2007-S1	333-132375	CWHEQ, Inc.	2/1/2007	CFI	2/28/2007
CWL 2007-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S2	CWHEQ Home Equity Loan Trust, Series 2007-S2	333-132375	CWHEQ, Inc.	3/1/2007	CREF	3/30/2007
CWL 2007-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S2	CWHEQ Home Equity Loan Trust, Series 2007-S2	333-132375	CWHEQ, Inc.	3/1/2007	CREF	3/30/2007
CWL 2007-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S2	CWHEQ Home Equity Loan Trust, Series 2007-S2	333-132375	CWHEQ, Inc.	3/1/2007	TIAA-CREF Funds	3/30/2007
CWL 2007-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S2	CWHEQ Home Equity Loan Trust, Series 2007-S2	333-132375	CWHEQ, Inc.	3/1/2007	TIAA-CREF Funds	3/30/2007

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<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>
CWL 2007-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S2	CWHEQ Home Equity Loan Trust, Series 2007-S2	333-132375	CWHEQ, Inc.	3/1/2007	TIAA-CREF Funds	3/30/2007
CWL 2007-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S2	CWHEQ Home Equity Loan Trust, Series 2007-S2	333-132375	CWHEQ, Inc.	3/1/2007	TIAA	3/30/2007
CWL 2007-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S2	CWHEQ Home Equity Loan Trust, Series 2007-S2	333-132375	CWHEQ, Inc.	3/1/2007	TIAA	3/30/2007
CWL 2007-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S2	CWHEQ Home Equity Loan Trust, Series 2007-S2	333-132375	CWHEQ, Inc.	3/1/2007	TIAA-CREF LIC	3/30/2007
CWLN 2006-21 N	Countrywide Net Interest Margin Floating Rate Notes, Series 2006-21N	Countrywide Home Loan Trust 2006-21N	Private Placement	CWABS, Inc.	12/21/2006	FSAM	12/21/2006
CWLN 2006-21 N	Countrywide Net Interest Margin Floating Rate Notes, Series 2006-21N	Countrywide Home Loan Trust 2006-21N	Private Placement	CWABS, Inc.	12/21/2006	FSAM	3/5/2007
CWLN 2006-22 N	Countrywide Net Interest Margin Floating Rate Notes, Series 2006-22N	Countrywide Home Loan Trust 2006-22N	Private Placement	CWABS, Inc.	12/21/2006	FSAM	12/21/2006



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CWLN 2006-22 N	Countrywide Net Interest Margin Floating Rate Notes, Series 2006-22N	Countrywide Home Loan Trust 2006-22N	Private Placement	CWABS, Inc.	12/21/2006	FSAM	3/5/2007
CWLN 2006-23 N	Countrywide Net Interest Margin Floating Rate Notes, Series 2006-23N	Countrywide Home Loan Trust 2006-23N	Private Placement	CWABS, Inc.	12/21/2006	FSAM	12/21/2006
CWLN 2006-26 N	Countrywide Net Interest Margin Floating Rate Notes, Series 2006-26N	Countrywide Home Loan Trust 2006-26N	Private Placement	CWABS, Inc.	2/23/2007	FSAM	2/23/2007
CWLN 2006-26 N	Countrywide Net Interest Margin Floating Rate Notes, Series 2006-26N	Countrywide Home Loan Trust 2006-26N	Private Placement	CWABS, Inc.	2/23/2007	FSAM	7/27/2007
CWLN 2007-1 N	Countrywide Net Interest Margin Floating Rate Notes, Series 2007-1N	Countrywide Home Loan Trust 2007-1N	Private Placement	CWABS, Inc.	2/23/2007	FSAM	2/23/2007
CWLN 2007-1 N	Countrywide Net Interest Margin Floating Rate Notes, Series 2007-1N	Countrywide Home Loan Trust 2007-1N	Private Placement	CWABS, Inc.	2/23/2007	FSAM	7/27/2007
CWLN 2007-2 N	Countrywide Net Interest Margin Floating Rate Notes, Series 2007-2N	Countrywide Home Loan Trust 2007-2N	Private Placement	CWABS, Inc.	3/16/2007	FSAM	3/16/2007

**Exhibit 2: Original and Current Ratings on Plaintiffs' Countrywide Certificates**

Certificate Offering and Class	Original Moody's Rating	Current Moody's Rating	Original Fitch Rating	Current Fitch Rating	Original S&P Rating	Current S&P Rating
CWALT 2004-13CB A3	Aaa	A2/*-	--	--	AAA	AAA
CWALT 2004-16CB 1A2	Aaa	Aa2/*-	--	--	AAA	AAA
CWALT 2004-28CB 1A3	Aaa	A3/*-	--	--	AAA	AAA
CWALT 2004-29CB A7	--	--	AAA	BBB	AAA	AAA
CWALT 2004-30CB 1A15	Aaa	Baa1/*-	--	--	AAA	AAA
CWALT 2004-30CB 2A3	Aaa	Baa1/*-	--	--	AAA	AAA
CWALT 2004-30CB 2A4	Aaa	Baa1/*-	--	--	AAA	AAA
CWALT 2004-31T1 A2	--	--	AAA	A	AAA	AAA/*-
CWALT 2004-36CB M	NR	NR	--	--	AA	CCC
CWALT 2004-J4 2A1	Aaa	Aa2/*-	--	--	AAA	AAA
CWALT 2005-10CB 1A5	Aaa	B3	--	--	AAA	AAA
CWALT 2005-11CB 2A2	Aaa	Caa2	--	--	AAA	BB+
CWALT 2005-11CB 2A4	Aaa	Caa1	--	--	AAA	AAA
CWALT 2005-11CB 3A1	Aaa	Caa2	--	--	AAA	AAA
CWALT 2005-12R A5	--	--	AAA	BB	AAA	AAA
CWALT 2005-14 4A1	Aaa	Caa2	--	--	AAA	A-
CWALT 2005-18CB A5	Aaa	Caa1	--	--	AAA	AAA
CWALT 2005-1CB 1A3	Aaa	Caa1	--	--	AAA	AAA
CWALT 2005-20CB 1A2	Aaa	Caa2	--	--	AAA	B-
CWALT 2005-20CB 2A4	Aaa	Caa2	--	--	AAA	A+
CWALT 2005-21CB A10	Aaa	Caa2	--	--	AAA	B-
CWALT 2005-21CB A5	Aaa	Caa2	--	--	AAA	B-
CWALT 2005-22T1 A5	NR	NR	AAA	C	AAA	CCC
CWALT 2005-23CB A4	Aaa	B3	--	--	AAA	AAA
CWALT 2005-25T1 A6	--	--	AAA	CCC	AAA	CCC
CWALT 2005-30CB 1A3	Aaa	Caa2	--	--	AAA	AA+
CWALT 2005-30CB 1A4	Aaa	Caa2	--	--	AAA	AA-

**Exhibit 2: Original and Current Ratings on Plaintiffs' Countrywide Certificates**

<b>Certificate Offering and Class</b>	<b>Original Moody's Rating</b>	<b>Current Moody's Rating</b>	<b>Original Fitch Rating</b>	<b>Current Fitch Rating</b>	<b>Original S&amp;P Rating</b>	<b>Current S&amp;P Rating</b>
CWALT 2005-31 2A3	Aaa	C	--	--	AAA	CCC
CWALT 2005-32T1 A6	--	--	AAA	CC	AAA	CCC
CWALT 2005-34CB 1A4	Aaa	Caa1	--	--	AAA	AAA
CWALT 2005-36 2A1B	Aaa	Ba3	--	--	AAA	B+
CWALT 2005-4 1A6	Aaa	B3	--	--	AAA	B+
CWALT 2005-42CB A12	Aa1	C	--	--	AAA	CCC
CWALT 2005-42CB A8	Aaa	Caa2	--	--	AAA	CCC
CWALT 2005-46CB A3	Aaa	Caa2	AAA	CC	--	--
CWALT 2005-49CB A8	Aaa	Caa2	AAA	C	--	--
CWALT 2005-51 1A3B	Aaa	Caa3	--	--	AAA	CC
CWALT 2005-51 2A3B	Aaa	B2	--	--	AAA	CC
CWALT 2005-51 3AB2	Aaa	Ca	--	--	AAA	CC
CWALT 2005-57CB 3A5	Aaa	Caa3	AAA	C	--	--
CWALT 2005-57CB 4A5	Aaa	Caa3	AAA	C	--	--
CWALT 2005-61 1A3	Aaa	Ca	--	--	AAA	CCC
CWALT 2005-65CB 1A8	Aaa	Caa2	--	--	AAA	CCC
CWALT 2005-6CB 1A6	--	--	AAA	CCC	AAA	AAA
CWALT 2005-6CB 1A7	--	--	AAA	CCC	AAA	AAA
CWALT 2005-73CB 1A11	Aaa	Caa2	--	--	AAA	CCC
CWALT 2005-73CB 1A9	Aaa	Caa2	--	--	AAA	CCC
CWALT 2005-75CB A5	Aaa	Caa2	--	--	AAA	CCC
CWALT 2005-7CB 2A3	Aaa	Caa1	--	--	AAA	AA
CWALT 2005-84 1A2	Aaa	C	--	--	AAA	D
CWALT 2005-86CB A11	Aaa	Caa3	--	--	AAA	CCC
CWALT 2005-86CB A2	Aaa	C	--	--	AAA	CC
CWALT 2005-9CB 1A7	Aaa	Caa2	--	--	AAA	BB-
CWALT 2005-J12 1A2	Aaa	Caa1	--	--	AAA	CCC

**Exhibit 2: Original and Current Ratings on Plaintiffs' Countrywide Certificates**

Certificate Offering and Class	Original Moody's Rating	Current Moody's Rating	Original Fitch Rating	Current Fitch Rating	Original S&P Rating	Current S&P Rating
CWALT 2005-J12 1A3	Aaa	Caa2	--	--	AAA	CCC
CWALT 2005-J12 1A5	Aaa	Caa2	--	--	AAA	CCC
CWALT 2005-J14 A7	Aaa	Caa3	--	--	AAA	CCC
CWALT 2005-J2 1A4	--	--	AAA	B	AAA	AAA
CWALT 2005-J6 1A10	Aaa	Caa1	--	--	AAA	B
CWALT 2006-12CB A10	Aaa	Caa3	AAA	C	--	--
CWALT 2006-19CB A5	Aaa	Caa3	AAA	CC	AAA	CCC
CWALT 2006-19CB A6	Aaa	Caa3	AAA	C	AAA	CC
CWALT 2006-21CB A3	Aaa	Caa3	AAA	C	AAA	CC
CWALT 2006-32CB A17	Aaa	Caa3	AAA	CC	AAA	CCC
CWALT 2006-42 1A4	Aaa	Ca	AAA	C	AAA	CC
CWALT 2006-42 1A5	Aaa	Ca	AAA	C	AAA	CC
CWALT 2006-43CB 1A8	--	--	AAA	C	AAA	CC
CWALT 2006-HY11 A2	Aaa	C	--	--	AAA	CC
CWALT 2006-HY13 2A2	--	--	AAA	C	AAA	CCC
CWALT 2006-HY13 3A1	--	--	AAA	CC	AAA	CCC
CWALT 2006-J1 1A10	Aaa	Caa3	--	--	AAA	CC
CWALT 2006-J1 1A11	Aaa	Caa3	--	--	AAA	CCC
CWALT 2006-OA16 A4B	Aaa	C	--	--	AAA	CCC
CWALT 2006-OA17 1A2C	Aaa	Ca	--	--	AAA	CCC
CWALT 2006-OA2 A2A	Aaa	Ba2	--	--	AAA	BBB
CWALT 2006-OA6 1A4C	Aaa	C	--	--	AAA	CCC
CWALT 2006-OA8 2A2	Aaa	B3/*-	--	--	AAA	CCC
CWALT 2006-OA8 2A3	Aaa	Caa3/*-	--	--	AAA	CCC
CWALT 2006-OC10 2A1	Aaa	Caa1	--	--	AAA	D
CWALT 2006-OC11 2A2B	Aaa	C	--	--	AAA	D
CWALT 2006-OC7 2A3	Aaa	C	--	--	AAA	D

**Exhibit 2: Original and Current Ratings on Plaintiffs' Countrywide Certificates**

<b>Certificate Offering and Class</b>	<b>Original Moody's Rating</b>	<b>Current Moody's Rating</b>	<b>Original Fitch Rating</b>	<b>Current Fitch Rating</b>	<b>Original S&amp;P Rating</b>	<b>Current S&amp;P Rating</b>
CWALT 2006-OC8 2A2C	Aaa	C	--	--	AAA	D
CWALT 2007-12T1 A6	Aaa	Caa3	AAA	C	AAA	CCC
CWALT 2007-13 A4	Aaa	Caa3	AAA	C	AAA	CCC
CWALT 2007-15CB A19	Aaa	Caa3	--	--	AAA	CC
CWALT 2007-17CB 1A1	Aaa	Caa2	AAA	CC	AAA	CCC
CWALT 2007-18CB 2A18	Aaa	Caa3	AAA	C	AAA	CCC
CWALT 2007-21CB 1A4	Aaa	Caa2	--	--	AAA	CCC
CWALT 2007-2CB 1A10	Aaa	Caa3	AAA	C	AAA	CCC
CWALT 2007-4CB 1A10	Aaa	Caa3	AAA	C	AAA	CC
CWALT 2007-HY4 3A1	Aaa	Caa3	--	--	AAA	CCC
CWHEL 2004-B 1A	Aaa	Caa2	--	--	AAA	CCC
CWHEL 2006-D 2A	Aaa	Ca/*-	--	--	AAA	D
CWHEL 2006-E 2A	Aaa	B3/*-	--	--	AAA	BB+
CWHEL 2006-H 2A1A	Aaa	C	--	--	AAA	CC
CWHEL 2007-GW A	Aaa	Aa3	--	--	AAA	AA+
CWHL 2004-12 11A2	Aaa	Ba1/*-	--	--	AAA	BB+
CWHL 2004-12 11A3	Aa1	Ba2/*-	--	--	AAA	B+
CWHL 2004-13 1A7	Aaa	Aa3/*-	AAA	AAA	--	--
CWHL 2005-17 1A10	--	--	AAA	B	AAA	CCC
CWHL 2005-18 A3	--	--	AAA	BBB	AAA	BB
CWHL 2005-19 1A7	Aaa	Caa2	AAA	CCC	--	--
CWHL 2005-21 2A3	Aaa	Caa2	AAA	CCC	--	--
CWHL 2005-24 A2	--	--	AAA	CC	AAA	CCC
CWHL 2005-24 A37	--	--	AAA	CC	AAA	CCC
CWHL 2005-31 1A1	Aaa	Caa3	AAA	C/*-	AAA	CCC
CWHL 2005-4 6A1	Aaa	Ca	--	--	AAA	A-

**Exhibit 2: Original and Current Ratings on Plaintiffs' Countrywide Certificates**

Certificate Offering and Class	Original Moody's Rating	Current Moody's Rating	Original Fitch Rating	Current Fitch Rating	Original S&P Rating	Current S&P Rating
CWHL 2005-HYB10 5A1 (listed on Bloomberg as CWHL 2005-HY10 5A1)	Aaa	Caa3	--	--	AAA	CCC
CWHL 2005-HYB2 1A4	Aaa	Caa3	--	--	AAA	B
CWHL 2005-HYB3 1A1	Aaa	Caa3	--	--	AAA	B-
CWHL 2005-HYB3 2A5B	Aaa	Caa1	--	--	AAA	B
CWHL 2005-HYB7 1A1	Aaa	Caa3	--	--	AAA	CCC
CWHL 2005-HYB9 5A2	Aaa	C	--	--	AAA	CC
CWHL 2005-J1 1A2	--	--	AAA	BB	--	--
CWHL 2005-J1 2A1	--	--	AAA	BB	--	--
CWHL 2005-J1 B1	--	--	A	CC	--	--
CWHL 2005-J1 B2	--	--	BBB	C	--	--
CWHL 2005-J1 B3	--	--	BB	C	--	--
CWHL 2005-J1 B4	--	--	B	C	--	--
CWHL 2005-J1 B5	--	--	--	--	--	--
CWHL 2005-J1 M	--	--	AA	CC	--	--
CWHL 2005-J2 1A2	Aaa	A3	AAA	AAA	--	--
CWHL 2005-J2 1A3	Aaa	Ba3	AAA	AA	--	--
CWHL 2005-J2 1A4	Aaa	Ba2	AAA	AAA/*-	--	--
CWHL 2005-J2 2A1	Aaa	B3	AAA	CCC	--	--
CWHL 2005-J2 IB1	NR	NR	A	B	--	--
CWHL 2005-J2 IB2	NR	NR	BBB	CC	--	--
CWHL 2005-J2 IB3	NR	NR	BB	C	--	--
CWHL 2005-J2 IB4	NR	NR	B	C	--	--
CWHL 2005-J2 IB5	NR	NR	--	--	--	--
CWHL 2005-J2 IM	NR	NR	AA	BBB	--	--
CWHL 2005-J4 A5	Aaa	Caa1	AAA	BB	--	--

**Exhibit 2: Original and Current Ratings on Plaintiffs' Countrywide Certificates**

Certificate Offering and Class	Original Moody's Rating	Current Moody's Rating	Original Fitch Rating	Current Fitch Rating	Original S&P Rating	Current S&P Rating
CWHL 2006-13 1A4	Aaa	Caa2	AAA	CC	AAA	CCC
CWHL 2006-14 A6	Aaa	Caa2	AAA	CC	--	--
CWHL 2006-15 A4	Aaa	Caa2	AAA	CC	--	--
CWHL 2006-15 A5	Aaa	Caa2	AAA	CC	--	--
CWHL 2006-19 1A4	Aaa	Caa1	AAA	B	AAA	B
CWHL 2006-20 1A3	Aaa	Caa2	AAA	CC	AAA	CCC
CWHL 2006-9 A5	--	--	AAA	C	AAA	CCC
CWHL 2006-HYB5 1A2	Aaa	C	--	--	AAA	D
CWHL 2006-HYB5 3A1A	Aaa	Ca	--	--	AAA	CC
CWHL 2006-J1 1A2	Aaa	Caa2	AAA	C	--	--
CWHL 2006-J3 A3	--	--	AAA	BB	AAA	AA-
CWHL 2006-J4 A12	Aaa	Caa3	AAA	C	--	--
CWHL 2006-J4 A6	Aaa	Caa3	AAA	CC	--	--
CWHL 2006-J4 A8	Aaa	Caa3	AAA	C	--	--
CWHL 2007-1 A8	--	--	AAA	CCC	AAA	CCC
CWHL 2007-10 A19	Aaa	Caa2	AAA	CC	AAA	CCC
CWHL 2007-11 A10	Aaa	Caa2	AAA	C	AAA	CCC
CWHL 2007-13 A2	NR	NR	AAA	CC	AAA	CCC
CWHL 2007-14 A10	NR	NR	AAA	CCC	AAA	B-
CWHL 2007-14 A15	NR	NR	AAA	CCC	AAA	B-
CWHL 2007-15 1A20	--	--	AAA	CC	AAA	CCC
CWHL 2007-4 1A11	Aaa	Caa3	AAA	C	--	--
CWHL 2007-5 A2	Aaa	Caa2	AAA	CC	AAA	CCC
CWHL 2007-7 A8	--	--	AAA	C	AAA	CCC
CWHL 2007-HY3 4A1	Aaa	Caa2	--	--	AAA	CCC
CWL 2004-15 AF5	Aaa	Aaa/*-	--	--	AAA	AAA
CWL 2004-3 2A	Aaa	Aaa/*-	--	--	AAA	AAA

**Exhibit 2: Original and Current Ratings on Plaintiffs' Countrywide Certificates**

<b>Certificate Offering and Class</b>	<b>Original Moody's Rating</b>	<b>Current Moody's Rating</b>	<b>Original Fitch Rating</b>	<b>Current Fitch Rating</b>	<b>Original S&amp;P Rating</b>	<b>Current S&amp;P Rating</b>
CWL 2004-S1 A3	Aaa	Aa3/*-	--	--	AAA	AAA
CWL 2005-12 2A5	Aaa	Ba3	--	--	AAA	AAA
CWL 2005-13 AF4	Aaa	Caa3	--	--	AAA	CCC
CWL 2005-16 4AV3	Aaa	Ba2	--	--	AAA	BB
CWL 2005-17 1AF3	Aaa	Caa3	--	--	AAA	CC
CWL 2005-17 1AF4	Aaa	Ca	--	--	AAA	CC
CWL 2005-2 2A4	Aaa	Aaa	--	--	AAA	AAA
CWL 2005-7 AF3	Aaa	A2	--	--	AAA	AAA
CWL 2005-IM1 A4	Aaa	Ca	--	--	AAA	A-
CWL 2005-IM2 A4	Aaa	C	--	--	AAA	CCC
CWL 2005-IM3 A3	Aaa	Caa3	--	--	AAA	CCC
CWL 2006-24 2A2	Aaa	B3	--	--	AAA	BBB-
CWL 2006-8 2A3	Aaa	Caa3	--	--	AAA	B-
CWL 2006-ABC1 A2	Aaa	Ca	--	--	AAA	CCC
CWL 2006-BC2 2A3	Aaa	B2	--	--	AAA	A-
CWL 2006-BC4 2A3	Aaa	C	--	--	AAA	B+
CWL 2006-S2 A3	Aaa	Ca	--	--	AAA	D
CWL 2006-S3 A1	Aaa	Caa2	--	--	AAA	D
CWL 2006-S3 A3	Aaa	C	--	--	AAA	D
CWL 2006-S3 A4	Aaa	C	--	--	AAA	D
CWL 2006-S4 A4	Aaa	C	--	--	AAA	D
CWL 2006-S5 A3	Aaa	C	--	--	AAA	D
CWL 2006-S7 A3	Aaa	Ca	--	--	AAA	D
CWL 2006-S8 A3	Aaa	B3/*-	--	--	AAA	BB+
CWL 2007-12 2A2	Aaa	Caa1	--	--	AAA	BBB
CWL 2007-12 2A3	Aaa	Ca	--	--	AAA	BB
CWL 2007-2 2A3	Aaa	Ca	--	--	AAA	B-



**Exhibit 2: Original and Current Ratings on Plaintiffs' Countrywide Certificates**

<b>Certificate Offering and Class</b>	<b>Original Moody's Rating</b>	<b>Current Moody's Rating</b>	<b>Original Fitch Rating</b>	<b>Current Fitch Rating</b>	<b>Original S&amp;P Rating</b>	<b>Current S&amp;P Rating</b>
CWL 2007-4 A2	Aaa	B1	--	--	AAA	CCC
CWL 2007-4 A3	Aaa	Caa3	--	--	AAA	CCC
CWL 2007-4 A6	Aaa	Caa3	--	--	AAA	CCC
CWL 2007-5 2A3	Aaa	Ca	--	--	AAA	B
CWL 2007-9 2A3	Aaa	Ca	--	--	AAA	B
CWL 2007-S1 A3	Aaa	B3/*-	--	--	AAA	BB+
CWL 2007-S2 A3	Aaa	B3/*-	--	--	AAA	BB+
CWLN 2006-21 N	--	--	--	--	AA	B+
CWLN 2006-22 N	--	--	--	--	AA	B+
CWLN 2006-23 N	--	--	--	--	AA	B+
CWLN 2006-26 N	--	--	--	--	AA	B+
CWLN 2007-1 N	--	--	--	--	AA	B+
CWLN 2007-2 N	--	--	--	--	AA	B+

**Exhibit 3: Countrywide Certificates' Loan Delinquency**

#	Issuing Trust	Issue Date	Plaintiff	No. of Loans in Trust at Issuance	No. of Loans Currently Active	Total % of Current Delinquencies (30 Day + 60-Day + 90-Day + REO + Foreclosure)
1	CWALT 2004-13CB	05/01/04	TIAA	1,567	737	8.50
2	CWALT 2004-16CB	06/01/04	NYL	2,624	6,325	12.57
3	CWALT 2004-28CB	11/01/04	NYL	7,314	3,121	16.81
4	CWALT 2004-29CB	11/01/04	TIAA	3,537	1,625	15.63
5	CWALT 2004-30CB	12/01/04	TIAA	5,905	1,924	15.74
6	CWALT 2004-31T1	10/25/04	TIAA	568	196	15.49
7	CWALT 2004-36CB	12/01/04	TIAA	5,593	2,404	22.90
8	CWALT 2004-J4	04/30/04	FSAM	2,222	88	16.88
9	CWALT 2005-10CB	03/01/05	TIAA	6,462	3,018	15.95
10	CWALT 2005-11CB	04/01/05	NYL	6,436	1,771	15.86
11	CWALT 2005-12R	03/01/05	TIAA	639	234	24.24
12	CWALT 2005-14	03/30/05	FSAM	3,772	187	53.61
13	CWALT 2005-18CB	03/01/05	TIAA	4,088	2,137	15.67
14	CWALT 2005-1CB	01/01/05	TIAA	6,391	1,518	20.87
15	CWALT 2005-20CB	05/01/05	TIAA	6,543	1,202	19.58
16	CWALT 2005-21CB	04/01/05	NYL	4,212	2,220	18.91
17	CWALT 2005-22T1	04/01/05	NYL	478	250	25.62
18	CWALT 2005-23CB	04/01/05	TIAA	3,970	2,037	13.78
19	CWALT 2005-25T1	05/01/05	NYL	533	286	29.43
20	CWALT 2005-30CB	06/01/05	NYL	3,063	1,288	19.70
21	CWALT 2005-31	06/29/05	FSAM	2,639	293	49.81
22	CWALT 2005-32T1	06/01/05	NYL	667	386	30.96
23	CWALT 2005-34CB	07/01/05	TIAA	2,185	1,242	17.55
24	CWALT 2005-36	06/24/05	FSAM	2,066	316	42.18
25	CWALT 2005-4	02/01/05	TIAA	1,043	253	21.22
26	CWALT 2005-42CB	08/01/05	TIAA	1,958	1,130	21.26

**Exhibit 3: Countrywide Certificates' Loan Delinquency**

#	Issuing Trust	Issue Date	Plaintiff	No. of Loans in Trust at Issuance	No. of Loans Currently Active	Total % of Current Delinquencies (30 Day + 60-Day + 90-Day + REO + Foreclosure)
27	CWALT 2005-46CB	08/01/05	NYL	6,346	3,786	17.63
28	CWALT 2005-49CB	09/01/05	TIAA	2,825	1,643	19.76
29	CWALT 2005-51	09/30/05	FSAM	4,297	442	55.87
30	CWALT 2005-57CB	10/01/05	NYL	4,236	808	22.86
31	CWALT 2005-61	10/27/05	FSAM	1,872	221	65.74
32	CWALT 2005-65CB	11/01/05	NYL	4,983	1,592	20.98
33	CWALT 2005-6CB	02/01/05	NYL	6,420	2,846	16.83
34	CWALT 2005-73CB	11/01/05	NYL	1,791	519	21.27
35	CWALT 2005-75CB	11/01/05	NYL	2,000	1,227	18.34
36	CWALT 2005-7CB	02/01/05	TIAA	5,506	1,299	16.65
37	CWALT 2005-84	12/01/05	NYL	4,403	104	39.36
38	CWALT 2005-86CB	12/01/05	NYL	4,822	2,801	27.10
39	CWALT 2005-9CB	03/01/05	TIAA	3,526	1,490	17.07
40	CWALT 2005-J12	10/01/05	TIAA	2,732	392	49.56
41	CWALT 2005-J14	11/01/05	NYL	2,016	1,224	25.44
42	CWALT 2005-J2	02/01/05	TIAA	1,926	846	21.65
43	CWALT 2005-J6	05/01/05	NYL	714	270	20.69
44	CWALT 2006-12CB	10/25/04	TIAA	3,070	1,716	35.39
45	CWALT 2006-19CB	06/01/06	TIAA	7,198	4,236	26.60
46	CWALT 2006-21CB	05/01/06	NYL	2,542	1,462	27.49
47	CWALT 2006-32CB	09/01/06	NYL	2,898	1,743	29.07
48	CWALT 2006-42	11/01/06	TIAA	866	566	35.95
49	CWALT 2006-43CB	12/25/06	TIAA	4,211	2,595	32.71
50	CWALT 2006-HY11	04/28/06	FSAM	1,811	1,000	45.68
51	CWALT 2006-HY13	12/01/06	NYL	1,346	85	31.62
52	CWALT 2006-J1	01/01/06	NYL	2,744	1,538	29.87

**Exhibit 3: Countrywide Certificates' Loan Delinquency**

#	Issuing Trust	Issue Date	Plaintiff	No. of Loans in Trust at Issuance	No. of Loans Currently Active	Total % of Current Delinquencies (30 Day + 60-Day + 90-Day + REO + Foreclosure)
53	CWALT 2006-OA16	08/30/06	FSAM	3,127	1,744	60.58
54	CWALT 2006-OA17	09/29/06	FSAM	4,021	2,205	61.21
55	CWALT 2006-OA2	03/30/06	FSAM	4,107	1,980	63.73
56	CWALT 2006-OA6	05/17/06	FSAM	2,689	1,262	60.99
57	CWALT 2006-OA8	05/31/06	FSAM	1,497	276	62.97
58	CWALT 2006-OC10	11/30/06	NYL	3,499	1,426	60.52
59	CWALT 2006-OC11	12/29/06	FSAM	3,776	1,488	62.36
60	CWALT 2006-OC7	08/30/06	FSAM	2,251	679	58.19
61	CWALT 2006-OC8	09/29/06	FSAM	6,733	2,814	58.87
62	CWALT 2007-12T1	04/01/07	TIAA	1,289	942	38.05
63	CWALT 2007-13	04/01/07	TIAA	707	538	33.28
64	CWALT 2007-15CB	05/01/07	TIAA	2,841	1,964	25.75
65	CWALT 2007-17CB	06/01/07	NYL	3,090	1,658	22.08
66	CWALT 2007-18CB	06/01/07	TIAA	3,026	1,282	26.32
67	CWALT 2007-21CB	07/01/07	TIAA	3,323	1,397	21.14
68	CWALT 2007-2CB	01/01/07	TIAA	4,274	1,682	28.91
69	CWALT 2007-4CB	02/01/07	TIAA	2,612	1,629	27.98
70	CWALT 2007-HY4	05/01/07	NYL	2,018	1,357	40.97
71	CWHEL 2004-B	03/31/04	FSAM	1,564	1,017	13.75
72	CWHEL 2006-D	03/30/06	FSAM-NYL	19,953	10,075	19.71
73	CWHEL 2006-E	06/29/06	FSAM	13,329	5,717	20.64
74	CWHEL 2006-H	09/29/06	NYL	23,033	10,975	19.61
75	CWHEL 2007-GW	08/15/07	TIAA	18,168	10,005	4.67
76	CWHL 2004-12	06/01/04	NYL	14,524	3,150	26.08
77	CWHL 2004-13	06/01/04	NYL	1,522	571	6.94
78	CWHL 2005-17	07/01/05	TIAA	1,132	451	14.15

**Exhibit 3: Countrywide Certificates' Loan Delinquency**

#	Issuing Trust	Issue Date	Plaintiff	No. of Loans in Trust at Issuance	No. of Loans Currently Active	Total % of Current Delinquencies (30 Day + 60-Day + 90-Day + REO + Foreclosure)
79	CWHL 2005-18	08/01/05	NYL	766	497	15.28
80	CWHL 2005-19	07/01/05	TIAA	739	444	14.98
81	CWHL 2005-21	08/01/05	NYL	1,795	202	15.14
82	CWHL 2005-24	09/01/05	TIAA	1,928	1,215	14.97
83	CWHL 2005-31	12/01/05	NYL	1,061	31	27.56
84	CWHL 2005-4	01/28/05	FSAM	3,718	56	48.38
85	CWHL 2005-HY10	12/01/05	NYL	2,943	1,464	38.17
86	CWHL 2005-HYB2	03/01/05	NYL	1,169	83	27.58
87	CWHL 2005-HYB3	04/01/05	NYL	1,172	51	27.83
88	CWHL 2005-HYB7	09/01/05	NYL	2,469	76	38.08
89	CWHL 2005-HYB9	11/01/05	NYL	3,042	201	32.12
90	CWHL 2005-J1	04/01/05	NYL	215	57	9.41
91	CWHL 2005-J2	06/01/05	NYL	1,545	178	19.15
92	CWHL 2005-J4	10/01/05	NYL	297	232	46.97
93	CWHL 2006-13	07/01/06	TIAA	832	429	24.98
94	CWHL 2006-14	07/01/06	TIAA	589	296	16.16
95	CWHL 2006-15	08/01/06	TIAA	646	350	21.67
96	CWHL 2006-19	11/01/06	TIAA	2,001	1,249	18.17
97	CWHL 2006-20	12/01/06	TIAA	1,641	1,091	18.66
98	CWHL 2006-9	03/01/06	TIAA	679	405	20.67
99	CWHL 2006-HYB5	07/01/06	NYL	998	41	42.89
100	CWHL 2006-J1	01/01/06	TIAA	757	292	24.88
101	CWHL 2006-J3	05/01/06	NYL	377	223	9.26
102	CWHL 2006-J4	07/01/06	TIAA	666	387	25.60
103	CWHL 2007-1	01/01/07	TIAA	1,210	801	19.19
104	CWHL 2007-10	05/01/07	TIAA	1,047	720	23.42

**Exhibit 3: Countrywide Certificates' Loan Delinquency**

#	Issuing Trust	Issue Date	Plaintiff	No. of Loans in Trust at Issuance	No. of Loans Currently Active	Total % of Current Delinquencies (30 Day + 60-Day + 90-Day + REO + Foreclosure)
105	CWHL 2007-11	06/01/07	TIAA	1,597	1,133	21.42
106	CWHL 2007-13	06/01/07	TIAA	920	611	17.23
107	CWHL 2007-14	07/01/07	TIAA	1,182	790	11.96
108	CWHL 2007-15	07/01/07	TIAA	1,690	599	20.58
109	CWHL 2007-4	03/01/07	TIAA	1,751	1,220	24.95
110	CWHL 2007-5	03/01/07	NYL	1,349	946	17.35
111	CWHL 2007-7	04/01/07	NYL	1,208	876	15.64
112	CWHL 2007-HY3	04/01/07	NYL	903	307	23.62
113	CWL 2004-15	12/01/04	TIAA	8,807	861	49.65
114	CWL 2004-3	03/30/04	FSAM	11,317	347	36.54
115	CWL 2004-S1	12/01/04	NYL	10,259	2,225	3.27
116	CWL 2005-12	09/01/05	NYL	4,805	885	55.22
117	CWL 2005-13	11/01/05	TIAA	9,979	805	55.89
118	CWL 2005-16	12/28/05	FSAM	12,548	1,229	46.36
119	CWL 2005-17	12/01/05	TIAA	13,648	2,828	51.51
120	CWL 2005-2	03/30/05	FSAM	6,730	763	54.36
121	CWL 2005-7	06/01/05	TIAA	12,263	2,625	49.12
122	CWL 2005-IM1	08/30/05	FSAM	3,457	721	46.00
123	CWL 2005-IM2	10/28/05	FSAM	2,597	569	53.23
124	CWL 2005-IM3	12/21/05	FSAM	3,869	931	65.20
125	CWL 2006-24	12/29/06	FSAM	6,769	2,341	64.02
126	CWL 2006-8	06/28/06	FSAM	11,268	4,388	61.48
127	CWL 2006-ABC1	06/29/06	FSAM	1,596	596	70.58
128	CWL 2006-BC2	05/30/06	FSAM	2,730	461	65.90
129	CWL 2006-BC4	09/29/06	FSAM	3,272	853	66.38
130	CWL 2006-S2	03/01/06	NYL	22,134	8,551	7.53

**Exhibit 3: Countrywide Certificates' Loan Delinquency**

#	Issuing Trust	Issue Date	Plaintiff	No. of Loans in Trust at Issuance	No. of Loans Currently Active	Total % of Current Delinquencies (30 Day + 60-Day + 90-Day + REO + Foreclosure)
131	CWL 2006-S3	06/29/06	NYL	22,971	9,402	8.94
132	CWL 2006-S4	08/01/06	TIAA	19,002	7,994	10.41
133	CWL 2006-S5	09/01/06	NYL	17,239	7,227	11.01
134	CWL 2006-S7	11/01/06	NYL	18,395	8,485	11.74
135	CWL 2006-S8	12/01/06	NYL	19,106	8,865	7.63
136	CWL 2007-12	08/13/07	FSAM	7,345	2,539	59.06
137	CWL 2007-2	02/28/07	FSAM	7,710	2,911	63.28
138	CWL 2007-4	03/01/07	NYL	5,643	4,297	47.48
139	CWL 2007-5	03/30/07	FSAM	5,571	2,005	66.45
140	CWL 2007-9	06/08/07	FSAM	6,084	2,234	60.88
141	CWL 2007-S1	02/01/07	NYL	30,222	14,895	8.38
142	CWL 2007-S2	03/01/07	TIAA	20,462	10,860	7.10
143	CWLN 2006-21	12/21/06	FSAM	4,213	3,278	64.26
144	CWLN 2006-22	12/21/06	FSAM	--	4,890	63.95
145	CWLN 2006-23	12/21/06	FSAM	--	4,914	63.04
146	CWLN 2006-26	02/23/07	FSAM	5,898	3,778	58.76
147	CWLN 2007-1	02/23/07	FSAM	--	--	--
148	CWLN 2007-2	03/16/07	FSAM	--	--	--
					<b>Average:</b>	<b>31.51</b>

**Exhibit 4: Tolling Chart**

<b>Certificate Offerings</b>	<b>Included in November 2007 <i>Luther</i></b>	<b>Included in June 2008 <i>Washington State</i></b>	<b>Included in October 2008 <i>Luther</i></b>	<b>Included in January 2010 <i>Maine State</i></b>
CWALT 2004-13CB	No	No	No	No
CWALT 2004-16CB	No	No	No	No
CWALT 2004-28CB	No	No	No	No
CWALT 2004-29CB	No	No	No	No
CWALT 2004-30CB	No	No	No	No
CWALT 2004-31T1	No	No	No	No
CWALT 2004-36CB	No	No	No	No
CWALT 2004-J4	No	No	No	No
CWALT 2005-10CB	Yes	No	Yes	Yes
CWALT 2005-11CB	Yes	No	Yes	Yes
CWALT 2005-12R	No	No	No	No
CWALT 2005-14	Yes	No	Yes	Yes
CWALT 2005-18CB	Yes	No	Yes	Yes
CWALT 2005-1CB	Yes	No	Yes	Yes
CWALT 2005-20CB	Yes	No	Yes	Yes
CWALT 2005-21CB	Yes	No	Yes	Yes
CWALT 2005-22T1	Yes	No	Yes	Yes
CWALT 2005-23CB	Yes	No	Yes	Yes
CWALT 2005-25T1	Yes	No	Yes	Yes
CWALT 2005-30CB	Yes	Yes	Yes	Yes
CWALT 2005-31	Yes	Yes	Yes	Yes
CWALT 2005-32T1	Yes	Yes	Yes	Yes
CWALT 2005-34CB	Yes	Yes	Yes	Yes
CWALT 2005-36	Yes	Yes	Yes	Yes
CWALT 2005-4	Yes	No	Yes	Yes
CWALT 2005-42CB	Yes	Yes	Yes	Yes
CWALT 2005-46CB	Yes	Yes	Yes	Yes
CWALT 2005-49CB	Yes	Yes	Yes	Yes
CWALT 2005-51	Yes	Yes	Yes	Yes
CWALT 2005-57CB	Yes	Yes	Yes	Yes
CWALT 2005-61	Yes	Yes	Yes	Yes



**Exhibit 4: Tolling Chart**

<b>Certificate Offerings</b>	<b>Included in November 2007 <i>Luther</i></b>	<b>Included in June 2008 <i>Washington State</i></b>	<b>Included in October 2008 <i>Luther</i></b>	<b>Included in January 2010 <i>Maine State</i></b>
CWALT 2005-65CB	Yes	Yes	Yes	Yes
CWALT 2005-6CB	Yes	No	Yes	Yes
CWALT 2005-73CB	Yes	Yes	Yes	Yes
CWALT 2005-75CB	Yes	Yes	Yes	Yes
CWALT 2005-7CB	Yes	No	Yes	Yes
CWALT 2005-84	Yes	Yes	Yes	Yes
CWALT 2005-86CB	Yes	Yes	Yes	Yes
CWALT 2005-9CB	Yes	No	Yes	Yes
CWALT 2005-J12	Yes	Yes	Yes	Yes
CWALT 2005-J14	Yes	Yes	Yes	Yes
CWALT 2005-J2	No	No	Yes	Yes
CWALT 2005-J6	Yes	No	Yes	Yes
CWALT 2006-12CB	Yes	Yes	Yes	Yes
CWALT 2006-19CB	Yes	Yes	Yes	Yes
CWALT 2006-21CB	Yes	Yes	Yes	Yes
CWALT 2006-32CB	Yes	Yes	Yes	Yes
CWALT 2006-42	Yes	Yes	Yes	Yes
CWALT 2006-43CB	No	Yes	Yes	Yes
CWALT 2006-HY11	Yes	Yes	Yes	Yes
CWALT 2006-HY13	Yes	Yes	Yes	Yes
CWALT 2006-J1	Yes	Yes	Yes	Yes
CWALT 2006-OA16	Yes	Yes	Yes	Yes
CWALT 2006-OA17	Yes	Yes	Yes	Yes
CWALT 2006-OA2	No	Yes	Yes	Yes
CWALT 2006-OA6	Yes	Yes	Yes	Yes
CWALT 2006-OA8	Yes	Yes	Yes	Yes
CWALT 2006-OC10	Yes	Yes	Yes	Yes
CWALT 2006-OC11	Yes	Yes	Yes	Yes
CWALT 2006-OC7	Yes	Yes	Yes	Yes
CWALT 2006-OC8	Yes	Yes	Yes	Yes
CWALT 2007-12T1	Yes	Yes	Yes	Yes

**Exhibit 4: Tolling Chart**

<b>Certificate Offerings</b>	<b>Included in November 2007 <i>Luther</i></b>	<b>Included in June 2008 <i>Washington State</i></b>	<b>Included in October 2008 <i>Luther</i></b>	<b>Included in January 2010 <i>Maine State</i></b>
CWALT 2007-13	Yes	Yes	Yes	Yes
CWALT 2007-15CB	Yes	Yes	Yes	Yes
CWALT 2007-17CB	No	Yes	Yes	Yes
CWALT 2007-18CB	No	Yes	Yes	Yes
CWALT 2007-21CB	No	Yes	Yes	Yes
CWALT 2007-2CB	Yes	Yes	Yes	Yes
CWALT 2007-4CB	Yes	Yes	Yes	Yes
CWALT 2007-HY4	Yes	Yes	Yes	Yes
CWHEL 2004-B	No	No	No	No
CWHEL 2006-D	No	Yes	Yes	Yes
CWHEL 2006-E	No	Yes	Yes	Yes
CWHEL 2006-H	No	Yes	Yes	Yes
CWHEL 2007-GW	No	Yes	Yes	Yes
CWHL 2004-12	No	No	No	No
CWHL 2004-13	No	No	No	No
CWHL 2005-17	No	Yes	Yes	Yes
CWHL 2005-18	No	Yes	Yes	Yes
CWHL 2005-19	No	Yes	Yes	Yes
CWHL 2005-21	No	Yes	Yes	Yes
CWHL 2005-24	No	Yes	Yes	Yes
CWHL 2005-31	No	Yes	Yes	Yes
CWHL 2005-4	No	Yes	Yes	Yes
CWHL 2005-HYB10 (listed on Bloomberg as CWHL 2005-HY10)	No	Yes	Yes	Yes
CWHL 2005-HYB2	No	No	No	No
CWHL 2005-HYB3	No	No	No	No
CWHL 2005-HYB7	No	Yes	Yes	Yes
CWHL 2005-HYB9	No	No	No	No
CWHL 2005-J1	No	No	No	No
CWHL 2005-J2	No	Yes	Yes	Yes

**Exhibit 4: Tolling Chart**

<b>Certificate Offerings</b>	<b>Included in November 2007 <i>Luther</i></b>	<b>Included in June 2008 <i>Washington State</i></b>	<b>Included in October 2008 <i>Luther</i></b>	<b>Included in January 2010 <i>Maine State</i></b>
CWHL 2005-J4	No	Yes	Yes	Yes
CWHL 2006-13	No	Yes	Yes	Yes
CWHL 2006-14	No	Yes	Yes	Yes
CWHL 2006-15	No	Yes	Yes	Yes
CWHL 2006-19	No	Yes	Yes	Yes
CWHL 2006-20	No	Yes	Yes	Yes
CWHL 2006-9	No	Yes	Yes	Yes
CWHL 2006-HYB5	No	Yes	Yes	Yes
CWHL 2006-J1	No	Yes	Yes	Yes
CWHL 2006-J3	No	Yes	Yes	Yes
CWHL 2006-J4	No	Yes	Yes	Yes
CWHL 2007-1	No	Yes	Yes	Yes
CWHL 2007-10	No	Yes	Yes	Yes
CWHL 2007-11	No	Yes	Yes	Yes
CWHL 2007-13	No	Yes	Yes	Yes
CWHL 2007-14	No	Yes	Yes	Yes
CWHL 2007-15	No	Yes	Yes	Yes
CWHL 2007-4	No	Yes	Yes	Yes
CWHL 2007-5	No	Yes	Yes	Yes
CWHL 2007-7	No	Yes	Yes	Yes
CWHL 2007-HY3	No	Yes	Yes	Yes
CWL 2004-15	No	No	No	No
CWL 2004-3	No	No	No	No
CWL 2004-S1	No	No	No	No
CWL 2005-12	No	Yes	Yes	Yes
CWL 2005-13	No	Yes	Yes	Yes
CWL 2005-16	No	Yes	Yes	Yes
CWL 2005-17	No	Yes	Yes	Yes
CWL 2005-2	No	No	No	No
CWL 2005-7	No	Yes	Yes	Yes
CWL 2005-IM1	No	Yes	Yes	Yes

**Exhibit 4: Tolling Chart**

<b>Certificate Offerings</b>	<b>Included in November 2007 <i>Luther</i></b>	<b>Included in June 2008 <i>Washington State</i></b>	<b>Included in October 2008 <i>Luther</i></b>	<b>Included in January 2010 <i>Maine State</i></b>
CWL 2005-IM2	No	Yes	Yes	Yes
CWL 2005-IM3	No	Yes	Yes	Yes
CWL 2006-24	No	Yes	Yes	Yes
CWL 2006-8	No	Yes	Yes	Yes
CWL 2006-ABC1	No	Yes	Yes	Yes
CWL 2006-BC2	No	Yes	Yes	Yes
CWL 2006-BC4	No	Yes	Yes	Yes
CWL 2006-S2	No	Yes	Yes	Yes
CWL 2006-S3	No	Yes	Yes	Yes
CWL 2006-S4	No	Yes	Yes	Yes
CWL 2006-S5	No	Yes	Yes	Yes
CWL 2006-S7	No	Yes	Yes	Yes
CWL 2006-S8	No	Yes	Yes	Yes
CWL 2007-12	No	Yes	Yes	Yes
CWL 2007-2	No	Yes	Yes	Yes
CWL 2007-4	No	Yes	Yes	Yes
CWL 2007-5	No	Yes	Yes	Yes
CWL 2007-9	No	Yes	Yes	Yes
CWL 2007-S1	No	Yes	Yes	Yes
CWL 2007-S2	No	Yes	Yes	Yes
CWLN 2006-21	No	No	No	No
CWLN 2006-22	No	No	No	No
CWLN 2006-23	No	No	No	No
CWLN 2006-26	No	No	No	No
CWLN 2007-1	No	No	No	No
CWLN 2007-2	No	No	No	No

<b>Total Number of Certificates: 148</b>	<b>Certificates included in November 2007 <i>Luther</i>: 55</b>	<b>Certificates included in 2008 <i>Washington State</i>: 107</b>	<b>Certificates included in October 2008 <i>Luther</i>: 122</b>	<b>Certificates included in January 2010 <i>Maine</i> <i>State</i>: 122</b>
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**Exhibit 5: Direct Purchases from Countrywide Securities**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>	<b>Purchased From</b>
CWALT 2005-14 4A1	Mortgage Pass-Through Certificates, Series 2005-14	Alternative Loan Trust 2005-14	333-117949	CWALT, Inc.	3/30/2005	FSAM	3/30/2005	Countrywide Sec.
CWALT 2005-31 2A3	Mortgage Pass-Through Certificates, Series 2005-31	Alternative Loan Trust 2005-31	333-123167	CWALT, Inc.	6/29/2005	FSAM	6/29/2005	Countrywide Sec.
CWALT 2005-36 2A1B	Mortgage Pass-Through Certificates, Series 2005-36	Alternative Loan Trust 2005-36	333-123167	CWALT, Inc.	6/24/2005	FSAM	6/24/2005	Countrywide Sec.
CWALT 2005-51 1A3B	Mortgage Pass-Through Certificates, Series 2005-51	Alternative Loan Trust 2005-51	333-125902	CWALT, Inc.	9/30/2005	FSAM	9/30/2005	Countrywide Sec.
CWALT 2005-51 2A3B	Mortgage Pass-Through Certificates, Series 2005-51	Alternative Loan Trust 2005-51	333-125902	CWALT, Inc.	9/30/2005	FSAM	9/30/2005	Countrywide Sec.
CWALT 2005-51 3AB2	Mortgage Pass-Through Certificates, Series 2005-51	Alternative Loan Trust 2005-51	333-125902	CWALT, Inc.	9/30/2005	FSAM	9/30/2005	Countrywide Sec.
CWALT 2005-61 1A3	Mortgage Pass-Through Certificates, Series 2005-61	Alternative Loan Trust 2005-61	333-125902	CWALT, Inc.	10/27/2005	FSAM	10/27/2005	Countrywide Sec.
CWALT 2005-J12 1A2	Mortgage Pass-Through Certificates, Series 2005-J12	Alternative Loan Trust 2005-J12	333-125902	CWALT, Inc.	10/1/2005	TIAA	10/28/2005	Countrywide Sec.
CWALT 2005-J12 1A2	Mortgage Pass-Through Certificates, Series 2005-J12	Alternative Loan Trust 2005-J12	333-125902	CWALT, Inc.	10/1/2005	TIAA	10/28/2005	Countrywide Sec.

**Exhibit 5: Direct Purchases from Countrywide Securities**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>	<b>Purchased From</b>
CWALT 2005-J12 1A3	Mortgage Pass-Through Certificates, Series 2005-J12	Alternative Loan Trust 2005-J12	333-125902	CWALT, Inc.	10/1/2005	TIAA	10/28/2005	Countrywide Sec.
CWALT 2005-J2 1A4	Mortgage Pass-Through Certificates, Series 2005-J2	Alternative Loan Trust 2005-J2	333-117949	CWALT, Inc.	2/1/2005	TIAA	2/28/2005	Countrywide Sec.
CWALT 2005-J2 1A4	Mortgage Pass-Through Certificates, Series 2005-J2	Alternative Loan Trust 2005-J2	333-117949	CWALT, Inc.	2/1/2005	TIAA	2/28/2005	Countrywide Sec.
CWALT 2006-HY11 A2	Mortgage Pass-Through Certificates, Series 2006-HY11	Alternative Loan Trust 2006-HY11	333-131630	CWALT, Inc.	4/28/2006	FSAM	5/5/2006	Countrywide Sec.
CWALT 2006-OA16 A4B	Mortgage Pass-Through Certificates, Series 2006-OA16	Alternative Loan Trust 2006-OA16	333-131630	CWALT, Inc.	8/30/2006	FSAM	8/30/2006	Countrywide Sec.
CWALT 2006-OA17 1A2C	Mortgage Pass-Through Certificates, Series 2006-OA17	Alternative Loan Trust 2006-OA17	333-131630	CWALT, Inc.	9/29/2006	FSAM	9/29/2006	Countrywide Sec.
CWALT 2006-OA2 A2A	Mortgage Pass-Through Certificates, Series 2006-OA2	Alternative Loan Trust 2006-OA2	333-131630	CWALT, Inc.	3/30/2006	FSAM	3/30/2006	Countrywide Sec.
CWALT 2006-OA6 1A4C	Mortgage Pass-Through Certificates, Series 2006-OA6	Alternative Loan Trust 2006-OA6	333-131630	CWALT, Inc.	5/17/2006	FSAM	5/17/2006	Countrywide Sec.
CWALT 2006-OA8 2A2	Mortgage Pass-Through Certificates, Series 2006-OA8	Alternative Loan Trust 2006- OA8	333-131630	CWALT, Inc.	5/31/2006	FSAM	5/31/2006	Countrywide Sec.

**Exhibit 5: Direct Purchases from Countrywide Securities**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>	<b>Purchased From</b>
CWALT 2006-OA8 2A3	Mortgage Pass-Through Certificates, Series 2006-OA8	Alternative Loan Trust 2006- OA8	333-131630	CWALT, Inc.	5/31/2006	FSAM	5/31/2006	Countrywide Sec.
CWALT 2006-OC10 2A1	Mortgage Pass-Through Certificates, Series 2006-OC10	Alternative Loan Trust 2006-OC10	333-131630	CWALT, Inc.	11/30/2006	NYL	11/30/2006	Countrywide Sec.
CWALT 2006-OC11 2A2B	Mortgage Pass-Through Certificates, Series 2006-OC11	Alternative Loan Trust 2006-OC11	333-131630	CWALT, Inc.	12/29/2006	FSAM	12/29/2006	Countrywide Sec.
CWALT 2006-OC7 2A3	Mortgage Pass-Through Certificates, Series 2006-OC7	Alternative Loan Trust 2006-OC7	333-131630	CWALT, Inc.	8/30/2006	FSAM	8/30/2006	Countrywide Sec.
CWALT 2006-OC8 2A2C	Mortgage Pass-Through Certificates, Series 2006-OC8	Alternative Loan Trust 2006-OC8	333-131630	CWALT, Inc.	9/29/2006	FSAM	9/29/2006	Countrywide Sec.
CWALT 2007-12T1 A6	Mortgage Pass-Through Certificates, Series 2007-12T1	Alternative Loan Trust 2007-12T1	333-140962	CWALT, Inc.	4/1/2007	TIAA	5/14/2007	Countrywide Sec.
CWALT 2007-13 A4	Mortgage Pass-Through Certificates, Series 2007-13	Alternative Loan Trust 2007-13	333-140962	CWALT, Inc.	4/1/2007	TIAA	4/30/2007	Countrywide Sec.
CWHEL 2006-D 2A	Revolving Home Equity Loan Asset Backed Notes, Series 2006-D	CWHEQ Revolving Home Equity Loan Trust, Series 2006-D	333-126790	CWHEQ, Inc.	3/30/2006	FSAM	3/30/2006	Countrywide Sec.
CWHEL 2006-D 2A	Revolving Home Equity Loan Asset Backed Notes, Series 2006-D	CWHEQ Revolving Home Equity Loan Trust, Series 2006-D	333-126790	CWHEQ, Inc.	3/30/2006	NYL	3/30/2006	Countrywide Sec.

**Exhibit 5: Direct Purchases from Countrywide Securities**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>	<b>Purchased From</b>
CWHEL 2006-E 2A	Revolving Home Equity Loan Asset Backed Notes, Series 2006-E	CWHEQ Revolving Home Equity Loan Trust, Series 2006-E	333-132375	CWHEQ, Inc.	6/29/2006	FSAM	6/29/2006	Countrywide Sec.
CWHEL 2006-H 2A1A	Revolving Home Equity Loan Asset Backed Notes, Series 2006-H	CWHEQ Revolving Home Equity Loan Trust, Series 2006-H	333-132375	CWHEQ, Inc.	9/29/2006	NYL	9/29/2006	Countrywide Sec.
CWHEL 2007-GW A	Revolving Home Equity Loan Asset Backed Notes, Series 2007-G	CWHEQ Revolving Home Equity Loan Trust, Series 2007-G	333-139891	CWHEQ, Inc.	8/15/2007	TGM	9/12/2007	Countrywide Sec.
CWHL 2005-4 6A1	Mortgage Pass-Through Certificates, Series 2005-4	CHL Mortgage Pass-Through Trust 2005-4	333-109248	CWMBS, Inc.	1/28/2005	FSAM	1/28/2005	Countrywide Sec.
CWHL 2005-HYB3 1A1	Mortgage Pass-Through Certificates, Series 2005-HYB3	CHL Mortgage Pass-Through Trust 2005-HYB3	333-121249	CWMBS, Inc.	4/1/2005	NYL	5/3/2005	Countrywide Sec.
CWHL 2005-J2 1A2	Mortgage Pass-Through Certificates, Series 2005-J2	CHL Mortgage Pass-Through Trust 2005-J2	333-117949	CWMBS, Inc.	6/1/2005	NYLIAC	6/30/2005	Countrywide Sec.
CWHL 2005-J2 1A3	Mortgage Pass-Through Certificates, Series 2005-J2	CHL Mortgage Pass-Through Trust 2005-J3	333-117949	CWMBS, Inc.	6/1/2005	NYL	6/30/2005	Countrywide Sec.
CWHL 2005-J2 1A4	Mortgage Pass-Through Certificates, Series 2005-J2	CHL Mortgage Pass-Through Trust 2005-J4	333-117949	CWMBS, Inc.	6/1/2005	NYLIAC	6/30/2005	Countrywide Sec.
CWHL 2005-J2 1B1	Mortgage Pass-Through Certificates, Series 2005-J2	CHL Mortgage Pass-Through Trust 2005-J5	333-117949	CWMBS, Inc.	6/1/2005	NYLIAC	6/30/2005	Countrywide Sec.



**Exhibit 5: Direct Purchases from Countrywide Securities**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>	<b>Purchased From</b>
CWHL 2005-J2 IB2	Mortgage Pass-Through Certificates, Series 2005-J2	CHL Mortgage Pass-Through Trust 2005-J6	333-117949	CWMBS, Inc.	6/1/2005	NYLIAC	6/30/2005	Countrywide Sec.
CWHL 2005-J2 IM	Mortgage Pass-Through Certificates, Series 2005-J2	CHL Mortgage Pass-Through Trust 2005-J10	333-117949	CWMBS, Inc.	6/1/2005	NYLIAC	6/30/2005	Countrywide Sec.
CWHL 2006-14 A6	Mortgage Pass-Through Certificates, Series 2006-14	CHL Mortgage Pass-Through Trust 2006-14	333-131662	CWMBS, Inc.	7/1/2006	TIAA	8/21/2006	Countrywide Sec.
CWHL 2006-J4 A6	Mortgage Pass-Through Certificates, Series 2006-J4	CHL Mortgage Pass-Through Trust 2006-J4	333-131630	CWMBS, Inc.	7/1/2006	TIAA	7/28/2006	Countrywide Sec.
CWL 2005-12 2A5	Asset-Backed Certificates, Series 2005-12	CWABS Asset-Backed Certificates Trust 2005-12	333-125164	CWABS, Inc.	9/1/2005	NYL	9/30/2005	Countrywide Sec.
CWL 2005-13 AF4	Asset-Backed Certificates, Series 2005-13	CWABS Asset-Backed Certificates Trust 2005-13	333-125164	CWABS, Inc.	11/1/2005	TIAA	11/21/2005	Countrywide Sec.
CWL 2005-16 4AV3	Asset-Backed Certificates, Series 2005-16	CWABS Asset-Backed Certificates Trust 2005-16	333-125164	CWABS, Inc.	12/28/2005	FSAM	12/28/2005	Countrywide Sec.
CWL 2005-17 1AF3	Asset-Backed Certificates, Series 2005-17	CWABS Asset-Backed Certificates Trust 2005-17	333-125164	CWABS, Inc.	12/1/2005	TIAA	12/29/2005	Countrywide Sec.

**Exhibit 5: Direct Purchases from Countrywide Securities**

<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>	<b>Purchased From</b>
CWL 2005-17 1AF4	Asset-Backed Certificates, Series 2005-17	CWABS Asset-Backed Certificates Trust 2005-17	333-125164	CWABS, Inc.	12/1/2005	TIAA	12/29/2005	Countrywide Sec.
CWL 2005-2 2A4	Asset-Backed Certificates, Series 2005-2	CWABS Asset-Backed Certificates Trust 2005-2	333-118926	CWABS, Inc.	3/30/2005	FSAM	3/30/2005	Countrywide Sec.
CWL 2005-IM1 A4	Asset-Backed Certificates, Series 2005-IM1	CWABS Asset-Backed Certificates Trust 2005-IM1	333-125164	CWABS, Inc.	8/30/2005	FSAM	8/30/2005	Countrywide Sec.
CWL 2005-IM2 A4	Asset-Backed Certificates, Series 2005-IM2	CWABS Asset-Backed Certificates Trust 2005-IM2	333-125164	CWABS, Inc.	10/28/2005	FSAM	10/28/2005	Countrywide Sec.
CWL 2005-IM2 A4	Asset-Backed Certificates, Series 2005-IM2	CWABS Asset-Backed Certificates Trust 2005-IM2	333-125164	CWABS, Inc.	10/28/2005	FSAM	5/15/2006	Countrywide Sec.
CWL 2005-IM3 A3	Asset-Backed Certificates, Series 2005-IM3	CWABS Asset-Backed Certificates Trust 2005-IM3	333-125164	CWABS, Inc.	12/21/2005	FSAM	12/21/2005	Countrywide Sec.
CWL 2006-ABC1 A2	Asset-Backed Certificates, Series 2006-ABC1	CWABS Asset-Backed Certificates Trust 2006-ABC1	333-131591	CWABS, Inc.	6/29/2006	FSAM	6/29/2006	Countrywide Sec.
CWL 2006-BC2 2A3	Asset-Backed Certificates, Series 2006-BC2	CWABS Asset-Backed Certificates Trust 2006-BC2	333-131591	CWABS, Inc.	5/30/2006	FSAM	5/30/2006	Countrywide Sec.
CWL 2006-BC4 2A3	Asset-Backed Certificates, Series 2006-BC4	CWABS Asset-Backed Certificates Trust 2006-BC4	333-135846	CWABS, Inc.	9/29/2006	FSAM	9/29/2006	Countrywide Sec.

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<b>Offering and Class</b>	<b>Full Name of Offering</b>	<b>Issuing Entity</b>	<b>Registration Statement File No.</b>	<b>Depositor</b>	<b>Issue Date</b>	<b>Purchaser</b>	<b>Purchase Date</b>	<b>Purchased From</b>
CWL 2006-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S2	CWHEQ Home Equity Loan Trust, Series 2006-S2	333-126790	CWHEQ, Inc.	3/1/2006	NYL	3/30/2006	Countrywide Sec.
CWL 2006-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S2	CWHEQ Home Equity Loan Trust, Series 2006-S2	333-126790	CWHEQ, Inc.	3/1/2006	NYLIAC	3/30/2006	Countrywide Sec.
CWL 2006-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S2	CWHEQ Home Equity Loan Trust, Series 2006-S2	333-126790	CWHEQ, Inc.	3/1/2006	NYLIAC	3/30/2006	Countrywide Sec.
CWL 2006-S3 A1	Home Equity Loan Asset Backed Certificates, Series 2006-S3	CWHEQ Home Equity Loan Trust, Series 2006-S3	333-132375	CWHEQ, Inc.	6/29/2006	NYL	6/29/2006	Countrywide Sec.
CWL 2006-S3 A1	Home Equity Loan Asset Backed Certificates, Series 2006-S3	CWHEQ Home Equity Loan Trust, Series 2006-S3	333-132375	CWHEQ, Inc.	6/29/2006	NYLIAC	6/29/2006	Countrywide Sec.
CWL 2006-S3 A4	Home Equity Loan Asset Backed Certificates, Series 2006-S3	CWHEQ Home Equity Loan Trust, Series 2006-S3	333-132375	CWHEQ, Inc.	6/29/2006	NYL	6/29/2006	Countrywide Sec.
CWL 2006-S3 A4	Home Equity Loan Asset Backed Certificates, Series 2006-S3	CWHEQ Home Equity Loan Trust, Series 2006-S3	333-132375	CWHEQ, Inc.	6/29/2006	NYLIAC	6/29/2006	Countrywide Sec.
CWL 2006-S3 A4	Home Equity Loan Asset Backed Certificates, Series 2006-S3	CWHEQ Home Equity Loan Trust, Series 2006-S3	333-132375	CWHEQ, Inc.	6/29/2006	NYL	6/29/2006	Countrywide Sec.
CWL 2006-S4 A4	Home Equity Loan Asset Backed Certificates, Series 2006-S4	CWHEQ Home Equity Loan Trust, Series 2006-S4	333-132375	CWHEQ, Inc.	8/1/2006	TIAA	9/8/2006	Countrywide Sec.

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CWL 2006-S5 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S5	CWHEQ Home Equity Loan Trust, Series 2006-S5	333-132375	CWHEQ, Inc.	9/1/2006	NYLIAC	9/28/2006	Countrywide Sec.
CWL 2006-S5 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S5	CWHEQ Home Equity Loan Trust, Series 2006-S5	333-132375	CWHEQ, Inc.	9/1/2006	NYLIAC	9/28/2006	Countrywide Sec.
CWL 2006-S5 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S5	CWHEQ Home Equity Loan Trust, Series 2006-S5	333-132375	CWHEQ, Inc.	9/1/2006	NYL	9/28/2006	Countrywide Sec.
CWL 2006-S7 A3	Home Equity Loan Asset-Backed Certificates, Series 2006-S7	CWHEQ Home Equity Loan Trust, Series 2006-S7	333-132375	CWHEQ, Inc.	11/1/2006	NYL	11/30/2006	Countrywide Sec.
CWL 2006-S8 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S8	CWHEQ Home Equity Loan Trust, Series 2006-S8	333-132375	CWHEQ, Inc.	12/1/2006	NYLIAC	12/28/2006	Countrywide Sec.
CWL 2006-S8 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S8	CWHEQ Home Equity Loan Trust, Series 2006-S8	333-132375	CWHEQ, Inc.	12/1/2006	NYLIAC	12/28/2006	Countrywide Sec.
CWL 2006-S8 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S8	CWHEQ Home Equity Loan Trust, Series 2006-S8	333-132375	CWHEQ, Inc.	12/1/2006	NYL	12/28/2006	Countrywide Sec.
CWL 2006-S8 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S8	CWHEQ Home Equity Loan Trust, Series 2006-S8	333-132375	CWHEQ, Inc.	12/1/2006	QAM	12/28/2006	Countrywide Sec.
CWL 2006-S8 A3	Home Equity Loan Asset Backed Certificates, Series 2006-S8	CWHEQ Home Equity Loan Trust, Series 2006-S8	333-132375	CWHEQ, Inc.	12/1/2006	CFI	12/28/2006	Countrywide Sec.
CWL 2007-12 2A2	Asset-Backed Certificates, Series 2007-12	CWABS Asset-Backed Certificates Trust 2007-12	333-140960	CWABS, Inc.	8/13/2007	FSAM	9/10/2007	Countrywide Sec.

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CWL 2007-12 2A3	Asset-Backed Certificates, Series 2007-12	CWABS Asset-Backed Certificates Trust 2007-12	333-140960	CWABS, Inc.	8/13/2007	FSAM	9/5/2007	Countrywide Sec.
CWL 2007-4 A2	Asset-Backed Certificates, Series 2007-4	CWABS Asset-Backed Certificates Trust 2007-4	333-135846	CWABS, Inc.	3/1/2007	NYLIAC	3/29/2007	Countrywide Sec.
CWL 2007-4 A2	Asset-Backed Certificates, Series 2007-4	CWABS Asset-Backed Certificates Trust 2007-4	333-135846	CWABS, Inc.	3/1/2007	NYLIAC	3/29/2007	Countrywide Sec.
CWL 2007-4 A3	Asset-Backed Certificates, Series 2007-4	CWABS Asset-Backed Certificates Trust 2007-4	333-135846	CWABS, Inc.	3/1/2007	NYL	3/29/2007	Countrywide Sec.
CWL 2007-4 A3	Asset-Backed Certificates, Series 2007-4	CWABS Asset-Backed Certificates Trust 2007-4	333-135846	CWABS, Inc.	3/1/2007	NYLIAC	3/29/2007	Countrywide Sec.
CWL 2007-4 A3	Asset-Backed Certificates, Series 2007-4	CWABS Asset-Backed Certificates Trust 2007-4	333-135846	CWABS, Inc.	3/1/2007	NYLIAC	3/29/2007	Countrywide Sec.
CWL 2007-4 A3	Asset-Backed Certificates, Series 2007-4	CWABS Asset-Backed Certificates Trust 2007-4	333-135846	CWABS, Inc.	3/1/2007	NYL	3/29/2007	Countrywide Sec.
CWL 2007-4 A6	Asset-Backed Certificates, Series 2007-4	CWABS Asset-Backed Certificates Trust 2007-4	333-135846	CWABS, Inc.	3/1/2007	NYL	3/29/2007	Countrywide Sec.
CWL 2007-4 A6	Asset-Backed Certificates, Series 2007-4	CWABS Asset-Backed Certificates Trust 2007-4	333-135846	CWABS, Inc.	3/1/2007	NYLIAC	3/29/2007	Countrywide Sec.
CWL 2007-4 A6	Asset-Backed Certificates, Series 2007-4	CWABS Asset-Backed Certificates Trust 2007-4	333-135846	CWABS, Inc.	3/1/2007	NYLIAC	3/29/2007	Countrywide Sec.

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CWL 2007-4 A6	Asset-Backed Certificates, Series 2007-4	CWABS Asset-Backed Certificates Trust 2007-4	333-135846	CWABS, Inc.	3/1/2007	NYL	3/29/2007	Countrywide Sec.
CWL 2007-9 2A3	Asset-Backed Certificates, Series 2007-9	CWABS Asset-Backed Certificates Trust 2007-9	333-140960	CWABS, Inc.	6/8/2007	FSAM	6/8/2007	Countrywide Sec.
CWL 2007-S1 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S1	CWHEQ Home Equity Loan Trust, Series 2007-S1	333-132375	CWHEQ, Inc.	2/1/2007	NYL	2/28/2007	Countrywide Sec.
CWL 2007-S1 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S1	CWHEQ Home Equity Loan Trust, Series 2007-S1	333-132375	CWHEQ, Inc.	2/1/2007	NYLIAC	2/28/2007	Countrywide Sec.
CWL 2007-S1 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S1	CWHEQ Home Equity Loan Trust, Series 2007-S1	333-132375	CWHEQ, Inc.	2/1/2007	NYL	2/28/2007	Countrywide Sec.
CWL 2007-S1 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S1	CWHEQ Home Equity Loan Trust, Series 2007-S1	333-132375	CWHEQ, Inc.	2/1/2007	NYL	2/28/2007	Countrywide Sec.
CWL 2007-S1 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S1	CWHEQ Home Equity Loan Trust, Series 2007-S1	333-132375	CWHEQ, Inc.	2/1/2007	QAM	2/28/2007	Countrywide Sec.
CWL 2007-S1 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S1	CWHEQ Home Equity Loan Trust, Series 2007-S1	333-132375	CWHEQ, Inc.	2/1/2007	CFI	2/28/2007	Countrywide Sec.
CWL 2007-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S2	CWHEQ Home Equity Loan Trust, Series 2007-S2	333-132375	CWHEQ, Inc.	3/1/2007	CREF	3/30/2007	Countrywide Sec.

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CWL 2007-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S2	CWHEQ Home Equity Loan Trust, Series 2007-S2	333-132375	CWHEQ, Inc.	3/1/2007	CREF	3/30/2007	Countrywide Sec.
CWL 2007-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S2	CWHEQ Home Equity Loan Trust, Series 2007-S2	333-132375	CWHEQ, Inc.	3/1/2007	TIAA-CREF Funds	3/30/2007	Countrywide Sec.
CWL 2007-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S2	CWHEQ Home Equity Loan Trust, Series 2007-S2	333-132375	CWHEQ, Inc.	3/1/2007	TIAA-CREF Funds	3/30/2007	Countrywide Sec.
CWL 2007-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S2	CWHEQ Home Equity Loan Trust, Series 2007-S2	333-132375	CWHEQ, Inc.	3/1/2007	TIAA-CREF Funds	3/30/2007	Countrywide Sec.
CWL 2007-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S2	CWHEQ Home Equity Loan Trust, Series 2007-S2	333-132375	CWHEQ, Inc.	3/1/2007	TIAA	3/30/2007	Countrywide Sec.
CWL 2007-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S2	CWHEQ Home Equity Loan Trust, Series 2007-S2	333-132375	CWHEQ, Inc.	3/1/2007	TIAA	3/30/2007	Countrywide Sec.
CWL 2007-S2 A3	Home Equity Loan Asset Backed Certificates, Series 2007-S2	CWHEQ Home Equity Loan Trust, Series 2007-S2	333-132375	CWHEQ, Inc.	3/1/2007	TIAA-CREF LIC	3/30/2007	Countrywide Sec.

IBANEZ



## OMG Notes on Ibanez

January 7, 2011

This is BIG case from the SJC of Mass that was filed today. In short, the Court rejected the argument that the PSA provides proof in and of itself that the notes were in fact transferred to the Trust. The court held that these documents "failed to demonstrate that the trustees were the holder of the Ibanez and LaRace mortgages, respectively." In short, the court has totally rejected the arguments advanced by the American Securitization Forum in testimony before the House and the Senate and in the so-called "White Paper" they produced late last Fall. The court also noted that the so-called post-trust confirmatory assignments of mortgages cannot be valid where there is "no earlier written assignment to confirm." As a result, the "postforeclosure assignments in Ibanez and LaRace were not confirmatory of the earlier valid assignments. Finally, the court refused to make the ruling prospective only in its application since the court held that the ruling made no significant change in the common law and therefore should be fully retroactive.

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U.S. BANK NATIONAL ASSOCIATION, trustee [FN1] vs. Antonio IBANEZ (and a consolidated case [FN2] ). For ABFC 2005-OPT 1 Trust, ABFC Asset Backed Certificates, Series 2005-OPT 1. [FN3]).

No. SJC-**10694**

October 7, 2010. - January 7, 2011.

*Real Property*, Mortgage, Ownership, Record title. *Mortgage*, Real estate, Foreclosure, Assignment. *Notice*, Foreclosure of mortgage.

CIVIL ACTIONS commenced in the Land Court Department on September 16 and October 30, 2008.

Motions for entry of default judgment and to vacate judgment were heard by *Keith C. Long, J.*

The Supreme Judicial Court granted an application for direct appellate review.

*R. Bruce Allensworth (Phoebe S. Winder & Robert W. Sparkes, III, with him)* for U.S. Bank National Association & another.

*Paul R. Collier, III (Max W. Weinstein with him)* for Antonio Ibanez.

*Glenn F. Russell, Jr.*, for Mark A. LaRice & another.

The following submitted briefs for amici curiae:

*Martha Coakley*, Attorney General, & *John M. Stephan*, Assistant Attorney General, for the Commonwealth.

*Kevin Costello, Gary Klein, Shennan Kavanagh & Stuart Rossman* for National Consumer Law Center & others.

*Ward P. Graham & Robert J. Moriarty, Jr.*, for Real Estate Bar Association for Massachusetts, Inc.

*Marie McDonnell, pro se.*

Present: Marshall, C.J., Ireland, Spina, Cordy, Botsford, & Gants, JJ.

[FN4]

GANTS, J.

After foreclosing on two properties and purchasing the properties back at the foreclosure sales, U.S. Bank National Association (U.S. Bank), as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z; and Wells Fargo Bank, N.A. (Wells Fargo), as trustee for ABFC 2005-OPT 1 Trust, ABFC Asset Backed Certificates, Series 2005-OPT 1 (plaintiffs) filed separate complaints in the Land Court asking a judge to declare that they held clear title to the properties in fee simple. We agree with the judge that the plaintiffs, who were not the original mortgagees, failed to make the required showing that they were the holders of the mortgages at the time of foreclosure. As a result, they did not demonstrate that the foreclosure sales were valid to convey title to the subject properties, and their requests for a declaration of clear title were properly denied. [FN5]

*Procedural history.* On July 5, 2007, U.S. Bank, as trustee, foreclosed on the mortgage of Antonio Ibanez, and purchased the Ibanez property at the foreclosure sale. On the same day, Wells Fargo, as trustee, foreclosed on the mortgage of Mark and Tammy LaRace, and purchased the LaRace property at that foreclosure sale.

In September and October of 2008, U.S. Bank and Wells Fargo brought separate actions in the Land Court under G.L. c. 240, § 6, which authorizes actions "to quiet or establish the title to land situated in the commonwealth or to remove a cloud from the title thereto." The two complaints sought identical relief: (1) a judgment that the right, title, and interest of the mortgagor (Ibanez or the LaRaces) in the property was extinguished by the foreclosure; (2) a declaration that there was no cloud on title arising from publication of the notice of sale in the Boston Globe; and (3) a declaration that title was vested in the plaintiff trustee in fee simple. U.S. Bank and Wells Fargo each asserted in its complaint that it had become the holder of the respective mortgage through an assignment made *after* the foreclosure sale.

In both cases, the mortgagors--Ibanez and the LaRaces--did not initially answer the complaints, and the plaintiffs moved for entry of default judgment. In their motions for entry of default judgment, the plaintiffs addressed two issues: (1) whether the Boston Globe, in which the required notices of the foreclosure sales were published, is a newspaper of "general circulation" in Springfield, the town where the foreclosed properties lay. See G.L. c. 244, § 14 (requiring publication every week for three weeks in newspaper published in town where foreclosed property lies, or of general circulation in that town); and (2) whether the plaintiffs were legally entitled to foreclose on the properties where the assignments of the mortgages to the plaintiffs were neither executed nor recorded in the registry of deeds until after the foreclosure sales. [FN6] The two cases

were heard together by the Land Court, along with a third case that raised the same issues.

On March 26, 2009, judgment was entered against the plaintiffs. The judge ruled that the foreclosure sales were invalid because, in violation of G.L. c. 244, § 14, the notices of the foreclosure sales named U.S. Bank (in the Ibanez foreclosure) and Wells Fargo (in the LaRance foreclosure) as the mortgage holders where they had not yet been assigned the mortgages. [FN7] The judge found, based on each plaintiff's assertions in its complaint, that the plaintiffs acquired the mortgages by assignment only after the foreclosure sales and thus had no interest in the mortgages being foreclosed at the time of the publication of the notices of sale or at the time of the foreclosure sales.

[FN8]

The plaintiffs then moved to vacate the judgments. At a hearing on the motions on April 17, 2009, the plaintiffs conceded that each complaint alleged a postnotice, postforeclosure sale assignment of the mortgage at issue, but they now represented to the judge that documents might exist that could show a prenotice, preforeclosure sale assignment of the mortgages. The judge granted the plaintiffs leave to produce such documents, provided they were produced in the form they existed in at the time the foreclosure sale was noticed and conducted. In response, the plaintiffs submitted hundreds of pages of documents to the judge, which they claimed established that the mortgages had been assigned to them before the foreclosures. Many of these documents related to the creation of the securitized mortgage pools in which the Ibanez and LaRance mortgages were purportedly included. [FN9]

The judge denied the plaintiffs' motions to vacate judgment on October 14, 2009, concluding that the newly submitted documents did not alter the conclusion that the plaintiffs were not the holders of the respective mortgages at the time of foreclosure. We granted the parties' applications for direct appellate review.

*Factual background.* We discuss each mortgage separately, describing when appropriate what the plaintiffs allege to have happened and what the documents in the record demonstrate. [FN10]

*The Ibanez mortgage.* On December 1, 2005, Antonio Ibanez took out a \$103,500 loan for the purchase of property at 20 Crosby Street in Springfield, secured by a mortgage to the lender, Rose Mortgage, Inc. (Rose Mortgage). The mortgage was recorded the following day. Several days later, Rose Mortgage executed an assignment of this mortgage in blank, that is, an assignment that did not specify the name of the assignee. [FN11] The blank space in the assignment was at some point stamped with the name of Option One Mortgage Corporation (Option One) as the assignee, and that assignment was recorded on June 7, 2006. Before the recording, on January 23, 2006, Option One executed an assignment of the Ibanez mortgage in blank.

According to U.S. Bank, Option One assigned the Ibanez mortgage to Lehman Brothers

Bank, FSB, which assigned it to Lehman Brothers Holdings Inc., which then assigned it to the Structured Asset Securities Corporation, [FN12] which then assigned the mortgage, pooled with approximately 1,220 other mortgage loans, to U.S. Bank, as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z. With this last assignment, the Ibanez and other loans were pooled into a trust and converted into mortgage-backed securities that can be bought and sold by investors--a process known as securitization.

For ease of reference, the chain of entities through which the Ibanez mortgage allegedly passed before the foreclosure sale is:

Rose Mortgage, Inc. (originator)

<<ArrowDn>>

Option One Mortgage Corporation (record holder)

<<ArrowDn>>

Lehman Brothers Bank, FSB

<<ArrowDn>>

Lehman Brothers Holdings Inc. (seller)

<<ArrowDn>>

Structured Asset Securities Corporation (depositor)

<<ArrowDn>>

U.S. Bank National Association, as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z

According to U.S. Bank, the assignment of the Ibanez mortgage to U.S. Bank occurred pursuant to a December 1, 2006, trust agreement, which is not in the record. What is in the record is the private placement memorandum (PPM), dated December 26, 2006, a 273-page, unsigned offer of mortgage-backed securities to potential investors. The PPM describes the mortgage pools and the entities involved, and summarizes the provisions of the trust agreement, including the representation that mortgages "will be" assigned into the trust. According to the PPM, "[e]ach transfer of a Mortgage Loan from the Seller [Lehman Brothers Holdings Inc.] to the Depositor [Structured Asset Securities Corporation] and from the Depositor to the Trustee [U.S. Bank] will be intended to be a sale of that Mortgage Loan and will be reflected as such in the Sale and Assignment Agreement and the Trust Agreement, respectively." The PPM also specifies that "[e]ach Mortgage Loan will be identified in a schedule appearing as an exhibit to the Trust Agreement." However, U.S. Bank did not provide the judge with any mortgage schedule

identifying the Ibanez loan as among the mortgages that were assigned in the trust agreement.

On April 17, 2007, U.S. Bank filed a complaint to foreclose on the Ibanez mortgage in the Land Court under the Servicemembers Civil Relief Act (Servicemembers Act), which restricts foreclosures against active duty members of the uniformed services. See 50 U.S.C. Appendix §§ 501, 511, 533 (2006 & Supp. II 2008). [FN13] In the complaint, U.S. Bank represented that it was the "owner (or assignee) and holder" of the mortgage given by Ibanez for the property. A judgment issued on behalf of U.S. Bank on June 26, 2007, declaring that the mortgagor was not entitled to protection from foreclosure under the Servicemembers Act. In June, 2007, U.S. Bank also caused to be published in the Boston Globe the notice of the foreclosure sale required by G.L. c. 244, § 14. The notice identified U.S. Bank as the "present holder" of the mortgage.

At the foreclosure sale on July 5, 2007, the Ibanez property was purchased by U.S. Bank, as trustee for the securitization trust, for \$94,350, a value significantly less than the outstanding debt and the estimated market value of the property. The foreclosure deed (from U.S. Bank, trustee, as the purported holder of the mortgage, to U.S. Bank, trustee, as the purchaser) and the statutory foreclosure affidavit were recorded on May 23, 2008. On September 2, 2008, more than one year after the sale, and more than five months after recording of the sale, American Home Mortgage Servicing, Inc., "as successor-in-interest" to Option One, which was until then the record holder of the Ibanez mortgage, executed a written assignment of that mortgage to U.S. Bank, as trustee for the securitization trust. [FN14] This assignment was recorded on September 11, 2008.

*The LaRace mortgage.* On May 19, 2005, Mark and Tammy LaRace gave a mortgage for the property at 6 Brookburn Street in Springfield to Option One as security for a \$103,200 loan; the mortgage was recorded that same day. On May 26, 2005, Option One executed an assignment of this mortgage in blank.

According to Wells Fargo, Option One later assigned the LaRace mortgage to Bank of America in a July 28, 2005, flow sale and servicing agreement. Bank of America then assigned it to Asset Backed Funding Corporation (ABFC) in an October 1, 2005, mortgage loan purchase agreement. Finally, ABFC pooled the mortgage with others and assigned it to Wells Fargo, as trustee for the ABFC 2005-OPT 1 Trust, ABFC Asset-Backed Certificates, Series 2005-OPT 1, pursuant to a pooling and servicing agreement (PSA).

For ease of reference, the chain of entities through which the LaRace mortgage allegedly passed before the foreclosure sale is:

Option One Mortgage Corporation (originator and record holder)

Bank of America

Asset Backed Funding Corporation (depositor)

Wells Fargo, as trustee for the ABFC 2005-OPT 1, ABFC Asset-Backed  
Certificates, Series 2005-OPT 1

Wells Fargo did not provide the judge with a copy of the flow sale and servicing agreement, so there is no document in the record reflecting an assignment of the LaRace mortgage by Option One to Bank of America. The plaintiff did produce an unexecuted copy of the mortgage loan purchase agreement, which was an exhibit to the PSA. The mortgage loan purchase agreement provides that Bank of America, as seller, "does hereby agree to and does hereby sell, assign, set over, and otherwise convey to the Purchaser [ABFC], without recourse, on the Closing Date ... all of its right, title and interest in and to each Mortgage Loan." The agreement makes reference to a schedule listing the assigned mortgage loans, but this schedule is not in the record, so there was no document before the judge showing that the LaRace mortgage was among the mortgage loans assigned to the ABFC.

Wells Fargo did provide the judge with a copy of the PSA, which is an agreement between the ABFC (as depositor), Option One (as servicer), and Wells Fargo (as trustee), but this copy was downloaded from the Securities and Exchange Commission website and was not signed. The PSA provides that the depositor "does hereby transfer, assign, set over and otherwise convey to the Trustee, on behalf of the Trust ... all the right, title and interest of the Depositor ... in and to ... each Mortgage Loan identified on the Mortgage Loan Schedules," and "does hereby deliver" to the trustee the original mortgage note, an original mortgage assignment "in form and substance acceptable for recording," and other documents pertaining to each mortgage.

The copy of the PSA provided to the judge did not contain the loan schedules referenced in the agreement. Instead, Wells Fargo submitted a schedule that it represented identified the loans assigned in the PSA, which did not include property addresses, names of mortgagors, or any number that corresponds to the loan number or servicing number on the LaRace mortgage. Wells Fargo contends that a loan with the LaRace property's zip code and city is the LaRace mortgage loan because the payment history and loan amount matches the LaRace loan.

On April 27, 2007, Wells Fargo filed a complaint under the Servicemembers Act in the Land Court to foreclose on the LaRace mortgage. The complaint represented Wells Fargo as the "owner (or assignee) and holder" of the mortgage given by the LaRaces for the property. A judgment issued on behalf of Wells Fargo on July 3, 2007, indicating that the LaRaces were not beneficiaries of the Servicemembers Act and that foreclosure could proceed in accordance with the terms of the power of sale. In June, 2007, Wells Fargo caused to be published in the Boston Globe the statutory notice of sale, identifying itself as the "present holder" of the mortgage.

At the foreclosure sale on July 5, 2007, Wells Fargo, as trustee, purchased the LaRace property for \$120,397.03, a value significantly below its estimated market value. Wells Fargo did not execute a statutory foreclosure affidavit or foreclosure deed until May 7, 2008. That same day, Option One, which was still the record holder of the LaRace

mortgage, executed an assignment of the mortgage to Wells Fargo as trustee; the assignment was recorded on May 12, 2008. Although executed ten months after the foreclosure sale, the assignment declared an effective date of April 18, 2007, a date that preceded the publication of the notice of sale and the foreclosure sale.

*Discussion.* The plaintiffs brought actions under G.L. c. 240, § 6, seeking declarations that the defendant mortgagors' titles had been extinguished and that the plaintiffs were the fee simple owners of the foreclosed properties. As such, the plaintiffs bore the burden of establishing their entitlement to the relief sought. *Sheriff's Meadow Found., Inc. v. Bay-Courte Edgartown, Inc.*, 401 Mass. 267, 269 (1987). To meet this burden, they were required "not merely to demonstrate better title ... than the defendants possess, but ... to prove sufficient title to succeed in [the] action." *Id.* See *NationsBanc Mtge. Corp. v. Eisenhower*, 49 Mass.App.Ct. 727, 730 (2000). There is no question that the relief the plaintiffs sought required them to establish the validity of the foreclosure sales on which their claim to clear title rested.

Massachusetts does not require a mortgage holder to obtain judicial authorization to foreclose on a mortgaged property. See G.L. c. 183, § 21; G.L. c. 244, § 14. With the exception of the limited judicial procedure aimed at certifying that the mortgagor is not a beneficiary of the Servicemembers Act, a mortgage holder can foreclose on a property, as the plaintiffs did here, by exercise of the statutory power of sale, if such a power is granted by the mortgage itself. See *Beaton v. Land Court*, 367 Mass. 385, 390-391, 393, appeal dismissed, 423 U.S. 806 (1975).

Where a mortgage grants a mortgage holder the power of sale, as did both the Ibanez and LaRance mortgages, it includes by reference the power of sale set out in G.L. c. 183, § 21, and further regulated by G.L. c. 244, §§ 11-17C. Under G.L. c. 183, § 21, after a mortgagor defaults in the performance of the underlying note, the mortgage holder may sell the property at a public auction and convey the property to the purchaser in fee simple, "and such sale shall forever bar the mortgagor and all persons claiming under him from all right and interest in the mortgaged premises, whether at law or in equity." Even where there is a dispute as to whether the mortgagor was in default or whether the party claiming to be the mortgage holder is the true mortgage holder, the foreclosure goes forward unless the mortgagor files an action and obtains a court order enjoining the foreclosure. [FN15] See *Beaton v. Land Court*, *supra* at 393.

Recognizing the substantial power that the statutory scheme affords to a mortgage holder to foreclose without immediate judicial oversight, we adhere to the familiar rule that "one who sells under a power [of sale] must follow strictly its terms. If he fails to do so there is no valid execution of the power, and the sale is wholly void." *Moore v. Dick*, 187 Mass. 207, 211 (1905). See *Roche v. Farnsworth*, 106 Mass. 509, 513 (1871) (power of sale contained in mortgage "must be executed in strict compliance with its terms"). See also *McGreevey v. Charlestown Five Cents Sav. Bank*, 294 Mass. 480, 484 (1936). [FN16]

One of the terms of the power of sale that must be strictly adhered to is the restriction on who is entitled to foreclose. The "statutory power of sale" can be exercised by "the



mortgagee or his executors, administrators, successors or assigns." G.L. c. 183, § 21. Under G.L. c. 244, § 14, "[t]he mortgagee or person having his estate in the land mortgaged, or a person authorized by the power of sale, or the attorney duly authorized by a writing under seal, or the legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee or person" is empowered to exercise the statutory power of sale. Any effort to foreclose by a party lacking "jurisdiction and authority" to carry out a foreclosure under these statutes is void. *Chace v. Morse*, 189 Mass. 559, 561 (1905), citing *Moore v. Dick*, *supra*. See *Davenport v. HSBC Bank USA*, 275 Mich.App. 344, 347-348 (2007) (attempt to foreclose by party that had not yet been assigned mortgage results in "structural defect that goes to the very heart of defendant's ability to foreclose by advertisement," and renders foreclosure sale void).

A related statutory requirement that must be strictly adhered to in a foreclosure by power of sale is the notice requirement articulated in G.L. c. 244, § 14. That statute provides that "no sale under such power shall be effectual to foreclose a mortgage, unless, previous to such sale," advance notice of the foreclosure sale has been provided to the mortgagee, to other interested parties, and by publication in a newspaper published in the town where the mortgaged land lies or of general circulation in that town. *Id.* "The manner in which the notice of the proposed sale shall be given is one of the important terms of the power, and a strict compliance with it is essential to the valid exercise of the power." *Moore v. Dick*, *supra* at 212. See *Chace v. Morse*, *supra* ("where a certain notice is prescribed, a sale without any notice, or upon a notice lacking the essential requirements of the written power, would be void as a proceeding for foreclosure"). See also *McGreevey v. Charlestown Five Cents Sav. Bank*, *supra*. Because only a present holder of the mortgage is authorized to foreclose on the mortgaged property, and because the mortgagor is entitled to know who is foreclosing and selling the property, the failure to identify the holder of the mortgage in the notice of sale may render the notice defective and the foreclosure sale void. [FN17] See *Roche v. Farnsworth*, *supra* (mortgage sale void where notice of sale identified original mortgagee but not mortgage holder at time of notice and sale). See also *Bottomly v. Kabachnick*, 13 Mass.App.Ct. 480, 483-484 (1982) (foreclosure void where holder of mortgage not identified in notice of sale).

For the plaintiffs to obtain the judicial declaration of clear title that they seek, they had to prove their authority to foreclose under the power of sale and show their compliance with the requirements on which this authority rests. Here, the plaintiffs were not the original mortgagees to whom the power of sale was granted; rather, they claimed the authority to foreclose as the eventual assignees of the original mortgagees. Under the plain language of G.L. c. 183, § 21, and G.L. c. 244, § 14, the plaintiffs had the authority to exercise the power of sale contained in the Ibanez and LaRice mortgages only if they were the assignees of the mortgages at the time of the notice of sale and the subsequent foreclosure sale. See *In re Schwartz*, 366 B.R. 265, 269 (Bankr.D.Mass.2007) ("Acquiring the mortgage after the entry and foreclosure sale does not satisfy the Massachusetts statute"). [FN18] See also *Jeff-Ray Corp. v. Jacobson*, 566 So.2d 885, 886 (Fla.Dist.Ct.App.1990) (per curiam) (foreclosure action could not be based on assignment of mortgage dated four months after commencement of foreclosure proceeding).

The plaintiffs claim that the securitization documents they submitted establish valid assignments that made them the holders of the Ibanez and LaRace mortgages before the notice of sale and the foreclosure sale. We turn, then, to the documentation submitted by the plaintiffs to determine whether it met the requirements of a valid assignment.

Like a sale of land itself, the assignment of a mortgage is a conveyance of an interest in land that requires a writing signed by the grantor. See G.L. c. 183, § 3; *Saint Patrick's Religious, Educ. & Charitable Ass'n v. Hale*, 227 Mass. 175, 177 (1917). In a "title theory state" like Massachusetts, a mortgage is a transfer of legal title in a property to secure a debt. See *Faneuil Investors Group, Ltd. Partnership v. Selectmen of Dennis*, 458 Mass. 1, 6 (2010). Therefore, when a person borrows money to purchase a home and gives the lender a mortgage, the homeowner-mortgagor retains only equitable title in the home; the legal title is held by the mortgagee. See *Vee Jay Realty Trust Co. v. DiCroce*, 360 Mass. 751, 753 (1972), quoting *Dolliver v. St. Joseph Fire & Marine Ins. Co.*, 128 Mass. 315, 316 (1880) (although "as to all the world except the mortgagee, a mortgagor is the owner of the mortgaged lands," mortgagee has legal title to property); *Maglione v. BancBoston Mtge. Corp.*, 29 Mass.App.Ct. 88, 90 (1990). Where, as here, mortgage loans are pooled together in a trust and converted into mortgage-backed securities, the underlying promissory notes serve as financial instruments generating a potential income stream for investors, but the mortgages securing these notes are still legal title to someone's home or farm and must be treated as such.

Focusing first on the Ibanez mortgage, U.S. Bank argues that it was assigned the mortgage under the trust agreement described in the PPM, but it did not submit a copy of this trust agreement to the judge. The PPM, however, described the trust agreement as an agreement to be executed in the future, so it only furnished evidence of an intent to assign mortgages to U.S. Bank, not proof of their actual assignment. Even if there were an executed trust agreement with language of present assignment, U.S. Bank did not produce the schedule of loans and mortgages that was an exhibit to that agreement, so it failed to show that the Ibanez mortgage was among the mortgages to be assigned by that agreement. Finally, even if there were an executed trust agreement with the required schedule, U.S. Bank failed to furnish any evidence that the entity assigning the mortgage-Structured Asset Securities Corporation--ever held the mortgage to be assigned. The last assignment of the mortgage on record was from Rose Mortgage to Option One; nothing was submitted to the judge indicating that Option One ever assigned the mortgage to anyone before the foreclosure sale. [FN19] Thus, based on the documents submitted to the judge, Option One, not U.S. Bank, was the mortgage holder at the time of the foreclosure, and U.S. Bank did not have the authority to foreclose the mortgage.

Turning to the LaRace mortgage, Wells Fargo claims that, before it issued the foreclosure notice, it was assigned the LaRace mortgage under the PSA. The PSA, in contrast with U.S. Bank's PPM, uses the language of a present assignment ("does hereby ... assign" and "does hereby deliver") rather than an intent to assign in the future. But the mortgage loan schedule Wells Fargo submitted failed to identify with adequate specificity the LaRace mortgage as one of the mortgages assigned in the PSA. Moreover, Wells Fargo provided the judge with no document that reflected that the ABFC (depositor) held the LaRace

mortgage that it was purportedly assigning in the PSA. As with the Ibanez loan, the record holder of the LaRace loan was Option One, and nothing was submitted to the judge which demonstrated that the LaRace loan was ever assigned by Option One to another entity before the publication of the notice and the sale.

Where a plaintiff files a complaint asking for a declaration of clear title after a mortgage foreclosure, a judge is entitled to ask for proof that the foreclosing entity was the mortgage holder at the time of the notice of sale and foreclosure, or was one of the parties authorized to foreclose under G.L. c. 183, § 21, and G.L. c. 244, § 14. A plaintiff that cannot make this modest showing cannot justly proclaim that it was unfairly denied a declaration of clear title. See *In re Schwartz, supra* at 266 ("When HomEq [Servicing Corporation] was required to prove its authority to conduct the sale, and despite having been given ample opportunity to do so, what it produced instead was a jumble of documents and conclusory statements, some of which are not supported by the documents and indeed even contradicted by them"). See also *Bayview Loan Servicing, LLC v. Nelson*, 382 Ill.App.3d 1184, 1188 (2008) (reversing grant of summary judgment in favor of financial entity in foreclosure action, where there was "no evidence that [the entity] ever obtained any legal interest in the subject property").

We do not suggest that an assignment must be in recordable form at the time of the notice of sale or the subsequent foreclosure sale, although recording is likely the better practice. Where a pool of mortgages is assigned to a securitized trust, the executed agreement that assigns the pool of mortgages, with a schedule of the pooled mortgage loans that clearly and specifically identifies the mortgage at issue as among those assigned, may suffice to establish the trustee as the mortgage holder. However, there must be proof that the assignment was made by a party that itself held the mortgage. See *In re Samuels*, 415 B.R. 8, 20 (Bankr.D.Mass.2009). A foreclosing entity may provide a complete chain of assignments linking it to the record holder of the mortgage, or a single assignment from the record holder of the mortgage. See *In re Parrish*, 326 B.R. 708, 720 (Bankr.N.D.Ohio 2005) ("If the claimant acquired the note and mortgage from the original lender or from another party who acquired it from the original lender, the claimant can meet its burden through evidence that traces the loan from the original lender to the claimant"). The key in either case is that the foreclosing entity must hold the mortgage at the time of the notice and sale in order accurately to identify itself as the present holder in the notice and in order to have the authority to foreclose under the power of sale (or the foreclosing entity must be one of the parties authorized to foreclose under G.L. c. 183, § 21, and G.L. c. 244, § 14).

The judge did not err in concluding that the securitization documents submitted by the plaintiffs failed to demonstrate that they were the holders of the Ibanez and LaRace mortgages, respectively, at the time of the publication of the notices and the sales. The judge, therefore, did not err in rendering judgments against the plaintiffs and in denying the plaintiffs' motions to vacate the judgments. [FN20]

We now turn briefly to three other arguments raised by the plaintiffs on appeal. First, the plaintiffs initially contended that the assignments in blank executed by Option One,

identifying the assignor but not the assignee, not only "evidence[ ] and confirm[ ] the assignments that occurred by virtue of the securitization agreements," but "are effective assignments in their own right." But in their reply briefs they conceded that the assignments in blank did not constitute a lawful assignment of the mortgages. Their concession is appropriate. We have long held that a conveyance of real property, such as a mortgage, that does not name the assignee conveys nothing and is void; we do not regard an assignment of land in blank as giving legal title in land to the bearer of the assignment. See *Flavin v. Morrissey*, 327 Mass. 217, 219 (1951); *Macurda v. Fuller*, 225 Mass. 341, 344 (1916). See also G.L. c. 183, § 3.

Second, the plaintiffs contend that, because they held the mortgage note, they had a sufficient financial interest in the mortgage to allow them to foreclose. In Massachusetts, where a note has been assigned but there is no written assignment of the mortgage underlying the note, the assignment of the note does not carry with it the assignment of the mortgage. *Barnes v. Boardman*, 149 Mass. 106, 114 (1889). Rather, the holder of the mortgage holds the mortgage in trust for the purchaser of the note, who has an equitable right to obtain an assignment of the mortgage, which may be accomplished by filing an action in court and obtaining an equitable order of assignment. *Id.* ("In some jurisdictions it is held that the mere transfer of the debt, without any assignment or even mention of the mortgage, carries the mortgage with it, so as to enable the assignee to assert his title in an action at law.... This doctrine has not prevailed in Massachusetts, and the tendency of the decisions here has been, that in such cases the mortgagee would hold the legal title in trust for the purchaser of the debt, and that the latter might obtain a conveyance by a bill in equity"). See *Young v. Miller*, 6 Gray 152, 154 (1856). In the absence of a valid written assignment of a mortgage or a court order of assignment, the mortgage holder remains unchanged. This common-law principle was later incorporated in the statute enacted in 1912 establishing the statutory power of sale, which grants such a power to "the mortgagee or his executors, administrators, successors or assigns," but not to a party that is the equitable beneficiary of a mortgage held by another. G.L. c. 183, § 21, inserted by St.1912, c. 502, § 6.

Third, the plaintiffs initially argued that postsale assignments were sufficient to establish their authority to foreclose, and now argue that these assignments are sufficient when taken in conjunction with the evidence of a presale assignment. They argue that the use of postsale assignments was customary in the industry, and point to Title Standard No. 58(3) issued by the Real Estate Bar Association for Massachusetts, which declares: "A title is not defective by reason of ... [t]he recording of an Assignment of Mortgage executed either prior, or subsequent, to foreclosure where said Mortgage has been foreclosed, of record, by the Assignee." [FN21] To the extent that the plaintiffs rely on this title standard for the proposition that an entity that does not hold a mortgage may foreclose on a property, and then cure the cloud on title by a later assignment of a mortgage, their reliance is misplaced because this proposition is contrary to G.L. c. 183, § 21, and G.L. c. 244, § 14. If the plaintiffs did not have their assignments to the Ibanez and LaRaca mortgages at the time of the publication of the notices and the sales, they lacked authority to foreclose under G.L. c. 183, § 21, and G.L. c. 244, § 14, and their published claims to be the present holders of the mortgages were false. Nor may a postforeclosure assignment

be treated as a pre-foreclosure assignment simply by declaring an "effective date" that precedes the notice of sale and foreclosure, as did Option One's assignment of the LaRace mortgage to Wells Fargo. Because an assignment of a mortgage is a transfer of legal title, it becomes effective with respect to the power of sale only on the transfer; it cannot become effective before the transfer. See *In re Schwartz*, *supra* at 269.

However, we do not disagree with Title Standard No. 58(3) that, where an assignment is confirmatory of an earlier, valid assignment made prior to the publication of notice and execution of the sale, that confirmatory assignment may be executed and recorded after the foreclosure, and doing so will not make the title defective. A valid assignment of a mortgage gives the holder of that mortgage the statutory power to sell after a default regardless whether the assignment has been recorded. See G.L. c. 183, § 21; *MacFarlane v. Thompson*, 241 Mass. 486, 489 (1922). Where the earlier assignment is not in recordable form or bears some defect, a written assignment executed after foreclosure that confirms the earlier assignment may be properly recorded. See *Bon v. Graves*, 216 Mass. 440, 444-445 (1914). A confirmatory assignment, however, cannot confirm an assignment that was not validly made earlier or backdate an assignment being made for the first time. See *Scaplen v. Blanchard*, 187 Mass. 73, 76 (1904) (confirmatory deed "creates no title" but "takes the place of the original deed, and is evidence of the making of the former conveyance as of the time when it was made"). Where there is no prior valid assignment, a subsequent assignment by the mortgage holder to the note holder is not a confirmatory assignment because there is no earlier written assignment to confirm. In this case, based on the record before the judge, the plaintiffs failed to prove that they obtained valid written assignments of the Ibanez and LaRace mortgages before their foreclosures, so the postforeclosure assignments were not confirmatory of earlier valid assignments.

Finally, we reject the plaintiffs' request that our ruling be prospective in its application. A prospective ruling is only appropriate, in limited circumstances, when we make a significant change in the common law. See *Papadopoulos v. Target Corp.*, 457 Mass. 368, 384 (2010) (noting "normal rule of retroactivity"); *Payton v. Abbott Labs*, 386 Mass. 540, 565 (1982). We have not done so here. The legal principles and requirements we set forth are well established in our case law and our statutes. All that has changed is the plaintiffs' apparent failure to abide by those principles and requirements in the rush to sell mortgage-backed securities.

*Conclusion.* For the reasons stated, we agree with the judge that the plaintiffs did not demonstrate that they were the holders of the Ibanez and LaRace mortgages at the time that they foreclosed these properties, and therefore failed to demonstrate that they acquired fee simple title to these properties by purchasing them at the foreclosure sale.

*Judgments affirmed.*

CORDY, J. (concurring, with whom Botsford, J., joins).

I concur fully in the opinion of the court, and write separately only to underscore that

what is surprising about these cases is not the statement of principles articulated by the court regarding title law and the law of foreclosure in Massachusetts, but rather the utter carelessness with which the plaintiff banks documented the titles to their assets. There is no dispute that the mortgagors of the properties in question had defaulted on their obligations, and that the mortgaged properties were subject to foreclosure. Before commencing such an action, however, the holder of an assigned mortgage needs to take care to ensure that his legal paperwork is in order. Although there was no apparent actual unfairness here to the mortgagors, that is not the point. Foreclosure is a powerful act with significant consequences, and Massachusetts law has always required that it proceed strictly in accord with the statutes that govern it. As the opinion of the court notes, such strict compliance is necessary because Massachusetts is both a title theory State and allows for extrajudicial foreclosure.

The type of sophisticated transactions leading up to the accumulation of the notes and mortgages in question in these cases and their securitization, and, ultimately the sale of mortgage-backed securities, are not barred nor even burdened by the requirements of Massachusetts law. The plaintiff banks, who brought these cases to clear the titles that they acquired at their own foreclosure sales, have simply failed to prove that the underlying assignments of the mortgages that they allege (and would have) entitled them to foreclose ever existed in any legally cognizable form before they exercised the power of sale that accompanies those assignments. The court's opinion clearly states that such assignments do not need to be in recordable form or recorded before the foreclosure, but they do have to have been effectuated.

What is more complicated, and not addressed in this opinion, because the issue was not before us, is the effect of the conduct of banks such as the plaintiffs here, on a bona fide third-party purchaser who may have relied on the foreclosure title of the bank and the confirmative assignment and affidavit of foreclosure recorded by the bank subsequent to that foreclosure but prior to the purchase by the third party, especially where the party whose property was foreclosed was in fact in violation of the mortgage covenants, had notice of the foreclosure, and took no action to contest it.

FN1. For the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z.

FN2. Wells Fargo Bank, N.A., trustee, vs. Mark A. LaRace & another.

FN3. The Appeals Court granted the plaintiffs' motion to consolidate these cases.

FN4. Chief Justice Marshall participated in the deliberation on this case prior to her retirement.

FN5. We acknowledge the amicus briefs filed by the Attorney General; the Real Estate Bar Association for Massachusetts, Inc.; Marie McDonnell; and the National Consumer Law Center, together with Darlene Manson, Germano DePina, Robert Lane, Ann Coiley, Roberto Szumik, and Geraldo Dosanjós.

FN6. The uncertainty surrounding the first issue was the reason the plaintiffs sought a declaration of clear title in order to obtain title insurance for these properties. The second issue was raised by the judge in the LaRace case at a January 5, 2009, case management conference.

FN7. The judge also concluded that the Boston Globe was a newspaper of general circulation in Springfield, so the foreclosures were not rendered invalid on that ground because notice was published in that newspaper.

FN8. In the third case, LaSalle Bank National Association, trustee for the certificate holders of Bear Stearns Asset Backed Securities I, LLC Asset-Backed Certificates, Series 2007-HE2 vs. Freddy Rosario, the judge concluded that the mortgage foreclosure "was not rendered invalid by its failure to record the assignment reflecting its status as holder of the mortgage prior to the foreclosure since it was, in fact, the holder by assignment at the time of the foreclosure, it truthfully claimed that status in the notice, and it could have produced proof of that status (the unrecorded assignment) if asked."

FN9. On June 1, 2009, attorneys for the defendant mortgagors filed their appearance in the cases for the first time.

FN10. The LaRace defendants allege that the documents submitted to the judge following the plaintiffs' motions to vacate judgment are not properly in the record before us. They also allege that several of these documents are not properly authenticated. Because we affirm the judgment on other grounds, we do not address these concerns, and assume that these documents are properly before us and were adequately authenticated.

FN11. This signed and notarized document states: "FOR VALUE RECEIVED, the undersigned hereby grants, assigns and transfers to \_\_\_\_\_ all beneficial interest under that certain Mortgage dated December 1, 2005 executed by Antonio Ibanez...."

FN12. The Structured Asset Securities Corporation is a wholly owned direct subsidiary of Lehman Commercial Paper Inc., which is in turn a wholly owned, direct subsidiary of Lehman Brothers Holdings Inc.

FN13. As implemented in Massachusetts, a mortgage holder is required to go to court to obtain a judgment declaring that the mortgagor is not a beneficiary of the Servicemembers Act before proceeding to foreclosure. St.1943, c. 57, as amended through St.1998, c. 142.

FN14. The Land Court judge questioned whether American Home Mortgage Servicing, Inc., was in fact a successor in interest to Option One. Given our affirmance of the judgment on other grounds, we need not address this question.

FN15. An alternative to foreclosure through the right of statutory sale is foreclosure by entry, by which a mortgage holder who peaceably enters a property and remains for three years after recording a certificate or memorandum of entry forecloses the mortgagor's right of redemption. See G.L. c. 244, §§ 1, 2; *Joyner v. Lenox Sav. Bank*, 322 Mass. 46, 52-53 (1947). A

foreclosure by entry may provide a separate ground for a claim of clear title apart from the foreclosure by execution of the power of sale. See, e.g., *Grabiel v. Michelson*, 297 Mass. 227, 228-229 (1937). Because the plaintiffs do not claim clear title based on foreclosure by entry, we do not discuss it further.

FN16. We recognize that a mortgage holder must not only act in strict compliance with its power of sale but must also "act in good faith and ... use reasonable diligence to protect the interests of the mortgagor," and this responsibility is "more exacting" where the mortgage holder becomes the buyer at the foreclosure sale, as occurred here. See *Williams v. Resolution GGF Oy*, 417 Mass. 377, 382-383 (1994), quoting *Seppala & Aho Constr. Co. v. Petersen*, 373 Mass. 316, 320 (1977). Because the issue was not raised by the defendant mortgagors or the judge, we do not consider whether the plaintiffs breached this obligation.

FN17. The form of foreclosure notice provided in G.L. c. 244, § 14, calls for the present holder of the mortgage to identify itself and sign the notice. While the statute permits other forms to be used and allows the statutory form to be "altered as circumstances require," G.L. c. 244, § 14, we do not interpret this flexibility to suggest that the present holder of the mortgage need not identify itself in the notice.



FN18. The plaintiffs were not authorized to foreclose by virtue of any of the other provisions of G.L. c. 244, § 14: they were not the guardian or conservator, or acting in the name of, a person so authorized; nor were they the attorney duly authorized by a writing under seal.

FN19. Ibanez challenges the validity of this assignment to Option One. Because of the failure of U.S. Bank to document any preforeclosure sale assignment or chain of assignments by which it obtained the Ibanez mortgage from Option One, it is unnecessary to address the validity of the assignment from Rose Mortgage to Option One.

FN20. The plaintiffs have not pressed the procedural question whether the judge exceeded his authority in rendering judgment against them on their motions for default judgment, and we do not address it here.

FN21. Title Standard No. 58(3) issued by the Real Estate Bar Association for Massachusetts continues: "However, if the Assignment is not dated prior, or stated to be effective prior, to the commencement of a foreclosure, then a foreclosure sale after April 19, 2007 may be subject to challenge in the Bankruptcy Court," citing *In re Schwartz*, 366 B.R. 265 (Bankr.D.Mass.2007).

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**COMMONWEALTH OF MASSACHUSETTS  
THE TRIAL COURT  
LAND COURT DEPARTMENT**

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U.S. BANK NATIONAL ASSOCIATION,  
as trustee for the Structured Asset Securities  
Corporation Mortgage Pass-Through  
Certificates, Series 2006-Z,

Plaintiff,

v.

ANTONIO IBANEZ,

Defendant

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MISC. CASE NO. 384283 (KCL)

LASALLE BANK NATIONAL  
ASSOCIATION, as trustee for the certificate  
holders of Bear Stearns Asset Backed  
Securities I, LLC Asset-Backed Certificates  
Series 2007-HE2,

Plaintiff,

v.

FREDDIE ROSARIO,

Defendant

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MISC. CASE NO. 386018 (KCL)

WELLS FARGO BANK, N.A., as trustee for  
ABFC 2005-OPT 1 Trust, ABFC Asset  
Backed Certificates Series 2005-OPT 1,

Plaintiff,

v.

MARK A. LARACE and TAMMY L.  
LARACE,

Defendant

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MISC. CASE NO. 386755 (KCL)

**MEMORANDUM AND ORDER ON PLAINTIFFS' MOTIONS FOR ENTRY OF  
DEFAULT JUDGMENT**

### ***Introduction and Facts***

The above-captioned cases, each brought pursuant to G.L. c. 240, § 6 to "remove a cloud from the title" of the properties in question, present two issues, one in common and the other in three variations. Each arises from a foreclosure sale of property in Springfield. The first issue is whether the *Boston Globe*, in which the notices of foreclosure sale were published, was "a newspaper with general circulation in the town where the land lies" (Springfield) within the meaning of G.L. c. 244, § 14 at the times of publication.<sup>(1)</sup> The second is whether the published notices, which named the plaintiffs as the foreclosing parties even though they had no record interest in the property at the time of either publication or foreclosure, complied with G.L. c. 244, § 14.

The variations of the second issue are as follows. In *Ibanez*, U.S. Bank National Association,<sup>(2)</sup> in whose name notice was published and sale took place, had no interest in the mortgage being foreclosed (either recorded or unrecorded) at the time of publication or sale. Complaint to Remove Cloud from Title at 2, ¶ 3; 3, ¶ 8 (Sept. 12, 2008) (filed in Misc. 384283) (hereinafter, the "Ibanez Complaint"). Further, there was nothing in the notice to indicate that it was acting (or purporting to act) as someone else's agent, much less the agent of the principal. Motion for Entry of Default Judgment at 3 (Jan. 30, 2009) (filed in Misc. 384283) (hereinafter,

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<sup>1</sup> The notice in *Rosario* was published on June 5, 12, and 19, 2007 for auction to take place on June 26, 2007. Complaint to Remove Cloud from Title at 2, ¶ 5; 3, ¶ 8 (Oct. 16, 2008) (filed in Misc. 386018) (hereinafter, the "Rosario Complaint"). The notices in *Ibanez* and *Larace* were published on June 14, 21, and 28, 2007 for auctions to take place on July 5, 2007. Complaint to Remove Cloud from Title at 2, ¶ 5; 3, ¶ 8 (Sept. 12, 2008) (filed in Misc. 384283) (hereinafter, the "Ibanez Complaint"); Complaint to Remove Cloud from Title at 2, ¶ 5; 3, ¶ 8 (Oct. 23, 2008) (filed in Misc. 386755) (hereinafter, the "Larace Complaint").

<sup>2</sup> I refer to the plaintiffs by bank name (U.S. Bank, LaSalle Bank, and Wells Fargo Bank) solely for ease of reference. None of these banks hold the mortgages in question for *themselves*. Instead, they are the servicing trustees of the securitized mortgage pools identified in the case captions, which are the actual beneficial owners of the mortgages. Neither the details of the pools nor the particulars of the trust agreements are relevant for purposes of this Memorandum and Order, which assumes that the pools were duly and properly formed and compliant with all applicable laws, that the mortgages in question were properly included in those pools, and that the banks, as trustees, had full authority to act as they did.

the "Ibanez Motion"). U.S. Bank only acquired an interest in the *Ibanez* mortgage by assignment nearly fourteen months *after* the auction took place. Ibanez Complaint at 2, ¶ 3; 3, ¶ 8.

In *Larace*, Wells Fargo Bank, in whose name notice was published and sale took place, also had no interest in the mortgage being foreclosed (either recorded or unrecorded) at the time of publication or sale. Complaint to Remove Cloud from Title at 2, ¶ 3; 3, ¶ 8 (Oct. 23, 2008) (filed in Misc. 386755) (hereinafter, the "Larace Complaint"). There also was nothing to indicate that it was acting (or purporting to act) as someone else's agent, much less the agent of the principal. Motion for Entry of Default Judgment at 2-3 (Feb. 2, 2009) (filed in Misc. 386755) (hereinafter, the "Larace Motion"). However, it acquired the mortgage by assignment ten months after the sale, with the assignment declaring an effective date prior to foreclosure (April 18, 2007). Larace Complaint at 2, ¶ 3.

In *Rosario*, LaSalle Bank, in whose name notice was published and sale took place, was the unrecorded holder of the mortgage at the time of publication and sale, but did not record the assignment reflecting that interest until over a year after the sale. Complaint to Remove Cloud from Title at 2, ¶ 3; 3, ¶ 8 (Oct. 16, 2008) (filed in Misc. 386018) (hereinafter, the "Rosario Complaint").

In each of these cases, the bank was the only bidder at the foreclosure sale. Stipulation of Walter Porr, Esq., Counsel for Plaintiffs (Feb. 11, 2009 oral argument).<sup>(3)</sup> In *Ibanez*, the bank bought the property for \$94,350, which was \$16,437.27 less than the amount of the outstanding loan (\$110,787.27) and \$16,650 (15%) less than the bank's calculation of the property's actual market value (\$111,000). Ibanez Complaint at 3, ¶ 8; Aff. of Walter H. Porr, Jr., Ex. G (Jan. 30,

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<sup>3</sup> I may consider such stipulation as an admission binding on the plaintiffs for purposes of these motions. *White v. Peabody Constr. Co., Inc.*, 386 Mass. 121, 126 (1982).

2009). In *Larace*, the bank bought the property for \$120,397.03, which was the amount of the outstanding loan plus "all outstanding fees and costs" and \$24,602.97 (17%) less than the bank's calculation of the property's actual market value (\$145,000). *Larace* Complaint at 3, ¶ 8; Aff. of Walter H. Porr, Jr., Ex. E (Feb. 2, 2009). In *Rosario*, the bank bought the property for \$136,000. *Rosario* Complaint at 3, ¶ 8. Unlike *Ibanez* and *Larace*, the record in *Rosario* does not include information on the amount of the outstanding loan or the market value of the property.

According to the plaintiffs, despite their successful bids and their subsequent recording of all the relevant documents, they cannot obtain title insurance for the properties -- making them effectively unsaleable -- unless and until these issues are resolved in their favor. They have thus brought these actions seeking such relief. In each of these cases, the defendants (the mortgagors/equity holders of the properties at issue) have been served, failed to respond, and have been defaulted. The plaintiffs have moved for entry of default judgment. The issues were clearly identified before those motions were heard and the parties were given full opportunity to submit whatever affidavits or other admissible materials they believed necessary for adjudication of those issues. Notice of Docket Entry (Jan. 7, 2009) (filed in each case).

Based on the record before me and for the reasons discussed below, I find and rule that the *Boston Globe* was "a newspaper of general circulation" in Springfield at the time of the notices and sales and thus meets that requirement of G.L. c. 244, § 14. I also find and rule that LaSalle Bank's foreclosure in *Rosario* was not rendered invalid by its failure to record the assignment reflecting its status as the holder of the mortgage prior to the foreclosure since it was, in fact, the holder by assignment at the time of the foreclosure, it truthfully claimed that status in the notice, and it could have produced proof of that status (the unrecorded assignment) if

asked.<sup>(4)</sup> Finally, I find and rule, however, that the other two foreclosures (U.S. Bank's in *Ibanez* and Wells Fargo Bank's in *Larace*) are invalid because the notices that named those entities failed to name the mortgage holder as of the date of the sale as required by G.L. c. 244, § 14. Neither U.S. Bank nor Wells Fargo Bank had been assigned the mortgages at the time notice was published and sale took place. Neither an intention to do so in the future nor the backdating of a future assignment meets the statute's strict requirement that the holder of the mortgage *at the time notice is published and auction takes place* be named in the notice.

### *Analysis*

#### *Whether Publication in the Boston Globe Was Sufficient to Meet the Requirements of G.L. c. 244, § 14*

G.L. c. 244, § 14 requires notification of a foreclosure sale to be published "in a newspaper, if any, published in the town where the land lies or in a newspaper with general circulation where the land lies" for that sale to be valid. *See Bottomly v. Kabachnick*, 13 Mass. App. Ct. 480, 484 (1982) ("The manner in which the notice of the proposed sale shall be given is one of the important terms of the power and a strict compliance with it is essential to the valid exercise of the power."). The purpose behind that requirement is easily discerned and simply stated. It is to ensure, for the benefit of the mortgagor whose equity interest is about to diminish or disappear and who may face personal liability for the full amount of any deficiency, that a sufficient number of likely bidders learn of the sale so that competition, and thus the highest price, will result. *See Roche v. Farnsworth*, 106 Mass. 509, 513 (1871) ("There is the more reason for this [requiring strict adherence to the statute's notice provisions], where the power [of sale] is made to a mortgagee, who is interested merely for himself, and has opportunities for

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<sup>4</sup> The notices gave its agent's (counsel for the foreclosure) name and address.

collusion and for taking unfair advantage of the mortgagor."). Underlying the notice requirement is the notion that most of the interested and likely bidders will either live or work locally or, if from afar, expect the local newspapers to carry the relevant notices.

The plaintiffs in these cases did not choose "a newspaper . . . published in the town where the land lies" or even, for that matter, the newspaper with the greatest local circulation. That would have been, for both these criteria, the *Springfield Republican*. Instead, they chose the *Boston Globe* for reasons of cost and convenience. According to plaintiffs' counsel, the *Globe* has competitive advertising rates and its legal notices advertising department is able to receive electronically-transmitted notices from foreclosing parties, immediately acknowledge that receipt, and promptly publish notices. The record does not indicate, and counsel did not know, if the *Springfield Republican* has similar rates or capacities.

G.L. c. 244, § 14, however, does not require publication in a locally-published newspaper, in the newspaper with greatest circulation, or even on the day with the greatest circulation.<sup>(5)</sup> It is enough to publish in "a newspaper with general circulation in the town where the land lies . . . ." G.L. c. 244, § 14. The statute does not contain an explicit definition of "general circulation," none appears anywhere in the relevant statutory provisions (those governing foreclosures), and counsel has not directed the court's attention to any relevant decisions of our appellate courts. Thus, the familiar tools of statutory interpretation must be employed.

[A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of

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<sup>5</sup> The circulation data submitted for both the *Springfield Republican* and the *Boston Globe* show that their Sunday editions have their largest readership. The notices in each of these cases were published on weekdays.

the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated. Courts must ascertain the intent of a statute from all its parts and from the subject matter to which it relates, and must interpret the statute so as to render the legislation effective, consonant with sound reason and common sense. Words that are not defined in a statute should be given their usual and accepted meanings, provided that those meanings are consistent with the statutory purpose. We derive the words' usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions.

*Seideman v. City of Newton*, 452 Mass. 472, 477-78 (2008) (internal quotations and citations omitted).

Black's Law Dictionary is such a source. *See id.* at 478; *Thurdin v. SEI Boston, LLC*, 452 Mass. 436, 453 (2008) (both citing Black's). It defines "newspaper" as "a publication for general circulation, usually in sheet form, appearing at regular intervals, usually daily or weekly, and containing matters of general public interest, such as current events." Black's Law Dictionary at 1069 (8th ed. 2004). "Newspaper of general circulation" is defined as "a newspaper that contains news and information of interest to the general public, rather than to a particular segment, and that is available to the public within a certain geographic area." *Id.* The *Boston Globe* met each of these tests in Springfield at the time the notices were published. It was a "publication for general circulation" in Springfield.<sup>(6)</sup> It "contain[ed] matters of general public interest," such as national and international news, sports, and business coverage. And it was available in Springfield on a daily basis during the times in question, both through subscription and single-copy sales at stores and by vendors.

The *Globe* also was a newspaper that, for the times in question, met the statute's intent of reaching a broad audience of likely bidders. While it had a fraction of the *Springfield*

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<sup>6</sup> See circulation figures discussed immediately below.



*Republican's* circulation (the *Republican* sold somewhere between 21,959 and 24,733 copies in Springfield on an average weekday during the relevant time period),<sup>(7)</sup> the *Globe's* figures (somewhere between 1,400 and 1,600 copies in Springfield during the relevant time period)<sup>(8)</sup> were nonetheless significant and sufficiently "general" in the context of Springfield's overall population at the times in question.<sup>(9)</sup> The *Globe's* status as one of New England's major newspapers also makes it likely to reach a large, additional audience of institutional and other bidders.<sup>(10),(11)</sup>

In short, while far from the best alternative, the *Globe* was good enough to meet the statutory test at the times in question. It was "a newspaper with general circulation in the town where the land lies" when the notices were published and thus sufficed under G.L. c. 244, § 14.<sup>(12)</sup>

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<sup>7</sup> The *Republican* sold 21,959 copies in Springfield on March 7, 2007, and 24,733 copies in Springfield on March 28, 2008. Supplemental Aff. of Walter H. Porr, Jr. at Exs. A, B (Feb. 3, 2009) (filed in the *Larace* case). On March 7, 2007, it sold an additional 11,985 copies in the immediately adjacent towns of West Springfield, Longmeadow and East Longmeadow. *Id.* On March 28, 2008, it sold an additional 14,720 copies in those same adjacent localities. *Id.*

<sup>8</sup> The *Globe* sold 1600 copies in Springfield on October 24, 2006 and 1,400 copies in Springfield on October 23, 2007. Aff. of Walter H. Porr, Jr. at Exs. B, C (Feb. 2, 2009) (filed in the *Larace* case). It sold an additional 896 copies on October 24, 2006 and an additional 674 copies on October 23, 2007 in the immediately adjacent towns of West Springfield, Longmeadow and East Longmeadow. *Id.*

<sup>9</sup> According to the U.S. Census data submitted by the plaintiffs, there were approximately 57,000 households in Springfield during this time period. *Id.* at Ex. D.

<sup>10</sup> This is also true of the *Springfield Republican* and, as shown by their comparative circulation data, even more so in the Pioneer Valley area. Supplemental Aff. of Walter H. Porr, Jr. at Exs. A, B.

<sup>11</sup> The record did not indicate, and counsel did not know, if the notices at issue in these cases appeared statewide or only in more localized editions of the *Globe*. For purposes of this Memorandum and Order, I make the conservative assumption that they appeared only in an edition circulated in Springfield and the neighboring Pioneer Valley area.

<sup>12</sup> This ruling is not intended, and should not be construed, as a finding that the *Globe* meets the statutory test in Springfield for any times other than those at issue in these cases. The drop-off in the *Globe's* circulation in Springfield between October 24, 2006 and October 23, 2007 (1,600 to 1,400 copies -- a 12.5% reduction in a single

*Whether Publication Occurred in the Name Required by G.L. c. 244, § 14*

G.L. c. 244, § 14 requires that notice of a foreclosure auction be given not only to the mortgagor and "all persons of record" holding junior interests in the property (by registered mail), but also by publication in a newspaper of general circulation at least "once in each of three successive weeks, the first publication to be not less than twenty-one days prior to the date of sale." The purpose of such publication, as previously noted, is to ensure, for the benefit of the mortgagor whose equity interest is about to diminish or disappear and who may face personal liability for the full amount of any deficiency, that a sufficient number of likely bidders learn of the sale so that competition, and thus the highest price, will result.<sup>(13)</sup> See *Roche*, 106 Mass. at 513. It is thus, broadly speaking, a consumer protection statute and, as the courts have repeatedly made clear, one that requires "strict compliance" with its notice provisions. *Bottomly v. Kabachnick*, 13 Mass. App. Ct. 480, 484 (1982) and cases cited therein.

One of those requirements is that the notice identify "the holder of the mortgage." *Id.* at 483. Failure to do so renders the "sale void as a matter of law." *Id.* at 484. The purpose of this requirement and the need for "strict compliance" is readily discerned. As even a cursory glance at the current caseload of this court reveals, titles arising from mortgage foreclosures can have many problems. These include the most fundamental: Did the party conducting the foreclosure have the authority to do so and, if challenged, can it prove that it had such authority? In short, will a purchaser at the foreclosure sale get good title and will get it in prompt fashion? These are increasingly important questions in the current deteriorating real estate market and are not small

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year from an already small figure) suggests that foreclosure notices published subsequent to October 2007 may need to be assessed on a case-by-case basis.

<sup>13</sup> It is also for the benefit of junior creditors, whose chances for recovery may be diminished or eliminated by the foreclosure if there is insufficient proceeds from the foreclosure to cover all liens. See G.L. c. 183, § 27 (disposition of proceeds of foreclosure sale); *Wiggin v. Heywood*, 118 Mass. 514, 516 (1875); *Pioneer Credit Corp. v. Bloomberg*, 323 F. 2nd 992, 993-94 (1st Cir. 1963) (foreclosure of senior encumbrance discharges junior liens whose holders are made parties to the proceeding).

concerns. It is increasingly rare for a mortgage to remain with its originating lender. Often, as here, mortgages are assigned to other entities, and then assigned yet again into large securitized pools.<sup>(14)</sup> Often, as here, the paperwork lags far behind. Sometimes mistakes are made.<sup>(15)</sup> Mistakes can only be corrected, if at all, through confirmatory documents (which the borrower may not so easily agree to) or litigation. With so many foreclosed properties available for purchase, why bid on a property with even the possibility for such trouble? Why bid on a property when the foreclosing party cannot produce all the documents (including proper mortgage assignments in recordable form) that would give good title? Why take the risk that the foreclosing party will be able to produce the documents promptly after the auction takes place, that those documents will be complete and in proper form, or even (in this era of failed and failing institutions) that the foreclosing party will still be in existence, with intact files and knowledgeable employees able to find those files so that the proper paperwork can be completed? Since these concerns affect the ability to obtain clear, marketable title, why bid a reasonable market value instead of a discount price to account for that risk?

None of this is the fault of the mortgagor, yet the mortgagor suffers due to fewer (or no) bids in competition with the foreclosing institution. Only the foreclosing party is advantaged by the clouded title at the time of auction. It can bid a lower price, hold the property in inventory, and put together the proper documents at any time it chooses. And who can say that problems won't be encountered during this process? It is interesting that it took the plaintiff (the

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<sup>14</sup> In *Ibanez*, for example, the mortgage was originally granted to Rose Mortgage, Inc., then assigned to Option One Mortgage Corporation, then assigned to American Home Mortgage Servicing, Inc., and then assigned to the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z, of which U.S. Bank is currently the trustee. *Ibanez* Complaint at 2, ¶ 3. *Larace* and *Rosario* have similar histories.

<sup>15</sup> See, e.g., *LaSalle Bank National Association, as trustee for Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-1 v. Truong*, Land Court Misc. Case No. 390707 (KCL) (assignment made, servicemembers action brought and judgment entered, G.L. c. 244, § 14 notices published, foreclosure conducted, and foreclosure deeds issued in incorrect name).

foreclosing party and successful bidder) almost *fourteen months* after the auction to obtain its assignment in *Ibanez* and *ten months* after the auction in *Larace*.<sup>(16)</sup> Would any reasonable third-party bidder have been willing to wait that long, trusting that no other issues would arise?<sup>(17)</sup> Only in *Rosario* was the assignment (showing that the foreclosing party held the mortgage and could convey title as a result of the sale) in hand and ready for recording at the time of the auction sale.

The plaintiffs defend the validity of their post-foreclosure assignments (in *Ibanez* and *Larace*) and post-foreclosure recording of their assignments (in all cases), making essentially three arguments. First, they say that the language of G.L. c. 244, § 14 does not require that the notice name the holder of the mortgage. They agree that the form of foreclosure notice included in the statute contains that requirement *explicitly* (the signature line on that form is labeled "Present holder of said mortgage" and its text contains both the representation "of which mortgage the undersigned is the present holder" and the command "if by assignment, or in any fiduciary capacity, give reference"), but contend that these are not *statutory* requirements because the statute permits "alter[ation] [of the form] as circumstances require" and does not "prevent the use of other forms." G.L. c. 244, § 14 (Form).

This argument is unpersuasive, for three reasons. First, it ignores *Bottomly v. Kabachnick*, which states that the notice in that case "was defective *because it failed to identify*

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<sup>16</sup> The foreclosure auction in *Ibanez* took place on July 5, 2007. *Ibanez* Complaint at 3, ¶ 8. The mortgage was not assigned to U.S. Bank until September 2, 2008. *Id.* at 2, ¶ 3. The foreclosure auction in *Larace* took place on July 5, 2007. *Larace* Complaint at 3, ¶ 8. The mortgage was not assigned to Wells Fargo until May 7, 2008. *Id.* at 2, ¶ 3.

<sup>17</sup> There may be an innocent explanation for the delay (*i.e.*, a rational business reason for waiting months to document the assignment), but none was offered or apparent in the record. Moreover, such an explanation is unlikely given the many months of delay, the deteriorating real estate market, the properties' carrying costs (upkeep, security, and real estate taxes) and the bank's desire for cash. Surely, each of these was a powerful incentive to move as quickly as possible.

*the holder of the mortgage*, thereby rendering the first foreclosure sale *void as a matter of law*."

13 Mass. App. Ct. at 483-84 (citing *Roche v. Farnsworth*, 106 Mass. 509 (1871)) (emphasis added).<sup>(18),(19)</sup> Second, it ignores the "fundamental precept[]" that "[c]ourts must ascertain the intent of a statute from *all its parts* and from the subject matter to which it relates . . . ."

*DeGiacomo v. Metropolitan Property & Casualty Ins. Co.*, 66 Mass. App. Ct. 343, 346 (2006) (emphasis added). The form of foreclosure notice included in G.L. c. 244, § 14 is a part of that statute, indicative of its intent, and clearly contemplates (as *Bottomly* holds) that the present holder of the mortgage be identified in the notice. There is nothing to indicate that *this* aspect of the notice could be "altered."<sup>(20)</sup> See G.L. c. 244, § 14. Indeed, at oral argument, plaintiffs' counsel conceded that the current practice is to obtain and record all assignment documents before publication and commencement of foreclosure proceedings. Third, the language in the body of the statute clearly contemplates that the "holder of the mortgage" is the entity to give notice, as indicated by its reference to notices to be mailed "to the last address of the owner or owners of the equity of redemption *appearing on the records of the holder of the mortgage* . . . ." G.L. c. 244, § 14 (emphasis added).

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<sup>18</sup> *Roche* invalidated a mortgage foreclosure sale because the notice, *inter alia*, failed to name the holder of the mortgage at the time of the foreclosure sale (defendant George B. Farnsworth). 106 Mass. 509, 513 (1871). This omission and the other failings in the notice were "inconsistent with the degree of clearness that ought to exist in such an advertisement." *Id.*

<sup>19</sup> One can become the "holder of the mortgage" (an interest in land) only by a writing satisfying the statute of frauds, G.L. c. 259, § 1, in recordable form. Thus, the plaintiffs' contention at oral argument that G.L. c. 244, § 14's requirement of "holder" status was satisfied by the assignment of the promissory notes secured by the mortgages to the securitized pools (apparently done by contract documents referencing them generally, along with hundreds or thousands of other such notes) fails. In any event, no such documents were included in the record, so any arguments based upon them are unsupported and waived. Moreover, there is nothing in the record to indicate when the promissory notes were assigned and the record is unambiguously clear that the *mortgages* were assigned on the dates referenced herein.

<sup>20</sup> Plaintiffs cite *146 Dundas Corp. v. Chemical Bank*, 400 Mass. 588, 593 (1987), for the proposition that the precise form of notice contained in G.L. c. 244, § 14 is not mandatory. True enough. But the inclusion of that form in G.L. c. 244, § 14 reflects the Legislature's intent regarding the *contents* of the notice, the suggested notice contains *two* places for "the present holder" of the mortgage to be identified (including a blank line to "give reference" if the mortgage is held by assignment), and there is nothing in *146 Dundas Corp.* that holds (or even suggests) that such an identification can be omitted from an alternate form of notice.

The plaintiffs' second argument is that the statute should be read "in its practical application, purpose and effect [to] uphold the exercise of the power of sale even though the assignment of the mortgage was recorded afterwards." Second Supplemental Memorandum of Law in Support of Motion for Entry of Default Judgment at 5 (Feb. 16, 2009) (filed in *Larace*). This argument is made in two parts. First, the plaintiffs argue that the mortgagor "had ample time and opportunity to exercise his rights in equity to challenge the foreclosure at the time it was ongoing and failed to do so." This contention (which places the burden and expense of a lawsuit on the mortgagor and allows a statutory violation with potentially severe adverse consequences to proceed unchecked if a lawsuit is not brought) is contrary to the "consumer protection" nature of the statute. The defaulting mortgagor is often a layperson, unfamiliar with law and legal proceedings, and often financially distressed and thus without resources to hire counsel.<sup>(21)</sup> Second, the plaintiffs' argument that the mortgagor already knows the identity of the assignee of his mortgage from his RESPA notices<sup>(22)</sup> and thus cannot credibly complain, *Id.*, completely misses the point of the publication requirement. As noted above, its purpose is to notify potential *bidders* who do *not* have that information and whose bids may be chilled by concerns over the foreclosing party's inability to show, in recordable form, an assigned interest in the mortgage it purports to foreclose. Based upon the facts of these cases, such chilling is not speculative. In each of the two cases for which market value information was provided (*Ibanez* and *Larace*), the plaintiff purchased the property at the foreclosure auction for significantly less than that value (15% and 17%, respectively). *See* discussion, *supra* at 3-4.

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<sup>21</sup> These cases are perfect examples. None of the defendants ever came to court or filed a responsive pleading even though they had meritorious defenses. There is no suggestion that the mortgagors "waited until the owner may have added largely to the estate, or it has increased in value by a general rise, before bringing [a claim for redemption]." *Montague v. Dawes*, 12 Allen (94 Mass.) 397, 400 (1866).

<sup>22</sup> Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601, *et seq.*

Even the plaintiffs' argument premised on a general notion of "practical application, purpose and effect" fails. As current practice shows, there is nothing difficult or inhibitive in a requirement that assignment documents be in place at the time of notice and auction. That is precisely what the plaintiffs do now. Those documents must be created, executed and recorded before title can pass in any event, so no additional time or expense is incurred by having them ready at the time of publication and auction sale. Having the assignments in place in recordable form at the time of publication and auction avoids the chilling effects on bidding described above. Interpreting the statute in this manner thus not only comports with its language and the intent inferred from that language, but also with common sense and a rational policy objective. *See DiGiacomo*, 66 Mass. App. Ct. at 346 (statutes to be interpreted "so as to render the legislation effective, consonant with sound reason and common sense").

The plaintiffs' third argument is that both case law and prevailing title practice support their contention that post-notice/post-auction assignment, so long as the ultimate assignee was the foreclosing party, suffices under G.L. c. 244, § 14. I disagree and discuss each of this argument in turn.

*Bottomly* is the most recent case construing the notice provisions of the statute and is the starting point for the proper interpretation of the earlier cases and proper title practice. As noted above, *Bottomly* unequivocally holds that a notice that fails to identify the holder of the mortgage is defective, thereby rendering the "foreclosure sale void as a matter of law." 13 Mass. App. Ct. at 483-84. None of the cases cited by the plaintiffs either hold or suggest the contrary.

The first case plaintiffs cite is *Montague v. Dawes*, 12 Allen (94 Mass.) 397 (1866). *Montague* predates the publication provisions of G.L. c. 244, § 14, which were not enacted until

1877, so it is unclear what, if any, guidance it gives on the notice issue.<sup>(23),(24)</sup> What it *does* hold, and *only* holds, is that title derived from a foreclosure sale by an assignee of a mortgage *in possession of that assignment at the time of the auction* is not defeated by the fact that the assignment was not *recorded* until after the foreclosure took place, so long as the mortgagor is aware of the assignment and it is "unaccompanied with the suggestion that it was not recorded from improper motives, or that in some way the circumstance actually affected the sale by misleading purchasers or otherwise . . . ." <sup>(25)</sup> *Id.* at 400. Thus, it is directly applicable to *Rosario* (where the foreclosing party, LaSalle Bank, was correctly named in the notice as the holder of the mortgage and was ready, willing and able to produce its assignment, in recordable form, at the time of auction) and *inapplicable* to *Ibanez* and *Larace* (where the named foreclosing party had not been assigned the mortgage at the time of notice and auction, either on or off record).

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<sup>23</sup> The foreclosure in *Montague* took place under St. 1857, c. 229, which allowed sales to take place with "such notices . . . as are authorized or required by such power [of sale in the mortgage deed]," so long as a copy of that notice and an affidavit by the mortgagee "set[ting] forth his acts in the premises fully and particularly" were filed in the registry of deeds within thirty days after the sale. The statutory requirement for published notice was not enacted until 1877, which provided the following:

No sale under and by virtue of a power of sale contained in any mortgage of real estate shall be valid and effectual to foreclose said mortgage, unless previous to such sale notice of the same shall have been published once a week, the first publication to be not less than twenty-one days before the date of sale, for three successive weeks, in some newspaper, if there be any, published in the city or town wherein the mortgaged premises are situated; but nothing herein shall avoid the necessity of also giving notice of such sale in accordance with the terms of the mortgage.

St. 1877, c. 215. It would not be surprising if it came about, in part, as a result of the practices exemplified in the fact pattern and condemned by the court in *Montague v. Davis*. 14 Allen (96 Mass.) 369, 374 (1867) ("Here the notice proved ineffectual to attract purchasers, as might reasonably have been anticipated from the meagre information it contained, its irresponsible character, and the place of sale selected, remote from the premises to be sold.").

<sup>24</sup> Although not statutorily required at the time, the power of sale in *Montague* apparently contained a publication requirement of some form or fashion. See *Montague*, 12 Allen (94 Mass.) at 400 (referring to "public notice by advertisement of the time and place of sale"). The form and type of notice, however, was apparently never placed in issue since the defendant "aver[red] that the notices and affidavit required by statute were duly made and recorded" and the plaintiff "nowhere charg[ed] that the sale was wrongfully made . . . [or] that there was any irregularity in the proceedings." *Id.* at 399.

<sup>25</sup> Samuel Rice, the original mortgagee, assigned the note and mortgage to Henry Dawes on June 19, 1862. Mr. Dawes conducted the foreclosure sale on August 11, 1862, *after* he was assigned the mortgage, and conveyed the property to John Dunbar, who purchased it at Dawes' request. Dunbar then conveyed it to Dawes on August 20, 1862. Dawes later conveyed it to a Mr. Hassam, who conveyed it Lydia Hawes. The case involved the mortgagor's (George Montague) attempt to redeem the property, which the court denied.



The plaintiffs next cite the Rule 1:28 Memorandum and Order in *Federal Deposit Corporation v. Kefelas*, 62 Mass. App. Ct. 1121, 2005 WL 277693 (2005), for the proposition that the foreclosure notice need not contain the name of the holder of the mortgage in order for the sale to be valid. As a pre-February 26, 2008 unpublished opinion, *Federal Deposit Corporation* has no precedential value. Order Amending Appeals Court Rule 1:28 (Nov. 25, 2008). Even so, when closely examined, *Federal Deposit Corporation* does not reflect the holding plaintiffs argue. The notice in that case stated that the Bank of New England ("BNE") was the mortgage holder when, in fact, that bank had failed and substantially all of its assets (including the Kefelas mortgage) had transferred to a "bridge bank," New Bank of New England ("NBNE"). *Federal Deposit Corp.*, 2005 WL 277693 at \*1. The Appeals Court failed to see why, under these circumstances, "the change in name was significant" and thus refused to invalidate the foreclosure sale. *Id.* at 2-3. This is completely consistent with *Bottomly*. NBNE was, for foreclosure purposes, effectively the same entity as BNE and, given the general knowledge that BNE had failed and its assets acquired by NBNE, likely no one could have been confused or had their bid chilled.

The plaintiffs' final citation is REBA Title Standard No. 58, "Out of Order Recording of Mortgage Discharges and Assignments."<sup>(26)</sup> It provides, in relevant part, "[a] title is not defective by reason of . . . [t]he recording of an Assignment of Mortgage executed either prior, or subsequent, to foreclosure where said Mortgage has been foreclosed, of record, by the Assignee." REBA Title Standard No. 58. The accompanying note states that this portion of the standard "is based on *Montague v. Dawes*, 12 Allen 397 (1866)." *Id.* (Comment). No explanation is given and no authority other than *Montague* is cited or discussed. So far as I can tell, this aspect of REBA Title Standard No. 58 has never been reviewed or ruled upon by a court at any level. I have great

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<sup>26</sup> REBA is the Real Estate Bar Association for Massachusetts, a private organization.

respect for REBA and the work of its committees, and the *initial* portion of its standard is certainly a correct reading of G.L. c. 244, § 14 and *Montague* ("[a] title is not defective by reason of . . . [t]he recording of an Assignment of Mortgage executed . . . prior . . . to foreclosure . . ."). But the *latter* portion (relating to assignments made *after* notice is published and sale has occurred) misconstrues the statute, the holding in *Montague*, and the teachings of *Bottomly* and *Roche*. As discussed above, G.L. c. 244, § 14 requires publication in the name of the holder of the mortgage for the foreclosure sale to be valid. *Bottomly*, 13 Mass. App. Ct. at 483-84. It does so to assure potential bidders that the foreclosing party can promptly deliver good title and to prevent "opportunities for collusion and for taking unfair advantage of the mortgagor." *See Roche*, 106 Mass. at 513. The best practice, of course, is to put the assignment on record prior to notice publication so it is available for all to examine. At the very least, the assignment should be fully executed and available, in recordable form, at the time of the foreclosure sale. *Montague*, 12 Allen at 400. To allow a foreclosing party, without any interest in the mortgage at the time of the sale (recorded or unrecorded), to conduct the sale in these circumstances, bid, and then acquire good title by later assignment is completely contrary to G.L. c. 244, § 14's intent and commands.

### ***Conclusion***

For the foregoing reasons, none of the three foreclosures at issue in these lawsuits were rendered invalid because notice was published in the *Boston Globe*. LaSalle Bank's foreclosure in *Rosario* was not rendered invalid by its failure to record the assignment reflecting its status as holder of the mortgage prior to the foreclosure since it was, in fact, the holder by assignment at the time of the foreclosure, it truthfully claimed that status in the notice, and it could have produced proof of that status (the unrecorded assignment) if asked. The other two foreclosures (U.S. Bank's in *Ibanez* and Wells Fargo Bank's in *Larace*) are invalid because the notices (which

named those entities) failed to name the mortgage holder as required by G.L. c. 244, § 14.

Judgment shall enter accordingly.

**SO ORDERED.**

By the court (Long, J.)

Attest:

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Deborah J. Patterson, Recorder

Dated: 26 March 2009

### *Footnotes*

1. The notice in *Rosario* was published on June 5, 12, and 19, 2007 for auction to take place on June 26, 2007. Complaint to Remove Cloud from Title at 2, ¶ 5; 3, ¶ 8 (Oct. 16, 2008) (filed in Misc. 386018) (hereinafter, the "Rosario Complaint"). The notices in *Ibanez* and *Larace* were published on June 14, 21, and 28, 2007 for auctions to take place on July 5, 2007. Complaint to Remove Cloud from Title at 2, ¶ 5; 3, ¶ 8 (Sept. 12, 2008) (filed in Misc. 384283) (hereinafter, the "Ibanez Complaint"); Complaint to Remove Cloud from Title at 2, ¶ 5; 3, ¶ 8 (Oct. 23, 2008) (filed in Misc. 386755) (hereinafter, the "Larace Complaint").

2. I refer to the plaintiffs by bank name (U.S. Bank, LaSalle Bank, and Wells Fargo Bank) solely for ease of reference. None of these banks hold the mortgages in question for *themselves*. Instead, they are the servicing trustees of the securitized mortgage pools identified in the case captions, which are the actual beneficial owners of the mortgages. Neither the details of the pools nor the particulars of the trust agreements are relevant for purposes of this Memorandum and Order, which assumes that the pools were duly and properly formed and compliant with all applicable laws, that the mortgages in question were properly included in those pools, and that the banks, as trustees, had full authority to act as they did.

3. I may consider such stipulation as an admission binding on the plaintiffs for purposes of these motions. *White v. Peabody Constr. Co., Inc.*, 386 Mass. 121, 126 (1982).

4. The notices gave its agent's (counsel for the foreclosure) name and address.

5. The circulation data submitted for both the *Springfield Republican* and the *Boston Globe* show that their Sunday editions have their largest readership. The notices in each of these cases were published on weekdays.

6. See circulation figures discussed immediately below.

7. The *Republican* sold 21,959 copies in Springfield on March 7, 2007, and 24,733 copies in Springfield on March 28, 2008. Supplemental Aff. of Walter H. Porr, Jr. at Exs. A, B (Feb. 3, 2009) (filed in the *Larace* case). On March 7, 2007, it sold an additional 11,985 copies in the immediately adjacent towns of West Springfield, Longmeadow and East Longmeadow. *Id.* On March 28, 2008, it sold an additional 14,720 copies in those same adjacent localities. *Id.*

8. The *Globe* sold 1600 copies in Springfield on October 24, 2006 and 1,400 copies in Springfield on October 23, 2007. Aff. of Walter H. Porr, Jr. at Exs. B, C (Feb. 2, 2009) (filed in the *Larace* case). It sold an additional 896 copies on October 24, 2006 and an additional 674 copies on October 23, 2007 in the immediately adjacent towns of West Springfield, Longmeadow and East Longmeadow. *Id.*

9. According to the U.S. Census data submitted by the plaintiffs, there were approximately 57,000 households in Springfield during this time period. *Id.* at Ex. D.

10. This is also true of the *Springfield Republican* and, as shown by their comparative circulation data, even more so in the Pioneer Valley area. Supplemental Aff. of Walter H. Porr, Jr. at Exs. A, B.

11. The record did not indicate, and counsel did not know, if the notices at issue in these cases appeared statewide or only in more localized editions of the *Globe*. For purposes of this Memorandum and Order, I make the conservative assumption that they appeared only in an edition circulated in Springfield and the neighboring Pioneer Valley area.

12. This ruling is not intended, and should not be construed, as a finding that the *Globe* meets the statutory test in Springfield for any times other than those at issue in these cases. The drop-off in the *Globe*'s circulation in Springfield between October 24, 2006 and October 23, 2007 (1,600 to 1,400 copies -- a 12.5% reduction in a single year from an already small figure) suggests that foreclosure notices published subsequent to October 2007 may need to be assessed on a case-by-case basis.

13. It is also for the benefit of junior creditors, whose chances for recovery may be diminished or eliminated by the foreclosure if there is are insufficient proceeds from the foreclosure to cover all liens. *See* G.L. c. 183, § 27 (disposition of proceeds of foreclosure sale); *Wiggin v. Heywood*, 118 Mass. 514, 516 (1875); *Pioneer Credit Corp. v. Bloomberg*, 323 F. 2nd 992, 993-94 (1st Cir. 1963) (foreclosure of senior encumbrance discharges junior liens whose holders are made parties to the proceeding).

14. In *Ibanez*, for example, the mortgage was originally granted to Rose Mortgage, Inc., then assigned to Option One Mortgage Corporation, then assigned to American Home Mortgage Servicing, Inc., and then assigned to the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z, of which U.S. Bank is currently the trustee. *Ibanez* Complaint at 2, ¶ 3. *Larace* and *Rosario* have similar histories.

15. *See, e.g., LaSalle Bank National Association, as trustee for Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-1 v. Truong*, Land Court Misc. Case No. 390707 (KCL) (assignment made, servicemembers action brought and judgment entered, G.L. c. 244, § 14 notices published, foreclosure conducted, and foreclosure deeds issued in incorrect name).

16. The foreclosure auction in *Ibanez* took place on July 5, 2007. *Ibanez* Complaint at 3, ¶ 8. The mortgage was not assigned to U.S. Bank until September 2, 2008. *Id.* at 2, ¶ 3. The foreclosure auction in *Larace* took place on July 5, 2007. *Larace* Complaint at 3, ¶ 8. The mortgage was not assigned to Wells Fargo until May 7, 2008. *Id.* at 2, ¶ 3.

17. There may be an innocent explanation for the delay (*i.e.*, a rational business reason for waiting months to document the assignment), but none was offered or apparent in the record. Moreover, such an explanation is unlikely given the many months of delay, the deteriorating real estate market, the properties' carrying costs (upkeep, security, and real estate taxes) and the bank's desire for cash. Surely, each of these was a powerful incentive to move as quickly as possible.

18. *Roche* invalidated a mortgage foreclosure sale because the notice, *inter alia*, failed to name the holder of the mortgage at the time of the foreclosure sale (defendant George B. Farnsworth).

106 Mass. 509, 513 (1871). This omission and the other failings in the notice were "inconsistent with the degree of clearness that ought to exist in such an advertisement." *Id.*

19. One can become the "holder of the mortgage" (an interest in land) only by a writing satisfying the statute of frauds, G.L. c. 259, § 1, in recordable form. Thus, the plaintiffs' contention at oral argument that G.L. c. 244, § 14's requirement of "holder" status was satisfied by the assignment of the promissory notes secured by the mortgages to the securitized pools (apparently done by contract documents referencing them generally, along with hundreds or thousands of other such notes) fails. In any event, no such documents were included in the record, so any arguments based upon them are unsupported and waived. Moreover, there is nothing in the record to indicate when the promissory notes were assigned and the record is unambiguously clear that the *mortgages* were assigned on the dates referenced herein.

20. Plaintiffs cite *146 Dundas Corp. v. Chemical Bank*, 400 Mass. 588, 593 (1987), for the proposition that the precise form of notice contained in G.L. c. 244, § 14 is not mandatory. True enough. But the inclusion of that form in G.L. c. 244, § 14 reflects the Legislature's intent regarding the *contents* of the notice, the suggested notice contains *two* places for "the present holder" of the mortgage to be identified (including a blank line to "give reference" if the mortgage is held by assignment), and there is nothing in *146 Dundas Corp.* that holds (or even suggests) that such an identification can be omitted from an alternate form of notice.

21. These cases are perfect examples. None of the defendants ever came to court or filed a responsive pleading even though they had meritorious defenses. There is no suggestion that the mortgagors "waited until the owner may have added largely to the estate, or it has increased in value by a general rise, before bringing [a claim for redemption]." *Montague v. Dawes*, 12 Allen (94 Mass.) 397, 400 (1866).

22. Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601, *et seq.*

23. The foreclosure in *Montague* took place under St. 1857, c. 229, which allowed sales to take place with "such notices . . . as are authorized or required by such power [of sale in the mortgage deed]," so long as a copy of that notice and an affidavit by the mortgagee "set[ting] forth his acts in the premises fully and particularly" were filed in the registry of deeds within thirty days after the sale. The statutory requirement for published notice was not enacted until 1877, which provided the following:

No sale under and by virtue of a power of sale contained in any mortgage of real estate shall be valid and effectual to foreclose said mortgage, unless previous to such sale notice of the same shall have been published once a week, the first publication to be not less than twenty-one days before the date of sale, for three successive weeks, in some newspaper, if there be any, published in the city or town wherein the mortgaged premises are situated; but nothing herein shall avoid the necessity of also giving notice of such sale in accordance with the terms of the mortgage.

St. 1877, c. 215. It would not be surprising if it came about, in part, as a result of the practices exemplified in the fact pattern and condemned by the court in *Montague v. Davis*. 14 Allen (96 Mass.) 369, 374 (1867) ("Here the notice proved ineffectual to attract purchasers, as might reasonably have been anticipated from the meagre information it contained, its irresponsible character, and the place of sale selected, remote from the premises to be sold.").

24. Although not statutorily required at the time, the power of sale in *Montague* apparently contained a publication requirement of some form or fashion. *See Montague*, 12 Allen (94 Mass.) at 400 (referring to "public notice by advertisement of the time and place of sale"). The form and type of notice, however, was apparently never placed in issue since the defendant "aver[red] that the notices and affidavit required by statute were duly made and recorded" and the plaintiff "nowhere charg[ed] that the sale was wrongfully made . . . [or] that there was any irregularity in the proceedings." *Id.* at 399.

25. Samuel Rice, the original mortgagee, assigned the note and mortgage to Henry Dawes on June 19, 1862. Mr. Dawes conducted the foreclosure sale on August 11, 1862, *after* he was assigned the mortgage, and conveyed the property to John Dunbar, who purchased it at Dawes' request. Dunbar then conveyed it to Dawes on August 20, 1862. Dawes later conveyed it to a Mr. Hassam, who conveyed it Lydia Hawes. The case involved the mortgagor's (George Montague) attempt to redeem the property, which the court denied.

26. REBA is the Real Estate Bar Association for Massachusetts, a private organization.

**COMMONWEALTH OF MASSACHUSETTS  
THE TRIAL COURT  
LAND COURT DEPARTMENT**

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U.S. BANK NATIONAL ASSOCIATION,  
as trustee for the Structured Asset Securities  
Corporation Mortgage Pass-Through  
Certificates, Series 2006-Z,

Plaintiff,

v.

ANTONIO IBANEZ,

Defendant

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MISC. CASE NO. 384283 (KCL)

LASALLE BANK NATIONAL  
ASSOCIATION, as trustee for the certificate  
holders of Bear Stearns Asset Backed  
Securities I, LLC Asset-Backed Certificates  
Series 2007-HE2,

Plaintiff,

v.

FREDDIE ROSARIO,

Defendant

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MISC. CASE NO. 386018 (KCL)

WELLS FARGO BANK, N.A., as trustee for  
ABFC 2005-OPT 1 Trust, ABFC Asset  
Backed Certificates Series 2005-OPT 1,

Plaintiff,

v.

MARK A. LARACE and TAMMY L.  
LARACE,

Defendant

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MISC. CASE NO. 386755 (KCL)

**AMICUS AFFIDAVIT AND ANALYSIS  
OF MARIE MCDONNELL**

**April 17, 2009**



**I, MARIE THERESE MCDONNELL, DO HEREBY DEPOSE AND DECLARE:**

1. My name is Marie Therese McDonnell. I am a Mortgage Fraud and Forensic Analyst and the founder and managing member of Truth In Lending Audit & Recovery Services, LLC located in Orleans, Massachusetts. I have twenty-two years experience in this emerging field and have, since 1991, specialized in auditing residential and commercial mortgage finance transactions on behalf of consumers and the attorneys who represent them.

2. The core of my practice involves crisis and foreclosure intervention, problem resolution, and mediation on behalf of consumers who are experiencing difficulties with their mortgage lenders and servicers. I rely upon the objective data produced incident to auditing these transactions as the basis for negotiating fair-minded solutions that avert litigation, preserve homeownership, and protect the bond holders who have an equal but opposite interest at stake.

3. A significant portion of my practice consists of providing litigation support services to attorneys who represent clients that have been negatively impacted by lender abuses in the origination and servicing of these complex transactions. My background and methodologies are more particularly described in the Professional Profile attached hereto. (See Section II - Professional Profile)

4. The information in this Affidavit and Analysis is accurate, true and correct to the best of my personal knowledge given the documentary evidence available to me for review as of this writing.

**Methodologies**

5. Over the past eighteen years, I have developed, extensively tested, and reliably employed a proprietary set of auditing tools and protocols that enable me to track with precision a

lender's loan servicing system and determine with particularity whether a problem is the result of borrower failure, lender malfeasance, or whether it is technology and policy related.

6. My process begins by assembling documentation from borrowers, lenders, closing agents, loan servicers, and interested third parties so that I have a well rounded view of the entire history. I then integrate the data into a Microsoft Excel spreadsheet and map out each transaction by date in all contractual, fiduciary and collection accounts.

7. This mapping modality enables me to detect and quantify a lender's failure to disclose properly the material disclosures required under state and federal truth in lending laws; expose hidden devices that result in the gleaning of unearned interest; see how and when a loan servicer breaches its fiduciary duty in the handling of escrow and suspense accounts; uncover equity skimming schemes; and discover nefarious unfair and deceptive acts and practices as these are defined by the Federal Trade Commission. I am also able to reconstruct lost or suppressed data through a variety of forensic accounting techniques, detect unconscionable loan terms, identify predatory lending schemes, cite violations of state and federal consumer protection statutes, and uncover fraud.

8. Over the past several years, I have made a concerted effort to study the securitization of residential mortgage loans into mortgage backed securities and derivatives that are ostensibly designed to reduce risk for the institutional investors who purchase these securities. The evidence is overwhelming that the top 50 Bank Holding Companies in the United States have abused and corrupted this method of providing liquidity to the residential mortgage market. The consequences for consumers are measured in the astronomical foreclosure rates that keep climbing; investors on the other hand, are seeing the funds they manage for state and local municipalities, union pension plans, retirement accounts, and private wealth plummet in a vertical freefall. The only people who are making out on this paradigm are the entities who set up camp in the middle of the securitization

paradigm and they are continuing to squeeze both ends to the middle in a last ditch effort to keep the house of cards they built from wiping them out.

9. The instant cases before the Land Court provide a unique opportunity to look inside the securitization model and examine whether clouds on title that the Plaintiffs seek to remove can be corrected with newly manufactured Assignments, or whether each transaction must be unwound from its inception.

#### **Reliability & Validity**

10. My analysis here is based on strictly on the documents recorded in the Hampden County Registry of Deeds, information available through Bloomberg information systems, and the Land Court's recent rulings in these matters.

11. Therefore, my analysis here is strictly clinical in nature and it is designed to enlighten the Court as to additional facts that support the Court's rulings.

#### **Timeline**

12. To assist the Court in understanding the critical timing of events and the identity of the real party in interest, I have constructed a number of exhibits that illustrate how the securitization of the subject loans occurred, whether the named Plaintiffs can achieve standing, and what is happening to each of the securitized pools in question with respect to default rates as follows:

- Securitization Flow Charts
- Timelines
- Annotated Affidavits
- Mortgage Loan Schedules
- Historical Default Rates
- Collateral Loan Performance
- Ratings History
- Recorded Mortgages, Riders, Assignments, and Foreclosure Documents

### **Caveats**

13. Due to the fact that I only learned about today's hearing on the Plaintiffs' Motion To Vacate two days ago, I have focused on my research and the creation of exhibits knowing that "a picture is worth a thousand words." This left virtually no time to write a narrative report on all of my important findings. If the Court would find it helpful for me to expand my written analysis, I will be happy to do so because the issues here are profoundly important to consumers and investors around the country who are being decimated by the fallout from this failed system of mortgage financing.

### **THE COURT'S MEMORANDUM AND ORDER OF MARCH 26, 2009**

14. In its Memorandum and Order on Plaintiffs' Motions for Entry of Default Judgment, the Court made the following assumption:

FN2. I refer to the plaintiffs by bank name (U.S. Bank, LaSalle Bank, and Wells Fargo Bank) solely for ease of reference. None of these banks hold the mortgages in question for themselves. Instead, they are the servicing trustees of the securitized mortgage pools identified in the case captions, which are the actual beneficial owners of the mortgages. Neither the details of the pools nor the particulars of the trust agreements are relevant for purposes of this Memorandum and Order, which assumes that the pools were duly and properly formed and compliant with all applicable laws, that the mortgages in question were properly included in those pools, and that the banks, as trustees, had full authority to act as they did.

15. The evidence presented with my Affidavit and Analysis suggests that the Plaintiffs' Quiet Title actions cannot be resolved without examining the securitization documents including the Prospectus, Prospectus Supplement, Pooling and Servicing Agreement, Mortgage Loan Schedule, and other related filings.

16. The reason for this is that all of the Assignments before the Court are defective because they purport to assign the subject loan from the Originator directly into the Trust Fund. This widespread practice is patently wrong because the Registration documents filed with the Securities and Exchange Commission stipulate precisely how the promissory Notes are to be

endorsed and the Mortgages are to be assigned. The “structure” that has been devised to securitize these mortgage transactions requires at least three (3) buy-sell steps before the obligations are deposited into the securitized Trust Fund as illustrated in the Securitization Flow Charts I include in my exhibits.

17. I purposely letter the boxes representing the entities involved in the buy-sell chain from “A” to “D” or in some cases where there are two originating entities, from “A” to “E,” the last letter representing the Trust Fund. What the Plaintiffs here have done is to create Assignments that transfer the mortgage obligation from the Originator, party “A,” directly into the Trust Fund, party “D” or “E” which is improper.

18. I have included in electronic medium the Prospectuses for the three securitizations in question which will verify the information contained in my Flow Charts.

19. In addition, I found that neither the Ibanez loan nor the Rosario loan are in the designated securitized Trust Funds which calls into question their whereabouts. Those loans must be traced to find out what became of them before either of those matters can be adjudicated.

20. Finally, I would like to point out to the Court that the Mortgage Servicing companies who deal with the day to day operations are manufacturing bogus Assignments that are very much self-dealing.

#### **RESERVATION OF RIGHTS**

21. If additional discovery is forthcoming prior to arbitration or trial, I reserve the right to amend or further develop my opinions.

22. I am happy to answer any questions the Court or opposing Counsel may have regarding my analysis.

Respectfully submitted,



Marie McDonnell

*Mortgage Fraud and Forensic Analyst*

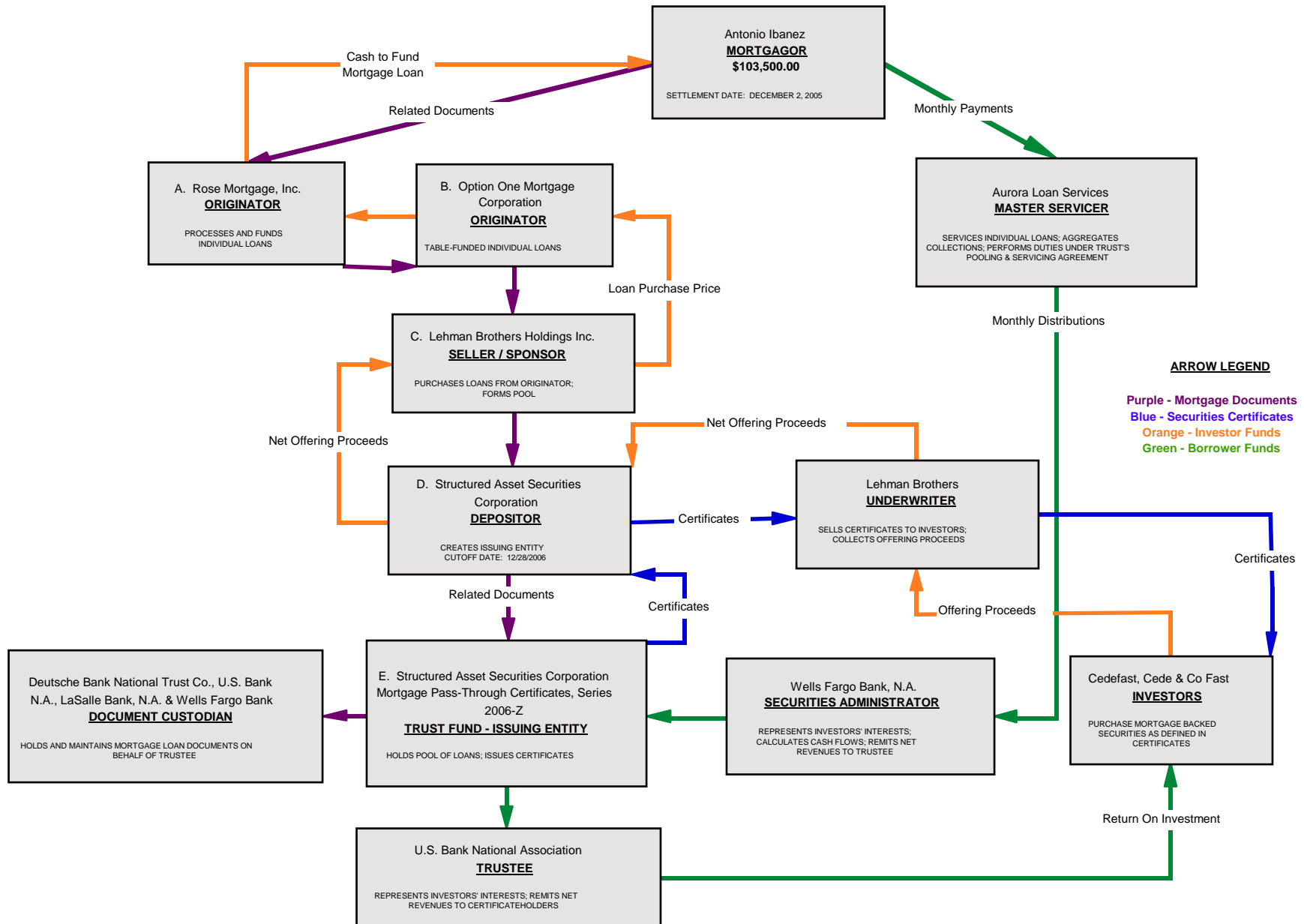
Truth In Lending Audit & Recovery Services, LLC

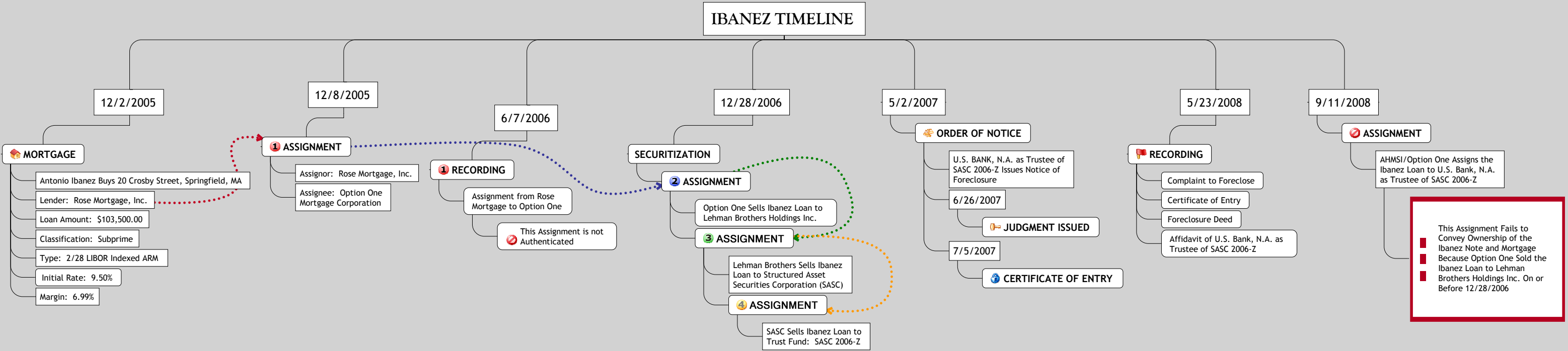
P.O. Box 2067, Orleans, MA 02653

Tel. (508) 255-8829 Fax (508) 255-9626

# IBANEZ SECURITIZATION FLOW CHART

U.S. BANK NATIONAL ASSOCIATION, as Trustee for the Structured Asset Securities Corporation  
Mortgage Pass-Through Certificates, Series 2006-Z





**Documenting The Chain Of Title in the Ibanez Case Requires All of the Following:**

- 1 ASSIGNMENT FROM ROSE MORTGAGE TO OPTION ONE
- 2 ASSIGNMENT FROM OPTION ONE TO LEHMAN BROTHERS HOLDINGS, INC.
- 3 ASSIGNMENT FROM LEHMAN BROTHERS HOLDINGS, INC. TO STRUCTURED ASSET SECURITIES CORPORATION
- 4 ASSIGNMENT FROM STRUCTURED ASSET SECURITIES CORPORATION TO STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-Z

**FATAL FLAW: The Ibanez Loan is Not Presently in SASC 2006-Z**

See Mortgage Loan Schedule, Page 4

Default Rate for This Securitization is 35.74% as of 3/25/2009



## Apocalypse Now? Will The Massachusetts Ibanez Case Unravel Widespread Irregularities In The Residential Securitized Mortgage Market?

By Richard D. Vetstein, Esq., Vetstein Law Group, P.C. © All Rights Reserved

Barely 24 hours old — the Massachusetts Supreme Judicial Court's [\*U.S. Bank v. Ibanez\*](#) decision is already a huge national story. CNN-Money calls it a [—beat down|| of the big banks](#). Reuters says its a [—catastrophe risk|| for banks](#). The Huffington Post claims there's some [Obama Administration-Bank of America conspiracy in play](#). The ruling has spooked investors, as bank stocks [were down in reaction to the ruling](#).

The case certainly has national implications as the SJC is the first state supreme court to weigh in on this particular issue, and the majority of states have laws similar to Massachusetts' regarding the assignment of mortgages, such as California and Georgia. Other courts across the country will likely be influenced by the ruling, and the SJC is widely regarded as one of the most respected state supreme courts in the country.

But is the *Ibanez* ruling really the next **Foreclosure Apocalypse**?

That remains to be seen. But the answer to the question will likely rest with what has transpired under complex [mortgage securitization pooling and servicing agreements](#), known as PSA's. These complex agreements may unlock the key to who, if anyone, owns these non-performing mortgage loans and has the legal right to foreclose.

### The Ibanez Fact Pattern: Mortgage Assignments In Blank, A Common Practice

On December 1, 2005, Antonio Ibanez took out a \$103,500 loan for the purchase of property at 20 Crosby Street in Springfield, MA secured by a mortgage to the lender, Rose Mortgage, Inc. The mortgage was recorded in the county registry of deeds the following day. Several days later, Rose Mortgage executed an assignment of this mortgage in blank, that is, an assignment that did not specify the name of the assignee. The blank space in the assignment was at some point stamped with the name of Option One Mortgage Corporation (Option One) as the assignee, and that assignment was recorded in the registry of deeds on June 7, 2006. Before the recording, on January 23, 2006, Option One also executed an assignment of the Ibanez mortgage in blank.

Option One then assigned the Ibanez mortgage to Lehman Brothers Bank, FSB, which assigned it to Lehman Brothers Holdings Inc., which then assigned it to the Structured Asset Securities Corporation, which then assigned the mortgage, pooled with approximately 1,220 other mortgage loans, to U.S. Bank, as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z. With this last assignment, the Ibanez and other loans were pooled into a trust and converted into a mortgage-backed securities pool that was bought and sold by investors.

On April 17, 2007, U.S. Bank started a foreclosure proceeding in Massachusetts state court. Although Massachusetts requires foreclosing lenders to follow the Soldier's and Sailor's Servicemember's Act to ensure the debtor is not in the military, it is considered a non-judicial foreclosure state. In the foreclosure complaint, U.S. Bank represented that it was the "owner (or assignee) and holder" of the Ibanez mortgage. At the foreclosure sale on July 5, 2007, the Ibanez property was purchased by U.S. Bank, as trustee for the securitization trust, for \$94,350, a value significantly less than the outstanding debt and the estimated market value of the property.

On September 2, 2008--14 months after the foreclosure sale was completed - U.S. Bank obtained an assignment of the Ibanez mortgage.

The major problem was that as the time U.S. Bank initiated the foreclosure proceeding, it did not possess (and could not produce evidence of) a legally effective mortgage assignment evidencing that it held the Ibanez mortgage.

## Securitized Pooling and Servicing Agreements

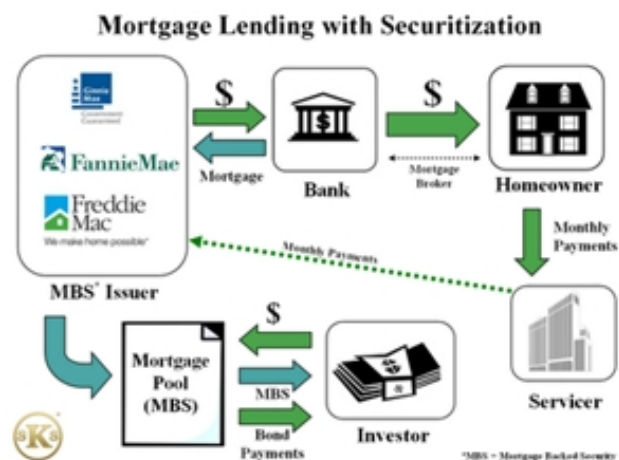
Almost all sub-prime mortgages and millions of conventional mortgages originated before the mortgage meltdown in 2008 were packaged in securitized mortgage securities and sold off to Wall Street investors. [Securitized mortgages currently comprise over half, or \\$8.9 trillion, of the \\$14.2 trillion in total U.S. mortgage debt outstanding.](#)

**Pooling and Servicing Agreements** are part of the complex mortgage securitization lending agreements. As [one securitization expert explains](#), a Pooling and Servicing Agreement is the legal document creating a residential mortgage backed securitized trust. The PSA also establishes some mandatory rules and procedures for the sales and transfers of the mortgages and mortgage notes from the originators to the securitized trusts which hold the millions of bundles of mortgage loans.

## The Ibanez Ruling: Prohibits Assignments In Blank

The *Ibanez* ruling clearly invalidates a common practice in the sub-prime mortgage securitization industry of assigning the promissory note and mortgage in blank and not recording it until after the foreclosure process has started. The Court held that there must be evidence of a valid assignment of the mortgage at the time the foreclosure process starts which would establish the current ownership of the mortgage.

Left open by the Court was what evidence would suffice to establish such ownership, specifically referencing PSA's:



**“We do not suggest that an assignment must be in recordable form at the time of the notice of sale or the subsequent foreclosure sale, although recording is likely the better practice. Where a pool of mortgages is assigned to a securitized trust, the executed agreement that assigns the pool of mortgages, with a schedule of the pooled mortgage loans that clearly and specifically identifies the mortgage at issue as among those assigned, may suffice to establish the trustee as the mortgage holder. However, there must be proof that the assignment was made by a party that itself held the mortgage.”**

This language opens the door for Massachusetts foreclosing lenders to move ahead with foreclosures and cure title defects by using PSA's to prove proper assignment of the mortgage loans. That is, if they can produce proper documentation that the defaulting mortgage was actually transferred into the pool and assigned to the end-holder before the initiation of foreclosure proceedings. Whether lenders can do this is another story.

### **Have Lenders Complied With The PSA's?**

The major problem for banks is mounting evidence is that originating lenders never transferred a vast number of loans into the securitized trusts in the first place. Josh Rosner, a well respected financial analyst, issued a [client advisory](#) in October 2010, advising of widespread violations of pooling and servicing agreements on mortgages. Mr. Rosner counseled that although PSA's require transfer of the promissory notes into the securitized trusts, that hardly ever occurred in the white hot run-up of securitized loans in the last decade. He also says that the mortgage assignments which must accompany each note are routinely ignored or left blank. (This was the major problem in the *Ibanez* case).

Mr. Rosner said:

—We believe nearly every single loan transferred was transferred to (securitized trusts) in —blank name. That is to say the actual loans were apparently not, as of either the cut-off or closing dates, assigned to the (securitized trusts) as required by the PSA.||

Mr. Rosner concludes in this chilling statement:

—There have been a large numbers of foreclosure proceedings where, because of improper assignments, the trust has been unable to demonstrate the right to foreclose. It is thus that we raised concern about the transfer —in blank name.|| We do believe it likely the rush to move large volumes of loans may well have resulted in operational failures in the —true sale process by some selling firms and trustees. Were this —missing assignment problem, which we are witnessing in individual foreclosure proceedings, to be found to have resulted from widespread failure of issuers and trusts to properly transfer rights there would be appear to be a strong legal basis for the calling into question securitizations.||

Mr. Rosner's theory has been born out in court testimony. In a New Jersey bankruptcy case, a senior Bank of America manager admitted that [Countrywide Loans routinely failed to transfer promissory notes as part of the securitization process](#). Countrywide, of course, went under but not after originating billions in loans.

But only the *banks themselves* have a handle on how widespread these irregularities are.

## **Apocalypse Now?**

If, in fact, there exists widespread legal failure of securitized mortgage pools, as Mr. Rosner, theorizes, then we are possibly facing the **Apocalypse Scenario**, calling into question the legal and financial soundness of the vast majority of the existing sub-prime mortgage market and potentially even a large portion of the U.S. securitized mortgage market. [Securitized mortgages comprise over half, or \\$8.9 trillion, of the \\$14.2 trillion in total U.S. mortgage debt outstanding.](#)

—It may mean investors who think they bought mortgage-backed securities bought securities that aren't backed by anything,|| [said](#) Kurt Eggert, a professor at Chapman University School of Law in Orange, California. Well, that's already happened. Take a look at this [lawsuit](#) by MBIA Insurance against Credit Suisse over a bad securitization loan deal.

Before the Ibanez ruling came down [Bloomberg News](#) said the best scenario is that the disputes are deemed as legal technicalities, which would cause a one-year delay in foreclosures. In the medium case, years of litigation will ensue. In the worst case, the problem becomes systemic, causing —the mortgage market to grind to a halt as title insurers refuse to insure mortgages involving existing homes.||

Well, we now know from the *Ibanez* decision that this is hardly a —legal technicality.|| So we are in the medium or worst case scenarios.

For those thousands (or millions?) of defaulted loans which were —assigned in blank,|| I'm simply not sure if or how mortgage lenders are going to be able to cure the title defects they created. It's going to take some major effort and creative lawyering, that's for sure.

## **Don't Believe The Hype?**

Not all investment analysts, however, expect financial chaos. The controversy may cause a six-month delay in foreclosures and —have a muted effect on valuation|| of about \$154 billion of mortgage-backed securities, Laurie Goodman, senior managing director of Amherst Securities Group LP in New York, [wrote in a note to investors.](#) —Servicers will incur high costs both from re-processing loans that are in the process of foreclosure as well as from defending themselves in litigations,|| Goodman wrote. —And investors definitely need to question the cash flows they are receiving on private-label MBS, to ascertain that they are not paying for expenses that rightfully belong to servicers.||

How many pools of mortgage loans are affected by the —assignment in blank|| and related irregularities in the servicing pools? I haven't been able to find any firm data.

For the sake of our economy, I hope that this mess can be fixed at minimal cost to taxpayers and distressed homeowners alike!



## **WELLS FARGO, U.S. BANK LOSE CLOSELY WATCHED FORECLOSURE CASE**

**By Kate Berry and Jeff Horwitz**

**January 7, 2011**

A ruling by Massachusetts' highest court Friday repudiating a widespread securitization practice could scuttle other foreclosure cases statewide and may portend similar blows to the industry elsewhere.

The Supreme Judicial Court of Massachusetts rejected claims made by U.S. Bancorp and Wells Fargo & Co. that the banks, as securitization trustees, did not have to prove their authority to foreclose on two separate homes.

"This is the first court to say directly, 'it doesn't matter if there are large dollars involved or if it is convenient to ignore governing laws. You are bound to the laws just like the rest of us are,'" said Paul Collier, a Cambridge lawyer who represented the homeowners in the case.

In a research note Friday, Miller Tabak + Co. LLC, a brokerage firm in Boston, wrote to its clients that it expects "this sort of ruling to appear over and over again," though in most cases "the lender will end up retaining significant legal rights once the paperwork is properly amended."

The ruling is an effective rejection of the industry's fallback defense on botched securitization procedures. The American Securitization Forum and numerous securitization attorneys working for the industry have argued that evidence of intended transfers of a mortgage are sufficient to demonstrate legal standing. The Massachusetts high court disagreed.

The case, Ibanez vs. U.S. Bank, has been closely watched because banks have routinely argued that pooling and servicing agreements allowed them to convey mortgages to securitized trusts "in blank," or without specifying who the new owner of the mortgage would be.

The court ruled that the banks could not submit documents after filing for foreclosure and that they failed to show they were the holders of the mortgage at the time of foreclosure.

"There must be proof that the assignment was made by a party that itself held the mortgage," Justice Ralph D. Gants wrote. "The plaintiffs were not the original mortgagees to whom the power of sale was granted; rather, they claim the authority to foreclose as the eventual assignees of the original mortgagees."

Grants also wrote "that a conveyance of real property, such as a mortgage, that does not name the assignee conveys nothing and is void; we do not regard an assignment of land in blank as giving legal title."

Perplexingly, the American Securitization Forum issued a press release hailing the court's ruling as upholding the validity of assignments in blank. A spokesman for the organization could not be reached to explain its interpretation.

The shares of U.S. Bancorp and Wells Fargo slid on news of the ruling even though as trustees, they did not have a direct financial stake in the outcome of the case.

U.S. Bancorp said in a statement Friday that the judgment "has no financial impact" on the Minneapolis company. "As trustee, U.S. Bancorp has no responsibility for the terms of the underlying mortgage or the procedure by which they were transferred to the trust and has no ownership interest in the underlying mortgages."

Wells Fargo said that it did not believe that the ruling would "prevent foreclosures on loans in securitizations," according to a statement released late in the day. But it distanced itself from the case, highlighting its limited role as a trustee.

"The loans at issue in the court's ruling were not originated, owned, serviced or foreclosed upon by Wells Fargo," the company said. "Wells Fargo expects the entities who service these loans to abide by all applicable state laws."

American Home Mortgage Servicing, the servicer for both the loans, said that the problems seized on by the court were of limited scope and unrelated to its handling of the loan. "The challenged foreclosures were conducted by a prior servicer," the company said.

In the ruling and a concurring opinion, the judges made clear that they were not taking issue with securitization in and of itself. Rather, they were faulting the sloppiness with

which it had been carried out, and left open the possibility of fixing it.

"There is no dispute that the mortgagors of the properties in question had defaulted on their obligations," wrote Justice Robert Cordy in a concurring opinion joined by another judge. But the legal standard to foreclose is higher than simply demonstrating that, he added: "Before commencing such an action ... the holder of an assigned mortgage needs to take care to ensure that his legal paperwork is in order."

Joshua Rosner, managing director at the research firm Graham Fisher & Co., Inc., said the ruling appears to leave some room for banks to go back and correct mortgage assignments as long as they do so prior to initiating a foreclosure.

"It appears that foreclosures already in process are those at risk from this ruling," Rosner said.

Borrowers who were foreclosed on a year ago may have some legal remedy, he said. "The borrower could sue, but I can't imagine they would get the house back if they defaulted."

Still, the outcome of the case "will increase lawsuits by investors, particularly if there is a pool of loans geographically concentrated in Massachusetts," Rosner said.

# National Mortgage News

## The Ibanez Effect on Past, Future Foreclosures

Tuesday, January 18, 2011

By [Amilda Dymi](#)

The Ibanez case ruled against the lender in a lender-borrower dispute over the validity of a foreclosure proceeding is not just a highly political homeowners' protection issue. It sets a precedent expected to greatly affect the mortgage industry in the future.

The Massachusetts Supreme Court ruling on the Ibanez case—which states that U.S. Bancorp and Wells Fargo did not have standing to foreclose on a borrower because they failed to follow proper legal procedure in the mortgage transfer and securitization process—is about to turn into the cornerstone of future foreclosure proceedings not only in Massachusetts.

Sean O'Toole, CEO and founder of ForeclosureRadar.com, is one of many mortgage market insiders who expect servicers to “have their hands full” when processing and managing foreclosures.

It may be a while before foreclosure activity stabilizes “and some clarity” comes to the foreclosure process, he said, not only at the federal but also at the state level.

In his view the recent example of the Massachusetts Supreme Court decision made it clear that lenders must follow the letter of the law in each state rather than simply continue industry practices. Such compliance requirements that have the power to turn into sizable legal responsibility for lenders “could certainly slow one type of activity while accelerating another.”

In times when the life of a loan entails multiple mortgage assignments and securitization agreements, lawyers Patricia Antonelli and Thomas J. Enright wrote in a recent white paper on the Ibanez ruling that dotting the “i's” and crossing the “t's” in mortgage transfers is “the Achilles heel for some lenders.”

**They consider the Supreme Court's review of the Massachusetts Land Court's 2009 a “landmark decision” that is significant because it rejects securitization and pooling agreements and other forms of evidence ruling that “only fully executed assignments in recordable form are sufficient to prove mortgage ownership.”**

**And as everyone in the legal profession knows, these rulings are important because they create a precedent.**



**The State Supreme Court decision is the first to weigh in on such evidence as its opinion in the Ibanez case “makes clear that the foreclosing lender must be able to document ownership of the mortgage to be foreclosed before issuing notices of foreclosure.”**

As importantly, Antonelli and Enright wrote, the Supreme Court “did not restrict evidence of mortgage ownership to fully executed assignments in “recordable form,” as the Land Court had found, but noted that a foreclosing lender may document its ownership in many ways, including securitization agreements.

They explain that the underlying cases leading to the Supreme Court decision arose when U.S. Bank and Wells Fargo Bank, trustees of securitized trusts, filed complaints in the Massachusetts Land Court seeking to validate sales of foreclosed mortgages as part of a pool. The Land Court found that the lenders could not prove that they held valid assignments of the mortgages prior to foreclosing under the Massachusetts state law.

Going forward, they wrote, “It is clear that lenders seeking to foreclose in Massachusetts must make certain that they can document ownership of the mortgage at issue, with no gaps in the chain of ownership, before sending out a notice of sale.”

It means lenders with Massachusetts foreclosures will be better off if they consider auditing their internal foreclosure procedures and mortgage ownership documentation so they are prepared to comply with “demands from third parties, such as buyers and title insurers, seeking confirmation that foreclosures are valid under Ibanez.”

Antonelli and Enright list a number of takeaways from the Ibanez case.

Those takeaways include foreclosure by a party that has not been assigned the mortgage has no standing, and the foreclosure is void; where the mortgage is assigned after origination, the foreclosing party must have validly been assigned the mortgage prior to noticing the foreclosure sale; a valid mortgage assignment is not limited to an assignment of mortgage in recordable form; a mortgage is a conveyance of an interest in real property, and it must contain the name of an assignee to be valid (assignments of mortgage in blank are void); the mortgage does not “follow the note” in Massachusetts; the mortgage holder holds the mortgage in trust for the purchaser of note; and the note purchaser has equitable right to obtain an assignment of mortgage.

They also note that the Ibanez ruling is not prospective because the Ibanez decision is not a change in common law (holding not limited to future foreclosures).

Among others, Rep. Maxine Waters, D-Calif., a long-time advocate of the Ibanez case, applauded the Supreme Court ruling as a victory for homeowners because it upheld a judge’s decision to invalidate two U.S. Bancorp and Wells Fargo foreclosures as these banks “failed to prove that they followed the appropriate legal process documenting their ownership of the mortgages.

"The failure to properly transfer loans through the appropriate legal 'chain of title' is no technicality," she said, "but rather part of a long pattern of predatory and negligent behavior by Wall Street."

Waters compared it with the sale of tricky exotic products that resulted in the subprime mortgage meltdown that devastated America's entire economy and the illegality of the servicers' practice of rubberstamping thousands of foreclosures a week without examining the accuracy of the paperwork.

The banks' failure "to follow the rules of the road when documenting ownership of these borrowers' mortgages and therefore the right to foreclose...creates uncertainty for mortgage investors," she said, and produces more wrongful foreclosures.

The congresswoman's hope is that the influence of this ruling extends to other states.

"I will continue to advocate for servicing reform and in favor of the due process rights of homeowners."

[http://www.nationalmortgagenews.com/nmn\\_features/-1022954-1.html?ET=nationalmortgage:e771:12832a:](http://www.nationalmortgagenews.com/nmn_features/-1022954-1.html?ET=nationalmortgage:e771:12832a)



## **“THE REPORTS OF MY DEATH ARE GREATLY EXAGGERATED”: FORECLOSURES IN MASSACHUSETTS FOLLOWING THE SUPREME JUDICIAL COURT DECISION IN IBANEZ**

By Bruce Allensworth, Phoebe S. Winder, Andrew C. Glass, Robert W. Sparkes III  
January 12, 2011

### **I. Introduction**

Language in securitization agreements providing for the present conveyance of specifically identified mortgages is sufficient to effect assignments of mortgages under the unique aspects of Massachusetts law, according to a January 7, 2011 opinion of the Massachusetts Supreme Judicial Court ("SJC").<sup>[1]</sup>

In so holding, the SJC rejected the lower court's reasoning that individually executed assignments of mortgage "in recordable form" are required. While the SJC affirmed the lower court's decision, the SJC did so solely based on an allegedly incomplete evidentiary record relating only to the two specific mortgage loans at issue. Contrary to recent media commentary regarding the decision and its negative implications, the SJC's ruling stands as a reaffirmation that the mortgage loan securitization processes currently in place in the secondary mortgage market are sound, and that those processes can and do serve to validly assign mortgages for foreclosure purposes under unique Massachusetts law.

The decision is in the consolidated cases styled U.S. Bank National Association, as Trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z v. Antonio Ibanez ("Ibanez") and Wells Fargo Bank, N.A., As Trustee For ABFC 2005-OPT 1 Trust, ABFC Asset Backed Certificates Series 2005-OPT 1, v. Mark A. LaRace and Tammy L. LaRace ("LaRace") (No. SJC-10694).<sup>[2]</sup>

### **II. Securitization Agreements Can Effectuate Assignment Of Mortgages To A Securitization Trustee**

The most important aspect of the SJC's ruling is its finding that securitization agreements that transfer pools of mortgage loans can effectuate the assignments of the mortgages for those mortgage loans where the transferee and the loans at issue are

identified in the agreements. According to the SJC, such assignments of mortgages are sufficient to provide the assignee the authority to foreclose under Massachusetts law. While this case arises in the context of mortgage-backed securities and pooling and servicing agreements, the underlying principles would apply with equal force to whole loan sales and mortgage loan purchase and servicing agreements.

In Massachusetts, foreclosure proceedings are typically initiated in the name of the securitization trustee. The key issue underlying the Ibanez and LaRance appeals was whether a trustee of a securitization trust was a mortgage assignee, and thereby had authority, under Massachusetts law, to give notice of foreclosure and invoke the statutory power of sale contained in the mortgage; note that Massachusetts is a non-judicial foreclosure state.[3] The SJC held that the securitization trustee may indeed have authority to foreclose on a mortgage held in the securitization trust based upon the assignment of the mortgage effectuated by the various securitization agreements. Specifically, the SJC explained that:

[w]here a pool of mortgages is assigned to a securitized trust, the executed agreement that assigns the pool of mortgages, with a schedule of the pooled mortgage loans that clearly and specifically identifies the mortgage at issue as among those assigned, may suffice to establish the trustee as the mortgage holder.[4]

In so finding, the SJC repudiated the finding of the lower court that the securitization agreements presented to it by the plaintiffs did not effectuate a present assignment of the mortgages, but merely indicated a prospective right to an assignment of the mortgages.[5] According to the lower court, “[t]he various agreements between the securitization entities stating that each had a right to an assignment of the mortgage are not themselves an assignment . . . . At best, the agreements gave those entities a right to bring an action to get an assignment.”[6] The SJC also rejected the similar arguments of the defendant-borrowers that securitization agreements could not, as a matter of law, serve to effectuate assignments of mortgages to a securitization trustee or provide a trustee the authority to foreclose on a mortgage so assigned.[7] At oral argument, for example, counsel for Ibanez stated that, as a matter of law, “securitization agreements are not assignments.”[8] The SJC has now very clearly held otherwise.

Pooling and servicing agreements, like whole loan purchase agreements, typically contain clear and unequivocal language assigning and transferring all interest in the subject mortgage loans, including the mortgages themselves, to the securitization trustee and include schedules identifying each mortgage loan transferred by the securitization agreements. As such, under the SJC’s ruling in the consolidated Ibanez and LaRance appeals, such agreements can, as a matter of law, effectuate an assignment

of a mortgage that would satisfy the unique Statute of Frauds requirements under Massachusetts law.

### **III. An Assignment Of Mortgage Need Not Be “In Recordable Form” Or Recorded Prior To Conducting Foreclosure Proceedings**

The lower court’s decisions, and the defendant-borrowers’ arguments on appeal, were predicated in large part on the contention that an assignment of mortgage conveys authority to foreclose to the assignee only if that assignment is “in recordable form.” Indeed, the lower court stated that “[o]ne can become the ‘holder of the mortgage’ . . . only by a writing satisfying the statute of frauds . . . in recordable form.”[9] In effect, both the lower court and the defendant-borrowers argued that an entity seeking to foreclose must obtain a single document entitled “assignment of mortgage” that otherwise satisfies each of the requirements for recording with the registry of deeds prior to publishing statutory notice of sale and conducting the foreclosure sale.[10] Moreover, counsel for the defendant-borrowers went so far as to request that the SJC overrule long-standing Massachusetts law and require that the foreclosing entity actually record an assignment of mortgage before initiating foreclosure proceedings.[11]

The SJC rejected these arguments and expressly found that an assignment of mortgage need not be “in recordable form” before a foreclosing entity issues statutory notice of sale pursuant to Mass. Gen. Laws c. 244, § 14, or conducts the subsequent foreclosure sale.[12] In so ruling, the SJC effectively repudiated the lower court’s efforts to judicially legislate such a requirement into Massachusetts jurisprudence. Most significantly, this finding further supports the SJC’s ruling that securitization agreements – which likely are not “in recordable form” – can serve to validly assign a mortgage under Massachusetts law, and that such agreements can support a securitization trustee’s authority to foreclose.

### **IV. A Foreclosing Securitization Trustee Need Not Provide A Complete Chain Of Assignment From The Last Mortgagee Of Record**

The SJC also rejected the lower court’s contention that “[a]n assignment simply from the last assignee of record may not be sufficient” and that a foreclosing entity may be required to establish each and every off-record assignment of the mortgage in order to prove its authority to foreclose.[13] Instead, the SJC found that to foreclose, “[a] foreclosing entity may provide a complete chain of assignment linking it to the record holder of the mortgage, or a single assignment from the record holder of the mortgage.”[14] Thus, from a practical perspective, it is enough that the securitization trustee has a written, executed assignment of mortgage from the last mortgage holder of record that identifies the securitization trustee as the assignee. Under the SJC’s ruling, this assignment of mortgage must identify the name of the assignee to constitute

a valid and effectual assignment of the mortgage. That is because the SJC held that an assignment-in-blank, which does not identify the name of the assignee, has no effect.[15] In a typical mortgage loan securitization process, assignments-in-blank, in recordable form, are provided to the assignee of the mortgages (ultimately the trustee) pursuant to the securitization agreement as a means to evidence the assignments that are effectuated by the securitization agreements themselves. It remains to be seen whether, pursuant to its express power of attorney, a servicer can fill in the name of a trustee on an assignment of mortgage in blank. The Samuels and Almeida decisions issued by the United States Bankruptcy Court for the District of Massachusetts appear to suggest that this might be permissible in some instances.[16]

Finally, the SJC's ruling also appears to lay to rest the argument asserted by the defendant-borrowers, and echoed by some commentators, that an assignment of mortgage from the last mortgagee of record to the securitization trustee is null and void because it somehow violates the terms of the pooling and servicing or other securitization agreement (which typically requires that a "depositor" assign the mortgages to the trustee).[17] While the SJC did not directly address this argument in its opinion, its ruling implicitly defeats any future reliance by Massachusetts borrowers attempting to challenge completed foreclosure sales based on that and similar arguments.

#### **V. Post-Foreclosure "Confirmatory" Assignments Are Valid To Confirm Prior, Pre-Foreclosure Assignments Of Mortgage**

The SJC further ruled that a "confirmatory" assignment, which is an assignment of mortgage executed in recordable form and often recorded after the foreclosure sale on the underlying property is completed, can serve to confirm an assignment of mortgage that occurred by way of a prior, pre-foreclosure-sale securitization agreement.[18]

Specifically, the SJC explained that "where an assignment is confirmatory of an earlier, valid assignment made prior to the publication of notice and execution of the sale, that confirmatory assignment may be executed and recorded after the foreclosure, and doing so will not make the title defective."[19]

This portion of the SJC's ruling again exemplifies how the SJC, despite affirming the lower court's decisions, significantly reined in the broad grounds and rationale advanced by the lower court. In its decisions, the lower court rejected the validity of "confirmatory" assignments without meaningful analysis and suggested that any parcel of property that contained a post-foreclosure assignment of mortgage in its chain-of-title is inherently clouded and the earlier foreclosure sale automatically void (or at least questionable).[20] The lower court's decisions, moreover, arguably meant that third parties who purchased property at foreclosure sales may not now actually own the properties they purchased in good faith and for value where a post-foreclosure

assignment exists in the recorded chain-of-title of those properties.[21] Indeed, in one recent decision, the lower court rejected out of hand the idea that a third-party purchaser at a foreclosure sale had an interest in the subject property, because there had been a confirmatory assignment of mortgage executed after issuance of the notice of foreclosure.[22] That rationale has now been rejected.

The SJC has clearly signaled that the existence of a post-foreclosure assignment of mortgage on the public record will not automatically void a foreclosure or otherwise cloud title to the underlying property. The press reports that the SJC's Ibanez decision has voided foreclosure sales on a widespread basis are simply wrong. Instead, where a defaulted borrower seeks to challenge a completed foreclosure sale based on the existence of a post-sale, "confirmatory" assignment, courts will need to assess the factual background of each challenged loan and each such challenge will depend upon the specific facts unique to that loan. And, in the context of securitization, such confirmatory assignments will serve to validly confirm the language of assignment contained in the underlying securitization agreements and can thus properly confirm the earlier assignment of mortgage which itself bestowed the authority to foreclose. [23]

#### **VI. The SJC Partially Rejects The "Mortgage Follows The Note" Rule**

Most, if not all, states and jurisdictions outside of Massachusetts recognize the well-established common law rule that "the mortgage follows the note." This rule means that the assignment of a mortgage note, which is the debt obligation to which the mortgage serves as security interest, carries with it the assignment of the corresponding mortgage without any further action. The "mortgage follows the note rule" is also codified in the Uniform Commercial Code ("UCC"), which has been adopted, with state-specific variations, in all fifty states and the District of Columbia,[24] including Massachusetts.[25]

The SJC, however, rejected this rule as a matter of Massachusetts law, explaining that "where a note has been assigned but there is no written assignment of the mortgage underlying the note, the assignment of the note does not carry with it the assignment of the mortgage." [26] In doing so, the SJC did not completely abrogate the principle underlying the rule, noting that the holder of the mortgage note "has an equitable right to obtain an assignment of the mortgage, which may be accomplished by filing an action in court and obtaining an equitable order of assignment." [27] Therefore, the holder of the mortgage note is entitled to an assignment of the mortgage, but the holder of the mortgage note must bring a separate action to obtain that assignment.

As a practical matter, the SJC's rejection of the widely accepted common law rule that "the mortgage follows the note" may have little effect on the assignment and transfer

of mortgages into securitization trusts. Most, if not all, securitization agreements contain clear and unequivocal language of present sale and assignment to the securitization trustee of the mortgage note and the mortgage for each loan in the pool. As such, the securitization agreements themselves will serve as an effective assignment of both the mortgage note and the mortgage to the same intended party – the trustee. Thus, since ownership of the mortgage note and the mortgage for each loan is transferred to and remains with the same entity, securitization trustees should not, as a practical matter, need to resort to some equitable procedure before they may initiate foreclosure proceedings on the mortgage.

## **VII. The SJC's Ruling Is Limited To Massachusetts Law**

It is important to address a serious misconception adopted by the press regarding the SJC's ruling in the Ibanez and LaRae appeals. The SJC's ruling is based entirely on Massachusetts-specific law and has no direct bearing on other states' legal requirements relating to assignments of mortgage, foreclosure or other related subjects. Indeed, Massachusetts has a somewhat unique body of real property law that has developed over the past two hundred years. For instance, Massachusetts is a non-judicial foreclosure state and one of a minority of "title theory" states, which treat a mortgage as a conveyance of the legal title to the underlying property from the mortgagor (the borrower) to the original mortgagee (typically, the mortgage lender) and the mortgagee's assigns.[28] The practical consequence of this law is that, in Massachusetts, an assignment of a mortgage must be in a writing executed by the party assigning the mortgage and, in accordance with the Massachusetts Statute of Frauds, it must identify the assignee by name.[29] These requirements are specific to Massachusetts, and the SJC's ruling will not affect the assignment of mortgages or foreclosures in other states as some commentators have incorrectly suggested.

## **VIII. MERS Matters In Massachusetts**

The SJC's ruling is of further significance as it implicitly recognizes the validity of the use of Mortgage Electronic Registration Systems ("MERS") in Massachusetts. In mortgage loan transactions in which MERS is involved, MERS is identified on the public land records as the mortgagee of record as the nominee of the loan originator (i.e., the lender) and its assignees. As such, MERS is listed as the record mortgage holder. MERS essentially serves as a central registry to track all future mortgage loan transfers and assignments of the mortgage, which transfers and assignments are not, and need not be, recorded in the public land records. Accordingly, when a borrower defaults on his or her mortgage loan and the mortgage holder seeks to foreclose, MERS, as the last mortgage holder of record, will execute an assignment of the mortgage to the foreclosing entity. The SJC's ruling that an assignment from the last mortgage holder of record to the foreclosing entity suffices to demonstrate authority to foreclose (irrespective of any intervening off-record assignments) clearly stands as an affirmation



of MERS' role in mortgage transactions in Massachusetts. For those who wonder why MERS exists, look no further than these consolidated cases that reference real property law from the end of the 19<sup>th</sup> century to determine how mortgages are assigned in Massachusetts. MERS matters in Massachusetts.

## **IX. Conclusion**

In sum, contrary to press reports, the Massachusetts Supreme Judicial Court's recent decision in the consolidated Ibanez and LaRance appeals is, overall, a positive result for the mortgage industry. Indeed, the SJC's ruling is the first reported ruling from a state's highest court that recognizes that securitization agreements may serve, as a matter of law, to effectuate the assignment of mortgages from the originator and ultimately to the securitization trustee. While the future ramifications of the SJC's rulings are not quite clear, one thing is certain: the SJC's ruling will not bring about the wide spread invalidation of past foreclosure sales or other chaos as some have rushed to predict.

### **Notes:**

[1] K&L Gates LLP served as appellate counsel for Plaintiffs U.S. Bank, as Trustee and Wells Fargo, as Trustee in the consolidated appeals before the Massachusetts Supreme Judicial Court; it was not involved in the lower court's decision.

[2] Plaintiffs, U.S. Bank, as Trustee and Wells Fargo, as Trustee, appealed and sought direct appellate review from the SJC after the lower court entered judgment on its own initiative against the plaintiffs on motions for entry of default judgment and subsequently denied the plaintiffs' motions for reconsideration.

[3] This means that an entity seeking to foreclose on a mortgage need not demonstrate its authority to foreclose or make any showing to a court prior to initiating foreclosure proceedings. A foreclosing entity is typically only required to demonstrate its authority to foreclose under Massachusetts law where the borrower, or a third party with standing, challenges the foreclosing entity's authority to do so. But see The Service Members' Civil Relief Act of 1940, 50 U.S.C. §§ 501-596 (requiring, where applicable, that a foreclosing entity file appropriate documents with a court prior to issuing notice of sale or otherwise initiating foreclosure proceedings).

[4] U.S. Bank Nat'l Assoc. v. Ibanez, No. SJC-10694, ---N.E.2d---, 2011 WL 38071, at \*9 (Mass. Jan. 7, 2011).

[5] See U.S. Bank Nat'l Assoc. v. Ibanez, Nos. 08 MISC 384283 (KCL), 08 MISC 386755 (KCL), 2009 WL 3297551, at \*11 (Mass. Land Ct. Oct. 14, 2009) ("Ibanez II").

[6] Id. (emphasis in original).

[7] See Ibanez, 2011 WL 38071, at \*9.

[8] See Webcast of Oral Argument before the Massachusetts Supreme Judicial Court held on October 7, 2010. (oral argument of Paul R. Collier, III).

[9] See U.S. Bank Nat'l Assoc. v. Ibanez, Nos. 384283 (KCL), 386018 (KCL), 386755 (KCL), 2009 WL 795201, at \*5 n.19 (Mass. Land Ct. Mar. 26, 2009) (emphasis added) ("Ibanez I"); see also Ibanez II, 2009 WL 3297551 at \*11 n.51 ("G.L. c. 244, § 14 requires the foreclosing party to be in possession of a valid assignment of the mortgage in recordable form at the time of notice and sale.").

[10] See, e.g., Brief of Appellees Mark A. LaRace and Tammy L. LaRace dated August 17, 2010, at 42 ("An Assignment of Mortgage placed in the Trust must be in recordable form.").

[11] See Webcast of Oral Argument before the Massachusetts Supreme Judicial Court held on October 7, 2010. (oral argument of Paul R. Collier, III).

[12] Ibanez, 2011 WL 38071, at \*9 ("[w]e do not suggest that an assignment must be in recordable form at the time of the notice of sale or the subsequent foreclosure sale"); id. at \*12 (Cordy, J., concurring) ("[t]he court's opinion clearly states that such assignments do not need to be in recordable form or recorded before foreclosure").

[13] Ibanez II, 2009 WL 3297551, at \*11 & n.48.

[14] Ibanez, 2011 WL 38071, at \*9.

[15] See Ibanez, 2011 WL 38071, at \*10 ("We have long held that a conveyance of real property, such as a mortgage, that does not name the assignee conveys nothing and is void; we do not regard an assignment of land in blank as giving legal title in land to the bearer of the assignment.").

[16] See In re Samuels, 415 B.R. 8, 16-17, 20-21 (Bankr. D. Mass. 2009); In re Almeida, 417 B.R. 140, 149-50 (Bankr. D. Mass. 2009).

[17] See Brief of Appellees Mark A. LaRace and Tammy L. LaRace dated August 17, 2010, at 15-16 (arguing that "the 'Originator' . . . [is] expressly precluded from assigning or transferring any Notes and/or Mortgages and/or assignments of Mortgages into the trust"), 43-45 (arguing that the originator was prohibited from depositing an assignment of mortgage into the trust and that such an act could not validly transfer ownership of the mortgage).

[18] Ibanez, 2011 WL 38071 at \*11 (“we do not disagree with Title Standard No. 58(3) that, where an assignment is confirmatory of an earlier, valid assignment made prior to the publication of notice and execution of the sale, that confirmatory assignment may be executed and recorded after the foreclosure, and doing so will not make the title defective”).

[19] Id. (emphasis added).

[20] Ibanez I, 2009 WL 795201, at \*5-6, \*8; see also Bevilacqua v. Rodriguez, No. MISC 427157 KCL, 2010 WL 3351481, at \*1-2 (Mass. Land Ct. Aug. 26, 2010).

[21] See Bevilacqua, 2010 WL 3351481, at \*1-2.

[22] See id.

[23] The SJC’s ruling may impact the putative class action pending in the United States District Court for the District of Massachusetts, entitled Manson v. GMAC Mortgage, LLC, No. 1:08-cv-12166-RGS (D. Mass.), which, like the Ibanez and LaRace matters, is predicated on allegations of improper assignments of mortgage. The SJC’s ruling may not only call into question the substantive merits of the plaintiffs’ claims and allegations, but may also make class certification a difficult hurdle for the plaintiffs to clear because of the numerous factual issues likely involved in the determination of whether putative class members’ properties were properly foreclosed upon.

[24] See UCC §§ 9-203(g) cmt. 9; 9-308(e). For a more detailed discussion of the “mortgage follows the note rule,” see generally American Securitization Forum, Transfer and Assignment of Residential Mortgage Loans in the Secondary Mortgage Market, in ASF White Paper Series (dated November 16, 2010).

[25] See Mass. Gen. Laws c. 106, § 9-308 & cmt. 3.

[26] Ibanez, 2011 WL 38071, at \*10.

[27] Id.

[28] See id. at \*8; Faneuil Investors Group, Ltd. Partnership v. Selectmen of Dennis, 458 Mass. 1, 6 (2010). The majority of states adhere to the “lien theory” of mortgages, which rejects the formalistic view of the “title theory” and treats mortgages as mere security interests for the debt obligation represented in the mortgage note. See Faneuil Investors, 458 Mass. at 6 (discussing difference between “title theory” and “lien theory” jurisdictions).

[29] See Ibanez, 2011 WL 38071, at \*8 (“Like a sale of land itself, the assignment of a mortgage is a conveyance of an interest in land that requires a writing signed by the grantor.”); Mass. Gen. Laws c. 259, § 1 (Fourth) (requiring a written contract or agreement for any “contract for the sale of lands . . . or of any interest in or concerning them”); Mass. Gen. Laws c. 183, § 3 (“no estate or interest in land shall be assigned, granted or surrendered unless by . . . writing or by operation of law”).

## Tips On Special Servicing (Loss Mitigation) After Ibanez

After hearing about the Ibanez case ([link to search on TT4L](#)), every lender or loan servicer who holds an assigned note and real property lien is now tasking staff to evaluate their own risk on the key issue in the case: locating documents that prove ownership of both the note (a UCC question) AND the lien (a chain-of-title question). Let's focus on the 2nd question and the Ibanez case:

- Is there proof or evidence of chain-of-title as to the real property lien?

Evaluating and mitigating risk are tasks that [John Kincade](#) and [Brian Vanderwoude](#) use every day for lenders and servicers. So, they jump in here with some tips, and then (for those who don't enjoy reading legal opinions) give us a quick summary of the Ibanez case.

While the case (and these tips) are directed at loans transferred into a CMBS pool, the concepts apply equally to any assigned or conveyed note and real property lien.

**Your Collateral File Should Contain** (guidelines of ownership chain-of-title given by the Ibanez court):

1. An assignment of the note AND the lien that is -
  - Recorded - although in Ibanez, an assignment did not need to be in recordable form at the time of notice or foreclosure sale (under Massachusetts law), "recording is likely the better practice."
  - Made by a party that itself held the mortgage
2. The assignment (or other document containing the transfer) should contain conveyance language of a present assignment ("does hereby assign" and "does hereby deliver") - rather than conveyance language of an intent to assign in the future.
3. A transfer document containing an assignment of multiple notes AND liens (into a securitized trust, if a CMBS pool) should clearly and specifically identify each mortgage being assigned.
4. This identification may be evidenced by attaching to the pooling & servicing agreement (or other assignment instrument) a schedule or listing of the assigned loans and mortgages.

- A sufficient description would include a complete property address; the loan number, assuming it is referenced in the mortgage or deed of trust; filing record of the mortgage; or other similar proof which would allow tracing if any question were raised.
- On the other hand, a mere description of the mortgage by property zip code and payment history is insufficient proof.

**Before You Make Demand and\Or Foreclose** (some risk management suggestions)

1. The solution to the problems the Massachusetts court raised in Ibanez may be as simple as making sure the last recorded assignee grants a new assignment to the foreclosing entity before the foreclosure process begins - or better yet, before a demand letter is sent.
2. Note that many commercial securitization documents typically discuss the completion of mortgage loan assignments by a servicer. Locate this provision, and complete the assignments (and record them) as step one in your process.
3. If documents are missing, you'll need to assess these types of exposures:
  - Breach of the servicing standard of care: the failure of a loan servicer to obtain the necessary assignments may constitute a breach of the servicer's standard of care.
  - Liability of prior note holder: The failure to properly assign the loan could be a breach by the lender that closed the loan or last assigned the note and lien.
  - Liability to real property purchasers: If the real property has been foreclosed upon and then sold, then the buyers probably have recourse against their seller - because the seller did not properly obtain title of the mortgage and thus improperly foreclosed - so that it did NOT have title to convey to the buyers.
  - Liability to investors: There may be some additional exposure when the security offering documents (or the loan participation agreement) represented to investors that the mortgages had been validly assigned (or owned by the lead lender).

4. Consider a Judicial Foreclosure: [\*CalculatedRisk\*](#) notes that even in states where non-judicial foreclosure is allowed, judicial foreclosure may still make sense if there are questionable assignments in the chain of title.
5. Title Insurance: If practical, consider obtaining an endorsement to the existing loan title policy.
6. \_\_\_\_\_ ?????? (Please add your suggestions in the comment box below)

### **The Ibanez case: Background**

To paraphrase the prison warden's famous line from *Cool Hand Luke* (Warner Bros. 1967), "[What we've got here is a failure \[of proof\]](#)." A failure of proof indeed. As has been widely publicized, in *U.S. Bank, N.A. v. Ibanez*, the Massachusetts Supreme Court last Friday (January 7, 2011) voided foreclosures by trustees on behalf of mortgage-backed securitization trusts because the trustee banks could not prove that they actually owned the mortgages at issue at the time of foreclosure.

Following origination, the residential mortgages had been assigned to various entities and eventually pooled with others and converted into mortgage-backed securities. After the borrowers fell behind on payments, the trustees foreclosed and purchased the properties. They then filed declaratory judgment actions to clear title to the properties, which of course required them to establish the validity of the foreclosure upon which their respective claims to title rested.

But in each case, the trustee could not prove its trust held an assignment of the mortgage at the time of foreclosure notice or sale. In fact, the actual assignments from the mortgage holders occurred eight months (*La Race*) and over one year (*Ibanez*) following the foreclosure. So whereas the state foreclosure law (in this case Massachusetts) required proof that the trustees held the respective mortgages *before* foreclosing on them, neither bank could satisfy this standard burden.

The ruling left open the door for the bank trustees to fix the chain-of-title issues and, at the end of the day, the trustees *might* be able to foreclose on the two properties at issue. They will need to get their paperwork in order, however, before beginning the foreclosure process again.

Thank you to John and Brian for this; and if you have suggestions, please post them below.

**TAGS:** 1 Guest Writers, CMBS 1.0, CMBS Chain of Title, Defaults, Market Trends, Remedies, chain of title



Kemp v. Countrywide

## KEMP VS COUNTRYWIDE HOME LOANS, INC.

Judge Wizmur expunged the secured claim filed by Countrywide Home Loans Inc. on behalf of Bank of NY. Judge Wizmur held that Bank of NY could not enforce the note because they never possessed it. She thoroughly explores the UCC law on enforceability of notes and concludes that Bank of NY meets none of them.

Judge Wizmur also considered and rejected Bank of NY's claim that it could enforce the Note by virtue of language in the assignment of the mortgage. Judge Wizmur held that the assignment language may create ownership issues but does not confer holder status or create a right to enforce the Note.

FOR PUBLICATION

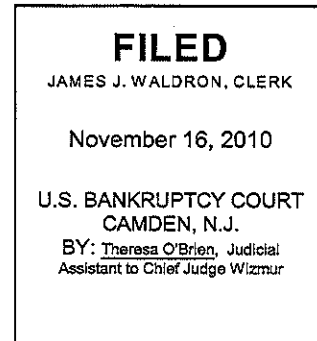
**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW JERSEY**

In the Matter of : Case No. 08-18700-JHW  
John T. Kemp :  
Debtor :  
\_\_\_\_\_  
John T. Kemp : Adversary No. 08-2448  
Plaintiff :  
v. :  
Countrywide Home Loans, Inc. :  
Defendant :

**OPINION**

APPEARANCES: Bruce H. Levitt, Esq.  
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South Orange, New Jersey 07079  
Counsel for the Debtor

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West Orange, New Jersey 07052  
Counsel for the Defendant



Before the court for resolution is the debtor's adversary complaint seeking to expunge the proof of claim filed on behalf of the Bank of New York by Countrywide Home Loans, Inc. as servicer. The debtor challenges the creditor's opportunity to enforce the obligation alleged to be due, based

primarily on the fact that the underlying note executed by the debtor was not properly indorsed to the transferee, and was never placed in the transferee's possession. Under the New Jersey Uniform Commercial Code, the note, as a negotiable instrument, is not enforceable by the Bank of New York under these circumstances. The plaintiff/debtor's challenge to the proof of claim is sustained on this record.

### **PROCEDURAL HISTORY**

On May 9, 2008, the debtor, John T. Kemp, filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code. The debtor scheduled an ownership interest in several properties, including one located at 1316 Kings Highway, Haddon Heights, New Jersey, the property at issue in this proceeding. Schedule D of the debtor's petition, listing creditors holding secured claims, listed Countrywide Home Loans as both the first and second mortgagee, with claims of \$167,000 and \$42,000, respectively, against the 1316 Kings Highway property. The debtor's Chapter 13 plan proposed to make payments over 60 months to satisfy priority claims and to cure arrearages on three separate mortgages, including the two Countrywide mortgages.<sup>1</sup>

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<sup>1</sup> The debtor filed an amended plan on October 3, 2008 which was confirmed on December 11, 2008 at \$2,081 for 54 months. The modified plan increased the arrearage to be paid to Countrywide from \$18,000 to \$34,000,

On June 11, 2008, the defendant herein, Countrywide Home Loans, Inc. (hereinafter "Countrywide"), identifying itself as the servicer for the Bank of New York, filed a secured proof of claim in the amount of \$211,202.41, including \$40,569.69 in arrears, noting the property at 1316 Kings Highway as the collateral for the claim.<sup>2</sup> The debtor filed this adversary complaint on October 16, 2008 against Countrywide, seeking to expunge its proof of claim.<sup>3</sup> The debtor asserts that the Bank of New York cannot enforce the underlying obligation.

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and maintained the second Countrywide mortgage arrears at \$6,000. A second modified plan was filed on April 15, 2010 and is currently scheduled for confirmation on December 8, 2010. The latest modified plan does not list Countrywide as a creditor to be treated under the plan.

<sup>2</sup> Although the debtor listed two mortgages held by Countrywide against 1316 Kings Highway in his schedules, Countrywide only filed one proof of claim regarding one mortgage and note.

<sup>3</sup> In 2008, Countrywide Financial Corporation, the umbrella organization for Countrywide Home Loans, Inc., was purchased by the Bank of America Corporation. Effective April 27, 2009, Countrywide Home Loans, Inc. changed its name to BAC Home Loan Servicing, L.P. ("BAC Servicing"). Motion to Dismiss, Van Beveren Certif. at 1. On July 1, 2010, a "Transfer of Claim for Security" was filed on the debtor's claim register, transferring the claim from "Countrywide Home Loans, Inc., servicer for Bank of New York" to "BAC Home Loan Servicing, LP". In this opinion, I will continue to refer to the defendant as Countrywide.

**FACTS**

In his complaint, the debtor does not dispute that he signed the original mortgage documents in question. The note and mortgage were executed by the debtor on May 31, 2006. The note, designated as an "Interest Only Adjustable Rate Note", listed the lender as "Countrywide Home Loans, Inc." No indorsement appeared on the note. Accompanying the note was an unsigned "Allonge to Note" dated the same day, May 31, 2006, in favor of "America's Wholesale Lender", directing that the debtor "Pay to the Order of Countrywide Home Loans, Inc., d/b/a America's Wholesale Lender."<sup>4</sup>

The mortgage, in the amount of \$167,000, listed the lender as "America's Wholesale Lender". Mortgage Electronic Registration Systems, Inc., or "MERS", is named as "the mortgagee", and is authorized to act "solely as the nominee" for the lender and the lender's successors and assigns. The mortgage references the promissory note signed by the borrower on the same date. The mortgage was recorded in the Camden County Clerk's Office on July 13, 2006.

Shortly after the execution by the debtor of the note and mortgage, the

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<sup>4</sup> The record does not reflect whether the unsigned allonge was physically affixed to the note.

instruments executed by the debtor were apparently pooled with other similar instruments and sold as a package to the Bank of New York as Trustee. On June 28, 2006, a Pooling and Servicing Agreement ("PSA" or "the Agreement") was executed by CWABS, Inc. as the depositor, with Countrywide Home Loans, Inc., Park Monaco, Inc. and Park Sienna, LLC as the sellers, Countrywide Home Loans Servicing LP ("Countrywide Servicing") as the master servicer, and the Bank of New York as the Trustee. Pursuant to the Agreement, the depositor was directed to transfer the Trust Fund, consisting of specified mortgage loans and their proceeds, including the debtor's loan, to the Bank of New York as Trustee, in return for certificates referred to as Asset-backed Certificates, Series 2006-8. The sellers sold, transferred or assigned to the depositor "all the right, title and interest of such Seller in and to the applicable Initial Mortgage Loans, including all interest and principal received and receivable by such Seller." PSA § 2.01(a) at 52. In turn, the depositor immediately transferred "all right title and interest in the Initial Mortgage Loans," including the debtor's loan, to the Trustee, for the benefit of the certificate holders. Id.

The Agreement expressly provided that in connection with the transfer of each loan, the depositor was to deliver "the original Mortgage Note, endorsed by manual or facsimile signature in blank in the following form: 'Pay to the order

of \_\_\_\_\_ without recourse', with all intervening endorsements that show a complete chain of endorsement from the originator to the Person endorsing the Mortgage Note." PSA § 2.01(g)(i) at 56. Most significantly for purposes of this discussion, the note in question was never indorsed in blank or delivered to the Bank of New York, as required by the Pooling and Servicing Agreement.

On March 14, 2007, MERS, as the nominee for America's Wholesale Lender, assigned the debtor's mortgage to the Bank of New York as Trustee for the Certificateholders CWABS, Inc. Asset-backed Certificates, Series 2006-8. The assignment purported to assign "a certain mortgage dated May 31, 2006 . . . [t]ogether with the Bond, Note or other obligation described in the Mortgage, and the money due and to become due thereon, with the interest." The assignment provided further that the "Assignor covenants that there is now due and owing upon the Mortgage and the Bond, Note or other obligation secured thereby, the sum of \$167,199.92 Dollars principal with interest thereon to be computed at the rate of 9.530 percent per year." The assignment was recorded with the County Clerk on March 24, 2008.

At the trial of this matter, Countrywide produced a new undated "Allonge to Promissory Note", which directed the debtor to "Pay to the Order of Bank of New York, as Trustee for the Certificateholders CWABS, Inc., Asset-backed



Certificates, Series 6006-8.”<sup>5</sup> The new allonge was signed by Sharon Mason, Vice President of Countrywide Home Loans, Inc., in the Bankruptcy Risk Litigation Management Department. Linda DeMartini, a supervisor and operational team leader for the Litigation Management Department for BAC Home Loans Servicing L.P. (“BAC Servicing”),<sup>6</sup> testified that the new allonge was prepared in anticipation of this litigation, and that it was signed several weeks before the trial by Sharon Mason.

As to the location of the note, Ms. DeMartini testified that to her knowledge, the original note never left the possession of Countrywide, and that the original note appears to have been transferred to Countrywide’s foreclosure unit, as evidenced by internal FedEx tracking numbers. She also confirmed that the new allonge had not been attached or otherwise affixed to the note. She testified further that it was customary for Countrywide to maintain

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<sup>5</sup> The allonge misidentifies the Asset-backed Certificates as “Series 6006-8” rather than “Series 2006-8.”

<sup>6</sup> Ms. DeMartini testified that Countrywide Home Loans, Inc., the originator of the note and mortgage at issue here, and Countrywide Home Loans Servicing LP, the servicer of the loan both before and after the sale of the loan, were and are two different legal entities under one corporate umbrella. Her understanding that the entity known as Countrywide Home Loans Servicing LP became BAP Home Loans Servicing LP when Bank of America took over the Countrywide entities differs from the representation made in papers submitted by the defendant herein that the entity known as Countrywide Home Loans, Inc. became BAP Home Loan Servicing LP. See n. 3.

possession of the original note and related loan documents.

In a supplemental submission dated September 9, 2009, the defendant asserted that “the Defendant/Secured Creditor located the original Note. The original Note with allonge and Pooling and Servicing Agreement are available for inspection.”<sup>7</sup> When the matter returned to the court on September 24, 2009, counsel for the defendant represented to the court that he had the original note, with the new allonge now attached, in his possession. No additional information was presented regarding the chain of possession of the note from its origination until counsel acquired possession.

In sum, we have established on this record that at the time of the filing of the proof of claim, the debtor’s mortgage had been assigned to the Bank of New

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<sup>7</sup> In a bizarre twist, in the same September 9, 2009 submission, Countrywide produced a copy of a “Lost Note Certification,” dated February 1, 2007, which indicated that the original note had been delivered to the lender on the origination date and thereafter “misplaced, lost or destroyed, and after a thorough and diligent search, no one has been able to locate the original Note.” The defendant asserted for the first time that the “whereabouts of the Note could not be determined” at the time that the proof of claim was filed. Def. Suppl. Subm. at 6. As a result, Countrywide claimed that it was unable to affix the allonge to the note until after the original note had been rediscovered. At the next hearing on September 24, 2009, counsel was not able to explain the inconsistencies between the lost note certification, Ms. DeMartini’s testimony, and the “rediscovery” of the note, and asked that the lost note certification be disregarded. T13-15 to 16 (9/24/2009).

York, but that Countrywide did not transfer possession of the associated note to the Bank. Shortly before trial in this matter, the defendant executed an allonge to transfer the note to the Bank of New York; however, the allonge was not initially affixed to the original note, and possession of the note never actually changed. The Pooling and Servicing Agreement required an indorsement and transfer of the note to the Trustee, but this was not accomplished prior to the filing of the proof of claim. The defendant has now produced the original note and has apparently affixed the new allonge to it, but the original note and allonge still have not been transferred to the possession of the Bank of New York. Countrywide, the originator of the loan, filed the proof of claim on behalf of the Bank of New York as Trustee, claiming that it was the servicer for the loan. Pursuant to the PSA, Countrywide Servicing, and not Countrywide, Inc., was the master servicer for the transferred loans.<sup>8</sup> At all relevant times, the original note appears to have been either in the possession

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<sup>8</sup> According to a Prospectus Supplement dated June 30, 2006, filed by Countrywide, Inc. with the Securities and Exchange Commission, see [www.sec.gov](http://www.sec.gov), Countrywide Servicing was created to service the loans originated by Countrywide, Inc. The Prospectus notes that "Countrywide Home Loans expects to continue to directly service a portion of its loan portfolio," while transferring new mortgage loans to Countrywide Servicing. Prospectus Supplement at 40. In addition, because "certain employees of Countrywide Home Loans became employees of Countrywide Servicing, Countrywide Servicing has engaged Countrywide Home Loans as a subservicer to perform certain loan servicing activities on its behalf." Id. Because Countrywide Home Loans, Inc. designated itself as the servicer for the Bank of New York on the proof of claim at issue here, I assume for these purposes that it is acting in that capacity on this loan.

of Countrywide or Countrywide Servicing.<sup>9</sup>

### **DISCUSSION**

With this factual backdrop, we turn to the issue of whether the challenge to the proof of claim filed on behalf of the Bank of New York, by its servicer Countrywide, can be sustained. Under the Bankruptcy Code, a claim is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a). If an objection to a claim is made, the claim is disallowed “to the extent that . . . such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured.” 11 U.S.C. § 502(b)(1).

Countrywide’s claim here must be disallowed, because it is unenforceable under New Jersey law on two grounds. First, under New Jersey’s Uniform Commercial Code (“UCC”) provisions, the fact that the owner

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<sup>9</sup> The record is unclear about whether the original note has been in the possession of Countrywide Home Loans, Inc. or Countrywide Home Loans Servicing LP. Ms. DeMartini testified both that the original note was always located in the Countrywide origination file (presumably at Countrywide Home Loans, Inc.) and that the servicer actually retained possession of the original note (presumably Countrywide Home Loans Servicing LP). She also testified that the “Documents Department” was charged with imaging and storing the original documents, but the record is not clear about which of the two entities housed the Documents Department.

of the note, the Bank of New York, never had possession of the note, is fatal to its enforcement. Second, upon the sale of the note and mortgage to the Bank of New York, the fact that the note was not properly indorsed to the new owner also defeats the enforceability of the note.

Under New Jersey law, the enforcement of a promissory note that is secured by a mortgage is governed by the UCC. The note, at issue here, made payable to Countrywide, providing for interest and an unconditional promise to pay the lender, is a "negotiable instrument" under the New Jersey UCC, which defines a negotiable instrument as "an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it: (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder; (2) is payable on demand or at a definite time." N.J.S.A. 12A:3-104. A party is entitled to enforce a negotiable instrument if it is "the holder of the instrument, a nonholder in possession of the instrument who has the rights of a holder, or a person not in possession of the instrument who is entitled to enforce the instrument pursuant to 12A:3-309 or subsection d. of 12A:3-418." N.J.S.A. 12A:3-301. In this case, the creditor may not enforce the instrument under any of the three statutory qualifiers.

1. Holder.

A “holder” is defined as “the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession.” N.J.S.A. 12A:1-201(20). “Mere ownership or possession of a note is insufficient to qualify an individual as a ‘holder’.” Adams v. Madison Realty & Dev. Inc., 853 F.2d 163, 166 (3d Cir. 1988). Where, as here, the ownership of an instrument is transferred, the transferee’s attainment of the status of “holder” depends on the negotiation of the instrument to the transferee. N.J.S.A. 12A:3-201(a). The two elements required for negotiation, both of which are missing here, are the transfer of possession of the instrument to the transferee, and its indorsement by the holder. N.J.S.A. 12A:3-201(b).

As to the issue of possession, we are not certain on this record whether the party in possession of the note is Countrywide or Countrywide Servicing.<sup>10</sup> What we do know is that the note was purchased by the Bank of New York as Trustee, but never came into the physical possession of the Bank. Because the Bank of New York never had possession of the note, it can not qualify as a “holder” under the New Jersey UCC. See Dolin v. Darnall, 115 N.J.L. 508, 181

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<sup>10</sup> See n. 9.

A. 201 (E&A 1935) (“Since the plaintiff was not ‘in possession of’ the notes in question, he was neither the ‘holder’ nor the ‘bearer’ thereof.”).<sup>11</sup>

The second element required to negotiate an instrument to the transferee, i.e., indorsement of the instrument by the holder, is also missing here. An indorsement means “a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of negotiating the instrument, restricting payment of the instrument, or incurring indorser’s liability on the instrument.” N.J.S.A. 12A:3-204. The indorsement may be on the instrument itself, or it may be on “a paper affixed to the instrument.” *Id.* Such a paper is called an “allonge”, defined as “[a] slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements.” See Black’s Law Dictionary at 88 (9<sup>th</sup> Ed. 2009).

The significance of indorsement and affixation requirements to achieve

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<sup>11</sup> If Countrywide was in possession of the note, then it would have had “holder” status as of the date of the petition filing date, because the note was payable to Countrywide, no indorsement or allonge had been executed, and Countrywide was in possession of the original note. However, Countrywide did not file the claim on its own behalf. Rather, it filed the claim as “servicer for Bank of New York.” The qualification of the Bank of New York, rather than Countrywide, to enforce the note is at issue.

holder status, and thereby qualify to enforce a note against the maker, was explained by the Third Circuit in Adams v. Madison Realty & Dev. Inc., *supra*. The court explained that the maker of the note must have certainty regarding the party who is entitled to enforce the note.

From the maker's standpoint, therefore, it becomes essential to establish that the person who demands payment of a negotiable note, or to whom payment is made, is the duly qualified holder. Otherwise, the obligor is exposed to the risk of double payment, or at least to the expense of litigation incurred to prevent duplicative satisfaction of the instrument. These risks provide makers with a recognizable interest in demanding proof of the chain of title. Consequently, plaintiffs here, as makers of the notes, may properly press defendant to establish its holder status.

853 F.2d at 168.

At the time of the Adams' decision, the New Jersey UCC provided in relevant part that "[a]n indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof." N.J.S.A. 12A:3-202(2) (1961).<sup>12</sup> The UCC Commentary explained that this language was in conformance with those

decisions holding that a purported indorsement on a mortgage or other separate paper pinned or clipped to an instrument is not

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<sup>12</sup> The New Jersey Study Comment noted that the "wording in reference to indorsements [was] changed from 'or upon a paper attached thereto', to 'so firmly affixed thereto as to become a part thereof'. This change merely implement[ed] the ancient doctrine of allonge."



sufficient for negotiation. The indorsement must on the instrument itself or on a paper intended for the purpose is so firmly affixed to the instrument as to become an extension or part of it. Such a paper is called an allonge.

In 1995, Chapter 3 of Title 12A was amended and subsection 2 of 12A:3-202 was revised, renumbered, and included as the last sentence in N.J.S.A. 12A:3-204(a). As revised, the provision now states that “[f]or the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.” N.J.S.A. 12A:3-204(a).

In this case, we had neither a proper indorsement on the note itself, nor an allonge that was executed at the time the proof of claim was filed. An allonge purporting to negotiate the note to the Bank of New York was not executed until shortly before the original trial date, and was not affixed to the original note until the second trial date. Even if the newly executed allonge is recognized as a valid indorsement of the note, under these circumstances, the Bank of New York does not qualify as a holder, because it never came into possession of the note.<sup>13</sup>

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<sup>13</sup> As an additional argument in support of the proposition that the Bank of New York qualifies as a holder who may enforce the note, the claimant cites to Mulert v. National Bank of Tarentum, 210 F. 857, 860 (3d Cir. 1913) for the proposition that it had constructive possession of the note because Countrywide intended to transfer possession, and that constructive possession is sufficient to permit the transferee to enforce the note. This proposition is not sustainable in light of the actual possession required under the New Jersey

2. Nonholder in Possession.

Nor does the claimant qualify as a non-holder in possession who has the rights of a holder. "A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument." N.J.S.A. 12A:3-301. The Official Comment to section 3-301 adds that this definition:

includes a person in possession of an instrument who is not a holder. A nonholder in possession of an instrument includes a person that acquired rights of a holder by subrogation or under Section 3-203(a). It also includes both a remitter that has received an instrument from the issuer but has not yet transferred or negotiated the instrument to another person and also any other person who under applicable law is a successor to the holder or otherwise acquires the holder's rights.

Id. at UCC Comment to § 3-301. Countrywide, the originator of the loan and the original "holder" of the note, sold the note to the Bank of New York as Trustee. In this way, the Bank of New York is a successor to the holder. As a successor to the holder of the note, the Bank of New York would qualify as a non-holder in possession who could enforce the note by its servicer if it had possession of the note. Because the Bank of New York does not have possession of the note, and never did, it may not enforce the note as a

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UCC. See N.J.S.A. 12A:1-201(20).

nonholder in possession.

3. Non-holder Not in Possession.

The third category that would enable a claimant to enforce the note would be a person not in possession of the note who is entitled to enforce the note pursuant to N.J.S.A. 12A:3-309 or subsection d. of N.J.S.A. 12A:3-418. Section 12A:3-309 concerns the enforcement of lost, destroyed or stolen instruments.<sup>14</sup> The defendant presented a lost note certification to this court,

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<sup>14</sup> N.J.S.A. 12A:3-309 provides:

a. A person not in possession of an instrument is entitled to enforce the instrument if the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, the loss of possession was not the result of a transfer by the person or a lawful seizure, and the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

b. A person seeking enforcement of an instrument under subsection a. of this section must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, 12A:3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

but the factual predicate of the certificate conflicted with other facts presented on this record, and we have determined to disregard the certificate.<sup>15</sup> Section 12A:3-418, concerning payment or acceptance by mistake, does not apply here.

In a recent District Court decision from the District of Massachusetts, the court rejected the enforcement of a note where the assignee of the note and accompanying mortgage did not have possession of the note. Marks v.

Braunstein, No. 09-11402-NMG, 2010 WL 3622111 (D.Mass. Sept. 14, 2010).

In Marks, the assignee of the note and mortgage purchased the collateral for the note, a commercial building, from the Chapter 7 trustee, filed a secured proof of claim, and sought to enforce the note and mortgage against the proceeds from the sale. When the matter first came on to be heard, the claimant confirmed that he was not in possession of the note and was unaware of who was in possession of it.<sup>16</sup> Because the claimant acknowledged that he was never in possession of the note, he was precluded from reliance on Section 3-309A of the Massachusetts UCC, which permits enforcement of a lost, destroyed or stolen instrument, but requires possession of the instrument at

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<sup>15</sup> See n. 7.

<sup>16</sup> Following the disallowance of the proof of claim by the court, the claimant discovered the location of the note. However, the bankruptcy court denied his motion for reconsideration of the disallowance. The denial was affirmed by the District Court. Marks v. Braunstein, 2010 WL 3622111 at \*5.

some point. Citing to Premier Capital, LLC v. Gavin, 319 B.R. 27, 33 (1<sup>st</sup> Cir. BAP 2004), the Marks court reflected that “[t]he purpose of the possession requirement in Article 3 is to protect the Debtor from multiple enforcement claims to the same note.” Id. at \*3. Acknowledging that conflicting enforcement claims were not a concern in the case before it, the court nevertheless applied the statutory requirements to hold that the note could not be enforced by the claimant to collect proceeds otherwise due to the claimant from the sale of the collateral on account of his secured claim.

Similarly, in this case, the purchaser of the note and mortgage, the Bank of New York, never had possession of the note. Therefore, under the Uniform Commercial Code as adopted in New Jersey, the Bank of New York as Trustee may not enforce the instrument.

On behalf of the Bank of New York, Countrywide contends that the written mortgage assignment in this case, which purports to assign both the note and mortgage in this case, and which was properly executed and recorded with the appropriate county clerk’s office, serves to properly transfer the note to the new owner, enabling the new owner to enforce both the note and the mortgage. The recorded assignment of mortgage does include provision for the assignment of the note as well. However, the recorded assignment of the

mortgage does not establish the enforceability of the note. As discussed above, the UCC governs the transfer of a promissory note. See 29 Myron C. Weinstin, New Jersey Practice, Law of Mortgages, § 11.2 at 749. The attempted assignment of the note in the assignment of mortgage document, together with the terms of the Pooling and Servicing Agreement, created an ownership issue, but did not transfer the right to enforce the note.

The right to enforce an instrument and ownership of the instrument are two different concepts. . . . Moreover, a person who has an ownership right in an instrument might not be a person entitled to enforce the instrument. For example, suppose X is the owner and holder of an instrument payable to X. X sells the instrument to Y but is unable to deliver immediate possession to Y. Instead, X signs a document conveying all of X's right, title, and interest in the instrument to Y. Although the document may be effective to give Y a claim to ownership of the instrument, Y is not a person entitled to enforce the instrument until Y obtains possession of the instrument. No transfer of the instrument occurs under Section 3-203(a) until it is delivered to Y.

N.J.S.A. 12A:3-203 (UCC Cmt. 1). Accordingly, the Bank of New York has a valid claim of ownership, but may not enforce the note on the basis of the reference to the note in the recorded assignment of the mortgage.

The fact that the proof of claim in question was filed by "Countrywide Home Loans, Inc., as servicer for Bank of New York, Trustee" does not alter the enforceability of the note. Bankruptcy Rule 3001(b) provides that a proof of claim may be filed by either the creditor "or the creditor's agent."

FED.R.BANKR.P. 3001(b). Here, Countrywide, Inc. was the originator of the note and mortgage, but sold both the note and mortgage to the Bank of New York as Trustee, and filed the proof of claim as the “servicer” for the Bank of New York. A servicer has standing to file a proof of claim on behalf of a creditor. See, e.g., Greer v. O'Dell, 305 F.3d 1297, 1302 (11<sup>th</sup> Cir. 2002) (“A servicer is a party in interest in proceedings involving loans which it services.”); In re Viencek, 273 B.R. 354, 358 (N.D.N.Y. 2002); In re Gulley, No. 07-33271-SGJ-13, 2010 WL 3342193, \*9 (Bankr. N.D.Tex. Aug. 23, 2010) (“many courts have held that a mortgage servicer has standing to participate in a debtor's bankruptcy case by virtue of its pecuniary interest in collecting payments under the terms of a note”); In re Minbatiwalla, 424 B.R. 104, 109 (Bankr. S.D.N.Y. 2010); In re Conde- Dedonato, 391 B.R. 247, 250 (Bankr. E.D.N.Y. 2008) (“A servicer of a mortgage is clearly a creditor and has standing to file a proof of claim against a debtor pursuant to its duties as a servicer.”). But Countrywide, as the servicer, acts only as the agent of the owner of the instrument, and has no greater right to enforce the instrument than its principal. See, e.g., Greer v. O'Dell, 305 F.3d at 1303. Because the Bank of New York has no right to enforce the note, Countrywide as its agent and servicer cannot enforce the note.<sup>17</sup>


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<sup>17</sup> As noted, Countrywide Home Loans, Inc. is listed as the servicer on the debtor's loan. However, there is serious question raised about the authority of that entity to file a proof of claim on behalf of the Bank of New

**CONCLUSION**

Because the claim filed by "Countrywide Home Loans, Inc., servicer for Bank of New York" cannot be enforced under applicable state law, the claim must be disallowed under 11 U.S.C. § 502(b)(1).

Dated: November 16, 2010

  
\_\_\_\_\_  
JUDITH H. WISMUR  
CHIEF JUDGE  
U.S. BANKRUPTCY COURT

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York. A Power of Attorney dated November 15, 2005 was submitted, affording Countrywide Home Loans Servicing LP, not Countrywide Home Loans, Inc., the limited opportunity to perform all necessary acts to foreclose mortgage loans, dispose of properties and modify or release mortgages, presumably including the authority to file a proof of claim in a bankruptcy case.



IN THE UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW JERSEY

IN RE:	)	Bankruptcy No. 08-18700
	)	
	)	
JOHN T. KEMP,	)	
	)	
Debtor.	)	
-----	)	
JOHN T. KEMP,	)	Adversary No. 08-02448
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
COUNTRYWIDE HOME LOANS, INC.,	)	Camden, New Jersey
	)	August 11, 2009
Defendant.	)	10:24 a.m.
-----	)	

TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE JUDITH H. WIZMUR  
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording, transcript  
produced by transcription service.

1 LINDA DeMARTINI, DEFENSE WITNESS, SWORN

2 THE COURT: Please have a seat. Your full name,  
3 first and last, and spell your last name, please.

4 THE WITNESS: My name is Linda DeMartini. The last  
5 name is spelled D-E capital M-A-R-T-I-N-I.

6 DIRECT EXAMINATION

7 BY MR. KAPLAN:

8 Q Okay, Ms. DeMartini, would you -- who are you employed by?

9 A I am employed by Bank of America Home Loans, formally  
10 known as Countrywide Home Loans.

11 Q Okay. And how long have you been employed there?

12 A A total of almost ten years.

13 Q And what is your position there?

14 A I am an operational team leader for the Litigation  
15 Management Department currently. I've been there just about a  
16 year.

17 Q Are you familiar with the documents relating to Mr. Kemp's  
18 mortgage loan?

19 A Yes, I am.

20 Q Okay. Now who, based upon your knowledge of the loan  
21 documents, who's presently the owner, holder, transferee of  
22 the note?

23 A Well, the owner as in the investor, that would be Bank of  
24 New York, and we -- we are the servicer, Bank of America Home  
25 Loan, Servicing, LP, formally known as Countrywide Home Loan

1       Servicing, LP.

2       Q     Okay.

3               MR. KAPLAN:  I'd like this marked as I guess D-1.

4       Okay, may I approach the witness, Your Honor?

5               THE COURT:  Yes.

6       BY MR. KAPLAN:

7       Q     Could you tell the Court what that document is?

8       A     That's the allonge to the promissory note.

9       Q     And is that the original?

10      A     Yes, this is.

11      Q     And it references -- what -- could you -- and who signed  
12      that document?

13      A     Sharon Mason.

14      Q     And what's Ms. Mason's position with Country --

15      A     She is Vice President.  She's actually part of our  
16      Bankruptcy Risk Litigation Management Department.  She's  
17      actually my boss's boss.

18      Q     Okay.  And you're familiar with Ms. Mason's signature?

19      A     Yes, I know it very well.

20      Q     And that's Ms. Mason's signature?

21      A     Definitely.

22      Q     And the allonge is -- the purpose of the allonge?

23      A     It shows the transfer to Bank of New York as the trustee.

24      Q     Okay.  So it -- it's your testimony that Bank of New York  
25      is trustee as the holder or the investor of that loan?

1 A Yes, that's correct.

2 MR. KAPLAN: Your Honor, essentially she has  
3 testified to the document. I really don't have any other  
4 questions that --

5 THE COURT: Well, let's cross.

6 CROSS-EXAMINATION

7 BY MR. LEVITT:

8 Q Ms. DeMartini, you said you're familiar with the loan  
9 documents?

10 A Hm-hmm.

11 Q What do they consist of?

12 A Well, we've got the notice there, the mortgage is there.  
13 In our system we have any of the documents -- settlement  
14 statement, title policy, every single document that would have  
15 been signed at the time that the loan was taken out.

16 Q When was the first time that you saw those documents?

17 A A few weeks ago.

18 Q Were you at all involved in the preparation of the proof  
19 of claim?

20 A No, I was not involved in the proof of claim. That would  
21 have been before it got to the Litigation Department.

22 Q When was the first time that you saw the allonge to the  
23 promissory note?

24 A Approximately two weeks ago.

25 Q And how was it that you came to see the allonge to the

1 promissory note?

2 A Well, in my role as a supervisor in the department I have  
3 litigation specialists who work for me. When cases are coming  
4 up, I review their cases as a regular matter of course so I'd  
5 be reviewing the documents with that. When this date came up  
6 as far as having this hearing today and it became known to me  
7 that I was most likely going to be the one traveling here to  
8 be a part of it, I made sure that I got involved in every  
9 aspect of the case.

10 Q When was this allonge prepared?

11 A This allonge would have been prepared by my specialists.  
12 I don't have the exact date committed to memory, but this  
13 would have been done within the last couple of months most  
14 likely.

15 Q So one of your employee's prepared the allonge?

16 A One of my employee's would have taken -- would have gotten  
17 the allonge and we would have been the ones that obtained the  
18 signature from Sharon, yes.

19 Q So it was just recently signed?

20 A Fairly recently signed, yes.

21 Q Signed essentially in contemplation or in the course of  
22 this litigation, correct?

23 A Most likely.

24 Q And it was prepared in your office?

25 A It would have been -- whether it was originally prepared

1 in my office or not I can't answer to that. I can tell you it  
2 was signed in our office because Sharon's the one that signed  
3 it --

4 Q So the original --

5 A -- and I've been to her office.

6 Q -- the original was located in your office?

7 A Yes.

8 Q Where's your office located?

9 A Simi Valley, California.

10 Q And has the original of this allonge remained in your  
11 office until you appeared here today?

12 A We had sent it on to -- to our attorneys. They were in  
13 possession of it.

14 Q And again, who do you believe is the holder of the note  
15 and mortgage here?

16 A Well, Countrywide -- Bank of America -- whatever we're  
17 calling ourselves these days, we are Bank of America now -- we  
18 originated this loan. It was originated via a broker and it's  
19 really always been a Countrywide loan. The investor is Bank  
20 of New York. We are the servicer of the loan.

21 Q Now, when you say it's really a Countrywide loan, wasn't  
22 it sold? Wasn't this loan securitized and ultimately sold --  
23 sold to this trust?

24 A Right, it would have been securitized and sold. They are  
25 the investors of the loan. But we are the ones that would

1 have originated it, we are the ones that have always serviced  
2 it.

3 Q Today who is the owner of the loan?

4 A Bank of New York.

5 Q Bank of New York?

6 A As -- as the trustee for the certificate holder CWABS,  
7 Asset-Backed Securities series number --

8 Q And who is in possession of the note?

9 A Who is in possession of the note? We have the note in our  
10 origination file.

11 Q So -- so Bank of New York as trustee does not hold the  
12 note, is that correct, or is not in possession of the note?

13 A The original note to my knowledge is in the origination  
14 file.

15 Q Where is the -- do you have it here today?

16 A No, I don't have it with me here today.

17 Q So you don't have the note?

18 A It's in our office.

19 Q So it's in your office, it's not with this trust that owns  
20 the -- that's supposedly holds the -- or is the owner of this  
21 note, is that correct?

22 A That's correct.

23 Q And your testimony is that this allonge was never  
24 submitted to -- it was never in the possession of Bank of New  
25 York as trustee for the certificate holder, is that correct?



1 MR. KAPLAN: Your Honor, I object. Countrywide or  
2 Bank of America is the servicer. They possess and hold all  
3 the documents.

4 THE COURT: Don't give me an argument, that's not an  
5 objection to the question. I don't mean to be -- to cut your  
6 off, but you're welcome to make that argument bottom line, but  
7 that's a perfectly proper question.

8 BY MR. LEVITT:

9 Q And this allonge, it's a stand-alone document, correct?  
10 It's not attached to anything, is that correct?

11 A I'm not sure I'm understanding your question.

12 Q Was there anything -- when you brought the original that's  
13 in front of you, did you remove it? Was it stapled to  
14 something else?

15 A No, it wouldn't have necessarily been stapled to something  
16 else. There would have probably been other documents showing  
17 the -- you know, we would have shown her the note. We would  
18 have reviewed all of that before.

19 Q And where are all the documents that you showed her?

20 A Well, I have copies of -- I have a copy of the note, I  
21 have a copy of the deed with me here today.

22 Q And those --

23 A They're signed copies.

24 Q Can you show me exactly the documents that you showed her  
25 when you had her sign this allonge?

1       A    They're probably right -- well, they would be in that  
2       clump there.  That's mostly the Pooling and Servicing  
3       Agreement, the larger one.

4       Q    This one?

5       A    Yeah.  There's the note in there, there's the deed and the  
6       mortgage and you sign it.

7       Q    You just --

8               MR. KAPLAN:  May I provide this --

9               MR. LEVITT:  -- I'm sorry.

10              MR. KAPLAN:  -- provide this note?

11              MR. LEVITT:  Yeah, go ahead.

12              THE WITNESS:  Because this was provided to me by my  
13       specialist to -- to bring along so that I have the documents  
14       here for you today.

15       BY MR. LEVITT:

16       Q    Let me ask you this.  Did you show those documents to --  
17       is it Sharon Mason?

18       A    Did I personally show the documents?  Whoever brought her  
19       -- and to be honest with you, I don't know if it was me or my  
20       specialist, Dee, who brought them to her -- whoever brought  
21       them to her would have had them with them, yes, whichever of  
22       the two of us.

23       Q    Who brought them to her?

24       A    Generally speaking, it would have been me, but I don't  
25       recall bringing this particular one to her so I believe it was

1 Dee.

2 Q So you don't recall bringing it, you don't recall -- and  
3 you don't know what documents were shown to her, is that  
4 correct?

5 A No, I know what documents were shown to her because  
6 they're right here and they -- and they're all together.

7 Q Did you bring those documents to Sharon Mason? Did you  
8 personally?

9 A Not to my knowledge, no.

10 Q Do you know specifically who brought those documents to  
11 Ms. Mason?

12 A My specialist, Dee.

13 Q And you saw her bring the documents to Ms. Mason?

14 A Did I physically stand over her --

15 Q Yes.

16 A -- and witness it? No.

17 Q Okay. Is the original note in that stack of documents?

18 A An imaged copy of the signed note is in here.

19 Q Is --

20 A The absolute original, no, it is not.

21 Q And again, my question before was was this attached to the  
22 note? This allonge, was it attached physically, with a  
23 staple, with a piece of glue -- was it attached?

24 A With a staple? No, because then it would have a hole in  
25 it. But it would have been brought along with it. We would

1 have shown it to her.

2 Q But again, now again getting back to my other question, so  
3 this is a stand-alone document, it wasn't attached to  
4 anything?

5 A Okay, then yes.

6 Q Okay. And can you take a look at the -- what you believe  
7 to be the good copy of the note that you have?

8 A Okay.

9 Q Do you mind separating it from the rest of the papers?

10 A Sure, I'll take it apart.

11 (Pause in proceedings)

12 A Okay, and your question?

13 MR. LEVITT: Your Honor, may I approach the witness?

14 THE COURT: Sure.

15 BY MR. LEVITT:

16 Q Not the mortgage, the note --

17 A Yeah, I've got all kinds of stuff.

18 MR. LEVITT: Your Honor, if you could excuse us one  
19 second. There seems to be a discrepancy between what the  
20 witness has and what my office was provided.

21 THE COURT: Certainly.

22 MR. KAPLAN: Judge --

23 THE COURT: And while you look at that, let me see  
24 what's going on with the other case. You're welcome to take a  
25 few minutes.

1 (The Court hears another matter)

2 MR. LEVITT: Your Honor, with counsel's permission,  
3 since we have stipulated, I'd like to provide a copy to Your  
4 Honor.

5 THE COURT: All right. Is this a copy that we can  
6 mark?

7 MR. LEVITT: It's an exact copy and we can mark that  
8 as joint Exhibit 1, I believe.

9 THE COURT: J-1, interest only adjustable rate note.

10 BY MR. LEVITT:

11 Q Now, that document is the note that was contained in your  
12 file?

13 A Yes.

14 Q And there's no endorsement on the last page of that note,  
15 is there?

16 A No --

17 Q There's --

18 A -- there's no signature.

19 Q Is there room on the bottom if somebody wanted to put Pay  
20 To The Order Of? Would there be room on the bottom?

21 A Well, I'm sure you could find a way to fit it in.

22 Q Okay.

23 MR. LEVITT: I have no further questions of this  
24 witness, Your Honor.

25 THE COURT: All right.

1 MR. KAPLAN: Cross-examine, Your Honor?

2 THE COURT: Please, please.

3 REDIRECT EXAMINATION

4 BY MR. KAPLAN:

5 Q Ms. DeMartini, is it generally the custom to -- for your  
6 investor to hold the documents?

7 A No. They would stay with us as the servicer.

8 Q And are documents ever transferred to the investor?

9 A If we service-release them they would be transferred to  
10 whomever we're service-releasing them to.

11 Q So I believe you testified Countrywide was the originator  
12 of this loan?

13 A Yes.

14 Q So Countrywide had possession of the documents from the  
15 outset?

16 A Yes.

17 Q And subsequently did Countrywide transfer these documents  
18 by assignment or an allonge?

19 A Yes.

20 Q And --

21 A Well, transferred the rights, yes, transferred the  
22 ownership, not the physical documents.

23 Q So the physical documents were retained within the  
24 corporate entity Countrywide or Bank of America?

25 A Correct.

1 Q Okay. And would you say that this is standard operating  
2 procedure in the mortgage banking business?

3 A Yes. It would be normal -- the normal course of business  
4 as the reason that we are the servicer, as we're the ones that  
5 are doing all the servicing, and that would include retaining  
6 the documents.

7 Q Now, you were asked about whether or not the note could be  
8 -- was endorsed at the bottom. Is it generally the practice  
9 to endorse the actual note or to use an allonge?

10 A It's -- I've never seen an actual note that has an  
11 endorsement on the bottom.

12 Q So would you say it's normal --

13 A It's generally more --

14 Q -- to have an allonge?

15 A Yeah, it would be more normal to have an allonge.

16 Q Okay. And once the allonge was signed, what would  
17 generally happen to the allonge?

18 A Well, it would also be imaged and it would be recorded and  
19 it would be put in our system and it would be kept as a normal  
20 course. In a situation like this, we forwarded it onto the  
21 attorneys because of the case but --

22 Q Okay. And if it had not been forwarded to the attorneys,  
23 what would have happened to the allonge?

24 A It would have ended up in the file with everything else.

25 Q And the note attached to it?

1 A Yes.

2 Q Thank you.

3 MR. KAPLAN: I have no further questions, Your  
4 Honor.

5 MR. LEVITT: Just briefly, Your Honor.

6 RECROSS-EXAMINATION

7 BY MR. LEVITT:

8 Q Ms. DeMartini, you testified that this allonge was just  
9 prepared a couple of weeks ago, correct?

10 A Yeah, a short time ago, yes.

11 Q And wasn't it prepared because counsel called up and said  
12 we need and allonge?

13 A Yes.

14 Q So it wasn't your normal course to have an allonge in this  
15 situation, correct?

16 A Well --

17 Q When was this loan made?

18 A This loan was taken out I believe in 2006 -- yes.

19 Q So between 2006 and 2009 when you got a phone call from  
20 counsel that said we've got a problem, prepare an allonge,  
21 there was no allonge, correct?

22 A There wasn't an allonge prior to that, no. This loan,  
23 like I said, it was always -- this was a loan that we  
24 originated that has always been within the company that yes,  
25 it was sold to -- as Bank of New York as the trustee and



1 securitized, but there wasn't a need for an allonge prior to  
2 this case.

3 Q Because there was no litigation pending, correct?

4 A Well, because there was no litigation --

5 Q Thank you.

6 A -- and because there was nothing to -- to get in the way  
7 of the fact of the normal course of -- of the way that this  
8 loan's being executed and being --

9 Q That's fine.

10 A -- being serviced.

11 Q Thank you.

12 MR. LEVITT: That's it, Your Honor.

13 MR. KAPLAN: One more question, Your Honor.

14 REDIRECT EXAMINATION

15 BY MR. KAPLAN:

16 Q Was it the intention of Countrywide to assign both its  
17 rights in the mortgage and the note to Bank of -- to Bank of  
18 New York as trustee?

19 A Yes.

20 THE COURT: Say that again?

21 BY MR. KAPLAN:

22 Q Was it the intention of Countrywide to assign its rights  
23 in both the note and the mortgage to Bank of New York?

24 MR. LEVITT: I'm going to object to the question,  
25 Your Honor. I'm not sure this witness is competent to answer

1 that question based upon the foundation laid.

2 THE COURT: I agree.

3 MR. KAPLAN: Well, Your Honor, they -- to the extent  
4 that there wasn't a physical document at some -- at the time,  
5 they remediated that by signing the allonge and facilitating  
6 their intentions.

7 THE COURT: Well, that's certainly a valid argument,  
8 but it's not -- it still doesn't answer the question of  
9 whether Ms. DeMartini can speak for Countrywide in terms of  
10 their intent in doing anything.

11 MR. KAPLAN: Well, it's evidence that it was their  
12 intent to assign the mortgage.

13 THE COURT: It very well may be, and we'll leave it  
14 at that.

15 MR. KAPLAN: Okay.

16 THE COURT: Objection sustained. Let me ask you a  
17 couple of questions.

18 EXAMINATION

19 BY THE COURT:

20 Q There was an unexecuted allonge to America's Wholesale  
21 Lender that was filed with the proof of claim. Is that in  
22 your file as well, that --

23 A Yeah. I have the -- the unsigned copy in there.

24 Q And it is unsigned?

25 A The old one? Yeah, that's the -- the copy I have, it

1 looks like it's unsigned, yeah.

2 Q So is it the normal practice of Countrywide not to sign  
3 allonges in the normal course?

4 A I can't answer to why that one was unsigned and that was  
5 in there. When a loan goes into bankruptcy, our Bankruptcy  
6 Department is the one that would be the ones actually  
7 preparing and filing the proof of claim. Our group gets  
8 involved when things turn to litigated matters --

9 Q But I'm not --

10 A -- and so that's why I can't speak to what they do in  
11 their -- in their normal course of action. I haven't seen an  
12 unsigned one before.

13 Q Well, I'm not talking about the process of filing a proof  
14 of claim. I'm talking about the customary business practice  
15 of Countrywide when a loan is transferred, when ownership is  
16 transferred, when in this case the mortgage assignment  
17 occurred on March 24th, 2008, correct?

18 A Yes.

19 Q And would that have been the date that the ownership of  
20 the note and mortgage were sought to be transferred to Bank of  
21 New York as trustee?

22 A That would have been the day they got the ownership, yes.

23 Q So the question is whether you know whether it's normal  
24 practice for Countrywide to execute an allonge at the time  
25 that that transfer takes place.

1 A I don't believe that they're always executed exactly when  
2 the transfer takes place. I believe that it often times  
3 happens that it happens after the fact.

4 Q And does it always happen?

5 A I can speak that it always happens, no.

6 Q So there's no routine that requires internally, to your  
7 knowledge, that the allonge be executed in connection with the  
8 transfer of ownership?

9 A No, I don't think that there is a norm in that respect  
10 because in a normal course of action and for -- and normal is  
11 kind of a hard word anyway -- but --

12 Q A normal business practice, an ordinary --

13 A -- but as a normal business practice with a normal loan,  
14 often times there really isn't a need for it unless the loan  
15 is going to continually to be sold, and since this loan was --  
16 yes, it was transferred to Bank of New York as trustee as it  
17 was securitized, but it wasn't that another mortgage company  
18 had the loan and then we bought it from them. Like I  
19 mentioned, this was always done by Countrywide and we  
20 securitized it and we -- you know, we sold it to them --

21 Q This was done --

22 A -- and so --

23 Q -- I'm not asking whether it was necessary, I am asking  
24 whether there was an ordinary business practice to sign an  
25 allonge and the answer is no, there was not?

1 A I don't believe so.

2 Q Countrywide, the same entity as the originator of the  
3 loan, serviced the loan from the outset or was it a different  
4 aspect of the company?

5 A No. It would have always been the same. Even though Bank  
6 of America has taken over Countrywide so to speak and we are  
7 now wholly owned by Bank of America, all of the Countrywide  
8 loans are still being serviced and the Bank of America --  
9 prior Bank of America loans, they're all still being serviced  
10 and done separately. This has always been by Countrywide.

11 Q Okay. Putting aside the takeover by Bank of America, this  
12 loan was given on May 31st, 2006, correct?

13 A Yes.

14 Q And when the loan was given, after the loan was given,  
15 Countrywide Home Loans, Inc. retained the servicing on the --

16 A Yes, that's correct.

17 Q And as of March 24th, 2008, that continued to be the case,  
18 is that right?

19 A That's correct.

20 Q And there was a Pooling and Servicing Agreement between  
21 Countrywide and --

22 A Bank of New York.

23 Q -- Bank of New York --

24 A Yes.

25 Q -- regarding the continued servicing of the loan, is that

1 right?

2 A That's correct.

3 Q And to your knowledge -- I think you might have the  
4 servicing arrangement --

5 A Yes, I brought a copy of it.

6 Q -- with you, to your knowledge, is there any provision  
7 that in the servicing of this loan that Countrywide acts as  
8 the agent for Bank of New York in terms of possession of  
9 original documents including the note in connection with this  
10 transaction?

11 A I have the Pooling and Servicing Agreement there. It's  
12 over 200 pages long. I'll be very honest; I did not read the  
13 entire Pooling and Servicing Agreement. I do know that it is  
14 our normal course of action with the loans that we service  
15 that we are the ones that retain the -- that we retain those  
16 documents.

17 Q Could such a clause be included in that, and if there were  
18 such a clause, would that -- what would be the effect of that?  
19 Should I look for that clause? Should I ask you to look for  
20 that clause, or is it a fruitless enterprise?

21 MR. LEVITT: Your Honor, I think -- and I have it  
22 also and it is a very thick document, Your Honor -- there are  
23 other provisions in this document that I think would be --  
24 even if there was something in there that says they could  
25 retain documents, there's other provisions in this document

1 which would be contradictory because there's provisions in the  
2 Pooling and Servicing Agreement that say that documents have  
3 to be delivered to an intermediary between Bank of America and  
4 Bank of New York, the --

5 THE COURT: Well, shouldn't I consider all of that?  
6 In other words, your -- one of your key points is the note was  
7 not properly transferred because possession of the original  
8 note was not given to the new owner, is that right?

9 MR. LEVITT: Partially, Your Honor.

10 THE COURT: Okay.

11 MR. LEVITT: But again, I'm not --

12 THE COURT: What's the --

13 MR. LEVITT: -- but I'm not raising --

14 THE COURT: What part of it is --

15 MR. LEVITT: -- but I'm not -- I'm not defending  
16 this. The proofs that have been submitted to the Court are  
17 that there's a piece of paper that they're calling an allonge  
18 that was prepared in the course of this litigation that  
19 they're relying on as an endorsement.

20 THE COURT: You're right.

21 MR. LEVITT: I haven't --

22 THE COURT: You're right, but --

23 MR. LEVITT: But I haven't heard --

24 THE COURT: -- I'm asking the question, and maybe it  
25 should have been asked otherwise, but if there is such a

1 provision in the servicing agreement about the retention of  
2 possession as agent for the owner --

3 MR. LEVITT: And if -- if --

4 THE COURT: -- what part of your argument is it? In  
5 other words, you say possession of the document is part of the  
6 argument. What else is a part of the argument?

7 MR. LEVITT: No, but possession -- you have to have  
8 possession of the document but in addition to possession, you  
9 either have to have an endorsement, or you have to have proof  
10 that these documents were actually transferred to the ultimate  
11 owner, even if the agent for the owner is holding them. But  
12 there still has to be proof that it was delivered from A to B  
13 to C but none of those proofs have been submitted and it's not  
14 my burden, Your Honor.

15 If counsel wants to say all right, forget the holder  
16 argument, I lost on holder but here's my case that this note  
17 was transferred from A to B to C, here's the delivery receipts  
18 and yeah, it may be sitting in somebody's vault in California  
19 and not with this trust, fine. But I haven't heard those  
20 proofs and I don't think the Pooling and Servicing Agreement  
21 gives us that, Your Honor. We need to see the delivery  
22 receipts, we need to show the chain and there's nothing before  
23 the Court.

24 THE COURT: Understood. Mr. Kaplan, is there  
25 anything in those documents in the Pooling and Servicing



1 contract that would --

2 MR. KAPLAN: That's a good question, Your Honor,  
3 but, you know --

4 THE COURT: Don't you think you --

5 MR. KAPLAN: -- and I believe the witness's  
6 experience is that documents are not physically transferred  
7 from party to party to party.

8 THE COURT: But it's not experience that we're  
9 talking about, it's UCC requirements.

10 MR. KAPLAN: I understand.

11 THE COURT: Is Mr. Levitt right when he says that  
12 some kind of delivery of possession is required in order to  
13 qualify as a transferee, not a holder? I think we've pretty  
14 well established that the affixing that is required for holder  
15 in due course status as not apparent in this case, has not  
16 been established, but if you establish under UCC requirements  
17 that there is a proper transfer, there may still be  
18 opportunity to enforce the obligation.

19 MR. KAPLAN: Right. Your Honor, I understand but, I  
20 mean, there's no way I'm going to argue that there was a  
21 physical transfer. Countrywide was the servicer, the  
22 originator. They had the documents --

23 THE COURT: Right, there was no --

24 MR. KAPLAN: -- they physically signed the necessary  
25 documents required to document their ownership interests being

1 transferred to the trust --

2 THE COURT: That's the issue. In other words,  
3 I'm --

4 MR. KAPLAN: -- but they didn't physically deliver  
5 it.

6 THE COURT: -- I'm raising the possibility that the  
7 Pooling and Servicing Agreement might contain provisions that  
8 would serve to offer Countrywide an out, meaning I'm not --  
9 you know, here to advocate Countrywide's cause, but I am here  
10 to get to the -- as close as I can to what should happen here.

11 MR. LEVITT: Your Honor, I'll answer the question  
12 because I did see in the index -- and if Your Honor would like  
13 I can hand up the Pooling and Servicing Agreement. This is  
14 the Pooling and Servicing Agreement that was provided by the  
15 defendant and I'll call your attention to Section 8-13.

16 THE COURT: Thank you.

17 MR. KAPLAN: What page is he on?

18 MR. LEVITT: It's 150.

19 THE COURT: 8.13, "Access to records of the trustee.  
20 The trustee shall afford the sellers, the depositor, the  
21 master servicer, the NIM Insurer and each certificate owner  
22 upon reasonable notice during normal business hours access to  
23 all records maintained by the trustee" --

24 MR. LEVITT: That tells me the trustee has the  
25 records, Your Honor. That's as close as I can get. But I'll

1 let you finish.

2 THE COURT: Well, yes, that doesn't seem to get at  
3 it. If there is no authority in this document for Countrywide  
4 to act as the agent for the trustee in maintaining the  
5 original documents, then we face squarely the question of  
6 whether lack of possession by the owner, the retention of  
7 possession by the servicer, violates the transferee status of  
8 the owner, or whether the servicer who filed the proof of  
9 claim can stand by that status to succeed against this  
10 challenge.

11 MR. KAPLAN: Well, Your Honor, the servicer has  
12 authority to act in servicing the loan, including filing a  
13 proof of claim under the Pooling and Servicing Agreement. In  
14 addition, I believe there's a power of attorney that Bank of  
15 New York has provided to Countrywide to act on their behalf to  
16 administer --

17 THE COURT: Well, where is that?

18 MR. KAPLAN: I'd be happy to provide that to Your  
19 Honor. Okay, we can mark that as Defendant's Exhibit 2.

20 THE COURT: Did we mark this copy of the servicing  
21 agreement as Defendant's Exhibit 3?

22 MR. KAPLAN: That's fine, Your Honor.

23 THE COURT: And did we allow you a chance to look at  
24 this document to ascertain what in it might be helpful to  
25 you --

1 MR. KAPLAN: Your Honor, there's --

2 THE COURT: -- rather than just leaving it to me to  
3 peruse?

4 MR. KAPLAN: Well, that's fine, Your Honor, we'll be  
5 happy to go through and submit to Your Honor references to the  
6 various provisions in the document.

7 THE COURT: Okay, let's take a look, D-2, power of  
8 attorney signed by the trustee. "Under the Pooling and  
9 Servicing Agreements" -- "constituting and appointing  
10 Countrywide Home Loan Servicing, LP full power of substitution  
11 and re-substitution for the limited purpose of executing and  
12 recording any and all documents necessary to effect a  
13 foreclosure of a mortgage loan, the disposition of an REO  
14 property, an assumption agreement or modification agreement to  
15 supplement -- or supplement to the mortgage note, mortgage or  
16 deed of trust and a reconveyance, deed of reconveyance or  
17 release or satisfaction of mortgage or such instrument  
18 releasing the lien of a mortgage in connection with the  
19 transactions contemplated in those certain Pooling and  
20 Servicing Agreements, by and among the undersigned," et  
21 cetera.

22 "The undersigned also grants" -- "full power and  
23 authority to do and perform each and every act and thing  
24 requisite and necessary to be done in and about the premises  
25 as fully to all intents and purposes as might or could be done

1 in person to effect items one, two and three above, hereby  
2 ratifying and confirming all that said attorneys in fact and  
3 agents or any of them or their substitutes may lawfully do or  
4 cause to be done by virtue hereof."

5 Well, there's a question mark -- does this power of  
6 attorney authorize the agent/servicer to hold the original  
7 documents in substitution for and satisfaction of the  
8 requirements of the UCC. I mean, that's a question mark.

9 MR. KAPLAN: I understand. I understand, Your  
10 Honor. But, I mean, Your Honor's probably familiar, mortgage  
11 lenders and servicers don't normally transfer documents back  
12 and forth in order to effectuate physical transfer. They  
13 utilize agents or servicers to execute documents and retain  
14 the documents and they don't send them across the country by  
15 messengers or Federal Express to go to different vaults to be  
16 maintained because --

17 THE COURT: And that's fine. That's --

18 MR. KAPLAN: And that's standard --

19 THE COURT: I mean, I'm not accepting your testimony  
20 as an expert --

21 MR. KAPLAN: Yeah, I know, I know.

22 THE COURT: -- to that effect --

23 MR. KAPLAN: But I think it's reasonable --

24 THE COURT: -- but I'm accepting it and it may very  
25 well be reasonable. Is it permissible under the Code.

1 MR. KAPLAN: I understand, okay.

2 THE COURT: That's all I'm asking.

3 MR. KAPLAN: All I'm saying is I believe that it's a  
4 standard business practice amongst the mortgage banking  
5 industry and servicing industry not to physically move  
6 documents from party to party unless there is a change of  
7 servicing, in which case the physical files then must be sent  
8 to the new servicer, not necessarily the new investor, holder  
9 or -- you know, recorded owner of an assignment of mortgage,  
10 et cetera, but the new servicer.

11 THE COURT: Well, it certainly makes sense and  
12 presumably the Pooling and Servicing Agreement will clarify  
13 that there is agency status for that purpose and we would try  
14 to understand whether that would be sufficient for UCC  
15 purposes. What else should I be looking at, counsel? We're  
16 talking first about possession. What else are we talking  
17 about? All right, let me ask one question before I forget. I  
18 take it that the allonge that we've looked at, the new  
19 allonge, has not been recorded?

20 MR. KAPLAN: Well, normally you would not record a  
21 note, Your Honor. The note passes from party to party. It's  
22 like a check --

23 THE COURT: Right.

24 MR. KAPLAN: -- it doesn't get recorded in the  
25 County Clerk's Office generally --

1 THE COURT: That's fine.

2 MR. KAPLAN: -- so it would normally be placed in  
3 original -- with all the original documents and essentially  
4 attached to the note.

5 THE COURT: Understood. Okay, what else should I be  
6 looking at?

7 MR. LEVITT: Your Honor, if Your Honor does want to  
8 focus on the Pooling and Servicing Agreement, there are other  
9 provisions in the Pooling and Servicing Agreement that Your  
10 Honor might want to look at, specifically -- and if I could  
11 just grab my copy --

12 THE COURT: Of course. Is this your copy?

13 MR. LEVITT: Yes, it is. Actually, I have -- I have  
14 excerpts -- copies of excerpts, Your Honor, and I'll --  
15 actually I'll hand up the original to you so --

16 MR. KAPLAN: I would also argue, Your Honor, in that  
17 -- as I said, I believe it's standard operating procedure for  
18 servicers, especially when they were the originator of the  
19 documents and when they sell them or securitize them and  
20 remain the servicer, to execute the documents that are  
21 required for transfer, but that there's not a physical  
22 transfer. And if you're going to determine --

23 THE COURT: Mr. Kaplan, you're testifying about the  
24 ordinary --

25 MR. KAPLAN: My witness I think can testify to that

1 but I think --

2 THE COURT: Well, you're welcome to have --

3 MR. KAPLAN: -- I think Your Honor can --

4 THE COURT: -- her testify.

5 MR. LEVITT: She has.

6 MR. KAPLAN: -- I think Your Honor's experience can  
7 reasonably allow you to take judicial notice that documents  
8 don't go from party to party, that they remain with the  
9 servicer.

10 MR. LEVITT: I don't -- I don't think the --

11 THE COURT: I'm not going to take judicial notice of  
12 that.

13 I noticed that this particular copy is unsigned. Do  
14 you know when the Pooling and Servicing Agreement would have  
15 been signed?

16 THE WITNESS: We went to get a signed copy the other  
17 day and we were told that it is not customary for us to have  
18 the signed document so I wasn't able to access the signed  
19 document. We have the copy --

20 THE COURT: But --

21 THE WITNESS: -- but we don't have the signed  
22 original. I don't have the signed of that. That's the one  
23 document I don't have the original -- access to the original  
24 of.

25 MR. LEVITT: Your Honor, again, I'm not in any way,



1 shape or form testifying but I can advise the Court that I  
2 spent many hours trying to find this Pooling and Servicing  
3 Agreement on the SEC website where they have to be filed and I  
4 could not find it, so the only copy of the Pooling and  
5 Servicing Agreement that I have is this unsigned copy provided  
6 by counsel for the defendant which I have to accept as a valid  
7 document.

8 But I can tell Your Honor, the SEC website is where  
9 -- where you can find them; I can't find it. I can find a lot  
10 of others in a similar name but with different numbers. I  
11 can't find this one.

12 THE COURT: Is there reference in this document that  
13 I have in my hand to this particular mortgage?

14 THE WITNESS: I don't have it in front of me.

15 THE COURT: There are all kinds of exhibits --

16 THE WITNESS: It's --

17 THE COURT: -- that have numbers but don't have  
18 substance.

19 (Pause in proceedings)

20 THE COURT: Have you looked at that, counsel?

21 MR. LEVITT: Excuse me, Your Honor?

22 THE COURT: Have you looked at whether there is  
23 reference to this particular mortgage?

24 MR. LEVITT: No, Your Honor. Your Honor, it wasn't  
25 again my experience -- because I've been reading a lot of

1       these lately -- my experience is there's a schedule that's  
2       annexed. Very often I'm finding that they don't include the  
3       schedule in the filing with SEC I guess for privacy purposes  
4       and you're directed to whichever law firm is the firm that  
5       filed the documents with the SEC, but I wasn't even provided  
6       the schedule as part of this submission.

7               And again, I went onto the SEC website looking for  
8       it and couldn't find it. I will also point out to Your Honor  
9       that the copy that I was provided and the copy that's in front  
10      of Your Honor on the first page references a draft. It says  
11      "Sidley" -- I guess Sidley and Austin was the law firm, it was  
12      their draft dated 06/27/06. I don't believe, again because  
13      this is labeled draft, this may not be the operative document  
14      but it is the only document that I was provided by the  
15      defendant.

16             MR. KAPLAN: I understand, Your Honor, and I wasn't  
17      involved in transmitting the document but I am aware that it  
18      does say that.

19             THE COURT: Well, I think you need to get involved  
20      and --

21             MR. KAPLAN: I did -- I did ask specifically for a  
22      document that was signed and essentially was final.

23             THE COURT: Essentially?

24             MR. KAPLAN: Well, it was a final document --  
25      signed, final document, not as alleged, a draft.

1 THE COURT: And you didn't get it?

2 MR. KAPLAN: And I have not, no.

3 THE COURT: So we don't know what this is, nor do we  
4 know whether it applies to this particular situation. The  
5 only clue we have is that it's between Countrywide and the  
6 Bank of New York trustee and that it relates to Asset-Backed  
7 Certificate Series 2006/8 --

8 MR. KAPLAN: Right.

9 THE COURT: -- which suggests that it might be the  
10 same pool, but we don't know whether it was executed. We have  
11 questions raised because it's not on the SEC website and we  
12 don't have a specific listing of this particular mortgage, and  
13 I take it that additional time will not help you?

14 MR. KAPLAN: Well, I don't have physical access. It  
15 would be up to Countrywide or Bank of America --

16 THE COURT: Well, you as counsel for Countrywide --

17 MR. KAPLAN: Well, Your Honor, I would certainly  
18 request additional time to allow Countrywide, the defendant,  
19 to procure the documents, provide them to counsel and Your  
20 Honor, as well as for us to synopsise the information  
21 contained in there pertaining to possession and retention of  
22 documents.

23 THE COURT: Well, you know, this is a serious  
24 consequence -- this meaning the relief sought by the  
25 plaintiff. If there are substantial gaps in my ability to

1 follow the stream, then the plaintiff will be successful. I  
2 would offer that opportunity to Countrywide.

3 If they can't come up with a signed legitimate  
4 verified copy of it -- and it can be in the first instance the  
5 final executed document with some tie-in to this mortgage --  
6 somebody has an exhibit that would, you know, list this  
7 mortgage theoretically -- and if they don't, that's a problem  
8 -- with a certification from a qualified Countrywide  
9 representative that this is what it purports to be.

10 If there are further questions, we can take further  
11 testimony, either in Court or by telephone conference call. I  
12 hate to make you come back from California, although -- and  
13 it's not very nice this time of year in New Jersey, I will  
14 grant you that, but we can, you know, try to keep going in  
15 terms of getting it.

16 There is a limit and there is a burden, I fully  
17 agree with you, counsel. I'm pushing the envelope to see  
18 where we get to in terms of lining these things up or not.  
19 That's what I'm aiming for because I frankly don't want to  
20 grant relief if there is something for instance in these  
21 documents and if the final draft has been executed and so  
22 forth that should guide resolution of this decision. It has  
23 major implications potentially. I mean, you know, my written  
24 decision may be ignored but it may be a basis for other such  
25 relief and I'd like to get it right if I can so --

1           MR. KAPLAN: I share that thought, Your Honor. I  
2 was going to mention, it does have significant ramifications  
3 because of what -- you know, the document and the physical  
4 retention of documents or physical transfer of the documents  
5 might mean to other -- you know, loans.

6           THE COURT: Then I urge Countrywide to take it  
7 seriously and to direct their attention to -- meaning if there  
8 are things that they want under seal for any reason, that's  
9 certainly something that we would accommodate in the first  
10 instance subject to objection so there is opportunity to work  
11 with them on this, but they've got to come to the table, and I  
12 think that's demonstrated by this hearing.

13           So if -- if there can be a -- if you're right,  
14 counsel, number one that possession is required but if that  
15 possession is demonstrated by agency, one might disagree about  
16 whether possession can be demonstrated by agency. Perhaps  
17 that's another question that is posed, even if the documents  
18 do support that. But let's assume that Countrywide gets over  
19 that hurdle. What else would we look at -- should be look at?

20           MR. LEVITT: Again, Your Honor, the lack of  
21 endorsement, the fact that there's no allonge affixed so --

22           THE COURT: Well, affixing of the allonge we've sort  
23 of -- we're done with. We're -- this is not going to be a  
24 holder in due course but I'm not sure that it matters. You're  
25 right that there is no affixing, there's no proof that this

1 was affixed in the way that the Third Circuit imagined was  
2 necessary -- not imagined but proclaimed was necessary.

3 Your assertion would be that the allonge that was  
4 executed two weeks ago should not be considered as an  
5 appropriate transfer because it was post-petition, it was in  
6 the litigation, it wasn't effective as of the date of the  
7 proof of claim or better yet, as of the date of the filing of  
8 the petition and that therefore, it is invalid.

9 MR. LEVITT: Correct, Your Honor.

10 THE COURT: And that is a very legitimate and  
11 important issue and I would appreciate Mr. Kaplan dealing with  
12 that.

13 MR. LEVITT: And so getting to the other portion,  
14 Your Honor, the only -- and it has nothing to do with holder  
15 in due course, we're not raising the fraud issue, we're not  
16 raising those issues. The issue is does this creditor have  
17 the right to enforce the note. So with regard to the allonge,  
18 luckily I have a Third Circuit decision that makes it easy.  
19 With regard to the other, there's only one other way to  
20 enforce and that's to take the rights of the transferee --  
21 transferor under the Third Circuit decision and under 3-203.

22 And again there, Your Honor, if my position is the  
23 trust has to be in possession of the note and the trust has to  
24 prove that it took possession and if we're going to deal with  
25 the Pooling and Servicing Agreement -- and, Your Honor, one of

1 the reasons why I wasn't moving it into evidence was because  
2 to me it wasn't competent evidence at this point, again, it  
3 wasn't my burden, but if counsel is going to find the  
4 legitimate document that's recorded with the SEC, well that's  
5 going to be the Bible, Your Honor, and that's going to say  
6 that this note had to be delivered.

7           Whether it ultimately ended up with the trust --  
8 with the servicer, the Pooling and Servicing Agreement, if  
9 it's at all close to this draft or like every other Pooling  
10 and Servicing Agreement I've read, it's going to say it would  
11 have had to be physically transferred first from Countrywide  
12 was the originator to the depositor, and then from the  
13 depositor ultimately to the trust.

14           The physical documents according to the Pooling and  
15 Servicing have to be transferred and in this document you're  
16 going to see it had to be endorsed. We're not going to have  
17 that here. So if they can prove that these documents were  
18 physically transferred, meaning there's delivery receipts  
19 showing they were physically transferred from A to B, from B  
20 to C, and if C decided to let its agent hold them, I think,  
21 Your Honor --

22           THE COURT: Well, there's no question on this record  
23 and, you know, I'm ready to accept it as fact that these  
24 original documents never moved. I mean, that was the  
25 testimony.

1           MR. LEVITT: And if that's the case, Your Honor, I  
2 think we're done because unless the documents were physically  
3 transferred, the trust ultimately could decide to let its  
4 agent -- you know, Countrywide here, despite the witness's  
5 beliefs and assertions, Countrywide here is wearing two  
6 different hats, it's wearing the hat as Countrywide Home  
7 Mortgage, the one that originated these mortgages, packaged  
8 them and got rid of them as quickly as they possibly could,  
9 that's hat number one, and then as another way to make money,  
10 they're a servicer.

11           THE COURT: Right.

12           MR. LEVITT: So it's two different -- from all  
13 practical purposes and in fact I think the Pooling and  
14 Servicing Agreement will show, it's two separate and distinct  
15 legal entities, both Countrywide entities, now Bank of America  
16 entities. So if A, which is Countrywide the originator, ended  
17 up securitizing and selling this loan they would have had to  
18 have followed the terms of the Pooling and Servicing Agreement  
19 to get it into the hands of the trust and then D, which is  
20 Countrywide the servicer, could have gotten possession. And  
21 even if it meant -- even if they stayed in the same vault but  
22 if it meant that there was a delivery receipt from A to D or A  
23 to B to C to D, that's what they have to prove.

24           And because they're saying that, now maybe they do  
25 have those delivery receipts and if they want to produce them,



1       that's great, but if that document never moved from that safe,  
2       first of all they're in violation of their Pooling and  
3       Servicing Agreement, they're in violation of the UCC -- we're  
4       done.

5               THE COURT:  If they're in violation of the UCC, I'm  
6       agreeing with you.  If they're in violation of the Pooling and  
7       Servicing Agreement, I wonder how a debtor can avail  
8       themselves of enforcement of the pooling and servicing --

9               MR. LEVITT:  Third-party beneficiary.

10              THE COURT:  I'm sorry?

11              MR. LEVITT:  They're the third-party beneficiary of  
12       this contract.

13              THE COURT:  Beneficiary in terms of where the  
14       documents are -- that's a tough one.

15              MR. LEVITT:  In terms of -- and sometimes it's  
16       third-party detriment too because we have all these problems  
17       of the way these servicers act, but the reality is, Your  
18       Honor --

19              THE COURT:  It's a whole other story.

20              MR. LEVITT:  -- we're referenced, again, they're  
21       going to produce the document, we're going to be referenced as  
22       one of the loans that are subject to this Pooling and  
23       Servicing Agreement.

24              THE COURT:  Yes, but the moving around of the  
25       documents are not for the benefit of the third-party

1 beneficiary. You can make the argument that they are because  
2 they act upon the UCC protections of knowing who's holding  
3 what. That's not an unreasonable argument and I'm thinking it  
4 out as we go, but here's what I need, counsel. Because your  
5 submission didn't focus, I would -- because you didn't have  
6 the --

7 MR. LEVITT: I --

8 THE COURT: -- the factual basis --

9 MR. LEVITT: Correct.

10 THE COURT: -- now you do, I would appreciate your  
11 honing in on your arguments. They are to -- we've eliminated  
12 the affixing as we've said, but I'm interested in the  
13 possession element. At the same time that I allow the  
14 defendant to amplify upon their argument by future submission,  
15 not only of a document that is a final version if you have it  
16 and can get it and can certify that that's what it is and a  
17 focus on what provisions in that document I should -- on both  
18 sides pay attention to -- obviously, when you get it you  
19 provide it to counsel as well, in addition to any argument  
20 that you would focus me on.

21 So it's half-baked. We've made some progress.  
22 We've understood certain factual predicates that the documents  
23 remained where they were, that the allonge was created two  
24 weeks ago and those are important facts to fit into the  
25 equation.

1 Did you have a comment, sir?

2 MR. KAPLAN: Yeah, I'm just -- I'm just a little --  
3 and believe me, I understand where Your Honor is heading. I'm  
4 not -- I know I'm not going to change Your Honor's mind, but  
5 I'm a little troubled by the fact that we're accepting a  
6 representation here. And this witness is in the Litigation  
7 Department, this witness is not the person that was  
8 responsible for the Pooling and Servicing Agreement or how  
9 these documents are dealt with.

10 I think at the very least, even if we don't have  
11 live testimony, we need to have something from someone who can  
12 say they're custodian of records that truly tracks this.  
13 We're accepting a representation --

14 THE COURT: Which representation?

15 MR. KAPLAN: The representation that they stayed in  
16 the same vault and they never moved. We don't know that, Your  
17 Honor. We're -- this is --

18 THE COURT: But let's examine --

19 MR. KAPLAN: -- and a lot of that is counsel's  
20 representation.

21 THE COURT: -- Ms. DeMartini in terms of her  
22 knowledge of that fact.

23 EXAMINATION

24 BY THE COURT:

25 Q You've testified that these documents, the originals, the

1 files --

2 A Have remained with Countrywide.

3 Q -- stayed with -- now, are there two different entities?

4 This note was entered into with Countrywide Home Loans, Inc.

5 A Yes.

6 Q Is that the same as Countrywide Home Loan Servicing, LP?

7 A Countrywide Home Loan Servicing, LP is the -- is our

8 service -- is the portion of the business that does the

9 servicing of the loan so they are slightly different in that

10 they were both part of the -- what was formerly Countrywide

11 Financial Corporation. Countrywide Servicing Home Loans, LP

12 was the servicing portion of that business. They would -- and

13 Countrywide Home Loans would have been the ones that

14 originated the loan.

15 Q Well, let's talk first about your experience with the

16 company. You said that you started about ten years ago?

17 A Yes.

18 Q And with which company, the servicer or the --

19 A I've always been involved with servicing.

20 Q In the servicing.

21 A Yes.

22 Q And what were your positions with servicing?

23 A Oh, I've had a lot of positions with servicing. I've been

24 a customer service representative, I've been a supervisor,

25 I've been a trainer, I've been a training developer, I've

1 managed our Policies and Procedures writers, I've been a  
2 Communications leader, I've been a senior team leader, I've  
3 been a team leader auditor, a team leader trainer -- I've done  
4 all kinds of things all within the customer contact area of  
5 servicing.

6 And as being part of customer contact we had to --  
7 we were involved in every aspect of the servicing. We were  
8 the ones that did all of the speaking to the borrowers about  
9 anything to do with their loans so I had to know about  
10 everything in order to be able to do that and in order to be  
11 able to train the customer service representatives.

12 In order to do that, as I stated before, I went over  
13 to the -- we were called the Case Management Department; now  
14 we're called the Litigation Management Department. We are  
15 part of servicing as well under -- under -- in the loan admin  
16 servicing, what used to be loan admin servicing as a  
17 supervisor last September.

18 Q What contact, if any, during your experience with  
19 Countrywide Servicing have you had with the loan originator  
20 aspect of the company?

21 A I've never been involved specifically with the  
22 originations of the -- of the loans. As a servicer, we get  
23 involved after the loan is established and we're the ones that  
24 then deal with everything after the fact.

25 Q What do you -- are you aware of the procedures that occur

1 internally as between the originator and the servicer as soon  
2 as the loan is given?

3 A Well, after the loan's originated, then it's going to what  
4 we would have called boarded our system. I would be familiar  
5 with it from the time that it boarded on --

6 Q What does that mean?

7 A Boarded is when it would get put into the computer system.  
8 That would be when the documents are all imaged and then  
9 stored. That all happens when the loan comes on board or  
10 becomes a part of our servicing. What happens to it prior to  
11 that as far as the origination process inasmuch as the  
12 underwriting or any of that, that I'm not as familiar with,  
13 no.

14 Q When the file is -- when the loan is boarded, who does  
15 that?

16 A Let me find the best way to describe that. Well, the  
17 documents themselves, we have a Documents Department that  
18 would be in charge of imaging and then they would be the ones  
19 that would be storing the original documents. We have a  
20 system --

21 Q Is that within your servicing company?

22 A That would be under our servicing company, yes.

23 Q Have you ever dealt in that department -- the Documents  
24 Department?

25 A I have not physically worked in that department. I've

1       been in that building, I -- but for me to specifically be the  
2       one doing that, no, I haven't.

3       Q    Have you had occasion to go there to look for a document  
4       let's say or --

5       A    I've had occasion to speak to people -- the documents --  
6       some of them are stored -- they're stored there and then we  
7       also have other storage facilities. These particular  
8       documents are in our building because I looked these ones up,  
9       but --

10      Q    What do you mean, you've looked these up -- these ones up?

11      A    Well, when we went to order the originations file we  
12      looked -- looked for the -- the documents. The documents had  
13      been previously requested by our Foreclosure Department and so  
14      that's where they're located right now. The physical  
15      documents are in the Foreclosure Department.

16      Q    The original physical documents?

17      A    Yeah.

18      Q    So is it your custom to request original documents --

19      A    The --

20      Q    -- from this department when the Litigation Department  
21      needs them?

22      A    If they're requested by counsel, if they're requested for  
23      various things with whether it's within a foreclosure or a  
24      bankruptcy. But if there's something that comes up where  
25      we're being asked to prove something, then it's becoming more

1 customary lately.

2 It never used to be to where the originals were ever  
3 requested but lately more and more of the time of day of  
4 things around the country, we are being asked to physically  
5 produce the originals more frequently.

6 Q And you would direct those inquiries to the Document  
7 Department?

8 A Yes, Document Request. It's our DMS system, it's our  
9 Document Request.

10 Q And so to your knowledge, the original documents, the  
11 origination documents, the notes and the mortgages are  
12 maintained in that facility?

13 A Yes.

14 Q To your knowledge, are they ever moved except for  
15 inquiries from counsel? Are they ever moved to follow the  
16 transfer of ownership?

17 A I can't say that they're never moved because, I mean, with  
18 this many millions of loans as we have I wouldn't presume to  
19 say that, but it is not customary for them to move.

20 Q Do you have personal knowledge of under what circumstances  
21 they would move or whether and to what extent they're ever  
22 moved?

23 A Not -- not specifically to what I would be comfortable  
24 testifying to, no.

25 Q Okay. In terms of this particular transaction, from your



1 experience of requesting these original documents, were you  
2 able to establish that these were not moved?

3 A We were able to establish that they're in our -- what we  
4 call the 400 Building which is the building that we're --  
5 where we're at and we were able to establish that that's where  
6 they're located and that's -- we were still in the process of  
7 trying to physically get them to bring them here today but it  
8 just -- I wasn't able to obtain them in time.

9 Q And your information is that they may be at the  
10 Foreclosure Department, but are you certain that they weren't  
11 moved out of the servicing company?

12 A We had Federal Express tracking. Even when we move  
13 something internally like that a lot of times it will go Fed  
14 Ex so that we have that tracking so that's how I know that  
15 they went there because I have the tracking number --

16 Q I see.

17 A -- so that's how I know that they're there, and I don't  
18 have any receipt or any tracking that they've ever moved  
19 beyond that.

20 Q Understood.

21 THE COURT: Did I generate additional questions?

22 MR. KAPLAN: No, Your Honor.

23 MR. LEVITT: No, Your Honor.

24 THE COURT: All right. Are there any other  
25 questions for Ms. DeMartini?

1 MR. LEVITT: No, Your Honor.

2 THE COURT: Thank you, Ms. DeMartini. You may step  
3 down.

4 (Witness excused)

5

6

\* \* \*

7

8

C E R T I F I C A T I O N

I, Diane Gallagher, court approved transcriber,  
certify that the foregoing is a correct transcript from the  
official electronic sound recording of the proceedings in the  
above-entitled matter.

      /s/Diane Gallagher       November 22, 2010

DIANE GALLAGHER

DIANA DOMAN TRANSCRIBING

Comments on DeMartini Testimony by O. Max Gardner, III  
November 24, 2010

I think the argument that Linda DeMartini was testifying about some process she was not aware of is total damage control by BAC and KL Gates and is categorically false. She testified that she had personally seen the “original note” in the “original loan file” of BAC in Simi Valley where she has worked for 10 years. 10 years not 10 months. She was the number 3 officer in charge of the Litigation Unit. Number 3, not number 3000. She also testified that the allonge that allegedly transferred the note to the Trust was prepared several weeks before the hearing, prepared for the hearing, and was the only document she could provide that established any physical transfer of any documents to the Trust. Of course, the originator NEVER transfers a note directly to the Trust. The note is physically transferred from the originator to the sponsor, from the sponsor to the depositor, from the depositor to the trust, and then the Trustee delivers it to the custodian for the Trust. And, the Allonge to be legally effective must be permanently attached to the “original” note. You cannot have a free-standing and floating Allonge.

Ms. DeMartini also testified that whenever Countrywide originated a loan and sold it with servicing rights retained Countrywide always kept the ORIGINAL NOTE in the loan origination file in Simi Valley. She testified to this based on 10 years of experience and her own PERSONAL knowledge. On the other hand, if Countrywide sold the note with servicing rights released then and only then would Countrywide transfer and deliver the note to the buyer.

Also, she clearly testified that the original note in Kemp “was in her office” and was “not with the trust that owns the note.” In my view, this witness told the truth from her own personal knowledge and actual knowledge of how the SYSTEM worked and her actual testimony is 100 times more damaging than the Court’s opinion. Extraordinary stuff to say the very least.

On direct examination, DeMartini testified that it was “not the custom for the notes to go the investors but for the original notes to stay with us [Countrywide].” She also testified that Countrywide “had possession of the original documents [in Kemp] from the outset” and up to and including the day of the hearing. She also clearly testified that Countrywide transferred the “rights” to the Trust but not “the physical documents.” She also testified that this “was standard operating procedure in the mortgage business.” This is a truly WTF moment!

The incredible thing and extremely troubling thing is that she testified that the “Allonge” was prepared several weeks before the hearing “because counsel called up and said we needed one.” She also said that the original Allonge, after the court hearing, would have been placed back in the Countrywide loan file. This testimony among other things is evidence of a major fraud on the court and serious ethical violations by the attorneys for Countrywide BAC in this case. Plus, the Allonge related to a Trust that was formed and closed out in 2006. You cannot make up stuff and then pretend it was transferred to such a trust in 2009! She also testified that before the telephone call from counsel for the bogus Allonge there “was not an original Allonge in the loan file.”

I am actually in a state of shock after reading this transcript. Shock.

From: <http://people.forbes.com/profile/david-a-spector/116748>

**David A. Spector**

**President, Chief Operating Officer and Trustee; Chief Investment Officer of PCM and PLS**

**PennyMac Mortgage Investment Trust**

Calabasas , CA

Sector: FINANCIAL / REIT - Residential

Officer since March 2008

47 Years Old

Mr. Spector, age 47, has served on our Board of Trustees since August 2009 and is a Class III Trustee as well as our President and Chief Operating Officer. He is also the Chief Investment Officer of PNMAC, PCM and PLS. Before joining PNMAC in March 2008, Mr. Spector was co-head of global residential mortgages for Morgan Stanley, a global financial services firm, based in London. Prior to joining Morgan Stanley in September 2006, Mr. Spector served as senior managing director, secondary marketing, at Countrywide Financial Corporation, where he was employed from May 1990 to August 2006. Mr. Spector was a member of Countrywide's Asset Liability Committee and Credit Committee, as well as Advisory Committees for both Freddie Mac and Fannie Mae. Mr. Spector holds a BA from the University of California at Los Angeles. We believe Mr. Spector is qualified to serve on our board because he is our President and an experienced executive with broad mortgage banking expertise in portfolio investments and management, interest rate and credit risk management, and capital markets activity in pricing, trading and hedging.

**Compensation for 2009**

Salary	\$0.00
Bonus	\$0.00
Restricted stock awards	\$431,957.00
All other compensation	\$0.00
Option awards \$	\$0.00
Non-equity incentive plan compensation	\$0.00
Change in pension value and nonqualified deferred compensation earnings	\$0.00

<b>Total Compensation</b>	<b>\$431,957.00</b>
---------------------------	---------------------

**Options Granted**

Grant Date	All other stock awards	Number of securities underlying options	Exercise or base price	Percent of total options granted	Grant date fair value of stock and option	See More
------------	------------------------	---	------------------------	----------------------------------	---	----------

	(# of shares of stocks or units)			in fiscal year	awards	
08/04/2009	60,000	-	\$ -	0%	\$431,957.00	

 [RSS Feed on David Spector](#)

### **Forbes.com Headlines**

#### **Countrywide Execs Get New Home At PennyMac**

Ruthie Ackerman

Executives from the mortgage lender team up to save the distressed market it helped create.

#### **Countrywide Reconstructed: PennyMac**

Ruthie Ackerman

Executives from the mortgage lender team up to save the distressed market they helped create

O. Max Gardner, III to Abigail Field

November 29, 2010

Judge Wizmur's Kemp decision references 2 allonges. The first was unsigned. The second allonge was not affixed to the note and was signed by Sharon Mason, a CHL VP, whose floating allonge purported to endorse some document directly from CHL to the trust. A copy of the signed allonge is attached.

On PACER I could not locate in the Kemp case filings a stamped facsimile signature on an allonge from 2008 by David A. Spector. In a South Jersey Legal Services' Ukpe case, Mr. Spector allegedly executed the PSA and endorsed the Ukpes' promissory note in blank on behalf of Countrywide Home Loans, Inc.

In reading the transcript of Ms. DeMartini's testimony, I was intrigued to learn that the only evidence of the trust's existence at the time of the Kemp trial was an unsigned draft PSA. Eventually, Countrywide produced an execution copy of a PSA. This circumstance parallels our experience in the Ukpe case.

In both Kemp & SJLS' Ukpe case, the foreclosure firms' first efforts to prove a Countrywide securitized trust owned the note involved the creation of a bogus MERS assignment of the mortgage and note to an entity whose name sounds like a securitized trust. Only when the assignment claim was exposed as worthless - - because MERS never had any property interest to assign - - did the law firms fall back on the PSA argument. At this point, the law firm and the servicer continued to manufacture evidence.

As alternative ownership evidence they offered as documentary proofs (1) draft, unexecuted PSAs without any mortgage schedules, and (2) promissory notes without any endorsements. Thus, the law firm's only basis for creating the MERS assignment and filing a complaint based on the assignment was the referral document from the servicer or default subservicer instructing the law firm in whose name to bring the case. A year or so after filing the foreclosure action, the law firm lacked any evidence the trust even existed. A draft, unsigned document cannot create or be evidence of an express trust.

The foreclosure mill law firms' argument that the MERS assignment merely confirms the earlier securitization is demonstrably false. When they created the phony assignment, the law firms had absolutely zero evidence the named plaintiff even existed as a securitized trust much less owned the note in issue. The phony MERS assignment purports to affect a present transfer of MERS' interests in the note and mortgage. Moreover, MERS is not a signatory to the PSA, so how can the assignment confirm anything to which it was not a party.

Instead, all the law firm relies upon in preparing the MERS assignment, and the foreclosure complaint based on the assignment, is the name of the plaintiff provided by the servicer or default subservicer in the referral document. Once the law firm is caught in a MERS assignment lie, it and the servicer begin backpedaling, claiming the plaintiff owned the note all along by virtue of a PSA acquisition several years earlier. But even then the only evidence anyone can manufacture for them initially is a draft, unsigned PSA. Eventually Countrywide comes up with meaningless execution copies of PSAs accompanied by loan schedules that patently are not the Mortgage Loan Schedules described in the PSAs.

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW JERSEY

---

FRENKEL, LAMBERT, WEISS, WEISMAN &  
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973-325-8800

Attorney for BAC Home Loan Servicing, L.P. (Formerly  
known as Countrywide Home Loans, Inc. servicer for Bank  
of New York), Secured Creditor  
DLS-2756

Case No.: **08-18700**

In Re:

**John T. Kemp**

CHAPTER 13

Judge: **Judith H. Wizmur**

**John T. Kemp,**  
**Plaintiff,**

**vs.**

**Countrywide Home Loans, Inc.**  
**Defendant.**

**Trial Date: August 11, 2009**

**Adversary Proceeding: 08-02448**

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW BY DEFENDANT,**

**BAC Home Loan Servicing, L.P. (Formerly known as Countrywide Home Loans, Inc.,)**

**servicer for Bank of New York**



### **STATEMENT OF FACTS**

The Defendant relies on the Joint Stipulation of Undisputed Facts submitted by the Plaintiff/Debtor but also sets forth additional facts. On October 16, 2008, Plaintiff filed the instant adversary proceeding. In short, the Plaintiff alleged that the Defendant/Secured Creditor does not own the loan; that the mortgage is invalid; and that the Proof of Claim should be expunged. The intended purpose of the proceeding commenced by the Plaintiff/Debtor was “to determine the extent and validity of the lien based on loan documentation.” The Plaintiff requested and received copies of the Note; Mortgage; Assignment of Mortgage, and Allonge to the Note (Allonge to Note is attached hereto as Exhibit “A”). Said documents establish that Bank of New York is the holder and owner of the loan and has standing.

On June 15, 2009, the Defendant/Secured Creditor filed a motion to dismiss the adversary proceeding. The Plaintiff/Debtor filed opposition to the motion. The hearing date of the motion was set for August 3, 2009. The attorney that was scheduled to appear in court was late for court and was unable to give oral argument. As a result, the motion to dismiss was denied.

### **PROPOSED CONCLUSIONS OF LAW**

Perfection of a security interest is governed by state law. A promissory note is an “instrument” as defined by the New Jersey Uniform Commercial Code. N.J.S.A. 12A:9-105(1)(g) and 12A:3-104(2)(d); In re Kennedy Mortgage Co., 17 B.R. 97, B.R. 957, 963 (Bankr.D.N.J. 1982). Case law in New Jersey is settled that where the mortgage is assigned with the underlying promissory note, the assignee is a secured creditor. Mardirossian v. Wilder, Super. 37 (Ch. Div. 1962). An assignment of mortgage together with a transfer of possession

of the underlying note perfects a security interest in the note. In Re Investors & Lenders, Ltd., 156 B.R. 145 (1993).

In the case at bar, the Defendant/Secured Creditor has provided the Note, allonge, mortgage and recorded assignment. All of the documents establish Bank of New York as Trustee for the Certificateholders CWABS, Inc. Asset-Backed Certificates, Series 2006-8 as holder and owner of the loan. As such, the Defendant/Secured Creditor had standing to file its' Proof of Claim and enforce the obligations of the Note and Mortgage. Based upon the foregoing, the Proof of Claim should not be expunged.

**RESPECTFULLY SUBMITTED,**  
Attorney for Defendant/Secured Creditor,  
BAC Home Loan Servicing, L.P.

*/s/ Dori L. Scovish*

Dori L. Scovish, Esq.

**ALLONGE TO PROMISSORY NOTE**

**Loan # 138805335**

**This Allonge is to be attached to and made a part of that certain Promissory Note**

**Dated 5/31/2006 original principal amount of: One Hundred Sixty**

**Seven Thousand, Two Hundred Dollars (\$167,200.00) executed by JOHN T.**

**KEMP, AN UNMARRIED MAN,**

**ADDRESS: 1316 Kings Hwy., Haddon Heights, NJ 08035**

**In favor of COUNTRYWIDE HOME LOANS, INC.**

**Pay to the order of BANK OF NEW YORK, as Trustee for the Certificateholders  
CWABS, Inc. Asset-backed Certificates, Series 6006-8**

**WITHOUT RECOURSE,**

**COUNTRYWIDE HOME LOANS, INC.**

By 

Title: VICE PRESIDENT

O. Max Gardner, III on the attached Compliance Report  
December 6, 2010

All of the CWABS deals I have reviewed tonight seem to require that the trustee take possession and custody of the applicable loan files and confirm a complete and unbroken chain of transfers and assignments in proper form from the originator up the line to all parties with the last party being the Trustee. For what it's worth, Reg AB compliance reports support this as well - those filed by CW indicate they did not handle custodial responsibilities. See 2/2007 statement on compliance (covering 2006) filed [here as an example - the document custody sections are 1122\(d\)\(4\)\(i\) and \(ii\):](http://www.sec.gov/Archives/edgar/data/1365985/000090514807002715/efc7-0816_ex331.txt) [http://www.sec.gov/Archives/edgar/data/1365985/000090514807002715/efc7-0816\\_ex331.txt](http://www.sec.gov/Archives/edgar/data/1365985/000090514807002715/efc7-0816_ex331.txt). This clearly means that Linda DeMartini has established that CWHL never delivered the original loans duly indorsed the sponsor. MAJOR FINDING.

<DOCUMENT>  
<TYPE>EX-33.1  
<SEQUENCE>3  
<FILENAME>efc7-0816\_ex331.txt  
<TEXT>

Exhibit 33.1  
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<PAGE>

[LOGO OMITTED] Countrywide  
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HOME LOANS

2900 Madera Road  
Simi Valley, California 93065-

6298

(805) 955-1000

ASSESSMENT OF COMPLIANCE WITH APPLICABLE SERVICING CRITERIA

Countrywide Financial Corporation and certain of its subsidiaries, including its direct and indirect wholly-owned subsidiaries, Countrywide Home Loans, Inc. (CHL), Countrywide Tax Services Corporation, Newport Management Corporation, and Countrywide Home Loans Servicing, LP, a wholly-owned subsidiary of CHL (collectively the "Company") provides this platform-level assessment, for which Countrywide Financial Corporation and such subsidiaries participated in servicing functions, as such term is described under Title 17, Section 229.1122 of the Code of Federal Regulations ("Item 1122 of Regulation AB"), of compliance in respect of the following Applicable Servicing Criteria specified in Item 1122(d) of Regulation AB promulgated by the Securities and Exchange Commission in regard to the following servicing platform for the following period:

Platform: publicly-issued (i.e., registered with the Securities and Exchange Commission pursuant to the Securities Act of 1933, as amended) residential mortgage-backed securities (securities collateralized by residential mortgage loans, including prime, alternative loan products, sub-prime, HELOC and closed seconds) issued on or after January 1, 2006 for which the Company provides cash collection and administration, investor remittances and reporting (except for those activities relating to trustee and paying agent services), and pool asset administration (except for those activities relating to custodial operations of pool assets and related documents), collectively "Servicing Functions" and for which the related issuer has a fiscal year end of December 31, 2006.

The platform excludes any transactions issued by any government sponsored enterprise for which the Company provides Servicing Functions.

Period: as of and for the year ended December 31, 2006.

Applicable Servicing Criteria: all servicing criteria set forth in Item 1122(d), to the extent required in the related agreements, except for the following paragraphs: 1122(d)(1)(iii), 1122(d)(3)(i)(B), only as it relates to information other than that contained in the monthly remittance report delivered by the servicer to the master servicer, trustee, and/or bond administrator, 1122(d)(3)(i)(D), only as it relates to the agreeing with investors' records as to the total unpaid principal balance and number of pool assets serviced by the servicer, 1122(d)(3)(ii), only as it relates to amounts other than amounts remitted by the servicer to the master servicer, trustee, and/or bond administrator, 1122(d)(3)(iii), 1122(d)(3)(iv), 1122(d)(4)(i) and 1122(d)(4)(ii), only as 1122(d)(4)(i) and 1122(d)(4)(ii) relate to the custodial operations of the pool assets and related documents (collateral file) by the document custodian responsible for such functions for the related transaction, and 1122(d)(4)(xv), only as it relates to Item 1115 of Regulation AB (derivative transactions).

<PAGE>

With respect to the Platform and the Period, the Company provides the following assessment of compliance in respect of the Applicable Servicing Criteria:

1. The Company is responsible for assessing its compliance with the Applicable Servicing Criteria.
2. The Company has assessed compliance with the Applicable Servicing Criteria.
3. Other than as identified on Schedule A hereto, as of and for the Period, the Company was in material compliance with the Applicable Servicing Criteria.

KPMG LLP, an independent registered public accounting firm, has issued an attestation report with respect to the Company's foregoing assessment of compliance.

<PAGE>

COUNTRYWIDE FINANCIAL CORPORATION

By: /s/ Steve Bailey

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Steve Bailey

Executive Its: Senior Managing Director and Chief  
Officer, Loan Administration

Dated: February 28, 2007

By: /s/ Kevin Meyers

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Kevin Meyers

Its: Managing Director and Chief Financial  
Officer, Countrywide Home Loans, Inc.

Loan

Administration

Dated: February 28, 2007

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Schedule A

Material Instances of Noncompliance

No material instances of noncompliance: the Company has complied, in all material respects, with the applicable servicing criteria as of and for the year ended December 31, 2006.

</TEXT>

</DOCUMENT>

## Kemp v Countrywide and BAC—TEN BIG PROBLEMS

On Sunday, the [New York Times reported](#) on a recent case known as [Kemp vs. Countrywide](#). In it, the judge in his decision states that for the mortgage loan in question in the case, a Countrywide employee testified that the mortgage note had never been delivered to the trustee, as required under the securitization documents. In addition, the Countrywide employee testified that it was the company's practice not to deliver the notes.

These facts were so extraordinary that I felt compelled to track down the underlying legal documents to the securitization to see what was going on. In the Kemp case, the trustee to the securitization (Bank of New York) was trying to file a proof of claim in Kemp's bankruptcy, while Kemp was fighting the attempt claiming that the trustee did not have standing to make such a claim because it did not have possession of the mortgage note. While this was a bankruptcy case, the situation is similar to foreclosure cases where borrowers argue that the trustee for the securitization lacks standing to foreclose because the mortgage loan at issue has not been conveyed to the trust.

In the Kemp case, it appears that not only did Countrywide fail to properly convey the mortgage loan, it didn't even bother to deliver it. Based on my review, Countrywide failed to comply with the terms of the agreement for the delivery of the mortgage notes. In addition, importantly, the trustee also failed to comply with the terms – it was required to certify it had the mortgage notes at closing and then certified annually that it had safeguarded the mortgage loan documents as required by the PSA. The Trustee was also the Master Document Custodian for the Trust for the benefit of the Investors.

As a result, if Countrywide actually failed to deliver all of the mortgage notes to the trustee, as the judge describes in the Kemp case, then

- (1) This is a problem for the trustee proving it has standing for foreclosures or bankruptcies, as in the Kemp case, since the specific transfer terms of the PSA, which are excepted from the UCC under 1-302, have been breached;
- (2) It seems like investors in the certificates issued by CWABS 2006-8 would have a good case to pursue claims against both Countrywide and the Bank of New York, as trustee, for failing to perform as required under the agreement,
- (3) By stating that the notes had been delivered and certifying all of the notes had been received, Countrywide and the trustee seem to have misrepresented the transaction to investors, by creating the impression that the trust had secured the collateral, and
- (4) The trustee's annual certification under Reg AB that the mortgage loan documents were safeguarded and secured may open the parties up to additional liability for misrepresentation to investors, despite the fact that three-year statute of limitations may have expired for misrepresentations made in the offering statement for the transaction;



- (5) Since the note was never transferred to the Trust before the close out date, any subsequent attempt to transfer is void under New York Trust law;
- (6) The Trust cannot claim to be the owner of the note under applicable law and thus cannot enforce the note;
- (7) For purposes of bankruptcy, the failure to properly transfer the note to the Trust as required by the PSA means the claim can be defeated as a secured debt in bankruptcy;
- (8) The Trust by attempting to engineer a post-closing transfer of the note has willfully violated the Real Estate Mortgage Investment Conduit Tax Act of 1986 and is thus subject to massive taxes, penalties and fines;
- (9) The organizers of the Trust are subject to civil and criminal sanctions under various laws and regulations regarding SEC representations, attestations and warranties; and
- (10) The various insurance parties and default swap parties involved in the Countrywide deals face years and years of claims and litigation.

I tracked down the pooling and servicing agreement in the Kemp case from CWABS 2006-8 to make sure it did not have any unique exceptions to delivery. It did not. Section 2.01 of the PSA requires the Depositor (CWABS) delivery of the note to the trustee with all intervening endorsements as follows:

- (g) In connection with the transfer and assignment of each Mortgage Loan, the Depositor has delivered to, and deposited with, the Trustee (or, in the case of the Delay Delivery Mortgage Loans, will deliver to, and deposit with, the Trustee within the time periods specified in the definition of Delay Delivery Mortgage Loans) (except as provided in clause (vi) below) for the benefit of the Certificateholders, the following documents or instruments with respect to each such Mortgage Loan so assigned (with respect to each Mortgage Loan, clause (i) through (vi) below, together, the "Mortgage File" for each such Mortgage Loan):
  - (i) **the original Mortgage Note**, endorsed by manual or facsimile signature in blank in the following form: "Pay to the order of \_\_\_\_\_ without recourse", **with all intervening endorsements that show a complete chain of endorsement from the originator to the Person endorsing the Mortgage Note (each such endorsement being sufficient to transfer all right, title and interest of the party so endorsing, as noteholder or assignee thereof, in and to that Mortgage Note)**, or, if the original Mortgage Note has been lost or destroyed and not replaced, an original lost note affidavit, stating that the original Mortgage was lost or destroyed, together with a copy of the related Mortgage Note and all such intervening endorsements;

**The trustee, pursuant to Section 2.02(a) of the PSA states that it has possession of the mortgage note (identified as section 2.01(g)(i)) and the assignment of mortgage (identified as section 2.01(g)(iii)). See below:**

- (a) The Trustee acknowledges receipt, subject to the limitations contained in and any exceptions noted in the Initial Certification in the form annexed hereto as Exhibit G-1 and in the list of

exceptions attached thereto, of the documents referred to in clauses (i) and (iii) of Section 2.01(g) above with respect to the Initial Mortgage Loans and all other assets included in the Trust Fund and declares that it holds and will hold such documents and the other documents delivered to it constituting the Mortgage Files, and that it holds or will hold such other assets included in the Trust Fund, in trust for the exclusive use and benefit of all present and future Certificateholders.

The Trustee agrees to execute and deliver on the Closing Date to the Depositor, the Master Servicer and CHL (on behalf of each Seller) an Initial Certification substantially in the form annexed hereto as Exhibit G-1 to the effect that, as to each Initial Mortgage Loan listed in the Mortgage Loan Schedule (other than any Initial Mortgage Loan paid in full or any Initial Mortgage Loan specifically identified in such certification as not covered by such certification), the documents described in Section 2.01(g)(i) and, in the case of each Initial Mortgage Loan that is not a MERS Mortgage Loan, the documents described in Section 2.01(g)(iii) with respect to such Initial Mortgage Loans as are in the Trustee's possession and based on its review and examination and only as to the foregoing documents, such documents appear regular on their face and relate to such Initial Mortgage Loan.

According to the language above, the trustee specifically issues a preliminary certification that it has all of the notes on the closing date.

In addition to the preliminary certification of its receipt of the notes, and the final certification that all required documents have been received, the trustee also delivers an annual certification for the transaction. This annual certification is required pursuant to the SEC's Regulation AB, for asset backed securities. Specifically, the trustee certifies each year, pursuant to SEC regulation section 1122(d)(4)(ii) that:

(ii) Pool assets and related documents are safeguarded as required by the transaction agreements.

In March, 2007 Countrywide filed the form below from Bank of New York, as trustee, that the trustee's sections of Reg AB were in compliance, including the pool assets and documents were safeguarded as required by the PSA.

If the notes were not delivered to the trustee, and a court determines that saying the notes were safeguarded for the trust when they were still with Countrywide is a material mis-statement, Countrywide and/or the trustee could face liability under Regulation AB.

Finally, the PSA contains a standard provision that states that if for the some reason the agreement is determined not to be a sale, then the parties intend for the transaction to be the grant of a security interest in the mortgage loans for the benefit of the certificate holders. In order to ensure that the agreement is the grant of a security interest, the depositor (CWABS) files UCC statements for the mortgage loans and represents various facts including, pursuant to Section 10.04(b)(v):

All original executed copies of each Mortgage Note that are required to be delivered to the Trustee pursuant to Section 2.01 have been delivered to the Trustee.

It would appear that, if the Countrywide employee's testimony is accurate that none of the notes were delivered to the trustee, then Countrywide and the trustee would be unable to argue, as a fall back, that the trust has a security interest in the mortgage loans because the notes were not delivered and therefore are not in the possession of the trustee.

While the Countrywide employee's statement about the failure to deliver of the other notes was not directly at issue in the case, and thus was not confirmed by the court, if true, it raises serious issues for Countrywide and for Bank of New York. Countrywide's law firm has denied that the bank failed to convey notes as a matter of policy. However, it seems odd that an employee would make such a claim without some basis for that belief. We are in the early stages of finding out how widespread the failure to convey notes really was, and the Countrywide employee statement suggests these concerns could be well founded.

## Failure to Transfer Notes a Serious Issue for Countrywide and Its Trustee

Posted: 22 Nov 2010 02:30 AM PST

By Tom Adams, an attorney and former monoline executive

On Sunday, the New York Times reported on a recent case known as Kemp vs. Countrywide. In it, the judge in his decision states that for the mortgage loan in question in the case, a Countrywide employee testified that the mortgage note had never been delivered to the trustee, as required under the securitization documents. In addition, the Countrywide employee testified that it was the company's practice not to deliver the notes. These facts were so extraordinary that I felt compelled to track down the underlying legal documents to the securitization to see what was going on. In the Kemp case, the trustee to the securitization (Bank of New York) was trying to file a proof of claim in Kemp's bankruptcy, while Kemp was fighting the attempt claiming that the trustee did not have standing to make such a claim because it did not have possession of the mortgage note. While this was a bankruptcy case, the situation is similar to foreclosure cases where borrowers argue that the trustee for the securitization lacks standing to foreclose because the mortgage loan at issue has not been conveyed to the trust.

In the Kemp case, it appears that not only did Countrywide fail to properly convey the mortgage loan, it didn't even bother to deliver it. Based on my review, Countrywide failed to comply with the terms of the agreement for the delivery of the mortgage notes. In addition, importantly, the trustee also failed to comply with the terms – it was required to certify it had the mortgage notes at closing and then certified annually that it had safeguarded the mortgage loan documents as required by the PSA.

As a result, if Countrywide actually failed to deliver all of the mortgage notes to the trustee, as the judge describes in the Kemp case, then

- (1) This is a problem for the trustee proving it has standing for foreclosures or bankruptcies, as in the Kemp case,
- (2) It seems like investors in the certificates issued by CWABS 2006-8 would have a good case to pursue claims against both Countrywide and the Bank of New York, as trustee, for failing to perform as required under the agreement,
- (3) By stating that the notes had been delivered and certifying all of the notes had been received, Countrywide and the trustee seem to have misrepresented the transaction to investors, by creating the impression that the trust had secured the collateral, and

(4) The trustee's annual certification under Reg AB that the mortgage loan documents were safeguarded and secured may open the parties up to additional liability for misrepresentation to investors, despite the fact that three-year statute of limitations may have expired for misrepresentations made in the offering statement for the transaction.

I tracked down the pooling and servicing agreement in the Kemp case from CWABS 2006-8 to make sure it did not have any unique exceptions to delivery. It did not. Section 2.01 of the PSA requires the Depositor (CWABS) delivery of the note to the trustee with all intervening endorsements as follows:

(g) In connection with the transfer and assignment of each Mortgage Loan, the Depositor has delivered to, and deposited with, the Trustee (or, in the case of the Delay Delivery Mortgage Loans, will deliver to, and deposit with, the Trustee within the time periods specified in the definition of Delay Delivery Mortgage Loans) (except as provided in clause (vi) below) for the benefit of the Certificateholders, the following documents or instruments with respect to each such Mortgage Loan so assigned (with respect to each Mortgage Loan, clause (i) through (vi) below, together, the "Mortgage File" for each such Mortgage Loan):

(i) the original Mortgage Note, endorsed by manual or facsimile signature in blank in the following form: "Pay to the order of \_\_\_\_\_ without recourse", with all intervening endorsements that show a complete chain of endorsement from the originator to the Person endorsing the Mortgage Note (each such endorsement being sufficient to transfer all right, title and interest of the party so endorsing, as noteholder or assignee thereof, in and to that Mortgage Note), or, if the original Mortgage Note has been lost or destroyed and not replaced, an original lost note affidavit, stating that the original Mortgage was lost or destroyed, together with a copy of the related Mortgage Note and all such intervening endorsements; The trustee, pursuant to Section 2.02(a) of the PSA states that it has possession of the mortgage note (identified as section 2.01(g)(i)) and the assignment of mortgage (identified as section 2.01(g)(iii)). See below:

(a) The Trustee acknowledges receipt, subject to the limitations contained in and any exceptions noted in the Initial Certification in the form annexed hereto as Exhibit G-1 and in the list of exceptions attached thereto, of the documents referred to in clauses (i) and (iii) of Section 2.01(g) above with respect to the Initial Mortgage Loans and all other assets included in the Trust Fund and declares that it holds and will hold such documents and the other documents delivered to it constituting the Mortgage Files, and that it holds or will hold such other assets included in the Trust Fund, in trust for the exclusive use and benefit of all present and future Certificateholders.

The Trustee agrees to execute and deliver on the Closing Date to the Depositor, the Master Servicer and CHL (on behalf of each Seller) an Initial Certification substantially in the form annexed hereto as Exhibit G-1 to the effect that, as to each Initial Mortgage Loan listed in the Mortgage Loan Schedule (other than any Initial Mortgage Loan paid in full or any Initial Mortgage Loan specifically identified in such certification as not covered by such certification), the documents described in Section 2.01(g)(i) and, in the case of each Initial Mortgage Loan that is not a MERS Mortgage Loan, the documents described in Section 2.01(g)(iii) with respect to such Initial Mortgage Loans as are in the Trustee's possession and based on its review and examination and only as to the foregoing documents, such documents appear regular on their face and relate to such Initial Mortgage Loan.

According to the language above, the trustee specifically issues a preliminary certification that it has all of the notes on the closing date.

In addition to the preliminary certification of its receipt of the notes, and the final certification that all required documents have been received, the trustee also delivers an annual certification for the transaction. This annual certification is required pursuant to the SEC's Regulation AB, for asset backed securities. Specifically, the trustee certifies each year, pursuant to SEC regulation section 1122(d)(4)(ii) that:

(ii) Pool assets and related documents are safeguarded as required by the transaction agreements.

In March, 2007 Countrywide filed the form below from Bank of New York, as trustee, that the trustee's sections of Reg AB were in compliance, including the pool assets and documents were safeguarded as required by the PSA. If the notes were not delivered to the trustee, and a court determines that saying the notes were safeguarded for the trust when they were still with Countrywide is a material mis-statement, Countrywide and/or the trustee could face liability under Regulation AB.

Finally, the PSA contains a standard provision that states that if for the some reason the agreement is determined not to be a sale, then the parties intend for the transaction to be the grant of a security interest in the mortgage loans for the benefit of the certificate holders. In order to ensure that the agreement is the grant of a security interest, the depositor (CWABS) files UCC statements for the mortgage loans and represents various facts including, pursuant to Section 10.04(b)(v):

All original executed copies of each Mortgage Note that are required to be delivered to the Trustee pursuant to Section 2.01 have been delivered to the Trustee.

It would appear that, if the Countrywide employee's testimony is accurate that none of the notes were delivered to the trustee, then Countrywide and the trustee would be unable to argue, as a fall back, that the trust has a security interest in the mortgage loans because the notes were not delivered and therefore are not in the possession of the trustee.

While the Countrywide employee's statement about the failure to deliver of the other notes was not directly at issue in the case, and thus was not confirmed by the court, if true, it raises serious issues for Countrywide and for Bank of New York. Countrywide's law firm has denied that the bank failed to convey notes as a matter of policy. However, it seems odd that an employee would make such a claim without some basis for that belief. We are in the early stages of finding out how widespread the failure to convey notes really was, and the Countrywide employee statement suggests these concerns could be well founded.

# naked capitalism

## **COUNTRYWIDE ADMITS TO NOT CONVEYING NOTES TO MORTGAGE SECURITIZATION TRUSTS**

November 21, 2010

Testimony in a New Jersey bankruptcy court case provides proof of the scenario we've depicted on this blog since September, namely, that subprime originators, starting sometime in the 2004-2005 timeframe, if not earlier, stopped conveying note (the borrower IOU) to mortgage securitization trust as stipulated in the pooling and servicing agreement. Professor Adam Levitin in his testimony before the House Financial Services Committee last week described what the implications would be:

If mortgages were not properly transferred in the securitization process, then mortgage-backed securities would in fact not be backed by any mortgages whatsoever. The chain of title concerns stem from transactions that make assumptions about the resolution of unsettled law. If those legal issues are resolved differently, then there would be a failure of the transfer of mortgages into securitization trusts, which would cloud title to nearly every property in the United States and would create contract rescission/putback liabilities in the trillions of dollars, greatly exceeding the capital of the US's major financial institutions....

Recently, arguments have been raised in foreclosure litigation about whether the notes and mortgages were in fact properly transferred to the securitization trusts. This is a critical issue because the trust has standing to foreclose if, and only if it is the mortgagee. If the notes and mortgages were not transferred to the trust, then the trust lacks standing to foreclose...

If the notes and mortgages were not properly transferred to the trusts, then the mortgage-backed securities that the investors' purchased were in fact non-mortgage-backed securities. In such a case, investors would have a claim for the rescission of the MBS, meaning that the securitization would be unwound, with investors receiving back their original payments at par (possibly with interest at the judgment rate). Rescission would mean that the securitization sponsor would have the notes and mortgages on its books, meaning that the losses on the loans would be the securitization sponsor's, not the MBS investors, and that the securitization sponsor would have to have risk-weighted



capital for the mortgages. If this problem exists on a wide-scale, there is not the capital in the financial system to pay for the rescission claims; the rescission claims would be in the trillions of dollars, making the major banking institutions in the United States would be insolvent.

As we indicated back in September, it appeared that Countrywide, and likely many other subprime originators quit conveying the notes to the securitization trusts sometime in the 2004-2005 time frame. Yet bizarrely, they did not change the pooling and servicing agreements to reflect what appears to be a change in industry practice. Our evidence of this change was strictly anecdotal; this bankruptcy court filing, posted at [StopForeclosureFraud](#) provides the first bit of concrete proof. The key section:

As to the location of the note, Ms. DeMartini testified that to her knowledge, the original note never left the possession of Countrywide, and that the original note appears to have been transferred to Countrywide's foreclosure unit, as evidenced by internal FedEx tracking numbers. She also confirmed that the new allonge had not been attached or otherwise affixed to the note. She testified further that it was customary for Countrywide to maintain possession of the original note and related loan documents.

This is significant for two reasons: first, it points to pattern and practice, and not a mere isolated lapse. Second, Countrywide, the largest subprime originator, reported in SEC filings that it securitized 96% of the loans it originated. So this activity cannot be defended by arguing that Countrywide retained notes because it was not on-selling them; the overwhelming majority of its mortgage notes clearly were intended to go to RMBS trusts, but it appears industry participants came to see it as too much bother to adhere to the commitments in their contracts.

As one hedge fund investor noted, "Whenever we've gotten into situations on the short side, no matter how bad we think it is, it always proven to be worse." The mortgage securitization mess looks to be adhering to this script.

## TESTIMONY POKES HOLES IN BANK OF AMERICA'S DEFENSE

By Abigail Field  
November 24, 2010

Another shoe has dropped in the Bank of America (BAC)/Countrywide foreclosure case.

Following the news that Bank of America could be facing billions of dollars in losses because it allegedly held on to homeowners' notes instead of putting them in a securitization trust, a BofA spokesman has challenged the credibility of Linda DiMartini. She's the BofA Home Loan operational leader who testified that holding on to the notes was Countrywide's custom.

But the transcript of DiMartini's testimony has come out, and it reinforces the fear that BofA has a big problem. Sure, the bank makes a plausible argument that DiMartini didn't know enough to testify that Countrywide often didn't deliver the notes. A sliver of daylight remains for BofA, neatly captured in part by a spokesperson's comment to *DailyFinance* a couple of days ago:

"...The associate whose testimony was cited in the ruling was asked about a process outside her normal scope of responsibilities and in an entirely different department from where she worked. A review of her testimony shows she later clarified that she was not comfortable testifying about the circumstances under which original loan documents would move, or whether and to what extent they ever are moved. This would include the initial delivery of original loan documents to the trustee."

But Countrywide's alleged custom of holding on to the notes isn't DiMartini's only damaging testimony. And contrary to BofA's comment, the damaging nature of that testimony is due in part to "her normal scope of responsibilities" and which department she works in.

### **BofA's Defense**

Countrywide had two separate divisions: one that originated loans and one that serviced them. DiMartini worked in the servicing department, and if the notes had been properly transferred into the securitization trust, that event would have happened before the notes reached DiMartini's department. The blog *Naked Capitalism* reported that the securitization contract in the Kemp case seems to require the trust to hold on to the notes, meaning the trust should not have handed them over to Countrywide's

servicing division.

But that kind of contract breach wouldn't be that big a deal -- at least not compared to never giving the notes to the trust in first place. *That* kind of failure to deliver leads to a title-clouding nightmare scenario, that could overwhelm BofA's balance sheet and throw into question the ownership of millions of properties -- as laid out by the Congressional Oversight Panel.

And helpfully for BofA, DiMartini confirmed that she had "never been involved specifically with the originations of the...loans." When asked if the notes ever moved to follow the transfer of ownership, she said: "I can't say that they're never moved because...with this many millions of loans as we have I wouldn't presume to say that, but it is not customary for them to move." And when asked if she had personal knowledge of the circumstances under which notes would move, DiMartini said: "not specifically to what I would be comfortable testifying to, no."

So it appears BofA might be okay, because the witness can't definitively say that between originating and servicing the notes, they were never delivered as required. But appearances can be deceiving.

### **The Hole in BofA's Defense: No Endorsements or Allonges**

Another part of DiMartini's testimony suggests that, even if Countrywide delivered the notes as required, Bank of America still has a big problem. The securitization agreement in the Kemp case, like most such agreements, required each loan's note to be endorsed multiple times -- that is, signed over from one owner of the note to another -- to guaranty that a bankruptcy court couldn't latch onto the notes if the bank sponsoring the securitization went under. Those endorsements make the mortgages "bankruptcy remote."

Under most securitization contracts, if the notes were never properly endorsed to the trust, then it doesn't matter whether they were delivered. In that case, BofA's defense that DiMartini didn't know what she was talking about -- when she said it was customary not to deliver the notes -- becomes irrelevant.

And even if delivery without the right endorsements somehow gave the trust ownership of the notes -- preventing them from reverting to BofA's balance sheet -- that lack of endorsements should still be grounds for investors to demand BofA buy the securities back and/or sue over the securities. That's because it was extremely important to investors that the mortgages were "bankruptcy remote."

So what about the endorsement of the notes? DiMartini testifies that, in the 10 years she worked for Countrywide's servicing department, she's "never seen an actual note that has an endorsement on the bottom." And she would have seen a lot of notes, being that she was involved in "every aspect of the servicing".

While that certainly sounds bad, it's not definitive. Endorsements can be done on an "allonge" -- a paper addendum attached to the actual note. But to effectively get the notes into the trust, that allonge must be endorsed as the note would have been: at the time the trust was formed. In the Kemp case, the trust was formed in 2006. And the allonge would need to have been attached by staple, glue or its equivalent -- paperclips don't cut it.

The underlying idea of that rule is that a debtor should be certain that those demanding payment on the note are entitled to demand payment. If an allonge could work without being attached, you could have one person holding the note and someone else holding an allonge -- with both parties trying to get paid.

For her part, DiMartini says "it would be more normal to have an allonge than an endorsement." But in the Kemp case it turns out no allonge existed until BofA created one specifically for that litigation -- something DiMartini readily admitted. And the Kemp note was not endorsed. So, delivered or not, it seems the trust never got the Kemp note in compliance with the securitization contract. (The judge ultimately believed the note was never delivered and ruled the trust never owned the note on that basis.)

### **No "Norm" in Allonges?**

So is it possible that the Kemp case was an aberration, and that allonges were routinely created and affixed at the time of securitization? Not likely.

DiMartini testified that, even though the Kemp loan was sold to the Bank of New York as the trustee and was securitized, "there wasn't a need for an allonge prior to this case." She also testified the allonge was never affixed to the note, and never in possession of Bank of New York.

Litigants are not supposed to create allonges. According to Max Gardner, a consumer bankruptcy attorney not involved in the case:

"The incredible thing and extremely troubling thing is that she testified that the 'allonge' was prepared several weeks before the hearing 'because counsel called up and said we

needed one.' She also said that the original allonge, after the court hearing, would have been placed back in the Countrywide loan file. This testimony among other things is evidence of a major fraud on the court and serious ethical violations by the attorneys for Countrywide BAC in this case."

Regarding BofA's use of allonges, DiMartini explained to the judge:

"I don't believe that [allonges are] always executed exactly when the transfer [of ownership] takes place. I believe that it oftentimes happens that it happens after the fact."

Judge: So there's no routine that requires internally, to your knowledge, that the allonge be executed in connection with the transfer of ownership?

DiMartini: "No, I don't think that there is a norm in that respect...but as a normal business practice with a normal loan, often times there really isn't a need for [an allonge] unless the loan is going to continually to be sold, and since this loan was --yes, it was transferred to Bank of New York as trustee as it was securitized, but it wasn't that another mortgage company had the loan and then we bought it from them. Like I mentioned, this was always done by Countrywide and we securitized it and we, you know, we sold it to them --"

Judge: I'm not asking whether it was necessary, I am asking whether there was an ordinary business practice to sign an allonge and the answer is no, there was not?

DiMartini: "I don't believe so."

But is the BofA argument about DiMartini being in servicing, and not originating, relevant? How does she know what allonges were done at the initial securitization? DiMartini notes that any file she deals with contains all the documents, because the documents are scanned into the database the minute the servicing department gets them. So if a file had an allonge, she would see it.

And if all the files she had handled in her decade at BofA contained notes with allonges, wouldn't she have testified to that experience?

When I talked with BofA spokesman Jerry Dubrowski, and pointedly asked him about the endorsement/allonge issue, he reiterated the bank's basic line. "Her testimony was incorrect," he said. "While we cannot change what she said, the fact is she was wrong and she was talking about things that she did not have direct knowledge of." And when I pointed out that DiMartini's testimony about endorsements and allonges were

regarding things she did have direct knowledge of (at least to the extent I've laid out above), he simply replied, "that's all I can say."

### **Getting Definitive Answers**

Getting to the truth of the situation, regardless of what DiMartini has said, should be straightforward. Either all those notes that BofA's servicer has are properly endorsed or they're not. All one needs to do is look.

And regarding the delivery issue, DiMartini testified BofA used FedEx even when moving the notes among its own departments, so those documents could be tracked. Because the notes are extremely valuable, such tracking makes sense. And if the notes were ever delivered to the Bank of New York and then re-transferred to BofA Servicing, as BofA would have us believe, there should be a paper trail.

Surely at least one of the 50 Attorneys General and/or at least one federal regulator will go check, won't they?

# B of A Disowns Its Own Lawyer's Argument in Fumbled Mortgage Case

American Banker | Wednesday, December 1, 2010

By Kate Berry and Jeff Horwitz

To quell doubts about its mortgage unit's handling of documents, Bank of America Corp. is distancing itself from ... itself.

B of A now says that a senior litigation manager — who had 10 years' experience working at Countrywide Home Loans Servicing LP — was out of her depth when she testified in a New Jersey courtroom about the unit's document practices. The Charlotte company also says the local lawyer that represented it essentially fumbled the routine personal bankruptcy case.

There is no doubt that Kemp vs. Countrywide Home Loans was a spectacularly bungled defense — and its implications have caused an uproar in the world of mortgage securitizations.

In a series of unforced admissions, the B of A manager, Linda DeMartini, and Harold Kaplan, the company's outside attorney, described how Countrywide had failed to adhere to the most rudimentary of securitization procedures, such as transferring the original promissory note to the trusts that had purchased the loans, as required under the pooling and servicing agreement.

Both DeMartini and Kaplan said it was standard practice for Countrywide to hold onto the original mortgage notes, which were stored in Simi Valley, Calif., despite securitization contracts that require the notes be physically transferred to sponsors, trustees or custodians.

"I mean, there's no way I'm going to argue that there was a physical transfer," Kaplan told Chief Judge Judith Wizmur of the U.S. Bankruptcy Court in New Jersey, in an August 2009 hearing. "They had the documents."

Wizmur rejected Countrywide's claim that it had standing to foreclose on the borrower, John T. Kemp, and in a Nov. 17 ruling excoriated Bank of America for its handling of the case.

At the heart of B of A's bungled courtroom performance is a critical issue plaguing mortgage servicers and bond investors: whether Countrywide may still be holding onto a massive trove of untransferred mortgages and if so, what that means for the trusts that never received them.

For virtually everyone in the mortgage securitization business, the admissions in court (including DeMartini's sworn testimony) have opened the door to further litigation by borrowers questioning every trust's legal standing to foreclose.

"I don't think anyone wants the trusts to be in essence incapable of performing their needed functions," said Talcott Franklin, a Dallas attorney who represents a consortium of investors in mortgage-backed securities. "That's not good for anyone."

Jerry Dubrowski, a B of A spokesman, said it was Countrywide's "policy and practice" to comply with its contracts, including forwarding any necessary documents to trustees. (B of A acquired Countrywide, the largest servicer of home mortgages, in 2008.)

But, he added, in the New Jersey case "I don't think we can say these notes were delivered at this point. We're not sure because we don't know all of the facts of the case."

Dubrowski later said he believed the loan documents were delivered to the trustee but at some point they were lost or misplaced.

B of A was still evaluating whether to appeal even though the deadline to do so was Tuesday.

Larry Platt, a partner at the law firm K&L Gates in Washington and an external counsel for B of A, has disowned the DeMartini testimony and Kaplan's courtroom statements.

Neither of them had personal knowledge of how documents were handled, Platt said. DeMartini, he said, "talked about things outside her job responsibilities."

"The employee's job had nothing to do with executing loan documents," Platt said. "Her testimony as to whether it was the common practice not to deliver the documents was not accurate."

Platt said no one should "try to extrapolate how trillions of dollars of loans are being handled based on one badly defended bankruptcy case."

"What we keep telling people, and it's a hard statement to make and a harder one to hear, is that if the company had it to do over again, we would have defended it differently," Platt said of the case. "The company was not well served by its own lawyer and employee."

Attempts to reach DeMartini for comment were unsuccessful. Kaplan, B of A's



lawyer in the case, did not return calls.

He said in court that he was unable to track down an original signed pooling and servicing agreement (to the consternation of the judge), and had no certificate from the trustee, Bank of New York Mellon, about any transfers of loan documents. Kevin Heine, a BNY spokesman, said the company fulfilled its contractual obligations as the trustee "including returning the file to the servicer, as we did upon request."

Bruce Levitt, the plaintiff's attorney with Levitt & Slafkes P.C. in South Orange, N.J., said the case had "a multitude of problems," besides the testimony of B of A's own employee.

"It's hard for B of A to back-pedal because she was their witness," Levitt said. "This case was refreshing because the witness wasn't told how to spin things and actually told the truth. They can't dispute the fact that the note was never transferred because she was testifying proudly that Countrywide always retained the note and would never let it out of their sight. It was unscripted. That's why you won't find other testimony like this; this one slipped through."

There is little doubt that Countrywide was supposed to provide the physical note for Kemp's loan to the trust that purchased it, known as CWABS-2006-8.

In the Securities and Exchange Commission filing for that specific securitization, Countrywide and Bank of New York Mellon both attested that at the time of the trust's formation in 2006, "the Trustee has received ... the original Mortgage Note ... or, if the original Mortgage Note has been lost or destroyed and not replaced, an original lost note affidavit."

According to the testimony in the Kemp case, Countrywide never transferred the note and instead recreated documents weeks before the date of the hearing in an effort to prove its standing in the case.

Judge Wizmur noted in an exchange with Kaplan that the bank could salvage its position by demonstrating that the transfer of the documents was not legally necessary.

"I'm raising the possibility that the Pooling and Servicing Agreement might contain provisions that would serve to offer Countrywide an out," Wizmur said, suggesting that B of A should comb the 270-page agreement for language suggesting that it was entitled to retain the notes as the trustee's proxy or that

transfer at the time of sale was immaterial.

Lawyers argue that trustees do not have to take physical possession of the notes if there are contracts and other documents showing proof of transfer.

"As a matter of law, the note doesn't have to be delivered to the trust, it can be delivered to an agent," said Platt, who nevertheless acknowledged that the pooling and service agreement in this case did not allow for such delivery.

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# Moody's Countrywide Review Backs Claim It Sent Home-Loan Notes

December 13, 2010, 2:24 PM EST

*By Jody Shenn*

Dec. 13 (Bloomberg) -- A Moody's Investors Service review showed no evidence that Bank of America Corp.'s Countrywide Financial Corp. typically failed to deliver mortgage notes to trustees for home-loan securities, the ratings company said.

Questions arose about Countrywide's procedures after a Bank of America employee testified in a New Jersey bankruptcy case that the lender retained the paperwork. Bank of America, which bought Countrywide in 2008, has said the comments weren't accurate. Moody's said its review of the documents supported the bank's assertion.

"We don't believe as a standard practice they failed to deliver the notes to the trustee," Yehudah Forster, a vice president at New York-based Moody's, said today in a telephone interview. "That we're confident in."

The testimony drew the attention of attorneys for homeowners and mortgage-bond investors because promissory notes are typically needed for foreclosures and companies that sell home loans into securities usually make contractual promises that the paperwork will be delivered to trustees.

Confidentiality restrictions prevent Moody's from saying which documents it reviewed, Forster said. The ratings company referred to the documents in a Dec. 9 report.

The testimony in the bankruptcy case, while inaccurate, will nevertheless damage Charlotte, North Carolina-based Bank of America and investors in mortgage bonds created by Countrywide because it will spark more legal challenges, Moody's analysts Forster and David Fanger said in the report.

That would increase courtroom costs, delay foreclosures and "could reveal defects in BofA's mortgage servicing processes, exposing the bank to further unfavorable legal decisions," Moody's said in a Dec. 9 report.

Jerry Dubrowski, a spokesman for Bank of America, declined immediate comment.

The case is In the Matter of John T. Kemp, Kemp v. Countrywide Home Loans Inc., 08-02448, U.S. bankruptcy Court for the District of New Jersey (Camden).

--Editors: Sharon L. Lynch, Alan Goldstein

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# Testimony in Bankruptcy Case Signals Potential Trouble for Mortgage Industry

(12/20/10)



By John Rao

In the frenzy to make loans during the mortgage bubble, loan originators often did not follow the steps required by the Uniform Commercial Code for the proper indorsement and negotiation of the notes as negotiable instruments, or those required by securitization pooling and servicing agreements (PSA) for transfers into trusts. Testimony in a recent bankruptcy case, *Kemp v. Countrywide Home Loans, Inc.*,[\[i\]](#) sheds new light on industry-wide practices that may have far-reaching implications for the enforcement of notes by mortgage creditors.

## Securitization Trust Not Entitled To Enforce Note

Assuming that the note is a negotiable instrument, a party is entitled to enforce a note under UCC § 3-301 if it is 1) the holder of the note, 2) a nonholder in possession of the note who has the rights of a holder, or 3) a person not in possession of the instrument who is entitled to enforce the instrument under UCC § 3-309 or 3-418. Based on a series of findings in a claim objection proceeding, Judge Wismur in *Kemp* held that the purported owner of the note, the Bank of New York as Trustee, could not show it was entitled to enforce the note under any of the three tests and that the proof of claim filed on its behalf by the servicer must be disallowed.

**1. Holder.** The UCC defines a “holder” as “the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.”[\[ii\]](#) The note in *Kemp* was originated by Countrywide and later pooled with other notes and securitized. A PSA was executed by CWABS, Inc. as the depositor, Countrywide Home Loans, Inc. and several other loan originators as the sellers, Countrywide Home Loans Servicing LP as the master servicer, and the Bank of New York as the Trustee. The PSA provided that for each loan, the depositor was to deliver “the original Mortgage Note, endorsed by manual or facsimile signature in blank in the following form: ‘Pay to the order of \_\_\_\_\_ without recourse’, with all intervening endorsements that show a complete chain of endorsement from the originator to the Person endorsing the Mortgage Note.”

Based primarily on trial testimony of the Countrywide witness, the court held that Bank of New York was not a “holder” because the note was never indorsed in blank and delivered to the Bank. In fact, the court found that the Bank never had possession of the note. At trial, Countrywide produced an undated allonge which

purported to make the note payable to Bank of New York.<sup>[iii]</sup> It was signed several weeks before the trial by a Countrywide vice-president in the bankruptcy department, after the proof of claim had been filed in the case. However, the witness testified that the allonge was not affixed to the note. In a subsequent hearing, Countrywide produced the original note with the new allonge apparently affixed to it, but the court dismissed this because possession of the note still had never been transferred to Bank of New York.

**2. Nonholder in possession.** A nonholder who has the rights of a holder may be entitled to be entitled to enforce a note under UCC § 3-301, but it must be in possession of the note. Bank of New York could not take advantage of this exception because it never had possession of the note.

**3. Nonholder not in possession.** Another exception permits enforcement by a person not in possession of the note if that person is entitled to enforce the note pursuant to UCC § 3-309 [lost instruments] or § 3-418(d) [payment or acceptance by mistake].<sup>[iv]</sup> Although a lost note affidavit was produced at one point during the proceedings (which the court described as a “bizarre twist”), this was contradicted by testimony that Countrywide actually possessed the original note. The court also found that the other factual predicates for a lost note were not met and that UCC § 3-418(d) dealing with payment or acceptance by mistake did not apply.

### **Witness Claims Loan Documents Never Transferred to Trust**

The most significant testimony in the case concerned Countrywide's retention of the loan documents, which the PSA contemplated would be delivered to the trust. The trial witness was Linda DiMartini, who is the “operational team leader” for the litigation department of Countrywide's successor, BAC Home Loan Servicing. In response to redirect by BAC's attorney as to whether it was customary for the investor to hold the loan documents, she testified that the original loan documents “would stay with us as the servicer” and “were retained within the corporate entity Countrywide or Bank of America”, and that the only situation in which they would be transferred to the investor is if Countrywide would not be retaining the servicing rights on the loan. Asked if this was “standard operating procedure in the mortgage banking business,” she responded: “Yes. It would be normal -- the normal course of business as the reason that we are the servicer, as we're the ones doing all the servicing, and that would include retaining the documents.”

### **Could This Have Been an Industry-Wide Practice?**

Future litigation will prove whether Ms. DiMartini is correct that this was an industry-wide practice. In public statements following the *Kemp* opinion, BAC has disavowed the statements of Ms. DiMartini and its local attorney, claiming that it was Countrywide's “policy and practice” to transfer necessary documents to trustees.<sup>[v]</sup> Even if not a customary practice, discovery on this issue in individual cases may prove that mistakes were made, such as in *Kemp*. Information about the travel of the note (or lack thereof) may be contained in document transmittal reports maintained

in the loan file by the loan originator or servicer, and may include Federal Express or other couriers' tracking numbers.

In response to *Kemp*, mortgage creditors will likely argue that the note does not need to be delivered to the trust itself and that it may be delivered to an agent such as a servicer. For this argument even to be considered, however, the PSA or some other trust document should clearly provide that the identified agent has authority to accept delivery of the note on behalf of the trust for purposes of a valid negotiation of the note under the UCC.[\[vi\]](#) In fact, the judge in *Kemp* suggested to BAC's attorney during the trial that this might be a way to salvage his case, but he was unable to find any provision in the PSA that allowed for such delivery. Attorneys representing homeowners should be prepared to demand proof of such explicit authority.

The *Kemp* case also raises questions about the validity of attempts to effectuate delivery to a trust on the eve of trial, particularly if such actions may violate the PSA or governing trust law. Under the PSA in *Kemp*, each of the sellers was required to transfer and assign the notes and mortgages to the depositor. Thus, a transfer of the *Kemp* note should have been made from the originator Countrywide Home Loans, Inc (the entity the note was made payable to), to the depositor CWABS, Inc., and not directly to Bank of New York.[\[vii\]](#) However, in an attempt to correct the transfer problem during litigation, an allonge was prepared by a "specialist" in BAC's bankruptcy department and signed by a vice-president of BAC. If effective, the indorsement would transfer the note from BAC as successor to the servicer Countrywide Home Loans Servicing LP (not the originator/seller Countrywide Home Loans, Inc.) to Bank of New York (not CWABS, Inc.). Thus, the indorsement appears to have the wrong parties on both ends, as transferor and transferee.

Ms. DiMartini also testified that the allonge was prepared a "couple of weeks" before trial. This creates other potential problems because PSAs typically have a strict deadline (referred to as the "Cut-off Date") for when all transfers to the trust must be made, which is usually within 120 days of the trust closing date. When asked if it was prepared because "counsel called up and said we need an allonge," she said "yes" and that "there wasn't a need for an allonge prior to this case." Certainly the *Kemp* court did not share this view.



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Advisory Committee on Bankruptcy Rules, appointed by Chief Justice John Roberts in 2006. He is a conferee of the National Bankruptcy Conference, fellow of the American College of Bankruptcy, secretary for the National Association of Consumer Bankruptcy Attorneys, and former board member for the American Bankruptcy Institute. He is an adjunct faculty member at Boston College School of Law. Mr. Rao is a graduate of Boston University and received his J.D. in 1982 from the University of California (Hastings).

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[\[i\]](#) 2010 WL 4777625 (Bankr. D.N.J. Nov. 16, 2010).

[\[ii\]](#) U.C.C. § 1-201(21).

[\[iii\]](#) A note can be indorsed on a separate document, called an allonge, but it must be "affixed to the instrument." U.C.C. § 3-204.

[\[iv\]](#) U.C.C. § 3-301.

[\[v\]](#) See American Banker, "B of A Disowns Its Own Lawyer's Argument in Fumbled Mortgage Case", Dec. 1, 2010.

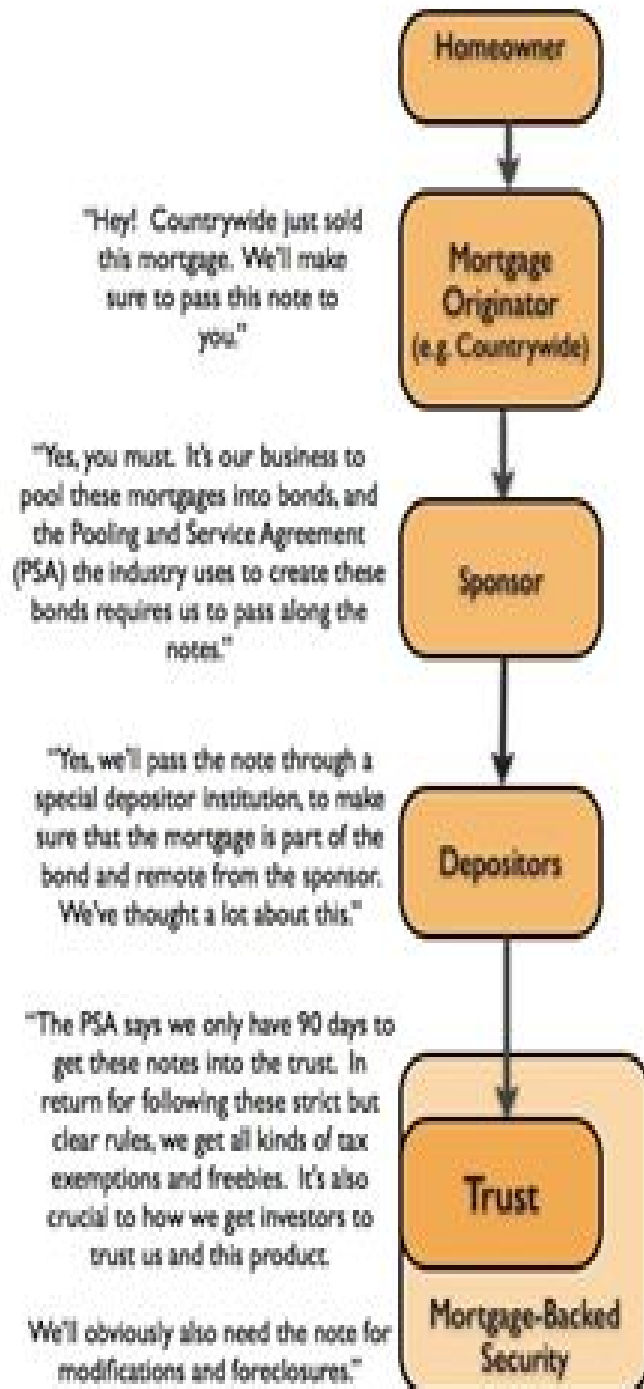
[\[vi\]](#) Moreover, this argument may fail if the PSA designates an entity to be the custodian of documents received by the trust, and that entity is different than the purported agent.

[\[vii\]](#) In fact, there should have been several intermediate transfers to other entities before the final transfer to the trust. This is significant in order for the trust property to be "bankruptcy-remote" and for the trust to qualify as a Real Estate Mortgage Investment Conduit (REMIC) for tax purposes.

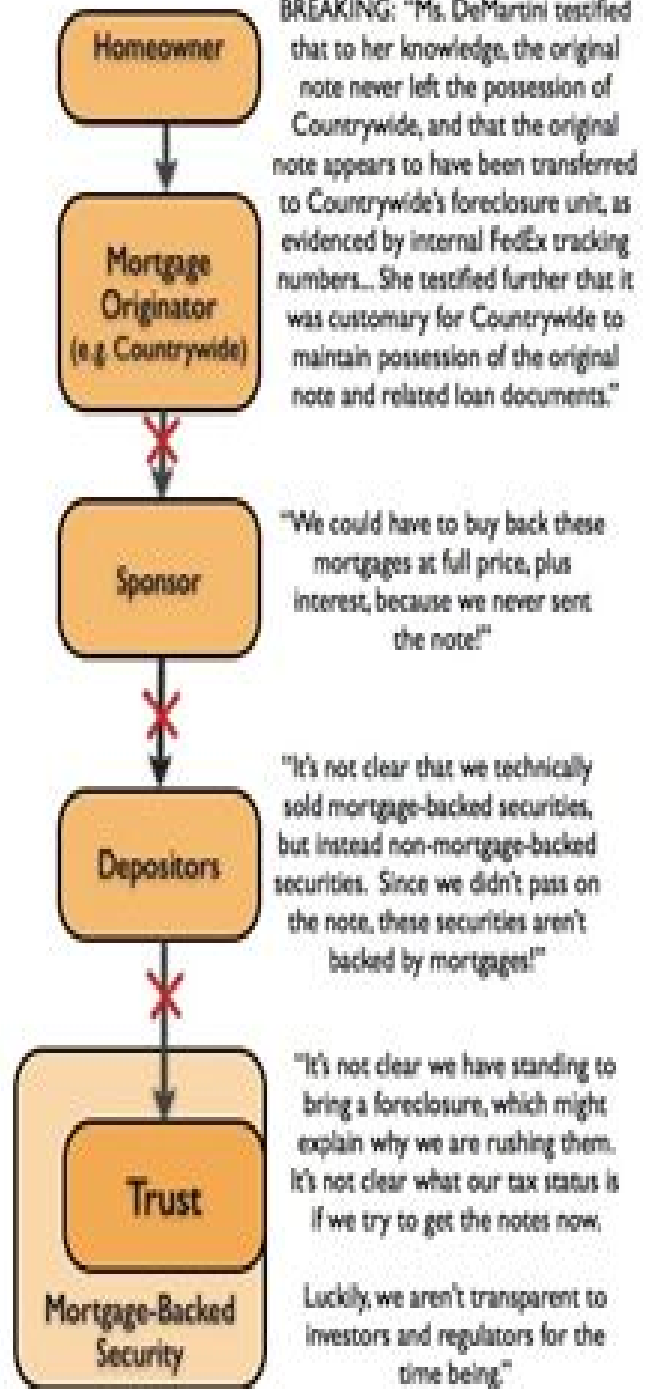
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What was supposed to happen, last decade.



What we are learning happened.



## Critical Case Comment

*In re Kemp,*

**2010 WL 4777625 (Bankr. D. N.J. November 16, 2010) (Wizmur)**

(published at [ConsiderChapter13.org](http://ConsiderChapter13.org) 12/29/10)

***A claim filed by a mortgage servicer would be disallowed when that creditor did not have possession of the note and the note was not endorsed to the creditor at the time the claim was filed.***

### Summary of the Case

The Debtor signed mortgage documents in May of 2006 which included an interest only adjustable rate note payable to "Countrywide Home Loans, Inc d/b/a America's Wholesale Lender." No signed endorsement was on the note, although there was an unsigned allonge in favor of America's Wholesale Lender.

In 2008, the Debtor filed a Chapter 13 petition and when Countrywide Home Loans, Inc. filed a claim identifying itself as a servicer for The Bank of New York, the debtor sought to "expunge" the claim.

Following the initial execution of the note and mortgage, the obligation was pooled with other mortgages and sold as a package to The Bank of New York, as trustee pursuant to a Pooling and Servicing Agreement ("PSA"). Pursuant to the PSA, the Debtor's mortgage was to be "transferred" to the Trust with The Bank of New York acting as trustee. The PSA specifically provided that the original mortgage note must be transferred and endorsed by manual or facsimile signature.

At the time of the filing, The Bank of New York did not have physical possession of the note and the note had not been endorsed. In fact, an employee of BAC Home Loans (successor to Countrywide) testified that "the original note never left the possession of Countrywide, and that the original note appears to have been transferred to Countrywide's foreclosure unit . . . ." She also confirmed that a new allonge had been signed right before trial but had not been attached or otherwise affixed to the note. Thus, "at the time of the filing of the proof of claim, the debtor's mortgage had been assigned to The Bank of New York, but . . . Countrywide did not transfer possession of the associated note to the Bank." Thus, at trial the allonge was presented, had not been affixed to the original note and possession of the note never actually changed from Countrywide to The Bank of New York.

The Court found that under New Jersey's Uniform Commercial Code, the claim had to be disallowed. Section 502(b)(1) provides that a claim that is not enforceable under applicable non-bankruptcy law is not allowable. The fact that the owner of the note, The Bank of New York, never had possession of the note was fatal to its enforcement under the UCC. Further, when the note and the mortgage were sold to The Bank of New York,

the fact that the note was not properly endorsed to the new owner defeats enforceability.

A “holder” is a person in possession of an instrument payable to bearer or, if the instrument is payable to an identifiable person, the holder is that person if the identified person is in possession of the note. Mere ownership or possession of a note is insufficient to qualify an individual as a holder. “Where, as here, the ownership of an instrument is transferred, the transferee’s attainment of the status of the ‘holder’ depends on the negotiation of the instrument to the transferee. . . . The two elements required for negotiation, both of which are missing here, are the transfer of possession of the instrument to the transferee, and its endorsement by the holder.” The Bank of New York may have purchased the note, but the note never came into the Bank’s possession.

Even though there was an “allonge” that had been signed immediately prior to the trial, such did not qualify as a proper endorsement since it had not been pinned or clipped to the instrument to serve as an endorsement. Even if the allonge was recognized as a valid endorsement, The Bank of New York does not qualify as a holder because it never had actual possession of the note.

The fact that Countrywide executed a written mortgage assignment purporting to assign both the note and the mortgage was not adequate to confer upon The Bank of New York status as a “holder with rights to enforce.” It is the UCC that governs the transfer of a promissory note. “The attempted assignment of the note in the assignment of mortgage document, together with the terms of the Pooling and Servicing Agreement, created an ownership issue, but did not transfer the right to enforce the note.” Accordingly, The Bank of New York may have a valid claim of ownership of the note but it does not have the right or the power to enforce it based upon the facts. Because the note cannot be enforced under applicable state law, the claim must be disallowed pursuant to § 502(b)(1).

### **What This Case Means To Debtors**

The Debtor in *Kemp* was clearly prepared to fully challenge the proof of claim asserted by Countrywide. Counsel for *Kemp* introduced into the record the PSA which specifically required an endorsement on the note to transfer it to the trustee. Counsel also successfully cross-examined Countrywide’s witness establishing that the new allonge was prepared in anticipation of litigation and that the original note had never left the possession of Countrywide.

By producing such a clear record of a profound failure of the documents to follow the UCC, Kemp’s counsel was able to successfully knock out the claim asserted by Countrywide on behalf of The Bank of New York.

The opinion makes no reference as to the outcome of the underlying lien which, as noted by Judge Wizmur, was executed by the Debtor in 2006. In the transcript, the Court recognized that the issue of the lien would need to be addressed sometime. However, § 506(d) appears to make clear that if a claim is disallowed, the lien attempting to support the claim is void. Note then, that by challenging the

enforceability of the note, Kemp didn't simply eliminate the claim; *Kemp* may have eliminated the mortgage on the property if he completes the Chapter 13 plan.

### **What This Case Means to Creditors**

The seismic effect of the *Kemp* decision is already being felt in creditors' attorneys' offices across the country. Knowing that, in many cases, original notes executed by subprime borrowers were never transferred to the trustee of the mortgage pools and knowing that endorsements required by the Uniform Commercial Code are lacking, creditors have reason to fear a Chapter 13 filing. To avoid the risk that § 506(d) might eliminate a mortgage, mortgage creditors may well consider it prudent to not file a proof of claim in a bankruptcy case, thus eliminating the risk of "voiding" the mortgage lien. This may only be delaying a day of reckoning in a judicial foreclosure state, where a state court judge may impose the same rigorous analysis as imposed by Judge Wizmur in the *Kemp* case.

It is unknown how many millions of mortgages in the United States are supported by defective documentation and documents that do not comply with the UCC. Most of these defective mortgages may never see the light of day since most mortgagors will pay their mortgage in a timely fashion without any independent scrutiny given to the documents. Where housing values decline and a depressed economy compel more Chapter 13 filings, there may be increased judicial attention imposed on the documentation supporting the mortgages. The Chapter 13 bankruptcy process is proving to be the acid test of mortgages and in many cases, those mortgages are found wanting.

### **What This Case Means To Trustees**

Chapter 13 trustees should assist debtors or take the lead in challenging the validity of improper or potentially improper mortgage instruments. The UST requests Chapter 13 trustees verify that a claim purporting to be a mortgage claim is not only backed up by a recorded mortgage or deed of trust but is also backed up by a valid note, properly endorsed, enforced by the creditor that has the power to enforce the note. If a trustee can successfully disallow a defective claim because the underlying note is not enforceable under state law, substantial distributions to unsecured creditors with valid and allowed claims may be enhanced.

The training of trustees and their staff to provide this kind of scrutiny is not insubstantial. Nevertheless, with the support of the United States Trustee Program and an active debtors' bar, trustees can initiate and pursue such actions and, where appropriate, challenge the validity and enforceability of defective claims.

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## MARKET UPDATES

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### More Detail on Countrywide Note Transfers

A recent New Jersey bankruptcy court decision<sup>1</sup> led market participants to question whether Countrywide systemically failed to endorse mortgage notes and physically deliver them to the trustee in its securitizations, as the pooling and servicing agreements required. In a recent *Resi Landscape* article<sup>2</sup>, we said that we didn't believe that Countrywide, as a standard practice, failed to endorse the mortgage notes and deliver them to the trustee. In this update we elaborate on the bases of our opinion by discussing our review of a number of initial trustee certifications and our interviews of various BofA/Countrywide employees responsible for keeping and transferring loan files. As a result, we have not taken any negative actions on Countrywide-issued RMBS at this point.

**Initial Trust Receipts Showed that Countrywide Delivered Notes to the Trustee.** We looked at the initial trustee certifications included in the closing sets for a sample of Countrywide deals covering prime, Alt-A, subprime, option-ARM, closed-end second lien, and HELOC asset types. The securitization closing sets typically contained an initial certification from The Bank of New York, as trustee. For the loans delivered on the closing date, the trustee certified that it received the original mortgage note endorsed in blank "Pay to the order of \_\_\_\_\_, without recourse" and an executed assignment of mortgage and that the documents "appeared regular on their face." Some certifications also allowed, in lieu of the original note, a lost note affidavit from Countrywide stating that the original mortgage note was lost or destroyed. Often the initial certification attached an exception report detailing the number of loans in the deal, the number of loans delivered, and any exceptions.

For deals whose initial certifications contained detailed exception reports, those reports indicated that for the majority of the mortgage loans in the deal, Countrywide endorsed the mortgage notes and delivered them to the trustee on the closing date. For example, for the CWABS 2006-8 deal, the deal that included the loan that was the subject of the NJ bankruptcy court case, the initial certification listed 8,896 mortgage notes delivered out of 9,233 loans in the deal. For the loans delivered, the certification listed approximately 180 loans with exceptions. Of these exceptions, most related to missing assignments of mortgage, a handful related to missing notes, and a handful related to missing endorsements, missing deeds of trust, and missing powers of attorney. Not all the deals included such detailed information. For some of the deals, the closing set included an initial certification but did not attach an exception report.

Countrywide wasn't required to deliver all the mortgage notes on the initial closing date. Countrywide-sponsored securitizations generally required Countrywide to deliver only 50% of the mortgage notes to the trustee at closing, and to deliver the remainder in stages some time shortly thereafter, generally within 30 days. The pooling and servicing agreements also required Countrywide to cure the exceptions listed on the initial trustee certifications.

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<sup>1</sup> Kemp v. Countrywide Home Loans, Inc. (November 16, 2010).

<sup>2</sup> See Moody's *Resi Landscape*, "New Jersey Court Decision May Be Unique, but Still Bad for BofA and RMBS" (December 9, 2010).

The closing sets did not include the final trustee certifications, which we have not yet seen. The pooling and servicing agreements required the trustee to deliver final certifications to Countrywide some time after the closing date, covering all the loans in the deal, including those loans and required documents delivered after the initial closing date, and reflecting those exceptions still remaining after Countrywide had time to cure them.

**Countrywide Managers said that Endorsing and Delivering the Notes to the Trustee was Standard Procedure.** BofA/Countrywide employees we interviewed detailed the procedures for endorsing and transferring the mortgage notes to the trustee or its custodian that were in place for Countrywide securitizations. We spoke to managers who were responsible for secondary marketing and transaction management, custodial operations, final document procurement and correction, and loan delivery during the time that Countrywide was an active securitizer.

According to the procedures they outlined, the custodial team received loan documents after origination. They endorsed the mortgage notes in blank either on the note itself or on a separate piece of paper known as an allonge, and they attached the allonge to the file along with the note. The managers also confirmed that Countrywide delivered the physical mortgage notes to The Bank of New York, which is the trustee and custodian on nearly all of their securitizations except for those backed by HELOCs and a handful of privately offered securitizations. For the HELOC securitizations issued through Countrywide, Treasury Bank, an affiliate of Countrywide, held the notes in its capacity as named custodian on behalf of the securitization trust under the securitization documents. Based on our observations so far, we believe that the claim that Countrywide systemically failed to endorse mortgage notes and physically deliver them to the trustee is not accurate.

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## Jumbo Foreclosure Rates on the Rise Again

The balance of loans in foreclosure among Wells Fargo-originated Jumbo RMBS pools jumped significantly between September and November of 2010. Over that period, the percentage of loans in foreclosure in Wells RMBS transactions rose 40%, to 3.43% in November from 2.46% in September. The foreclosure rate among other RMBS issuers also rose between September and November, although at a somewhat more modest pace of 13%.

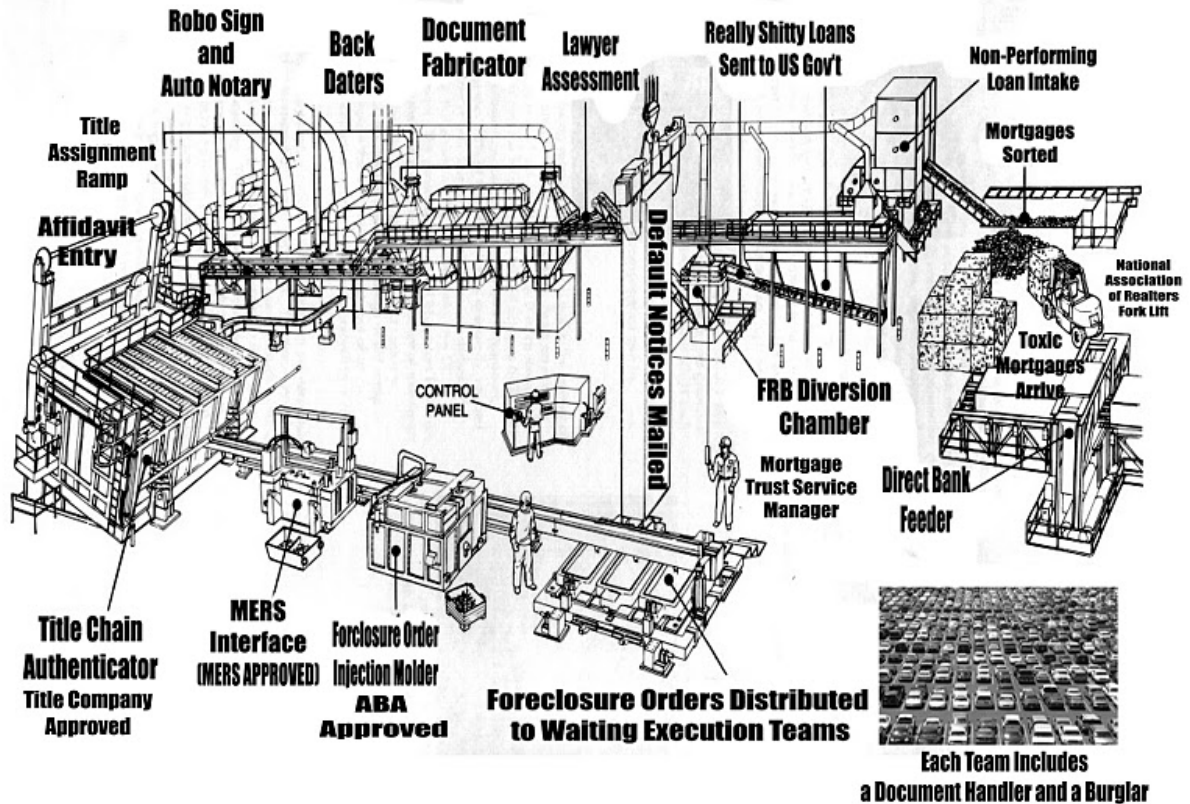
Foreclosures among Wells transactions mirrored those of other issuers until July 2009, when Wells' foreclosures stabilized somewhat as others' continued to rise. Through September, Wells' foreclosure rate had declined in seven of the last eight months, dropping just below 2.5% while the rest of the industry's rate had risen above 4.0%. With the jump beginning in October, Wells' foreclosure rate is now slightly above its previous high, although it is still well below that of other issuers.

The general industry-wide pick-up in foreclosure rates follows a year-long period during which the balance of loans in foreclosure leveled off and even declined slightly. The flattening of the foreclosure rate coincided with increasing loan modification activity. The number of new loan modifications has declined fairly steadily over the past several months, however, and foreclosures have once again begun to rise. Foreclosures have also picked up in the subprime, Alt-A, and Option ARM sectors over the last two months, though to a less dramatic extent. The foreclosure rates in those sectors are still below their peak levels experienced in late 2009 or early 2010.

# Foreclosures Gone Wild

# Subprime Mortgage Processing

## Banzai7 Institute





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INVESTIGATIONS AND OVERSIGHT



Alan Grayson  
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October 6, 2010

The Honorable Timothy F. Geithner  
Secretary  
Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

The Honorable Sheila Bair  
Chairman  
Federal Deposit Insurance Corporation  
550 17<sup>th</sup> Street, NW  
Washington, DC 20429

The Honorable Ben S. Bernanke  
Chairman  
Board of Governors of the Federal Reserve System  
20th Street and Constitution Ave, NW  
Washington, DC 20551

The Honorable Mary Schapiro  
Chairman  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

The Honorable John G. Walsh  
Acting Comptroller of the Currency  
Office of the Comptroller of the Currency  
250 E St. SW  
Washington, DC 20219

The Honorable Gary Gensler  
Chairman  
Commodity Futures Trading Commission  
1155 21<sup>st</sup> St. NW  
Washington, DC 20581

The Honorable Ed DeMarco  
Acting Director  
Federal Housing Finance Agency  
1700 G Street, NW  
Washington, DC 20552

The Honorable Debbie Matz  
Chairman  
National Credit Union Administration  
1775 Duke Street,  
Alexandria, VA 22314-3428

Dear Secretary Geithner and members of the Financial Stability Oversight Council (FSOC),

The FSOC is tasked with ensuring the financial stability of the United States, which includes identifying and addressing possible systemic risks. There is a well-documented wave of foreclosure fraud sweeping the country that presents such a risk. Bank of America and JP Morgan Chase have both suspended foreclosures in 23 states where that fraud could be uncovered and stopped by the courts. Connecticut has suspended foreclosures.

I write to encourage the FSOC to appoint an emergency task force on foreclosure fraud as a potential systemic risk. I am also writing to ask the members of the FSOC to use their regulatory authority to impose a foreclosure moratorium on all mortgages originated and securitized between 2005-2008, until this task force is able to understand and mitigate the systemic risk posed by the foreclosure fraud crisis.

So far, banks are claiming that the many forged documents uncovered by courts and attorneys represent a simple 'technical problem' with foreclosure processes. This is not true. What is happening is fraud to cover up fraud.

The mortgage lending boom saw the proliferation of predatory lending and mortgage fraud, what the FBI called at the time 'an epidemic of mortgage fraud.' Much of this was lender-induced.

When lenders - many of whom are now out of business - originally lent money to borrowers, they often did so knowing that the terms of the loans could not possibly be honored. They sought fees, not repayment. These lenders put people in predatory loans, they induced massive amounts of fraud, and Wall Street banks misrepresented these loans to investors when they moved through the securitization chain. They were stealing money from investors, and from homeowners.

Obviously these originators and servicers didn't keep good records of who owed what to whom because the point was never about getting paid back, it was about moving as much loan volume as possible as quickly and as cheaply as possible. The banks didn't keep good records, and there is good reason to believe in many if not virtually all cases during this period, failed to transfer the notes, which is the borrower IOUs in accordance with the requirements of their own pooling and servicing agreements. As a result, the notes may be put out of eligibility for the trust under New York law, which governs these securitizations. Potential cures for the note may, according to certain legal experts, be contrary to IRS rules governing REMICs. As a result, loan servicers and trusts simply lack standing to foreclose. The remedy has been foreclosure fraud, including the widespread fabrication of documents.

There are now trillions of dollars of securitizations of these loans in the hands of investors. The trusts holding these loans are in a legal gray area, as the mortgage titles were never officially transferred to the trusts. The result of this is foreclosure fraud on a massive scale, including foreclosures on people without mortgages or who are on time with their payments.

The liability here for the major banks is potentially enormous, and can lead to a systemic risk. Fortunately, the Dodd-Frank financial reform legislation includes a resolution process for these banks. More importantly, these foreclosures are devastating neighborhoods, families, and cities all over the country. Each foreclosure costs tens of thousands of dollars to a municipality, lowers property values, and makes bank failures more likely.

I appreciate your willingness to assess possible systemic risks to the country, and would again encourage you to suspend foreclosures until this problem is understood and its ramifications dealt with.

Sincerely,

A handwritten signature in blue ink that reads "Alan Grayson". The signature is fluid and cursive, with the first name "Alan" and last name "Grayson" clearly distinguishable.

Alan Grayson  
Member of Congress

# The Rot From Within the Mortgage Servicing Business

Paul Jackson

HousingWire

Monday, October 11th, 2010, 1:37 pm

Believe it or not, mortgage servicing is a noble industry. Or, at least, it's supposed to be. Even in managing borrower defaults and repossessing property, there is something noble to the work, underneath it all — and it comes from following the law, enforcing contracts, ensuring that our nation's system of property rights maintains its integrity for all Americans.

In many ways, for me, being involved in the machinery of servicing loans when I first started my career was sort of like being a financial cop; and it seemed to serve the same useful societal functions, too. There was purpose to the work that gave what we did meaning.

Call it youthful idealism. That idealism is now dead for me, for many reasons, including getting older and gaining a more realistic perspective on the industry I've been a part of.

I've come to realize that foreclosures aren't just a cleansing mechanism, but a test of our nation's real property laws. And as of late, we've been failing that test on a scale previously unimaginable by nearly anyone.

## Anger and unease

Last week, I wrote about how our nation's sacred system of protecting real property rights was [being used as a weapon against us](#). How this came to pass, however, is an entirely different story.

Have you seen the [anger and indignation](#) of the American people? Just [watch Jon Stewart and The Daily Show](#). Talk to a waitress while getting your next lunch. Speak with your hairstylist the next time you get a haircut. Most borrowers don't expect to live in their homes for free: but they do expect the rule of law to be followed.

Most Americans, at their core, understand very well and in a very guttural sense that the rule of law exists to maintain order in our society.

And most who understand this can't help but be offended as the [news has continued to unfold](#) regarding document missteps in the foreclosure process at some very large banks. One or two mistakes here or there are one thing. But enough mistakes to cause a major bank to halt foreclosures nationally? And other banks to halt foreclosures in a wide range of states? That's another thing entirely.

I know many I speak to in the mortgage industry are extremely uneasy at the news that's now been coming out, and I'd like to think that's because they know this time is different — even if what's allegedly been done doesn't change the fact that a borrower has defaulted on their loan, and doesn't change the fact that the bank is entitled to take back its secured interest in real property. Even if the borrower hasn't legally been damaged by any of it.

## The rot from within

For years, mortgage servicing as an industry has been rotting from within, slowly but surely. Much of the industry has long confused rampant cost-cutting with process improvement, and has always been about moving as fast as possible — believing that moving faster was always the best approach to limiting

investor losses. In an earlier column, I discussed the persona of “Chainsaw Al” and his [cut-costs-at-all-costs mentality](#). That’s the mentality that has ruled this industry for decades now.

It’s this same mentality that has spawned massive, interconnected computer systems that manage attorneys and others based almost entirely on how quickly they can respond and perform certain “steps” — not that the computer systems themselves are the problem, of course. They merely reflect the reality of an industry that long ago threw due process out the rear window in the name of ‘process efficiency.’

I’ve seen first hand the sort of nonsense that passes as ‘efficiency’ in mortgage servicing, since I spent years working as part of the industry. I’ve seen bank clients demand that a law firm I once worked for proceed with an eviction prior to the expiration of a given notice period; and I’ve seen line staff at banks threaten attorneys with removing cases should the law firm fail to do their bidding, even if that bidding directly contravened existing laws. (And this was in 2004; I can’t imagine what it’s like now.) Beyond witnessing it myself, I’ve heard stories over the years from numerous attorneys that practice in the field about the nonsense their clients would demand of them.

The insults on top of injury here are as numerous as they are now part of the servicing industry’s very fabric. Attorneys that manage foreclosures often aren’t usually even referred to as legal counsel anymore, insofar as many banking personnel are concerned. The law firms have been flat-fee’d into “vendor” status, instead, no different than whatever vendor is delivering office supplies. And these attorneys are often also subjected to the indignation of having to go through vendor management departments just even to be able to begin working for a given bank.

Show me one other industry where this is how legal work gets done.

As a result, attorneys in mortgage servicing now compete on the degree to which they rank on the various computer systems used in the industry — almost all of which measure speed as the most critical (if not the only) variable. Too many “exceptions” holding up your foreclosure work? Not only is a law firm going to expend inordinate resources explaining the “exceptions” to a bank employee that may or may not understand the legal prudence behind a given delay, but that law firm’s grade will suffer. As will, in turn, their ability to earn future work.

The result is that the concept of risk — the core of any truly good lawyering, in any field of law — has largely become a lost art in an industry that should have been concerned most of all with managing it. The industry charged with protecting the sanctity of our nation’s property rights has instead allowed them to rot in the name of ‘process efficiency.’

### **Blame at the feet of the GSEs?**

How did this happen? How did we find ourselves in a world where protecting property rights became secondary to worshipping at the altar of speed-at-all-costs?

Most attorneys that I speak to — at least, those with enough tenure to remember how the industry evolved — point to the GSEs as being largely responsible for creating this mess. (Which is supremely ironic, given that most consumers also blame the GSEs for their predicament in a more general sense.)

While it’s true that **Fannie Mae** and **Freddie Mac** both publish allowable foreclosure timelines, I’m not sure that’s really the root of the problem. Timelines are by their very nature central to the foreclosure process, since foreclosure law by its very nature largely establishes the shortest possible time frame for foreclosures to proceed. The GSEs’ allowable time guidelines merely reflect the state-level laws, and help ensure that a servicer doesn’t spend too much time trying to find a work-out at the expense of the investor. It’s supposed to be an art as much as a science.

But when banks decided to take the GSE guidelines as literal gospel, requiring that the law firms manage *every case exactly* to the published timelines *or else*, things began to change. Non-attorneys placed in management roles at banks and elsewhere were trained only on the importance of timelines, rather than the virtues of legal risk management. Many were thrown into servicing operations with marching orders to ‘manage process’ without really knowing what, exactly, they were supposed to be managing. So everything became about the timeline. And I mean *everything*.

There’s an old adage that says when all you have is a hammer, everything starts to resemble a nail. It applies in spades here.

Layer on top of this a surge in foreclosures so large that it has quite literally overwhelmed attorneys and servicers alike. With a series of bank managers that have now been trained to only understand timelines, and a glut of foreclosures now stuck in the system, law firms — ahem, make that *vendors* — found themselves having to answer to angry bank managers that wanted to know why so many of their files were stuck in “exceptions” and not hitting the timelines that the bank’s computer systems said they were supposed to.

But the result of these industry forces now seem apparent: in an effort to appease clients, and push speed at all costs, it appears some law firms cut corners in order to get from point A to point B as fast as they could. However they could do it. (I have to think this isn’t every firm in the industry, as there are very good firms that take their legal work very seriously, too.)

None of that matters, however, in the end. As a reminder, from the Fourteenth Amendment to the U.S. Constitution (*italics are mine*):

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.”

Some part of the default industry have clearly allowed their charge to protect this vital Constitutional right — to ensure that no person is deprived of property without due process of law — to literally rot on the proverbial vine. I don’t claim to know which part.

That this rot is being exposed right now, however, just as our nation’s property rights are truly being tested by a real estate collapse of historic proportions, is a threat to those same rights. The only question left is how we choose to respond. To those lawyers and servicers in the industry who have worked so hard to protect the sanctity of the due process of law, often for so little thanks in return: you’re needed now, more than ever before.

*Paul Jackson is the publisher of HousingWire.com and HousingWire Magazine. Follow him on Twitter: [@pjackson](https://twitter.com/pjackson)*

## Equities

12 October 2010 | 7 pages

# Foreclosures Gone Wild

## Key Takeaways from Our Conference Call

■ **What's New** — Yesterday we hosted a conference call on the topic of “Foreclosures Gone Wild: Understanding the Legal Issues Surrounding the Recent Foreclosure Freezes and Investigations.” Our speaker was Adam Levitin who is an Associate Professor of Law at Georgetown University. Levitin emphasized that all parties involved are still trying to get their arms around the legal issues in question. Relative to other opinions which we have heard on these issues, Levitin painted what we believe to be one of the bleaker portraits of these matters and their ultimate resolution.

■ **Overview of the Key Legal Issues** — The underlying issues which have recently erupted involve the proper transfer of paperwork in the mortgage securitization process. Real estate law is “arcane” and requires that paperwork be physically transferred when mortgage ownership is transferred (“assigned”) from one party to another party. It appears that in many instances during the mortgage securitization process over the past few years, the paperwork was not properly transferred. If the paperwork was not transferred in the legally required manner, it raises questions not only about who owns the mortgages in question but also about the validity and tax exempt status of the trusts in which the mortgages reside. All of these issues also bear directly on the role played by the title insurance industry.

■ **Why Attempted Remedies Raise New Questions** — Banks have attempted to remedy the aforementioned problems by having employees sign affidavits that they have personal knowledge that the trust was once in possession of the necessary documents. Two problems have emerged with regards to these affidavits. First, several news stories have reported that the people signing these affidavits had no knowledge of the matters in question despite the fact that there were legally swearing that they did. Second, the affidavits may be irrelevant because the issue is not that the documents were lost but they were never properly transferred at each step of the aforementioned securitization process.

■ **Three Potential Outcomes** — Levitin articulated three possible outcomes to the aforementioned issues and assigned an equal likelihood to each. In his best case scenario, these issues are deemed merely technical in nature and are successfully resolved but it takes at least year to do so and all foreclosures are delayed by at least a year. Levitin disputed the claim by banks that these issues can be resolved in a month or so and attributed the banks' claims to “legal posturing.” In the medium case scenario, litigation ensues and it takes years to sort out these matters. In the worst case scenario, the aforementioned issues become a “systemic problem” which causes the mortgage market to grind to a halt as title insurers refuse to insure mortgages involving existing homes.

See Appendix A-1 for Analyst Certification, Important Disclosures and non-US research analyst disclosures.

### ■ Industry Overview

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## **Foreclosures Gone Wild**

Over the past two weeks there have been several developments which have raised questions surrounding the integrity of the residential mortgage foreclosure process. As a result, several banks have announced temporary suspensions of their foreclosure proceedings in various states. Numerous states' attorney generals have launched investigations and key federal officials have weighed in as well. Importantly, these issues involve only mortgages which have been securitized and placed in a pool.

To help us better understand these issues and handicap the likely outcomes, we hosted a conference with Adam Levitin. Levitin is an Associate Professor of Law at Georgetown and has served as Special Counsel to the Congressional Oversight Panel for the Troubled Asset Relief Program (TARP) and spearheaded the Panel's reporting on the mortgage market and foreclosures. Levitin's research focuses on consumer and housing finance, payment systems, and bankruptcy reorganization.

Below we summarize the conference call's key takeaways.

### **Overarching Thesis**

Our speaker argued that what appears on the surface to be a series of technical glitches in the mortgage securitization and foreclosure process may well cause a "systemic problem." He stated that what we have recently seen and heard in the news is "just the tip of the iceberg."

### **Overview of Foreclosure Law**

The foreclosure process is governed by state law. Some states have what is known as a "judicial" foreclosure process whereas other states have a "non-judicial" foreclosure process. In a judicial foreclosure process, foreclosures must work their way through the state court system. In a non-judicial foreclosure process, the court system does not typically intervene. The federal government does not have jurisdiction over the foreclosure process.

### **The Underlying Key Issue: The Physical Transfer**

The underlying problems center around the proper transfer of paperwork. It is important to appreciate that real estate law is arcane and requires the physical transfer of documents when ownership changes hands. In industry parlance this transfer is known as "assignment."

When a mortgage is securitized and placed in a mortgage pool, there are typically four parties involved. The mortgage bank or lender originates a mortgage and then sells it to a "sponsor" who in turn sells it to a "depositor" who then sells it to the "trust" which governs the pool. Importantly, as noted above, the original paperwork must be transferred at each step of the process.

It now appears that in many cases (1) the paperwork was not properly transferred and (2) it is unclear in many cases where the actual paperwork actually rests today.



### **Issues Concerning Affidavits**

When the aforementioned paperwork is lost, an agent of the mortgage servicer can sign an affidavit swearing that he or she has personal knowledge that, although now lost, the trustee was once in possession of the necessary documents. The affidavit is considered to have the same weight as sworn testimony in a court of law.

Two problems have emerged with regards to affidavits. First, several news stories have reported that the people signing these affidavits had no knowledge of the matters in question despite the fact that there were legally testifying that they did. Many of these people have since been labeled “robo-signers” given the tremendous volumes of affidavits which they signed in relatively short periods of time. Second, the affidavits may be irrelevant because the issue is not that the mortgage documents were lost but they were never properly transferred at each step of the aforementioned securitization process.

### **Issues Concerning Tax and Trust Laws**

Beyond the affidavit issues, our speaker highlighted potential problems concerning the trusts which hold the securitized mortgages.

Most mortgage trusts were set up as REMICs (Real Estate Mortgage Investment Conduits) which are special purpose vehicles used to pool mortgages. Under the IRS code, REMIC confers a special tax status in which the cash flows to the trust are not taxed. Investors in the trust pay taxes. The tax exempt nature is important. If the trusts were in fact to be taxed, the taxes would distort the yields required by investors.

To qualify as a REMIC under the IRS code and enjoy the beneficial tax treatment, the trust (1) must be passive and (2) cannot acquire any new assets 90 days following the trust’s creation.

If, as described above, mortgage documents were never correctly passed through to the trust when it was established, then the trust may not actually own the underlying mortgages it purports to own. Although it is possible that this issue could be remedied by some legal maneuvering, doing so could violate the REMIC status since the trust would be acquiring assets long after the aforementioned 90 day period has expired. Such a violation in turn could trigger a sizeable tax burden for investors. Our speaker indicated that there are a handful of open questions on this front and that this is a legal gray area.

### **Issues Concerning Title Insurers**

Levitin noted that all of the above issues may impact how title insurance companies act. If a scenario emerges in which title companies are unwilling to issue title insurance, in those scenarios lenders may cease lending.

When a home with a mortgage on it is sold, the mortgage must be released at closing by the current mortgage owner before a new mortgage with title insurance is issued. If it is not known with certainty who owns the mortgage in question, it cannot be released. If the title company is not satisfied that there is a good release on the old mortgage, it will refuse to insure the new mortgage.

None of these issues affect mortgages for newly constructed homes. Our speaker expects the mortgage market for new homes to continue to function without any material hindrances.

### **Issues Concerning MERS**

MERS (Mortgage Electronic Registration Systems) functions as a centralized electronic registry of mortgages and tracks ownership of mortgages. MERS allows mortgage ownership to change hands efficiently and relatively quickly since it is electronic and allows all parties to forgo making a filing in local land records. Indeed, MERS was designed to function as a substitute for local land records.

Although MERS was designed to enhance efficiency in the mortgage assignment process, Levitin argued it may not conform with the law. “Slowly but surely” courts are issuing decisions which “cast validity on the MERS process.” Although ~60% of mortgages list MERS as the “nominee” which owns the mortgage, a handful of recent court cases have ruled that MERS has no standing in foreclosure actions either because (1) physical paperwork must be transferred when a mortgage is assigned by one party to another or (2) MERS has no true economic interest in the mortgage in question since it collects no payments from the borrowers.

### **What Happens Next?**

Our speaker predicted that more and more lenders are likely to stop their foreclosure processes in both judicial and non-judicial states. He also expects more states’ attorney generals to get involved. At the federal level, it is possible that banking regulators might step in as there is legal and reputational risk for the banks involved.

Ultimately, if these issues do in fact escalate, the Administration may try to broker some sort of settlement. If such deal brokering does take place, Levitin believes that “some payment” will be exacted from the lenders and servicers. The Administration could bargain for more mortgage principal write downs.

## Appendix A-1

### Analyst Certification

The research analyst(s) primarily responsible for the preparation and content of all or any identified portion of this research report hereby certifies that, with respect to each issuer or security or any identified portion of the report with respect to an issuer or security that the research analyst covers in this research report, all of the views expressed in this research report accurately reflect their personal views about those issuer(s) or securities. The research analyst(s) also certify that no part of their compensation was, is, or will be, directly or indirectly, related to the specific recommendation(s) or view(s) expressed by that research analyst in this research report.

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Data current as of 30 Sep 2010

	Buy	Hold	Sell
Citi Investment Research & Analysis Global Fundamental Coverage	53%	36%	11%
% of companies in each rating category that are investment banking clients	48%	45%	39%

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For securities in emerging markets (Asia Pacific, Emerging Europe/Middle East/Africa, and Latin America), investment ratings are: Buy (1) (expected total return of 15% or more for Low-Risk stocks, 20% or more for Medium-Risk stocks, 30% or more for High-Risk stocks, and 40% or more for Speculative stocks); Hold (2) (5%-15% for Low-Risk stocks, 10%-20% for Medium-Risk stocks, 15%-30% for High-Risk stocks, and 20%-40% for Speculative stocks); and Sell (3) (5% or less for Low-Risk stocks, 10% or less for Medium-Risk stocks, 15% or less for High-Risk stocks, and 20% or less for Speculative stocks).

Investment ratings are determined by the ranges described above at the time of initiation of coverage, a change in investment and/or risk rating, or a change in target price (subject to limited management discretion). At other times, the expected total returns may fall outside of these ranges because of market price movements and/or other short-term volatility or trading patterns. Such interim deviations from specified ranges will be permitted but will become subject to review by Research Management. Your decision to buy or sell a security should be based upon your personal investment objectives and should be made only after evaluating the stock's expected performance and risk.

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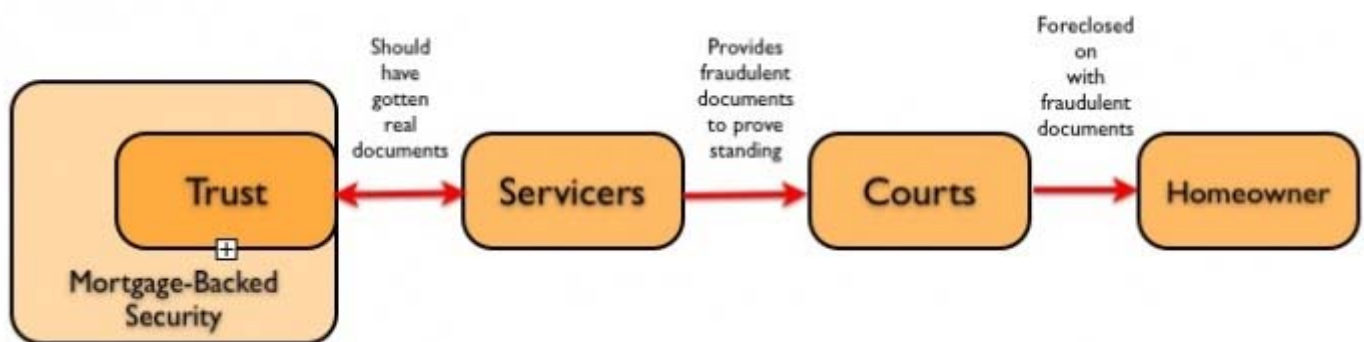


This is a useful post from Mike Konzcal. I also recommend [this youtube clip](#) from Rep. Grayson:

## Foreclosure Fraud For Dummies, 1: The Chains and the Stakes

Posted in **Uncategorized** by Mike on October 8, 2010

The current wave of foreclosure fraud and the consequences for the economy are difficult to follow. As such, I'm going to write a few posts to simplify what is going on so you can follow stories as they unfold. This is very 101 level, and will include a reading list of blog posts and articles at each stage to help provide depth. (Special thanks to Yves Smith for walking me through much of this.) Let's make three charts of the chains involved in the process. The first is what is currently going on with foreclosure fraud (click through for larger).



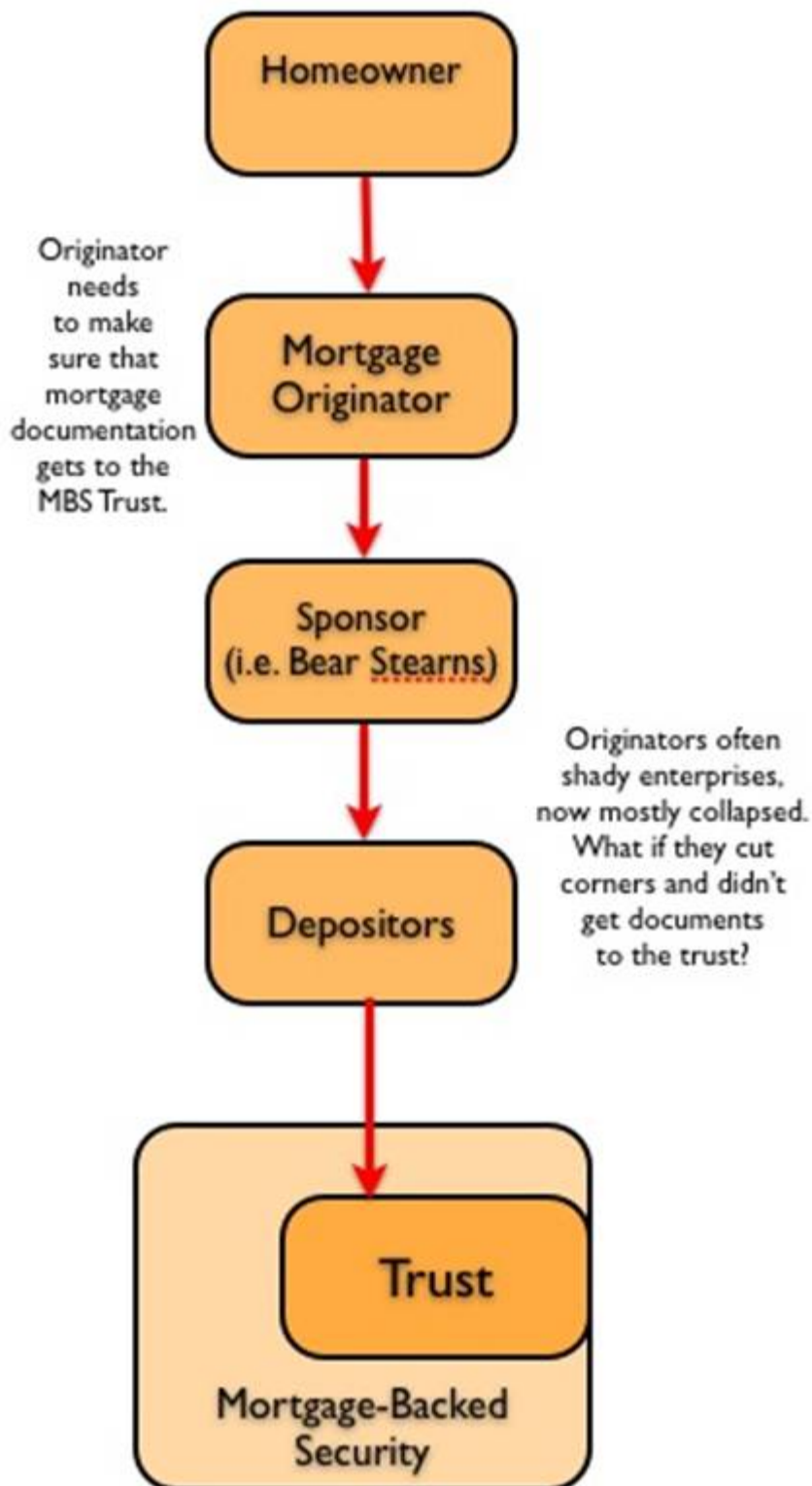
As you can see, in judicial review states like Florida the courts require that servicers, or those who administer the bonds that are full of mortgages (securitization, residential mortgage backed securities, RMBS, are all phrases for them), say that they have everything necessary in order to have standing to bring a foreclosure. They need to have the note for a mortgage, which is supposed to be in the trust – part of the mortgage backed securities – that they administer.

What is breaking down here? In Florida, a judicial review state, it was found that one person was notarizing documents far faster than anyone could reasonably have. Forged documents necessary for the foreclosure process like the note were found. A separate court system was set up to resolve these foreclosures faster at the expense of allowing serious challenges to the documents. Here's Smith on [how kangaroo these courts look](#) up close. [Here's WaPo on one individual](#) and the nightmare of trying to challenge an invalid foreclosure. Keep him in mind when you hear about deadbeats and whatnot: the current system is designed to make it difficult for anyone to challenge their case. Meet the robo-signer who kicked it off [here at this WaPo story](#). I almost feel bad for this patsy; the real battle here is between junior and senior tranche holders, and this doofus could end up in jail in order to keep [John Paulson rich](#). After reading about this guy I'm asking our elites to take care of

their patsies better. (Can we get a Financial Patsy Fordism social contract movement going? If you are going to be a patsy for GMAC, you should be paid enough able to be able to buy GMAC's services or something.)

Why would servicers do this? One story would be that the more foreclosures they process, the more fees they get, so there is an incentive to cut as many corners to speed through the process as possible. Hence the term foreclosure mills. You can read more about this from Andy Kroll's excellent work for Mother Jones ([start here](#)).

There's another problem though – what if servicers are behaving this way because the actual notes aren't in the trust? Let's go back to the creation of these instruments.





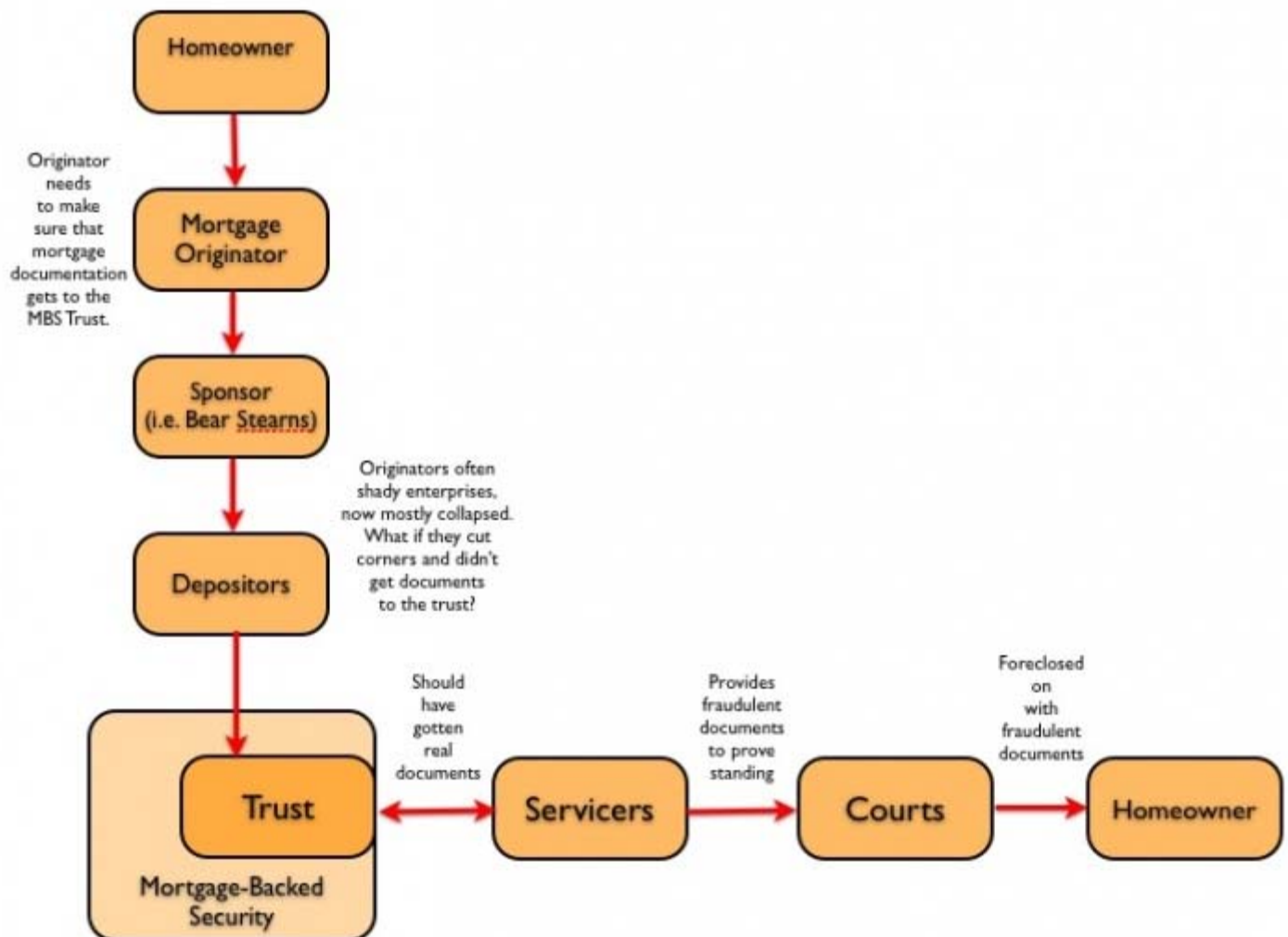
I take a mortgage out at Joe's Lending, a mortgage originator. A mortgage consists of two parts. The first is the note, or the IOU, which is the borrower's promise to pay. The second is the mortgage, which is the security, or the lien, or the actual interest.

Joe's lending takes the mortgage note to a sponsor to turn these mortgages into a bond. The sponsor was often an investment bank like Bear Sterns. Now that investment bank puts an intermediary in between itself and the trust. This intermediary is usually called a depositor, and sometimes there are several of them in the chain.

What's the worry here? Well many of these mortgage originators were fly-by-night shops, shady enterprises that collapsed the moment they hit trouble. And many of them cut corners and one of the corners they may have cut would have been to send the note to the trust. Specifically, there is worry that many mortgage originators never sent the notes to the depositors. Originators wanted volume to get fees and may not have done all the paperwork correctly. There are a lot of things that have to end up in the trust when I take out a mortgage, things like the note, title insurance, supporting documents. But the note is the most important.

Why is this important? Well the trustees usually sign several certificates saying that they have verified all the documentation in these trusts. Many of these trusts are under New York trust law which is particularly clear and strict when it comes to these matters. With this in mind, tackle these three posts by Yves Smith ([one](#) [two](#) [three](#)).

So connect the two together, and you can see why we might have a systemic crisis on our hands:



There are roughly \$2.6 trillion dollars in mortgage backed securities. The Wall Street Journal [starts to explain](#) how this will be a battle between holders of junior and senior tranches of debt. It also exposes the servicers, which include the four largest banks, to extensive legal liabilities by those who bought these securitizations that were signed off as being properly administered and created. One result is that this has lead homeowners to reasonably demand to see the proper documentation before they and their families are put out on the street. Read Ryan Grim and Shahien Nasiripour from June, [Who Owns Your Mortgage? "Produce The Note" Movement Helps Stall Foreclosures](#). Katie Porter is an expert who has done extensive research into this area and often blogs about it at credit slips. See the blog posts: [How to Find the Owner of Your Mortgage](#) and [Produce the \(Bogus?\) Paper](#). Porter found that this was extensive in her research, see [Misbehavior and Mistake in Bankruptcy Mortgage Claims](#) ("A majority of mortgage claims are missing one or more of the

required pieces of documentation for a bankruptcy claims. Fees and charges on claims often are poorly identified and do not appear to be reasonable. The bankruptcy data reinforce concerns about the overall reliability of the mortgage service industry to charge homeowners only the correct and legal amount of the debt and to comply with applicable consumer protection laws”). By rushing the process, unreasonable and excessive foreclosure fees can get applied to homeowners when there may not even be the proper documentation to have the standing to bring foreclosure at all.

So keep these frameworks in mind when you see the debate unfold in the next weeks. It is a problem of systemic risk, and it is a problem for the currently cratered securitization market. It will need to be addressed, the sooner the better. But how?

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## **Robo-signers: Mortgage experience not necessary**

Banks hired hair stylists, teens to process foreclosure documents, workers' testimony shows

NEW YORK (AP) -- In an effort to rush through thousands of home foreclosures since 2007, financial institutions and their mortgage servicing departments hired hair stylists, Walmart floor workers and people who had worked on assembly lines and installed them in "foreclosure expert" jobs with no formal training, a Florida lawyer says.

In depositions released Tuesday, many of those workers testified that they barely knew what a mortgage was. Some couldn't define the word "affidavit." Others didn't know what a complaint was, or even what was meant by personal property. Most troubling, several said they knew they were lying when they signed the foreclosure affidavits and that they agreed with the defense lawyers' accusations about document fraud.

"The mortgage servicers hired people who would never question authority," said Peter Ticktin, a Deerfield Beach, Fla., lawyer who is defending 3,000 homeowners in foreclosure cases. As part of his work, Ticktin gathered 150 depositions from bank employees who say they signed foreclosure affidavits without reviewing the documents or ever laying eyes on them -- earning them the name "robo-signers."

The deposed employees worked for the mortgage service divisions of banks such as Bank of America and JP Morgan Chase, as well as for mortgage servicers like Litton Loan Servicing, a division of Goldman Sachs.

Ticktin said he would make the testimony available to state and federal agencies that are investigating financial institutions for allegations of possible mortgage fraud. This comes on the eve of an expected announcement Wednesday from 40 state attorneys general that they will launch a collective probe into the mortgage industry.

"This was an industrywide scheme designed to defraud homeowners," Ticktin said.

The depositions paint a surreal picture of foreclosure experts who didn't understand even the most elementary aspects of the mortgage or foreclosure process -- even though they were entrusted as the records custodians of homeowners' loans. In one deposition taken in Houston, a foreclosure supervisor with Litton Loan couldn't define basic terms like promissory note, mortgagee, lien, receiver, jurisdiction, circuit court, plaintiff's assignor or defendant. She testified that she didn't know why a spouse might claim interest in a property, what the required conditions were for a bank to foreclose or who the holder of the mortgage note was. "I don't know the ins and outs of the loan, I just sign documents," she said at one point.

Until now, only a handful of depositions from robo-signers have come to light. But the sheer volume of the new depositions will make it more difficult for financial institutions to argue that robo-signing was an aberrant practice in a handful of rogue back offices.

Judges are unlikely to look favorably on a bank that claims paperwork flaws don't matter because the borrower was in default on the loan, said Kendall Coffey, a former Miami U.S. attorney and author of the book "Foreclosures."

"There has to be a cornerstone of integrity to the process," Coffey said.

Bank of America responded to Tiktin's depositions by re-affirming that an internal review has shown that its foreclosures have been accurate. "This review will ensure we have a full understanding of any potential issues and quickly address them," Bank of America spokesman Dan Frahm said. Frahm added that, on average, the bank's foreclosure customers have not made a payment in more than 18 months.

JP Morgan Chase spokesman Thomas Kelly said the bank has requested that courts not enter into any judgments until the bank had reviewed its procedures. But Kelly added that the bank believes that all the underlying facts of the cases involved in the document fraud allegations are true.

Litton Loan Servicing did not respond to a request for comment.

Even before the foreclosure scandal broke, the housing market was in the midst of an ugly detoxification. Now the escalating crisis is likely to prolong the housing depression for at least another few years. The allegations are opening the entire chain of foreclosure proceedings to legal challenge. Some foreclosures could be overturned. Others could be deemed illegal.

For a housing recovery to occur, all the foreclosed properties -- which could account for 40 percent of all residential sales by 2012 -- need to be re-scrutinized by the banks and resold on the market. Now, with so much inventory under a legal threat, the process will become severely delayed.

"This just adds more uncertainty to the whole mortgage process, so buyers are asking themselves: do I want to buy a home in this environment?" says Cris deRitis, director of credit analytics at Moody's Analytics. "We need to fix these issues before the economy can recover."

Though some have chalked up the foreclosure debacle to an overblown case of paperwork bungling, the underlying legal issues are far more serious. Yes, swearing that you've reviewed documents you've never seen is a legal offense. But at the center of the foreclosure scandal looms something much larger: the question of who actually owns the loans and who has the right to foreclose upon them. The paperwork issues being raised by lawyers and attorneys general have the potential to blight not just the titles of foreclosed properties but also those belonging to homeowners who have never missed a mortgage payment.

So far, JP Morgan Chase, PNC Financial and Litton Loan Servicing have stopped some foreclosure proceedings in 23 states. Bank of America and GMAC, recently renamed Ally, have extended their moratoriums to all 50 states. Wells Fargo and Citigroup have said they are continuing with foreclosures, adding that they are confident in their documents and processes.

But Citigroup has now backpedaled some on that assertion. The bank sent out a press release Tuesday that it was no longer using the law firm of "foreclosure king" David Stern, now under investigation by the Florida attorney general's office. "Pending the outcome of the AG's investigation, Citi is not referring new matters to this firm," the bank said in an e-mailed statement.

Late last week, in an interview with the Florida attorney general, a former senior paralegal in Stern's firm described a boiler-room atmosphere in which employees were pressured to forge signatures, backdate documents, swap Social Security numbers, inflate billings and pass around notary stamps as if they were salt.

Stern's lawyer, Jeffrey Tew, did not respond to a request for comment.

Meanwhile, the public outrage continues to mount. In what is perhaps a sign of things to come, a Simi Valley, Calif., couple and their nine children broke into their foreclosed home over the weekend and moved back in, according to television station KABC of Simi Valley. The couple, Jim and Danielle Earl, say they were working with the bank to catch up on payments until they discovered a \$25,000 difference

between what they owed and what the bank said they owed. The family was evicted from their Spanish-style two-story in July. The home has been sold, and the new owner was due to move in soon.

The Earls and their attorney now allege that they were victims of fraudulent paperwork.

Curt Anderson contributed from Miami.

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## UNDERWRITING ALERT

Ladies and Gentlemen:

At approximately 11:10 AM, EDT, today Fox new reconfirmed its prior news release of Friday last past that some major banks including JP Morgan Chase, BOA, Ally (the former residential finance arm of GMAC) and Wells Fargo have suspended all existing foreclose actions in 23 states because of irregular and possible improper and illegal paperwork mistakes in prior foreclosures already concluded. The DOJ is conducting a probe in regards of these actions to determine if those and other banks may have committed fraud. Alleged improper robo-signing is only one of the allegations made to date. More of these concerns and allegations may be found at [http://www.nytimes.com/2010/10/06/business/06mortgage.html?\\_r=1](http://www.nytimes.com/2010/10/06/business/06mortgage.html?_r=1) and an announcement made by Reuters in WASHINGTON | Wed Oct 6, 2010 7:15pm EDT. Some of you may recall we first called this to your attention via email dated last Friday, October 1, 2010. We have made every attempt to verify what we then suggested. Obviously these concerns may further deepen the real estate crisis and have adverse affects on related industries, including the title industry. One of those concerns would be what affect would such a turn of events have upon the current title insurance industry claims situation, particularly in the event that some appellate courts were to determine that a previously insured title is faulty as a result of the recent disclosure and practices and, previously insured titles coming through the foreclosure process were thereafter unwound?

In a related concern is the apparent fact some finger-pointing was also being directed back at Congress. The Ohio secretary of state, Jennifer Brunner, suggested in a telephone interview on Tuesday that a bill passed by Congress last week about notarizations could facilitate foreclosure fraud.

Dubious notary practices used by banks to justify foreclosures have come under scrutiny in recent weeks as GMAC and other top lenders suspended homeowner evictions over possible improper procedures.

Ms. Brunner, who has recently referred possible cases of notary fraud in her state to federal authorities, worries that the legislation would allow the lowest standard for notaries to become a nationwide practice. She said she also worried that the changes were coming in the middle of a foreclosure storm where people could lose their homes improperly.

“A notary’s signature is that of a trusted, impartial third party, whose notarization bolsters the integrity of the document,” Ms. Brunner said. “To take away the safeguards of notarization means foreclosure procedures could be more susceptible to fraud.”

As banks' foreclosure practices have come under the microscope, problems with notarizations on mortgage assignments have emerged. These documents transfer the ownership of the underlying note from one institution to another and are required for foreclosures to proceed.

In some cases, the notarizations predated the preparation of the legal documents, suggesting that signatures were not reviewed by a notary. Other notarizations took place in offices far away from where the documents were signed, indicating that the notaries might not have witnessed the signings as the law required.

Notary practices vary from state to state and the bill, sponsored by Representative Robert B. Aderholt, a Republican from Alabama, would essentially require that one state's rules be accepted by others. If one state allows its notaries to sign off on electronic signatures, for example, documents carrying such signatures and notarized by officials in that state would have to be recognized and accepted in any state or federal court.

Ms. Brunner pointed out that some states had adopted "electronic notarization" laws that ignored the requirement of a signer's personal appearance before a notary. "Many of these policies for electronic notarization are driven by technology rather than by principle, and they are dangerous to consumers," she said.

Mr. Aderholt had introduced the bill twice before and both times it passed the House of Representatives but not the Senate. Mr. Aderholt reintroduced the bill last October and it passed the Senate on Sept. 29. It is awaiting President Obama's signature.

O Max Gardner III has gone so far as to suggest that under the guise of simply reflecting changes in technology, the bill would force state and federal courts to recognize and accept the notarization from another state. This would be true even if the notary signed in blank. It would be true even if the witnesses were not present despite the recitation to the contrary signed by the notary. It would be true even if the main person signing the alleged document was not the person named as having signed the alleged document. It would be true even if the main person signing the alleged document was not present or identified by the notary. In other words under this new bill passed by both the House of Representatives and the Senate, both essentially bought and paid for by the financial services industry, all of the illegal, improper and criminal acts performed by the "lenders" (mainstream media insists on using this term even though it is not true) would be made legal. That sounds like a pardon to me, how about you?

If President Obama signs this bill it will become law. At that point, more than half of the meritorious defenses of borrowers (homeowners) or petitioners in bankruptcy courts will go down the drain. The fact that this bill even got introduced without the mainstream media taking note is not really surprising considering the fact that mainstream media has failed to grasp the true scope of this fraud which began with the first sale of a fake mortgage bond to an investor. A fake financial services product was marketed to investors who believed they were lenders and to homeowners who believed they were borrowers, both of whom were mere pawns in the Wall Street game. In fact they supplied the only two ingredients that Wall Street wanted -money from the lenders and a signature from the homeowners. The nature of the document was immaterial. Now that the foreclosures are obviously fake, lawmakers responsive to the demands of the financial services industry have quietly passed a bill in both houses of Congress that would allow the fraud to be ratified and the perpetrators to escape any accountability whatsoever.

If President Obama signs this bill he will be condemning the victims of this fraud to bear the full cost of the losses. If President Obama signs this bill he will be awarding the perpetrators of this fraud all of their winnings. In case anybody hasn't been looking, another development which has been ignored by our mainstream media is



that countries around the world are looking for an alternative reserve currency to replace the once almighty US dollar. The reason they are looking is because they no longer have confidence in a system that produced a Wall Street scheme which in essence depreciated the value and viability of currencies and economies all over the world. If President Obama signs this bill he will be giving a signal to the world that the United States will be more vigilant, more sophisticated and much more involved in enforcement of laws, rules and regulations already existing in the marketplace and upon which all investors, lenders, homeowners, borrowers and foreign investors had placed reasonable reliance and suffered to their detriment. The loss of our status as the issuer of the world's reserve currency will have profound consequences on our nation, our citizens, our businesses, and the prospects for generations of Americans yet unborn.

Comment: While Mr. Gardner's observations may be a stretch or a bit overreaching he is correct in suggesting that this legislation places us in unknown waters and could have profound implications. At the very least it may deprive homeowners who heretofore have had legitimate real property arguments which they or their lawyers could advance in defense of their home foreclosures, arguments that go as far back as 300 years in American jurisprudence, may be deprived of such legal arguments if this legislation is signed into law. We suggest the ALTA, ABA RPPT and TIPS committees together with members of ACREL and ACMA become active in following these matters. Professor Whitman may wish to rethink the arguments advanced in his most recent law review article, "How Negotiability Has Fouled up the Secondary Mortgage Market, and What to Do about It" , published in the 37 Pepperdine L. Rev. 737 (2010)" after reviewing Professor Kettering's scathing article, "Securitization and Its Discontents: The Dynamics of Financial Product Development", published in the Cardozo Law Review, Vol. 29, p. 1553, 2008, NYLS Legal Studies Research Paper No. 07/08-7 .

Respectfully submitted Thursday, October 7, 2010

William C. Hart  
Editor

*Title Management Today*

PS O. Max Gardner, April Chaney and Pamela Simmons contributed to this Bulletin. Their contributions are greatly appreciated.

Distribution Lists A, B, C. D

## Bank Disinformation I: PR Machine in Overdrive on Foreclosure Fraud Front

Posted: 11 Oct 2010 02:16 AM PDT

A DC contact warned me last week that the banks were readying a massive pushback on the foreclosure crisis. It went into full swing over the weekend.

Obama, admittedly through his proxy, David Axelrod, threw his weight in behind the banks on Face The Nation:

Q: I guess the first question I would have is does the administration favor some kind of national moratorium on these foreclosures to get this all sorted out?

A: First of all, Bob, it is a serious problem. It's thrown a lot of uncertainty into the housing market that as you know is already fragile. It's bad for the housing market and it's bad for these institutions which is why they're scrambling now to go back through their documentation for all of this as they should. The president was concerned enough to veto a bill that came to him last Thursday that would have unintentionally made it perhaps easier to make mistakes. so we are concerned. We're working with these institutions. I'm not sure about a national moratorium because there are, in fact, valid foreclosures that probably should go forward and where the documentation and paperwork is proper. But we are working closely with these institutions to make sure that they expedite the process of going back and reconstructing these and throwing out those that don't work.

Q: I mean, I guess people are worried about what do you think the impact this is going to have on an economy that's pretty shaky right now?

A: Look, our hope is is that this moves rapidly and that this gets unwound very, very quickly and that if they can go back, reconstruct their paperwork and what we've stressed to them is that they need to expedite that process and work very, very quickly to get it done. we're going to continue to push for that.

Yves here. The sense of priorities is astonishing. Axelrod repeatedly stresses the need to get "this" resolved quickly. Notice the refusal to use accurate and honest language: at best, these are improprieties, but the more accurate word is fraud.

The emphasis is NOT on doing things correctly but on the need for haste. Yes, there is what amounts to an aside on the need to have "proper" paperwork, but that is more an assertion that some foreclosures aren't afflicted by doubts over the securitization trust that supposedly owns the note, the borrower IOU, actually having taken the steps to perfect its rights.

And this is simply a variant of the spin the banks have tried since the affidavit mess surfaced: that this is a mere "paperwork" problem. As we commented earlier in the weekend, that's utter bunk. First, even the supposedly minor manifestation, that of "improper" affidavits, is a fraud on the court. And it hasn't just

been taking place in the 23 judicial foreclosure states; it has also taken place in non-judicial states every time a foreclosure is contested. Second, the banks and their mouthpieces are being disingenuous in implying that they merely need to find the right parties and redo the affidavits. Some states, like South Carolina, are very strict on procedures; they disbar lawyers who screw up residential real estate closings (the logic is if a lawyer can't handle something that simple, he has no business practicing law). The lawyers involved in providing these bogus affidavits to the court ought to be subject to sanctions; some judges may require cases to be refiled. Not only is this a big operational hassle; there are judges who take the propriety of their court seriously and may not be terribly accommodating when banks try resubmitting affidavits.

And that's before we get to elephant in the room, namely, the affidavit "improprieties" are a mere symptom of much deeper problems, namely, with the failure of the key parties in the original securitization (the originator, the investment bank packager, and the trustee/custodian) to make sure all the contractually-stipulated steps were taken to make sure the trust actually got possession of the properly-endorsed note and related documentation.

Another bit of bank-defending rubbish was in the Washington Post over the weekend (the intensity of coverage in the WaPo is a function of bank industry efforts to get its message out). Even though the headline wasn't too awful ("**Government had been warned for months about troubles in mortgage servicer industry**"), it was a defense of the Administration's failure to bring servicers to heel. The core argument is Treasury party line; Geithner took exactly the same position in the blogger meeting last August:

In an interview this week, a senior administration official confirmed that the White House and Treasury Department had received warnings that the mortgage industry employed inexperienced staffers to oversee foreclosures, had problems handling documents and communicating with borrowers, and often failed to comply with regulations.

But the government had struggled to address shortcomings in the industry, the official said, because the administration was also seeking the servicers' help with modifying the home loans of millions of borrowers to help them avoid foreclosure.

In addition, a Treasury official said the federal government's power to tackle problems in the servicer industry is limited because foreclosure law is largely the domain of states.

Yves here. We are supposed to take this seriously? Any regulator with guts could very quickly make life miserable for the servicers if it wanted to. If they were to threaten investigations on, say, issues where there is clear evidence of servicer problems that really ought to be cleaned up regardless (the gaming of HAMP and other mod programs, plus illegal application of payments to fees first rather than principal and interest, or servicing errors generally are all ripe targets), they would easily unearth a lot of poor practices that could be used to gain leverage over uncooperative banks. And the point would not be even

to make the investigations, but to have a staredown with the banks and make it clear that if certain things didn't happen that were in everyone's best interest, there would be consequences. This isn't about lack of leverage, as the Treasury falsely contends, it's an unwillingness to inconvenience the industry.

And below is the text of a letter making the rounds on the Hill. This is simply dishonest. First, note the complete lack of mention of the foreclosure crisis; this is an effort to divert attention from the real issue, the mess the securitization industry has made of the housing market at pretty much every step of the process, from ginning up bad "spreadly" loans on purpose to feed demand for CDOs, to deciding to ignore the carefully-devised procedures to make sure the securitization trust complied with all the requirements needed for it to have ownership of the mortgages; to rampant document forgeries and fraud to remedy the procedural failings. Second, it implies that servicers are happy to mod mortgages. Huh? They've done it only under duress, and with bribes, um, fees. And even then, most of what they call "mods" are short-term payment catch-up plans which do the servicer more good than the borrower; even the so-called HAMP "permanent" mods are mislabeled; they are five year payment reduction plans; there is nothing "permanent" about them.

So get used to the barrage from the Ministry of Truth; you'll be subjected to a lot more of the same over the next few weeks.

October 8, 2010

The Honorable XYZ  
United States House of Representatives  
Washington DC 20515

Dear Representative XYZ,

We are writing to set the record straight on the efforts mortgage servicers are making to assist at-risk homeowners, as well as to address the issues that are being raised about the processing of documents for mortgages that are in foreclosure.

#### Foreclosure Document Reviews

As we have said consistently, foreclosure helps no one, and it is the last thing our mortgage servicing companies want to have happen. That is why our members work hard every day with their customers who are behind on their mortgage to try to find a solution that avoids a foreclosure. This effort has produced dramatic positive results for homeowners. Mortgage servicers have completed 1.3 million loan modifications for homeowners thus far in 2010 and more than 3.7 million since 2007.

Unfortunately, there are circumstances when a modification or other potential solution such as a short sale is not possible and foreclosure proceedings must be undertaken. As has always been the case, no

change in the terms of the loan will help a homeowner if they don't have adequate income to make even greatly reduced monthly payments, or if they have no desire to remain in the home. If that is the case, a foreclosure must be pursued by the servicer.

We want to assure you that foreclosure is not initiated by servicers until many months of delinquent payments, after repeated attempts to work with the homeowner, and only when all other foreclosure prevention efforts have failed.

In several states, some mortgage servicers have put final foreclosure sales on hold while they review their document procedures. It is important to note, however, that these are document process reviews; in almost all cases there are no factual disputes about whether the mortgage is delinquent, the amount of the arrears, or whether foreclosure is proper. Indeed, a substantial percentage of foreclosures are uncontested by borrowers. In the overwhelming majority of cases, we believe the facts presented to the courts in foreclosure proceedings about the debt amounts and delinquencies have been accurate.

Servicers should be permitted to complete the review of their document processes that they have already begun. Calls for a blanket national moratorium on all foreclosures are a bad idea and would cause significant harm to communities at risk, the unstable housing market and the fragile economy. A foreclosure moratorium would not change the ultimate outcome for borrowers impacted by this situation.

#### Distressed Homeowners Are Being Assisted

The foreclosure document and affidavit reviews servicers are conducting are only a part of the on-going efforts being made to help homeowners avoid foreclosure and stay in their homes. Servicers are also continuing to work to assist thousands of homeowners everyday who are behind on their mortgage payments.

These are the facts:

\* Mortgage servicers completed 149,000\* loan modifications for homeowners in August 2010, including 116,000 proprietary loan modifications and 33,000 Home Affordable Modifications (HAMP.) [\*HOPE NOW Alliance October Data report]

\* 91% of all proprietary loan modifications in August reduced homeowners' monthly payments so that the modifications are affordable and sustainable.

\* Through August, mortgage servicers completed 1.3 million loan modifications in 2010 and almost 3.7 million since 2007.

\* There have been 775,000 completed foreclosure sales through August 2010, compared to 1.3 million

loan modifications through August, 2010

\* Short sales and deeds-in-lieu are being offered as a dignified alternative to foreclosure for homeowners who have exhausted all their foreclosure prevention options and cannot maintain their mortgage.

\* Servicers continue to contact and assist at-risk homeowners in a wide variety of ways. Companies have individual customer assistance centers and participate in face to face outreach events across the nation individually and sponsored by Making Home Affordable and the HOPE NOW Alliance. More than 77,000 homeowners have received assistance at 87 HOPE NOW face-to-face events held all across the country since 2008.

\* Homeowners can reach a non-profit counselor at a HUD-Certified counseling agency 24 hours a day, 7 days a week through the 888-995-HOPE Homeowners' HOPE hotline operated by the Homeownership Preservation Foundation.

\* Servicers and Counselors have worked to enhance electronic submission of documents for loan modifications through the new HOPE LoanPort system.

Mortgage servicers continue to help thousands of consumers avoid foreclosure every day. Real progress is being made. The foreclosure document and affidavit review process that servicers are undertaking will clarify the situation significantly.

Attached is a link to the resource sheet for Congressional staff to assist your constituents. We will continue to work with all Members of Congress on mortgage loan inquiries that you receive from your constituents.

Sincerely,

Steve Bartlett  
President and CEO  
The Financial Services Roundtable

John Dalton  
President  
Housing Policy Council

John A. Courson  
President and Chief Executive Officer  
Mortgage Bankers Association

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## Bank Disinformation II: Banks Attacking Rule of Law Frontally

Posted: 11 Oct 2010 02:00 AM PDT

Readers may argue I'm reading more of a bank PR role in a page one Wall Street Journal story than is warranted. However, even the Columbia Journalism Review **took notice of the Journal's scanty reporting on the foreclosure crisis**, a mounting series of problems that is deservedly damaging to the banking industry's image and bottom line. Now we have the Murdoch paper feature a remarkably one sided story on foreclosures. That looks to be no accident.

The story, "**Courts Add To Foreclosure Delay**" is utterly one sided. Having a judicial process for making foreclosures, as is required in 23 states, is bad for you....because it is preventing the housing market from bottoming. This argument is the polar opposite, by the way, of the Administration's lame defense of its HAMP mod program.

Readers may recall that HAMP for the most part merely delayed foreclosures of participating homeowners for a few months, allowing banks to extract a few more payments from stressed borrowers and extract some incentive fees. Team Obama contended that was really a good thing, a feature, not a bug. The housing market was weak; better to have foreclosure properties dribble out on the market to prevent overshoot on the downside. So it seems that bank defenders will spin the delay issue whatever way they need at any point in time to flatter the banks.

The author also leads with an exaggerated claim up front:

One comparison widely cited: In California, where judges don't handle foreclosures, the housing market appears to have hit bottom a year ago and has been bouncing back. In Florida, where foreclosures go through the court system, prices keep falling, and foreclosure inventory continues to rise.

Correlation is not causation, and indeed, the author backpedals, but it's a full 13 paragraphs later:

The judicial process isn't the only determining factor. California's economy is more diverse than Florida's and real estate, long term, has always been a stronger bet in California, which explains why buyers would pounce once prices declined.

The article attributes differences in foreclosure times solely to the judicial versus non-judicial issue. Yet it

has repeatedly been reported that banks themselves are failing to foreclose on severely delinquent borrowers. Indeed, the “deadbeat borrower” reaction comes up repeatedly whenever we talk about people fighting foreclosures. In fact, relatively few people who can’t afford their homes fight; most are beating back a bank motion to break a bankruptcy stay or believe they are the victim of servicing errors; in Florida, some were partway through getting mods, yet the servicer failed to call off the foreclosure mill. The banks aren’t about to release the data, but a fair bit of the lengthening of time to foreclosure is due to the banks’ choice: they keep the borrower in place so that they are liable for the real estate taxes. If a bank has a lot of real estate already in a certain city or area, it’s going to have trouble moving inventory, so it sees delaying foreclosure as a way to save holding costs.

There is also not a single acknowledgment in the article that affidavits submitted were improper. Look how timid the Journal’s formulation is: “alleged irregularities in foreclosure documents submitted by the banks.” The banks have ADMITTED the affidavits were fraudulent, prepared by people who had no direct knowledge. This isn’t an “allegation”; these are admissions by bank employees in multiple depositions.

The article focuses strictly on the same theme of the Axelrod Face the Press remarks on Sunday: delay is bad for the economy, and gives as little mention as possible to the dead body in the room, that the “documentation” problems are severe and not fixable in any simple fashion.

That isn’t to say that some of the issues and data in this article aren’t worth exploring. But this piece was not an inquiry; it’s a badly skewed account, but the framing and the heavy use of data provides effective camouflage.

On another front, we had a pretty lame sighting over the weekend, the president of MERS, Mortgage Electronic Registry System, trying to defend his firm’s activities. We’ve avoided talking much about MERS, simply because it is a secondary problem in the foreclosure mess. The big failing of the securitization industry was not conveying the borrower IOU (the note) correctly to the securitization trust. In 45 of 50 states, it’s no tickie, no laundry: if you don’t own the note, you can’t foreclose. The mortgage (aka a deed of trust) is an “accessory” to the note in those states.

Some statements made in a Q&A released in connection the the president’s remarks are patently untrue, as in they have been repeatedly contradicted by sworn testimony by MERS employees. For instance:

- 1) MERS holds legal title to a mortgage as an agent for the owner of the loan
- 2) MERS can become the holder of the promissory note when the owner of the loan chooses to make MERS the holder of the note with the right to enforce if the mortgage loan goes into default.

This is utter baloney. MERS has no legal relationship to the note-holder. The owner of a loan (in the MERS context) will always be a trust. Per Max Gardner, a Federal bankruptcy attorney:

The Trust is NOT a member of MERS by a bi-lateral or tri-lateral agreement. The Trust cannot be a



member of MERS per the MERS By-Laws. The Trust has never signed any document or filed any document that appoints MERS to execute any documents for the Trust. You simply cannot have a silent or unauthorized “agent” or “nominee” for a NY or Delaware Trust without a specific designation and appointment by the Trust.....The mortgage note is never transferred to MERS.

There is more from the Q&A that is false:

Claims that MERS disrupts or creates a defect in the mortgage or deed of trust are not supported by fact or legal precedents....MERS does not remove, omit, or otherwise fail to report land ownership information from public records.

Yves here. Ahem. This is misleading. There is no public record of the transfers from the originator to the trust (assuming that was done correctly).

MERS also falsely insists it increases transparency:

MERS was created to provide clarity, transparency and efficiency by tracking the changes in servicing rights and beneficial ownership interests. It was not created to enable faster securitization.

Um, MERS was create to save recording fees. And transparent? Absolutely not. Only MERS members, which are basically banks and servicers, can access the service. And it appears any MERS member can assign a mortgage. Moreover, from what I can infer, MERS is lacking in the sorts of checks you’d expect in a registry of this importance (requirement of approval or confirmation by a second party of a records change; audit trails, etc).

Although the MERS effort at image-burnishing is a side show, it’s still worth noting that they can’t even keep their own story straight. And MERS is hardly alone in that regard.

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# 5 Things David Axelrod Must Have Missed About The Foreclosure Thing

Posted by [Moe Tkacik](#) on Oct. 11, 2010 at 4:05 pm

A lot of you are probably still wondering what to make of the latest spasm of foreclosure apoplexy that temporarily seized the memeosphere last week when Obama vetoed that two-page bill everyone else in D.C. so unanimously loved. Here is who is *not* wondering, though: the *Washington Post*! There is nothing in any section of today's paper about foreclosure moratoriums, so you have to direct yourself to a bottom-page B2 [story](#) in the *New York Times* to learn why: **David Axelrod** told *Face The Nation* yesterday that the **Obama**administration's "hope is this moves rapidly and that this gets unwound very, very quickly" and that he's "not sure that a national moratorium" is called for since "there are in fact valid foreclosures that probably should go forward." No big deal, bro! Some reasons I beg to differ:

**1. Hello, this whole story was touched off when the banks *voluntarily* stopped throwing people out of their homes.** That's right! The *banks*, not Elizabeth Warren or Hugo Chavez or Pol Pot or whomever. Chances are you didn't hear about this meme until the mortgage servicer GMAC sent all employees a widely circulated September 17 [memo](#) ordering staff in 23 states to indefinitely suspend all evictions and foreclosure sales pending review of the lender's foreclosure protocol. That was not for lack of publicly available information about the comprehensively criminal practices of the "foreclosure mill" businesses; it was in December 2009 that [now-famous](#) (and *terribly* urbane) GMAC manager **Jeffrey Stephan** gave his first of three depositions detailing the stunning amount of negligence and perjury required to evict people from their homes at the gold standard rate of 10,000 per month. But the media had long since grown weary of the same-old-same-old story of banks screwing people with impunity etc. etc. and was preoccupied declaring currency war on China and [promulgating](#) revisionist history when the shit hit the fan.

**2. Banks do not just walk away from a cash cow like "mortgage servicing" without a good reason.** Mortgage servicing is a \$200 billion a year business, and that is not because of the flat 0.25% fee mortgage servicers receive to process the timely payments of responsible homeowners. In the boom years, mortgage servicers raked in fees every time they convinced a homeowner to refinance—the more "adjustable" the better!—and in the bust years, [late fees and foreclosures](#) are the cash cows. Like all things banks do, it is truly recession-proof! The catch is that because foreclosures sort of necessarily involve, you know, "laws" governing "property rights" and "trespassing" and whatever, they require someone acting on behalf of the theoretical new "owner" of the property (whoever that is) to sign an affidavit saying something along the lines of, "yes, I've thought about it and reviewed the documents and whoever the local sheriff is should know that definitely these people deserve to have their locks abruptly changed and all their shit ransacked by some contract team of meatheads, and whoever shows up on this property after that they should feel free to harass, arrest, and what the hell waterboard."

But if actually it turns out that whoever signed the affidavit is either not a human, or possibly not the human who is named, or did not actually look at the documents probably because no one could find the documents, or can't even really read, and whatever the case definitely was not actually in the presence of a witness like the affidavit says, that is what they call "perjury" and also possibly "forgery" and/or "falsification," all of which are crimes that carry large fines. That was no big deal, until some bankruptcy attorneys actually got incensed enough to spend their own money deposing employees of the servicers, and now the potential fines (and legal fees) are threatening to offset the profits reaped in by all those glorious fees, and that is why many of them stopped doing it.

**3. Hey, so who actually "owns" these foreclosed properties anyway? Funny you should ask...** Sometimes the party named as the plaintiff in a foreclosure will purport to be some sort of trust, other times it will be something called the Mortgage Electronic Registry System or MERS. Either way, it is a total joke. Most of the time no one actually knows and it doesn't matter because [more than half](#) of the \$10.7 trillion in mortgages outstanding in this country are owned or guaranteed by Fannie Mae and Freddie Mac i.e. you, and hundreds of billions of others are guaranteed by other federal agencies or programs.

So put yourself in the shoes of these rightful owners, since they're yours anyway: do you really want to evict millions of homeowners in the worst real estate market since the cholera epidemic, just so your houses can be ransacked by the lockup mercenaries, disemboweled and converted into meth labs by local entrepreneurs and blamed for the downward spiral in the values of surrounding properties many of which you also own? No of course not, only the mortgage servicers want that. You want to try and cut a deal with the homeowner, like **Tim Geithner** was supposed to facilitate with that "making home affordable" program that **Rick Santelli** used to launch a thousand tea parties, except that in his infinite ignorance Geithner outsourced that whole endeavor to the servicers who predictably sabotaged it entirely. Some private mortgage investors have [tried to sue the servicers](#) for this very reason, but it's hard to even know who wants what because...

**4. The entire industry stopped keeping track of who bought and sold.** This brings us back to the aforementioned MERS. Headquartered in Reston, MERS was founded by this guy **Paul Mullings** who is now an executive at Freddie Mac and it is currently helmed by a fellow named **R.K. Arnold** who according to one account spends his leisure time collecting military toys. MERS was created to sidestep the process by which buyers and sellers of homes used to record transactions with local authorities by just entering deed and lien information electronically into a database. MERS did not even have to lobby anyone to change any laws do this, apparently: "The mortgage industry just changed how the land title system worked without getting anyone's okay," a law professor explained to the *Washington Post*. Various libertards are now arguing that since mortgages change hands a lot more often than actual houses do, MERS is the only "efficient" way of doing things, which might be true were there any evidence they were actual "doing" anything; two lawyers I spoke with and everyone quoted by anyone

else who has actually done any reporting into the matter say that MERS has a pretty sloppy record of recording this stuff, since it has almost no employees of its own. That has not stopped MERS from volunteering its name to be used on the “plaintiff” side of millions of foreclosure actions, despite having no claim to anything at all except a poorly-kept database no one uses, but they have stopped doing that so much in recent months because a lot of judges have decided it might be against the law. But really, *should* someone have to have a claim on your house to file a foreclosure notice on it?

**5. Homeowners Associations are still foreclosing on the houses of members who are delinquent on their dues by amounts of \$150 or so.** Seriously, how is [this](#) legal? How do I keep reading the same story [over](#) and [over](#)? Because we live in a banana republic that is carrying out some sort of unmanned drone attack on our so-called property rights for no apparent reason other than to juice the official indicators of housing market “activity” and that sort of thing such that [Steve Pearlstein](#) will continue telling us it’s all okay, business as usual, that the whole snafu will be resolved very, very quickly, safe in the knowledge that anyone who begs to differ is guaranteed to lose the audience within the first 160 characters anyway.

[E-mail Moe Tkacik](#) • [Follow moetskacik on Twitter](#)

## **Well well well...OBAMA Victim of Robo Signers?**

Lookie what we have here folks...

Is this why they tried to sneak through H.R. 3808? (just kidding)

Just like we have been saying all along, this is so much bigger than "affidavits."

Here is another piece of the puzzle, without bringing up the REMIC issues...

Now that YOU are effected personally in this, Mr. President, what are you going to do about it?

Let's get off the whole CNN Axelrod signals White House opposition to foreclosure moratorium BS...

"The Obama administration opposes a moratorium on home foreclosures, but wants problems involving improper paperwork resolved as quickly as possible, senior adviser David Axelrod said Sunday."I'm not sure about a national moratorium,"

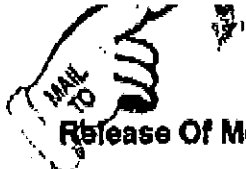
Like my dear friend at the Hamlet puts it

It's not the foreclosure affidavits only. Hello? It's the whole kit-n-caboodle. it's the fabricated assignments of mortgage, fake allonges, robo-stamped endorsements in blank, and satisfactions of mortgage, ignoring SEC and IRS regulations, disregard for the steps required by the REMIC rules. It's all the top national banks and their servicing arms. The whole of it is a sham. Don't believe the propaganda that insists otherwise.

Got it?

Now for the fireworks...

First we will start with a screen shot of one of Obama's Release of Mortgage...



## Release Of Mortgage

WHEREAS the indebtedness secured by the mortgage described below has been fully paid and satisfied, the undersigned owner and holder of the debt does hereby release and discharge the mortgage.

Original Mortgage: HYDE PARK MORTGAGE COMPANY

Original Mortgagor: BARACK OBAMA, MICHELLE OBAMA

Recorded [www.4closureFraud.org](http://www.4closureFraud.org)

Tax ID: 21

Date of mortgage: 08/25/02 Amount of mortgage: \$210000.00 Address: 5450 S E View Park Unit Chicago, IL 60616

SEE ATTACHED LEGAL DESCRIPTION

NOW THEREFORE, the recorder or clerk of said county is hereby instructed to record this instrument and to cancel, release, and discharge the mortgage in accordance with the regulation of said state and county.

Dated: 05/10/2006

CHASE HOME FINANCE LLC

S/B/M CHASE MANHATTAN MORTGAGE CORPORATION

By Marshe Craine  
Marshe Craine  
Vice President

Marshe Craine of Chase signed off on their release of mortgage.

Now you ask, so what is wrong with that?

Nothing on it's face, but you know how I roll...

With all that is going on with the robosigning, forgeries, fabrications and LIES, we decided to dig into this to see if something was there to help educate the masses on the issues that all of us as Americans face...

Guess what we found...

President Obama is a victim of the robosigning phenomenon that has taken the financial industry by storm...

How else would you explain this?

Check it out...

Random search of signature for Craine

(Click to Enlarge)

NOW THEREFORE, the recorder or clerk of said county is to  
cancel, release, and discharge the mortgage in accordance with  
[www.4closureFraud.org](http://www.4closureFraud.org)

CHASE HOME FINANCE LLC (See "Footnote One" below)

By:



Marshe Craine  
Vice President

Witness:



Whoa, is that the same Marshe Craine "Vice President" of Chase that signed off, and was  
notarized I might add BY THE SAME NOTARY, on the Presidents Satisfaction of Mortgage?

Let's compare...

CHASE HOME FINANCE LLC

S/B/M CHASE MANHATTAN MORTGAGE CORPORATION

By:



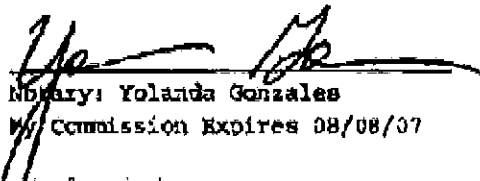
Marshe Craine

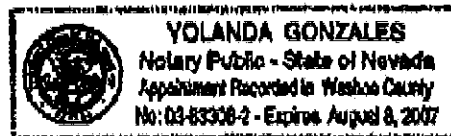
[www.4closureFraud.org](http://www.4closureFraud.org)

Hmmm. I'm no handwriting expert but...

Let' clarify if the same person notarized these documents...

Obama Notary

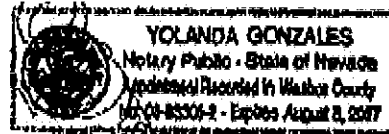
  
Notary: Yolanda Gonzales  
My Commission Expires 08/08/07



[www.4closureFraud.org](http://www.4closureFraud.org)

### Random Satisfaction Notary

  
Notary: Yolanda Gonzales  
My Commission Expires: 08/08/07



[www.4closureFraud.org](http://www.4closureFraud.org)

Looks the same to me on the notary, so if these signatures turn out to be different, she is LYING on one of them, but hey, no big deal, it is just a "technicality", right?

Not convinced yet?

Okay, let's dig deeper...

Let's see if this "Vice President" Marshe Craine is a MERS agent as well.

Yep...

**MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC**  
**as nominee for ADVANTAGE MORTGAGE INC**

[www.4closureFraud.org](http://www.4closureFraud.org)

By: \_\_\_\_\_

  
Marshe Craine  
Vice President

Oh, much better, that signature is much closer to the signature on the President's Satisfaction of mortgage...



I feel much better now, don't you?

Was getting a little nervous there for a second...

Didn't MERS just come out with some statement about how they weren't involved in any fraud or something like that?


Oh yea they did...

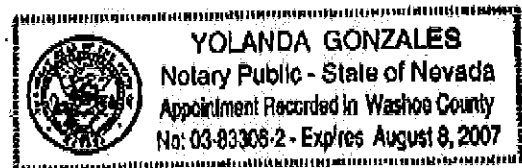
**Statement by CEO of Mortgage Electronic Registration Systems (MERS) "The MERS System is not fraudulent, and MERS has not committed any fraud."**

Statement by CEO of Mortgage Electronic Registration Systems (MERS) RESTON, Va.-(EON: Enhanced Online News)-Mortgage Electronic Registration Systems (MERS) Chief Executive Officer R.K. Arnold today issued the following statement regarding the organization and clarifying certain aspects of its operations: "The MERS System is not fraudulent, and MERS has not committed any fraud." "MERS is one important ... [Read more](#)


Anyway, it is a good thing it was the same notary again or we would be in big trouble...

**www.4closureFraud.org**

  
Notary: Yolanda Gonzales  
My Commission Expires 08/08/07



Here is another one just for fun now as a Chase VP...

**Paid and Satisfied**  
Chase Home Finance LLC  
Chase Manhattan Mortgage Corporation  
Chase Mortgage Co. - West  
  
BY: Marsha Graine  
ON: 8.29.05  
Vice President  
**PAID IN FULL**  
NORTH CAROLINA - ORANGE COUNTY  
**www.4closureFraud.org**  
All notes tied to one recorded and satisfied in full

So you see, this whole Foreclosure-Gate crisis has nothing to do with the "deadbeat" borrowers, it never has.

It has to do with the complete lack of the respect of the law by the banking industry.

They got away with it up until now and are trying their damndest to paper over their crimes.

( It is time to say no more...

They tricked all of us, even you Mr. President, and completely disregarded the basic laws of this country to make a buck.

I have been beating this drum, along with a few others, for years now and it is time to come to an end.

Mr President, now that you have had the fraud perpetrated on you personally, what are you going to do about it?

The system is broken and the foreclosures need to be stopped NOW.

It is actually worse than you can imagine...

Feel free to call or email me to discuss this further, Mr President.

All documents supporting the screen shots above are available to the media upon request.

The first national news media outlet that chooses to report this to the American Public will get an exclusive on a similar issue effecting another one of the President's mortgages...

( It is just as interesting, if not better than the above...

# More Yves, This Time on The Real Story Behind the Missing Notes: Sort of...

28 September 2010

Produce the Note; not so simple when the note was destroyed...  
No electronic signatures permitted... Max Gardner and his BK attorneys army...  
Original notes all still with the original lenders? That could also be the case...  
Really? “We never transferred the paper” – really?

Fabricated documents are the only way out? Could be...

## **FUBAR Mortgage Behavior: Florida Banks Destroyed Notes; Others Never Transferred Them**

from [naked capitalism](#) by Yves Smith

Before we get to the meat of the post, I have a fun project for readers. Just as “whocoulddanode” has become inextricably linked to the excuses for the failure to see the housing crisis coming, we need a new tag phase for the hopeless tangled mess that the folks who screwed up mortgage securitizations have foisted on Americans. Conceptually, FUBAR (Fucked Up Beyond All Recognition) is accurate, but it is pretty antique as far as slang goes, so we need a new term. Ideas encouraged.

But to give readers the latest report of modern FUBAR, mortgage edition, let us continue with the sorry saga of “Where’s My Note?” For the benefit of newbies, what everyone calls a mortgage actually has two components: the note, which is the borrower IOU, and the mortgage (in some states, it’s called a deed of trust) which is the lien on the property. In 45 states, the mortgage is a mere accessory to the note; you must be the real party of interest in the note in order to foreclose.

The pooling and servicing agreement, which governs who does what when in a mortgage securitization, requires the note to be endorsed (just like a check, signed by one party over to the next), showing the full chain of title, and the minimum conveyance chain is A (originator) => B (sponsor) => C (depositor) => D (trust). The endorsements also have to be wet ink; no electronic signatures permitted.

I’ve had a lot of anecdotal evidence to support the idea that these procedures, which were created in the early days of mortgage securitizations, were simply not observed on a widespread, if not a universal basis. My sense is that the breakdown

in practice was well underway by 2004, but it may have taken place earlier. For instance, a group of over 100 lawyers in a loose network around O. Max Gardner III, a North Carolina bankruptcy lawyer who has taken a serious interest in this area, now has a standing joke that the first one that finds a deal where the note was correctly endorsed must bronze it and hang it on their wall. In other words, *in none of the cases this large group has seen were the notes transferred to the trust properly.*

I've been reluctant to take as strong a stand as their collective experience suggests, but independent evidence confirms their report. One little stunner came courtesy Alan Grayson's office. In 2009, the Florida Bankers Association wrote a letter to the Florida Supreme Court objecting to some proposed rule changes for foreclosure cases. The full text of the letter is [here](#). The critical section:

The reason "many firms file lost note counts as a standard alternative pleading in the complaint" is because the physical document was deliberately eliminated to avoid confusion immediately upon its conversion to an electronic file. See *State Street Bank and Trust Company v. Lord*, 851 So. 2d 790 (Fla. 4th DCA 2003). Electronic storage is almost universally acknowledged as safer, more efficient and less expensive than maintaining the originals in hard copy, which bears the concomitant costs of physical indexing, archiving and maintaining security. It is a standard in the industry and becoming the benchmark of modern efficiency across the spectrum of commerce—including the court system.

This is highly entertaining, because the excuse is "oh we destroyed the note, so our standard practice is to use a lost note affidavit." If this was really as widespread as the Florida Bankers Association suggests, they are in a whole heap of trouble, because in most (if not all) jurisdictions, original notes with proper wet ink endorsements are required. And in states that are serious about proper procedure (South Carolina, for instance), judges are not going to have much sympathy with the use of a lost note affidavit when the note was destroyed.

But while it is clear the notes weren't handled properly, I'm not certain that this electronic scanning story is accurate either (meaning it isn't standard practice in mortgage land). In plenty of cases, plaintiffs come up with collateral files with hard copies of documents in them, albeit including suspiciously helpful ones that appear miraculously at the last minute.

At least in private label deals (meaning non Freddie and Fannie), it appears instead that the notes are back with the originator, never endorsed as required in the

pooling and servicing agreement, and are transferred out when needed. We provided a report that suggests [all the notes from Countrywide deals are still with Countrywide](#), even though it securitized 96% of the mortgages it originated. We got even stronger confirmation over the weekend.

One of my colleagues had a long conversation with the CEO of a major subprime lender that was later acquired by a larger bank that was a major residential mortgage player. This buddy went through his explanation of why he thought mortgage trusts were in trouble if more people wised up to how they had messed up with making sure they got the note. The former CEO was initially resistant, arguing that they had gotten opinions from top law firms. My contact was very familiar with those opinions, and told him how qualified they were, and did not cover the little problem of not complying with the terms of the pooling and servicing agreement. He also rebutted other objections of the CEO. They guy then laughed nervously and said, **“Well, if you’re right, we’re fucked. We never transferred the paper. No one in the industry transferred the paper.”**

This creates a lot of problems. If the originator is bankrupt (New Century, IndyMac), the bankruptcy trustee is supposed to approve any assets leaving the BK’d estate. I’m told bankruptcy judges who have been asked were not happy to hear this sort of thing might be taking place, which strongly suggests this activity is going on without the requisite approvals. And who from the BK’d entity can endorse it over? It doesn’t have any more officers or employees. Similarly, a lot of the intermediary entities (the B and C in the A-B-C-D chain earlier) are long dead. How do you obtain their endorsements?

Now you understand why everyone is resorting to fabricated documents and bogus affidavits. There is no simple way to fix this mess. The cure for the mortgage documents puts the loan out of eligibility for the trust. In order to cure, on a current basis, they have to argue that the loan goes retroactively back into the trust. This is the cure that the banks have been unwilling to do, because it is a big problem for the MBS.

The former subprime lender CEO still refused this to consider this a problem: “Oh, Congress will pass a law.” My colleague pointed out that this was a state law matter, Congress had no authority, and even the Supreme Court was unlikely to intervene in well settled real estate law. The arguments from the CEO were distressingly familiar, bank industry incumbents seem to resort to the same script: any borrower friendly solution will wreck the economy, the banks will have to get another bailout to get themselves out of this mess.

So here we are back to 2007-8. If you and I make a serious mistake at our jobs, we get fired, and if we make a really serious error, our company could perish. But when bankers screw up, and leave a lot of collateral damage in their wake, they are confident that their sugar daddies in DC will clean up the mess for them.

And the worse is they might even be correct if we let them get away with it this time.

**Oct. 4, 2010**

## **LPS Comments on Recent Mischaracterizations of Its Services**

JACKSONVILLE, Fla. – October 4, 2010 – LPS is issuing this statement in response to recent mischaracterizations in the media regarding the default-related services LPS provides to mortgage lenders/servicers. Specifically, recent concerns have focused on foreclosure issues related to the execution of affidavits containing substantive borrower information and the preparation of assignments of mortgage.

LPS has not executed affidavits containing substantive borrower information on behalf of its lender/servicer clients since September 2008. When LPS performed this service, affidavits were prepared and provided by the lenders' or servicers' attorneys. These affidavits were then executed by LPS consistent with industry practice, under corporate resolution. LPS had processes in place to ensure the information in the affidavits was validated and that the affidavits were signed properly.

In reference to assignments of mortgage, LPS has made previous statements regarding its document preparation subsidiary, Docx, LLC. This small subsidiary (less than one percent of LPS' revenue) prepared assignments of mortgage for two lenders/servicers between 2008 and 2009. Docx did not prepare or execute affidavits containing substantive borrower information and no longer provides document preparation services.

During its operation, when lenders/servicers or their attorneys requested that Docx prepare an assignment of mortgage, the lenders/servicers or their attorneys provided the necessary borrower information, which was downloaded by Docx employees into a pre-approved document template. The document was then printed and either signed by the lender/servicer or Docx, pursuant to corporate resolution. Docx did not determine whether these documents were then used in a court proceeding – those decisions were made solely by the lenders/servicers or their attorneys.

There have also been reports in the media regarding varying signature styles on assignments of mortgage. The varying signature styles resulted from a decision made by the manager of Docx to allow an employee to sign an authorized employee's name with his or her express written consent. LPS was unaware of this practice. As previously reported, upon learning of it, LPS immediately took remedial actions to correct all assignments of mortgage signed in this manner and provided these corrected assignments of

mortgage to the two lender/servicer clients or their attorneys. LPS continues to believe this will not have a material adverse impact on its business or results of operations.

#### About Lender Processing Services

Lender Processing Services, Inc. (LPS) is a leading provider of integrated technology and services to the mortgage and real estate industries. LPS offers solutions that span the mortgage continuum, including lead generation, origination, workflow automation (Desktop), servicing, portfolio retention and default, augmented by the company's award-winning customer support and professional services. Approximately 50 percent of all U.S. mortgages by dollar volume are serviced using LPS's Mortgage Servicing Package (MSP). LPS also offers proprietary mortgage and real estate data and analytics for the mortgage and capital markets industries. For more information about LPS, visit [www.lpsvcs.com](http://www.lpsvcs.com).

#### Forward-Looking Statements

This press release contains forward-looking statements that involve a number of risks and uncertainties. Those forward-looking statements include all statements that are not historical facts, including statements about our beliefs and expectations. Forward-looking statements are based on management's beliefs, as well as assumptions made by and information currently available to management. Because such statements are based on expectations as to future economic performance and are not statements of historical fact, actual results may differ materially from those projected. We undertake no obligation to update any forward-looking statements, whether as a result of new information, future events or otherwise. The risks and uncertainties to which forward-looking statements are subject include, but are not limited to: our ability to adapt our services to changes in technology or the marketplace; the impact of adverse changes in the level of real estate activity on demand for certain of our services; our ability to maintain and grow our relationships with our customers; the effects of our substantial leverage on our ability to make acquisitions and invest in our business; changes to the laws, rules and regulations that regulate our businesses as a result of the current economic and financial environment; changes in general economic, business and political conditions, including changes in the financial markets; the impact of any potential defects, development delays, installation difficulties or system failures on our business and reputation; risks associated with protecting information security and privacy; and other risks and uncertainties detailed in the "Statement Regarding Forward-Looking Information," "Risk Factors" and other sections of the Company's Form 10-K, the Company's subsequent reports on Form 10-Q and other filings with the Securities and Exchange Commission.



**Investor Contact:** Parag Bhansali, 904.854.8640,  
[parag.bhansali@lpsvcs.com](mailto:parag.bhansali@lpsvcs.com)

**Media Contact:** Michelle  
Kersch, 904.854.5043, [michelle.kersch@lpsvcs.com](mailto:michelle.kersch@lpsvcs.com)

# Industry Letter

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To: Freddie Mac Servicers

October 1, 2010

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## **SUBJECT: FORECLOSURE PROCEEDINGS**

Freddie Mac is deeply concerned by recent news articles which report that affidavits used in foreclosure proceedings may have been executed inappropriately and without proper notarization. The practices described in these reports violate both applicable law and Freddie Mac's contractual Servicing requirements as set forth in the Freddie Mac *Single-Family Seller/Servicer Guide* ("Guide").

Through this Industry Letter, Freddie Mac seeks to reinforce our commitment to safeguarding the legal rights of Borrowers. We are also reaffirming our focus on protecting the integrity of the foreclosure process. Accordingly, Freddie Mac is requiring Servicers to review their Servicing operations to verify the adequacy of their processes regarding the execution of affidavits and to notify Freddie Mac of any identified deficiencies.

### **Process review**

Each Servicer must conduct a review of its Servicing operations with respect to Freddie Mac foreclosures which are either: a) currently pending or b) within the applicable judgment review period in each State.

Specifically, the Servicer must determine whether:

- The Servicer's policies, procedures and processes were and continue to be adequate to ensure that the affidavits executed in connection with these proceedings are in compliance with applicable law, including that the individuals signing the affidavits ("Affiant") had personal knowledge of the facts and that signatures were properly notarized; and
- The Servicer's employees and/or third parties responsible for executing affidavits supplied by the Servicer in these proceedings followed the above-described policies, procedures and processes, including those which required the Affiant to have personal knowledge of the facts and those which required proper notarization. If the Servicer cannot reasonably communicate with any such employee or third party directly, the Servicer should verify this information with the employee's or third party's former supervisor, to the extent possible.

### **Notification**

The Servicer must complete its review by **October 18, 2010**.

In the event that the Servicer's review creates any question as to whether: 1) its policies, procedures or processes regarding the execution of affidavits were adequate to ensure compliance with both applicable law and Freddie Mac's Servicing requirements, or 2) its employees and/or third parties followed the proper policies, procedures and processes, the Servicer must immediately notify Freddie Mac at [SRPMconfirmations@FreddieMac.com](mailto:SRPMconfirmations@FreddieMac.com) or (800) FREDDIE (and select "Servicing").

The Servicer must also remedy any deficiencies identified in order to ensure compliance with applicable law and Freddie Mac's Servicing requirements.

Freddie Mac reserves all rights and remedies available to it under the Guide and other Purchase Documents.

Sincerely,



Tracy Mooney  
Senior Vice President  
Servicer Relationship & Performance Management



1761 East St. Andrew Place  
Santa Ana, CA 92705-4934

Tel 714 247 6000  
Fax 714 247 6009

TO: ALL HOLDERS OF RESIDENTIAL MORTGAGE BACKED SECURITIES FOR WHICH  
DEUTSCHE BANK NATIONAL TRUST COMPANY OR DEUTSCHE BANK TRUST  
COMPANY AMERICAS ACTS AS SECURITIZATION TRUSTEE

FROM: DEUTSCHE BANK TRUST NATIONAL TRUST COMPANY, AS TRUSTEE AND  
DEUTSCHE BANK TRUST COMPANY AMERICAS, AS TRUSTEE (the "Trustee")

Date: October 25, 2010

Re: Certain Allegations Regarding Loan Servicer Foreclosure Practices

As widely reported in the news media, several major U.S. loan servicers reportedly have suspended certain foreclosures in some or all states due to allegations and investigations pertaining to alleged deficiencies in legal documents filed by them in certain foreclosure proceedings (the "Alleged Deficiencies").

The Trustee is aware of these reports and has communicated with loan servicers regarding the matter. Specifically, the Trustee issued, on October 8, 2010, the attached memorandum to all loan servicers for U.S. residential mortgage backed securities trusts for which it acts as Trustee, among other things, demanding that servicers comply with all applicable laws relating to foreclosures. The Trustee also has communicated with certain loan servicers that have announced suspensions of foreclosure activity to request additional information about the portfolios that they service on behalf of the trusts and the extent, if any, to which such suspensions and the Alleged Deficiencies may affect loans held by the trusts.

The Trustee reminds investors that the governing documents for securitization trusts typically allow holders of a requisite percentage in principal amount of securities to direct the time, place and manner of any remedial actions by the Trustee, subject to conditions stated in the governing documents. In that regard, any such instructions or other communications concerning these issues should be directed to the Trustee at the following address:

Deutsche Bank National Trust Company, as trustee  
Deutsche Bank Trust Company Americas, as trustee  
1761 East St. Andrew Place, Santa Ana, CA 92705-4934  
ATTN: David Co, Director

Telephone: (714) 247-6272  
email: [holder.inquiry@db.com](mailto:holder.inquiry@db.com)



1761 East St. Andrew Place  
Santa Ana, CA 92705-4934

Tel: 714-247-6000  
Fax: 714-247-6009

**URGENT AND TIME-SENSITIVE  
MEMORANDUM**

TO: SECURITIZATION LOAN SERVICERS  
FROM: DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE  
DEUTSCHE BANK TRUST COMPANY AMERICAS, AS TRUSTEE  
DATE: October 8, 2010  
RE: **Allegations Regarding Certain Servicing Foreclosure Procedures**

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Each addressee of this Memorandum (the "Servicers") services mortgage loans on behalf of one or more securitization trusts (the "Trusts") for which Deutsche Bank National Trust Company or Deutsche Bank Trust Company Americas (collectively, "Deutsche Bank") acts as trustee (in such capacity, the "Trustee"). **This Memorandum concerns an urgent issue requiring your immediate attention. A copy of this Memorandum and all attachments should be forwarded immediately to your Legal Department or General Counsel's office.**

**We write to express the Trustee's serious concern regarding allegations of potential defects in foreclosure practices, procedures and/or documentation used by certain major loan servicers and their agents (collectively, the "Alleged Foreclosure Deficiencies") that have been the subject of recent media reports. This Memorandum reiterates to all Servicers the importance of their duties and obligations relating to such matters.**

The pooling and servicing agreements or other governing documents for the Trusts (collectively, the "Governing Documents") provide that the Servicer is solely responsible for the performance of all loan-level remedial collection activity on behalf of the beneficiaries of the Trusts, including, without limitation, all foreclosure activity and all maintenance and sales of resulting REO properties. The Governing Documents typically require the Trustee to furnish the Servicer with powers of attorney that allow the Servicer to sign documents and institute legal actions, including foreclosure proceedings, in the name of the Trustee on behalf of the Trusts in connection with these servicing activities. The Governing Documents also provide that the Trustee shall not be responsible for the acts or omissions of the Servicer, including acts or omissions relating to the use or misuse of such powers of attorney.

As the Trustee has advised on more than one occasion, all Servicers and their agents (including any subservicers, subcontractors and professionals engaged by Servicers and/or by their agents) must



conduct all servicing activities, including foreclosure proceedings, in accordance with the Governing Documents and all applicable laws. Please review again, in particular, the Trustee's memoranda to all Servicers dated August 30, 2007 and July 28, 2008 (the "Prior Memoranda"), copies of which are enclosed.

Recent media reports suggest the Alleged Foreclosure Deficiencies may include the execution and filing by certain Servicers and/or their agents of potentially defective documents, possibly containing alleged untrue assertions of fact, in connection with certain foreclosure proceedings. The reported scope of such alleged practices raises the possibility that such documents may have been filed in connection with foreclosure proceedings relating to mortgage loans owned by the Trusts and may have been executed under color of one or more powers of attorney granted to Servicers pursuant to the Governing Documents. Any such actions by a Servicer or its agents would constitute a breach of that Servicer's obligations under the Governing Documents and applicable law.

In light of these recent developments, the Trustee demands that each Servicer (including its agents), immediately:

- **Inform the Trustee of: (i) any Alleged Foreclosure Deficiencies relating to mortgage loans serviced by the Servicer on behalf of the Trusts; and (ii) any suspensions by the Servicer of foreclosure proceedings relating to mortgage loans serviced by the Servicer on behalf of the Trusts due to any such Alleged Foreclosure Deficiencies.**
- **Cease and desist from taking any unlawful or improper action with respect to the servicing of Trust assets, including, but not limited to, making any false or misleading statements in any filing, notice, document or paper of any kind.**
- **Cease and desist from executing any document on behalf of the Trustee or on behalf of any Trust, under any power of attorney or otherwise, unless and until the Servicer and its agents have: (a) verified that all statements in such document are true, complete and correct; and (b) determined that the execution and filing of such document are in full compliance with all applicable laws, rules and regulations, including all applicable rules of court.**
- **Cease and desist from executing any document in a manner that indicates or suggests that the signatory is an officer or employee of the Trustee.<sup>1</sup>**
- **Require each of its agents to comply with the foregoing demands and all legal requirements applicable to any services that they perform on behalf of the Trusts.**

**Please be advised the Trustee will require each Servicer to indemnify and hold harmless Deutsche Bank, individually and in its capacity as Trustee, the Trusts and the investors in the**

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<sup>1</sup> The requirement that Servicers execute and file documents in a manner that properly describes their representative capacity was addressed specifically in the Prior Memoranda.

Memorandum to Servicers  
October 8, 2010  
Page 3 of 3

**Trusts from all liability, loss, cost and expense of any kind (including attorneys' fees and costs) arising directly or indirectly from any Alleged Foreclosure Deficiencies or from any other alleged acts or omissions of the Servicer and/or its agents relating to any servicing activities in breach or violation of the Governing Documents and/or applicable law, including, without limitation, any liability, loss, cost or expense arising from any related legal proceedings and government or regulatory investigations. The cost of any such indemnification and any remedial actions by a Servicer in respect of any Alleged Foreclosure Deficiencies or any other servicing activities in breach or violation of the Governing Documents and/or applicable law must be paid by the Servicer out of its own funds and should not be charged by any Servicer against any Trust. The Trustee reserves, and does not waive, any other rights or remedies that it and/or the Trusts may have under the Governing Documents regarding these matters.**

All correspondence and questions regarding this matter should be directed to David Co, Director, at [david.co@db.com](mailto:david.co@db.com) or by telephone at (714) 247-6272.

Thank you for your cooperation.

**DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee**  
**DEUTSCHE BANK TRUST COMPANY AMERICAS, as Trustee**





MEMORANDUM

TO: SECURITIZATION LOAN SERVICERS

FROM: DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE  
DEUTSCHE BANK TRUST COMPANY AMERICAS, AS TRUSTEE

DATE: July 28, 2008

RE: Advisory Concerning Servicing Issues Affecting Securitized Housing Assets

Each addressee of this Memorandum services mortgage loans on behalf of one or more securitization trusts (the "Trusts") for which Deutsche Bank National Trust Company or Deutsche Bank Trust Company Americas act as trustee (the "Trustee"). This memorandum focuses on certain issues relating to servicing practices that have come to the attention of the Trustee since the issuance of its Memorandum to Securitization Loan Servicers dated August 30, 2007 (the "First Servicer Memorandum"—copy enclosed). Because the issues addressed in the First Servicer Memorandum continue to be relevant in the current servicing environment, the Trustee respectfully requests that all servicers review the First Servicer Memorandum and adhere to the practices that it describes, as well as those described in this Memorandum.

The continued distressed state of residential real estate markets has placed increased burdens on all parties involved in the loss mitigation process, including servicing personnel, third-party contractors and professionals engaged by servicers, government agencies, and borrowers. In addition, the increased numbers of delinquencies and foreclosures, and resulting financial losses, have led to a climate in which the performance of securitization parties is being scrutinized carefully by various constituencies.

Against this background, the Trustee therefore asks that all servicers servicing loans on behalf of the Trusts remain particularly mindful of the following issues.

**(1) Foreclosure Procedures: Proof of "Ownership" of Loans.** As stated in the First Servicer Memorandum, servicers must exercise diligence to assure that they conduct *all* foreclosures and other actions with respect to REO properties (including actions affecting tenants of such properties) in compliance with all federal, state, and local laws, rules, regulations and court procedures. In recent months, it has been reported that the number of contested foreclosure proceedings has substantially increased nationwide. In the

## Securitization Servicers

July 28, 2008

Page 2 of 4

context of these adversarial proceedings, some courts are demanding that the party seeking to foreclose prove “ownership” and other particulars of loans earlier in the proceedings, and with more exacting standards of proof, than has previously been customary. Other courts are evaluating the propriety of various other servicing, foreclosure, and workout practices. Because loan servicers have contractual obligations to handle workouts and foreclosures in compliance with law and in accordance with industry standards, they must make sure that all servicing personnel and professionals handling foreclosures on behalf of the Trusts, including legal counsel retained by servicers, fully understand and comply with these changing standards and legal requirements. Failure to do so may result in servicer liability to the Trusts for losses caused by delays or, in some situations, forfeiture of collateral.

In this regard, the Trustee is concerned that servicers make clear to their servicing personnel and other professionals, including legal counsel retained by servicers, that securitization trusts typically become the owners of, and take title to, mortgage loans at the time the securitization trusts are formed. While the use of powers of attorney to complete recorded chains of title may be appropriate in some circumstances, servicers must take care not to confuse the record regarding the time at which securitization trusts actually first obtain legally enforceable rights in the mortgage loans. Servicers must ensure that loss mitigation personnel and professionals engaged by servicers, including legal counsel retained by servicers, understand the mechanics of relevant securitization transactions, and related custodial practices, in sufficient detail to address such questions in a timely and accurate manner. In particular, servicing professionals must become sufficiently familiar with the terms of the relevant securitization documents for each Trust for which they act to explain and, where necessary, prove those terms and the resulting ownership interests to courts and government agencies.

### **(2) Proper Description of the Servicer, the Trustee and their Roles in Proceedings.**

Servicers act for the benefit of the Trusts, and in the name of the Trustee, but are not themselves the Trustee. Servicing professionals and other agents engaged by servicers have adopted widely varying approaches to identifying the source of their authority. Some say they represent “the servicer,” others say they represent “the trustee” or “the trust,” and some simply say they represent “the bank” or “the lender.” These disparate practices have caused significant confusion regarding the roles of the parties to securitization transactions. The Trustee believes that all persons retained by the servicer should accurately identify the specific role or capacity in which they are acting. For example, an attorney for a servicer foreclosing on a property mortgaged to a securitization Trust would be less accurate in this respect if he or she claimed to be “[Name], Attorney for [Name of Trustee].” A more accurate statement would be “[Name], Attorney for [Servicer Name], Acting for [Name of Trustee] as Trustee of the [Name of Trust]”. In no event should servicer-retained foreclosure professionals, including counsel, mislead third parties, including courts, into believing that the Trustee directly controls the foreclosure process or any related litigation process. In addition, the Trustee should never be described as the party who “made” or is in “in the business of



## Securitization Servicers

July 28, 2008

Page 3 of 4

making/securitizing” loans. Such descriptions inaccurately reflect the role of a securitization trustee and may expose the Trusts and the Trustee to unwarranted legal liability and expense.

**(3) Maintenance of REO Properties.** The Trustee has received a number of inquiries and complaints from government officials and community groups about the physical condition of REO properties. Such inquiries and complaints also are receiving increasing attention from the media, law enforcement agencies, and courts. Under standard securitization documentation, loan servicers are expressly responsible for managing all aspects of the REO disposition process, including appropriate maintenance of REO properties. Failure to fulfill these responsibilities may expose the Trusts to financial losses, potentially depressing the value of Trust property and exposing the Trusts to legal and financial liability. Because title to REO properties typically includes the name of the Trustee institution, these failures also expose the Trustee to legal claims and reputational harm. To protect against such consequences, which are likely to give rise to indemnification claims against servicers, the Trustee urges servicers to exercise heightened diligence with respect to REO maintenance and disposition. In addition, we urge Servicers to engage property managers who will take proactive steps to protect REO properties, especially when they are vacant for extended periods of time.

**(4) Tracking and Engaging in Public-Private Initiatives.** The Trustee urges servicers to stay abreast of and, where appropriate, participate in, governmental policy discussions and rule-making processes that may affect servicing activities. Given the widespread misunderstanding of how securitization transactions work, servicers, trustees, and other financial institutions involved in the administration of securitization transactions should seek to educate others appropriately about the rights and responsibilities of the parties to these transactions. Without adequate understanding and sensitivity to these issues, officials may adopt rules or policies that adversely affect the interests of securitization investors. Active participation in government-industry discussions of these issues may help avert such outcomes. Shortly after the issuance of the First Servicer Memorandum, federal and state banking regulators issued their “Statement on Loss Mitigation Strategies for Servicers of Residential Mortgages.” In addition, in December 2007, the American Securitization Forum, in consultation with U.S. Treasury officials, promulgated the “Streamlined Foreclosure and Loss Avoidance Framework for Securitized Subprime Adjustable Rate Mortgage Loans.” Both of these documents reflect the kind of careful balancing of policy objectives and contract rights that can be achieved by engaging in responsible substantive discussions with affected constituencies. In addition, the Trustee urges servicers to exercise diligence and, where appropriate, involve or cooperate with law enforcement agencies regarding a variety of unethical and, in some cases, illegal real estate transaction schemes targeting distressed borrowers. In particular, servicers should be on the lookout for third parties who: (a) seek private data concerning borrowers, loans or loan portfolios without proper authorization or (b) purport to act based on an asserted affiliation or association with the servicer, the Trustee or the Trusts. Such practices may subject borrowers, servicers, the Trustee and the Trusts to financial and reputational harm.

Securitization Servicers  
July 28, 2008  
Page 4 of 4

The Trustee believes that adherence to the foregoing recommendations on a consistent basis will not only protect the interests of investors, but benefit all constituencies by minimizing misunderstandings that impede timely and fair resolution of foreclosure matters.

Thank you for your cooperation.

**DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee**  
**DEUTSCHE BANK TRUST COMPANY AMERICAS, as Trustee**

Deutsche Bank



1761 East St. Andrew Place  
Santa Ana, CA 92705-4934

Tel 714 247 6000  
Fax 714 247 6009

## MEMORANDUM

TO: SECURITIZATION LOAN SERVICERS

FROM: DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE  
DEUTSCHE BANK TRUST COMPANY AMERICAS, AS TRUSTEE

DATE: August 30, 2007

RE: Compliance With Laws, Rules and Regulations In Connection With  
Foreclosures On Securitized Assets; Attentiveness to Certain Community  
and Governmental Concerns; Proper Description Of Legal Capacities

Each of the addressees of this memorandum services mortgage loans on behalf of one or more securitization trusts (the "Trusts") for which Deutsche Bank National Trust Company ("DBNTC") or Deutsche Bank Trust Company Americas ("DBTCA") act as trustee (the "Trustee").

As you are no doubt aware, due to current real estate market conditions, the number of foreclosures and REO properties resulting from foreclosures on securitized mortgage loans is rising sharply. In the case of properties that contain rental units, foreclosure activities sometimes result in eviction of existing tenants, who may otherwise lawfully occupy some or all of the premises. Such evictions are drawing attention and policy responses from public officials and community organizations, who are expressing concerns about the significant hardship being imposed on tenants, including low-income families, who may be dislocated in the mortgage foreclosure process and about the potential deterioration of neighborhoods surrounding vacant properties.

In light of these developments, the Trustee respectfully requests that all servicers servicing loans on behalf of the Trusts:

- a) Exercise diligence to assure that all foreclosures and all actions with respect to REO properties (including actions affecting tenants on such properties) are conducted in compliance with all federal, state and local rules and regulations, particularly those relating to furnishing timely notices to affected parties;
- b) Consider developing working relationships with local housing officials and appropriate community organizations to address public concerns regarding foreclosure and eviction proceedings that might otherwise lead to public responses that might impede



the realization of value on the Trusts' mortgage loans and REO properties. Such relationships may result in creative solutions (including, where appropriate, consideration of sales of REO properties to non-profit or government sponsored organizations) that reduce the impact of foreclosures on neighborhoods, enhancing the value of Trust assets;

c) To the extent permitted by applicable securitization documents, exercise sound discretion in evaluating whether or not eviction of tenants otherwise lawfully occupying Trust REO properties will maximize the realization of value on Trust assets; if eviction will not enhance the marketability or resale value of Trust REO properties, maintaining occupancy may preserve affected neighborhoods and thereby support the value of REO property; and

d) At all times properly identify your representative capacity, as servicer, and DBNTC's or DBTCA's capacity "as Trustee of [insert name of relevant Trust]" in all notices, pleadings, correspondence or other documents relating to the mortgage loans, REO properties and other Trust assets. Title to properties should never be held, and notices concerning properties should never be issued, in DBNTC's or DBTCA's name without identification of our trustee capacity.

We believe that these "good housekeeping" principles can help create a "win-win" situation for investors and communities, and provide a model for harmonizing corporate responsibility with our legal duty to protect the interests of securities investors. Attentiveness to governmental and community concerns about the impacts of foreclosure and eviction activities on neighborhoods promotes healthy, stable communities and may maximize the value of Trust assets in those neighborhoods and reduce remedial costs. This approach is also consistent with the federal financial institutions regulatory agencies' April 18, 2007, Statement on Working with Mortgage Borrowers:<sup>1</sup>

The federal financial institutions regulatory agencies encourage financial institutions to work constructively with residential borrowers who are financially unable to make their contractual payment obligations on their home loans. Prudent workout arrangements that are consistent with safe and sound lending practices are generally in the long-term best interest of both the financial institution and the borrower.

In order to help facilitate implementation of this approach, the Trustee is prepared to participate with servicers in ongoing public dialogue with public officials and community groups in an effort to address the concerns that they have raised.

Thank you for your cooperation.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee  
DEUTSCHE BANK TRUST COMPANY AMERICAS, as Trustee

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<sup>1</sup> The federal financial institutions regulatory agencies are the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision.

# Senate and House Hearings



**Hearing on: Foreclosed Justice: Causes and Effects of the Foreclosure Crisis**  
**Thursday 12/02/2010 - 10:00 a.m.**  
**2141 Rayburn House Office Building**  
**Full Committee**  
**By Direction of the Chairman**

## **Witness List**

### **Panel I**

#### **Phyllis R. Caldwell**

Chief  
Homeownership Preservation Office  
Department of the Treasury  
Washington, DC

#### **Edward J. DeMarco**

Acting Director  
Federal Housing Finance Agency  
Washington, DC

#### **Julie L. Williams**

Chief Counsel  
Office of the Comptroller of the Currency  
Department of the Treasury  
Washington, DC

#### **Hon. F. Dana Winslow**

Supreme Court Justice  
New York State Supreme Court  
Mineola, NY

### **Panel II**

#### **James A. Kowalski, Jr.**

Law Offices of James A. Kowalski, Jr., PL  
Jacksonville, FL

**Joseph R. Mason, Ph.D.**

Hermann Moyse, Jr./Louisiana Bankers Association Endowed Chair of Banking  
Ourso School of Business  
Louisiana State University  
Baton Rouge, LA

**Thomas A. Cox**

Volunteer Program Coordinator  
Main Attorneys Saving Homes Project  
Portland, ME

**Vanessa G. Fluker**

Vanessa G. Fluker, Esq., PLLC  
Detroit, MI

**Tom Deutsch**

Executive Director  
American Securitization Forum  
New York, NY

**Christopher L. Peterson**

Associate Dean for Academic Affairs/Professor of Law  
S.J. Quinney College of Law  
University of Utah  
Salt Lake City, UT



**Statement of:**

**Tom Deutsch  
Executive Director  
American Securitization Forum**

**Testimony before the:  
United States House of Representatives  
Committee on the Judiciary**

**Hearing on:**

**Foreclosed Justice: Causes and Effects of the Foreclosure Crisis**

**December 2, 2010**



Chairman Conyers, Ranking Member Smith, Members of the Committee, my name is Tom Deutsch and as the Executive Director of the American Securitization Forum, I appreciate the opportunity to testify here today on behalf of the 330 ASF member institutions who originate the collateral, structure the transactions, serve as trustees, trade the bonds, service the loans and invest the capital in the preponderance of residential mortgage- and asset-backed securities (“RMBS”) and (“ABS”) in the United States, including those backed entirely by private capital as well as those guaranteed by Ginnie Mae and the government sponsored enterprises (“GSEs”) such as Fannie Mae and Freddie Mac.

In this testimony, we seek first to highlight some of the key aspects of securitization as well as its importance to the U.S. and global economy. Subsequently, we seek to address the concerns raised by a few commentators that the banking and housing markets may be subject to additional systemic risk because securitization trusts may not actually own the trillions of dollars of mortgages that are supposed to be contained within those trusts. In addition to introducing the white paper that ASF issued two weeks ago, we also examine a number of the new concerns that have been raised since the introduction of that white paper. In particular, we discuss and provide detailed background for four key components of valid loan transfers, including:

- A. PSAs meet the requirement for a “complete” or “unbroken” chain of indorsement<sup>1</sup>;
- B. securitization trusts comply with New York trust law;
- C. RMBS trusts effectively achieve REMIC status; and
- D. mistakes do not affect validity of transfer.

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<sup>1</sup> Note that the Uniform Commercial Code replaces the more common U.S. spelling of “endorsement” for the less common “indorsement.” The UCC spelling is used throughout this testimony for consistency.

Ultimately, we find that the conventional process for loan transfers embodied in standard legal documentation for mortgage securitizations has been adequate and appropriate to transfer ownership of mortgage loans to the securitization trusts in accordance with applicable law and contract. Since loan transfers have generally been effective, all of the dire consequences that a few commentators have speculated on fade away, given the faulty premise that they start from. Moreover, a number of the concerns that have been raised that securitization professionals have uniformly opted out of use of laws such as the Uniform Commercial Code (“UCC”) to set a higher bar for transfers, but then subsequently and systematically failed to meet that higher bar, appear on their face to be illogical assertions and patently false.

**I. Role and Importance of Securitization to the Financial System and U.S. Economy**

Securitization—generally speaking, the process of pooling and financing consumer and business assets in the capital markets by issuing securities, the payment on which depends primarily on the performance of those underlying assets—plays an essential role in the financial system and the broader U.S. economy. Over the past 40 years, securitization has grown from a relatively small and unknown segment of the financial markets to a mainstream source of credit and financing for individuals and businesses alike.

In recent years, the role that securitization has assumed in providing both consumers and businesses with credit is striking: currently, there is over \$12 trillion of outstanding securitized assets, including RMBS, ABS and asset-backed commercial paper (“ABCP”). This represents a market nearly double the normal size of all outstanding marketable U.S. Treasury securities—

bonds, bills, notes, and TIPS combined.<sup>2</sup> Between 1990 and 2006, issuance of MBS grew at an annually compounded rate of 13%, from \$259 billion to \$2 trillion a year.<sup>3</sup> In the same time period, issuance of ABS secured by auto loans, credit cards, home equity loans, equipment loans, student loans and other assets, grew from \$43 billion to \$753 billion. In 2006, just before the downturn, nearly \$2.9 trillion in RMBS and ABS were issued. As these data demonstrate, securitization is clearly an important sector of today's financial markets.

The importance of securitization becomes more evident by observing the significant proportion of consumer credit it has financed in the U.S. It is estimated that securitization has funded between 30% and 75% of lending in various markets, including an estimated 59% of outstanding home mortgages.<sup>4</sup> Securitization plays a critical role in non-mortgage consumer credit as well. Historically, banks securitized 50-60% of their credit card assets.<sup>5</sup> Meanwhile, in the auto industry, a substantial portion of automobile sales are financed through auto ABS.<sup>6</sup> Overall, recent data collected by the Federal Reserve Board show that securitization has provided over 25% of outstanding U.S. consumer credit.<sup>7</sup> Securitization also provides an important source of commercial mortgage loan financing throughout the U.S., through the issuance of commercial mortgage-backed securities ("CMBS").

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<sup>2</sup> U.S. Department of the Treasury, "Monthly Statement of the Public Debt of the United States: August 31, 2009," (August 2009). < <http://www.treasurydirect.gov/govt/reports/pd/mspd/2009/opds082009.pdf>>.

<sup>3</sup> National Economic Research Associates, Inc. (NERA), "Study of the Impact of Securitization on Consumers, Investors, Financial Institutions and the Capital Markets," pg. 16 (June 2009). <[http://www.americansecuritization.com/uploadedFiles/ASF\\_NERA\\_Report.pdf](http://www.americansecuritization.com/uploadedFiles/ASF_NERA_Report.pdf)>.

<sup>4</sup> Citigroup, "Does the World Need Securitization?" pg. 10-11 (Dec. 2008). <[http://www.americansecuritization.com/uploadedFiles/Citi121208\\_restart\\_securitization.pdf](http://www.americansecuritization.com/uploadedFiles/Citi121208_restart_securitization.pdf)>.

<sup>5</sup> Ibid., pg. 10.

<sup>6</sup> Ibid., pg. 10.

<sup>7</sup> Federal Reserve Board of Governors, "G19: Consumer Credit," (September 2009). <<http://www.federalreserve.gov/releases/g19/current/g19.htm>>.

Over the years, securitization has grown in large measure because of the benefits and value it delivers to transaction participants and to the financial system. Among these benefits and value are the following:

1. *Efficiency and Cost of Financing.* By linking financing terms to the performance of a discrete asset or pool of assets, rather than to the future profitability or claims-paying potential of an operating company, securitization often provides a cheaper and more efficient form of financing than other types of equity or debt financing.
2. *Incremental Credit Creation.* By enabling capital to be recycled via securitization, lenders can obtain additional funding from the capital markets that can be used to support incremental credit creation. In contrast, loans that are made and held in a financial institution's portfolio occupy that capital until the loans are repaid.
3. *Credit Cost Reduction.* The economic efficiencies and increased liquidity available from securitization can serve to lower the cost of credit to consumers. Several academic studies have demonstrated this result. A recent study by National Economic Research Associates, Inc., concluded that securitization lowers the cost of consumer credit, reducing yield spreads across a range of products including residential mortgages, credit card receivables and automobile loans.<sup>8</sup>
4. *Liquidity Creation.* Securitization often offers issuers an alternative and cheaper form of financing than is available from traditional bank lending, or debt or equity financing. As

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<sup>8</sup> National Economic Research Associates, Inc. (NERA), "Study of the Impact of Securitization on Consumers, Investors, Financial Institutions and the Capital Markets," (June 2009), pg. 16.  
<[http://www.americansecuritization.com/uploadedFiles/ASF\\_NERA\\_Report.pdf](http://www.americansecuritization.com/uploadedFiles/ASF_NERA_Report.pdf)>.

a result, securitization serves as an alternative and complementary form of liquidity creation within the capital markets and primary lending markets.

5. *Risk Transfer.* Securitization allows entities that originate credit risk to transfer that risk to other parties throughout the financial markets, thereby allocating that risk to parties willing to assume it.
6. *Customized Financing and Investment Products.* Securitization allows for precise and customized creation of financing and investment products tailored to the specific needs of both issuers and investors. For example, issuers can tailor securitization structures to meet their capital needs and preferences and diversify their sources of financing and liquidity. Investors can tailor securitized products to meet their specific credit, duration, diversification and other investment objectives.<sup>9</sup>

Recognizing these and other benefits, policymakers globally have taken steps to help encourage and facilitate the recovery of securitization activity. The G-7 finance ministers, representing the world's largest economies, declared that "the current situation calls for urgent and exceptional action...to restart the secondary markets for mortgages and other securitized assets."<sup>10</sup> The Department of the Treasury stated in March, 2009 that "while the intricacies of secondary markets and securitization...may be complex, these loans account for almost half of

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<sup>9</sup> The vast majority of investors in the securitization market are institutional investors, including banks, insurance companies, mutual funds, money market funds, pension funds, hedge funds and other large pools of capital. Although these direct market participants are institutions, many of them—pension funds, mutual funds and insurance companies, in particular—invest on behalf of individuals, in addition to other account holders.

<sup>10</sup> G-7 Finance Ministers and Central Bank Governors Plan of Action (Oct. 10, 2008).  
<<http://www.treas.gov/press/releases/hp1195.htm>>.

the credit going to Main Street,”<sup>11</sup> underscoring the critical nature of securitization in today’s economy. The Chairman of the Federal Reserve Board noted that securitization “provides originators much wider sources of funding than they could obtain through conventional sources, such as retail deposits” and also that “it substantially reduces the originator’s exposure to interest rate, credit, prepayment, and other risks.”<sup>12</sup> Echoing that statement, Federal Reserve Board Governor Elizabeth Duke stated that the “financial system has become dependent upon securitization as an important intermediation tool,”<sup>13</sup> and the International Monetary Fund (IMF) noted in its *Global Financial Stability Report* that “restarting private-label securitization markets, especially in the United States, is critical to limiting the fallout from the credit crisis and to the withdrawal of central bank and government interventions.”<sup>14</sup> There is clear recognition in the official sector of the importance of the securitization process and the access to financing that it provides lenders, and of its importance to the availability of credit that ultimately flows to consumers, businesses and the real economy.

Restoration of function and confidence to the securitization markets is a particularly urgent need, in light of capital and liquidity constraints currently confronting financial institutions and markets globally. As mentioned above, at present nearly \$12 trillion in U.S. assets are funded via securitization. With the process of bank de-leveraging and balance sheet

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<sup>11</sup> U.S. Department of the Treasury, “Road to Stability: Consumer & Business Lending Initiative,” (March 2009). <<http://www.financialstability.gov/roadtostability/lendinginitiative.html>>.

<sup>12</sup> Bernanke, Ben S., “Speech at the UC Berkeley/UCLA Symposium: The Mortgage Meltdown, the Economy, and Public Policy, Berkeley, California.” *Board of Governors of the Federal Reserve System* (Oct. 2008). <<http://www.federalreserve.gov/newsevents/speech/bernanke20081031a.htm>>.

<sup>13</sup> Duke, Elizabeth A., “Speech at the AICPA National Conference on Banks and Savings Institutions, Washington, D.C.” *Board of Governors of the Federal Reserve System* (Sept. 2009). <<http://www.federalreserve.gov/newsevents/speech/duke20090914a.htm>>.

<sup>14</sup> International Monetary Fund, “Restarting Securitization Markets: Policy Proposals and Pitfalls.” *Global Financial Stability Report: Navigating the Financial Challenges Ahead* (Oct. 2009), pg.33. <<http://www.imf.org/external/pubs/ft/gfsr/2009/02/pdf/text.pdf>>.

reduction still underway, and with increased bank capital requirements on the horizon, such as those expected in Basel III, the funding capacity provided by securitization cannot be replaced with deposit-based financing alone in the current or foreseeable economic environment. In fact, the IMF estimated that a financing “gap” of \$440 billion existed between total U.S. credit capacity available for the nonfinancial sector and U.S. total credit demand from that sector for the year 2009.<sup>15</sup> Moreover, non-bank finance companies, who have played an important role in providing financing to consumers and small businesses, are particularly reliant on securitization to fund their lending activities, since they do not have access to deposit-based funding. Small businesses, who employ approximately 50% of the nation’s workforce, depend on securitization to supply credit that is used to pay employees, finance inventory and investment, and other business purposes. Furthermore, many jobs are made possible by securitization. For example, a lack of financing for mortgages hampers the housing industry; likewise, constriction of trade receivable financing can adversely affect employment opportunities in the manufacturing sector. To jump start the engine of growth and jobs, securitization is needed to help restore credit availability.

Simply put, the absence of a properly functioning securitization market, and the funding and liquidity this market has historically provided, adversely impacts consumers, businesses, financial markets and the broader economy. The recovery and restoration of confidence in securitization is therefore a necessary ingredient for economic growth to resume, and for that growth to continue on a sustained basis into the future.

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<sup>15</sup> International Monetary Fund, “The Road to Recovery.” *Global Financial Stability Report: Navigating the Financial Challenges Ahead* (Oct. 2009), pg. 29. <<http://www.imf.org/external/pubs/ft/gfsr/2009/02/pdf/text.pdf>>.

## **II. Transfers of Loans into the Secondary Mortgage Market**

By way of background, there are approximately 55 million first lien mortgages outstanding in the United States today and an additional 25 million homes that have no mortgage attached to them. The debt outstanding for these 55 million mortgages is nearly \$9.75 trillion dollars, of which approximately \$7 trillion dollars resides in securitization trusts and are beneficially owned by institutional investors around the world. Approximately \$5.5 trillion dollars of these loans are government guaranteed in Ginnie Mae and GSE RMBS, with an additional \$1.5 trillion in outstanding private-label RMBS that has no government backstop. An additional \$2.75 trillion dollars of mortgage debt is owned in the portfolios of commercial banks, savings institutions and insurance companies. In addition to the \$9.75 trillion of outstanding first lien mortgages, approximately \$1 trillion of second liens are currently outstanding in the United States.<sup>16</sup>

As part of the larger public discourse about the current state of the residential mortgage market and the increasing number of foreclosures in America, a surprising number of concerns have been raised in the last couple of months in the midst of the worst housing crisis since the Great Depression that question whether the common legal procedures that have been used to transfer residential mortgage loans into RMBS trusts were in fact legally valid. A number of different dire outcomes have been raised if loans weren't validly transferred, including borrower confusion as to who to pay their mortgage to, large bank losses, and further housing market

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<sup>16</sup> Data compiled by Amherst Securities, based on information from the Federal Reserve Flow of Funds, Fannie Mae, Freddie Mac, Ginnie Mae and CoreLogic.



turmoil. A recent Congressional Oversight Panel Report (“COP Report”)<sup>17</sup> has even suggested that these issues could create systemic risk concerns if loans weren’t appropriately assigned to securitization trusts.

But the key incorrect premise that each of these dire outcomes relies upon is that the \$7 trillion dollars of outstanding securitized mortgage debt has not in fact been systematically transferred in a legally sound manner. ASF believes these concerns are without merit and our membership is confident that these methods of transfer are sound and based on a well-established body of law governing the multi-trillion dollar secondary mortgage market. The conventional process for loan transfers embodied in standard legal documentation for mortgage securitizations has been adequate and appropriate to transfer ownership of mortgage loans to the securitization trusts in accordance with applicable law. This process is sufficient to establish ownership by the securitization trusts. Moreover the concerns that have been raised have not been supported by substantiation that there are in fact any material signs of systematic fails in the system. Indeed, the origin of these concerns is not clear: they are not the result of a series of court cases supporting the arguments advanced and appear to be largely the result of academic theories. In fact, even the COP Report states that “the Panel takes no position on whether any of these arguments are valid or likely to succeed.”<sup>18</sup>

As part of our members’ diligence into these public concerns, the ASF issued two weeks ago a white paper legal study entitled “Transfer and Assignment of Residential Mortgage Loans in the Secondary Mortgage Market” (the “ASF White Paper”), which is attached to this

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<sup>17</sup> Congressional Oversight Panel, *November Oversight Report, Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation* (November 16, 2010) <<http://cop.senate.gov/documents/cop-111610-report.pdf>>.

<sup>18</sup> *Ibid.*, pg. 25, footnote 75.

testimony as Attachment A. In the White Paper, the ASF exhaustively studied traditional legal principles and processes, including common law, the Uniform Commercial Code and substantial case history, and finds that traditional legal principles and processes, including the not codified common law rule that “the mortgage follows the note,” are fully consistent with today’s complex holding, assignment and transfer methods for mortgage loans, which are legally effective for participants in the secondary mortgage market to transfer mortgage loans. Thirteen major U.S. law firms noted in Exhibit A to the ASF White Paper reviewed the ASF White Paper and believe that the Executive Summary contained therein represents a fair summary of the legal principles presented. Although we believe the ASF White Paper answered a number of the concerns that had previously been raised, some new concerns have been raised since the ASF White Paper has been published. In this testimony, we address four of these new concerns.

**A. PSAs Meet the Requirement for a “Complete” or “Unbroken” Chain of Indorsement**

In testimony before the U.S. Senate Committee on Banking, Housing and Urban Affairs on November 16, 2010,<sup>19</sup> Mr. Adam J. Levitin, Associate Professor of Law at Georgetown University Law Center, commented that while he did not disagree with the statements in the ASF White Paper about how mortgage loans may be legally transferred pursuant to contract law and the UCC, he believes that the ASF White Paper does not address some additional arguments as to why mortgage loans might not have been legally transferred to RMBS trusts in many cases.

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<sup>19</sup> Testimony of Professor Adam J. Levitin, U.S. Senate Committee on Banking, Housing and Urban Affairs Hearing, November 16, 2010.  
[http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=df8cb685-c1bf-4eea-941d-cf9d5173873a](http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=df8cb685-c1bf-4eea-941d-cf9d5173873a)

These arguments are outlined in Mr. Levitin's testimony submitted to the Senate Committee for these hearings, and further in testimony submitted to the House Financial Services Committee, Subcommittee on Housing and Social Opportunity, on November 18, 2010.<sup>20</sup> We seek to address these concerns directly herein.

In his written testimony as well as his statements before the Senate Committee, Mr. Levitin does not rely on the decisions in any court cases but instead discusses standard provisions of documentation typically used to issue RMBS, which generally is in the form of a pooling and servicing agreement (“PSA”). A typical PSA includes a section requiring that legal documents for each pooled mortgage loan be delivered to the trustee, or to a custodian on the trustee's behalf. This provision typically requires delivery of the original mortgage note, which must bear the following indorsements: 1) either an indorsement in blank or an indorsement to the trustee, and 2) a ‘complete’ or ‘unbroken’ chain of indorsements from the originator or named payee to the person signing the indorsement in blank or to the trustee. The language does not specify who must sign the indorsement in 1). The language used in these typical provisions in any PSA uses either the word “complete” or “unbroken”, with no apparent difference in intended meaning from deal to deal. The typical language does not state, nor does it imply, that a “complete” or “unbroken” chain means that all prior owners or holders of the note must appear as part of the chain. Nor does any judicial proceeding consider or uphold this novel opinion. Nor does Professor Levitin provide any third-party support for his interpretation of a typical PSA.

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<sup>20</sup>Testimony of Professor Adam J. Levitin, House Financial Services Committee, Subcommittee on Housing and Social Opportunity Hearing, November 18, 2010  
<<http://financialservices.house.gov/Media/file/hearings/111/Levitin111810.pdf>>.

In his testimony, Mr. Levitin suggests, but without providing any source of authority for his interpretation of contractual intent, that the typical PSA requirement for a “complete” chain of indorsements was intended to mean that there must be a separate indorsement from each and every person who was a prior owner of the note, including the originator, the securitization sponsor and the depositor. From his interpretation flows a number of seemingly logical but progressively more dire consequences, including:

- i. the PSA was intended to supersede standard indorsement practice as codified in the UCC;
- ii. the parties universally failed to comply with this requirement to show an expanded chain of indorsements;
- iii. such failure violates the express terms of the PSA and therefore applicable trust law requires that transfers of the mortgage loans to the trust are void;
- iv. therefore the trusts don’t really own anything and the trusts furthermore violate REMIC requirements;
- v. as a result the banks that sold the loans really still own them; and
- vi. the banks must repay all investors in full.

All of these consequences flow, however, from a single mistaken core premise—that the typical PSA requirement for indorsements requires this expanded chain. As discussed below, this core premise is incorrect, and therefore the consequences of this premise do not follow.

The typical PSA requirement for a complete or unbroken chain of indorsements to the person signing the indorsement in blank means only that there be no gaps in the chain of

indorsements, and that the chain of indorsements be sufficient to effect a transfer to the trust under applicable law. This provision would be interpreted in light of applicable law as well as customary indorsement practice, and the intent of the parties as evidenced by their contemporaneous conduct, all of which support the industry custom reading of a “complete” or “unbroken” chain.

As is clear in the ASF White Paper, for mortgage notes that are negotiable instruments, transfer may be made by negotiation in accordance with UCC Article 3, which requires an indorsement. Once a negotiable mortgage note has been endorsed in blank, negotiation may be effected by transfer of possession alone, until an indorsement has been made or completed in the name of a specific person. In other words, if there is an indorsement in blank, the note may be transferred to numerous successive parties without any need for a separate indorsement to each purchaser. Sales of mortgage notes may also be made pursuant to UCC Article 9, and such a sale is automatically perfected (without delivery of any mortgage note and with no requirement relating to any indorsement) as long as value is given in accordance with an agreement that specifies the mortgage loan to be conveyed, such as a loan schedule to a PSA.

In interpreting the typical PSA requirement for indorsements, we note that this requirement appears in the section that relates to transfer and delivery of the mortgage loans to the trustee. In this context, a “complete” or “unbroken” chain of indorsements is satisfied if the indorsements are sufficient to transfer all rights in and to the mortgage notes to the trustee under applicable law. Thus, for example, where the note was initially payable to originator A, then sold to securitization sponsor B, who transferred to depositor C who in turn is transferring the

note to trustee D, a complete chain of indorsements could be: 1) an indorsement from A to B, followed by an indorsement by B in blank, or 2) an indorsement by A in blank. Either of those examples of indorsements, together with delivery of the note to D, would be sufficient to effect a negotiation and transfer to D, and therefore would be a “complete” or “unbroken” chain of indorsements as required by standard PSA language. Examples of an incomplete or broken chain would be as follows: 1) no indorsement by A, or 2) an indorsement by A to X, followed by an indorsement by B in blank. Importantly, for the purposes for which indorsement is required by the PSA (which are limited to evidencing the transfer and delivery of the mortgage loans to the trustee), an indorsement by A in blank is no less sufficient or effective than an indorsement from A to B, followed by an indorsement from B to C, followed by an indorsement from C to D. In other words, the typical PSA does not impose contractual requirements that exceed those contained in the UCC, which has been adopted by all fifty states and the District of Columbia, as it pertains to the transfer of an interest in a mortgage note.

Moreover, the intended meaning of the typical PSA requirement for indorsements is illustrated by the contemporaneous conduct of the parties to the transactions. Sellers into securitizations generally deliver physical mortgage notes with indorsements in formats (following the example above) such as 1) an indorsement from A to B, followed by an indorsement by B in blank, or 2) an indorsement by A in blank. It was not at all typical nor required to show an indorsement to or from the depositor (C in this example). Furthermore, independent, third-party trustees and custodians checking in mortgage notes believed that a note showing indorsements in these formats satisfied the requirement that there be a ‘complete’ or

‘unbroken’ chain of indorsements. This actual conduct demonstrates the intended meaning of the indorsement requirements.

Mr. Levitin argues that the intended meaning of the typical PSA requirement for indorsements is that the requirement for a ‘complete’ or ‘unbroken’ chain means that every prior holder needs to have a separate indorsement to that holder. In other words that, following the above example, there must be an indorsement from A to B, followed by an indorsement from B to C, followed by an indorsement from C to D. Yet there is no persuasive basis for the proposition that the parties intended that the typical PSA provisions required this expanded chain of indorsements, nor is there any case law to support Mr. Levitin’s view.

Mr. Levitin argues that as a result of his interpretation the indorsement requirements intended an expanded chain of indorsements, and the parties therefore intended to contract around the UCC and impose upon themselves indorsement requirements that are in excess of what is required to satisfy applicable UCC provisions. It is unclear and seemingly unreasonable to practicing industry lawyers why parties to a transaction would contract around the UCC by imposing significant additional indorsement requirements upon themselves, and then to have systematically failed to observe those expanded requirements. On the other hand, it is very reasonable to interpret the PSA language as not having been intended to require this expanded chain of indorsements above and beyond UCC requirements for indorsements, where the actual indorsement practice satisfied the UCC requirements.

Mr. Levitin offers the following argument to support the interpretation that an expanded chain of indorsements was intended to be required under PSA contractual provisions:

“The reason for this additional requirement is to provide a clear evidentiary basis for all of the transfers in the chain of title in order to remove any doubts about the bankruptcy remoteness of the assets transferred to the trust. Absent a complete chain of indorsements, it could be argued that the trust assets were transferred directly from the originator to the trust, raising the concern that if the originator filed for bankruptcy, the trust assets could be pulled back into the originator’s bankruptcy estate.”<sup>21</sup>

However, this argument overlooks the fact that each separate step in the chain of transfers of ownership by each party from the originator to the trust is fully documented by a separate contract. In other words, there is a contract covering the sale from A to B, and another contract covering the sale from B to C, and the PSA itself documents the sale from C to D. There is no need for an expanded chain of indorsements to make the chain of transfers of ownership any more plain and evident than it already is. And there is no basis for the proposition that the parties thought that an expanded chain of indorsements to override the UCC was necessary or useful for this purpose.

## **B. Securitization Trusts Comply with New York Trust Law**

Because the parties did not intend for the expanded chain of indorsements to be contractually required under the PSA, the further argument that the transfers to the trusts were void under New York trust law also fails.

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<sup>21</sup> Testimony of Professor Adam J. Levitin, U.S. Senate Committee on Banking, Housing and Urban Affairs Hearing, November 16, 2010.  
[http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=df8cb685-c1bf-4eea-941d-cf9d5173873a](http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=df8cb685-c1bf-4eea-941d-cf9d5173873a)



Professor Levitin cites New York E.P.T.L. Section 7.2-4 as authority for the concept that a transfer to a New York common law trust that is in contravention of the trust documents is void. However, that section actually refers to any “sale, conveyance or other act of the trustee *in contravention of the trust*” [emphasis added], not sales or conveyances *to the trust*. This section is intended to protect trust beneficiaries from unauthorized acts by the trustee. Cases interpreting this section relate to wrongful acts by trustees with respect to assets that have previously been transferred into the trust, such as acts that are illegal or which dissipate or impair assets of the trust. Moreover, this section contains an exception for any such acts that are authorized by any other provision of law. As we explained in the preceding section, the method used to convey the mortgage loans to the trustee is consistent with the UCC.

In his November 18 written testimony, it is stated that “transfers to New York common law trusts are governed by the common law of gifts.” No authority is given for that statement, and we believe that this statement is not correct with respect to business or investment trusts, where transfers are made to the trust for consideration in commercial transactions, and not as gifts. The testimony then goes on to cite cases, which relate to the common law of gifts, for the proposition that assets must be transferred in a way “such that no one else could possibly claim ownership,” and then reads the cases to impose on all transfers to New York common law trusts a requirement that “the mere recital of a transfer is insufficient to effectuate a transfer; there must be delivery in as perfect a manner as possible.” The testimony goes on to argue that the contractual language in each PSA that transfers and conveys ownership of the mortgage loans to the trustee for the benefit of the investors is mere “recital” language that is ineffective in transfers to common law trusts, and further suggests that delivery of the note with an

indorsement in blank is defective under this standard because it turns a note “into bearer paper to which others could easily lay claim.”

The more recent of the cases cited in the testimony, *Vincent v. Putnam*, 248 N.Y. 76 (N.Y., 1928), involves a widow who received stocks and bonds by bequest from her husband, where the will provided that as to bequeathed remainder property that upon her death “shall remain at that time undisposed of”, such property would pass to the husband’s next of kin. The widow attempted to dispose of the stocks and bonds shortly before her own death by gift to one of her blood relatives. However, the only actions taken by the widow to effect the gift were to deliver the stock and bond certificates to her own attorney, with a verbal instruction to give them to her relative. This was not a transfer for consideration, and it was not a transfer to a common law trust. This case is about delivery of property to an agent of the donor, with an instruction to deliver the property to the intended donee, and the holding is that such delivery is not a completed gift. The “mere words” in this case, that were insufficient to effect a conveyance, were the verbal instruction to the widow’s attorney to make the gift, which instruction could have been revoked at any time. We believe that the cases cited in the November 18 testimony do not support the proposition that transfers of property to a New York common law trust, for consideration in a commercial transaction, require a higher standard or more rigid set of transfer requirements than would apply in any transfer for value of such property in any other commercial transaction.

The notion that new legal decisions in all 50 states would be handed down with no legal precedence to nullify trillions of dollars of mortgage securitization transactions simply because

the trusts acquired an interest in the pooled loans in accordance with applicable law but not in the manner that Mr. Levitin claims the trust documents require, appears on its face to be an unreasonable assertion. As noted above, we are confident that the standard processes of delivering loans into securitization trusts are proper as a matter of law and contract, and we are hard pressed to give any credence to an unsupported academic theory that the courts would thwart the intentions and expectations of the parties by voiding transfers of mortgage loans.

### **C. RMBS Trusts Effectively Achieve REMIC Status**

A final issue that we would like to address in this section relates to Real Estate Mortgage Investment Conduits (“REMIC”), which is a tax election under federal income tax law frequently used for RMBS under which trusts backed by qualified mortgages can issue multiple classes of securities that are treated as debt, with the trust exempted from entity level taxation. One argument that has been advanced by a couple commentators is that if the mortgage loans were not validly transferred to the trust, any defect in the procedures used to make the transfer can now not be cured without violating regulations that prohibit transfers of qualified mortgages to a REMIC more than 90 days after it was created. We believe that this argument is without merit, because the argument that there were wholesale failures to properly convey ownership of mortgage loans to RMBS trusts are without merit as discussed above and in the ASF White Paper.

**D. Mistakes Do Not Affect Validity of Transfer**

The fact that the ASF White Paper finds that the standard industry practices are legally effective for participants in the secondary mortgage market to transfer mortgage loans does not mean that mistakes never happen. From time to time mistakes are certain to occur, particularly in a market where 55 million mortgages are transferred and/or serviced, and that is one reason why typical language in a PSA provides the opportunity to cure mistakes. It is important, however, to distinguish between document deficiencies that impair the validity of the transfer of mortgage loans, on the one hand, and the additional steps that may be necessary to enforce the loan documents against the borrowers, on the other hand. The three new concerns that we counter in this testimony call into question the validity of a mortgage loan transfer. We believe that these concerns are misplaced and that, in the ordinary course, document deficiencies on a one-off basis may delay foreclosure while the paperwork is corrected or completed but will not impair the initial transfer of the loan to the securitization trust.

In conclusion, the ASF greatly appreciates the invitation to appear before this Committee to share our views related to these current issues. I look forward to answering any questions the Committee may have.

Thank you.

ATTACHMENT A

ASF White Paper

Transfer and Assignment of Residential Mortgage Loans  
in the Secondary Mortgage Market

November 16, 2010



# **Transfer and Assignment of Residential Mortgage Loans in the Secondary Mortgage Market**

ASF WHITE PAPER SERIES

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NOVEMBER 16, 2010



THIS WHITE PAPER AND ITS EXECUTIVE SUMMARY ARE INTENDED FOR INFORMATIONAL PURPOSES ONLY AND DO NOT CONTAIN OR CONVEY LEGAL ADVICE, A LEGAL OPINION OR A REPRESENTATION AS TO THE FACTS OF ANY PARTICULAR TRANSACTION PROVIDED BY THE AMERICAN SECURITIZATION FORUM OR BY ANY OF THE LAW FIRMS REFERENCED BELOW. THE INFORMATION IN THE EXECUTIVE SUMMARY AND WHITE PAPER SHOULD NOT BE USED OR RELIED UPON IN REGARD TO ANY PARTICULAR FACTS OR CIRCUMSTANCES. THE LAW FIRM K&L GATES LLP SERVED AS OUTSIDE COUNSEL TO THE AMERICAN SECURITIZATION FORUM IN CONNECTION WITH THE PREPARATION OF THE WHITE PAPER AND EXECUTIVE SUMMARY. THE OTHER LAW FIRMS LISTED ON EXHIBIT A HAVE REVIEWED THE WHITE PAPER AND BELIEVE THAT THE EXECUTIVE SUMMARY REPRESENTS A FAIR SUMMARY OF THE LEGAL PRINCIPLES PRESENTED.

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# Table of Contents

<b>Introduction</b> . . . . .	1
<b>Executive Summary.</b> . . . .	2
1. Basic Principles . . . . .	2
2. Transfer of Promissory Notes Secured by Mortgages . . . . .	3
3. Assignment and Transfer of Ownership of Mortgages. . . . .	3
4. Conclusion . . . . .	5
<b>Exhibit A</b> . . . . .	6
<b>Transfer and Assignment of Residential Mortgage Loans in the Secondary Mortgage Market.</b> . . . .	7
1. Basic Principles . . . . .	7
2. Transfer of Promissory Notes Secured by Mortgages . . . . .	9
What Constitutes a “Negotiable Instrument?” . . . . .	10
How is a Negotiable Mortgage Note Transferred? . . . . .	11
Who May Enforce A Negotiable Mortgage Note? . . . . .	12
What Rights Against Borrower Defenses are Available to the Holder of a Negotiable Mortgage Note? . . . . .	13
How Is a Mortgage Note Transferred Under Article 9 of the UCC? . . . . .	14
Transfer of Mortgage Notes: Conclusion . . . . .	15
3. Assignment and Transfer of Ownership of Mortgages. . . . .	16
What is the Relationship Between the Transfer of a Mortgage Note and the Transfer of Ownership of the Mortgage? . . . . .	16
What is the Relationship Between the UCC and State Real Property Laws? . . . . .	23
How Does the Use of MERS Affect These Issues? . . . . .	24
4. Conclusion. . . . .	27




# Introduction

Recently, a few commentators have raised a number of legal theories questioning whether securitization trusts, either those created by private financial institutions or those created by government sponsored enterprises, such as Ginnie Mae, Fannie Mae or Freddie Mac, have valid legal title to the seven trillion dollars of mortgage notes in those trusts. In an effort to contribute thorough and well-researched legal analysis to the discussion of these theories, the American Securitization Forum (“ASF”) issues the enclosed white paper entitled “Transfer and Assignment of Residential Mortgage Loans in the Secondary Mortgage Market” (the “White Paper”). The White Paper provides a detailed overview of the legal principles and processes by which mortgage loans are typically held, assigned, transferred and enforced in the secondary mortgage market and in the creation of mortgage-backed securities (“MBS”). These principles and processes have centuries-old origins, and they have continued to be sound and validated since the advent of MBS over forty years ago.

While the real property laws of each of the 50 U.S. states and the District of Columbia affect the method of foreclosing on a mortgage loan in default, the legal principles and processes discussed in this White Paper result, if followed, in a valid and enforceable transfer of mortgage notes and the underlying mortgages in each of these jurisdictions. To be thorough, the White Paper undertakes a review of both common law and the Uniform Commercial Code (the “UCC”) in each of the 50 U.S. states and the District of Columbia. One of the most critical principles is that when ownership of a mortgage note is transferred in accordance with common securitization processes, ownership of the mortgage is also automatically transferred pursuant to the common law rule that “the mortgage follows the note.” The rule that “the mortgage follows the note” dates back centuries and has been codified in the UCC. In essence, this means that the assignment of a mortgage to a trustee does not need to be recorded in real property records in order for it to be a valid and binding transfer.

In summary, these traditional legal principles and processes are fully consistent with today’s complex holding, assignment and transfer methods for mortgage loans and those methods are legally effective for participants in the secondary mortgage market to transfer mortgage loans. Thirteen major U.S. law firms noted in Exhibit A have reviewed the White Paper and believe that the Executive Summary contained therein represents a fair summary of the legal principles presented. ASF wishes to thank each of these firms and the dozens of preeminent MBS attorneys who have contributed to the development of this White Paper.



Tom Deutsch  
Executive Director  
American Securitization Forum

# Executive Summary

## 1. Basic Principles

The two core legal documents in most residential mortgage loan transactions are the promissory note and the mortgage or deed of trust that secures the borrower's payment of the promissory note. In a typical "private-label" mortgage loan securitization, each mortgage loan is sold to a trust through a series of steps. A mortgage note and a mortgage may be sold, assigned and transferred several times between the time the mortgage loan is originated and the time the mortgage loan ends up with the trust. The legal principles that govern the assignment and transfer of mortgage notes and related mortgages are determined, in significant part, by the Uniform Commercial Code ("UCC"), which has been adopted by all 50 states and the District of Columbia.<sup>1</sup>

The residential mortgage notes in common usage typically are negotiable instruments. As a general matter, under the UCC, a negotiable mortgage note can be transferred from the transferor to the transferee through the indorsement<sup>2</sup> of the mortgage note and the transfer of possession of the note to the transferee or a custodian on behalf of the transferee. An assignment of the related mortgage is also typically delivered to the transferee or its custodian, except in cases where the related mortgage identifies the Mortgage Electronic Registration System ("MERS") as the mortgagee. Such assignments generally are in recordable form, but unrecorded, and are executed by the transferor without identifying a specific transferee – a so-called assignment "in blank." Intervening assignments, in some cases, may be recorded in the local real estate records.

In some mortgage loan transactions, MERS becomes the mortgagee of record as the nominee of the loan originator and its assignees in the local land records where the mortgage is recorded, either when the mortgage is first recorded or as a result of the recording of an assignment of mortgage to MERS. This means that MERS is listed as the record title holder of the mortgage. MERS' name does not appear on the mortgage note, and the beneficial interest in the mortgage remains with the loan originator or its assignee. The documents pursuant to which MERS acts as nominee make clear that MERS is acting in such capacity for the benefit of the loan originator or its assignee. When a mortgage loan is originated with MERS as the nominal mortgagee (or is assigned to MERS post-origination), MERS tracks all future mortgage loan and mortgage loan servicing transfers and other assignments of the mortgage loan unless and until ownership or servicing is transferred (or the mortgage loan is otherwise assigned) to an entity that is not a MERS member. In this way, MERS serves as a central system to track changes in ownership and servicing of the mortgage loan. Fannie Mae, Freddie Mac and Ginnie Mae, among other governmental entities, permit mortgage loans that they purchase or securitize to be registered with MERS.

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<sup>1</sup> References to the UCC are to the Official Text of the Model UCC, as revised, issued by the National Conference of Commissioners on Uniform State Laws.

<sup>2</sup> Note that the UCC replaces the more common U.S. spelling of "endorsement" for the less common "indorsement." The UCC spelling is used throughout this Executive Summary.

## **2. Transfer of Promissory Notes Secured by Mortgages**

The law of negotiable instruments developed over the centuries as a way to encourage commerce and lending by making such instruments, including negotiable mortgage notes, as liquid and transferable as possible. The UCC, with state-specific variations, in significant part governs the assignment and transfer of mortgage notes. Article 3 of the UCC applies to the negotiation and transfer of a mortgage note that is a “negotiable instrument,” as that term is defined in Article 3. In addition, Article 9 of the UCC applies to the sale of “promissory notes,” a term that generally includes mortgage notes.

In addition, as a general matter, the securitization of a loan under a typical pooling and servicing agreement provides both for the negotiation of negotiable mortgage notes (by indorsement and transfer of possession to the securitization trustee or the custodian for the trustee) and for an outright sale and assignment of all of the mortgage notes and mortgages. Thus, whether the mortgage notes in a given securitization pool are deemed “negotiable” (as we believe most typically are) or “non-negotiable” will have little or no substantive effect under the UCC on the validity of the transfer of the notes. The typical securitization process effects valid transfers of the mortgage notes and related mortgages in accordance with the provisions of Articles 3 and 9 of the UCC.

Under the UCC, the transfer of a mortgage note that is a negotiable instrument is most commonly effected by (a) indorsing the note, which may be a blank indorsement that does not identify a person to whom the mortgage note is payable or a special indorsement that specifically identifies a person to whom the mortgage note is payable, and (b) delivering the note to the transferee (or an agent acting on behalf of the transferee). As residential mortgage notes in common usage typically are “negotiable instruments,” this is the most common method to transfer the mortgage note. In addition, even without indorsement, the transfer can be effected by transferring possession under the UCC. Moreover, the sale of any mortgage note also effects the transfer of the mortgage under Article 9. Securitization agreements often provide both for (a) the indorsement and transfer of possession to the trustee or the custodian for the trustee, which would constitute a negotiation of the mortgage note under Article 3 of the UCC and (b) an outright sale and assignment of the mortgage note. Thus, regardless of whether the mortgage notes in a securitization trust are deemed “negotiable” or “non-negotiable,” the securitization process generally includes a valid transfer of the mortgage notes to the trustee in accordance with the explicit requirements of the UCC.

In addition, Article 3 of the UCC permits a person without possession to enforce a negotiable mortgage note where the note has been lost, stolen, or destroyed. Courts have consistently affirmed the use of the salient provisions of the UCC to enforce lost, stolen or destroyed negotiable mortgage notes that are owned by a securitization trust when the trust or its agent has proved the terms of the mortgage notes and their right to enforce the mortgage notes.

## **3. Assignment and Transfer of Ownership of Mortgages**

As stated above, when a mortgage loan is assigned and transferred as part of the securitization of the mortgage loan in the secondary market, both the mortgage note and the mortgage itself are typically sold, assigned, and physically transferred to the trustee that is acting on behalf of the MBS investors or a trustee-

designated document custodian pursuant to a custody agreement. The assignment and transfer are usually documented in accordance with a pooling and servicing agreement.

When a mortgage note is transferred in accordance with common mortgage loan securitization processes, the mortgage is also automatically transferred to the mortgage note transferee pursuant to the general common law rule that “the mortgage follows the note.” The rule that “the mortgage follows the note” has been codified in the UCC, but the rule’s common law origins date back hundreds of years, long before the creation of the UCC. As stated in the official comments to UCC § 9-203(g), the section “codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien.” UCC § 9-203 cmt. 9. All states follow this rule.<sup>3</sup>

In addition to the codification under UCC § 9-203(g), reported court cases in nearly every state and non-UCC statutory provisions in some states make clear that “the mortgage follows the note.” Regarding the impact of these UCC provisions, one treatise states: “Article 9 makes it as plain as possible that the secured party need not record an assignment of mortgage, or anything else, in the real property records in order to perfect its rights in the mortgage.” J. McDonnell and J. Smith, Secured Transactions Under the Uniform Commercial Code, § 16.09[3][b]. Indeed, courts in several states have affirmed and applied the “mortgage follows the note” rule in cases where the mortgage assignment was not recorded by the transferee and even when there was no actual separate written assignment of the mortgage.<sup>4</sup>

Common securitization practices are consistent with the general rule that “the mortgage follows the note”: pursuant to the pooling and servicing agreement that governs an MBS, and the language of assignment typically contained in such an agreement, the mortgage note and the mortgage itself are sold, assigned, transferred and delivered to the trustee, and the transferor also typically delivers a written assignment of the mortgage that is in blank in recordable form. Courts have held that the language of sale and assignment contained in a pooling and servicing agreement, along with the corresponding transfer, sale, and delivery of the mortgage note and mortgage, are sufficient to transfer the mortgage to the transferee/trustee or its designee or nominee.

The creation of an interest in or lien on real property, including a mortgage, is governed by the non-UCC law of the state in which the property is located. Likewise, the enforceability of mortgages (including the right and method to foreclose) is subject to all of the conditions precedent and requirements that are set forth in the particular mortgage itself and in all applicable state and local laws. Those conditions precedent

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<sup>3</sup> However, in some states, such as Massachusetts and Minnesota, courts have held that the transfer of a mortgage note without an express transfer of the mortgage vests in the note holder only an equitable interest in the mortgage. This arrangement has been described as follows: the holder of the mortgage holds the legal title to the mortgage in constructive trust for the benefit of the mortgage note holder. In both states, however, case law suggests that foreclosure proceedings must be initiated by, or at least in the name of, the holder of the legal title in the mortgage.

<sup>4</sup> In most states, recording of an assignment of mortgage is generally not required to ensure the enforceability of the assignment of mortgage as between the assignor and assignee, and anyone with knowledge thereof. It is beyond the scope of this Executive Summary and the White Paper to discuss in detail the potential risks to the mortgage transferee of not recording a mortgage assignment. Those risks might include, among others, delaying the transferee’s ability to foreclose on the mortgage, failing to receive notices that may go to the mortgagee of record, and otherwise leaving the assignee open to negligent or fraudulent actions or inactions by the mortgagee of record that could bind the mortgage transferee and impair the value or enforceability of the mortgage. Similarly, when an assignment of mortgage is not recorded, the assignor may be liable for certain obligations imposed upon a mortgagee of record, such as the obligation to provide a pay-off statement or mortgage release within a designated time period.

and procedural requirements vary from mortgage to mortgage and from state to state. Thus, ownership of a mortgage (i.e., without notice to the mortgagor or the public, without judicial proceedings (where required), without satisfaction of other conditions precedent or procedural requirements in the mortgage itself or in applicable state law), does not always give the holder of the mortgage the legal ability to foreclose on the mortgage. Though a discussion of the other necessary prerequisites to foreclosure is beyond the scope of this Executive Summary and the White Paper, the fact that other steps may need to be taken by the owner of a mortgage note, or the owner of a mortgage, is neither unique nor surprising in our legal and regulatory system and does not diminish an otherwise legally effective transfer of the mortgage note and mortgage.

The use of MERS as the nominee for the benefit of the trustee and other transferees in the mortgage loan securitization process has been a subject of litigation in recent years regarding a mortgage note holder's right to enforce a mortgage loan registered in MERS. Some cases address the authority or ability of MERS or transferees of MERS to foreclose on a mortgage for which MERS is or was the mortgagee of record. As a general matter, the assignment and transfer of a mortgage to MERS as nominee of and for the benefit of the beneficial owner of the mortgage does not adversely impact the right to foreclose on the mortgage. Decisions in many jurisdictions support this conclusion.

There are several minority decisions that, in some form, have taken issue with MERS. But none of these decisions, to our knowledge, has invalidated a mortgage for which MERS is the nominee, and none of these decisions has challenged MERS' ability to act as a central system to track changes in the ownership and servicing of mortgage loans.

Finally, it is important to recognize that the UCC does not displace traditional rules of agency law. Under general agency law, an agent has authority to act on behalf of its principal where the principal "manifests assent" to the agent "that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Accordingly, the UCC does not prevent MERS or others, including loan servicers, from acting as the agent for the note holder in connection with transfers of ownership in mortgage notes and mortgages. In short, principles of agency law provide MERS and loan servicers another legal basis for their respective roles in the transfer of mortgage notes and mortgages.

## **4. Conclusion**

In summary, the longstanding and consistently applied rule in the United States is that, when a mortgage note is transferred, "the mortgage follows the note." When a mortgage note is transferred and delivered to a transferee in connection with the securitization of the mortgage loan pursuant to an MBS pooling and servicing agreement or similar agreement, the mortgage automatically follows and is transferred to the mortgage note transferee, notwithstanding that a third party, including an agent/nominee entity such as MERS, may remain as the mortgagee of record. Both common law and the UCC confirm and apply this rule, including in the context of mortgage loan securitizations.

## Exhibit A

- Alston & Bird LLP
- Bingham McCutchen LLP
- Cadwalader, Wickersham & Taft LLP
- Dechert LLP
- Hunton & Williams LLP
- Katten Muchin Rosenman LLP
- K&L Gates LLP
- Lowenstein Sandler PC
- Mayer Brown LLP
- O'Melveny & Myers LLP
- Orrick, Herrington & Sutcliffe LLP
- Sidley Austin LLP
- SNR Denton US LLP

# Transfer and Assignment of Residential Mortgage Loans in the Secondary Mortgage Market

The beginnings of the now multi-trillion dollar secondary market for residential mortgage loans date back to the federal government's creation of Fannie Mae in 1938. Since then, the complexity of the secondary mortgage market has increased, especially as a result of the rapid growth and market acceptance of mortgage-backed securities ("MBS") that began in the 1980s. In contrast, the legal principles and processes by which mortgage-related promissory notes and security instruments (mortgages and deeds of trust) are assigned and transferred have centuries-old origins. Now, in the midst of the worst economic and housing crisis since the 1930s, some are questioning whether the traditional state law principles and processes of assignment and transfer can be fully reconciled with today's complex holding, assignment and transfer systems for mortgage-related promissory notes and security instruments, and what methods are legally effective for participants in the secondary mortgage market to establish, maintain and transfer mortgage notes and security instruments.

This paper provides an overview of the legal principles and processes by which promissory notes and related mortgage security instruments are typically held, assigned, transferred and enforced in the secondary mortgage market in connection with loan securitizations and the creation of MBS.<sup>1</sup>

## 1. Basic Principles

The two core legal documents in most residential mortgage loan transactions are the promissory note and the mortgage or deed of trust that secures the borrower's payment of the promissory note. The promissory note contains a promise by the borrower to pay the lender a stated amount of money at a specified interest rate (which can be fixed or variable) by a certain date. The typical mortgage or deed of trust contains a grant of a mortgage lien or other security interest in the borrower's real property to the lender or, in a deed of trust, to a trustee for the benefit of the lender, to secure the borrower's obligations under the promissory note.<sup>2</sup>

In a typical "private-label" mortgage loan securitization, each mortgage loan, which is evidenced by a mortgage note and secured by a mortgage, is sold, assigned and transferred to a trust through a series of steps:

- The loan originator or a subsequent purchaser sells, assigns and transfers the mortgage loans to a "sponsor," which is typically a financial services company or a mortgage loan conduit or aggregator.
- The sponsor sells, assigns and transfers the mortgage loans to a "depositor," which in turn sells, assigns and transfers the mortgage loans to the trustee, which will hold the mortgage loans in trust for the benefit of the certificateholders.

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<sup>1</sup> Issues related to a party's right to foreclose or to engage in foreclosure-related activities are generally outside the scope of this paper.

<sup>2</sup> For ease of reference, "mortgage" will be used throughout much of this paper to refer to both mortgages and deeds of trust, and "mortgage note" will be used to refer to a promissory note that is secured by a mortgage.

- The trustee issues the MBS pursuant to a pooling and servicing agreement or trust agreement entered into by the depositor, the trustee and a master servicer or servicers.
- The trustee administers the pool assets, typically relying on the loan servicer to perform most of the administrative functions regarding the pool of mortgage loans. In addition, a document custodian is often designated to conduct a review of the mortgage loan documents pursuant to the requirements of the pooling and servicing agreement and to hold the mortgage loan documents for the loans included in the trust pool.
- In general, the loan documents are assigned and transferred from the depositor to the trustee through the indorsement of the mortgage note and the transfer of possession of the mortgage note to the trustee or a custodian on behalf of the trustee. An assignment of the related mortgage is also typically delivered to the transferee or its custodian, except in cases where the related mortgage identifies Mortgage Electronic Registration Systems (“MERS”) as the mortgagee. Such assignments generally are in recordable form, but unrecorded, and are executed by the transferor without identifying a specific transferee – a so called assignment in blank.
- In some mortgage loan transactions, MERS becomes the mortgagee of record as the nominee of the loan originator and its assignee in the local land records where the mortgage is recorded, either when the mortgage is first recorded or as a result of the recording of an assignment of mortgage to MERS. This means that MERS is listed as the record title holder of the mortgage. MERS’ name does not appear on the mortgage note, and the beneficial interest in the mortgage remains with the loan originator or its assignee. The documents pursuant to which MERS acts as nominee make clear that MERS is acting in such capacity for the benefit of the loan originator or its assignee. When a mortgage loan is originated with MERS as the nominal mortgagee (or is assigned to MERS post-origination), MERS tracks all future mortgage loan and loan servicing transfers and other assignments of the mortgage loan unless and until ownership or servicing is transferred (or the loan is otherwise assigned) to an entity that is not a MERS member. In this way, MERS serves as a central system to track changes in ownership and servicing of the loan. Fannie Mae, Freddie Mac and Ginnie Mae, among other governmental entities, permit loans that they purchase or securitize to be registered with MERS.

As part of the loan securitization process detailed above, a mortgage note and a mortgage may be sold, assigned and transferred several times from one entity to another. The legal principles that govern the assignment and transfer of mortgage notes and mortgages are generally determined by state law. See, e.g., In re Cook, 457 F.3d 561, 566 (6<sup>th</sup> Cir. 2006) (state law governed whether transferee had superior interest in promissory note secured by mortgage). As such, these principles can vary depending upon the state in which the assignor of the mortgage notes, the underlying property, or the relevant mortgage-related documents are



located. The assignment and transfer of a mortgage note, on the one hand, and of a mortgage, on the other hand, are addressed separately below.

## 2. Transfer of Promissory Notes Secured by Mortgages

The residential mortgage notes in common use in the secondary mortgage market typically are negotiable instruments. The law of negotiable instruments developed over the centuries as a way to encourage commerce and lending by making such instruments, including negotiable mortgage notes, as liquid and transferable as possible. *See, e.g., Overton v. Tyler*, 3 Pa. 346, 347 (1846) (“[A] negotiable bill or note is a courier without luggage”); 2 Frederick M. Hart & William F. Willier, *Negotiable Instruments Under the Uniform Commercial Code* § 1.01 (“Negotiable instruments play such an important role in the modern commercial world that it is difficult to realize that the struggle for their existence could be as long and complex as it has been, yet the evolution of the concept took centuries.”). Similarly, the standardization of the forms of mortgage notes and mortgages over the past thirty years or more has contributed to the liquidity and transferability of mortgage notes and the underlying mortgages. *See* Peter M. Carrozzo, Marketing the American Mortgage: The Emergency Home Finance Act of 1970, Standardization and the Secondary Market Revolution, 39 Real Prop. Prob. & Tr. J. 765, 799-800 (2004-2005) (“standardization of mortgage documents created marketable commodities. Once mechanisms were in place for the secondary market to operate, events rapidly moved toward the ultimate goal: the creation of a security which has as its base land [and] yet which will be as freely transferable as stocks and bonds” (internal quotation omitted)).

The Uniform Commercial Code (“UCC”), which, with state-specific variations, has been adopted as law by all 50 states and the District of Columbia, governs, in significant part, the transfer of mortgage notes.<sup>3</sup> Article 3 applies to the negotiation and transfer of a mortgage note that is a “negotiable instrument,” as that term is defined in Article 3. *See* UCC §§ 3-102, 3-201, 3-203 and 3-204; *see, e.g., Swindler v. Swindler*, 355 S.C. 245, 250 (S.C. Ct. App. 2003) (Article 3 governs negotiable mortgage note). In addition, Article 9 applies to the sale of “promissory notes,” a term that generally includes all mortgage notes (both negotiable and non-negotiable). *See* UCC §§ 1-201(b)(35) and 9-109(a)(3).<sup>4</sup>

The residential mortgage notes in common use today are typically negotiable instruments for UCC purposes. In addition, as a general matter, the securitization of a loan under a typical pooling and servicing agreement provides both for the negotiation of negotiable mortgage notes (by indorsement<sup>5</sup> and transfer of possession to the securitization trustee or the custodian for the trustee) and for an outright sale and assignment of all of the mortgage notes and related mortgages. Thus, whether the mortgage notes in a given securitization

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<sup>3</sup> References to the UCC are to the Official Text of the Model UCC, as revised, issued by the National Conference of Commissioners on Uniform State Laws.

<sup>4</sup> While Article 9 does not directly govern a mortgage on real property, the fact that a mortgage note is itself secured by a mortgage on real property does not render Article 9 inapplicable to transfers of the mortgage note. *See* UCC § 9-109(b) (“The application of this article [9] to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply.”).

<sup>5</sup> Note that the UCC eschews the more common U.S. spelling of “endorsement” for the less common “indorsement.” The UCC spelling is used throughout this paper.

pool are deemed “negotiable” (as we believe most typically are) or “non-negotiable” will have little or no substantive effect under the UCC on the validity of the transfer of the mortgage notes. The typical securitization process effects valid transfers of the mortgage notes and related mortgages in accordance with the provisions of Articles 3 and 9 of the UCC.<sup>6</sup>

### **What Constitutes a “Negotiable Instrument?”**

A “negotiable instrument” is defined as:

an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

- (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
- (2) is payable on demand or at a definite time; and
- (3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

UCC § 3-104(a).

Reference in a mortgage note to a mortgage does not affect the mortgage note’s status as a negotiable instrument. See UCC § 3-106(b) (“A promise or order is not made conditional [] by a reference to another writing for a statement of rights with respect to collateral, prepayment, or acceleration....”); see also Int’l Minerals & Chem. Corp. v. Matthews, 321 S.E.2d 545, 547 (N.C. Ct. App. 1984) (“referring to a mortgage or other collateral [in a mortgage note] does not impair negotiability” of the note); In re AppOnline.com, 285 B.R. 805, 815-16 (Bankr. E.D.N.Y. 2002) (reference in mortgage notes to underlying mortgages does not affect the negotiability of the notes).

The fact that a mortgage note contains a variable or adjustable interest rate also does not affect the mortgage note’s status as a negotiable instrument. That is because UCC § 3-112(b) provides that “[i]nterest may be stated in an instrument<sup>[7]</sup> as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument.” UCC § 3-112(b).

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<sup>6</sup> Article 3 and Article 9 are not mutually exclusive. Article 9 applies to the transfer of all “promissory notes,” which includes negotiable and non-negotiable instruments. Both Article 3 and Article 9 apply to “negotiable instruments.” With respect to non-negotiable instruments, only Article 9 applies to the transfer.

<sup>7</sup> UCC § 3-104(b) defines “instrument” simply as a “negotiable instrument” for purposes of Article 3. As discussed in more detail below, the definition of “instrument” in Article 9 (governing secured transactions) is somewhat more expansive.

## How is a Negotiable Mortgage Note Transferred?<sup>8</sup>

A negotiable mortgage note is transferred when it is “delivered” by a person other than the mortgagor for the purpose of giving the transferee the right to enforce the note. See UCC § 3-203(a). “Delivery” of a mortgage note occurs when there has been a voluntary transfer of possession of the mortgage note. See UCC § 1-201(b)(15). As a general matter, the “[t]ransfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument . . .” UCC § 3-203(b). Accordingly, a person in possession of the note becomes a “person entitled to enforce” if it can prove that it is the transferee.<sup>9</sup> See UCC § 3-301.

The easiest and most common way to transfer a negotiable mortgage note is through “negotiation.” Article 3 defines “negotiation” as “a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder.” UCC § 3-201(a). The “negotiation” of a negotiable mortgage note that is payable to an identified person or entity (such as the entity that originated a mortgage loan and whose name appears as the payee in the mortgage note) – “requires **transfer of possession** of the instrument and its **indorsement** by the **holder**.” UCC § 3-201(b) (emphasis added). As explained below, “indorsement” and “holder” are both defined terms in the UCC.

The “holder” of a negotiable mortgage note is “the person in possession of [the mortgage note] that is payable either to bearer or to an identified person that is the person in possession.” UCC § 1-201(b)(21) (A). In other words, upon the closing of a mortgage loan, the “holder” of the mortgage note is the entity that is the payee on the mortgage note and that possesses the note (either actually or constructively). After a negotiable mortgage note has been negotiated, such as in connection with a loan securitization, the “holder” of the mortgage note is the entity that possesses the mortgage note if the mortgage note was indorsed to that entity or if the mortgage note was indorsed in blank or to bearer.

The term “indorsement” is defined to include “a signature . . . that alone or accompanied by other words is made on an instrument [in our case, a negotiable mortgage note] for the purpose of . . . negotiating the instrument.” UCC § 3-204(a). Such an indorsement may be either a “special indorsement” or a “blank indorsement.” See UCC § 3-205. A “special indorsement” is a written indorsement that specifically “identifies a person to whom it makes the instrument payable.” UCC § 3-205(a). A “blank indorsement” is an indorsement that does not identify a person to whom the instrument is payable. See UCC § 3-205(b). Mortgage notes that are transferred in connection with loan securitizations are typically indorsed in blank with language such as “Pay to the order of \_\_\_\_\_,” where no name is filled in the blank. The effect of an indorsement in

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<sup>8</sup> It is important to note that Article 3 does not concern “ownership” of a mortgage note, but instead provides for the transfer of a mortgage note and the right to enforce such notes. See UCC § 3-301; UCC § 3-203 cmt. 1. A party need not be the “owner” of the mortgage note to enforce it. See UCC § 3-301 (“A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.”). Thus, a party may have the right to enforce the instrument, but not have “ownership” of that instrument. UCC § 3-203 cmt 1. For an example of situations where a party with the right to enforce an instrument is not also the “owner” of the instrument, see UCC 3-203 cmt. 1 and Note 12 *infra*.

<sup>9</sup> Note also that UCC § 3-203(c) provides for the scenario in which an instrument is transferred for value without the indorsement that, as described in the text below, would be needed for the mortgage note to have been “negotiated.” Under that section, if a negotiable mortgage note is transferred for value as part of a loan securitization, but the transferor fails to indorse the note, the transferee of the note has the “specifically enforceable right to the unqualified indorsement of the transferor.” UCC § 3-203(c); see Note 12, *infra* (discussing distinction between the right to enforce a mortgage note and ownership of the mortgage note).

blank is significant: “When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.” UCC § 3-205(b) (emphasis added).<sup>10</sup> See also UCC § 3-201(b) (The negotiation of a negotiable mortgage note that is payable to bearer (such as a negotiable mortgage note that has been indorsed in blank) is effected by “transfer of possession alone.”).

The term “possession” is not defined in the UCC. Thus, courts rely on common law definitions of possession to interpret that concept in the context of the negotiation of an instrument such as a mortgage note. See, e.g., In re Kelton Motors, Inc., 97 F.3d 22, 26 (2d Cir. 1996) (because Article 3 does not define “possession,” a court must look to the general law of the jurisdiction in determining whether a party is in possession of a negotiable instrument). Possession can be, and very often is, effected by an agent, nominee or designee, such as the designated custodian for the securitization trust. See, e.g., Midfirst Bank, SB v. C.W. Haynes and Co., Inc., 893 F. Supp. 1304, 1314-15 (D.S.C. 1994) (constructive possession exists when an authorized agent of the owner holds the note on behalf of the owner); Jenkins v. Evans, 31 A.D.2d 597, 598 (N.Y. App. Div. 3d Dept. 1968) (agent had authority to possess instruments for principal). In such cases, while the designated custodian has “physical” possession of the mortgage note, the trustee for which the custodian holds the mortgage note has “constructive” or “legal” possession. See Midfirst Bank, 893 F. Supp. at 1314-15; see also UCC § 9-313 cmt. 3 (“if the collateral is in [the] possession of an agent of the secured party for the purposes of possessing on behalf of the secured party, and if the agent is not also an agent of the debtor, the secured party has taken actual possession” (emphasis added)).

### **Who May Enforce A Negotiable Mortgage Note?**

The maker of a mortgage note is obligated to pay the note to the “person entitled to enforce the instrument.” UCC § 3-412. The “person entitled to enforce” a negotiable mortgage note includes “(i) the holder of the instrument, [and] (ii) a nonholder in possession of the instrument who has the rights of a holder.” UCC § 3-301. Accordingly, to enforce a mortgage note against the borrower, a person must generally prove either that it is a “holder” or that it is a transferee with the rights of a holder. See UCC § 3-301.

The first category of persons that may enforce a mortgage note is a “holder.” A “holder” of a negotiable mortgage note is “the person in possession of [the mortgage note] that is payable either to bearer or to an identified person that is the person in possession.” UCC § 1-201(b)(21)(A). The manner in which one becomes a “holder” is described in the section above.

The second category contemplated by UCC § 3-301 – a “nonholder in possession who has the rights of a holder” – is more difficult to define. Under this clause, a person would qualify as a “nonholder in possession” if possession of the mortgage note was transferred to him from the transferor, but the transferor did not indorse the mortgage note. See UCC § 3-203 cmt. 2. In this circumstance, the transferee is entitled to enforce the instrument, but to do so, the transferee must first prove both possession of the unindorsed mortgage note and prove the transfer of the mortgage note by the holder to the transferee. See id.<sup>11</sup> Under both clauses, the person

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<sup>10</sup> An indorsement is considered to be made “on an instrument” for purposes of negotiation when it is made either on the mortgage note itself or on a separate paper, often referred to as an “allonge,” that is affixed to the note. See UCC § 3-204(a). Once affixed, the allonge becomes “part of the instrument.” Id.

<sup>11</sup> As noted above, the right to enforce an instrument and the ownership of that instrument are not necessarily the same. See UCC § 3-203 cmt. 1. Thus, a party may have the right to enforce the instrument, but not have “ownership” of that instrument. Id. A party

seeking to enforce the mortgage note must have possession of the note.

UCC § 3-301 also permits a person without possession to enforce a mortgage note where the mortgage note has been lost, stolen, or destroyed within the meaning of UCC § 3-309. See UCC § 3-301.<sup>12</sup> Courts have consistently affirmed the use of UCC § 3-309 to enforce lost, stolen or destroyed negotiable mortgage notes that a party, such as a securitization trustee, seeks to enforce when the party has proven the terms of the mortgage notes and its right to enforce the mortgage notes (i.e., it has proven the transfer of the mortgage note from the transferee). See, e.g., In re Montagne, 421 B.R. 65, 79 (D. Vt. 2009) (finding that plaintiff who satisfied requirements of UCC § 3-309 could enforce lost mortgage note); Waggoner v. Mortgage Elect. Registration Sys., Inc., No. 2003-CA-002666-MR, 2005 WL 2175439, at \*1 n.1 (Ky. App. Ct. Sept. 9, 2005) (“The promissory note was proven ... by an affidavit concerning a lost or destroyed promissory note.”).

### **What Rights Against Borrower Defenses are Available to the Holder of a Negotiable Mortgage Note?**

A key concept relating to the negotiation of negotiable mortgage notes is the “holder in due course” doctrine. That is because where the “holder” of a negotiable mortgage note is deemed a “holder in due course,” the holder takes the mortgage note subject only to specific limited defenses of the borrower. The following is a brief summary of an expansive area of law. Under UCC § 3-302(a):

[A] “holder in due course” means the holder of an instrument if:

- (1) the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and
- (2) the holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in Section 3-306 [regarding claims of a property or possessory right in the instrument or its proceeds, including a claim to rescind a negotiation and to recover the instrument or its proceeds], and (vi) without notice that any party has a defense or claim in recoupment described in Section 3-305(a).

UCC § 3-302(a).

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need not be the “owner” of the note to enforce it. See UCC § 3-301 (“A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.”). For example, if X (holder of an instrument payable to X) sells the instrument to Y pursuant to a document conveying all of X’s right, title and interest in the instrument to Y, but does not deliver immediate possession to Y, Y would have ownership of the instrument under the agreement, but Y generally would not be entitled to enforce the instrument until it obtained possession of the instrument. Id.

<sup>12</sup> UCC § 3-301 also permits a person without possession to enforce a mortgage note where, in certain circumstances, there has been mistaken payment as defined in UCC § 3-418(d).

Under Article 3, a holder in due course of a negotiable mortgage note takes the mortgage note free of (a) all prior claims to or regarding the mortgage note by any person and (b) most defenses to enforceability of the mortgage note that may be raised by parties with whom the holder in due course has not dealt. See UCC §§ 3-305 and 3-306; see also Provident Bank v. Community Home Mortgage Corp., 498 F. Supp. 2d 558, 565 (E.D.N.Y. 2007). The defenses to which a holder in due course may be subject are found in UCC § 3-305, and include:

a defense of the obligor based on (i) infancy of the obligor to the extent it is a defense to a simple contract, (ii) duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor, (iii) fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms, or (iv) discharge of the obligor in insolvency proceedings.

UCC § 3-305(a)(1).

### **How Is a Mortgage Note Transferred Under Article 9 of the UCC?**

The sale of mortgage notes is also governed, in significant part, by Article 9. Article 9 establishes (1) whether the interests of a transferee of a mortgage note have both “attached” and become “perfected” so that those interests will prevail over conflicting claims of third parties and (2) the rights of the transferee in and to the underlying mortgage that secures the mortgage note.

Article 9 addresses the sale of mortgage notes, regardless of whether they are negotiable or non-negotiable.<sup>13</sup> More specifically, Article 9 applies to “a sale of . . . promissory notes.” UCC § 9-109(a)(3). A “promissory note” is defined as “an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.” UCC § 9-102(a)(65).<sup>14</sup> Given this broad definition, residential mortgage notes in common use today are typically “promissory notes” for purposes of Article 9.

Under Article 9, the sale of a mortgage note (whether or not the mortgage note is negotiable) is deemed a secured transaction and the transferee’s “security interest” is automatically perfected when it attaches (more on “attachment” and “perfection” below). See UCC § 9-309(4). While security interests are most commonly thought of as the liens obtained by lenders, the UCC defines the term “security interest” to also include “any interest of a . . . buyer of . . . a promissory note in a transaction that is subject to Article 9.” UCC § 1-201(b)(35) (emphasis

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<sup>13</sup> Article 9 also applies to the creation of a lien on, or a “less-than-ownership security interest” in, a mortgage note. Because most assignments and transfers of mortgage notes in loan securitizations are of the ownership of the mortgage notes, not a mere lien on or security interest in the notes, this paper addresses only outright sales of mortgage notes under Article 9. The principles discussed below regarding attachment of a buyer’s interest in a sale of mortgage notes are identical to those that apply in the context of the creation of a lien on mortgage notes, and the principles regarding perfection of the interest in the mortgage notes are likewise very similar. “Although . . . Article [9] occasionally distinguishes between outright sales of receivables and sales that secure an obligation, neither . . . Article [9] nor the definition of “security interest” (Section 1-201(37)) delineates how a particular transaction is to be classified. That issue is left to the courts.” UCC § 9-109 cmt 4.

<sup>14</sup> Under Article 9, the term “instrument” is defined broadly as “a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment.” UCC § 9-102(a)(47).

added). In addition, the definition of “secured party” includes “a person to which . . . promissory notes have been sold.” UCC § 9-102(a)(72)(D).

Before a buyer’s “security interest” in a mortgage note can be perfected under Article 9, the security interest must “attach.” A security interest attaches when (1) value has been given for the sale, (2) the seller has rights in the mortgage note or the power to transfer rights in the mortgage note to the buyer and (3) either (a) the mortgage note is in the possession of the buyer pursuant to a security agreement of the seller or (b) the seller has signed a written or electronic security agreement that describes the mortgage note. See UCC § 9-203(b). Article 9 defines “security agreement” as “an agreement that creates or provides for a security interest,” UCC § 9-102(a)(73), which, in the context of a mortgage loan securitization, would include an agreement pursuant to which mortgages and mortgage notes are sold and transferred from one entity to another. Such an agreement, normally a pooling and servicing agreement or trust agreement, typically will provide that the transfer of the mortgage note pursuant thereto effects a sale of the mortgage note, which would thus, under Article 9, constitute a “security agreement.”

Significantly, the attachment of a security interest in a mortgage note that is itself “secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage or other lien.” UCC § 9-203(g) (emphasis added).<sup>15</sup> Similarly, under UCC § 9-308(e), perfection of a security interest in a promissory note “also perfects a security interest in a security interest, mortgage, or other lien on personal or real property securing the right.” UCC § 9-308(e) (emphasis added). In other words, perfection of a security interest (which includes a sale to a buyer) in a mortgage note pursuant to Article 9 also perfects a security interest in the mortgage that secures the note.

Perfection of the interest in the mortgage note is important because it provides the transferee of the mortgage note with a right in the mortgage note and mortgage superior to that of a subsequent lien creditor of the seller. And, perfection provides the transferee of the mortgage note with a right in the mortgage superior to that of a subsequent lien creditor of the mortgagee, which includes a bankruptcy trustee (see UCC § 9-102(a)(52)). See UCC § 9-308 cmt. 6.

### **Transfer of Mortgage Notes: Conclusion**

In summary, under the UCC, the transfer of a mortgage note that is a negotiable instrument is most commonly effected by indorsing the note, which may be a blank or special indorsement, and delivering the mortgage note to the transferee (or the agent acting on behalf of the transferee). As the residential mortgage notes in common usage typically are “negotiable instruments,” this is the most common method of transfer. In addition, even without indorsement, the assignment can be effected by transferring possession under UCC § 3-203(a). Moreover, the sale of any mortgage note also effects the assignment and transfer of the mortgage under Article 9. The attachment and perfection of the buyer’s interest in the mortgage note attaches and perfects

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<sup>15</sup> The comments to UCC § 9-203 expressly provide that “Subsection (g) codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien.” UCC § 9-203 cmt. 9; see also Restatement (Third) of Property (Mortgages) § 5.4(a) (1997). The same holds true for UCC § 9-308(e), under which perfection of a security interest in a mortgage note also accomplishes perfection of a security interest in the mortgage. See UCC § 9-308 cmt. 6.

the buyer's interest in the underlying mortgage that secures the mortgage note. Securitization agreements often provide both for (a) the indorsement and transfer of possession to the trustee or the custodian for the trustee, which would constitute a negotiation of the mortgage note under Article 3 of the UCC and (b) an outright sale and assignment of the mortgage note. Thus, regardless of whether the mortgage notes in a securitization trust are deemed "negotiable" or "non-negotiable," the securitization process generally includes a valid transfer of the mortgage notes to the trustee in accordance with the explicit requirements of the UCC.

### 3. Assignment and Transfer of Ownership of Mortgages

As described above, when a mortgage loan is assigned and transferred as part of the securitization of the loan in the secondary market, both the mortgage note and the mortgage itself are typically sold, assigned, and physically transferred to the trustee that is acting on behalf of the MBS investors or to a trustee-designated document custodian pursuant to a custody agreement. The assignment and transfer are usually documented and performed in accordance with a pooling and servicing agreement.

#### What is the Relationship Between the Transfer of a Mortgage Note and the Transfer of Ownership of the Mortgage?

When a mortgage note is transferred in accordance with common mortgage loan securitization processes, the mortgage is also automatically transferred to the mortgage note transferee under the UCC and the general common law rule that "the mortgage follows the note." See, e.g., Carpenter v. Longan, 83 U.S. 271, 275 (1873) ("The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter."); Mortgage Elect. Registration Sys., Inc. v. Coakley, 41 A.D.3d 674, 674 (N.Y. App. Div. 2d Dept. 2007) ("the mortgage . . . passed as an incident to the promissory note"); Restatement (Third) of Property, Mortgages § 5.4(a) (1997) ("A transfer of an obligation secured by a mortgage also transfers the mortgage . . .").

The rule that "the mortgage follows the note" has been codified in the UCC, but the rule's common law origins date back hundreds of years, long before the creation of the UCC. As stated in the official comments to UCC § 9-203(g), that section "codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien." UCC § 9-203 cmt. 9.

All states follow this rule.<sup>16</sup> In addition to the codification of the rule under UCC § 9-203(g), reported

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<sup>16</sup> However, in some states, such as Massachusetts and Minnesota, courts have held that the transfer of a mortgage note without an express transfer of the mortgage vests in the note holder only an equitable interest in the mortgage. See, e.g., First Nat'l Bank of Cape Cod v. North Adams Hoosac Savs. Bank, 7 Mass. App. Ct. 790, 796 (1979); Jackson v. Mortgage Elect. Registration Sys., Inc., 770 N.W.2d 487, 497, 500-01 (Minn. 2009). This arrangement has been described as follows: the holder of the mortgage holds the legal title to the mortgage in constructive trust for the benefit of the mortgage note holder. See First Nat'l Bank of Cape Cod, 7 Mass. App. Ct. at 796. In both states, however, case law suggests that foreclosure proceedings must be initiated by, or at least in the name of, the holder of the legal title in the mortgage. See Jackson, 770 N.W.2d at 500; U.S. Bank Nat'l Ass'n v. Ibanez, Nos. 08 MISC 384283 (KCL), 08 MISC 386755 (KCL), 2009 WL 3297551, at \*11 (Mass. Land Ct. Oct. 14, 2009) (rejecting argument that note holders had authority to foreclose on mortgages for which their status as full mortgagees was in dispute) (currently on appeal to the Massachusetts Supreme Judicial Court).



court cases in nearly every state and non-UCC statutory provisions in some states make clear that “the mortgage follows the note”:

**Alabama:** Armour Fertilizer Works v. Zills, 177 So. 136, 138 (Ala. 1937) (“when the note is secured by a mortgage, such mortgage follows the note”).

**Arizona:** Ariz. Rev. Stat § 33-817 (“The transfer of any contract or contracts secured by a trust deed shall operate as a transfer of the security for such contract or contracts.”).

**Arkansas:** Leach v. First Cmty. Bank, No. CA 07-05, 2007 WL 2852599, at \*1 (Ark. App. Ct. Oct. 3, 2007) (“Arkansas has long followed the rule that, in the absence of an agreement or a plain manifestation of a contrary intention, the security of the original mortgage follows the note or renewal thereof.”).

**California:** Cal. Civ. Code § 2936 (“The assignment of a debt secured by mortgage carries with it the security”); In re Staff Mortgage & Invest. Corp., 625 F.2d 281, 284 (9<sup>th</sup> Cir. 1980) (in California, “[A] deed of trust is a mere incident of the debt it secures and . . . an assignment of the debt ‘carries with it the security.’” (internal quotation omitted)).

**Colorado:** Carpenter v. Longan, 83 U.S. 271, 275 (1873) (in an appeal from the Supreme Court of Colorado Territory, the United States Supreme Court stated: “The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter.”).

**Connecticut:** Conn. Gen. Stat. § 49-17 (“When any mortgage is foreclosed by the person entitled to receive the money secured thereby but to whom the legal title to the mortgaged premises has never been conveyed, the title to such premises shall, upon the expiration of the time limited for redemption and on failure of redemption, vest in him in the same manner and to the same extent as such title would have vested in the mortgagee if he had foreclosed, provided the person so foreclosing shall forthwith cause the decree of foreclosure to be recorded in the land records in the town in which the land lies.”); In re AMSCO, Inc., 26 B.R. 358, 361 (Bankr. D. Conn. 1982) (“An assignment of the note carries the mortgage with it . . .”).

**District of Columbia:** Hill v. Hawes, 144 F.2d 511, 513 (D.C. Cir. 1944) (after mortgage note has been cancelled, cancellation of “any mortgage follows as a matter of course and does not require a separate action”).

**Florida:** Capital Investors Co. v. Ex’rs of Estate of Morrison, 484 F.2d 1157, 1163 n.12 (4<sup>th</sup> Cir. 1973) (“That the mortgage follows the note it secures and derives negotiability, if any, from the note is the rule in Florida where the land under mortgage in this case was located.” (citing Daniels v. Katz, 237 So.2d 58, 60 (Fla. App. 1970); Meyerson v. Boyce, 97 So.2d 488, 489 (Fla. App. 1957))); Margiewicz v. Terco Properties, 441 So.2d 1124, 1125 (Fla. Dist. Ct. App. 1983) (when a note secured by a mortgage is assigned, the mortgage follows the note into the hands of the mortgagee).

**Illinois:** Federal Nat’l Mort. Ass’n v. Kuipers, 314 Ill. App.3d 631, 635, 732 N.E.2d 723, 727 (Ill. Ct. App. 2000) (“The assignment of a mortgage note carries with it an equitable assignment of the mortgage by which it was secured. The assignee stands in the shoes of the assignor-mortgagee with regard to the

rights and interests under the note and mortgage. . . . [I]n Illinois, the assignment of the mortgage note is sufficient to transfer the underlying mortgage.”) (citations omitted).

**Indiana:** Lagow v. Badollet, 1 Blackf. 416, 1826 WL 1087, at \*3 (Ind. 1826) (“a mortgage . . . follows the debt into whose hands soever it may pass”).

**Iowa:** Bremer County Bank v. Eastman, 34 Iowa 392, 1872 WL 254, at \*1 (Iowa 1872) (“The transfer of the note, secured by the mortgage, carried the mortgage with it as an incident to the debt, and the indorsee of the note could maintain an action in his own name, to foreclose the mortgage without any assignment thereon whatever.”).

**Kansas:** Kan. Stat. Ann § 58-2323 (“The assignment of any mortgage as herein provided shall carry with it the debt thereby secured.”); Bank Western v. Henderson, 255 Kan. 343, 354, 874 P.2d 632, 640 (1994) (“[T]he mortgage follows the note. A perfected claim to the note is equally perfected as to the mortgage.”).

**Maryland:** In re Bird, No. 03-52010-JS, 2007 WL 2684265, at \*2-4 (Bankr. D.Md. Sept. 7, 2007) (“The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it . . .”).

**Massachusetts:** The transfer of a mortgage note, without the express transfer of the mortgage, vests in the note holder an equitable interest in the mortgage (an interest that can be enforced by the note holder) and the mortgage holder is deemed to hold the mortgage in constructive trust for the benefit of the note holder. See Weinberg v. Brother, 263 Mass. 61, 62 (1928); Barnes v. Boardman, 149 Mass. 106, 114 (1889); Morris v. Bacon, 123 Mass. 58, 59 (1877); First Nat’l Bank of Cape Cod v. North Adams Hoosac Savs. Bank, 7 Mass. App. Ct. 790, 796 (1979); see also In re Ivy Properties, Inc., 109 B.R. 10, 14 (Bankr. D. Mass. 1989) (“[U]nder Massachusetts common law the assignment of a debt carries with it the underlying mortgage, without necessity for the granting or recording of a separate mortgage assignment.”).

Despite the above cited authorities, the Massachusetts Land Court in a recent opinion cast doubt on the “mortgage follows the note” rule:

[E]ven a valid transfer of the note does not automatically transfer the mortgage. . . . The holder of the note may have an equitable right to obtain an assignment of the mortgage by filing an action in equity, but that is all it has. . . . The mortgage itself remains with the mortgagee (or, if properly assigned, its assignee) who is deemed to hold the legal title in trust for the purchaser of the debt until the formal assignment of the mortgage to the note holder or, absent such assignment, by order of the court in an action for conveyance of the mortgage. . . . But . . . the right to get something and actually having it are two different things.

U.S. Bank Nat’l Ass’n v. Ibanez, Nos. 08 MISC 384283 (KCL), 08 MISC 386755 (KCL), 2009 WL 3297551, at \*11 (Mass. Land Ct. Oct. 14, 2009) (citations omitted).

The Ibanez case appears to stand in stark contrast to the principles embodied in the UCC.

The Ibanez case is currently pending on appeal before the Massachusetts Supreme Judicial Court, that state's highest court.

**Michigan:** Prime Fin. Serv. v. Vinton, 279 Mich. App. 245, 257, 761 N.W.2d 694, 704 (Mich. Ct. App. 2008) ("the transfer of a note necessarily includes a transfer of the mortgage with it") (citing Ginsberg v. Capitol City Wrecking Co., 300 Mich. 712, 717, 2 N.W.2d 892 (1942)); Jones v. Titus, 208 Mich. 392, 397, 175 N.W. 257, 259 (Mich. 1919) (when a note given with a mortgage was indorsed over to a third party it carried with it the equitable title to the mortgage).

**Minnesota:** Jackson v. Mortgage Elect. Registration Sys., Inc., 770 N.W.2d 487, 497 (Minn. 2009) ("Absent an agreement to the contrary, an assignment of the promissory note operates as an equitable assignment of the underlying security interest.") (emphasis in original).

**Mississippi:** Holmes v. McGinty, 44 Miss. 94, 1870 WL 4406, at \*4 ("[T]he mortgage . . . follows the debt as an incident, and is a security for whomsoever may be the beneficial owner of it.").

**Missouri:** George v. Surkamp, 76 S.W.2d 368, 371 (Mo. 1934) (when the holder of the promissory note assigns or transfers the note, the deed of trust is also transferred).

**Montana:** First Nat'l Bank v. Vagg, 65 Mont. 34, 212 P. 509, 511 (Mont. 1922) ("The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while the assignment of the latter alone is a nullity. The mortgage can have no separate existence.") (citations omitted).

**Nebraska:** In re Union Packing Co., 62 B.R. 96, 100 (Bankr. D. Neb. 1986) (with or without the assignment of the mortgage, the assignee of the promissory note has the right to enforce the mortgage securing the note).

**New Hampshire:** Southerin v. Mendum, 5 N.H. 420, 1831 WL 1104, at \*7 (N.H. 1831) ("When a mortgagee transfers to another person, the debt which is secured by the mortgage, he ceases to have any control over the mortgage. . . . And we are of the opinion, that the interest of the mortgagee passes in all cases with the debt, and that it is not within the statute of frauds, because it is a mere incident to the debt, has no value independent of the debt, and cannot be separated from the debt.").

**New Jersey:** In re Kennedy Mort. Co., 17 B.R. 957, 966 (Bankr. D. N.J. 1982) ("Anyone interested in acquiring an interest in the mortgage would be obliged to obtain an interest in the debt.").

**New York:** Mortgage Elec. Registration Sys., Inc. v. Coakley, 41 A.D.3d 674, 838 N.Y.S.2d 622 (App. Div. 2007) ("at the time of the commencement of this action, MERS was the lawful holder of the promissory note (see UCC 3-204[1]; Franzese v. Fidelity N.Y. FSB, 214 A.D.2d 646, 625 N.Y.S.2d 275), and of the mortgage, which passed as an incident to the promissory note (see Payne v. Wilson, 74 N.Y. 348, 354-355; see also Weaver Hardware Co. v. Solomovitz, 235 N.Y. 321, 139 N.E. 353; Matter of Falls, 31 Misc. 658, 660, 66 N.Y.S. 47, aff'd. 66 A. D. 616, 73 N.Y.S. 1134") (emphasis added); Provident Bank v. Community Home Mortgage Corp., 498 F. Supp. 2d 558, 564-65 (E.D.N.Y. 2007) (applying principle

that the mortgage follows the note).

**North Carolina:** Dixie Grocery Co. v. Hoyle, 204 N.C. 109, 167 S.E. 469 (1933) (“The mortgage follows the debt.”).

**Ohio:** U.S. Nat’l Bank Ass’n v. Marcino, 181 Ohio App.3d 328, 337 (2009) (“[T]he negotiation of a note operates as an equitable assignment of the mortgage, even when the mortgage is not assigned or delivered. Kuck v. Sommers (1950), 100 N.E.2d 68, 75, 59 Ohio Abs. 400. Various sections of the Uniform Commercial Code, as adopted in Ohio, support the conclusion that the owner of a promissory note should be recognized as the owner of the related mortgage. . . . Thus, although the recorded assignment is not before us, there is sufficient evidence on the record to establish that appellee is the current owner of the note and mortgage at issue in this case, and, therefore, the real party in interest.”) (citations to Ohio’s versions of UCC §§ 9-109(a)(3), 9-102(a)(72)(D) and 9-203(g) omitted).

**Oklahoma:** Zorn v. Van Buskirk, 111 Okla. 211, 239 P. 151 (1925) (“the mortgage follows the note”).

**Pennsylvania:** In re Miller, No. 99-25616JAD, 2007 WL 81052, at \*6 & n.7 (Bankr. W.D. Pa. Jan. 9, 2007) (citing and quoting with approval Gray, Mortgages in Pennsylvania at § 1-3 (1985) (“the mortgage follows the note”)).

**South Carolina:** MidFirst Bank, SSB v. C.W. Haynes & Co., Inc., 893 F. Supp. 1304, 1318 (D. S.C. 1994) (“South Carolina recognizes the ‘familiar and uncontroverted proposition’ that ‘the assignment of a note secured by a mortgage carries with it an assignment of the mortgage.’ Hahn v. Smith, 157 S.C. 157, 154 S.E. 112 (1930); Ballou v. Young, 42 S.C. 170, 20 S.E. 84 (1894).”).

**Texas:** Kirby Lumber Corp. v. Williams, 230 F.2d 330, 333 (5th Cir. 1956) (applying Texas law) (“The rule is fully recognized . . . that a mortgage to secure a negotiable promissory note is merely an incident to the debt, and passes by assignment or transfer of the note.”).

**Utah:** Smith v. Jarman, 211 P. 962, 966 (Utah 1922) (“The modern doctrine that the mortgage follows the note as an incident was thus long ago recognized by this court . . .”).

**Virginia:** Yerby v. Lynch, 3 Gratt. 460, 1847 WL 2384, at \*8-10 (Va. 1847) (“the mortgage follows the debt”).

**Virgin Islands:** UMLIC VP LLC v. Matthias, 234 F. Supp. 2d 520, 523 (D. V.I. 2002) (citing and quoting with approval the “RESTATEMENT (THIRD) OF PROPERTY, MORTGAGES § 5.4(a) (1997). The comment to this section further explains that ‘[t]he principle of this subsection, that the mortgage follows the note, ... applies even if the transferee does not know that the obligation is secured by a mortgage.... Recordation of a mortgage assignment is not necessary to the effective transfer of the obligation or the mortgage securing it.’ Id. § 5.4 cmt. b (1997). Accordingly, in the Virgin Islands, no separate document specifically assigning and transferring the mortgage which secures a note is required to accompany the assignment of the obligation, because the mortgage automatically follows the note.”).

**Washington:** Nance v. Woods, 79 Wash. 188, 189, 140 P. 323, 323 (Wash. 1914) (“the mortgage follows the note”).

As mentioned above, the general common law rule that “the mortgage follows the note” is codified in Article 9 of the UCC. Section 9-203(g) of the UCC states: “The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.”<sup>17</sup> UCC § 9-203(g) (emphasis added). The phrase “security interest” in this provision includes a buyer’s ownership interest because UCC § 1-201(b)(35) defines “security interest” to include “any interest of a . . . buyer of . . . a promissory note in a transaction that is subject to Article 9.” Thus, under Article 9, a sale of a mortgage note means that the buyer’s rights attach not only to the mortgage note itself but also to the mortgage that secures the mortgage note. Moreover, under UCC § 9-308(e), those rights are perfected and can be enforced against third parties.<sup>18</sup> Regarding the impact of these UCC provisions, one treatise states: “Article 9 makes it as plain as possible that the secured party need not record an assignment of mortgage, or anything else, in the real property records in order to perfect its rights in the mortgage.” J. McDonnell and J. Smith, Secured Transactions Under the Uniform Commercial Code, § 16.09[3][b].

Courts in several states have affirmed and applied the “mortgage follows the note” rule in cases where the mortgage assignment was not recorded by the transferee.<sup>19</sup> See, e.g., Nat’l Livestock Bank v. First Nat. Bank, 203 U.S. 296, 307-08 (1906) (citing with approval a decision of the Supreme Court of Kansas for the proposition that “where a mortgage upon real estate is given to secure payment of a negotiable note, and before its maturity the note and mortgage are transferred by indorsement of the note to a bona fide holder, the assignment, if there be a written one, need not be recorded”); Jackson v. Mortgage Elec. Registration Sys., Inc., 770 N.W.2d 487, 497-98, 500 (Minn. 2009) (applying the “mortgage follows the note” rule where there was no assignment of the mortgage); UMLIC VP LLC v. Matthias, 234 F. Supp. 2d 520, 523 (D. V.I. 2002) (“Recordation of a mortgage assignment is not necessary to the effective transfer of the obligation or the mortgage securing it.”); Federal Nat’l Mort. Ass’n v. Kuipers, 314 Ill. App. 3d 631, 635, 732 N.E.2d 723, 727 (Ill. Ct. App. 2000) (“Because the assignment of the debt, with nothing more, is sufficient to preserve the mortgage lien, it cannot follow that the lien is somehow extinguished for the failure to record the assignment. Therefore, we are persuaded that the

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<sup>17</sup> Courts have observed that UCC § 9-203(g) codifies the “mortgage follows the note” rule. See, e.g., U.S. Nat’l Bank Ass’n v. Marcino, 181 Ohio App.3d 328, 337 (2009) (quoting with approval Official Comment 9 to UCC § 9-203: “subsection (g) [of UCC § 9-203] codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien”).

<sup>18</sup> As discussed above, UCC § 9-308(e) provides that “perfection of a security interest in a right to payment or performance also perfects a security interest in a security interest, mortgage, or other lien on personal or real property securing the right.” UCC § 9-308(e) (emphasis added).

<sup>19</sup> In most states, recording of an assignment of mortgage is generally not required to ensure the enforceability of the assignment of mortgage as between the assignor and assignee, and anyone with knowledge thereof. It is beyond the scope of this paper to discuss in detail the potential risks to the mortgage transferee of not recording a mortgage assignment. Those risks might include, among others, delaying the transferee’s ability to foreclose on the mortgage, failing to receive notices that may go to the mortgagee of record, and otherwise leaving the assignee open to negligent or fraudulent actions or inactions by the mortgagee of record that could bind the mortgage transferee and impair the value or enforceability of the mortgage. Similarly, when an assignment of mortgage is not recorded, the assignor may be liable for certain obligations imposed upon a mortgagee of record, such as the obligation to provide a pay-off statement or mortgage release within a designated time period.

mortgage lien and priority position inure to the benefit of the assignee and that recording the assignment is unnecessary to preserve the security for the debt.”); In re Kennedy Mortgage Co., 17 B.R. 957, 964 (Bankr. D.N.J. 1982) (“The fact that assignments of mortgages may be recorded does not affect the validity of an assignment of a mortgage which has not been recorded.”).

Courts have also affirmed and applied the “mortgage follows the note” rule even when there was no actual separate written assignment of the mortgage. See, e.g., Carpenter v. Longan, 83 U.S. 271, 275 (1873) (“The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter.”); Chase Home Fin., LLC v. Fequiere, 119 Conn. App. 570, 989 A.2d 606, 610-11 (Conn. Ct. App. 2010) (“General Statutes § 49-17 [which codifies the “mortgage follows the note” rule] permits the holder of a negotiable instrument that is secured by a mortgage to foreclose on the mortgage even when the mortgage has not yet been assigned to him.” (emphasis added)); U.S. Nat’l Bank Ass’n v. Marcino, 181 Ohio App.3d 328, 337 (2009) (holding that bank was the “current owner” of a mortgage note and the related mortgage despite the fact that “there is no evidence on the record that appellee is the current assignee of the note and mortgage,” and finding that “the negotiation of a note operates as an equitable assignment of the mortgage, even when the mortgage is not assigned or delivered” (citing Kuck v. Sommers, 100 N.E.2d 68, 75, 59 Ohio Abs. 400 (1950))); UMLIC VP LLC v. Matthias, 234 F. Supp. 2d 520, 523 (D. V.I. 2002) (the principle “that the mortgage follows the note, . . . applies even if the transferee does not know that the obligation is secured by a mortgage”); In re Union Packing Co., 62 B.R. 96, 100 (Bankr. D. Neb. 1986) (with or without the assignment of the mortgage, the assignee of the promissory note has the right to enforce the mortgage securing the note); Morris v. Bacon, 123 Mass. 58, 59 (1877) (note holder that endorsed and delivered mortgage note to bank as security for a loan, but without an assignment of the mortgage, was required by the court to transfer the mortgage to the bank); Bremer County Bank v. Eastman, 34 Iowa 392, 1872 WL 254, at \*1 (Iowa 1872) (“The transfer of the note, secured by the mortgage, carried the mortgage with it as an incident to the debt, and the indorsee of the note could maintain an action in his own name, to foreclose the mortgage without any assignment thereon whatever.”); Southerin v. Mendum, 5 N.H. 420, 1831 WL 1104, at \*8 (N.H. 1831) (“the right of the mortgagee before foreclosure is . . . assignable by a mere assignment of the debt, without deed or writing”).

Common MBS practices, as described above, are consistent with the general rule that “the mortgage follows the note”: pursuant to the pooling and servicing agreement that governs a mortgage-loan securitization, and the language of assignment typically contained in such an agreement, the mortgage note and the mortgage itself are sold, assigned, transferred and delivered to the trustee, and the transferor also typically delivers a written assignment of the mortgage that is in blank in recordable form. Courts have held that the language of assignment contained in a pooling and servicing agreement, along with the corresponding transfer, sale and delivery of the mortgage note and mortgage, are sufficient to transfer the mortgage to the transferee/trustee or its designee or nominee. See, e.g., Wells Fargo Bank, N.A. v. Konover, No. 3:05 CV 1924 (CFD), 2009 WL 2710229, at \*3 (D. Conn. Aug. 21, 2009) (MBS pooling agreement vested authority in pool trustee to bring legal action in the event of default); U.S. Bank N.A. v. Cook, No. 07 C 1544, 2009 WL 35286, at \*2-3 (N.D. Ill. Jan. 6, 2009) (MBS pooling trust agreement effected an assignment of the mortgage at issue to the pool trustee); In re Samuels, 415 B.R. 8, 18 (Bankr. D. Mass. 2009) (“The [Pooling and Servicing Agreement] itself [by which the MBS loan trust was created], in conjunction with the schedule of mortgages deposited through it into the pool

trust, served as a written assignment of the designated mortgage loans, including the mortgages themselves.”); EMC Mortgage Corp. v. Chaudhri FSB, 400 N.J. Super. 126, 141, 946 A.2d 578, 588 (N.J. Super. Ct. 2008) (“any [mortgage] assignment shall pass and convey the estate of the assignor in the mortgaged premises, and the assignee may sue thereon in his own name.” (citing New Jersey Stat. Ann. § 46:9-9 and Byram Holding Co. v. Bogren, 2 N.J. Super. 331, 336, 63 A.2d 822 (N.J. Ch. Div. 1949)); LaSalle Bank N.A. v. Lehman Bros. Holdings, Inc., 237 F. Supp. 2d 618, 632-33 (D. Md. 2002) (MBS pooling agreement granted trustee authority to bring suit on behalf of trust); LaSalle Bank N.A. v. Nomura Asset Capital Corp., 180 F. Supp. 2d 465, 470-71 (S.D.N.Y. 2001) (language in the pooling and servicing agreement for MBS trust effectually assigned mortgage to the pool trustee).<sup>20</sup>

### **What is the Relationship Between the UCC and State Real Property Laws?**

Article 9 does not apply to “the creation or transfer of an interest in or lien on real property, . . . except to the extent that provision is made for . . . liens on real property in Sections 9-203 and 9-308.” UCC § 9-109(d)(11) (emphasis added). As discussed above, UCC § 9-203(g) provides that, when a security interest in a mortgage note attaches, a security interest in the underlying mortgage also attaches, and UCC § 9-308(e) provides the same regarding the perfection of the security interest. See UCC § 9-203 cmt. 9 (the “mortgage follows the note” rule codified into UCC §§ 9-203(g) and 9-308(e)). In addition, UCC § 9-109(b) makes clear that Article 9 does apply to mortgage notes even though Article 9 does not govern the creation of the mortgage itself:

The application of this article [9] to a security interest [remember that this term is defined to include any interest of a buyer of a promissory note in a transaction subject to Article 9] in a secured obligation [e.g., mortgage note] is not affected by the fact that the obligation [e.g., mortgage note] is itself secured by a transaction or interest [e.g., creation of the mortgage or deed of trust itself] to which this article does not apply.

UCC § 9-109(b).<sup>21</sup>

The creation of an interest in or lien on real property, including a mortgage, is governed by the non-UCC law of the state in which the property is located. See, e.g., Oregon v. Corvallis Sand and Gravel Co., 429 U.S. 363, 378-79 (1977). Likewise, the enforceability of mortgages (including the right and

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<sup>20</sup> Although the rule is “the mortgage follows the note” when a mortgage note is assigned, some case law indicates that the converse is not true and that the mortgage note does not necessarily follow the mortgage if there is an attempted assignment of the mortgage alone or separate from the mortgage note. See, e.g., Bellistri v. Ocwen Loan Servicing, LLC, 284 S.W.3d 619, 623 (Mo. Ct. App. 2009) (“An assignment of the deed of trust separate from the note has no ‘force.’”); Saxon Mort. Serv., Inc. v. Hillery, No. C-08-4357 EMC, 2008 WL 5170180, at \*4-5 (N.D. Cal. Dec. 9, 2008) (“For there to be a valid assignment, there must be more than just assignment of the deed [of trust] alone; the note must also be assigned.”); In re Wilhelm, 407 B.R. 392, 400-05 (Bankr. D. Idaho 2009); Kelley v. Upshaw, 39 Cal.2d 179, 192 (1952) (“In any event, Kelley’s purported assignment of the mortgage without an assignment of the debt which is secured was a legal nullity.”). This is consistent with the longstanding aspect of the “mortgage follows the note” rule that “the note and mortgage are inseparable; the former as essential, the latter as an incident.” In re Bird, No. 03-52010-JS, 2007 WL 2684265, at \*2-4 (Bankr. D.Md. Sept. 7, 2007).

<sup>21</sup> UCC Article 3, which applies to negotiable mortgage notes, does not apply to mortgages themselves because mortgages do not fit the definition of “negotiable instrument” in UCC § 3-104(a).

method to foreclose) is subject to all of the conditions precedent and requirements that are set forth in the particular mortgage itself and in all applicable state and local laws. Those conditions precedent and procedural requirements vary from mortgage to mortgage and from state to state. Thus, ownership of a mortgage (i.e., without notice to the mortgagor or the public, without judicial proceedings (where required), without satisfaction of other conditions precedent or procedural requirements in the mortgage itself or in applicable state law), does not always give the holder of the mortgage the legal ability to foreclose on the mortgage. Though a discussion of the other necessary prerequisites to foreclosure is beyond the scope of this paper, the fact that other steps may need to be taken by the owner of a mortgage note, or the owner of a mortgage, is neither unique nor surprising in our legal and regulatory system and does not diminish an otherwise legally effective transfer of the mortgage note and mortgage.

### **How Does the Use of MERS Affect These Issues?**

The use of MERS as the nominee for the benefit of the trustee and other transferees in the mortgage loan securitization process has been a subject of litigation in recent years. See, e.g., Bellistri v. Ocwen Loan Servicing, LLC, 284 S.W.3d 619, 623 (Mo. Ct. App. 2009). Some cases address the authority or ability of MERS or transferees of MERS to foreclose on a mortgage for which MERS is or was the mortgagee of record. See, e.g., Saxon Mort. Serv., Inc. v. Hillery, No. C-08-4357 EMC, 2008 WL 5170180, at \*4-5 (N.D. Cal. Dec. 9, 2008). As a general matter, the assignment and transfer of a mortgage to MERS as nominee of and for the benefit of the beneficial owner of the mortgage does not adversely impact the right to foreclose on the mortgage.

Decisions in many jurisdictions support this conclusion. See, e.g., In re Mortgage Elect. Registration Sys., Inc. (MERS) Litig., No. 2:09-md-2119, 2010 WL 4038788, at \*8 (D. Ariz. Sept. 30, 2010) (“Plaintiffs have not cited any legal authority where the naming of MERS . . . was cause to enjoin a non-judicial foreclosure as wrongful.”); Commonwealth Property Advocates, LLC v. Mortgage Elect. Registration Sys., Inc., No. 2:10-CV-340 TS, 2010 WL 3743643, at \*3 (D. Utah Sept. 20, 2010) (MERS as nominee has authority to foreclose); Taylor v. Deutsche Bank Nat’l Trust Co., No. 5D09-4035, 2010 WL 3056612, at \*3 (Fla. App. Aug. 6, 2010) (“[T]he written assignment of the note and mortgage from MERS to Deutsche Bank properly transferred the note and mortgage. . . . The transfer, moreover, was not defective by reason of the fact that MERS lacked a beneficial ownership interest in the note at the time of the assignment, because MERS was lawfully acting in the place of the holder and was given explicit and agreed upon authority to make just such an assignment.”); Mortgage Elect. Registration Sys., Inc. v. Bellistri, No. 4:09-CV-731 CAS, 2010 WL 2720802, at \*15 (E.D. Mo. July 1, 2010) (“[a]s the nominee of the original lender . . . or the lender’s assigns, MERS has bare legal title to the note and deed of trust securing it, and this is sufficient to create standing” to initiate foreclosure proceedings); Silvas v. GMAC Mortgage, LLC, No. CV-09-265-PHX-GMS, 2009 WL 4573234, at \*8 (D. Ariz. Jan. 5, 2010) (MERS empowered to foreclose where MERS is designated on deed of trust as beneficiary); Diessner v. Mortgage Elec. Registration Sys., 618 F. Supp. 2d 1184, 1187-91 (D. Ariz. 2009) (MERS and trustee under deed of trust are authorized to institute non-judicial foreclosure proceeding); Jackson v. Mortgage Elec. Registration Sys., Inc., 770 N.W.2d 487, 501 (Minn. 2009) (rejecting argument that transfer of mortgage note to MERS is a transfer that must be recorded before foreclosure); Reynoso v. Paul Financial, LLC, No. 09-3225 SC, 2009 WL 3833298, at \*2 (N.D. Cal. Nov. 16, 2009) (naming of MERS as initial beneficiary under deed of trust, as nominee for the lender,



and the subsequent transfer of the deed of trust from MERS to a transferee was effective and did not hinder transferee's right to foreclose); Blau v. America's Servicing Co., No. CV-08-773, 2009 WL 3174823, at \*8 (D. Ariz. Sept. 29, 2009) (MERS authorized under deed of trust to act on behalf of lender and transfer its interests); Farahani v. Cal-Western Recon. Corp., No. 09-194, 2009 WL 1309732, at \*2-3 (N.D. Cal. May 8, 2009) (MERS authorized to pursue non-judicial foreclosure action); Vazquez v. Aurora Loan Servs., No 2:08-cv-01800-RCJ-RJJ, 2009 WL 1076807, at \*1 (D. Nev. Apr. 20, 2009) (loan documents sufficiently demonstrate MERS' standing "with respect to the loan and the foreclosure"); Pfannenstiel v. Mortgage Elect. Registration Sys., Inc., No. CIV S-08-2609, 2009 WL 347716, at \*4 (E.D. Cal. Feb. 11, 2009) (dismissing plaintiff's claim that MERS lacked authority to foreclose); Trent v. Mortgage Elect. Registration Sys., Inc., 288 Fed. App'x 571, 572 (11th Cir. 2008) (MERS "has the legal right to foreclose on the debtors' property" and "is the mortgagee"); Peyton v. Recontrust Co., No. TC021868, Notice of Ruling, at 2 (Cal. Super. Ct. County of Los Angeles S. Cent. Dist. Oct. 15, 2008) (MERS may foreclose under California law); Johnson v. Mortgage Elect. Registration Sys., Inc., 252 Fed. App'x 293, 294 (11th Cir. 2007) (summary judgment for MERS on its action for foreclosure of plaintiff's property); In re Smith, 366 B.R. 149, 151 (Bankr. D. Colo. 2007) (MERS has standing to conduct foreclosure on behalf of the beneficiary); Mortgage Elect. Registration Sys., Inc. v. Revoredo, 955 So.2d 33, 34 (Fla. Dist. Ct. App. 2007) ("Because, however, it is apparent – and we so hold – that no substantive rights, obligations or defenses are affected by use of the MERS device, there is no reason why mere form should overcome the salutary substance of permitting the use of this commercially effective means of business."); Mortgage Elect. Registration Sys., Inc. v. Ventura, CV054003168S, 2006 WL 1230265, at \*1 (Conn. Super. Apr. 20, 2006) (MERS is proper party in foreclosure).

There are several minority decisions that, in some form, have taken issue with MERS. But none of these decisions, to our knowledge, has invalidated a mortgage for which MERS is the nominee, and none of these decisions has challenged MERS' ability to act as a central system to track changes in the ownership and servicing of loans:<sup>22</sup> See Rinegard-Guirma v. Bank of Am., Nat'l Ass'n, No. 10-1065-PK, 2010 WL 3945476, at \*4 (D. Or. Oct. 6, 2010) (suggesting that MERS may not qualify as a legitimate beneficiary of a deed of trust under Oregon law, and preliminarily enjoining foreclosure action by MERS); In re Allman, No. 08-31282-elp7, 2010 WL 3366405, at \*10 (Bankr. D. Or. Aug. 24, 2010) (same); Mortgage Elec. Registration Sys., Inc. v. Saunders, 2 A.3d 289, 297 (Me. 2010); In re Box, No. 10-20086, 2010 WL 2228289, at \*5 (Bankr. W.D. Mo. June 3, 2010) (finding that MERS, as beneficiary and nominee under the deed of trust lacked authority to assign the mortgage note because it never "held" the note itself);<sup>23</sup> In re Hawkins, No. BK-s-07-13593-LBR, 2009 WL

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<sup>22</sup> Some investors and loan servicers have sought to lessen the risk of challenges to foreclosure pertaining to MERS by assigning loans out of MERS and to the note holder prior to the initiation of foreclosure.

<sup>23</sup> The Court in In re Box expressly noted, but did not decide, the question of whether MERS had authority to assign the note as an agent of the lender or even as "a nominee beneficiary." In re Box, 2010 WL 2228289 at \*4. The same court, in a later case, answered the question directly and found that MERS, as the designated "nominee for the lender and its assigns," "was the agent for [the lender] under the Deed of Trust from the inception, and MERS became agent for each subsequent note-holder under the Deed of Trust when each such note holder negotiated the Note to its successors and assigns." In re Tucker, No. 10-61004, 2010 WL 3733916, at \*6 (Bankr. W.D. Mo. Sept. 20, 2010) ("[w]hen [note-holder] acquired the right to enforce the Note as the note-holder, MERS held the beneficial interest in the Deed of Trust on behalf of [note-holder] and [note-holder] had the right to enforce all the rights granted to [the original lender] and its successors and assigns in the Deed of Trust"). Thus, the Court found that the Note and the Deed of Trust were not split because of MERS' status as agent for the note holders. Id.

901766, at \*3 (Bankr. D. Nev. Mar. 31, 2009) (finding that MERS was not a true “beneficiary” under a deed of trust, that, under the UCC, MERS was not entitled to enforce the note, and that “[i]n order to foreclose, MERS must establish there has been a sufficient transfer of both the note and deed of trust, or that it has authority under state law to act for the note’s holder”).<sup>24</sup>

Finally, it is important to recognize that the UCC does not displace traditional rules of agency law. See UCC § 1-103(b) (“Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law [of] . . . principal and agent . . . supplement its provisions.”); see also UCC § 9-313 cmt. 3 (principles of agency apply for purposes of determining “possession” under Article 9). Under general agency law, an agent has authority to act on behalf of its principal where the principal “manifests assent” to the agent “that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.” Restatement (Third) of Agency § 1.01 (2006). Accordingly, the UCC does not prevent MERS or others, including loan servicers, from acting as the agent for the note holder in connection with transfers of ownership in mortgage notes and mortgages. See, e.g., In re Tucker, No. 10-61004, 2010 WL 3733916, at \*6 (Bankr. W.D. Mo. Sept. 20, 2010) (finding MERS was the “agent for [the lender] under the Deed of Trust from the inception, and MERS became the agent for each subsequent note-holder under the Deed of Trust when each such note holder negotiated the Note to its successor and assign”); King v. Am. Mortgage Network, Inc., No. 1:09CV162 DAK, 2010 WL 3516475, at \*3 (D. Utah Sept. 2, 2010) (rejecting argument that note and deed of trust were split because Fannie Mae held the note and MERS was listed as the nominal beneficiary under the deed of trust and finding that both MERS and the authorized loan servicer had authority as agents of the note holder to act on behalf of the note holder, including the initiation of foreclosure proceedings on the underlying property); Mich. Comp. Laws § 600.3204(1)(d) (“The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.”); Hilmon v. Mortgage Elect. Registration Sys., Inc., No. 06-13055, 2007 WL 1218718, at \*3 (E.D. Mich. Apr. 23, 2007); Caravantes v. California Reconveyance Co., No. 10-cv-1407-IEG (AJB), 2010 WL 4055560, at \*9 (S.D. Cal. Oct. 14, 2010) (“as servicer of the subject loan in this case, JP Morgan had the authority to record the Notice of Default and to enforce the power of sale under the Deed of Trust”); Birkland v. Silver State Fin. Servs., Inc., No. 2:10-CV-00035-KJD-LRL, 2010 WL 3419372, at \*3 (D. Nev. Aug. 25, 2010) (“MERS, as nominee on a deed of trust, is granted authority as an agent on behalf of the nominator (holder of the promissory note) as to the administration of the deed of trust, which would include substitution of trustees”). In short, principles of agency law provide MERS and loan servicers another legal basis for their respective roles in the transfer of mortgage notes and mortgages.

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<sup>24</sup> Some parties to litigation, and commentators, have relied upon the Kansas Supreme Court’s decision in Landmark National Bank v. Kesler, 216 P.3d 158 (Kan. 2009), to support the proposition that the identification of MERS as a nominee on a mortgage is improper. However, reliance on the decision in Kesler for that proposition is misplaced and stretches the decision well-beyond its actual holding. In Kesler, the Court merely held that MERS, in its capacity as the nominee for the lender under a second-position mortgage, was not entitled to notice of a foreclosure sale by the holder of the senior mortgage. See id. at 169-70. As the Kansas Appeals Court that considered the case noted, “[w]hether MERS may act as a nominee for the lender, either to bring a foreclosure suit or for some other purpose, is not at issue....” Landmark Nat’l Bank v. Kesler, 192 P.3d 177, 180 (Kan. Ct. App. 2008).

#### **4. Conclusion**

In summary, the longstanding and consistently applied rule in the United States is that, when a mortgage note is transferred, “the mortgage follows the note.” When a mortgage note is transferred and delivered to a transferee in connection with the securitization of the mortgage loan pursuant to an MBS pooling and servicing agreement or similar agreement, the mortgage automatically follows and is transferred to the mortgage note transferee, notwithstanding that a third party, including an agent/nominee entity such as MERS, may remain as the mortgagee of record. Both common law and the UCC confirm and apply this rule, including in the context of mortgage loan securitizations. The legal principles and processes discussed above provide for – and, if followed, result in – a valid and enforceable transfer of mortgage notes and the underlying mortgages. The transfer and legal effectiveness of mortgage notes and mortgages are not diminished by the fact that the enforceability of mortgages, including the right to foreclose, is subject to the conditions precedent and requirements that are set forth in the particular mortgage itself and in the laws of the state in which the mortgaged property is located.





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**Written Testimony of**

**Adam J. Levitin  
Associate Professor of Law  
Georgetown University Law Center**

Before the  
Senate Committee on Banking, Housing, and Urban Affairs  
“Problems in Mortgage Servicing from Modification to Foreclosure”

November 16, 2010  
2:30 pm

## **Witness Background Statement**

**Adam J. Levitin** is an Associate Professor of Law at the Georgetown University Law Center, in Washington, D.C., and Robert Zinman Scholar in Residence at the American Bankruptcy Institute. He also serves as Special Counsel to the Congressional Oversight Panel, and has been the Robert Zinman Scholar in Residence at the American Bankruptcy Institute.

Before joining the Georgetown faculty, Professor Levitin practiced in the Business Finance & Restructuring Department of Weil, Gotshal & Manges, LLP in New York, and served as law clerk to the Honorable Jane R. Roth on the United States Court of Appeals for the Third Circuit.

Professor Levitin holds a J.D. from Harvard Law School, an M.Phil and an A.M. from Columbia University, and an A.B. from Harvard College.

Professor Levitin has not received any Federal grants nor has he received any compensation in connection with his testimony. The views expressed in Professor Levitin's testimony are his own and do not represent the positions of the Congressional Oversight Panel.

## **Executive Summary**

The mortgage foreclosure process is beset by a variety of problems. These range from procedural defects (including, but not limited to robo-signing) to outright counterfeiting of documents to questions about the validity of private-label mortgage securitizations that could mean that these mortgage-backed securities are not actually backed by any mortgages whatsoever. While the extent of these problems is unknown at present, the evidence is mounting that it is not limited to one-off cases, but that there may be pervasive defects throughout the foreclosure and securitization processes.

The problems in the mortgage market are highly technical, but they are extremely serious. At best they present problems of fraud on the court, clouded title to property, and delay in foreclosures that will increase the shadow housing inventory and drive down home prices. At worst, they represent a systemic risk of liabilities in the trillions of dollars, greatly exceeding the capital of the US's major financial institutions.

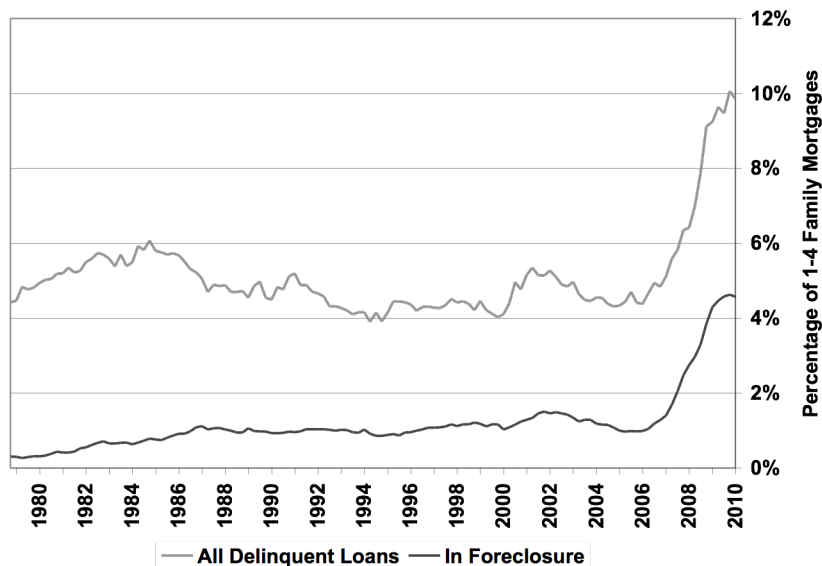
Congress would do well to ensure that federal regulators are undertaking a thorough investigation of foreclosure problems and to consider the possibilities for a global settlement of foreclosure problems, loan modifications, and the housing debt overhang that stagnate the economy and pose potential systemic risk.

Mr. Chairman, Members of the Committee:

Good morning. My name is Adam Levitin. I am an Associate Professor of Law at the Georgetown University Law Center in Washington, D.C., where I teach courses in bankruptcy, commercial law, contracts, and structured finance. I also serve as Special Counsel to the Congressional Oversight Panel for the Troubled Asset Relief Program. The views I express today are my own, however.

We are now well into the fourth year of the foreclosure crisis, and there is no end in sight. Since mid-2007 around eight million homes entered foreclosure,<sup>1</sup> and over three million borrowers lost their homes in foreclosure.<sup>2</sup> As of June 30, 2010, the Mortgage Bankers Association reported that 4.57% of 1-4 family residential mortgage loans (roughly 2.5 million loans) were currently in the foreclosure process a rate more than quadruple historical averages. (See Figure 1.) Additionally, 9.85% of mortgages (roughly 5 million loans) were at least a month delinquent.<sup>3</sup>

**Chart 1: Percentage of 1-4 Family Residential Mortgages in Foreclosure<sup>4</sup>**



Private lenders, industry associations, and two successive administrations have made a variety of efforts to mitigate the crisis and encourage loan modifications and refinancings. A series of much hyped initiatives, such as the FHASecure refinancing program and the Hope4Homeowners have all met what can charitably be described as limited success. FHASecure, predicted to help 240,000 homeowners,<sup>5</sup> assisted only a few thousand borrowers before it wound down,<sup>6</sup> while Hope4 Homeowners, originally predicted to help 400,000

<sup>1</sup> HOPE Now Data Reports.

<sup>2</sup> *Id.*

<sup>3</sup> Mortgage Bankers Association, National Delinquency Survey.

<sup>4</sup> Mortgage Bankers Association, National Delinquency Surveys.

<sup>5</sup> See, e.g., Press Release, US Dep't of Housing and Urban Development, Bush Administration to Help Nearly One-Quarter of a Million Homeowners Refinance, Keep Their Homes; FHA to implement new "FHASecure" refinancing product (Aug. 31, 2007), available at <http://www.hud.gov/news/release.cfm?content=pr07-123.cfm>; Press Release, US Dep't of Housing and Urban Development, FHA Helps 400,000 Families Find Mortgage Relief; Refinancing on pace to help half-million homeowners by year's end (Oct. 24, 2008), available at <http://www.hud.gov/news/release.cfm?content=pr08-167.cfm>.

<sup>6</sup> Michael Corkery, *Mortgage 'Cram-Downs' Loom as Foreclosures Mount*, WALL ST. J., Dec. 31, 2008.



homeowners,<sup>7</sup> had closed only 130 refinancings as of September 30, 2010.<sup>8</sup> The Home Affordable Modification (HAMP) has also failed, producing 495,898 permanent modifications through September 2010. This number is likely to be a high water mark for HAMP, as new permanent modifications are decreasing rapidly while defaults on permanent modifications rise; if current trends continue, by year's end the number of active permanent HAMP modifications will actually decline.

A number of events over the past several months have roiled the mortgage world, raising questions about:

- (1) Whether there is widespread fraud in the foreclosure process;
- (2) Securitization chain of title, namely whether the transfer of mortgages in the securitization process was defective, rendering mortgage-backed securities into *non*-mortgage-backed securities;
- (3) Whether the use of the Mortgage Electronic Registration System (MERS) creates legal defects in either the secured status of a mortgage loan or in mortgage assignments;
- (4) Whether mortgage servicers' have defaulted on their servicing contracts by charging predatory fees to borrowers that are ultimately paid by investors;
- (5) Whether investors will be able to "putback" to banks securitized mortgages on the basis of breaches of representations and warranties about the quality of the mortgages.

These issues are seemingly disparate and unconnected, other than that they all involve mortgages. They are, however, connected by two common threads: the necessity of proving standing in order to maintain a foreclosure action and the severe conflicts of interests between mortgage servicers and MBS investors.

It is axiomatic that in order to bring a suit, like a foreclosure action, the plaintiff must have legal standing, meaning it must have a direct interest in the outcome of the legislation. In the case of a mortgage foreclosure, only the mortgagee has such an interest and thus standing. Many of the issues relating to foreclosure fraud by mortgage servicers, ranging from more minor procedural defects up to outright counterfeiting relate to the need to show standing. Thus problems like false affidavits of indebtedness, false lost note affidavits, and false lost summons affidavits, as well as backdated mortgage assignments, and wholly counterfeited notes, mortgages, and assignments all relate to the evidentiary need to show that the entity bringing the foreclosure action has standing to foreclose.

Concerns about securitization chain of title also go to the standing question; if the mortgages were not properly transferred in the securitization process (including through the use of MERS to record the mortgages), then the party bringing the foreclosure does not in fact own the mortgage and therefore lacks standing to foreclose. If the mortgage was not properly transferred, there are profound implications too for investors, as the mortgage-backed securities they believed they had purchased would, in fact be non-mortgage-backed securities, which would almost assuredly lead investors to demand that their investment contracts be rescinded, thereby exacerbating the scale of mortgage putback claims.

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<sup>7</sup> Dina ElBoghdady, *HUD Chief Calls Aid on Mortgages a Failure*, WASH. POST. Dec. 17, 2008, at A1.

<sup>8</sup> See FHA Single Family Outlook, Sept. 2010, at <http://www.hud.gov/offices/hsg/rmra/oe/rpts/ooe/olcurr.xls> - 2010-11-02, Row 263 (note that FHA fiscal years begin in October, so that Fiscal Year 2009 began in October 2008).

Putback claims underscore the myriad conflicts of interest between mortgage servicers and investors. Mortgage servicers are responsible for prosecuting on behalf of MBS investors, violations of representations and warranties in securitization deals. Mortgage servicers are loathe to bring such actions, however, not least because they would often be bringing them against their own affiliates. Servicers' failure to honor their contractual duty to protect investors' interest is but one of numerous problems with servicer conflicts of interest, including the levying of junk fees in foreclosures that are ultimately paid by investors and servicing first lien loans while directly owning junior liens.

Many of the problems in the mortgage securitization market (and thus this testimony) are highly technical, but they are extremely serious.<sup>9</sup> At best they present problems of fraud on the court and questionable title to property. At worst, they represent a systemic risk of liabilities in the trillions of dollars, greatly exceeding the capital of the US's major financial institutions. While understanding the securitization market's problems involves following a good deal of technical issues, it is critical to understand from the get-go that securitization is all about technicalities.

Securitization is the legal apotheosis of form over substance, and if securitization is to work it must adhere to its proper, prescribed form punctiliously. The rules of the game with securitization, as with real property law and secured credit are, and always have been, that dotting "i's" and crossing "t's" matter, in part to ensure the fairness of the system and avoid confusions about conflicting claims to property. Close enough doesn't do it in securitization; if you don't do it right, you cannot ensure that securitized assets are bankruptcy remote and thus you cannot get the ratings and opinion letters necessary for securitization to work. Thus, it is important not to dismiss securitization problems as merely "technical;" these issues are no more technicalities than the borrower's signature on a mortgage. Cutting corners may improve securitization's economic efficiency, but it undermines its legal viability.

Finally, as an initial matter, let me also emphasize that the problems in the securitization world do not affect the whether homeowners owe valid debts or have defaulted on those debts. Those are separate issues about which there is no general controversy, even if debts are disputed in individual cases.<sup>10</sup>

This written testimony proceeds as follows: Part I presents an overview of the structure of the mortgage market, the role of mortgage servicers, the mortgage contract and foreclosure process. Part II presents the procedural problems and fraud issues that have emerged in the mortgage market relating to foreclosures. Part III addresses chain of title concerns. Part IV considers the argument that the problems in foreclosures are mere technicalities being used by deadbeats to delay foreclosure. Part V concludes.

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<sup>9</sup> I emphasize, however, that this testimony does not purport to be a complete and exhaustive treatment of the issues involved and that many of the legal issues discussed are not settled law, which is itself part of the problem; trillions of dollars of mortgage securitization transactions have been done without a certain legal basis.

<sup>10</sup> A notable exception, however, is for cases where the default is caused by a servicer improperly force-placing insurance or misapplying a payment, resulting in an inflated loan balance that triggers a homeowner default.

## **I. BACKGROUND ON SECURITIZATION, SERVICING, AND THE FORECLOSURE PROCESS**

### ***A. MORTGAGE SECURITIZATION***

Most residential mortgages in the United States are financed through securitization. . . . Securitization is a financing method involving the issuance of securities against a dedicated cashflow stream, such as mortgage payments, that are isolated from other creditors' claims. Securitization links consumer borrowers with capital market financing, potentially lowering the cost of mortgage capital. It also allows financing institutions to avoid the credit risk, interest rate risk, and liquidity risk associated with holding the mortgages on their own books.

Currently, about 60% of all outstanding residential mortgages by dollar amount are securitized.<sup>11</sup> The share of securitized mortgages by number of mortgages outstanding is much higher because the securitization rate is lower for larger "jumbo" mortgages.<sup>12</sup> Credit Suisse estimates that 75% of outstanding first-lien residential mortgages are securitized.<sup>13</sup> In recent years, over 90% of mortgages originated have been securitized.<sup>14</sup> Most second-lien loans, however, are not securitized.<sup>15</sup>

Although mortgage securitization transactions are extremely complex and vary somewhat depending on the type of entity undertaking the securitization, the core of the transaction is relatively simple.<sup>16</sup>

First, a financial institution (the "sponsor" or "seller") assembles a pool of mortgage loans. The loans were either made ("originated") by an affiliate of the financial institution or purchased from unaffiliated third-party originators. Second, the pool of loans is sold by the sponsor to a special-purpose subsidiary (the "depositor") that has no other assets or liabilities. This is done to segregate the loans from the sponsor's assets and liabilities.<sup>17</sup> Third, the depositor sells the loans to a passive, specially created, single-purpose vehicle (SPV), typically a trust in the case of residential mortgages.<sup>18</sup> The SPV issues certificated securities to raise the funds to pay the depositor for the loans. Most of the securities are debt securities—bonds—but there will also be a security representing the rights to the residual value of the trust or the "equity."

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<sup>11</sup> Inside Mortgage Finance, 2010 Mortgage Market Statistical Annual.

<sup>12</sup> *Id.*

<sup>13</sup> Ivy L. Zelman et al., *Mortgage Liquidity du Jour: Underestimated No More* 28 exhibit 21 (Credit Suisse, Equity Research Report, Mar. 12, 2007).

<sup>14</sup> Inside Mortgage Finance, 2010 Mortgage Market Statistical Annual.

<sup>15</sup> Inside Mortgage Finance, 2010 Mortgage Market Statistical Annual. From 2001-2007, only 14% of second lien mortgages originated were securitized. *Id.* Second lien mortgages create a conflict of interest beyond the scope of this paper. In many cases, second lien loans are owned by financial institutions that are servicing (but do not own) the first lien loan. See Hearing Before the House Financial Services Committee, Apr. 13, 2009 "Second Liens and Other Barriers to Principal Reduction as an Effective Foreclosure Mitigation Program" (testimony of Barbara DeSoer, President, Bank of America Home Loans) at 6 (noting that Bank of America owns the second lien mortgage on 15% of the first lien mortgages it services); Hearing Before the House Financial Services Committee, Apr. 13, 2009 "Second Liens and Other Barriers to Principal Reduction as an Effective Foreclosure Mitigation Program" (testimony of David Lowman, CEO for Home Lending, JPMorgan Chase) at 5 (noting that Chase owns the second lien mortgage on around 10% of the first lien mortgages it services). The ownership of the second while servicing the first creates a direct financial conflict between the servicer qua servicer and the servicer qua owner of the second lien mortgage, as the servicer has an incentive to modify the first lien mortgage in order to free up borrower cashflow for payments on the second lien mortgage.

<sup>16</sup> The structure illustrated is for private-label mortgage-backed securities. Ginnie Mae and GSE securitizations are structured somewhat differently. The private-label structure can, of course, be used to securitize any asset, from oil tankers to credit card debt to song catalogues, not just mortgages.

<sup>17</sup> This intermediate entity is not essential to securitization, but since 2002, Statement of Financial Accounting Standards 140 has required this additional step for off-balance-sheet treatment because of the remote possibility that if the originator went bankrupt or into receivership, the securitization would be treated as a secured loan, rather than a sale, and the originator would exercise its equitable right of redemption and reclaim the securitized assets. Deloitte & Touche, *Learning the Norwalk Two-Step*, HEADS UP, Apr. 25, 2001, at 1.

<sup>18</sup> The trustee will then typically convey the mortgage notes and security instruments to a "master document custodian," who manages the loan documentation, while the servicer handles the collection of the loans.

The securities can be sold directly to investors by the SPV or, as is more common, they are issued directly to the depositor as payment for the loans. The depositor then resells the securities, usually through an underwriting affiliate that then places them on the market. (See Figure 2, below.) The depositor uses the proceeds of the securities sale (to the underwriter or the market) to pay the sponsor for the loans. Because the certificated securities are collateralized by the residential mortgage loans owned by the trust, they are called residential mortgage-backed securities (RMBS).

A variety of reasons—credit risk (bankruptcy remoteness), off-balance sheet accounting treatment, and pass-through tax status (typically as a REMIC<sup>19</sup> or grantor trust)—mandate that the SPV be passive; it is little more than a shell to hold the loans and put them beyond the reach of the creditors of the financial institution.<sup>20</sup> Loans, however, need to be managed. Bills must be sent out and payments collected. Thus, a third-party must be brought in to manage the loans.<sup>21</sup> This third party is the servicer. The servicer is supposed to manage the loans for the benefit of the RMBS holders.

Every loan, irrespective of whether it is securitized, has a servicer. Sometimes that servicer is a first-party servicer, such as when a portfolio lender services its own loans. Other times it is a third-party servicer that services loans it does not own. All securitizations involve third-party servicers, but many portfolio loans also have third-party servicers, particularly if they go into default. Third-party servicing contracts for portfolio loans are not publicly available, making it hard to say much about them, including the precise nature of servicing compensation arrangements in these cases or the degree of oversight portfolio lenders exercise over their third-party servicers. Thus, it cannot always be assumed that if a loan is not securitized it is being serviced by the financial institution that owns the loan, but if the loan is securitized, it has third-party servicing.

Securitization divides the beneficial ownership of the mortgage loan from legal title to the loan and from the management of the loans. The SPV (or more precisely its trustee) holds legal title to the loans, and the trust is the nominal beneficial owner of the loans. The RMBS investors are formally creditors of the trust, not owners of the loans held by the trust.

The economic reality, however, is that the investors are the true beneficial owners. The trust is just a pass-through holding entity, rather than an operating company. Moreover, while the trustee has nominal title to the loans for the trust, it is the third-party servicer that typically exercises legal title in the name of the trustee. The economic realities of securitization do not track with its legal formalities; securitization is the apotheosis of legal form over substance, but punctilious respect for formalities is critical for securitization to work.

Mortgage servicers provide the critical link between mortgage borrowers and the SPV and RMBS investors, and servicing arrangements are an indispensable part of securitization.<sup>22</sup> Mortgage servicing has become particularly important with the growth of the securitization market.

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<sup>19</sup> A REMIC is a real estate mortgage investment conduit, as defined under I.R.C. §§ 860A-860G.

<sup>20</sup> See Anna Gelpern & Adam J. Levitin, *Rewriting Frankenstein Contracts: Workout Prohibitions in Residential Mortgage Backed Securities*, 82 S. CAL. L. REV. 1075, 1093-98. (2009).

<sup>21</sup> See Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers*, 15 HOUSING POL'Y DEBATE 753, 754 (2004).

<sup>22</sup> The servicing of nonsecuritized loans may also be outsourced. There is little information about this market because it does not involve publicly available contracts and does not show up in standard data.

The diagram illustrates the flow of mortgage-backed securities (MBS) from homeowners to investors. The process involves several key entities and their interactions:

- Homeowners:** Represented by house icons. They provide **Mortgages** to the **Originator(s)** and receive **S (Monthly Mortgage Payments)** from the **Servicer**.
- Originator(s):** Represented by bank icons. They provide **Mortgages** to the **Sponsor** and receive **S (Monthly Mortgage Payments)** from the **Servicer**.
- Sponsor:** A central entity that receives **Mortgages** from the **Originator(s)** and provides **Mortgages** to the **Depositor**. It also receives **S (Monthly Mortgage Payments)** from the **Servicer**.
- Depositor (wholly owned subsidiary of Sponsor):** Receives **Mortgages** from the **Sponsor** and provides **MBS Certificates** to the **Underwriter**.
- Underwriter (affiliate of Sponsor):** Provides **MBS Certificates** to the **Investors** and receives **S (Monthly Mortgage Payments)** from the **Investors**.
- Servicer (often affiliate of Sponsor):** Provides **S (Monthly Mortgage Payments)** to the **Homeowners** and the **Originator(s)**. It also provides **Servicing** to the **SPV (Trust)**.
- SPV (Trust):** Receives **Mortgages** from the **Depositor** and provides **MBS Certificates** to the **Investors**. It also receives **S (Monthly Mortgage Payments)** from the **Investors**.
- Investors:** Receive **MBS Certificates** from the **Underwriter** and provide **S (Monthly Mortgage Payments)** to the **Investors**.
- PSA (Public Sector Agency):** Provides **Servicing** to the **SPV (Trust)**.

The nature of the servicing business in general militates toward economies of scale and automation. Servicing combines three distinct lines of business: transaction processing, default management, and loss mitigation. Transaction processing is a highly automatable business, characterized by large economies of scale. Default management involves collections and activities related to taking defaulted loans through foreclosure. Like transaction processing, default management can be automated,<sup>25</sup> as it does not require any negotiation with the homeowner, insurers, or junior lienholders.<sup>26</sup>

<sup>24</sup> This section of my testimony comes from Adam J. Levitin & Larry Cordell, *What RMBS Servicing Can Learn from CMBS Servicing*, working paper, November 2010.

<sup>26</sup> Arguably servicers have a fourth line of business—the management of real estate owned (REO). REO are foreclosed properties that were not purchased by third-parties at the foreclosure sale. REO management involves caring for and marketing the REO. It does not require negotiations with the homeowner (who is evicted) or junior lienholders (whose liens are generally extinguished by the foreclosure).

Loss mitigation is considered an *alternative to foreclosure*, and includes activities such as repayment plans, loan modifications, short sales and deeds in lieu of foreclosure. Loss mitigation is always a negotiated process and is therefore labor-intensive and expensive. Not only must the homeowner be agreeable to any loss mitigation solution, but so too must mortgage insurers and junior lienholders if they are parties on the loan. Because each negotiation is separate and requires a trained employee, there are very few opportunities for automation or economies of scale. Labor expenses are also considered overhead, which are all non-reimbursable expenses to servicers. And, to the extent that loss mitigation is in the form of a loan modification, redefault and self-cure risk always lurk in the background. Moreover, loss mitigation must generally be conducted in addition to default management; the servicer must proceed with foreclosure even if attempting to find an alternative, so the cost of loss mitigation is additive. Yet, while taking a loan through foreclosure is likely to involve lower costs than pursuing loss mitigation, it may not ultimately maximize value for RMBS investors because loss severities in foreclosure can easily surpass those on a re-performing restructured loan.

The balance between these different parts of a servicer's business changes over the course of the housing cycle. When the housing market is strong, the transaction processing dominates the servicing business, but when the housing market is weak, default management and loss mitigation become more important.

The very short weighted average life (WAL) of RMBS trusts combined with very low defaults in most economic environments encouraged servicers to place disproportionate weight on performing loan servicing, which historically has been characterized by small servicing fees and enormous economies of scale. Thus, on a typical loan balance of \$200,000 today, a servicer might earn between \$500 and \$1,000 per year.<sup>27</sup> Given the low-level of annual income per loan, the short WAL of each loan, and low default rates in most economic environments before 2006, servicers had few incentives to devote resources to loss mitigation, but large incentives to invest in performing loan automation to capture the large economies of scale. This left servicers wholly unprepared for the elevated level of defaults that began in 2007.

### ***C. RMBS SERVICER COMPENSATION***

RMBS servicers' duties and compensation are set forth in a document called a "Pooling and Servicing" agreement (PSA) also governs the rights of the RMBS certificate holders. RMBS servicers are compensated in four ways. First, they receive a "servicing fee," which is a flat fee of 25—50 basis points (bps) and is a first priority payment in the RMBS trust.<sup>28</sup> This is by far the greatest portion of servicer income. This fee is paid out proportionately across all loans regardless of servicer costs through the economic cycle.

Second, servicers earn "float" income. Servicers generally collect mortgage payments at the beginning of the month, but are not required to remit the payments to the trust until the 25<sup>th</sup> of the month. In the interim, servicers invest the funds they have collected from the mortgagors, and they retain all investment income. Servicers can also obtain float income from escrow

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<sup>27</sup> Servicing fees are generally 25—50 bps, which translates into \$500--\$1000 per year in servicing fees.

<sup>28</sup> Generally the servicing fee is 25 bps for conventional fixed rate mortgages, 37.5 bps for conventional ARM loans, 44 bps for government loans and 50 bps for subprime.

balances collected monthly from borrowers to pay taxes and insurance during the course of the year.

Third, servicers are generally permitted to retain all ancillary fees they can collect from mortgagors. This includes things like late fees and fees for balance checks or telephone payments. It also includes fees for expenses involved in handling defaulted mortgages, such as inspecting the property. Finally, servicers can hold securities themselves directly as investors, and often hold the junior-most, residual tranche in the securitization.

Servicers face several costs. In addition to the operational expenses of sending out billing statements, processing payments, maintaining account balances and histories, and restructuring or liquidating defaulted loans, private label RMBS servicers face the expense of “servicing advances.”<sup>29</sup> When a loan defaults, the servicer is responsible for advancing the missed payments of principal and interest to the trust as well as paying taxes and insurance on the property. They continue to pay clear through liquidation of the property, unless these advances are not deemed recoverable.

The servicer is able to recover advances it has made either from liquidation proceeds or from collections on other loans in the pool, but the RMBS servicer does not receive interest on its advances. Therefore, advances can be quite costly to servicers in terms of the time value of money and can also place major strains on servicers’ liquidity, as the obligation to make advances continues until the loan is liquidated or the servicer believes that it is unlikely to be able to recover the advances. In some cases, servicers have to advance years’ worth of mortgage payments to the trust.

While RMBS servicers do not receive interest on servicing advances, they are compensated for their “out-of-pocket” expenses. This includes any expenses spent on preserving the collateral property, including force-placed insurance, legal fees, and other foreclosure-related expenses. Large servicers frequently “in-source” default management expenses to their affiliates.

#### ***D. MONITORING OF RMBS SERVICERS***

RMBS servicing arrangements present a classic principal-agent problem wherein the agent’s incentives are not aligned with the principal and the principal has limited ability to monitor or discipline the agent.

##### ***1. Investors***

Investors are poorly situated to monitor servicer behavior because they do not have direct dealings with the servicer. RMBS investors lack information about servicer loss mitigation activity. Investors do not have access to detailed servicer expense reports or the ability to examine loss mitigation decisions. Investors are able to see only the ultimate outcome. This means that investors are limited in their ability to evaluate servicers’ performance on an ongoing

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<sup>29</sup> In Agency securities, servicers generally stop advancing after borrowers owe their fifth payment, at 120 days past due. For GSE loans, they are then removed from the securities and taken on balance sheet. Servicer advances for the four payments are typically not reimbursed until termination.

basis. And even if investors were able to detect unfaithful agents, they have little ability to discipline them short of litigation.<sup>30</sup>

## 2. Trustees

RMBS feature a trustee, but the name is deceptive. The trustee is not a common law trustee with general fiduciary duties. Instead, it is a limited purpose corporate trustee whose duties depend on whether there has been a default as defined UN the PSA. A failure to pay all tranches their regularly scheduled principal and interest payments is *not* an event of default. Instead, default relates to the financial condition of the servicer, whether the servicer has made required advances to the trust, whether the servicer has submitted its monthly report, and whether the servicer has failed to meet any of its covenants under the PSA.

Generally, before there is an event of default, the trustee has a few specifically assigned ministerial duties and no others.<sup>31</sup> These duties are typically transmitting funds from the trust to the RMBS investors and providing investors performance statements based on figures provided by the servicer. The trustee's pre-default duties do *not* include active monitoring of the servicer.

Trustees are generally entitled to rely on servicers' data reporting, and have little obligation to analyze it.<sup>32</sup> Indeed, as Moody's has noted, trustees lack the ability to verify most data reported by servicers; at best they can ensure that the reported data complies with any applicable covenant ratios:

The trustee is not in a position to verify certain of the numbers reported by the servicer. For example, the amount of delinquent receivables and the amount of receivables charged off in a given month are figures that are taken from the servicer's own computer systems. While these numbers could be verified by an auditor, they are not verifiable by the trustee.<sup>33</sup>

Likewise, as attorney Susan Macaulay has observed, "In most cases, even if the servicer reports are incorrect, or even fraudulent, absent manifest error, the trustee simply has no way of knowing that there is a problem, and must allocate the funds into the appropriate accounts, and make the mandated distributions, in accordance with the servicer reports."<sup>34</sup>

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<sup>30</sup> Investors also arguably lack a strong incentive to care about servicer performance. See Levitin & Twomey, *supra* note **Error! Bookmark not defined.** (noting that resecuritization and investor optimism bias means that investors are likely to either be invested only derivatively in subordinated tranches or believe that they have selected a tranche that will be "in-the-money" and therefore unaffected by marginal changes in servicer behavior).

<sup>31</sup> See, e.g., Wells Fargo Mortgage Backed Securities 2006-AR10 Trust § 8.01 ("Prior to the occurrence of an Event of Default of which a Responsible Officer of the Trustee shall have actual knowledge and after the curing of all such Events of Default which may have occurred, the duties and obligations of the Trustee shall be determined solely by the express provisions of this Agreement, the Trustee shall not be liable except for the performance of such duties and obligations as are specifically set forth in this Agreement, no implied covenants or obligations shall be read into this Agreement against the Trustee and, in the absence of bad faith on the part of the Trustee, the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon any certificates or opinions furnished to the Trustee, and conforming to the requirements of this Agreement."). See also Moody's Investor Service, Structured Finance Ratings Methodology: Moody's Re-examines Trustees' Role in ABS and RMBS, Feb. 4, 2003, at 4. (noting "Some trustees have argued that their responsibilities are limited to strictly administrative functions as detailed in the transaction documents and that they have no "fiduciary" duty prior to an event of default.").

<sup>32</sup> MBIA Ins. Corp. v. Royal Indem. Co., 519 F. Supp. 2d 455 (2007), *aff'd* 321 Fed. Appx. 146 (3d Cir. 2009) ("Royal argues that Wells Fargo [the trustee] had the contractual obligation to analyze data using certain financial accounting principles and to detect any anomalies that analysis might have uncovered. As Royal suggests, this analysis may not have been very labor-intensive. Yet, the contract did not call for any analysis at all. It simply required Wells Fargo to perform rote comparisons between that data and data contained in various other sources, and to report any numerical inconsistencies. Wells Fargo did just that.").

<sup>33</sup> Moody's Investor Service, *supra* note 31, at 4.

<sup>34</sup> Susan J. Macaulay, *US: The Role of the Securitisation Trustee*, GLOBAL SECURITISATION AND STRUCTURED FINANCE 2004. Macaulay further notes that:



Similarly, trustees usually wait for servicers to notify them of defaults,<sup>35</sup> and Moody's has noted that trustees are often unresponsive to information from third parties indicating that an unreported default might have occurred.<sup>36</sup> Thus, trustees enforce servicer representations and warranties largely on the honor system of servicer self-reporting.

For private-label securities, trustees also lack the incentive to engage in more vigorous monitoring of servicer loss mitigation decisions. The trustee does not get paid more for more vigorous monitoring. The trustee generally has little ability to discipline the servicer except for litigation. Private-label RMBS trustees have almost no ability to fire or discipline a servicer. Servicers can only be dismissed for specified acts, and these acts are typically limited to the servicer's insolvency or failure to remit funds to the trust. Occasionally servicers may be dismissed if default levels exceed particular thresholds.

Trustees also have no interest in seeing a servicer dismissed because they often are required to step in as back-up servicer.<sup>37</sup> In the event of a servicer default, the trustee takes over as servicer (which includes the option of subcontracting the duties), and assumes the duty of making servicing advances to the trust. The back-up servicer role is essentially an insurance policy for investors, and activation of that role is equivalent to payment on a claim; a trustee that has to act as a back-up servicer is likely to lose money in the process, especially when some of the trustees do not themselves own servicing operations.

Trustees also often have close relationships with particular servicers. For example, Professor Tara Twomey and I have shown that Bank of America/Countrywide accounts for nearly two-thirds of Deutsche Bank's RMBS trustee business.<sup>38</sup> In such circumstances, trustees are unlikely to engage in meaningful monitoring and disciplining of servicers.<sup>39</sup> Amherst Securities points out that early payment default provisions are not effectively enforced by trustees, to the point where in cases where borrowers did not make a single payment on the mortgage, only 37 percent were purchased out of the trust, much smaller amounts for loans making only one to six payments.<sup>40</sup> Thus, for private-label RMBS, there is virtually no supervision of servicers.<sup>41</sup>

GSE and Ginnie Mae securitization have greater oversight of servicers. The GSEs serve as master servicers on most of their RMBS; they therefore have a greater ability to monitor servicer compliance. The GSEs require servicers to foreclose according to detailed timelines, and

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It is almost always an event of default under the indenture if the trustee does not receive a servicer report within a specified period of time, and the trustee must typically report such a failure to the investors, any credit enhancement provider, the rating agencies and others. However, the trustee generally has no duties beyond that with respect to the contents of the report, although under the TIA, the trustee must review any reports furnished to it to determine whether there is any violation of the terms of the indenture. Presumably this would include verifying that any ratios represented in any reports conform to financial covenants contained in the indenture, etc. It would not however, require the trustee to go beyond the face of the report, i.e. to conduct further investigation to determine whether the data underlying the information on the reports presented to it were, in fact, true. Virtually all indentures, whether or not governed by the TIA, explicitly permit the trustee to rely on statements made to the trustee in officers' certificates, opinions of counsel and documents delivered to the trustee in the manner specified within the indenture.

*Id.*

<sup>35</sup> Moody's Investor Service, *supra* note 31, at 4.

<sup>36</sup> *Id.*

<sup>37</sup> Eric Gross, *Portfolio Management: The Evolution of Backup Servicing*, Portfolio Financial Servicing Company (PFSC) (July 11, 2002) at <http://www.securitization.net/knowledge/article.asp?id=147&aid=2047>.

<sup>38</sup> Levitin & Twomey, *supra* note **Error! Bookmark not defined.**

<sup>39</sup> See *Ellington Credit Fund, Ltd. v. Select Portfolio, Inc.*, No. 1:07-cv-00421-LY, W.D. Tex., Plaintiffs' First Amended Complaint, July 10, 2007 (RMBS residual tranche holder alleging that trustee was aware that servicer was in violation of PSA and failed to act).

<sup>40</sup> See Amherst Mortgage Insight, *supra* note **Error! Bookmark not defined.**, at 15.

<sup>41</sup> For MBS with separate master and primary servicers, the master servicer may monitor the primary servicer(s), but often the master and primary servicers are the same entity.

servicers that fail to comply face monetary penalties. Recognizing the benefits inherent in effective loss mitigation, Fannie Mae places staff directly in all of the largest servicer shops to work alongside loss mitigation staff at their servicers.<sup>42</sup> Freddie Mac constructed servicer performance profiles to directly monitor servicers, sharing results directly with servicers and rating agencies. Since each GSE insures against credit losses on the loans, their ongoing monitoring provides consistent rules and a single point of contact to approve workout packages and grant exceptions, something absent in private label RMBS.

### 3. Ratings and Reputation

Like any repeat transaction business, servicers are concerned about their reputations. But reputational sanctions have only very weak discipline on servicer behavior.

While Regulation AB requires servicers to disclose information about their experience and practices,<sup>43</sup> they are not required to disclose information about performance of past pools they have serviced. In any event, reputational sanctions are ineffective because loss severities are more likely to be attributed to underwriting quality than to servicing decisions.

Rating agencies also produce servicer ratings, but these ratings are a compilation of the evaluation of servicers on a multitude of characteristics. Rating agencies have been known to incorporate features of Freddie Mac's servicer performance profiles in their servicer assessments and to incorporate loss mitigation performance into their ratings. But details of their methodology used to measure these assessments are not disclosed. They give no indication of whether a servicer is likely to make loss mitigation decisions based solely on the interests of the securitization trust. Ratings are also combined with other criteria, such as the servicer's own financial strength and operational capacity. In other words, servicer ratings go to the question of whether a servicer will have to be replaced because it is insolvent or lacks the ability to service the loans, with much less weight given to whether the servicer acts in the investors' interests.

### C. THE MORTGAGE CONTRACT AND FORECLOSURE PROCESS

The mortgage contract consists of two documents, a promissory note (the "note" or the "mortgage loan") and a security instrument (the "mortgage" or the "deed of trust").<sup>44</sup> The note is the IOU that contains the borrower's promise to repay the money loaned. If the note is a negotiable instrument, meaning that it complies with the requirements for negotiability in Article 3 of the Uniform Commercial Code,<sup>45</sup> then the *original physical note* is itself the right to payment.<sup>46</sup>

The mortgage is the document that connects the IOU with the house. The mortgage gives the lender a contingent right to the house; it provides that *if* the borrower does not pay according to the terms of the note, then the lender can foreclose and have the property sold *according to the*

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<sup>42</sup> PMI insurers have recently started to embed staff in servicer shops to monitor loss mitigation efforts. Harry Terris & Kate Berry, *In the Trenches*, AM. BANKER, Aug. 27, 2009.

<sup>43</sup> 17 C.F.R. § 229.1108.

<sup>44</sup> The note and the mortgage can be combined in a single document, but that is not common practice, both because the mortgage can be granted subsequent to the creation of the debt and because of borrower privacy concerns about the terms of the note, which would become public if the note and mortgage were combined and recorded in local property records.

<sup>45</sup> See UCC 3-104.

<sup>46</sup> UCC 3-203, Cmt. 1 ("An instrument is a reified right to payment. The right is represented by the instrument itself.").

*terms of the mortgage and applicable state and federal law.* The applicable law governing foreclosures is state law.<sup>47</sup>

State real estate law, including foreclosure law, is non-uniform, making it difficult to state what the law is as a generic matter; there is always the possibility that some jurisdictions may deviate from the majority rule. That said, no state requires a borrower's note to be recorded in local land records for the note to be valid, and, as a general matter, state law does not require the mortgage to be recorded either in order for the mortgage to be enforceable against the borrower. Recording of the mortgage is necessary, however, to establish the mortgage's priority relative to the claims of other parties, including other mortgagees, judgment lien creditors and tax and workmen's' liens against the property. The basic rule of priority is first in time, first in right; the first mortgage to be recorded has senior priority. An unrecorded mortgage will thus, generally have junior priority to a subsequently issued, but recorded mortgage. The difference between enforceability and priority is an important one, discussed in more detail below, in the section of this testimony dealing with MERS.

State law on foreclosures is also non-uniform. Roughly, however, states can be divided into two groups: those where foreclosure actions are conducted through the courts ("judicial foreclosure") and those where foreclosure actions are conducted by private sales ("nonjudicial foreclosure"). This division maps, imperfectly, with whether the preferred security instrument is a mortgage or a deed of trust.<sup>48</sup>

Mortgage loans cost more in states that have judicial foreclosure; what this means is that borrowers in judicial foreclosure states are paying more for additional procedural rights and legal protections; those procedural rights are part of the mortgage contract; failure to honor them is a breach of the mortgage contract. Note, that a default on the mortgage note is not a breach of the contract *per se*; instead it merely triggers the lender's right to foreclose per the applicable procedure.

In a typical judicial foreclosure proceeding, the homeowner receives a notice of default and if that default is not cured within the required period, the mortgagee then files a foreclosure action in court. The action is commenced by the filing of a written complaint that sets forth the mortgagee's allegations that the homeowner owes a debt that is secured by a mortgage and that the homeowner has defaulted on the debt. Rules of civil procedure generally require that legal actions based upon a writing include a copy of the writing as an attachment to the complaint, although there is sometimes an exception for writings that are available in the public records. While the mortgage is generally filed in the public records, assignments of the mortgage are often not (an issue complicated by MERS, discussed below), and the note is almost never a matter of public record.

It is important to understand that most judicial foreclosures do not function like the sort of judicial proceeding that is dramatized on television, in which all parties to the case appear in court, represented by attorneys and judgment only follows a lengthy trial. Instead, the norm in foreclosure cases is a default judgment. Most borrowers do not appear in court or contest their foreclosures, and not all of those who do are represented by competent counsel, not least because

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<sup>47</sup> There is a federal foreclosure statute that can be utilized by FHA...

<sup>48</sup> Mortgages sometimes also include a power of sale, permitting nonjudicial foreclosure. In a deed of trust, the deed to the property is transferred in trust for the noteholder to a deed of trust trustee, often a local attorney. The note remains the property of the lender (the deed of trust beneficiary). When there is a default on the note, the lender notifies the deed of trust trustee and the lender or its agent is typically appointed as substitute deed of trust trustee to run the foreclosure sale.

of the difficulties in paying for counsel. Most borrowers that the borrower does not contest the foreclosure or appear in court. In most cases, only the lender's attorney appears, and judges routinely dispatch dozens or hundreds of foreclosure cases in a sitting. Homeowners in foreclosure actions are among the most vulnerable of defendants, the least able to insist up on and vindicate their rights, and accordingly the ones most susceptible to abuse of legal process.

## **II. PROCEDURAL PROBLEMS AND FRAUD**

The first type of problems in the mortgage market are what might generously be termed "procedural defects" or "procedural irregularities." There are numerous such problems that have come to light in foreclosure cases. The extent and distribution of these irregularities is not yet known. No one has compiled a complete typology of procedural defects in foreclosures; there are, to use Donald Rumsfeld's phrase, certainly "known unknowns" and well as "unknown unknowns."

### ***A. AFFIDAVITS FILED WITHOUT PERSONAL KNOWLEDGE (ROBOSIGNING)***

Affidavits need to be based on personal knowledge to have any evidentiary effect; absent personal knowledge an affidavit is hearsay and therefore generally inadmissible as evidence. Accordingly, affidavits attest to personal knowledge of the facts alleged therein.

The most common type of affidavit is an attestation about the existence and status of the loan, namely that the homeowner owes a debt, how much is currently owed, and that the homeowner has defaulted on the loan. (Other types of affidavits are discussed in sections II.B. and II.C., *infra*). Such an affidavit is typically sworn out by an employee of a servicer (or sometimes by a law firm working for a servicer). Personal knowledge for such an affidavit would involve, at the very least, examining the payment history for a loan in the servicer's computer system and checking it against the facts alleged in a complaint.

The problem with affidavits filed in many foreclosure cases is that the affiant lacks any personal knowledge of the facts alleged whatsoever. Many servicers, including Bank of America, Citibank, JPMorgan Chase, Wells Fargo, and GMAC, employ professional affiants, some of whom appear to have no other duties than to sign affidavits. These employees cannot possibly have personal knowledge of the facts in their affidavits. One GMAC employee, Jeffrey Stephan, stated in a deposition that he signed perhaps 10,000 affidavits in a month, or approximately 1 a minute for a 40-hour work week.<sup>49</sup> For a servicer's employee to ascertain payment histories in a high volume of individual cases is simply impossible.

When a servicer files an affidavit that claims to be based on personal knowledge, but is not in fact based on personal knowledge, the servicer is committing a fraud on the court, and quite possibly perjury. The existence of foreclosures based on fraudulent pleadings raises the question of the validity of foreclosure judgments and therefore title on properties, particularly if they are still in real estate owned (REO).

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<sup>49</sup> See Deposition of Jeffrey Stephan, GMAC Mortgage LLC v. Ann M. Neu a/k/a Ann Michelle Perez, No. 50 2008 CA 040805XXXX MB, (15<sup>th</sup> Judicial Circuit, Florida, Dec. 10, 2009) at 7, available at <http://api.ning.com/files/s4SMwIZXvPu4A7kq7XQUsgW9xEcYtqNMPCm0a2hISJu88PoY6ZNqanX7XK41Fyf9gV8JIHDme7KcFO2cvHqSE/McplJ8vwnDT/091210gmactmortgagevsannmneu1.pdf> (stating that Jeffrey Stephan, a GMAC employee, signed approximately 10,000 affidavits a month for foreclosure cases).

## ***B. LOST NOTE AFFIDAVITS FOR NOTES THAT ARE NOT LOST***

The plaintiff in a foreclosure action is generally required to produce the note as evidence that it has standing to foreclose. Moreover, under the Uniform Commercial Code, if the note is a negotiable instrument, only a holder of the note (or a subrogee)—that is a party in possession of the note—may enforce the note, as the note is the reified right to payment.<sup>50</sup>

There is an exception, however, for lost, destroyed, or stolen notes, which permits a party that has lost possession of a note to enforce it.<sup>51</sup> If a plaintiff seeks to enforce a lost note, it is necessary “to prove the terms of the instrument” as well as the “right to enforce the instrument.”<sup>52</sup> This proof is typically offered in the form of a lost note affidavit that attests to the prior existence of the note, the terms of the note, and that the note has been lost.

It appears that a surprisingly large number of lost note affidavits are filed in foreclosure cases. In Broward County, Florida alone, over 2000 such affidavits were filed in 2008-2009.<sup>53</sup> Relative to the national population, that translates to roughly 116,000 lost note affidavits nationally over the same period.<sup>54</sup>

There are two problems with the filing of many lost note affidavits. First, is a lack of personal knowledge. Mortgage servicers are rarely in possession of the original note. Instead, the original note is maintained in the fireproof vault of the securitization trustee’s document custodian. This means that the servicer lacks personal knowledge about whether a note has or has not been lost.<sup>55</sup> Merely reporting a communication from the document custodian would be hearsay and likely inadmissible as evidence.

The second problem is that the original note is frequently not in fact lost. Instead, it is in the document custodian’s vault. Servicers do not want to pay the document custodian a fee (of perhaps \$30) to release the original mortgage, and servicers are also wary of entrusting the original note to the law firms they hire. Substitution of counsel is not infrequent on defaulted mortgages, and servicers are worried that the original note will get lost in the paperwork shuffle if there is a change in counsel. When pressed, however, servicers will often produce the original note, months after filing lost note affidavits. The Uniform Commercial Code (UCC) requires that a party seeking to enforce a note be a holder (or subrogee to a holder) or produce evidence that a note has been lost, destroyed, or stolen; the UCC never contemplates an “inconvenience affidavit” that states that it is too much trouble for a servicer to bother obtaining the original note. But that is precisely what many lost note affidavits are effectively claiming.

Thus, many lost note affidavits are doubly defective: they are sworn out by a party that does not and cannot have personal knowledge of the alleged facts and the facts being alleged are often false as the note is not in fact lost, but the servicer simply does not want to bother obtaining it.

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<sup>50</sup> UCC 3-301; 1-201(b)(21) (defining “holder”).

<sup>51</sup> UCC 3-309. Note that UCC 3-309 was amended in the 2001 revision of Article 3. The revision made it easier to enforce a lost note. Not every state has adopted the 2001 revisions. Therefore, UCC 3-309 is non-uniform law.

<sup>52</sup> UCC 3-309(b).

<sup>53</sup> Cite NY Times.

<sup>54</sup> According to the US Census Bureau, Broward County’s population is approximately 1.76 million, making it .57% of the total US population of 307 million. Broward does have a significantly higher than average foreclosure rate, roughly 12% over the past two years, according to Core Logic Loan Performance data, making it approximately 3 times the national average.

<sup>55</sup> The 2001 version of UCC 3-309 permits not only a party that has lost a note but a buyer from such a party to enforce a lost note.

### C. JUNK FEES

The costs of foreclosure actions are initially incurred by servicers, but servicers recover these fees off the top from foreclosure sale proceeds before MBS investors are paid. This reimbursement structure limits servicers' incentive to rein in costs and actually incentivizes them to pad the costs of foreclosure. This is done in two ways. First, servicers charge so-called "junk fees" either for unnecessary work or for work that was simply never done. Thus, Professor Kurt Eggert has noted a variety of abusive servicing practices, including "improper foreclosures or attempted foreclosures; imposition of improper fees, especially late fees; forced-placed insurance that is not required or called for; and misuse of escrow funds."<sup>56</sup> Servicers' ability to retain foreclosure-related fees has even led them to attempt to foreclose on properties when the homeowners are current on the mortgage or without attempting any sort of repayment plan.<sup>57</sup> Consistently, Professor Katherine Porter has documented that when mortgage creditors file claims in bankruptcy, they generally list amounts owed that are much higher than those scheduled by debtors.<sup>58</sup>

There is also growing evidence of servicers requesting payment for services not performed or for which there was no contractual right to payment. For example, in one particularly egregious case from 2008, Wells Fargo filed a claim in the borrower's bankruptcy case that included the costs of two brokers' price opinions allegedly obtained in September 2005, on a property in Jefferson Parish, Louisiana when the entire Parish was under an evacuation order due to Hurricane Katrina.<sup>59</sup>

Similarly, there is a frequent problem of so-called "sewer summons" issued (or actually not issued) to homeowners in foreclosures. Among the costs of foreclosure actions is serving notice of the foreclosure (a court summons) on the homeowner. There is disturbing evidence that homeowners are being charged for summons that were never issued. These non-delivered summons are known as "sewer summons" after their actual delivery destination.

One way in which these non-existent summons are documented is through the filing of "affidavits of lost summons" by process servers working for the foreclosure attorneys hired by mortgage servicers. A recent article reports that in Duval County, Florida (Jacksonville) the number of affidavits of lost summons has ballooned from 1,031 from 2000-2006 to over 4,000 in the last two years, a suspiciously large increase that corresponds with a sharp uptick in foreclosures.<sup>60</sup>

Because of concerns about illegal fees, the United States Trustee's Office has undertaken several investigations of servicers' false claims in bankruptcy<sup>61</sup> and brought suit against

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<sup>56</sup> Kurt Eggert, *Comment on Michael A. Stegman et al.'s "Preventive Servicing Is Good for Business and Affordable Homeownership Policy": What Prevents Loan Modifications?*, 18 HOUSING POL'Y DEBATE 279 (2007).

<sup>57</sup> Eggert, *Limiting Abuse*, *supra* note 21, at 757.

<sup>58</sup> Katherine M. Porter, *Mortgage Misbehavior*, 87 TEX. L. REV. 121, 162 (2008).

<sup>59</sup> *In re Stewart*, 391 B.R. 327, 355 (Bankr. E.D. La. 2008).

<sup>60</sup> Matt Taibbi, *Courts Helping Banks Screw Over Homeowners*, ROLLING STONE, Nov. 25, 2010, at [http://www.rollingstone.com/politics/news/17390/232611?RS\\_show\\_page=7](http://www.rollingstone.com/politics/news/17390/232611?RS_show_page=7).

<sup>61</sup> Ashby Jones, *U.S. Trustee Program Playing Tough With Countrywide, Others*, LAW BLOG (Dec. 3, 2007, 10:01 AM), <http://blogs.wsj.com/law/2007/12/03/us-trustee-program-playing-tough-with-countrywide-others>.

Countrywide,<sup>62</sup> while the Texas Attorney General has sued American Home Mortgage Servicing for illegal debt collection practices.<sup>63</sup>

The other way in which servicers pad the costs of foreclosure is by in-sourcing their expenses to affiliates at above-market rates. For example, Countrywide, the largest RMBS servicer, force places insurance on defaulted properties with its captive insurance affiliate Balboa.<sup>64</sup> Countrywide has been accused of deliberately extending the time to foreclosure in order to increase the insurance premiums paid to its affiliate, all of which are reimbursable by the trust, before the RMBS investors' claims are paid.<sup>65</sup> Similarly, Countrywide in-sources trustee services in deed of trust foreclosures to its subsidiary Recon Trust.<sup>66</sup>

Thus, in Countrywide's 2007 third quarter earnings call, Countrywide's President David Sambol emphasized that increased revenue from in-sourced default management functions could offset losses from mortgage defaults.

Now, we are frequently asked what the impact on our servicing costs and earnings will be from increased delinquencies and loss mitigation efforts, and what happens to costs. And what we point out is, as I will now, is that *increased operating expenses in times like this tend to be fully offset by increases in ancillary income in our servicing operation, greater fee income from items like late charges, and importantly from in-sourced vendor functions* that represent part of our diversification strategy, a counter-cyclical diversification strategy such as our businesses involved in foreclosure trustee and default title services and property inspection services.<sup>67</sup>

In June, 2010, Countrywide settled with the FTC for \$108 million on charges that it overcharged delinquent homeowners for default management services. According to the FTC,

Countrywide ordered property inspections, lawn mowing, and other services meant to protect the lender's interest in the property... But rather than simply hire third-party vendors to perform the services, Countrywide created subsidiaries to hire the vendors. The subsidiaries marked up the price of the services charged by the vendors – often by 100% or more – and Countrywide then charged the homeowners the marked-up fees.<sup>68</sup>

Among the accusations brought against Countrywide in a recent investor notice of default filed by the Federal Reserve Bank of New York along with BlackRock and PIMCO, is that Countrywide has been padding expenses via in-sourcing on the 115 trusts covered by the letter.<sup>69</sup>

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62 Complaint, Walton v. Countrywide Home Loans, Inc. (*In re Atchely*), No. 05-79232 (Bankr. N.D. Ga. filed Feb. 28, 2008).

63 Complaint, State v. Am. Home Mtg. Servicing, Inc., No. 2010-3307 (Tex. Dist. Ct. 448th Jud. Dist. filed Aug. 30, 2010).

64 Amherst Mortgage Securities, *supra* note **Error! Bookmark not defined.**, at 23.

65 *Id.*

66 Center for Responsible Lending, *Unfair and Unsafe: How Countrywide's irresponsible practices have harmed borrowers and shareholders*, CRL Issue Paper, Feb. 7, 2008, at 6-7.

67 Transcript, "Countrywide Financial Corporation Q3 2007 Earnings Call," Oct. 26, 2007 (emphasis added) (also mentioning "Our vertical diversification businesses, some of which I mentioned, are counter-cyclical to credit cycles, like the lender-placed property business in Balboa and like the in-source vendor businesses in our loan administration unit.").

68 FTC, Press Release, June 7, 2010, *Countrywide Will Pay \$108 Million for Overcharging Struggling Homeowners; Loan Servicer Inflated Fees, Mishandled Loans of Borrowers in Bankruptcy*.

69 Kathy D. Patrick, Letter to Countrywide Home Loan Servicing LP and the Bank of New York, dated Oct. 18, 2010, available at <http://www.scribd.com/Bondholders-Letter-to-BofA-Over-Countrywide-Loans-inc-NY-Fed/d/39686107>.

Countrywide is hardly the only servicer accused of acting in its interests at the expense of investors. Carrington, another major servicer, also owns the residual tranche on many of the deals it services. Amherst Mortgage Securities has shown that Carrington has been much slower than other servicers to liquidate defaulted loans.<sup>70</sup> Delay benefits Carrington both as a servicer and as the residual tranche investor. As a servicer, delay helps Carrington by increasing the number of monthly late fees that it can levy on the loans. These late fees are paid from liquidation proceeds before any of the MBS investors.

As an investor in the residual tranche, Carrington has also been accused of engaging in excessive modifications to both capture late fees and to keep up the excess spread in the deals, as it is paid directly to the residual holders.<sup>71</sup> When loans were mass modified, Carrington benefited as the servicer by capitalizing late fees and advances into the principal balance of the modified loans, which increased the balance on which the servicing fee was calculated. Carrington also benefited as the residual holder by keeping up excess spread in the deals and delaying delinquency deal triggers that restrict payments to residual holders when delinquencies exceed specified levels. Assuming that the residual tranche would be out of the money upon a timely foreclosure, delay means that Carrington, as the residual holder, receives many more months of additional payments on the MBS it holds than it otherwise would.<sup>72</sup>

It is important to emphasize that junk fees on homeowners ultimately come out of the pocket of MBS investors. If the homeowner lacks sufficient equity in the property to cover the amount owed on the loan, including junk fees, then there is a deficiency from the foreclosure sale. As many mortgages are legally or functionally non-recourse, this means that the deficiency cannot be collected from the homeowner's other assets. Mortgage servicers recover their expenses off the top in foreclosure sales, before MBS investors are paid. Therefore, when a servicer lards on illegal fees in a foreclosure, it is stealing from investors such as pension plans and the US government.

#### ***D. COMPLAINTS THAT FAIL TO INCLUDE THE NOTE***

Rule of civil procedure generally require that a complaint based on a writing include, as an attachment, a copy of a writing. In a foreclosure action, this means that both the note and the mortgage and any assignments of either must be attached. Beyond the rules of civil procedure requirement, these documents are also necessary as an evidentiary matter to establish that the plaintiff has standing to bring the foreclosure. Some states have exceptions for public records, which may be incorporated by reference, but it is not always clear whether this exception applies in foreclosure actions. If it does, then only the note, which is not a public record, would need to be attached.

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<sup>70</sup> Amherst Mortgage Insight, 2010, "The Elephant in the Room—Conflicts of Interest in Residential Mortgage Securitizations", pp. 22-24, May 20, 2010.

<sup>71</sup> See Amherst Mortgage Insight, "Why Investors Should Oppose Servicer Safe Harbors", April 28, 2009. Excess spread is the difference between the income of the SPV in a given period and its payment obligations on the MBS in that period, essentially the SPV's periodic profit. Excess spread is accumulated to supplement future shortfalls in the SPV's cashflow, but is either periodically released to the residual tranche holder. Generally, as a further protection for senior MBS holders, excess spread cannot be released if certain triggers occur, like a decline in the amount of excess spread trapped in a period beneath a particular threshold.

<sup>72</sup> Carrington would still have to make servicing advances on any delinquent loans if it stretched out the time before foreclosure, but these advances would be reimbursable, and the reimbursement would come from senior MBS holders, rather than from Carrington, if it were out of the money in the residual.



Many foreclosure complaints are facially defective and should be dismissed because they fail to attach the note. I have recently examined a small sample of foreclosure cases filed in Allegheny County, Pennsylvania (Pittsburgh and environs) in May 2010. In over 60% of those foreclosure filings, the complaint failed to include a copy of the note. Failure to attach the note appears to be routine practice for some of the foreclosure mill law firms, including two that handle all of Bank of America's foreclosures.

I would urge the Committee to ask Bank of America whether this was an issue it examined in its internal review of its foreclosure practices.

#### ***E. COUNTERFEIT AND ALTERED DOCUMENTS AND NOTARY FRAUD***

Perhaps the most disturbing problem that has appeared in foreclosure cases is evidence of counterfeit or altered documents and false notarizations. To give some examples, there are cases in which multiple copies of the "true original note" are filed in the same case, with variations in the "true original note;"<sup>73</sup> signatures on note allonges that have clearly been affixed to documents via Photoshop;<sup>74</sup> "blue ink" notarizations that appear in blank ink; counterfeit notary seals;<sup>75</sup> backdated notarizations of documents issued before the notary had his or her commission;<sup>76</sup> and assignments that include the words "bogus assignee for intervening asmts, whose address is XXXXXXXXXXXXXXXXXXXX."<sup>77</sup>

Most worrisome is evidence that these frauds might not be one-off problems, but an integral part of the foreclosure business. A price sheet from a company called DocEx that was affiliated with LPS, one of the largest servicer support firms, lists prices for various services including the "creation" of notes and mortgages. While I cannot confirm the authenticity of this price sheet or date it, it suggests that document counterfeiting is hardly exceptional in foreclosure cases.

While the fraud in these cases is not always by servicers themselves, but sometimes by servicer support firms or attorneys, its existence should raise serious concerns about the integrity of the foreclosure process. I would urge the Committee to ask the servicer witnesses what steps they have taken to ascertain that they do not have such problems with loans in their servicing portfolios.

#### ***G. THE EXTENT OF THE PROBLEM***

The critical question for gauging the risk presented by procedural defects is the extent of the defects. While Federal Reserve Chairman Bernanke has announced that federal bank regulators are looking into the issue and will issue a report this month, I do not believe that it is

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Brief of Antonio Ibanez, Defendant-Appellee, US Bank Nat'l Assn, as Trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z v. Ibanez; Wells Fargo Bank, N.A. as Trustee for ABFC 2005-Opt 1 Trust, ABFC Asset Backed Certificates Series 2005-OPT 1, No 10694, (Mass. Sept. 20, 2010), at 10 (detailing 3 different "certified true copies" of a note allonge and of an assignment of a mortgage); <http://4closurefraud.org/2010/04/27/foreclosure-fraud-of-the-week-two-original-wet-ink-notes-submitted-in-the-same-case-by-the-florida-default-law-group-and-jpmorgan-chase/> (detailing a foreclosure file with two different "original" wet ink notes for the same loan).

<sup>74</sup> <http://4closurefraud.org/2010/04/08/foreclosure-fraud-of-the-week-poor-photoshop-skills/>.

<sup>75</sup> See WSTB.com, at <http://www.wsbtv.com/video/25764145/index.html>.

<sup>76</sup> Deposition of Cheryl Samons, Deutsche Bank Nat'l Trust Co., as Trustee for Morgan Stanley ABS Capital 1 Inc. Trust 2006-HE4 v. Pierre, No. 50-2008-CA-028558-XXXX-MB (15<sup>th</sup> Judicial Circuit, Florida, May 20, 2009, available at <http://mattweidnerlaw.com/blog/wp-content/uploads/2010/03/depositionsammons.pdf>.

<sup>77</sup> <http://www.nassauclerk.com/clerk/publicrecords/oncoreweb/showdetails.aspx?id=809395&m=0&pi=0&ref=search>.

within the ability of federal bank regulators to gauge the extent of procedural defects in foreclosure cases. To do so would require, at the very least, an extensive sampling of actual foreclosure filings and their examination by appropriately trained personnel. I am unaware of federal bank regulators undertaking an examination of actual foreclosure filings, much less having a sufficient cadre of appropriately trained personnel. Bank examiners lack the experience or training to evaluate legal documents like foreclosure filings. Therefore, any statement put forth by federal regulators on the scope of procedural defects is at best a guess and at worse a parroting of the “nothing to see here folks” line that has come from mortgage servicers.

I would urge the Committee to inquire with federal regulators as to exactly what steps they are taking to examine foreclosure irregularities and how they can be sure that those steps will uncover the extent of the problem. Similarly, I would urge the Committee to ask the servicer witnesses what specific irregularities they examined during their self-imposed moratoria and by what process. It defies credulity that a thorough investigation of all the potential problems in foreclosure paperwork could be completed in a month or two, much less by servicers that have taken so long to do a small number of loan modifications.

### **III. CHAIN OF TITLE PROBLEMS**

A second problem and potentially more serious problem relating to standing to foreclose is the issue of chain of title in mortgage securitizations.<sup>78</sup> As explained above, securitization involves a series of transfers of both the note and the mortgage from originator to sponsor to depositor to trust. This particular chain of transfers is necessary to ensure that the loans are “bankruptcy remote” once they have been placed in the trust, meaning that if any of the upstream transferors were to file for bankruptcy, the bankruptcy estate could not lay claim to the loans in the trust by arguing that the transaction was not a true sale, but actually a secured loan.<sup>79</sup> Bankruptcy remoteness is an essential component of private-label mortgage securitization deals, as investors want to assume the credit risk solely of the mortgages, not of the mortgages’ originators or securitization sponsors. Absent bankruptcy remoteness, the economics of mortgage securitization do not work in most cases.

Recently, arguments have been raised in foreclosure litigation about whether the notes and mortgages were in fact properly transferred to the securitization trusts. This is a critical issue because the trust has standing to foreclose if, and only if it is the mortgagee. If the notes and mortgages were not transferred to the trust, then the trust lacks standing to foreclose. There are several different theories about the defects in the transfer process; I do not attempt to do justice to any of them in this testimony.

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<sup>78</sup> Chain of title problems appear to be primarily a problem for private-label securitization, not for agency securitization because even if title were not properly transferred for Agency securities, it would have little consequence. Investors would not have incurred a loss as the result of an ineffective transfer, as their MBS are guaranteed by the GSEs or Ginnie Mae, and when a loan in an Agency pool defaults, it is removed from the pool and the owned by the GSE or Ginnie Mae, which is then has standing to foreclose.

<sup>79</sup> Bankruptcy remote has a second meaning, namely that the trust cannot or will not file of bankruptcy. This testimony uses bankruptcy remote solely in the sense of whether the trust’s assets could be clawed back into a bankruptcy estate via an equity of redemption. The Uniform Commercial Code permits a debtor to redeem collateral at face value of the debt owed. If a pool of loans bore a now-above-market interest rate, the pool’s value could be above the face value of the debt owed, making redemption economically attractive.

It can be very difficult to distinguish true sales from secured loans. For example, a sale and repurchase agreement (a repo) is economically identical to a secured loan from the repo buyer to the repo seller, secured by the assets being sold.

While the chain of title issue has arisen first in foreclosure defense cases, it also has profound implications for MBS investors. If the notes and mortgages were not properly transferred to the trusts, then the mortgage-backed securities that the investors' purchased were in fact *non-mortgage-backed securities*. In such a case, investors would have a claim for the rescission of the MBS,<sup>80</sup> meaning that the securitization would be unwound, with investors receiving back their original payments at par (possibly with interest at the judgment rate). Rescission would mean that the securitization sponsor would have the notes and mortgages on its books, meaning that the losses on the loans would be the securitization sponsor's, not the MBS investors, and that the securitization sponsor would have to have risk-weighted capital for the mortgages. If this problem exists on a wide-scale, there is not the capital in the financial system to pay for the rescission claims; the rescission claims would be in the trillions of dollars, making the major banking institutions in the United States would be insolvent.

The key questions for evaluating chain of title are what method of transferring notes and mortgages is actually supposed to be used in securitization and whether that method is legally sufficient both as a generic matter and as applied. There is a surprising degree of legal uncertainty over these issues, even among banks' attorneys; different arguments appear in different litigation. The following section outlines the potential methods of transfer and some of the issues that arise regarding specific methods. It is critical to emphasize that the law is not settled on most of the issues regarding securitization transfers; instead, these issues are just starting to be litigated.

#### **A. TRANSFERS OF NOTES AND MORTGAGES**

As a generic matter, a note can be transferred in one of four methods:

- (1) the note can be sold via a contract of sale, which would be governed by the common law of contracts.
- (2) if the note is a negotiable instrument, it could be negotiated, meaning that it would be transferred via endorsement and delivery, with the process governed by Article 3 of the Uniform Commercial Code (UCC). The endorsement
- (3) the note could be converted into an electronic note and transferred according to the provisions of the federal E-SIGN Act.<sup>81</sup>
- (4) The note could be sold pursuant to UCC Article 9. In 49 states (South Carolina being the exception), Article 9 provides a method for selling a promissory note, which requires that there be an authenticated (signed) agreement, value given, and that the seller have rights in the property being transferred.<sup>82</sup> This process is very similar to a common law sale.

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<sup>80</sup> This claim would not be a putback claim necessarily, but could be brought as a general contract claim. It could not be brought as a securities law claim under section 11 of the Securities Act of 1933 because the statute of limitations for rescission has expired on all PLS.

<sup>81</sup> 15 U.S.C. § 7021.

<sup>82</sup> UCC 9-203. The language of Article 9 is abstruse, but UCC Revised Article 1 defines "security interest" to include the interest of a buyer of a promissory note. UCC 1-201(b)(35). Article 9's definition of "debtor" includes a seller of a promissory note, UCC 9-102(a)(28)(B), and "secured party" includes a buyer of a promissory note, UCC 9-102(a)(72)(D). Therefore UCC 9-203, which would initially appear to address the attachment (enforceability) of a security interest also covers the sale of a promissory note. South Carolina has not adopted the revised Article 1 definition of security interest necessary to make Article 9 apply to sales of promissory notes.

There is general agreement that as a generic method, any of these methods of transfer would work to effectuate a transfer of the note. No method is mandatory. Whether or not the chosen process was observed in practice, is another matter, however.<sup>83</sup>

There are also several conceivable ways to transfer mortgages, but there are serious doubts about the validity of some of the methods:

- (1) the mortgage could be assigned through the traditional common law process, which would require a document of assignment.
  - a. There is general consensus that this process works.
- (2) the mortgage could be negotiated.
  - a. This method of transfer is of questionable effectiveness. A mortgage is not a negotiable instrument, and concepts of negotiability do not fit well with mortgages. For example, if a mortgage were negotiated in blank, it should become a “bearer mortgage,” but this concept is utterly foreign to the law, not least as the thief of a bearer mortgage would have the ability to enforce the mortgage (absent equitable considerations). Similarly, with a bearer mortgage, a homeowner could never figure out who would be required to grant a release of the mortgage upon payoff. And, in many states (so-called title theory states), a mortgage is considered actual ownership of real property, and real property must have a definite owner (not least for taxation purposes).
- (3) the mortgage could “follow the note” per common law.
  - a. Common law is not settled on this point. There are several instances where the mortgage clearly does not follow the note. For example, the basic concept of a deed of trust is that the security instrument and the note are separated; the deed of trust trustee holds the security, while the beneficiary holds the note. Likewise, the mortgage follows the note concept would imply that the theft of a note also constitutes theft of a mortgage, thereby giving to a thief more than the thief was able to actually steal. Another situation would be where a mortgage is given to a guarantor of a debt. The mortgage would not follow the debt, but would (at best) follow the guarantee. And finally, the use of MERS, a recording utility, as original mortgage (a/k/a MOM) splits the note and the mortgage. MERS has no claim to the note, but MERS is the mortgagee. If taken seriously, MOM means that the mortgage does not follow the note. While MERS might claim that MOM just means that the beneficial interest in the mortgage follows the note, a transfer of the legal title would violate a bankruptcy stay and would constitute a voidable preference if done before bankruptcy.
- (4) the mortgage could “follow the note” if it is an Article 9 transfer.<sup>84</sup>

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<sup>83</sup> Note that common law sales and Article 9 sales do not affect the enforceability of the note against the obligor on the note. UCC 9-308, Cmt.6, Ex. 3 (“Under this Article, attachment and perfection of a security interest in a secured right to payment do not of themselves affect the obligation to pay. For example, if the obligation is evidenced by a negotiable note, then Article 3 dictates the person to whom the maker must pay to discharge the note and any lien security it.”). UCC Article 3 negotiation and E-SIGN do affect enforceability as they enable a buyer for value in good faith to be a holder in due course and thereby cut off some of the obligor’s defenses that could be raised against the seller. UCC 3-305, 3-306; 15 U.S.C. § 7021(d).

<sup>84</sup> UCC 9-203(g). If the transfer is not an Article 9 transfer, then the Article 9 provision providing that the mortgage follows the note would not apply.

- a. There is consensus that this process would work *if* Article 9 governs the transfer of the note.

Ultimately, there is lack of consensus as to the method of transfer that is actually employed in securitization transactions. In theory, the proper method should be UCC Article 9 transfer process was adopted as part of the 2001 revision of Article 9 with the apparent goal of facilitating securitization transactions. Parties are free, however, to contract around the UCC.<sup>85</sup> That is precisely what pooling and servicing agreements (PSAs) appear to do. PSAs provide a recital of a transfer of the notes and loans to the trust and then they further require that the as they set forth specific requirements regarding the transfer of the notes and mortgages, namely that there be a complete chain of endorsements followed by either a specific endorsement to the trustee or an endorsement in blank.<sup>86</sup> The reason for this additional requirement is to provide a clear evidentiary basis for all of the transfers in the chain of title in order to remove any doubts about the bankruptcy remoteness of the assets transferred to the trust. Absent a complete chain of endorsements, it could be argued that the trust assets were transferred directly from the originator to the trust, raising the concern that if the originator filed for bankruptcy, the trust assets could be pulled back into the originator's bankruptcy estate.

As PSAs are trust documents, they must be followed punctiliously. Moreover, most RMBS are issued by New York common law trusts, and well-established New York law provides that a transaction that does not accord with the trust documents is void.<sup>87</sup> Therefore, the key question is whether transfers to the trusts complied with PSAs. It appears that in recent years mortgage securitizers started to cut corners in order to deal with the increased deal volume they faced during the housing bubble, and they ceased to comply with the PSA requirements in many cases. Thus, in many cases, the notes contain either a single endorsement in blank or no endorsement whatsoever, rather than the chain of endorsements required by the PSA and critical for ensuring the trust's assets' bankruptcy remoteness.

It bears emphasis that the validity of transfers to the trusts is an unsettled legal issue. But if the transfers were invalid, they cannot likely be corrected because of various timeliness requirements in the PSAs.

#### **IV. YES, BUT WHO CARES? THESE ARE ALL DEADBEATS**

A common response from banks about the problems in the securitization and foreclosure process is that it doesn't matter as the borrower still owes on the loan and has defaulted. This "No Harm, No Foul" argument is that homeowners being foreclosed on are all a bunch of deadbeats, so who really cares about due process? As JPMorganChase's CEO Jamie Dimon put it "for the most part by the time you get to the end of the process we're not evicting people who deserve to stay in their house."<sup>88</sup>

Mr. Dimon's logic condones vigilante foreclosures: so long as the debtor is delinquent, it does not matter who evicts him or how. But that is not how the legal system works. A

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<sup>85</sup> UCC 1-203.

<sup>86</sup> This provision is general found in section 2.01 of PSAs.

<sup>87</sup> NY E.P.T.L. § 7-2.4.

<sup>88</sup> Tamara Keith & Renee Montaigne, *Sorting Out the Banks' Foreclosure Mess*, NPR, Oct. 15, 2010.

homeowner who defaults on a mortgage doesn't have a right to stay in the home if the proper mortgagee forecloses, but any old stranger cannot take the law into his own hands and kick a family out of its home. That right is reserved solely for the proven mortgagee.

Irrespective of whether a debt is owed, there are rules about who can collect that debt and how. The rules of real estate transfers and foreclosures have some of the oldest pedigrees of any laws. They are the product of centuries of common law wisdom, balancing equities between borrowers and lenders, ensuring procedural fairness and protecting against fraud.

The most basic rule of real estate law is that only the mortgagee may foreclose. Evidence and process in foreclosures are not mere technicalities nor are they just symbols of rule of law. They are a paid-for part of the bargain between banks and homeowners. Mortgages in states with judicial foreclosures cost more than mortgages in states without judicial oversight of the foreclosure process.<sup>89</sup> This means that homeowners in judicial foreclosure states are buying procedural protection along with their homes, and the banks are being compensated for it with higher interest rates. Banks and homeowners bargained for legal process, and rule of law, which is the bedrock upon which markets are built function, demands that the deal be honored.

Ultimately the “No Harm, No Foul,” argument is a claim that rule of law should yield to banks' convenience. To argue that problems in the foreclosure process are irrelevant because the homeowner owes *someone* a debt is to declare that the banks are above the law.

## **V. CONCLUSION**

The foreclosure process is beset with problems ranging from procedural defects that can be readily cured to outright fraud to the potential failure of the entire private label mortgage securitization system.

In the best case scenario, the problems in the mortgage market are procedural defects and they will be remedied within reasonably quickly (perhaps taking around a year). Remedying them will extend the time that properties are in foreclosure and increase the shadow housing inventory, thereby driving down home prices. The costs of remedying these procedural defects will also likely be passed along to future mortgage borrowers, thereby frustrating attempts to revive the housing market and the economy through easy monetary policy.

In the worst case scenario, there is systemic risk, as there could be a complete failure of loan transfers in private-label securitization deals in recent years, resulting in trillions of dollars of rescission claims against major financial institutions. This would trigger a wholesale financial crisis.

Perhaps the most important lesson from 2008 is the need to be ahead of the ball of systemic risk. This means (1) ensuring that federal regulators do a serious investigation as discussed in this testimony above and (2) considering the possible legislative response to a crisis. The sensible course of action here is to avoid gambling on unsettled legal issues that could have systemic consequences. Instead, we should recognize that stabilizing the housing market is the

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<sup>89</sup> See Karen Pence, *Foreclosing on Opportunity: State Laws and Mortgage Credit*, 88 REV. ECON. & STAT. 177 (2006) (noting that the availability—and hence the cost—of mortgages in states with judicial foreclosure proceedings is greater than in states with non-judicial foreclosures).

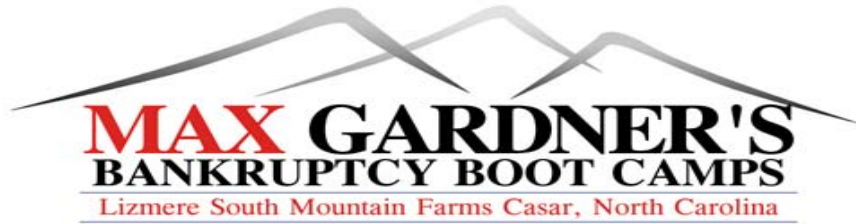
key toward economic recovery, and that it is impossible to fix the housing market unless the number of foreclosures is drastically reduced, thereby reducing the excess inventory that drives down housing prices and begets more foreclosures. Unless we fix the housing market, consumer spending will remain depressed, and as long as consumer spending remains depressed, high unemployment will remain and the US economy will continue in a doldrums that it can ill-afford given the impending demographics of retirement.

This suggests that the best course of action is a global settlement on mortgage issues, the key elements of which must be (1) a triage between homeowners who can and cannot pay with principal reduction and meaningful modifications for homeowners with an ability to pay and speedier foreclosures for those who cannot, (2) a quieting of title on securitized properties, and (3) a restructuring of bank balance sheets in accordance with loss recognition.

I recognize that for many, the preferred course of action is not to deal with a problem until it materializes. But if we pursue that route, we may be confronted with an unmanageable crisis. We cannot rebuild the US housing finance system until we deal with the legacy problems from our old system, and these are problems that are best addressed sooner, before an acute crisis, then when it is too late.

It's Elementary





## Max Gardner's Top Road Signs of Bogus Mortgage Documents

1. The Mortgage or Deed of Trust is assigned from the Originator directly to the Trustee for the Securitized Trust.
2. The Mortgage or Deed of Trust is assigned months and sometimes years after the date of the origination of the underlying mortgage note.
3. The Mortgage or Deed of Trust is assigned from the initial aggregator directly to the Securitized Trust with no assignments to the Depositor or the Sponsor for the Trust.
4. The Mortgage or Deed of Trust is executed, dated or assigned in a manner inconsistent with the mandatory governing rules of Section 2.01 of the Pooling and Servicing Agreement.
5. The assignment of the Mortgage or Deed of Trust is executed by a legal entity that was no longer in existence on the date the document was executed.
6. The assignment of the mortgage or Deed of Trust is executed by an entity whose name is different than the entity named in the original

document (i.e., National City Bank Corporation in lieu of ABC Corporation as a division of National City Bank).

7. The assignment was executed by a party pursuant to a Power of Attorney but no Power of Attorney is attached to the instrument or filed with the instrument or otherwise recorded with local land registry.

8. The mortgage note is allegedly transferred in a single document along with the Mortgage or Deed of Trust (i.e., "Assignment of the Note and Mortgage"). You cannot "assign" a mortgage note. You can only "negotiate" a mortgage note under Article 3 of the UCC.

9. The assignment is executed by a party who claims to be an "attorney in fact" for the assignor.

10. The assignment is notarized by a notary in Dakota County, Minnesota.

11. The assignment is notarized by a notary in Hennepin County, Minnesota.

12. The assignment is notarized by a notary in Duval County, Florida.

13. The assignment is executed by an officer or secretary of MERS.

14. The assignment is notarized by a secretary or paralegal employed by the attorney for the mortgage servicer.

15. The assignment is executed or notarized by an employee of MR Default Services, Promiss Solutions LLC, National Default Exchange, LP, LOGS Financial Services, or some similar third-party.

16. The endorsement on the note is actually on an allonge affixed to the note. In most states, an allonge cannot be used if there is a sufficient amount of room at the "foot" or the "bottom" of the original note for the endorsement.

17. The allonge is not "permanently" affixed to the original note. The term permanent excludes the use of staples and tape and as a result you must use a sold fastener such as glue. Allonges are commonly referred to "in the business" as "tear-off fraud papers."

18. The note proffered in evidence is not the original but a copy of the "certified copy" provided to the debtors at the closing.

19. The note is endorsed in blank with no transfer and delivery receipts. It is fine to endorse a note in blank, in which case it becomes "bearer" paper under the UCC. However, in order to prove a true sale from the Sponsor to the Depositor you must have written delivery and transfer receipts and proof of pay outs and pay in transactions.
20. The note proffered in evidence is not endorsed at the foot of the note or on an affixed allonge.
21. The assignment of the mortgage or deed of trust post-dates the filing of the court pleading.
22. The assignment of the mortgage or deed of trust is executed after the filing of the court pleadings but claims to be "legally effective" before the filing. For example, the deed of trust is assigned on June 1, 2009, with an effective date of May 1, 2007.
23. The parties who executed the assignment and who notarized the signature are in fact the same parties.
24. The signor states that he or she is an "agent" for the executing entity.
25. The signor states that he or she is an "attorney in fact" for the executing entity.
26. The signor states that he or she is an employee of the executing entity but claims to have custody and control of the records of the entity.
27. The signor of the document makes statements about the status of the mortgage debt based on his or her review of the "records of the plaintiff" or the "records of the moving party."
28. The proponent of the original note files an Affidavit of Lost Note.
29. The signor claims that the allegations in the court pleading are correct but the assignment of the mortgage and/or delivery and transfer of the note occurs after the law suit or the motion for relief from stay was filed.
30. One or more of the operative documents in the case is signed by one of the attorneys for the mortgage servicer.
31. The default payment history filed in the case is prepared by the attorney for the mortgage servicer or a member of his or her staff.
32. The affidavit filed in support of legal fees is not signed by an attorney with the firm involved in the case.

33. The name of one or more of the signors is stamped on the document.
34. The document is a form with standard "fill-in-the-blanks" for names and amounts.
35. The signature of one or more parties on the document is not legible and looks like something a three year old might have done.
36. The document is dated and signed years before the document is actually filed with the register of real estate documents or deeds or mortgages.
37. The proffered document has the word C O P Y stamped on or embedded in the document.
38. The document is executed by a notary in Denton County, Texas.
39. The document is executed by a notary in Collin County, Texas.
40. The document includes a legend "Hold for" a named law firm after recording.
41. The document was drafted by a law firm representing the mortgage servicer in the pending case.
42. The document includes any type of bar code that was not added by the local register or filing clerk for such instruments.
43. The document includes a reference to an "instrument number."
44. The document includes a reference to a "form number."
45. The document does not include any reference to a Master Document Custodian.
46. The document is not authenticated by any officer or authorized agent of a Master Document Custodian.
47. The paragraph numbers on the document are not consistent (the last paragraph on page one is 7 and the first paragraph on page two starts with number 9).
48. The endorsement of the note is not at the "foot" or "bottom" of the last page of the note. For example, a few states allow an endorsement on the back of the last page of the note but the majority requires it at the foot of the note.

49. The document purports to assign the mortgage or the deed of trust to the Trustee for the Securitized Trust before the Trust was registered with the Securities and Exchange Commission. This type of registration is normally referred to as a "shelf registration."
50. The document purports to transfer the note to the Trustee for the Securitized Trust before the date the Trust provides for the origination date of instruments in the Trust. The Prospectus, the Prospectus Supplement and the Pooling and Servicing Agreement will clearly state that the pool of notes includes those originated between date X and date Y.
51. The document purports to transfer the note to the Trustee for the Securitized Trust after the cut-off date for the creating of such instruments for the Trust.
52. The origination date on the mortgage note is not within the origination and cut-off dates provided for the by terms of the Pooling and Servicing Agreement.
53. The "Affidavit of a Lost Note" is not filed by the Master Document Custodian for the Trust but by the Servicer or some other third-party.
54. The document is signed by a "bank officer" without any designation of the office held by the said officer.
55. The affidavit includes the following language on the bottom of each page: "This is an attempt to collect a debt. Any information obtained will be used for that purpose."
56. The document is signed by a person who identifies himself or herself as a "media supervisor" for the proponent.
57. The document is signed by a person who identifies himself or herself as a "media coordinator" for the proponent.
58. The document is signed by a person who identifies himself or herself as a "legal coordinator" for the movant.
59. The date of the signature on the document and the date the signature was notarized are not the same.
60. The parties who signed the assignment and who notarized the signature are located in different states or counties.
61. The transferor and the transferee have the same physical address including the same street and post office box numbers.

62. The assignor and the assignee have the same physical address including the same street and post office box numbers.

63. The signor of the document states that he or she is acting "solely as nominee" for some other party.

64. The document refers to a power of attorney but no power of attorney is attached.

65. The document bears the following legend: "This is not a certified copy."

66. The document is signed by:

Jose Aguilar

Joseph Alvarado

Felix Amenumey

Natalie Anderson

Pam Anderson

Scott Anderson or by Scott W. Anderson

Pamela Ariano

Leticia Arias

Chris Arndt

Aimee Austin

Gina Avila

Katrina Bailey

Fern Baker

Janice M. Baker

Lorraine Balara

Steve Ballman

Steve Bashmakov

Michael Bender

Jamie Bilot  
Marnessa Birckett  
Sarah Block  
Janette Boatman  
Michele Boiko  
Sheri Bongaarts  
Beth Borse  
Christie Bouchard  
Diane Bowser  
Christopher Bray  
Tammy Brooks-Saleh or Tammy Saleh  
Sandy Broughton  
Jenny Brouwer  
Jacqueline Brown  
Paul Bruha  
Lins Bryce  
Rita Bucolo  
Judy Buseman  
Butler & Hosch, P.A.  
Becky Byrne  
Rodney Cadwell  
Robin Callahan  
Carolyn Cari  
Jeffrey P. Carlson  
Nancy L. Carlson  
Richard J. Carlson

Robin Carmody  
Marvell Carmouche  
Amy Jo Cauthern-Munoz  
Kristi M. Caya  
Kim Chambers  
Carol Chapman  
Keith Chapman  
Hari Charagundla  
Debra Chieffe  
Christina Ching  
Dave Chiodo  
Jim Clark  
Tara Clayton  
John Cody  
Robyn Colburn  
Rebecca Colgan  
Karen Cook  
Frank Coon  
Julie Coon  
Julie Cordova  
Jeremy Cox  
Cathy Crawford  
Kevin Crecco  
Dave Cunningham  
Michael Curry



Nanci Danekar  
Amie Davis  
Vickie Day  
Yvette Day  
Teresa DeBaker  
Jody Delfs  
Richard Delgado  
Mike Dian  
Dulce Diaz  
Larry Dingmann  
Kathleen Doherty  
Jason Dreher  
Jennifer Duncan  
Kimbretta Duncan  
Ronald Durant  
Neil E. Dyson  
Shirley Eads  
Salena Edwards  
Judy Faber  
Sue Filiczowski  
Donna Fitton  
Sean Flanagan  
Angela L. Freckman  
Verdine A. Freeman  
Eric Friedman  
Fedelis Fondungallah

Barb Frost  
LeAllen Frost  
Fanessa Fuller  
Laura Furrick  
Sarah Gacek  
Judi Gambrel  
Elizabeth Geretschlaeger  
Peggy Glass  
Dory or Dorey Goebel  
Alma Gonzales  
Eileen J. Gonzales  
Kathleen Gowan  
Kelly Graham  
Steven Y. Green  
Steven Grout  
Cathy Hagstrom  
Michelle Halyard  
Craig Hanlon  
Michael Hanna  
Donna Harkness  
Michael Hebling  
Renee L. Hensley  
May Her  
Jim Herman  
Laura Hescott  
Dave Hillen

Joseph P. Hillery  
Craig Hinson  
Bob Hora  
Teddi Horan  
Robert L. Horn  
Chrys Houston  
JK Huey  
Paul Hunt  
Vickie Ingamells  
Cassandra Inouye  
Andrea Jenkins  
Ashley Johnson  
Mary B. Johnson  
Tina Jones  
Peggy Jordon  
Etsuko Kabeya  
Jamil Kahin  
Robert E. Kaltenbach  
Pam Kammerer  
Gloria Karau  
Vishal Karingada  
Rhonda Kastli  
Andrew Keardy  
Patricia Kelleher  
Scott Keller  
Bryan Kerr

John Kerr  
Kim Kinney  
Sandy Kinnunen  
LeeAnne Kramer  
Mutru Kumar  
Martha Kunkle  
Margie Kwaitanowski  
Vicki Kyle  
Sukhada Lad  
Brian J. LaForest  
Diane LaFrance  
Patricia Lambengco  
Kyurstina Lawton  
Toccoa Lenair  
Bharati Lengade  
Lindsey Lesch  
Whitney Lewis  
Marie Lockwood  
Stephanie Lowe  
Todd Luckey  
Michele Luszcz  
Joseph Lutz  
Hang Luu  
Frank Madden  
Lisa Magnuson  
William Maguire

Michael G. Mand  
Silvia Marchan  
Charmaine Marchesi  
Brock Martin  
Joel Martinson  
Denise A. Marvel  
Mary Maxwell  
Christopher Mayall  
Patrick McClain  
Mary McGrath  
Hattie McLaughlin  
Noel McNally  
Donna McNaught  
Michael Mead  
Marcia Medley  
Susan Meier  
Marisa Menza  
Pamela Michael  
Linda Miller  
Steve Moe  
Nancy Mooney  
Joanne Moore  
Melody Moore  
Taylor Moore  
Ruth Morgan  
Michael H. Moreland

Treva Moreland  
Annmarie Morrison  
Melissa Mosloski  
Kim Mullins  
Patricia Murray  
Ginny Neidert  
Steve A. Nielsen  
Susan Nightingale  
Colleen O'Donnell  
Richard Olasande  
Mitchell Oringer  
Clothilde Ortega  
Amy Payment  
Dawn Peck  
Bonnie Pelletier  
Patte Peloquin  
Joseph Pensabene  
Kenneth R. Perkins  
Jennifer Peters  
Charity Peterson  
Joyce Petty  
Ann Pinto  
Ingrid Pittman  
Bernadette Polux  
Tamara Price  
Erika Puentes

Beverly Quaresima  
Shivani L. Ram  
Antonia Ramirez  
Rona Ramos  
Myron Ravelo  
Peter Read  
Keith S. Reno  
Anthony N. Renzi  
Dawn L. Reynolds  
Jeff Rivas  
Jose Rivera  
Bill Rizzo  
Paula Rosato  
Margery A. Rotundo  
Sarah Rubin or Sara Rubin  
Paige Sahr  
Tammy Saleh  
Kendall Sanders  
Cindy Sandoval  
Dianna Sandoval  
Kimberly Sanford  
Josephine Sciarrino  
Stephanie Scott  
Jenee Simon  
Laura Siess  
Gregory Smallwood

Rosalie Solano  
Erika Spencer  
Joseph Spicer  
Renaë Stanton  
Jeffrey Stephan  
Maya Stevenson  
Richard Stires  
Judith Stone  
September Stoudemire  
Roy Stringfellow  
Anne Sutcliffe  
Rachel Switzer  
Emmanuel Tabot  
Mary Taylor  
Varsha Thakkar  
Bernice Thell  
Keith Torok  
Deb Twining  
Kenneth Ugwuadu  
R.P. Umali  
Keo Maney Kue Vang  
Jason Vecchio  
Rebecca Verdeja  
Vinod Vishwakarma  
Fifi Volgarakis  
Janet Vollmer



Kim Waldroff

Linda Walton

Lisa Watson

John Wesley

Katrina Whitfield-Bailey or by Katrina Whitfield or by Katrina Bailey

Joanne Wight

Cathy Williams

Paul Williams

Kristine Wilson

Mary Winbauer

Rebecca Wirtz

Danielle Woods

Janine Yamoah

Jerry Yang

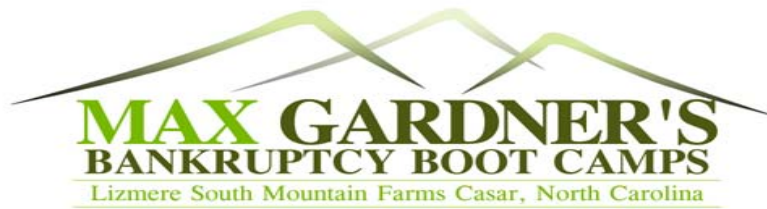
Elizabeth Yerosian

Mellisa Ziertman

Jan Zimmerman

Stephen Zindler

Katie Zrust



**Max Gardner's Dirty Dozen Rules  
For The  
Proof of Ownership in a Mortgage Note  
With Respect to a Simple  
Residential Mortgage-Backed Securitized Trust**

1. In the case of a Residential Mortgage-Backed Securitized Trust, it is always necessary for the Trust to establish an unbroken chain of transfers of the mortgage note from the originator to the trust. The objective of the securitization process is to make the mortgage notes as "bankruptcy remote" as is legally possible from any claims against the originator. Such claims would include those of a Trustee in a bankruptcy proceeding or the FDIC as a conservator in the case of a bank failure. The operative document for the mandatory note transfer rules in connection with mortgage notes is the Pooling and Servicing Agreement. The applicable statutory law includes Articles 3 and 9 of the Uniform Commercial Code, the Pooling and Servicing Agreement, any applicable special local statutes related to real estate law. Also, a mortgage note is transferred by negotiation. Negotiation means the transfer of possession by a person other than the issuer to a person who thereby becomes the holder. A note is therefore transferred when it is delivered to a third-person for the purpose of giving that person the right to enforce the note. Under the UCC, a holder-in-due course is a party who purchases a note for consideration without notice of any claims. If there is lack of adequate consideration for the transfer, or the transfer is made at the time the note is in default, then the transferee may not claim holder-in-due course status.

2. In the simplest securitized model, the parties to the mandatory chain of transfers include the originator, the sponsor, the depositor and the designated Trustee for the Trust. Almost every Trust is organized as a common law trust under the laws of Delaware or New York. The legal rights of common law trust are limited to the rights granted in the statutory enabling instrument. Those rights will be discussed below. Under this basic model, the typical players are as follows:
  - a. The originator is normally the party who wrote and funded the original mortgage transaction for the consumer;
  - b. The warehouse lender is generally the entity that provides the interim funding for the originator (the warehouse lender normally just files a UCC-1 financing statement as to the notes or claims perfection by possession and is rarely an actual transferee of the note);
  - c. The sponsor is the party who organized the securitization of the mortgage and submitted the original registration statements to the Securities and Exchange Commission;
  - d. The depositor is the last party in the chain to own the note before it is transferred to the Trust; and
  - e. The Trustee through a named Trust is the entity that owns the notes for the benefit of the parties who invested in the various tranches of bonds issued by the Trust.
  - f. Each tranche of bond holders has a different interest in the principal and interest income streams generated by the mortgage notes in the Trust or from fees and charges recovered by the servicers from the consumers. The originator may also have a residual interest in the Trust by virtue of acquiring the lowest-rated tranches of bonds. The rights of these bond holders are specified in the Pooling and Servicing Agreement, the Prospectus and the Prospectus Supplement.
  - g. The issue of ownership of the mortgage notes is not the same as whether or not the Trust has a perfected security interest in the residential real estate of the consumers who executed the notes. Perfection should not be confused with transfer, assignment and ownership rights in the mortgage notes on the one hand and in the deed of trust and mortgage on the other.
3. The original mortgage notes may be endorsed to a named transferee by each necessary party in the chain of transfers but:

- a. Generally, endorsements must appear at foot of the note if there is room for such endorsements (some cases have held substantial compliance is sufficient);
  - b. If there is not sufficient room at foot or end of the note for such endorsements, then they may appear on an allonge, which must be permanently affixed to the note;
  - c. The endorsements are not required to be notarized;
  - d. The Endorsements do not have to be dated but must be signed by an authorized agent of transferor;
  - e. If endorsed by an authorized agent, then some proof of the agency should be referenced and/or attached to the note; and
  - f. The Trust should have a designated document custodian who holds the original notes for the Trust as well as all of the delivery and receipt certificates regarding the notes.
- 4. Original notes may be endorsed in blank by the originator but:
  - a. If the first endorsement is in "blank" (no payee is named or designated) then the note becomes a bearer instrument by operation of law;
  - b. There must be both a delivery and an acceptance receipt to document the transfer and delivery of the bearer note from the originator to the sponsor;
  - c. There must be a delivery and an acceptance receipt to document the transfer and delivery of the bearer note from the sponsor to the depositor ;
  - d. There must be a delivery and an acceptance receipt to document the transfer and delivery of the bearer note from the depositor to the Trust; and
  - e. The designated document custodian for the Trust should maintain possession of all such documents including the original bearer note. There should only be one original note.
- 5. The Pooling and Servicing Agreement includes origination and cut-off dates for mortgage notes and transfer and delivery dates for the notes to the Trust but:
  - a. The Trust has no authority to accept an equitable transfer of a note. Since each transfer must be a true sale for purposes of creating the bankruptcy remote structure, all transfers must following the steps designated in the structure;

- b. The Trust has no authority to claim an equitable interest in a note that has not been transferred to the Trust pursuant to strict terms and guidelines of the Pooling and Servicing Agreement;
  - c. All steps in the transfer process must be true and complete sales between the parties in order to qualify the Trust for what is called REMIC qualification under the Internal Revenue Code;
  - d. The Trust has no authority to accept a note for no consideration as collateral for a mortgage loan obligation since each transfer must be a true and bona fide sale between the parties; and
  - e. The transfers must be to the Trust and the Trustee as the sole designated agent for the Trust (for example the transfer must be to John Smith as Trustee for REMIC Trust 2007-5).
- 6. Assignments relate to real property instruments and have nothing to do with negotiable instruments or other non-negotiable instruments, which are regulated by Article 3 of the Uniform Commercial Code.
- 7. Assignments are strictly regulated by applicable state law. The following are important concepts as they apply to assignments:
  - a. Statute of Frauds applies to assignments since these are real property instruments. You cannot assign a mortgage or deed of trust in blank. There is no such thing as a bearer assignment with respect to a mortgage or deed of trust. An "incomplete instrument" is a real estate document that would fail to transfer any statutory rights to the grantee.
  - b. Assignments in the context of Residential Mortgage-Backed Securitized Trusts apply only to mortgages and deeds of trust. You cannot assign a note, just like you cannot assign a mortgage or deed of trust in blank. There is no such thing as a "bearer" mortgage or a "bearer" deed of trust.
  - c. The authority of the assignor must be independently established of record for the assignment of a mortgage or deed of trust to be valid. If a party is executing an assignment as an agent for the true assignor of record, then the document evidencing such authority (such as a Power of Attorney) must be duly executed and in many cases of record.
  - d. Since we are dealing with real estate instruments, the mortgages and deeds of trust must be properly assigned to the Trust. In the most simple securitized trust, you would have the following:
    - i. Assignment from Originator to Sponsor;

- ii. Assignment from Sponsor to Depositor;
    - iii. Assignment from Depositor to the Trust.
  - e. Since the mortgage or deed of trust follows the note under Articles 3 and 9 of the Uniform Commercial Code, the assignments do NOT have to be recorded with the designated land registry unless such recording is required by applicable real estate law. In those states where assignments must be recorded, this is a matter of perfection between the Trust and third-parties and has nothing to do with the physical delivery of the assignments up the proper chain to the Trustee for the Trust.
  - f. The Pooling and Servicing Agreement has specific time-lines for the execution and delivery of the assignments to the Trust. The fact that an assignment does not have to be recorded to maintain perfection does not mean the assignments do not have to be properly delivered in an unbroken chain to the Trustee for the Trust.
  - g. The Trust has no authority to accept assignments executed or delivered outside of the mandatory time-lines established in the Pooling and Servicing Agreement. As a common law entity, the Trust has no authority to act outside of the specific authority granted by the instrument that created and governs the activities of the Trust.
  - h. The Trust has no authority to assert a claim for an equitable assignment of a mortgage or deed of trust.
  - i. The Trust has no authority to claim an equitable mortgage or deed of trust on any real property.
8. The Holder in due course doctrine relates to the notes and has nothing to do with the mortgage or deed of trust. In order to assert a holder in due course status, the transfer of the note to the Trust via the required chain must occur before the note is in default and the transferee must take the note without knowledge or notice of any claims or defects in the document. If the note is in default during any link in the transfer process, the holder in due course status is lost.
9. Any assignment of a mortgage or deed of trust from the originator directly to the Trust is per se invalid. This is the case because such an assignment would disregard two essential players in the chain of assignments—the sponsor and the depositor. Since this aspect of the securitization process is controlled by applicable state real estate law, the Trust would have to be able to establish “good title” to the mortgage or deed of trust from the depositor. This could

never be established with an originator assignment directly to the Trust assignment.

10. Any transfer of the mortgage note from the originator directly to the Trust would likewise be per se invalid. This is the case because such a transfer would disregard the “true sale” of the same note from the originator to the sponsor and the subsequent true sale from the sponsor to the depositor. Any “late” transfer of the note from the originator to the Trust would also be invalid because at that point in time the originator would have no ownership rights in the note. Under the Pooling and Servicing Agreement, the Trust may only purchase the note from the depositor. And, since each transfer must constitute a true and complete sale between the parties, consistent with the Pooling and Servicing Agreement, the Trust must be able to establish an unbroken chain of transfers and deliveries from the originator to the Trust. These rules apply whether or not the notes are endorsed to a named payee in each instance or are endorsed in blank at any process in the chain of transfers.
11. With respect to affidavits, simply attaching documents without first laying a proper evidentiary foundation for the admission of the documents is simply hearsay. Statements such as a person collects and maintains records and documents of a third-party do not satisfy the business records exception to the hearsay rule. The affiant must be able to state that the attached documents are created or maintained in the regular course of the affiant’s business, that their creation and maintenance are part of the regular course of the affiant’s business, and that the records are from or about the time the transaction was recorded. The mere filing of records or documents maintained by other entities is insufficient to qualify the documents as business records. The need for such authentication applies to the assignments of the mortgages and deeds of trust and to the endorsements, transfer and delivery receipts for the mortgage notes. In addition, if any part of the affidavit is based on data that is stored in a computer then the data must be further authenticated as to the type of computer, security systems associated therewith, regular maintenance, limited access to the data, etc.
12. The enforcement of lost or destroyed or stolen mortgage notes is another issue that comes up in many of these cases. Under Section

3-309 of the UCC, a person not in possession of a mortgage note is entitled to enforce the instrument if the person seeking to enforce the instrument was in possession of the instrument before it was lost or who has directly or indirectly acquired ownership of the note from a person who was entitled to enforce the note when the loss of possession occurred and:

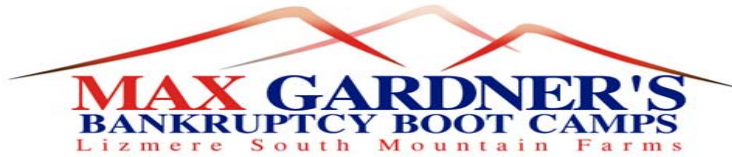
- a. The loss of possession was not the result of a transfer; or
- b. The loss of possession was not the result of a lawful seizure of the note; or
- c. The person cannot reasonably obtain possession of the note because:
  - i. It was destroyed;
  - ii. Its whereabouts cannot be determined;
  - iii. It is in the wrongful possession of an unknown party;
  - iv. The unknown party cannot be found;
  - v. The unknown party is not amenable to service of process;
  - vi. A reasonable search has been made for the note; and
  - vii. The note cannot be found after such a search.
- d. The person seeking enforcement of the lost note must prove the terms of the instrument AND the person's rights to enforce the instrument. Such proof would require a complete and unbroken chain of endorsements, transfers and deliveries from the originator to the current party seeking enforcement.
- e. Court must find that the person against whom enforcement is sought is adequately protected by reason of a claim by some other person holding the note. Such adequate protection may be provided by any reasonable means.

13. The After Acquired Property Doctrine. Wickopedia says this is a common law doctrine which is applicable when real property or personal property to which party A obtains title only after falsely selling the property to party B for value. The actual sale occurs when party A did not have proper title. An example would be Colonel Sanders pretends to sell "My Old Kentucky Home" to Daniel Boone for \$1000 (US) but does not own the property at the time and then uses the money to actually buy that same property from the true owner. The apparent outcome would be that Colonel Saunders and not Daniel Boone would own the property. Because the result of the set of transactions would be an injustice, a legal concept called the "After-acquired-title doctrine" vests the legal title in the property in party B even though buying it before party A had legal title to the property and



therefore had no right to transfer the title. This is an application of the principle of equity to property law. Historically, equity was applied in England in special chancery courts, but in the US, remedies at both law and equity are given in a single court. The After-acquired Title Doctrine is therefore a common law Rule by which the title of real estate, previously unsuccessfully transferred because of lack of possession by grantor, automatically passes to the buyer upon acquisition by the grantor and is based on the acquisition of title by estoppel.

Although this doctrine might have some traction outside of bankruptcy, it is doubtful that a common law trust could invoke an equitable rule. The powers of the Trust to accept and convey any property is strictly limited by the specific terms of the Pooling and Servicing Agreement. As a result, it is doubtful that the After Acquired Property Doctrine would work in a state court foreclosure. However, it is clear that the Trust could not use this doctrine in the context of an intervening consumer bankruptcy case. An intervening bankruptcy filing would prohibit the operation of the doctrine pursuant to both Sections 362(a)(4) and 549(a)(1). Section 362(a)(4) prohibits any act to create, perfect, or enforce any lien against property of the estate. Section 549(a)(1) allows for the avoidance of any post-petition transfer of property of the estate that occurs after the commencement of the case and that is not authorized under Title 11 or by order of the Bankruptcy Court.



## TALES OF THE **RED FLAG** REVIEWS OF LOAN DOCUMENTS

In 2008, the North Carolina Home Foreclosure Prevention Project was designed and implemented to review closing documents of homeowners facing foreclosure in order to determine any discrepancies, overcharges, illegal actions, etc., that may have occurred during the loan process or at the loan closing. The "Red Flag" reviews usually cover 5 closing documents: (1) HUD-1 Settlement Statement; (2) Note; (3) Deed of Trust; (4) Truth-In-Lending; and (5) Uniform Residential Loan Application. Additional documents may be included in the review and in some cases, fewer documents are available for review.

The Red Flag review follows a format designed by the NC Commissioner of Banks. Only the reviewers have access to this program for the actual reviews.

Following is a list of potential "red flags" that can and should be checked for inaccuracies and wrongdoings. Also listed are actual "red flags" found while reviewing closing documents of borrowers facing potential foreclosure. (Not all of these cases were included in the NCCOB Foreclosure Prevention Project. Some resulted in lawsuits filed against lender(s), broker(s), settlement agent(s), and/or the dismissal of a foreclosure action.)

### **HUD-1 Settlement Statement**

- *Lender Information*
  - ✓ Originating lender is listed on the HUD-1 Settlement Statement and should also be listed on the Note.
  - ✓ Check appropriate licensure website to determine if the lender is licensed. (North Carolina Commissioner of Banks website is <https://www.nccob.org>).
- *Settlement Agent Information*
  - ✓ Settlement Agent is listed on the HUD-1 Settlement Statement.
  - ✓ Check appropriate licensure website to determine if the settlement agent is licensed. (North Carolina State Bar website is [http://www.ncbar.com/members/member\\_directory.asp](http://www.ncbar.com/members/member_directory.asp)).
  - ✓ Did the Settlement Agent actually attend the closing?
- *Property Location* – check for correct address

- *Place of Settlement* – was it held at Lender's address? Or Settlement Agent's address? Or at Property Location? (Where does the borrower say it was held and WHO was present?)
- *Settlement Date* – does it match date on Note, Deed of Trust and other documents? If a *refinance*, is there a disbursement date – *3 days after the settlement date*?
- *Broker Information*
  - ✓ If applicable, the name of the Broker is usually indicated in section 800 of the HUD-1 Settlement Statement. The Broker may also be named as Settlement Agent or Lender on the HUD-1 Settlement Statement.
  - ✓ Check appropriate licensure website to determine if the broker is licensed. North Carolina Commissioner of Banks website is <https://www.nccob.org>).
- *Principal Amount* – does it match the amount on the Note and Deed of Trust?
- *Payoff* of prior mortgages in a refinance.
- *Per Diem Interest* – line 901 of the HUD-1 Settlement Statement.
- *Section 800* – fees payable in connection with loan (includes origination, discount points, pre-paid fees such as application, credit report and appraisal, flood certification, tax certification, yield spread premium or fees paid to broker "by lender").
- *Section 1100* – title charges information (includes title examination, document preparation, attorney fees, title binder, and title premium).
- *Did an attorney search the title?*
- *Do you recognize the name of the title company? If not, Google the name of title company for information (it may not be a legitimate title company and there may not be a title policy issued).*
- *Sections 900, 1000 or 1200* – other fees paid to lender, broker or settlement agent.
- *Mortgage Insurance Premium* – was the borrower aware that MIP was being charged? Compare with the estimated loan charges section on the Uniform Residential Application.
- *Other fees* – check for other fees that appear to be "out of line" or "out of the ordinary." At the same time, check for payees who are not listed elsewhere and appear to be "unknown."
- *Escrows* – real estate taxes and/or mortgage insurance.
- *Cancellation fee* paid to a "third party", the settlement agent, or the prior lender for cancellation of prior deed of trust in a refinance – there is NO fee for canceling Deed of Trust in North Carolina!
- *If monies were held in escrow at closing by the settlement agent, were the monies ever disbursed and/or according to the terms of an escrow statement signed by the borrower(s)?*
- Is the HUD-1 Settlement Statement signed on a separate page with nothing other than the signatures (allonge)?

## ACTUAL "RED FLAGS" FOUND DURING REVIEWS OF HUD-1 SETTLEMENT STATEMENTS:

- ✚ Lender not authorized to do business in North Carolina (terminated or canceled by NCCOB, or never registered).
- ✚ Settlement Agent not an attorney licensed by the NC State Bar. One review named an attorney not licensed in NC and upon further checking, the attorney was disbarred in another state!
- ✚ Property location doesn't match the address shown on other documents.
- ✚ Property location is 200+ miles from the place of settlement which is the same as the lender's address; settlement agent is also the same as the lender. Probably indicates a "signature closing", also known as a "witness closing" or "notary closing" with no attorney present. Borrowers usually aren't going to travel 400+ miles RT for a refinance.
- ✚ No "disbursement date" shown in the Settlement Date information and no 3-day right of rescission was given.
- ✚ No attorney fees paid! Not too many attorneys do real estate closings pro bono!
- ✚ No fee paid for title search (attorney fees), but title insurance premium was paid.
- ✚ Title insurance company was something like "Acme Title Company" and owned by an attorney not licensed in North Carolina and disbarred in a neighboring state. Title company not authorized in North Carolina and didn't appear to be a legitimate company.
- ✚ No signatures on the HUD-1 Settlement Statement page 2. Signatures are on a separate page (allonge) with no other information. Upon requesting documents from the lender, a HUD-1 Settlement Statement was produced that differed from that in the borrowers' closing package. The signature page was the same, but pages 1 and 2 differed.
- ✚ A common "red flag" is the old Yield Spread Premium paid to the broker "by the lender." What the borrowers usually don't understand is that they are actually paying this fee no matter what the broker and/or lender told them!
- ✚ Escrows that exceeded the number of months allowed.
- ✚ Mortgage Insurance charged, but not indicated on the HUD-1 Settlement Statement.
- ✚ Outrageous fees paid to the lender and/or broker!
- ✚ Outrageous fees paid to the closing attorney who is located in Fayetteville when the property is located in Cleveland County!
- ✚ Generally speaking, borrowers do not receive the required copies of the signed TIL and/or Notice of Right of Rescission at a "signature closing" because these closings take place in (1) parking lots; (2) borrowers' homes; (3) borrower's work; or (4) on the hood of a car at a rest stop along I-85!
- ✚ Over \$10,000 held in escrow by settlement agent was never disbursed and 8 years later, the same law firm acting as settlement agent – and allegedly still holding the monies in escrow – commenced a foreclosure action on behalf of the lender. The result was dismissal of the foreclosure action and more than \$40,000 of the loan adjusted off, leaving a loan payoff balance of less than \$4,000.

## Note

- What are the *terms* of the Note?
- Does the *origination date* of the Note match the date on the other documents?
- What is the *initial annual interest rate*?
- What is the *maturity period* of the loan?
- Is it an *adjustable rate loan*? (NOTE: If and ARM, an ARM rider will be attached to Deed of Trust.

- ***If an adjustable rate loan***, what is
  - ✓ the *initial adjustment date*?
  - ✓ any *subsequent adjustment date(s)*?
  - ✓ the *adjustable rate margin*?
  - ✓ the *minimum rate*?
  - ✓ the *maximum rate*?
  - ✓ the first *monthly payment change*?
  - ✓ any *subsequent payment change(s)*?
- Is it a **NEGATIVE AMORTIZATION LOAN**? And was the borrower advised as such?
- Check signature(s) on Note. Is there an *allonge*?

#### **ACTUAL "RED FLAGS" FOUND DURING REVIEWS OF NOTES:**

- ✚ On a 2-year ARM, the initial adjustment date was 2 days after closing date (which meant it was 1 day before the 3-day right of rescission expired!).
- ✚ Dates of rate adjustments didn't match the dates on the TIL.
- ✚ Terms of the Adjustable Rate Note do not match the terms contained in the ARM Rider to the Deed of Trust.
- ✚ Terms of the Note Rider do not match the terms of the Note OR the terms of the Rider to the Deed of Trust (actually had 3 completely different loan terms for this loan).

#### **Deed of Trust**

- Does lender's name match the name on the Note and Hud-1?
- If co-borrowers, are *both* names indicated as borrowers?
- If an adjustable rate loan, is an ARM Rider attached for recording?
- Does the date match that on the Note and HUD-1?
- If co-borrowers, did *both parties* sign?
- Is there an *allonge*?
- Check notaries. Anything look suspicious? (Don't rely upon the Register of Deeds to catch notary errors.)

#### **ACTUAL "RED FLAGS" FOUND DURING REVIEWS OF DEED OF TRUST:**

- ✚ Recorded prior to the expiration of the 3-day right of rescission.
- ✚ Although there were co-borrowers, only one borrower was named on the Deed of Trust and only one signed.
- ✚ Although there were co-borrowers, only one borrower named in the notary acknowledgment.
- ✚ ARM Rider did not match terms of the Adjustable Rate Note.
- ✚ Although there were co-borrowers, only the wife actually attended and signed the documents at closing; however, the Deed of Trust recorded with the Register of Deeds had both the wife's and husband's signatures, as did the Deed of Trust produced by the lender. (Someone else signed the husband's name.)

#### **Truth-in-Lending Statement (TIL)**

- APR ("Annual Percentage Rate")
- Initial payment amount – does it match that on the Note?
- Are there *itemized payments* for the term of the loan?
- Final payment amount(s)
- Review the payment disclosure for dates – do they match the dates and change dates on the Note?
- Is there a *prepayment penalty*?
- *Is it signed by borrower and co-borrower?*
- *Did the borrower(s) receive signed copy(ies) of the TIL at the closing?*

### **ACTUAL "RED FLAGS" FOUND DURING REVIEWS OF TILs:**

- # The monthly payment amounts don't match the payment shown on the Note.
- # The dates of the itemized payment changes on the TIL don't match the change dates shown on the Note.
- # Both borrowers didn't sign the TIL.
- # Borrower(s) didn't received signed (or unsigned) copy of TIL at closing.
- # TIL in the borrowers' closing package was different from that produced by the lender.
- # There is a prepayment penalty!

### **Uniform Residential Loan Application**

- Borrower monthly income – *was it inflated to qualify the borrower for the loan?*
- Borrower assets – *inflated?*
- Expense information – *is it accurate?*
- Borrower 2 monthly income – *was it inflated to qualify borrowers for the loan?*
- Good faith estimate – *how does it compare to the actual charges on the HUD-1? Does it mention escrows, including mortgage insurance?*
- Does the name of the loan officer or broker appear on the loan application? If so, *does the borrower recognize the name of the loan officer or broker appearing on the loan application?*

### **ACTUAL "RED FLAGS" FOUND DURING REVIEWS OF LOAN APPLICATIONS:**

- # Borrowers' monthly income GROSSLY inflated in order to qualify the borrowers for the loan.
- # Borrowers' assets inflated.
- # Good faith estimate showed borrower had to bring approximately \$1,200 to a refinance closing when she actually had to bring over \$16,000 to closing! (This loan did not close!)
- # Market value of the property shown considerably higher than the actual appraised value; again, in order to qualify the borrowers for the loan.
- # Loan officer's name is omitted.
- # Loan officer's name is shown, but not the loan officer who took the information from the borrower(s) (and the borrower(s) never heard of the loan officer named on the application).

### References:

NORTH CAROLINA GENERAL STATUTES Chapter 45, Article 11 – Emergency Program to Reduce Home Foreclosures.

NORTH CAROLINA GENERAL STATUTES Chapter 24, Article 1 – Interest.

NOTE OF CAUTION: "Signature" or "witness" or "notary" closings have become very popular. Websites such as [123Notary.com](http://123Notary.com) now offer their notaries a \$99 course on CD-rom to certify the notary as a "certified loan closer." According to the website, a "certified loan closer" is able to answer questions the borrower may have about the mortgage, note, settlement statement, etc. It appears that a number of borrowers facing foreclosure participated in this type of loan closing. The borrowers may have had questions about the various loan documents, but did not have the opportunity to ask an attorney, or may have been given incorrect information or "advice" by the notary (the "certified loan closer").

# A to D Transfers



## LPS Employee Activities:



LPS Document Signers taking a break from hard work in producing thousands of fake documents per day: (L to R): Chuck Hendrickson, Rebecca Conrin, Sarah French.

This Halloween, FIS Foreclosure Solutions in Jacksonville held a candy drive to benefit the Clara White Mission, a non-profit organization that provides housing, training, food and more to the needy in Jacksonville. We are proud to announce that the JAX office donated 3,202 pieces of candy to the CWM. Team members also competed in a cube decorating contest. Kevin Stoutenburg's bidding instructions team took first place

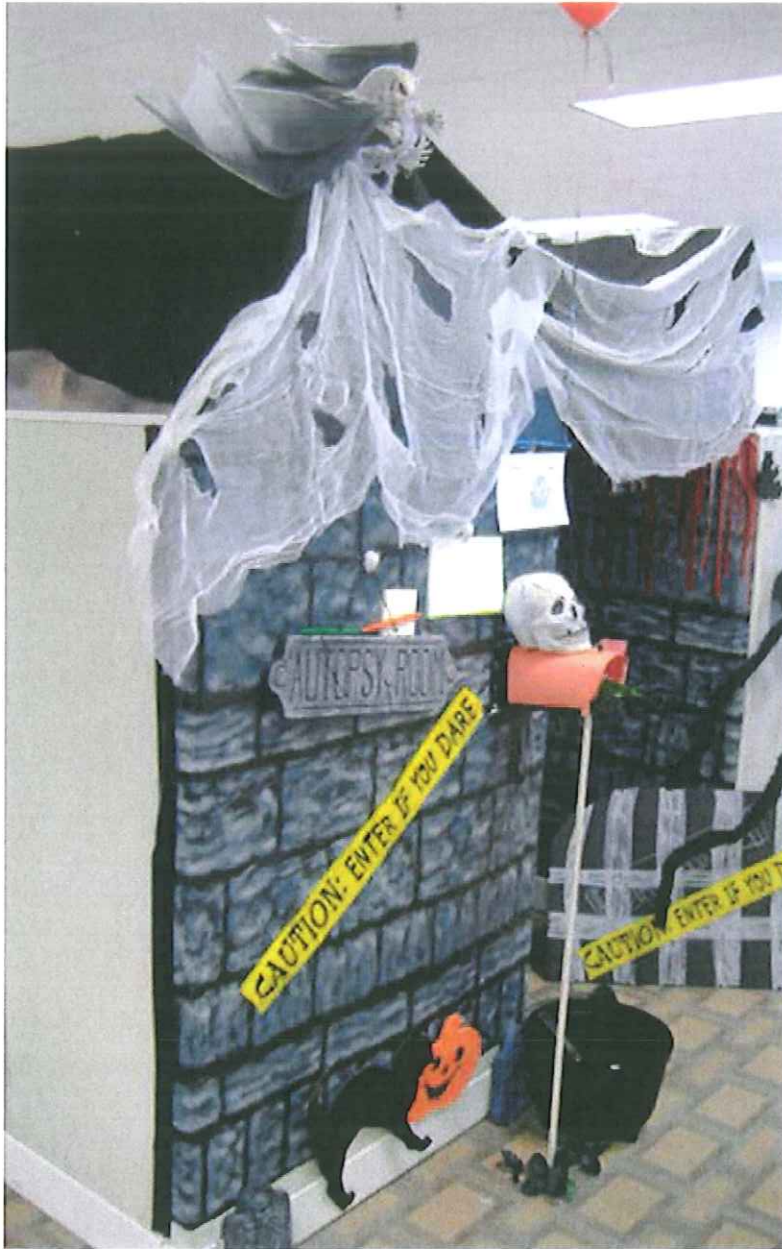


## LPS Employee Activities:



The Minnesota office participated in a pumpkin carving contest and a costume contest. The winning pumpkin was a “FIShark” created by the Bankruptcy Attorney Management team.

## LPS Employee Activities:



### CUBE DECORATING

CONTEST: Kevin Stoutenburg's team's winning team cube. The Autopsy Room. Apparently full of dead and evicted homeowners with stacks of fake documents.



## Recently Discovered Flaw in Recording System Clouds Titles on Previously Foreclosed Properties

*The modern system of mortgage refinancing and assignments created during the housing boom has left behind a wave of title defects on properties that have ever had a foreclosure in their history, due to a loophole in the property records recording system. This has been detected on a number of properties currently in foreclosure, and found to have been uncorrected on properties previously foreclosed.*

([PRWEB](#)) February 10, 2010 -- A previously undetected title flaw has been discovered on many previously foreclosed properties. As the number of real estate foreclosures skyrockets, the odds are higher that a home you live in today, or at some point in the future may have had a foreclosure in its history. Even if the foreclosure has long since passed, a loophole in the way mortgages are recorded can create a serious title defect for future owners. Title analysis performed this month by [AFX Title](#) has detected this error to be common in random samples of properties it reviewed. "This could affect the property ownership of millions of homes nationwide" said David Pelligrinelli, of AFX Title. "The mortgage recording method which created this title flaw did not exist until recently. As title abstractors are just seeing this problem emerge now but a wave of title claims is coming over the next year or so."

The problem is created through a break in the chain of mortgage ownership. Until the 1980's, most mortgages were loans between the homeowner and a bank, who lent the money directly. More recently, the mortgage financing system transformed into an international system of securitization, with mortgage lenders packaging their loans into securities, bought and sold by investors like stocks. These transactions even split individual mortgages into sections, where each loan could have parts owned by different investment banks.

The transfer of ownership in these mortgage backed securities (MBS) was done with contracts on the balance sheets of Wall Street investment banks, such as Morgan Stanley and Goldman Sachs. The company who originally appeared to make the loan was normally a retail lending company such as Countrywide or Lending Tree, who typically acted as a sales company, and sometimes remained contracted to service the loan. In the event that the loan goes into foreclosure at a later date, the then-current owner of the loan files the foreclosure and sells the property to a new owner, often at auction. The land records would show a deed of transfer from the investment bank to the new owner. This creates a break in the chain of ownership of the mortgage rights. In many cases, the transfer of ownership of the mortgage loan has gone from the original lender, through several owners, and then to the foreclosing bank, none of which is recorded on the property title history.

Technically, the foreclosing bank has no recorded title rights to foreclose in the first place. Owners of the loan normally do not publicly record each of the transfers out of expediency, and cost. Filing a document of transfer (called an assignment) in the land records incurs a substantial fee paid to the county clerk.

Some delinquent homeowners have used this error to delay the foreclosure, forcing lenders to "produce the note." In these cases, the bank has to go through the process of getting assignments to the foreclosing bank after the fact. However, the title repair process is not required however in the majority of cases when the homeowner does not contest the foreclosure.

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This leaves the break in chain of title dormant in the property records, vulnerable to be contested in the future. A few largely overlooked cases have already been decided by courts on this issue. In Lowell MA, a judge invalidated the foreclosure of homes based on missing and out-of-order assignments (US Bank v Ibanez).

Unraveling the chain of title and clarifying ownership of loans will create challenges for the courts and legislative bodies in all states. In the meantime, homeowners and buyers should be aware of how this could affect their property title. There are reports that some title insurers are indicating that they will not insure for this title defect.

As a national provider of property title searches, AFX Title is seeing an increasing number of files where the chain of title has obvious gaps in the recorded mortgage assignments. According to Pelligrinelli, the issue is serious. "When running searches for clients, we are noticing that a significant number of previously foreclosed properties have unconnected chain of assignments in the mortgage history. This could represent a title defect which could technically affect ownership rights for future owner."

Pelligrinelli adds that some lenders and government institutions are rushing to repair the titles on lender-owned properties as they discover them in their portfolio. This does not help individual owners who own properties previously foreclosed.

####

Page 2/3

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Page 3/3

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OMG Notes on IndyMac Federal Bank, FSB vs Israel A. Machado  
et. al. Transcript of Deposition of EricaAS. Johnson-Seck of  
OneWest Bank.

(Find the entire Transcript in the BLM/Vol IV – Max Gardner’s Guide to False  
Documents/A to D Transfers/Deposition of Erica Johnson-Seck)

This is another must read deposition transcript. The deponent (Erica Johnson-Seck of OneWest Bank) describes in detail how documents are processed through her own work station, the LPS system, and the LPS on-site employees (referred to as "on-sites"). I like a lot of this document but this is one of my favorite sections (page 20 to 22):

Q. When you execute a sworn document, do you make any kind of a verbal acknowledgement or oath to anyone?

A. I don't know if I know what you are talking about. What's a sworn document?

Q. Well, an affidavit.

A. Oh. No.

Q. In any event, there is no notary in the room with you when you...

A. Right.

Q. --take an oath with you, correct?

A. No, there is not.

Q. In fact, the Notaries can't see you sign the documents; is that correct?

A. Not unless they made it their business to do so.

Q. You mean to peek in your office?

A. Yes.

Q. At what point does the document get to the witnesses for signature?

A. The witnesses are, generally, are LPS on-sites, but it it's a witness, like if it has to be an authorized witness, then it would have my name or one of my peer's names or my name and my boss's name. And I would have a

cover sheet on top of a stack that was say Erica and Erik. So, after I signed, I would wake them over to my boss for him to sign.

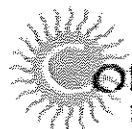
Q. Okay. But you're talking about documents that have dual signatures?

A. Some that require dual signatures. If it's just a witness, it doesn't have to be an authorized signer, then other LPS on-sites will witness.

Q. And do they do that before or after the notarization.

A. I don't know. I want to say after, but I really don't know. I haven't picked apart that process.

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<http://www.maxbankruptcybootcamp.com>  
Next Boot Camp: May 20 to May 24, 2010 (Spaces Open) Check out Boot  
Camp Photos at:  
<http://picasaweb.google.com/O.Max.Gardner>  
Google: O. Max Gardner III  
Governor O. Max Gardner Homepage:  
<http://www.governoromaxgardner.com/>

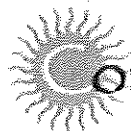


1 you're talking about your own staff when the documents  
2 arrive?  
3 A. No, we have LPS on site.  
4 Q. In Austin?  
5 A. Yes.  
6 Q. Take me through the procedure for getting  
7 your actual signature on the documents once they've  
8 gone through this quality control process.  
9 A. The documents are delivered to me for  
10 signature and I do a quick purview to make sure that  
11 I'm not signing for an entity that I cannot sign for.  
12 And I sign the document and I hand it to the Notary,  
13 who notarizes it, who then hands it back to LPS, who  
14 uploads the document so that the firms know it's  
15 available and they send an original.  
16 Q. "They" being LPS?  
17 A. LPS, yes.  
18 Q. Are all the documents physically, that you  
19 were supposed to sign, are they physically on your  
20 desk?  
21 A. Yes.  
22 Q. In your office?  
23 A. Yes.  
24 Q. You don't go somewhere else to sign  
25 documents?

1 going on with the bank. All the documents went to one  
2 of my supervisors, who manages the default forensic  
3 group, and she would pass it out. That's what I was  
4 describing to you.  
5 We don't have to have a process like that any more  
6 now because everyone's in a groove now with what the  
7 process should be. So we don't have to manage someone  
8 physically making sure everyone's notarizing. So now I  
9 just walk out of my office and hand them to one of my  
10 folks that can notarize that don't report directly to  
11 me. They still report up to their supervisor and then  
12 those direct reports report to me.  
13 Q. And does that Notary notarize all of those  
14 documents, or does she then distribute them to various  
15 Notaries?  
16 A. He or she would notarize all the documents I  
17 handed them.  
18 Q. Do they still have the requirement of  
19 returning them notarized within 24 hours?  
20 A. That got tough. That is tough. That's where  
21 we would like to be but we aren't. It takes us about a  
22 week for it to go through the process of verifying the  
23 information, getting it on my desk, me signing it,  
24 getting it to a Notary, and getting uploaded. So we  
25 have document delays.

1 A. No.  
2 Q. When you sign them, there's no one else in  
3 your office?  
4 A. Sometimes.  
5 Q. Well, the Notaries are not in your office,  
6 correct?  
7 A. They don't sit in my office, no.  
8 Q. And the witnesses who, if you need witnesses  
9 on the document, are not sitting in your office?  
10 A. That's right.  
11 Q. So you take your ten minutes and you sign  
12 them and then you give them to the supervisor of the  
13 Notaries, correct?  
14 A. I supervise the Notaries, so I just give them  
15 to a Notary.  
16 Q. You give all, you give the whole group that  
17 you just signed to one Notary?  
18 A. Yes.  
19 Q. Last time we talked about that there were a  
20 group of Notaries and that you had a supervisor that  
21 manages a group of loans and passes them out to the  
22 different Notaries. Has that changed?  
23 A. It used to go to -- well, a little bit. It  
24 used to go -- and that's with the shift of people  
25 leaving and people coming with everything that's been

1 Q. I'm mostly interested in how long it takes  
2 for the Notary to notarize your signature.  
3 A. I can't say categorically because the Notary,  
4 that's not the only job they do, so.  
5 Q. In any event, it doesn't have to be the same  
6 day?  
7 A. No.  
8 Q. When they notarize it and they put a date  
9 that they're notarizing, is it the date that you signed  
10 or is it the date that they're notarizing?  
11 A. I don't know.  
12 Q. When you execute a sworn document, do you  
13 make any kind of a verbal acknowledgment or oath to  
14 anyone?  
15 A. I don't know if I know what you're talking  
16 about. What's a sworn document?  
17 Q. Well, an affidavit.  
18 A. Oh. No.  
19 Q. In any event, there's no Notary in the room  
20 for you to --  
21 A. Right.  
22 Q. -- take an oath with you, correct?  
23 A. No, there is not.  
24 Q. In fact, the Notaries can't see you sign the  
25 documents; is that correct?



1 A. Not unless they made it their business to do  
2 so.  
3 Q. To peek into your office?  
4 A. Yes.  
5 Q. At what point does the document get to the  
6 witnesses for signature?  
7 A. The witnesses are, generally, are LPS  
8 on-sites, but if it's a witness, like if it has to be  
9 an authorized witness, then it would have my name and  
10 one of my peer's names or my name and my boss's name.  
11 And I would have a cover sheet on top of a stack that  
12 would say Erica and Eric. So after I signed, I would  
13 walk them over to my boss for him to sign.  
14 Q. Okay. But you're talking about documents  
15 that have dual signatures?  
16 A. Some that require dual signatures. If it's  
17 just a witness, it doesn't have to be an authorized  
18 signer, then other LPS on-sites will witness.  
19 Q. And do they do that before or after the  
20 notarization?  
21 A. I don't know. I want to say after, but I  
22 really don't know. I haven't picked apart that  
23 process.  
24 Q. Well, it seems logically, when you get the  
25 document, there's no witness signatures on there,

1 that it's supposed to include. They check that the  
2 document has the appropriate cover letter with the loan  
3 number on it and that document does not have the loan  
4 number on it for states that have the privacy act. I  
5 went through a presentation with what they do, and I  
6 want to say there was eight or nine different  
7 checkpoints.  
8 Q. Did that presentation, was a report included  
9 with that that you could read what they were saying?  
10 A. Yes, and there actually is a report that the  
11 LPS folks use in Minnesota for what they reject back to  
12 the firms because the documents aren't accurate.  
13 Q. Do you still have a copy of that report?  
14 A. I can find one. You didn't list that in your  
15 list of things.  
16 Q. Yeah. I didn't mean do you have it in here,  
17 but is it somewhere where you could get it for us if we  
18 needed it?  
19 A. Yes.  
20 Q. Okay. Did they say that they check the  
21 numbers that are in the affidavits?  
22 A. There's no way they can check the numbers,  
23 no.  
24 Q. Do they have access to the computer program  
25 that tracks all the debt numbers?

1 correct?  
2 A. No.  
3 Q. And you said that you take them and you give  
4 them to the Notary. You don't give them to the witness  
5 to sign, correct?  
6 A. That's right.  
7 Q. So logically it would have to go from the  
8 Notary then to the witness?  
9 A. Well, yes. Yes, that's logical. I just  
10 really don't know.  
11 Q. Let me jump back a moment to our discussion  
12 about the quality control that goes on at LPS. Do you  
13 have any familiarity with what they do per the quality  
14 control in Minnesota?  
15 A. I've been told what they do, yes.  
16 Q. And what is it that you were told that they  
17 do?  
18 A. For each of their clients, they have a matrix  
19 of who that client can sign for. And the processors  
20 that work in Minnesota, when they print the documents  
21 off line, they're checking to see if it's a document  
22 that their client can sign for. They're checking to  
23 see if that the document is aesthetically correct,  
24 looks, you know, looks like it should look. They check  
25 to see that the document includes the number of pages

1 A. LPS, in itself, has access to its client's  
2 system mainframe because they do screen scrapes from  
3 the systems to get data. I don't know if the  
4 individual person that does docs has that access.  
5 Q. Okay. Do you know who over at LPS would know  
6 that information?  
7 A. How high do you want to go? Do you want the  
8 president of, Scott Barns, president of default?  
9 Q. Okay. I'd like to talk about the procedure  
10 for referring a loan for foreclosure. That's done in  
11 your department, correct?  
12 A. Yes.  
13 Q. It's done by a person with the title of  
14 foreclosure specialist?  
15 A. Yes.  
16 Q. And foreclosure specialists are folks that  
17 report to you?  
18 A. They report to one of the supervisors who  
19 reports to me, yes.  
20 Q. To one of your two direct reports?  
21 A. Yes.  
22 Q. The decision is made to send the case to LPS.  
23 That's that first step in the procedure, correct?  
24 A. No. The first step is to see if the loan is  
25 ripe for referral; and, in conjunction with that, if



## **Analyzing the validity of Assignments and other documents signed under purported "Signing Authority"**

This task can involve two sub-issues, either or both of which can be at play in a given document:

(1) Did the individual who signed actually hold the corporate officer position that he/she purports to have? Example: Mortgage Electronic Registration Systems, Inc. ("MERS"), the mortgagee named in the mortgage, needs to assign the mortgage to the lender. An assignment by MERS is signed by an individual purporting to be a Vice President of MERS.

(2) Did the entity that signed actually have authority to take the action that the document purports to accomplish? Example: the borrower's state law provides that "the holder of the Note" can appoint a trustee to foreclose under a Deed of Trust. The Appointment of Trustee is executed by the servicer. The document recites that the servicer is the "duly authorized agent" on the Noteholder.

### **Step 1: Touch Base with the Corporate Law Perspective.**

Corporations are total "creatures of statute". This means but for some statute that grants it the power to act, a corporation is utterly incapable of performing any action whatsoever.

With the exception of some federally-chartered banks, most corporations exist under the corporation laws of a particular state. Federally-chartered banks are the only exception likely to be encountered (and many banks conduct lending and servicing operations through subsidiaries that are created under state law).

Every state has some title or chapter of its state code devoted to the creation, organization, and required operating formalities of corporations, limited liability companies ("LLC's") and other business entities.

The discussion throughout this article deals with corporations, but the same general approach is applicable to LLC's as well. Most states' LLC statutes will be found codified in or near the state's corporation laws.

## Step 2: Make Sure You have the Correct Corporate Entity.

Examine the document that you are questioning carefully as to the exact name of the corporate entity at issue. Typically the lender's corporate group will include subsidiaries and affiliates, each with their own corporate governance documents, and perhaps even different states of incorporation.

## Step 3. Determine the Governing State.

When corporations are parties to formal documents they usually will include their state of incorporation where they are first named in the document. Mortgage notes, mortgages, business-to-business agreements are good places to look for this information. For example, a note may identify the lender as "XYZ mortgage, Inc., a Delaware corporation". A corporation's website also may contain references to the state of incorporation.

Once the state of incorporation is known, online access to the code of laws of that state should readily lead to business corporation statute, and thus the specific statutory language governing the entity's officer-appointing procedures.

Delaware is the home a many corporations, and Delaware's laws serve as the model for many other states' corporation statutes. So focusing on Delaware as the model gives a good starting point. Though of course the actual state's law needs to be checked, the general approach discussed here generally applies to all states.

## Step 4. Walk through the applicable statutory text (Delaware example):

As a general rule corporation statutes are broad, non-specific and not very informative as to the specific officer-appointment process of any given entity. Yet the statutory text is the foundation for analysis of the validity of any particular signed document.

Three steps through the Delaware statute text:

A: The requirements as to how a corporation may sign documents:

"All other instruments [i.e. ones that are not filed with the Secretary of State] shall be signed:

- a. By any **authorized officer** of the corporation; or
- b. If it shall appear from the instrument that there are no such officers, then by a majority of the directors or by such directors as may be designated by the board; or
- c. If it shall appear from the instrument that there are no such officers or directors, then by the holders of record, or such of them as may be designated by the holders of record, of a majority of all outstanding shares of stock; or
- d. By the holders of record of all "outstanding shares of stock."

Delaware General Corporation Law ("DGCL") §103(b)(2)

B: OK, so what is an "authorized officer?"

" Officers shall be chosen in such manner and shall hold their offices for such terms as are prescribed by the bylaws or determined by the board of directors or other governing body. Each officer shall hold office until such officer's successor is elected and qualified or until such officer's earlier resignation or removal. Any officer may resign at any time upon written notice to the corporation." DGCL §142(b).

Commentary: That is about it as far as the statute is concerned. Except for documents that affect the validity of the corporation itself or of its stock and get filed with the Secretary of State, particulars as to what types of officers, how many, and their duties is left up the corporation's By-laws to govern.

C. So what are the requirements as to By-laws?

"The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees". DGCL §109(b).

Commentary: once again the statute is very general and not informative as to the content of any given corporation's By-laws or governance procedures. Now the analysis turns to the specifics of the entity in question.

Step 5. Are the By-laws publicly available? Check, and proceed form there.

Usually you are dealing with a subsidiary entity that is not a stand-alone publicly-traded SEC-filing company and as such generally does not make its By-laws public. Check the website and particularly any "Investor Relations" section just in case. The By-laws of the parent company DO NOT govern its subsidiaries, and the subsidiary's By-laws may be different. Having said that, corporate by-laws are similar on this point and the odds are that they provide, in effect, that the Board of Directors, by adopting a formal resolution, may appoint any officers that it chooses and give then any level of authority that the Board wishes.

In the case of MERS, its Membership Rules are readily available and spell out many specific processes as to how MERS' signature is supposed to be obtained. These rules are not by-laws but they do provide important clues into what formalities are supposed to be observed.

Step 6. Drill In.

The 5 steps above provide orientation to the formalities that the entity is supposed to be following, insofar as publicly available. The rest is fact-specific. Construct discovery going after a corporate resolution appointing the individual in question as a corporate office. Individuals may need to be deposed as to the genuineness of lists of names purportedly attached to resolutions adopted by Boards of Directors. Discovery may be needed to determine if a resolution was in fact adopted as purported. For example, a resolution bearing a certificate of the corporation stating that it was "adopted at a duly convened meeting of the Board of Directors on October 1, 2008" could entail a deposition of the corporate secretary as to the facts and circumstances of such meeting. [THIS SECTION NEEDS TO BE WORKED ON A LOT MORE].

[Need to add discussion of Issue #2 mention in the introduction above, Did the entity that signed actually have authority to take the action that the document purports to accomplish]

INCUMBENCY CERTIFICATE FOR LLC

\_\_\_\_\_, LLC

I, \_\_\_\_\_, do hereby certify that:

1. I am the duly elected and acting \_\_\_\_\_ of \_\_\_\_\_ LLC, a limited liability company organized and existing in good standing under the laws of the State of \_\_\_\_\_ (the "Company").

2. Attached hereto as Exhibit A is a true and correct copy of resolutions which were duly adopted by the members of the Company on \_\_\_\_\_, 20\_\_.

3. The attached resolutions have not been amended, rescinded or modified and are in full force and effect on the date hereof in the form originally adopted, and are in conformity with the Articles of Organization and Operating Agreement of the Company.

4. Attached hereto as Exhibit B is a true and correct copy of the Articles of Organization dated \_\_\_\_\_, 20\_\_ and the Operating Agreement dated \_\_\_\_\_, 20\_\_.

5. The attached Articles of Organization and Operating Agreement have not been amended rescinded or modified and are in full force and effect on the date hereof.

6. The following persons are the Authorized Officers of the Company in the capacities indicated, and the signatures set forth after their names and titles are their true and genuine signatures.

<u>Name</u>	<u>Office</u>	<u>Signature</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____

Witness, my signature and the seal of the Company this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Name:

Title:

**EXHIBIT A**

**TRANSACTION AUTHORIZATION OF**

\_\_\_\_\_, LLC

The undersigned, being the \_\_\_\_\_ of \_\_\_\_\_, LLC, a \_\_\_\_\_ limited liability company (the "Company"), hereby approves and adopts the following resolutions.

RESOLVED, that the Company is hereby authorized to enter into a [grant] [loan] in the amount of \_\_\_\_\_ (\$ \_\_\_\_\_) (the ["Grant"] ["Loan"]) from the Maryland Affordable Housing Trust ("MAHT") to the Company for the [acquisition] [development] [rehabilitation] of certain real property owned [leased] by the Company, [pursuant to that Ground Lease dated \_\_\_\_\_, 200 \_\_,] in \_\_\_\_\_, Maryland, and all improvements thereon (the "Property"), which [Grant] [Loan] shall be upon those terms and conditions as the Authorized Officers of the Company (as defined below) shall deem appropriate; and

FURTHER RESOLVED, that the \_\_\_\_\_ or \_\_\_\_\_ of the Company (the "Authorized Officers") be, and each of them is, hereby authorized to execute and deliver any and all documents required by MAHT to effectuate the [Grant] [Loan], including, without limitation, assignments, deeds, leases, notes, deeds of trust, building loan agreements, regulatory agreements, guaranties, grant agreements and any other documents pertaining to the [Grant] [Loan] (the "[Grant] [Loan] Documents"); and

FURTHER RESOLVED, that the Authorized Officers be and each hereby is authorized and directed to do all other things and acts, to execute and deliver all other instruments, documents and certificates, and to pay all costs, fees and expenses as may be, in his sole judgment, necessary, proper or advisable in order to carry out and comply with the purposes and intent of these resolutions, and that all acts and deeds of the officers that are consistent with the purposes and intent of these resolutions, be, and they each hereby are, in all respects, ratified, approved, confirmed and adopted as the acts and deeds of the Company.

FURTHER RESOLVED, that all acts of the officers and agents of the Company in connection with the negotiation, execution and delivery of the [Grant] [Loan] are hereby ratified and confirmed.

FURTHER RESOLVED, the members approve the inclusion in the [Grant] [Loan] Documents of a confession of judgment clause in favor of MAHT and the same be and is hereby approved, and the execution and delivery of the [Grant] [Loan] Documents by the Authorized Officers shall be conclusive evidence of such approval.

EFFECTIVE DATE: \_\_\_\_\_

APPROVED

\_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**CONTRACT AFFIDAVIT**

A. **AUTHORIZED REPRESENTATIVE:** I HEREBY AFFIRM THAT I am the \_\_\_\_\_ (title) and the duly authorized representative of \_\_\_\_\_ (name of recipient) and that I possess the legal authority to make this Affidavit on behalf of myself and the business for which I am acting.

B. **CERTIFICATION OF CORPORATION REGISTRATION AND TAX PAYMENT:**  
**I FURTHER AFFIRM THAT:**

(1) The business named above is a [corporation] [\_\_\_\_\_] formed in [\_\_\_\_\_] Maryland [(other state: \_\_\_\_\_)] and registered in accordance with the Corporations and Associations Article, Annotated Code of Maryland, and that it is in good standing and has filed all of its annual reports, together with filing fees, with the Maryland State Department of Assessments and Taxation, and that the name and address of its resident agent filed with the State Department of Assessments and Taxation is:

Name: \_\_\_\_\_  
(if not a corporation, state so)

Address: \_\_\_\_\_

(2) Except as validly contested, the business has paid, or has arranged for payment of, all taxes due all government entities including the State of Maryland and has filed all required returns and reports with the Comptroller of the Treasury, the State Department of Assessments and Taxation, and the Department of Labor, Licensing and Regulation (DLLR), and all other taxing authorities, as applicable, and will have paid all withholding taxes due to the State of Maryland prior to final settlement.

C. **AFFIRMATION REGARDING BRIBERY CONVICTIONS:** I FURTHER AFFIRM THAT neither I, nor to the best of my knowledge, information, and belief, the above business (as defined in §16-101(b) of the State Finance and Procurement Article of the Annotated Code of Maryland), or any of its officers, directors, members, or partners, or any of its employees directly involved in obtaining or performing contracts with the public bodies (as defined in §16-101(f) of the State Finance and Procurement Article of the Annotated Code of Maryland), has been convicted of, or has had probation before judgment imposed pursuant to Article 27, §641 of the Annotated Code of Maryland, or has pleaded nolo contendere to a charge of, bribery, attempted bribery, or conspiracy to bribe in violation of Maryland law, or of the law of any other state or federal law, except as follows [indicate the reasons why the affirmation cannot be given and list any conviction, plea, or imposition of probation before judgment with the date, court, official or administrative body, the sentence or disposition, the name(s) of the person(s) involved, and their current positions and responsibilities with the business]:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**D. AFFIRMATION REGARDING OTHER CONVICTIONS: I FURTHER AFFIRM THAT** neither I, nor to the best of my knowledge, information, and belief, the above business, or any of its officers, directors, members, or partners, or any of its employees directly involved in obtaining or performing contracts with public bodies, has:

- (a) been convicted under the state or federal statute of a criminal offense incident to obtaining, attempting to obtain, or performing a public or private contract, fraud, embezzlement, theft, forgery, falsification or destruction of records, or receiving stolen property;
- (b) been convicted of any criminal violation of a state or federal antitrust statute;
- (c) been convicted under the provisions of Title 18 of the United States Code for violation of the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§1961, et seq., or the Mail Fraud Act, 18 U.S.C. §§1341, et. seq., for acts arising out of the submission of bids or proposals for a public or private contract;
- (d) been convicted of a violation of the State Minority Business Enterprise Law, Section 14-308 of the State Finance and Procurement Article of the Annotated Code of Maryland;
- (e) been convicted of conspiracy to commit any act or omission that would constitute grounds for conviction or liability under any law or statute described in subsection (a), (b), (c), or (d) above;
- (f) been found civilly liable under a state or federal antitrust statute for acts or omissions in connection with the submission of bids or proposals for a public or private contract;
- (g) admitted in writing or under oath, during the course of an official investigation or other proceeding, acts or omissions that would constitute grounds for conviction or liability under any law or statute described above, **except as follows** [indicate reasons why the affirmations cannot be given, and list any conviction, plea, or imposition of probation before judgment with the date, court, official or administrative body, the sentence or disposition, the name(s) of the person(s) involved and their current positions and responsibilities with the business, and the status of any debarment]: \_\_\_\_\_

**E. AFFIRMATION REGARDING DEBARMENT: I FURTHER AFFIRM THAT** neither I, nor to the best of my knowledge, information, and belief, the above business, or any of its officers, directors, members, or partners or any of its employees directly involved in obtaining or performing contracts with public bodies, has ever been suspended or debarred (including being issued a limited denial of participation) by any public entity, **except as follows** [list each debarment or suspension providing the date of the suspension or debarment, the name of the public entity and the status of the proceedings, the name(s) of the person(s) involved and their current positions and responsibilities with the business, the grounds for the debarment or suspension, and the details of each person's involvement in any activity that formed the grounds for the debarment or suspension, and the details of each person's involvement in any activity that formed the grounds for the debarment or suspension]: \_\_\_\_\_



**F. AFFIRMATION REGARDING DEBARMENT OF RELATED ENTITIES:  
I FURTHER AFFIRM THAT:**

- (1) The business was not established to, nor does it operate and it does not operate in a \_\_\_\_\_ manner designed to, evade the application of or defeat the purpose of debarment pursuant to §§16-101, et seq., of the State Finance and Procurement Article of the Annotated Code of Maryland; and
- (2) The business is not a successor, assignee, subsidiary, or affiliate of a suspended or debarred business, except as follows [indicate the reasons(s) why the affirmations cannot be given without qualification]:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**SUB-CONTRACT AFFIRMATION:** I FURTHER AFFIRM THAT neither I, nor to the best of my knowledge, information, and belief, the above business, has knowingly entered into a contract with a public body under which a person debarred or suspended under Title 16 of the State Finance and Procurement Article of the Annotated Code of Maryland will provide, directly or indirectly, supplies, services, architectural services, construction related services, leases of real property, or construction.

- G. ACKNOWLEDGEMENT:** I ACKNOWLEDGE THAT this Affidavit is to be furnished to the Maryland Affordable Housing Trust and to the Department of Housing and Community Development and may be distributed to units and agents of (1) the State of Maryland; (2) counties or other subdivisions of the State of Maryland; (3) other states and their subdivisions; and (4) the federal government. I further acknowledge that this Affidavit is subject to applicable laws of the United States and the State of Maryland, both criminal and civil, and that nothing in this Affidavit or any agreement resulting from the submission of this grant application shall be construed to supersede, amend, modify, or waive, on behalf of the State of Maryland, or any unit or agent of the State of Maryland having jurisdiction, the exercise of any statutory right or remedy conferred by the Constitution and the laws of Maryland with respect to any misrepresentation made or any violation of the obligations, terms and covenants undertaken by the above business with respect to (1) this Affidavit, (2) the proposed contract, and (3) other Affidavits comprising part of the proposed contract.

**I DO SOLEMNLY DECLARE AND AFFIRM UNDER THE PENALTIES OF PERJURY THAT THE CONTENTS OF THIS AFFIDAVIT ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.**

WITNESS:

\_\_\_\_\_  
BY: \_\_\_\_\_  
(Authorized Representative and Affiant)

Date: \_\_\_\_\_, 20\_\_

Sponsor Name: \_\_\_\_\_ ("Project Sponsor")

MARYLAND AFFORDABLE HOUSING TRUST  
ASSURANCE OF COMPLIANCE  
WITH EEO, CIVIL RIGHTS, DRUG AND ALCOHOL FREE  
WORKPLACE, AND OTHER REQUIREMENTS

**THE PROJECT SPONSOR IDENTIFIED ABOVE HEREBY AGREES THAT IT WILL  
COMPLY WITH:**

A. Title VI of the Civil Rights Act of 1964 (the "Act"), as amended, to the end that, in accordance with Title VI of the Act, no person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Project Sponsor receives financial or technical assistance from the Maryland Affordable Housing Trust.

B. Title VII of the Civil Rights Act of 1964, as amended, to the end that, in accordance with Title VII of that Act, it shall be an unlawful employment practice for an employer:

1. to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin;

2. to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin.

C. Title VIII of the Civil Rights Act of 1968, as amended, to the end that, it is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

D. The Fair Housing Amendments Act of 1988, as amended (the "Fair Housing Amendments Act"), to the end that it shall be unlawful to discriminate against any person in the terms of the rental of a dwelling because of the familial status except with respect to "housing for older persons" (as defined in the Fair Housing Amendments Act).

E. Article 49B of the Annotated Code of Maryland, as amended, which establishes the Maryland Human Relations Commission and prohibits discrimination in employment and residential housing practices.

F. State of Maryland Executive Order 01.01.1989.18 relating to drug and alcohol free workplaces for non-State entities, promulgated November 28, 1989.

G. The Secretary of the Department of Housing and Community Development of the State of Maryland's (the "Secretary") Policy Statement on Equal Opportunity, to the end that, the Maryland

Affordable Housing Trust shall not knowingly approve grants of financial or technical assistance to recipients who are engaged in discriminatory employment practices.

H. The Secretary's Minority Business Enterprise Program which establishes a program to provide opportunities for minority contractors and vendors to participate in Department of Housing and Community Development Programs; and the minority business enterprise plan submitted by or on behalf of Project Sponsor as approved by the Department of Housing and Community Development's Equal Opportunity Officer, provided, however, that this Paragraph H shall not apply in the event that a statement is attached hereto from the Project Sponsor's equal opportunity officer stating that the general contractor is in compliance with local minority business participation programs or objectives.

I. The Department of Housing and Community Development's Relocation Policy where applicable.

J. All other related applicable Federal and State laws, regulations and rules.

**THE PROJECT SPONSOR HEREBY GIVES ASSURANCE THAT** it will immediately take any measures to effectuate this agreement.

**THIS ASSURANCE** is given on the date below, in consideration of and for the purpose of obtaining and shall continue for the period of any State financial or technical assistance extended after the date hereof to or on behalf of the Project Sponsor by the Maryland Affordable Housing Trust. The Project Sponsor recognizes and agrees that such State financial or technical assistance will be extended in reliance on the representations and agreements made in this assurance. This assurance is binding on the Project Sponsor, its successors, transferees, and assignees, and the person or persons whose signatures appear below are authorized to sign this assurance on behalf of the Project Sponsor.

**WITNESS/ATTEST:**

**PROJECT SPONSOR:**

\_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

[Name and Title should match Name/Title of a person authorized  
by the Corporate Resolutions and Incumbency Certificate]

Date: \_\_\_\_\_

***ACCESS TO PUBLIC RECORDS ACT NOTICE AND WAIVER***

Applicants should give specific attention to the identification of information furnished to the Maryland Affordable Housing Trust (MAHT) under this application which they deem confidential, commercial or financial information, proprietary information, or trade secrets and provide any justification of why this information should not be disclosed under the Maryland Access to Public Records Act, State Government Article, Part III, §§10-611 through 10-628 of the Annotated Code of Maryland. Applicants are advised that, upon request from a third party, MAHT is required to make an independent determination as to whether the information may or must be divulged to that party.

This information will be disclosed to appropriate staff of MAHT or to public officials for purposes directly connected with the administration of the programs for which its use is intended. Such information may be shared with State, Federal or local government agencies that have a financial role on the project.

MAHT intends to make available to the public certain information regarding projects recommended for funding by MAHT. Some of this information may not be disclosed under Maryland's Access to Public Records Act. By signing and delivering this application to MAHT, you hereby AGREE TO WAIVE ANY RIGHTS TO OBJECT TO OR PREVENT THE DISCLOSURE TO THE PUBLIC OF THE FOLLOWING INFORMATION: Grantee's/Borrower's name; name and location of the project; grant or loan amount and terms; amounts and source of other financing; public purpose of the grant or loan; county in which the project is located; a description of the project including the number of units and number of units set aside for the public purpose.

IN WITNESS WHEREOF, the applicant has caused this document to be duly executed in its name on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
(Full legal name of applicant)

Signature: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

## **Certificate of Incumbency FAQ**

Q. What is a Certificate of Incumbency?

A. A Certificate of Incumbency is a document used to confirm the identity of the signing officers of a corporation. Sometimes it also confirms the names of directors and shareholders as well as minute book contents. A Certificate of Incumbency is often used to prove that a particular individual is authorized to enact legally binding transactions on behalf of a company.

A Certificate of Incumbency has various other names; it is also known as an Incumbency Certificate, a Certificate of Officers, an Officer Certificate, a Register of Directors, and as a Secretary Certificate.

Q. What am I certifying and why?

A. You are certifying the identities of all the signing officers, directors, and/or shareholders of your organization. Other organizations will want to know which individuals have authority to enter into agreements on behalf your corporation and may require this list before doing business with your corporation.

Q. What is meant by Jurisdiction of Incorporation?

A. The law governing this document will be the the law of the jurisdiction in which the business is incorporated. It may or may not coincide with the jurisdiction in which the parties reside.

Q. Who is the Secretary?

A. The Secretary is the Officer in charge of keeping company records.

Q. Who are the Officers of a corporation?

A. The Officers of a corporation consist of members of upper level management that are appointed to their positions by the Board of Directors. The Officers of a corporation include the president, CEO, secretary, treasurer, and other individuals in similar positions. Officers are responsible for managing the daily operations of a business.

Q. What is the Minute Book?

A. The Minute Book is a written document containing a history of all key corporate records and documents. The documents in a Minute Book include, among others, corporate articles, bylaws, directors' resolutions, shareholders' resolutions and annual reports. Also included in the Minute Book are minutes of shareholders' meetings and minutes of directors' meetings, which describe actions taken and resolutions passed during any regular or special meeting of shareholders or directors.

Q. I do not know when the Certificate of Incumbency will be signed. Can I fill in the date later?

A. Yes - by selecting 'Unsure' as the date the agreement will be signed, a blank line will be inserted into the lease so that you can add the correct date after printing the document.

Q. Do I need witnesses to sign the Certificate of Incumbency?

A. No, it is not necessary for witnesses to sign the Certificate of Incumbency. Only the Secretary must sign the document to make it legally valid.

## **The Problem with Fake and Fraudulent Mortgage Documents**

The integrity of the civil litigation process depends on the truthful disclosure of facts. A system that depends on an adversary's ability to uncover falsehoods is doomed to failure, which is why this kind of conduct [fraudulent concealment of facts] must be discouraged in the strongest possible way. See also *Channel Components, Inc. v. America II Electronics, Inc.*, 915 So.2d 1278 (Fla. 2d DCA 2005).

Trial courts have "the right and obligation to deter fraudulent claims from proceeding in court." *Savino v. Fla. Drive In Theatre Mgmt., Inc.*, 697 So.2d 1011, 1012 (Fla. 4th DCA 1997). This is because "[o]ur courts have often recognized and enforced the principle that a party who has been guilty of fraud or misconduct in the prosecution or defense of a civil proceeding should not be permitted to continue to employ the very institution it has subverted to achieve [its] ends." *Hanono v. Murphy*, 723 So.2d 892, 895 (Fla. 3d DCA 1998). Where a party perpetrates a fraud on the court which permeates the entire proceedings, dismissal of the entire case is proper. *Desimone v. Old Dominion Ins. Co.*, 740 So.2d 1233, 1234 (Fla. 4th DCA 1999).

Here, Plaintiff and Plaintiff's counsel misled the Court about the real party in interest in the case; and 2) engaged in extensive discovery abuse to obstruct revelation of the known falsities in the complaint – a "flagrant abuse of the judicial process" worthy of severe sanctions. See *Martin v. Automobili Lamborghini Exclusive, Inc.*, 307 F.3d 1332 (11th Cir. 2002). Dismissal for fraud is appropriate where "a party has sentiently set in motion some unconscionable scheme

calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." *Cox v. Burke*, 706 So.2d 43, 46 (Fla. 5th DCA 1998).

The Court is also empowered to sanction counsel for its role in the litigation misconduct. The Court is entitled to expect Plaintiff counsel's compliance with Section 57.105 Florida Statutes which prohibits parties and their attorneys from presenting claims that are not supported by the material facts. The Court may also expect counsel's compliance with Rule 2.515(a) of the Rules of Judicial Administration, which provides that "[t]he signature of an attorney shall constitute a certificate by the attorney that the attorney has read the pleading or other paper [and] that to the best of the attorney's knowledge, information and belief there is good ground to support it..." *Id.* Additionally, the Court may expect that officers of the court comport themselves with the Rules Regulating the Florida Bar which prohibit a lawyer from asserting an issue without a factual basis. Rule 4-3.1 Meritorious Claims and Contentions. (Comment: "What is required of lawyers...is that they inform themselves about the facts of their clients' cases...").

In addition, the above-chronicled misconduct constitutes "unclean hands" on the part of the owner of the subject note and mortgage. "A foreclosure action is an equitable proceeding which may be denied if the holder of the note comes to the court with unclean hands or the foreclosure would be unconscionable." *Knight Energy Services, Inc. v. Amoco Oil Co.*, 660 So.2d 786, 789 (Fla. 4th DCA 1995)."



# The Story of One Law Firm (Among Hundreds) that Built Its Own Evidence for Foreclosure

The Marshall C. Watson Law Firm

Cynthia Kounil

April 25, 2010

Last March, Patricia Arango signed an assignment of mortgage over to Country Wide Home Servicing, LP as "Assistant Secretary" of Mortgage Electronic Registration Systems, Incorporated (MERS) as nominee for Countrywide Bank, FSB. "Assistant Secretary" is meant in the sense of the Secretary of the corporation, a corporate officer, not in the sense of someone who does they typing, phones and filing.

## ASSIGNMENT OF MORTGAGE

### KNOW ALL MEN BY THESE PRESENTS:

THAT MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INCORPORATED AS NOMINEE FOR COUNTRYWIDE BANK, FSB, residing or located at 1595 Springhill Road, # 310 Vienna, VA 22182 herein designated as the assignor, for and in consideration of the sum of \$1.00 Dollar and other good and valuable consideration, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell, assign, transfer and set over unto COUNTRYWIDE HOME LOANS SERVICING, LP residing or located at 7105 CORPORATE DRIVE, PLANO, TX 75024 herein designated as the assignee, the mortgage executed by ROBIN GONZALEZ AND MAGDA MIRANDA GONZALEZ A/K/A MAGDA MIRANDA A/K/A MAGDA GONZALEZ recorded December 18, 2007 in Broward County, Florida at BOOK 44918 and PAGE 879 encumbering the property more particularly described as follows:


1)

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

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 20 day of MARCH, 2009.

MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INCORPORATED AS NOMINEE FOR  
COUNTRYWIDE BANK, FSB

ATTEST:   
PRINT NAME: Patricia Arango, Assistant Secretary

You can see the entire document [here \[PDF\]](#).

Last October, Caryn Graham signed an assignment of mortgage over to The Bank of New York Mellon FKA Bank of New York, as Trustee for the certificate holders CWMBS Series 2006-HYB5, as "Assistant Secretary" of Mortgage Electronic Registration Systems Incorporated (MERS) as nominee for HomeAmercian Mortgage Corporation.

ASSIGNMENT OF MORTGAGE

KNOW ALL MEN BY THESE PRESENTS:

THAT MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INCORPORATED AS A NOMINEE FOR HOMEAMERICAN MORTGAGE CORPORATION, residing or located at 1595 Springhill Road, # 310 Vienna, VA 22182 herein designated as the assignor, for and in consideration of the sum of \$1 00 Dollar and other good and valuable consideration, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell, assign, transfer and set over unto THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE HOLDERS CWMBS SERIES 2006-HYB5 residing or located at C/O BAC HOME LOANS SERVICING, LP F/K/A COUNTRYWIDE HOME LOANS, INC. 7105, Corporate Drive Plano, TX 75024 herein designated as the assignee, the mortgage executed by JODI LINN recorded July 18, 2006 in Nassau County, Florida at BOOK 01428 and PAGE 1686 encumbering the property more particularly described as follows:

It

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.

In Witness Whereof, the said Assignor has hereunto set his hand and seal or caused these presents to be signed by its assistant secretary and its corporate seal to be hereto affixed this 01 day of OCT-12 2009.

MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS INCORPORATED AS A NOMINEE FOR  
HOMEAMERICAN MORTGAGE CORPORATION

Caryn A. Graham, Assistant Secretary

You can see the entire document [here \[PDF\]](#).

However, neither Ms. Graham nor Ms. Arango are employees of MERS. They are lawyers at the law firm which filed these assignments. You can see their names on the [law firm's website](#). And you can see the name of the firm, Law Office of Marshall C. Watson in the top left hand corner of the documents at the links. You can't miss it there is an arrow pointing to the name and address of the firm with instructions to "record and return to" the law office.

A query to the MERS confirmed that neither Ms. Graham nor Ms. Arango are employees of MERS. According to MERS spokesperson Karmela Lejarde:

Caryn A. Graham and Patricia Arango are duly authorized officers of Mortgage Electronic Registration Systems, Inc. This authorization is obtained through a Corporate Resolution that is granted by our Corporate Secretary and approved by the MERS Board of Directors. **These individuals are not employees of MERS.** [emphasis added]



POLICY BULLETIN – Number 2010-1

To: All MERS Members

February 17, 2010

Starting April 19, 2010, all new Mortgage Electronic Registration Systems, Inc. (MERS) Certifying Officers will be required to complete a certification process before being authorized to execute documents as a MERS Certifying Officer.

For complete image click [here \[PDF\]](#).

So MERS has created a system, where people who are not employed by MERS and do not work at MERS are nonetheless designated as "officers" of MERS and are signing documents which are presented in court in the course of foreclosures and judges are innocently relying on these documents, falsely believing them to represent arms length transactions entered into by people with actual knowledge of the status to the mortgage file.

Don't for a minute think these are the only two such documents or that [this is the only law firm](#) involved.

MERS must realize that this does not look very good because they have suddenly decided that hereafter certifying officers (those non-employee signers) must take a training program before being authorized to sign.

In his law firm's blog [Mather Weidener](#) suspects that the "training" will consist of "making sure they don't tell the truth in a deposition like Cheryl Sammons did (No I don't read the documents before I sign them)." Read her whole transcript [here \[PDF\]](#); your eyeballs will fall out of your head.



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## Foreclosure

Law firm probed over 'false' documents filed in court cases

May 10, 2010

By: Paola Iuspa-Abbott

**T**he Florida attorney general is investigating one of the nation's largest foreclosure law firms over allegations it falsified legal documents to expedite foreclosure cases filed by its lender clients.

Tampa-based Florida Default Law Group "appears to be fabricating and/or presenting false and misleading documents in foreclosure cases," according to the attorney general's Economic Crimes Division in Fort Lauderdale, which is leading the investigation.

[Read the judgment](#)

[Read the court order](#)

The office of Attorney General Bill McCollum is reviewing consumer complaints, taking depositions and researching the company's business practices to determine whether Florida Default has violated any state laws.

The investigation is based on allegations that Florida Default lawyers submitted misleading documents to judges hearing foreclosure cases. The documents included assignments of mortgage that "have later been shown to be legally inadequate and/or insufficient," according an April 28 statement by the attorney general's office when the investigation was opened.

The attorney general's office has received dozens of complaints from homeowners about questionable court documents filed by Florida Default's lawyers, according to a source familiar with the probe.



Defense Lawyer Thomas Ice

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A call and e-mail to Florida Default president Michael Echevarria were not returned.

In announcing the Florida Default investigation, the attorney general's office pointed out that it is also investigating a Jacksonville-based provider of mortgage processing services for lenders that "appears" to be doing business with Florida Default. The investigation, opened on the same day, also centers on questionable court documents in foreclosure cases.

The attorney general is also investigating the relationship between Florida Default and an AG staffer who also worked for the foreclosure firm.

Firms like Florida Default, which handles thousands of cases on behalf of lenders, are known in the industry as "foreclosure mills." Their job is to do all the legal work lenders need to foreclose on homes.

Foreclosures usually aren't contested, so companies like Florida Default are rarely challenged over the validity of their affidavits and court filings. But homeowners are increasingly hiring foreclosure defense lawyers to scrutinize a lender's right to take their home.

Most lawyers request copies of notes and mortgages to verify that the lender actually owns the mortgage on a distressed property. These documents can be hard to find because loans are often bought and sold many times. As a result, lenders often don't have those documents available when they file a lawsuit.

Months into the litigation, they produce documents, like assignments of mortgage, that were recorded long after the suit was filed. Often, they produce affidavits that wrongly name the lender as the loan owner, according to defense lawyers.

Foreclosure defense lawyer Thomas Ice said the investigation into Florida Default is overdue. "It was a long time coming for a governmental agency to get involved in investigating what foreclosure defense lawyers are showing the courts every day," he said, adding that he often sees misleading affidavits and other court documents allegedly filed by foreclosure lawyers representing lenders.

### WON DISMISSAL

Last year, Ice won dismissal of a foreclosure case after he showed that Florida Default had filed an affidavit that incorrectly named IndyMac Federal Bank, now OneWest Bank, as the owner of a West Palm Beach couple's mortgage.

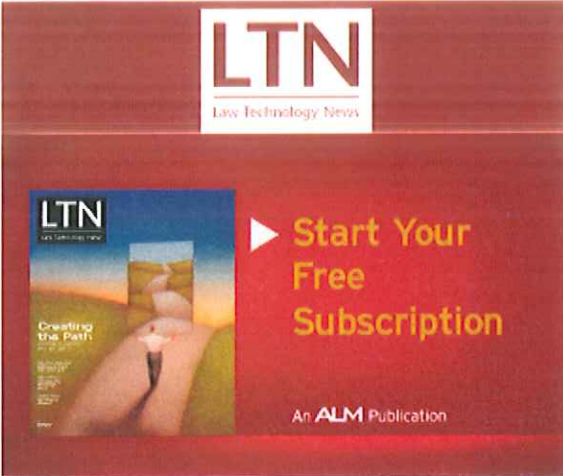
And Florida Default has paid for improper filings. In October 2008, U.S. Bankruptcy Judge John Olson fined Florida Default \$95,130 for "repeated misrepresentations" to the court.

The firm had submitted documents claiming that Fort Lauderdale homeowner Fazlul Haque owed his lender, Wells Fargo, \$2,114 in prepayment penalties even though the mortgage, while in arrears, was still on its books.

Olson realized the fee was illegal since Haque had yet to pay off the delinquent loan.

"The notion that the debtor paid off his loan in full to the creditor is absurd," Olson wrote. "It is utterly perplexing to me how the creditor or its law firm could or did assert such claim."

In a recent interview with the Daily Business Review, Olson attributed the misrepresentations to "sloppiness" by the foreclosure firm rather than fraud.



In 2004, the Florida Bar reprimanded Florida Default president Echevarria for not properly supervising lawyers at his prior firm, Echevarria & Associates, according to the Florida Bar. Among the issues in the case, a lawyer at his firm notarized foreclosure-related documents without reviewing the foreclosure files despite signing affidavits affirming he had done so.

Until recently, an assistant attorney general with the Economic Crimes Division in Tampa worked part-time for Florida Default notarizing affidavits for the firm. Her work for Florida Default became an issue in a pending foreclosure lawsuit filed in Volusia County.

"That is a potential conflict," said Ice, whose West Palm Beach law firm Ice Legal is involved in the Volusia suit. "They should address that issue first before they continue with the investigation."

Ice questions the veracity of the documents notarized by the AG employee on behalf of Florida Default and asked for the court's permission to depose her.

Erin Cullaro, who joined the attorney general's office in March 2008, received permission from her supervisors to moonlight three nights a week for 15 minutes each night notarizing documents. The request didn't disclose the name of the firm she would work for.

Several foreclosure suits filed across Florida contain Florida Default affidavits signed by Cullaro, including the lawsuit filed in Volusia.

Ice says he has nine affidavits from different foreclosure cases purportedly signed by Cullaro in 2009. Ice contends each signature is different.

"There is a possibility that [Cullaro] is not signing all of the thousands of Florida Default affidavits that she has filed around the state," Dustin Zacks, an Ice Legal attorney, said in a March deposition on the pending Volusia foreclosure case. "Even the 20 or so that we have, have noticeably different signatures."

The attorney general's office is aware of Cullaro's side job, said spokeswoman Ryan Wiggins. "Any suggestion that one of our attorneys might have been involved in improper activities while engaged as a notary outside her scope of employment with this office is troubling," she said. "The attorney general has asked his inspector general to thoroughly investigate this matter."

Wiggins declined to discuss details of the investigation into Cullaro and Florida Default.

Cullaro did not return several phone calls seeking comment.

It is unclear why the AG's office linked its investigation into Florida Default with another investigation of Docx, the Jacksonville mortgage processing service company.

Docx parent company Lender Processing Services said in a filing with the Securities and Exchange Commission that its subsidiary made an "error in the notarization of certain documents, some of which were used in foreclosure proceedings across the country."

Docx "seems to be creating and manufacturing 'bogus assignments' of mortgage in order that foreclosures may go through more quickly and efficiently," according to the attorney general's office. "These documents are used in court cases as 'real' documents . . . when it actually appears that they are fabricated in order to meet the demands of the institution that does not, in fact, have the necessary document to foreclose."

The attorney general's office said it appears that Florida Default was a "client" of Docx, which is also under investigation by the U.S. attorney for the Middle District of Florida.

LPS spokeswoman Michelle Kersch said that Florida Default is a "vendor" of her company, but she declined to comment further about the two company's relationship.

Kersch said her company was cooperating in the investigations and had already dealt with its subsidiary's problem.



"The services performed by this small subsidiary were offered to a limited number of customers," she said. "LPS immediately corrected the business process and has completed the remedial actions necessary to minimize the impact of the error."

Paola Iuspa-Abbott can be reached at (305) 347-6657.

***Defense Lawyer Thomas Ice photo by Melanie Bell***

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IN THE SUPREME COURT OF FLORIDA  
(Before a Referee)

THE FLORIDA BAR,

Case No. SC03-904

TFB No. 2000-11,585(13D)

Complainant,

v.

MICHAEL JOHN ECHEVARRIA,

Respondent.

CONDITIONAL GUILTY PLEA FOR  
CONSENT JUDGMENT

COMES NOW Michael John Echevarria, pursuant to Rule 3-7.9, Rules Regulating The Florida Bar, and states his present intention to tender a conditional plea to the below-listed violations as charged in the Complaint filed by The Florida Bar, in this cause, provided and conditioned upon the below-stated discipline being finally approved by the Supreme Court of Florida. The following is the stipulated factual basis:

1. Respondent is, and at all times mentioned herein was, a member of The Florida Bar, subject to the jurisdiction of the Supreme Court of Florida.
2. Respondent is aware that Rule 3-7.6(o), Rules Regulating The Florida Bar, provides for the taxing of costs incurred by The Florida Bar in a disciplinary proceeding. Respondent agrees that he will not attempt to discharge the obligation



for the payment of the Bar's costs in any future proceedings, including but not limited to, by filing a Petition for Bankruptcy.

3. Respondent is not certified in any area of practice.

4. For purposes of this action, Respondent does not contest the following statements, which are the facts for purposes of this consent judgment:

During the period from 1997 through October 1, 1999, the Respondent was the sole shareholder in Michael J. Echevarria, P.A. Michael J. Echevarria, P.A. was the general and managing partner of the general partnership of Echevarria, McCalla, Raymer, Barrett & Frappier. In October 1999, the partnership dissolved and the succeeding entity was Echevarria & Associates, P.A., f/k/a Michael J. Echevarria, P.A. During the time of 1997 through the finding of probable cause on January 8, 2002, Michael J. Echevarria was the managing attorney of both entities. (Both entities are hereinafter referred to as "Echevarria" without distinguishing between the two). Respondent established or ratified the policies and procedures followed by Echevarria staff working on Florida foreclosure cases, including those applicable to service of process, use of locator services, affidavits of cost, and affidavits related to attorney's fees.

Echevarria's primary business during the period from 1997 through 2000 was collecting debts on behalf of residential mortgage lenders through foreclosure actions which were filed throughout the State of Florida. Echevarria had and

continues to have a very large staff, including more than a dozen attorneys and a large non-lawyer support staff who work on the foreclosure cases. Respondent did not work on individual case files during the relevant time period, and staff attorneys signed all pleadings and correspondence which were sent from Echevarria to the parties in the foreclosure actions.

During the period from 1997 through 2000, many of Echevarria's residential mortgage lender clients were seeking to collect arrearages in, and/or foreclose on, government guaranteed loans, including HUD, VA, and FHA loans.

At all times relevant to this Complaint, Respondent was a 50 percent shareholder and served as President of Lightning Serve, Inc. Echevarria on its own initiative, at the direction of Respondent, disclosed to foreclosure clients that Respondent had a financial interest in Lightning Serve, Inc. While it is possible that not all clients were notified, Respondent can say with certainty that the practice in the firm was to disclose when asked.

Respondent had no direct day to day supervisory responsibilities at Lightning Serve, Inc. Echevarria almost exclusively used Lightning Serve, Inc. to arrange for service of process on defendants named in the foreclosure actions that Echevarria filed on behalf of its clients. Lightning Serve, Inc. arranged for service of process by private process servers who contracted with Lightning Serve, Inc., and in those few counties which required service by the sheriff's department, it

arranged for that service. The usual fee of Lightning Serve, Inc. for its role in service of process was \$35.00 for each requested service.

Based on Echevarria guidelines, requests for service of process sent to Lightning Serve, Inc. and forwarded to process servers would typically instruct the local Sheriffs, or private process servers, to attempt to serve process on the debtor, the unknown spouse of the debtor, other parties in interest, and two (2) or more unknown tenants. In some cases, service of process was requested on four unnamed tenants, and summonses for those unnamed tenants were sent to Lightning Serve, Inc. Respondent's guideline was to bill for attempted service on only two unnamed tenants when no unnamed tenants were found at a single family residence being foreclosed. While there may have been instances where Lightning Serve, Inc. charged for service of all four unnamed tenants, that was not done at the direction of Respondent, nor was he aware that it may have occasionally occurred. Testimony taken in this matter has suggested that the charge of \$35.00 per service of process is a common charge in foreclosure cases, and that charging for attempted service on two unnamed tenants is also a common practice in the foreclosure industry. While Echevarria did not routinely disclose to the Court the cost Lightning Serve, Inc. paid to the sheriff or private process servers, as distinguished from Lightning Serve, Inc.'s charges to Echevarria for service of process, no instances were found where other firms have been routinely making

that disclosure. No agency contacted by the Bar, such as HUD, Fannie Mae, or the VA, indicated they have a policy prohibiting an attorney utilizing an agency owned in whole or in part by him to facilitate service of process, and charging a fee for the intermediary service that exceeds the amount paid by that agency to a process server. Agencies such as Fannie Mae, HUD, and the Veteran's Administration have indicated that they have no policy or guidelines at the present time which prohibit costs by an intermediary which coordinates service of process.

In foreclosure cases, Echevarria utilized a locator service called Accu-Search to "locate" certain individuals or entities who were named as defendants in the foreclosure complaints. Respondent indicates that while Accu-Search may have been a "sister company" to Lightning Serve, Inc., Respondent does not have, and did not have, a financial interest in Accu-Search.

As part of the foreclosure proceeding, Echevarria was responsible for foreclosing the interest of anyone whose involvement with the real property in question might result in a cloud on the title to the real property. Echevarria would often purchase some title work from a third party, such as Attorneys Title Insurance Fund, Inc., (hereinafter referred to as "the Fund"). In some instances, the charge by the Fund might be as low as \$175.00 per file, comprised of \$50.00 for the actual title search and \$125.00 for a "guaranteed review" of the title search. Although the Fund might guarantee that those whose interests must be foreclosed

had been identified, and agreed at times to pay damages for any incorrect work product, there remained the possibility of financial loss to the firm for any improper work. The "guarantee" did not cover all losses, and would not have provided for compensation to Echevarria if there were damage to Echevarria's reputation had it relied on improper work performed by The Fund. After Echevarria received the title work from the Fund, non-lawyer personnel on the Echevarria staff (title examiners) reviewed the Fund's work. Echevarria routinely charged the clients of Echevarria a total of \$325.00 for a title search and a title examination, breaking down the charges on cost statements provided to the courts as \$175.00 for title search and \$150.00 for title examination. Echevarria did not separately report the charges for Title work paid to third parties and that charged for title work done in-house by Echevarria staff. Other foreclosure firms reviewed also do not separately indicate the amount of charges for Title work which was paid to a third party. Agencies such as HUD, VA, and Fannie Mae provide general guidelines for the amount which can be charged for Title work in foreclosure cases, and have indicated to the Bar that they have no policy regarding costs for work done internally by a firm foreclosing loans. The amount charged by Echevarria fell within the guidelines. Doing in-house title work, and charging a standard fee for title work which may exceed payments to third parties, is a common practice in the foreclosure industry.

In support of Echevarria's claims for attorneys fees in foreclosure cases, during the period of 1997 through 2000, Echevarria attorneys handling foreclosure cases routinely submitted Affidavits Of Plaintiff's Counsel to the court. In some of the Affidavits Of Plaintiff's Counsel, Echevarria associates stated that whenever possible, the attorney utilized the services of paralegals and document clerks to complete the action; that based upon their knowledge and experience, the services that had been rendered included six (6) hours and that it was believed that it would take an additional two (2) hours to complete the action; and that the attorney's billing rate was \$125.00 per hour, and a reasonable fee was \$1,000.00. The Affidavits of Plaintiff's Counsel indicated that Echevarria and the lender had an agreement for a fixed attorney's fee of \$1,000. Respondent acknowledges that the time Echevarria attorneys spend on a file varies from case to case, that at times it is less than eight hours, and at other times is much more. Respondent has amended the statement of costs in uncontested foreclosure cases to prevent misinterpretation by the courts. The statement clearly indicates to the court that Echevarria does not keep track of the hours spent by various personnel at his firm on a file. Echevarria forms now more clearly state that his requested fees are based on a flat fee agreement with the lender.

In support of the request for attorneys fees, Echevarria associate attorneys submitted Affidavits As To Reasonable Attorneys Fees to the court. Since at least

1998 and through 2000, the Affidavits As To Reasonable Attorneys Fees in most, if not all, foreclosure cases submitted to the courts by Echevarria, were signed by Attorney Anthony G. Woodward. The affidavits routinely stated that Attorney Woodward had reviewed the foreclosure file in question, including pleadings, correspondence, and other matters in the action and that it was the opinion of Anthony Woodward that the reasonable number of hours for the services rendered was eight hours, which would include an additional two hours to complete the action. The Affidavits As To Reasonable Attorneys Fees typically further stated that \$1,000.00 would be a reasonable attorney fee for the Plaintiff's attorneys for their services. In hundreds of Echevarria foreclosure cases during the period from approximately 1998 through 2000, Affidavits As To Reasonable Attorneys Fees were sent by courier from Echevarria to Attorney Woodward for his signature without the case file being sent along. Except for Woodward's signature and the notarization, the Affidavits would be completed by staff at Echevarria for each uncontested case. The affidavits were signed by Woodward and notarized, and then a courier arranged by Echevarria would pick up the signed and notarized affidavits. Attorney Woodward was paid approximately two dollars for each Affidavit As To Reasonable Attorneys Fees he signed and had notarized.

Respondent indicates that while he knew that Woodward was completing hundreds of affidavits, he was never informed during the relevant time period that

the files were not being sent to Woodward for review, and that he believed that Woodward was reviewing the files and providing affidavits for \$2.00 per case. After learning that Woodward was not reviewing all files, Echevarria initiated firm action to conform the affidavits to the procedures being used.

During the period from 1997 through 2000, many of the residential borrowers, when notified of the foreclosure proceedings by Echevarria or the lender, were also advised that they could seek to reinstate the defaulted mortgage loans. Upon request by the borrowers, Echevarria staff provided to residential borrowers a specific payment amount needed to reinstate their loans. In many instances, the amount represented to the residential borrowers was an estimate of the amount needed to reinstate, and took into account an anticipated delay in concluding the reinstatement and various additional interest amounts, payments on principal, and costs for the foreclosure action that might be incurred prior to actual reinstatement. Residential borrowers were at times, but not always, advised that the "amount to reinstate" was an estimate. Regardless of whether borrowers were advised the reinstatement amount was an estimate, any overpayments were refunded at the time of reinstatement.

**DISCIPLINARY RULES:** Respondent does not contest that he has violated the following Rules Regulating The Florida Bar: Rule 4-5.1(a) (a member of the Bar who is a partner, proprietor, shareholder, member of a limited liability



company, officer, director, or manager in an authorized business entity, shall make reasonable efforts to ensure that the authorized business entity has in effect measures giving reasonable assurance that all lawyers therein conform to the Rules of Professional Conduct); Rule 4-5.1(b) (any lawyer in an authorized business entity having supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct).

5. In future foreclosure actions handled by Respondent or a law firm in which he has an interest (his firm), Respondent agrees that the following will be disclosed to the individuals or entities for whom his firm is handling foreclosures, to those against whom his firm brings foreclosure actions, and also to the court when statements of costs and affidavits of attorneys fees are filed with the court:

a) If Respondent has a financial interest, directly or indirectly, in any corporation or legal entity other than Respondent's firm, which performs services and/or incurs costs which are then billed in a foreclosure action as costs or services to the client, or to the subject of the foreclosure, the firm will disclose that there is the ownership or other financial interest.

b) When Respondent's firm handles foreclosure actions, if Respondent has a financial interest, directly or indirectly, in any

corporation or legal entity other than Respondent's firm, paid for Title search, Title survey, Title examination, or other Title work, the firm will disclose that the title search/exam cost includes amounts paid to third parties for data and information reviewed for Title purposes, but need not sua sponte disclose the exact amount.

c) In cases where service of process services are performed by any corporation or other legal entity, other than Respondent's firm, in which Respondent has a financial interest, directly or indirectly, Respondent's firm will clearly indicate the number of successful service of process, the number of attempted service of process for which there is a charge, and upon whom each service was made and/or attempted. It will clearly indicate the number of unnamed tenants successfully served, and the number of unnamed tenants for whom service of process was unsuccessful but for whom there was a charge.

d) When Respondent's firm submits affidavits to the Court in support of Attorney's fees, Respondent will ensure that the affidavit indicates clearly whether the attorney submitting the affidavit has actually reviewed the foreclosure file.

e) Respondent will ensure that affidavits submitted by his firm to the

Court in support of attorneys fees clearly indicate whether the firm has kept track of attorney's hours spent on the file for which attorney's fees are being sought.

f) When providing borrowers with the amount required to reinstate, Respondent's firm will itemize the individual components which comprise the total, and will clearly indicate which of the charges have already been incurred and which of the charges are estimates.

6. The parties understand that Respondent's responsibility is to ensure that the appropriate policies and procedures are instituted (continued) in order to ensure his staff comply with the conditions above. Isolated and unintentional instances of not strictly complying with those conditions should not be the basis for further Bar action against Respondent or his staff.

The parties stipulate that Respondent has instituted the measures indicated in paragraphs 5 a) through 5 f) above, in order to further clarify to the court the basis for charges to the debtor in foreclosure cases. These measures were instituted by Respondent during the course of these proceedings.

**MITIGATING CIRCUMSTANCES:**

Standard 9.32(a) absence of a prior disciplinary record

(g) character or reputation

(e) full and free disclosure to the disciplinary board or

cooperative attitude toward proceedings.

Also noted is Respondent's having taken steps to institute procedures and forms to address the Bar's concerns.

DISCIPLINE: Public Reprimand, to be administered by publication of the Order of the Florida Supreme Court accepting this Conditional Guilty Plea for Consent Judgment.

COSTS: \$2,581.73 (Affidavit of costs attached).

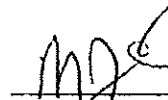
Administrative costs pursuant to Rule 3-7.6(o)(1)(I) .....	\$ 750.00
---	-----------

Bar Expenses as set forth in Exhibit A attached hereto and made a part hereof .....	1,831.73
--	----------

	<u>\$2,581.73</u>
--	-------------------

The Respondent acknowledges that there may be additional costs incurred if further proceedings are held. Respondent would be responsible for any future costs.

Dated: 1/15/04

  
Michael John Echevarria  
Respondent  
9119 Corporate Lake Dr, #300

Tampa, Florida 33634-2357  
(813) 342-2200  
Florida Bar No. 362344

Dated: Jan. 16, 2004

Donald A Smith, Jr.  
Donald A Smith, Jr., Attorney for  
Respondent  
109 N. Brush Street, Ste 150  
Tampa, Florida 33602-4159  
(813) 273-0063  
Florida Bar No. 265101

Dated: January 20, 2004

Thomas Edward DeBerg  
Thomas Edward DeBerg  
Assistant Staff Counsel  
5521 W. Spruce St.  
Suite C-49  
Tampa, Florida 33607-1442  
(813) 875-9821  
Florida Bar No. 521515

Telephonically Approved By: Timon V. Sullivan, Designated Reviewer  
John Anthony Boggs, Staff Counsel

## **The Baton Rule and Securitization**

The maze and obstacle course promulgated by mortgages and promissory notes that were sent on a mortgage backed security journey reveals a complex system of originators, aggregators, sponsors, depositors, trustees, custodians, master servicers, primary servicers, default servicers, brokers, agents, sub-agents, affiliates, underwriters, successors, beneficiaries, insurers, independent accountants, and the elusive principal creditor.

In a relay track meet, the baton is handed off from the leadoff runner to each subsequent runner, ending with the runner who finishes the race. Each team runner is fully dependent on the performance of each of the previous runners. A drop of the baton or pass outside of the lane results in an immediate disqualification. Each runner is accountable for his or her "assigned" leg of the race when they were the "holder" of the baton. If one runner fails, the entire team loses.

Keeping to this analogy, plaintiffs in foreclosure actions or movants seeking relief from stay in bankruptcy cases must be able to show the proper handoff and receipt (possession, assignment, transfer, negotiation, and ownership) of a borrower's original promissory note and mortgage (or deed of trust) in order to perfect their lien interests and claims.

Plaintiffs bear the burden of proof regarding the possession and the proper transfer, assignment, and endorsement of a note from A to B to C and any subsequent parties in the deal and holders in due course.

Moreover, plaintiffs must prove that the mortgage that secures such indebtedness (note), was not intentionally separated and bifurcated from the note itself in which case, the borrower could still owe the actual Lender the performance of their obligation, but such obligation could be deemed unsecured. In essence, a missed baton pass (missing assignment or lost note) or failed exchange outside the lane (improper indorsement or assignment

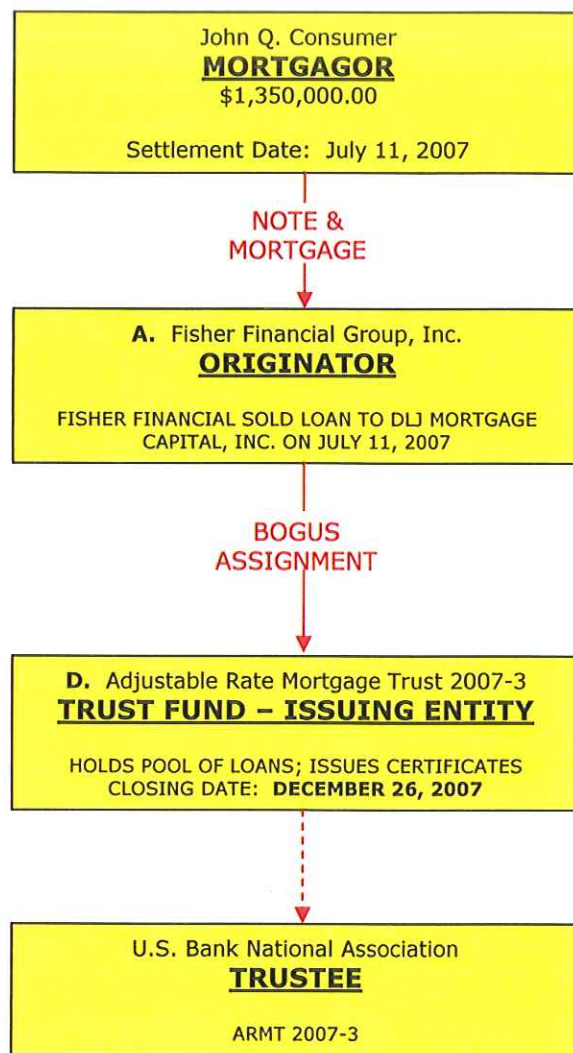
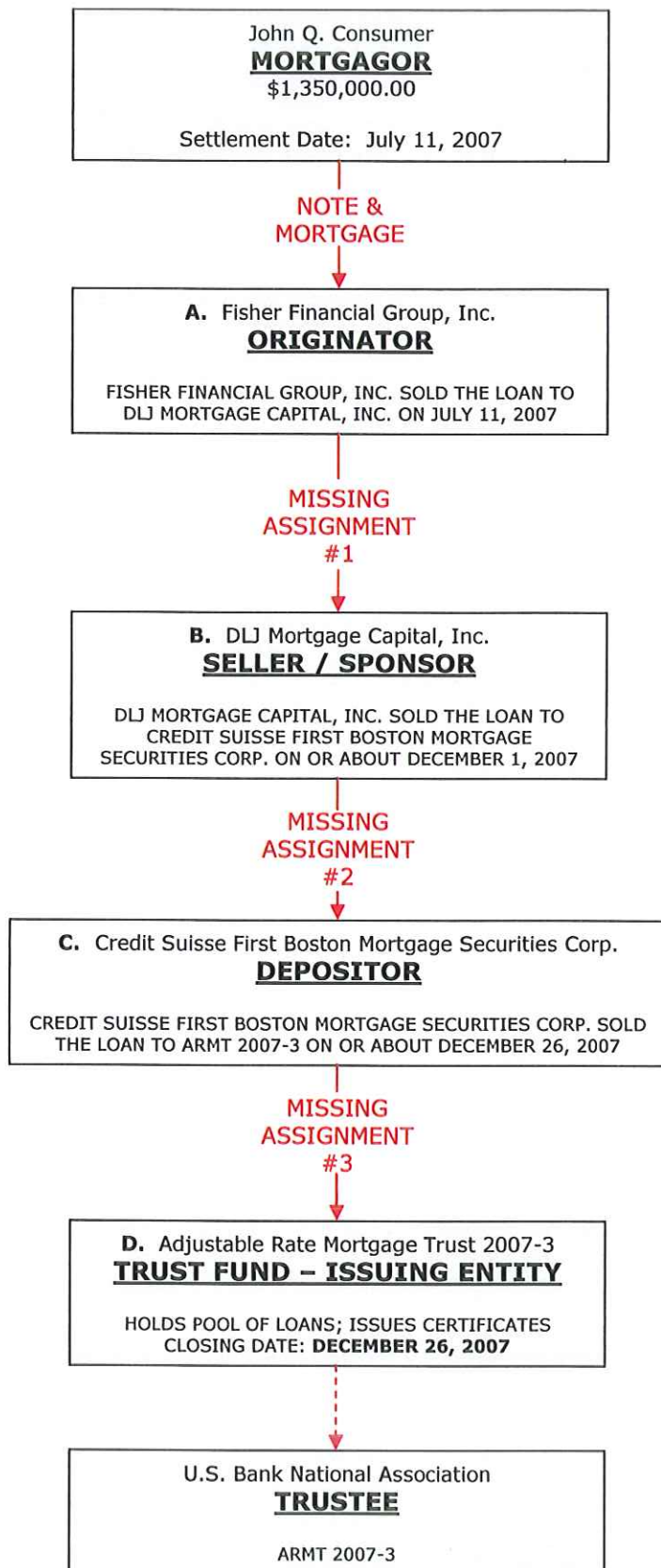
2 years after the fact) of the baton (i.e. note) results in a disqualification. All transfers must occur during the race and there is only one race and one chance to win. This is not the land of second chances. One missing link in the chain and the race is lost.

# BOGUS AND MISSING ASSIGNMENTS

Borrower: John Q. Consumer  
Lender: Fisher Financial Group, Inc. d/b/a NationsChoice Mortgage  
Assignee: Adjustable Rate Mortgage Trust 2007-3

## TRANSFERS & ASSIGNMENTS REQUIRED BY SECURITIZATION DOCUMENTS

## BOGUS ASSIGNMENTS RECORDED IN OFFICIAL RECORDS – COUNTY OF CLEVELAND, NC





The Florida Times-Union

May 14, 2010

## Florida AG investigating 'bogus' foreclosure records

**Source URL:** <http://jacksonville.com/news/florida/2010-05-14/story/state-investigating-bogus%E2%80%99-foreclosure-records>

By Steve Patterson

Florida's attorney general is investigating whether Jacksonville-based Lender Processing Services and Fidelity National Financial were involved with forging real estate documents for foreclosure lawsuits.

The probe deals with a Lender Processing subsidiary that "seems to be creating and manufacturing 'bogus assignments' of mortgage," according to a synopsis the Attorney General's Office posted on its website.

Assignments are notices that a mortgage has been sold or transferred from a lender to someone else. Many lenders routinely sell or assign their mortgages to investors, who could be businesses, pension funds or individuals.

If a homeowner stops making mortgage payments, the investor can sue to take the home — a foreclosure.

But the investor has to have paperwork proving the original lender sold the mortgage. And many don't.

Investigators suspect workers at a Lender Processing company called Docx LLC could have created paperwork that was "illegally executed, false and misleading," said a statement posted on the Attorney General's Office site.

"These documents are used in court cases as 'real' documents of assignment and presented to the court as so, when it actually appears that they are fabricated," the statement said.

The state investigation is looking for civil infractions, not crimes.

Lawyers fighting foreclosures have questioned the authenticity of some assignment paperwork prepared by Docx.

Court files have given them some extra ammunition.

At least 10 times since 2008, Docx assignments have been filed in Florida courthouses naming the new owner of the mortgage only as "BOGUS ASSIGNEE FOR INTERVENING ASMTS [assignments]," court records show.

On at least three assignments, the initial owner of the mortgage is listed as "A BAD BENE" — seemingly, for a false beneficiary.

Those forms were filed in Duval, Nassau, Volusia, Lee, Orange, Pasco and St. Lucie counties.

It's not clear how Fidelity National Financial, a Fortune 500 title insurance company, might fit into the state review.

Fidelity National Financial bought Alpharetta, Ga.-based Docx in 2005. But the next year, the company spun off many of its holdings into an independent company, Fidelity National Information Services, and no longer owns Docx. Fidelity National Information Services spun off Lender Processing as a separate company in 2008.

Fidelity National Financial Chief Compliance Officer Paul Perez declined to comment publicly.

Lender Processing Services spokeswoman Michelle Kersch was out of town Friday and didn't respond to messages sent by e-mail and routed through an assistant. Company CEO Jeff Carbiener didn't reply to an e-mailed message.

Like a deed, assignment forms carry notarized signatures of people listed as officers of the company transferring the mortgage to the new owner.

But a number of forms prepared through Docx carry signatures of the same people listed as officers of different companies. One signer was listed as a vice president at three different mortgage companies, based in different parts of the country, over a six-month period.

The attorney general's investigation started in early April, shortly after news reports announced said federal prosecutors were reviewing records from an LPS subsidiary. LPS had reported that to shareholders in its annual report in February.

At the time, the company said it had "identified a business process that caused an error in the notarization of certain documents" used in foreclosures.

Jacksonville Area Legal Aid attorney April Charney said she began reporting concerns about Docx documents to the Attorney General's Office in 2006 or 2007.

"I know they have been playing around with this for years," she said.

[steve.patterson@jacksonville.com](mailto:steve.patterson@jacksonville.com),  
(904) 359-4263 (904) 359-4263

IN RE CANTY

In re: MICHAEL TERRY CANTY, JR. MARCIA HOUSE CANTY  
Debtors.

MICHAEL TERRY CANTY, JR., and MARY ESTES JONES,  
Plaintiffs, v.

CHASE HOME FINANCE, LLC, Defendant.

BK 04-73002-CMS-13, AP 09-70029-CMS.

United States Bankruptcy Court, N.D. Alabama, Western Division.

May 7, 2010.

## MEMORANDUM OF DECISION

C. MICHAEL STILSON, Bankruptcy Judge

This matter came before the court on November 19, 2009 for hearing on Chase Home Finance, LLC's ("Defendant") Motion to Dismiss Amended Class Action Complaint ("Motion to Dismiss"). (AP Doc. 27). Steve Olen and Claude M. Burns, Jr. appeared on behalf of Michael T. Canty, Jr. and Mary Estes Jones (collectively "the Plaintiffs"); Danielle J. Szukala and Stephen B. Porterfield appeared on behalf of the Defendant. After consideration of the evidence submitted and the arguments of counsel this court DENIES the Defendant's Motion to Dismiss.

## JURISDICTION

The Bankruptcy Court has jurisdiction of this case pursuant to 28 U.S.C. § 1334(a). This court has jurisdiction of this issue, a core bankruptcy proceeding, pursuant to 28 U.S.C. § 157(b)(2). Jurisdiction is referred to the bankruptcy courts by the General Order of Reference of the United States District Court for the Northern District of Alabama, signed July 16, 1984, as Amended July 17, 1984.

## FINDINGS OF FACT

The Plaintiffs allege the following in their Amended Complaint: Plaintiff Michael Canty filed his Chapter 13 bankruptcy petition September 28, 2004. On April 11, 2006, the Defendant, with the active participation and consent of one or more of its attorneys, filed an improper and fraudulent affidavit in support of a motion for relief from stay that Defendant had filed in Plaintiff Michael Canty's bankruptcy case. Defendant's affidavit was improper and fraudulent in that the signature page was executed and/or notarized separate and apart from the affidavit. Defendant's affidavit purportedly was signed by its employee Scott Guinn on April 5, 2006 and purportedly was notarized by its employee Adam Caswell on April 5, 2006. Defendant's affidavit states that a pay history is incorporated by reference and attached as Exhibit A. However, the pay history was dated April 6, 2006, the day after the affidavit was signed and notarized.

Plaintiff Mary Estes Jones filed her Chapter 13 bankruptcy petition February 12, 2004. On March 17, 2005, the Defendant, with the active participation and consent of one or more of its attorneys, filed an improper and fraudulent affidavit in support of a motion for relief from stay that Defendant had filed in Plaintiff Mary Estes Jones' bankruptcy case. Defendant's affidavit was improper and fraudulent in that the signature page was executed and/or

notarized separate and apart from the affidavit. Defendant's affidavit purportedly was signed by its Bankruptcy Specialist Rhonda Jinks on March 14, 2005 and purportedly was notarized by its employee Jeffrey Javorsky on March 14, 2005. Defendant's affidavit states that a pay history is incorporated by reference and attached as Exhibit A. However, the pay history was dated March 16, 2005, two days after the affidavit was signed and notarized.

Essentially, the Amended Complaint alleges that Defendant has made an institutional practice of filing false affidavits in this court, and elsewhere,[ 1 <javascript:void(0)> ] in support of its motions for relief from the automatic stay. The Amended Complaint further alleges that the allegedly false affidavits submitted by the Defendant in the Plaintiffs' cases are just two examples of a widespread practice by the Defendant of filing improper affidavits. It is alleged that this harms not only individual debtors, but also defiles the court and prevents it from operating properly.

Plaintiffs' Amended Complaint asserts three separate causes of action. First, the Plaintiffs assert that Defendant's "actions violate the Bankruptcy Code and Rules and constitute an abuse of the bankruptcy process." Plaintiffs further "invoke the Court's inherent powers and the Court's powers under § 105 of the Bankruptcy Code." Second, the Plaintiffs assert that Defendant's "actions violate the Bankruptcy Code and Rules and constitute fraud on the bankruptcy court." Plaintiffs further "invoke the Court's inherent powers and the Court's powers under § 105." Third, the Plaintiffs assert that they are entitled to prospective injunctive relief that enjoins the Defendant from engaging in the acts and practices described in the Amended Complaint with respect to any debtor who is a member of the class certified by the court. Plaintiffs further "invoke the Court's inherent powers and the Court's powers under § 105."

In addition to seeking class certification, which has not been granted, Plaintiffs also seek damages, including disgorgement and refund or credit for fees charged, sanctions and punitive damages, as well as an order declaring Defendant's practices improper, illegal, and fraudulent. Plaintiffs also seek attorney fees and costs.

## CONCLUSIONS OF LAW

The Defendant seeks dismissal of the Plaintiffs' Amended Complaint pursuant to Federal Rules of Civil Procedure 8, 9, and 12(b), made applicable in bankruptcy cases pursuant to Federal Rules of Bankruptcy Procedure 7008, 7009, and 7012. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to `state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

The Defendant seeks to have the Amended Complaint dismissed on five separate grounds:

(1) Plaintiffs' "fraud on the court" claim fails to state a claim upon which relief can be granted;

(2) Section 105 of the Bankruptcy Code does not create a private right of action;

(3) Plaintiffs' claims are barred by the doctrine of res judicata;

(4) Plaintiffs' claims are barred by the doctrine of waiver; and

(5) Plaintiffs' claims are barred by the one year time period established by Federal Rule of Civil Procedure 60(b).

The court will address each of these in turn.

### Fraud on the Court

Defendant asserts that Plaintiffs' fraud on the court claim fails to state a claim upon which relief can be granted because Plaintiffs did not plead any factual allegations to suggest that the affidavits at issue had any impact on the motions for relief from stay filed in the Plaintiffs' bankruptcy cases. This court does not agree.

"[F]raud upon the court itself does not require damage to a party. It requires proof of actions that abuse or defraud the court system and/or a particular court itself, particularly if the fraud is a recurring one as alleged in the complaint." *Tate v. Citimortgage, Inc. (In re Tate)*, No 09-01059, slip op. at 7 (Bankr. S.D. Ala. Oct. 29, 2009). Plaintiffs' allegations in the Amended Complaint, taken as true for the purposes of this Motion to Dismiss, would prove "actions that abuse or defraud the court system." Therefore, the fact that Plaintiffs did not allege that Defendant's actions affected the outcome of the motions for relief from stay filed in their bankruptcy cases is not relevant to the determination of whether Plaintiffs have failed to state a claim upon which relief can be granted. Because this is true, the Defendant's assertions that Plaintiff failed to comply with the requirement of Rule 9 of the Federal Rules of Civil Procedure, made applicable through Bankruptcy Rule of Civil Procedure 7009, that fraud be pled with



particularity is also without merit. Defendant asserts that: "Plaintiff must allege facts to support that the later dated payment histories attached to the affidavits somehow impacted and/or were material in some to the parties' resolution of and/or this Court's determination on the motions for relief." Chase Home Finance LLC's Memorandum in Support of Its Motion to Dismiss Amended Class Action Complaint, No. 09-70029 (Bankr. N.D. Ala. Oct. 23, 2009). Because fraud on the court does not require proof of damage to a particular party, i.e. proof that the outcome of the proceeding was adversely affected by fraud, there cannot be a requirement in Rule 9 that damage to a particular party be pled with particularity. Therefore, the failure to plead damage to a particular party with particularity cannot be the basis for dismissing the Amended Complaint.

Defendant also asserts that Plaintiffs' fraud on the court claim fails to meet the pleading standards recently set down by the Supreme Court, which require a plaintiff to allege claims with "facial plausibility." *Ashcroft*, 129 S.Ct. at 1937. In both the Southern and Middle Districts of Alabama, this same argument has been made and rejected. See *Woodruff v. Chase Home Finance, LLC* (In re *Woodruff*), No. 09-8014-WRS, 2010 WL 386209, \*7-\*8 (Bankr. M.D. Ala. Jan. 27, 2010); *Tate v. Citimortgage, Inc.* (In re *Tate*), No 09-01059, slip op. at 7-8 (Bankr. S.D. Ala. Oct. 29, 2009). This court agrees with the conclusions reached in those decisions: Plaintiffs allegations that fraud was perpetrated on the court by an officer of the court, as well as the allegations of conduct which defiles the court process, are sufficient for this court to find that there is "facial plausibility" to the Plaintiffs' claim for fraud on the court. See, e.g., *Travelers Indemnity Co. v. Gore*, 761 F. 2d 1549, 1551 (11th Cir. 1985) ("Fraud upon the court should, we believe, embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging in cases that are presented

for adjudication, and relief should be denied in the absence of such conduct.").

This court finds that Defendant has failed to show that the Plaintiffs have failed to state a claim upon which relief can be granted, and the court will not dismiss the Plaintiffs' Amended Complaint upon those grounds.

## Section 105

Defendant asserts that Plaintiffs' Amended Complaint must be dismissed because it alleges a cause of action pursuant to § 105, and § 105 does not confer a private right of action to collect damages. In essence, Defendant argues that because Plaintiffs did not cite to a bankruptcy code provision that Defendant violated, Plaintiffs' cause of action must fail. While this court agrees with the general proposition that § 105 is a means to enforce the Bankruptcy Code rather than the creator of independent causes of action, this court does not agree that this proposition means that Plaintiffs' asserted causes of action must fail.

Although Plaintiffs cited to § 105 numerous times in their Amended Complaint, this court recognized above that the Amended Complaint states a plausible claim for fraud on the court. Therefore, "[t]his [c]ourt is of the view that this civil action is an independent action alleging fraud on the [c]ourt, seeking relief from prior orders entered as a result of the fraud, and not an action predicated on [s]ection 105 of the Bankruptcy Code." In re Woodruff, 2010 WL 386209, at \*8. While this court is willing accept that § 105 might be used in fashioning a remedy if Plaintiffs are able to prove their claim of a fraud on the court, this

court does not accept that the fashioning of a remedy is the same as creating an independent cause of action. See *id.*

Even if this court is incorrect about fraud on the court being an independent cause of action, it is "difficult to conceive of a more appropriate use of a court's inherent power than to protect the sanctity of the judicial process-to combat those who would dare to practice unmitigated fraud upon the court itself." *Aoude v. Mobil Oil Corp.*, 892 F. 2d 1115, 1119 (1st Cir. 1989). "To deny the existence of such power would . . . foster the very impotency against which the Hazel-Atlas Court specifically warned." *Id.*

Based upon the foregoing, this court finds that fraud on the court is an independent cause of action, and that even if it was not, § 105 would be an appropriate vehicle to bring a claim for fraud on the court because it is necessary for the court to be able to address frauds perpetrated upon it. Therefore, Plaintiffs' cause of action for fraud on the court is not barred by the general proposition that § 105 does not create a private cause of action.

## Res Judicata

Defendant asserts that any causes of action relating to the affidavits filed with the motions for relief from stay in the Plaintiffs' bankruptcy cases are barred by the doctrine of res judicata. The doctrine of res judicata provides that "a final judgment on the merits bars the parties to a prior action from re-litigating a cause of action that was or could have been raised in that action." *Kaiser Aerospace and Electronics Corp. v. Teledyne Industries (In re Piper Aircraft Corp.)*, 244 F. 3d 1289, 1296 (11th Cir. 2001). See also *Travelers Indemnity Co. v. Gore*, 761 F. 2d 1549, 1552 (11th Cir. 1985) ("Courts have consistently held that a party is precluded by res judicata from relitigation in the independent

equitable action issues that were open to litigation in the former action where he had a fair opportunity to make his claim or defense in that action."). The Defendant relies heavily upon the Gore case handed down by the Eleventh Circuit Court of Appeals in 1985. *Travelers Indemnity Co. v. Gore*, 761 F. 2d 1549, 1552 (11th Cir. 1985). However, this court finds the Gore case distinguishable because this case involves a cause of action for fraud on the court, while the Gore case did not. In addition, even assuming that the Plaintiffs had a "fair opportunity to make his claim or defense" at the time the motions for relief from stay were filed, such failure to "exercise the highest degree of diligence" does not mean that the Defendant can escape the consequences of any fraud perpetrated on this court. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246, 64 S. Ct. 997, 1001 (1944), abrogated on other grounds by *Standard Oil Co. v. U.S.*, 429 U.S. 17, 97 S. Ct. 31 (1976). "No court can be prevented from determining whether an attorney or litigant has abused the court or the judicial process merely because no party caught the impropriety before a ruling. A debtor's focus on his or her own issues should not allow fraudulent practices to be ignored or punishment for them avoided." *Tate v. Citimortgage, Inc.* (In re Tate), No 09-01059, slip op. at 11 (Bankr. S.D. Ala. Oct. 29, 2009). Based upon the foregoing, this court finds that the doctrine of res judicata does not bar the Plaintiffs' fraud on the court suit.

## Waiver

Defendant asserts that Plaintiffs have waived any claim relating to the affidavits filed with the motions for relief from stay because they failed to raise any such claim before such motions were resolved. As detailed above, this court has found that Plaintiffs have stated a plausible claim for fraud on the court. When the

claim raised is fraud on the court, lack of diligence of the parties to the original transaction does not determine the outcome:

But even if Hazel did not exercise the highest degree of diligence Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246, 64 S. Ct. 997, 1001 (1944), abrogated on other grounds by Standard Oil Co. v. U.S., 429 U.S. 17, 97 S. Ct. 31 (1976) (citations omitted). Based upon the foregoing, this court does not believe that waiver is an appropriate defense to a claim of fraud on the court. Even if such a defense was proper, this court is not convinced that it is an issue that should be resolved by a Motion to Dismiss. This court is required to accept as true the well-pleaded allegations contained in the Amended Complaint, and there is nothing in such complaint or in the record that affirmatively shows a waiver by the Plaintiffs. In re Woodruff, 2010 WL 386209, at \*9. Based upon the foregoing, this court finds that the doctrine of waiver does not bar the Plaintiffs' fraud on the court suit.

Rule 60(b)

Defendant asserts that pursuant to Federal Rule of Civil Procedure 60, made applicable to bankruptcy proceedings pursuant to Bankruptcy Rule of Civil Procedure 9024, "when a party seeks relief from a 'final judgment, order, or proceeding' resulting from an alleged fraud by the opposing party, the party must bring that motion 'no more than a year after entry of the judgment or order or the date of the proceeding.'" Chase Home Finance LLC's Memorandum in Support of Its Motion to Dismiss Amended Class Action Complaint, No. 09-70029 (Bankr. N.D. Ala. Oct. 23, 2009) (quoting FED. R. CIV. PRO. 60(b) & (c)). This assertion of Defendants ignores the exception to the one-year time limit contained in Rule 60(d):

(d) This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding . . . .

(3) set aside a judgment for fraud on the court.

FED. R. CIV. PRO. 60(d). Because the court concluded above that the Plaintiffs have stated a claim for fraud on the court, Rule 60(d) applies in this case. Therefore, the one-year time limit contained in Rule 60(c) does not apply and does not bar this suit. In re Woodruff, 2010 WL 386209, at \*10 ("Given the Court's conclusion that the Plaintiff has stated a claim for fraud on the Court, the exception contained in Rule 60(d) applies hear [sic] and does not bar this suit.").

CONCLUSION

It is possible that relief could be granted to the Plaintiffs based upon the facts stated in the Amended Complaint. Therefore, dismissal is inappropriate at this time and the Defendant's Motion to Dismiss is hereby DENIED.

An Order, consistent with these findings pursuant to Fed. R. Bankr. P. 7052, will be entered separately.

DONE and ORDERED.

1. The court notes that there are similar class action suits pending in both the Southern and Middle Districts of Alabama.

# Samples of Fake Documents



## The What If Talking Points

- What if thousands of homeowners were really current in their mortgages, but the system kicked them out, because of this fraudulent testimony?
- What if thousands of foreclosure cases were brought by servicers that didn't really own the mortgages that they said they did?
- What if Fannie/Freddie/HUD were forced to pay out hundreds of millions in mortgage insurance in cases where the borrowers were current, or behind so little that they could have been kept in their homes, instead of being evicted?
- What if HAMP was not working, because servicers were more interested in foreclosing and the fraudulent testimony allowed them to do so?
- What if YOUR house was on the eviction block and it was because someone in a far away state signed the piece of paper that the judge relied on to kick you out (even though that person didn't read it; didn't know what it meant; and never bothered to check for accuracy, despite being sworn to do so?)
- What if you robbed a bank by fraud and then voluntarily brought the money back three months later, would this conduct eliminate the predicate criminal act?
- What if you replaced hundreds of thousands of false statements with what purports to be truthful statements, would this eliminate the original fraud on the court?
- What do you do to unwind millions of acts of criminal and civil fraud?

Highlights of Deposition of Jeffrey D. Stephan,  
Team Leader, Document Execution Team,  
Foreclosure Department, GMAC Mortgage, LLC

**Proudly Executing Up to 10,000 fake documents per month**

Q. When you sign a summary judgment affidavit, do you check to see if all the exhibits are attached to it?

A. No.

Q. Does anybody in your department check to see if all the exhibits are attached to it at the time that it is presented to you for your signature?

A. No.

Q. When you sign a summary judgment affidavit, do you inspect any exhibits attached to it?

A. No.

Q. My question to you is, where does a summary judgment go after you sign it?

A. After I sign it, it is handed back to my staff. My staff hands it to a notary for notarization. It is then handed back to my staff. They send it back to the network attorney requesting any type of affidavit through the LPS system and Signature-Required function.

Q. So you do not appear before the notary; is that correct?

A. I do not.

Q. Mr. Stephan, do you recall testifying in your Florida deposition in December of 2009 that you rely on your attorney network to ensure that the documents that you receive are correct and accurate?

A. That is correct.

Q. Your department does not do any independent check of the accuracy of the information on the summary judgments coming to you; isn't that correct?

A. I review, quickly, the figures. Other than that, that's about it.

Q. When you receive a summary judgment affidavit to sign, do you read every paragraph of it?

A. No.

Q. What do you read?

A. I look for the figures.

Q. That's all that you look at when you sign a summary judgment affidavit?

A. Yes, to ensure that the figures are correct.

Q. Is it fair to say then that when you sign a summary judgment affidavit, you do not know what it says, other than what the figures are that are contained within it?

Q. Let me restate the questions. It fair to say that when you sign a summary judgment affidavit, you don't know what information it contains, other than the figures that are set forth within it?

A. Other than the borrower's name, and if I have signing authority for that entity. That is correct.

Q. The practice that you've just described for signing summary judgment affidavits is the practice that you use signing all summary judgment affidavits that you handle; is that correct?

A. The practice that I use for summary judgment affidavits is the same practice that I use for all affidavits.

Q. And that's the one that you've just described?

A. Yes.

Q. Does GMAC do any quality assurance training for your department?

A. Presently, no.

Q. Has it in the past?

A. I do not know.

Q. You don't recall any?

A. I never received any.

Q. In your practice of signing 3 summary judgment affidavits, Mr. Stephan, is it correct that they always have a paragraph containing the numbers of the amounts claiming to be due?

A. That would be correct.

Q. And is it correct that when you sign those affidavits, you don't know whether any other part of the affidavit is true or correct?

A. Please advise me. What do you mean by "any other part"?

Q. Any other paragraph, other than the one containing the numbers.

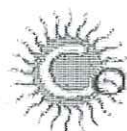
A. I review it for the due date, if that's included in there.

Q. So all of them --

A. So that would be the numbers.

Q. So other than the due date And the balances due, is it correct that you do not know whether any other part of the affidavit that you sign is true?

A. That could be correct.



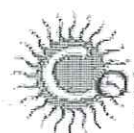
IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT  
PALM BEACH COUNTY, FLORIDA

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Chase Home Finance, LLC, :  
:   
Plaintiff, :   
:   
vs. : Case No.   
: 50-2008-CA-016857   
[REDACTED], et al., :   
:   
Defendants. :

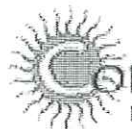
-----  
DEPOSITION OF BETH ANN COTTRELL  
-----

Monday, May 17, 2010  
2:01 o'clock p.m.  
Anderson Reporting Services, Inc.  
3242 West Henderson Road  
Suite A  
Columbus, Ohio 43220

-----  
ANN FORD  
REGISTERED PROFESSIONAL REPORTER  
-----



1 Q. Have you given depositions before?  
2 A. Yes.  
3 Q. How many?  
4 A. One.  
5 Q. Just a couple things to keep in mind, if  
6 you need to take a break, let me know. If you don't  
7 understand a question, just ask, I'll clarify it.  
8 And also for the purposes of the record, please do  
9 state yes or no. I get some transcripts back and  
10 folks saying uh-huh doesn't mean anything for me. So  
11 how long have you worked for Chase?  
12 A. I've worked for Chase for one year. Well,  
13 actually it's been eight months.  
14 Q. And before that.  
15 A. First American, seven years.  
16 Q. Your title you said is operation  
17 supervisor.  
18 A. Yes.  
19 Q. Can you describe your duties day to day  
20 with Chase.  
21 A. My duties are -- at this point are  
22 reporting for the document execution, reviewing  
23 verbiage, reviewing questionable items on amount  
24 dues.  
25 Q. So can you describe what kinds of



1 documents you sign?

2 A. I sign affidavits, deeds, assignments.

3 Q. And what else?

4 A. Allonges, lost note affidavits, lost  
5 mortgage affidavits.

6 Q. And can you tell me in a given week how  
7 many affidavits you might sign?

8 A. Can I tell you -- I can tell you as a  
9 group, as a whole.

10 Q. Sure.

11 A. Amongst all the management we sign about  
12 18,000 a month.

13 Q. And that would include affidavits and  
14 assignments and the other documents you listed?

15 A. Everything.

16 Q. And how many folks are on what you call  
17 the management?

18 A. Let's see, eight.

19 Q. Eight. For each document that you sign,  
20 including all those that you listed, assignments,  
21 et cetera, et cetera, how much time would you say you  
22 take to review what's on each document?

23 A. I take personally or what's taken?

24 Q. Sure. What you take.

25 A. A lot of the review is done by the



IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE  
STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY  
CIVIL DIVISION

U.S. BANK, NA AS TRUSTEE FOR CCB LIBOR SERIES  
2006-2 TRUST,

Plaintiff,

vs.

CASE NO. [REDACTED]  
[REDACTED] DIVISION F

[REDACTED]  
Defendant(s).

MOTION TO REFORM THE ASSIGNMENT OF MORTGAGE AND  
CORRECT SCRIVENER'S ERROR IN THE COMPLAINT, LIS  
PENDENS, AND ASSIGNMENT OF MORTGAGE

COMES NOW, the Plaintiff, U.S. BANK, NA AS TRUSTEE FOR CCB LIBOR SERIES 2006-2 TRUST, and moves this Honorable Court for an Order Reforming the Assignment of Mortgage and Correcting Scrivener's Error in the Plaintiff's name on the Complaint, Lis Pendens, and Assignment of Mortgage and support thereof alleging:

1. On November 16, 2009, an assignment of mortgage was recorded in the public records of Hillsborough County at Official Records bk [REDACTED] pg [REDACTED]
2. On October 8, 2009, a complaint of Foreclosure was filed in the Circuit Court of Hillsborough County, Florida.
3. There was an error contained in the Plaintiff name, which should read: U.S. Bank, N.A. as trustee relating to Chevy Chase Funding LLC Mortgage Backed Certificates Series 2006-2.
4. Plaintiff's attorney was directed to file in the name of U.S. Bank, N.A. as trustee for CCB Libor Series 2006-2 Trust, which does not exist. The Libor Index is used to calculate the interest rate on the adjustable rate mortgages and was inadvertently inserted in the name.
5. An assignment of mortgage into the improperly named entity was recorded, however no such entity exists. A corrective assignment of mortgage has been executed and has been or will be recorded and is attached hereto as Plaintiff's Exhibit "Z".
6. The intent of the parties was to assign the mortgage to U.S. Bank, N.A. as trustee relating to Chevy Chase Funding LLC Mortgage Backed Certificates Series 2006-2 as that entity is the owner and holder of the note and mortgage. It was through mistake that the name was incorrectly listed on the assignment of mortgage and subsequent foreclosure pleading.

This case involved an  
Assignment of Mortgage to a non-existent trust.

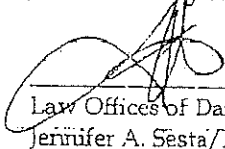


7. It is well established that equity will reform the instrument so as to conform to the intent of the parties and relief should be given where, through a mistake of the scrivener, the instrument contains a clerical error.

8. In support thereof Plaintiff would state that no party would be prejudiced by this correction of the scrivener's error and by ordering the correction, this matter would be resolved quickly, inexpensively, and fairly to all of the parties.

WHEREFORE, the plaintiff prays that this Honorable Court will enter an Order Reforming the Assignment of Mortgage and Correcting Scrivener's Error in the Assignment of Mortgage, Complaint, and Lis Pendens.

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to all parties on attached Master Civil Service List, on this 4th day of June, 2010.



\_\_\_\_\_  
Law Offices of Daniel C. Consuegra  
Jennifer A. Sesta/Florida Bar #0966339  
9204 King Palm Drive  
Tampa, FL 33619-1328  
Tel (813) 915-8660/Fax (813) 915-0559

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL  
CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

U.S. BANK, NA AS TRUSTEE FOR  
CCB LIBOR SERIES 2006-2 TRUST.

Plaintiff,

v

CIRCUIT CIVIL DIVISION

CASE NO.: 09-025768

DIVISION F

MARK CAMPESE, et.al,  
Defendant

**ORDER ON DEFENDANT MARK CAMPESE'S RESPONSE AND OBJECTION  
TO PLAINTIFF'S MOTION TO REFORM THE ASSIGNMENT OF  
MORTGAGE AND CORRECT SCRIVENER'S ERROR IN THE  
COMPLAINT, LIS PENDENS, AND ASSIGNMENT OF MORTGAGE**

THIS CAUSE coming on to be heard upon Plaintiff's Motion To Reform The Assignment of Mortgage and Correct Scrivener's Error in The Complaint, Lis Pendens and Assignment of Mortgage it is:

**ORDERED AND ADJUDGED THAT:**

1. Plaintiff's Motion To Reform The Assignment of Mortgage is **DENIED.**
2. Plaintiff's Motion To Correct Scrivener's Error in The Complaint, Lis Pendens and Assignment of Mortgage is **DENIED.**

3. Plaintiff is granted leave to file an amended  
Complaint and Lis Pendens.

ORDERED at Tampa, Hillsborough County, Florida on July 2, 2010.

  
CIRCUIT COURT JUDGE

Copies:

- Rory Rohan 900 Colony Point Circle Suite 310 Pembroke Pines, FL, 33026;
- Michelle G. Gilbert, attorney for Heather Campese, 3200 Henderson Blvd Suite 100 Tampa, FL., 33609
- Daniel C. Consuega, attorney for plaintiff, 9204 King Palm Dr. Tampa, FL., 33619-1328
- Mirabay Homeowner's Association, Inc., c/o Rizzetta & Company, Inc., 5844 Old Pasco Road, Suite 100 Wesley Chapel, FL., 33544

Filed for record and recorded 30<sup>th</sup> day of April  
2010 At 3:30 O'Clock P M, and recorded in Book  
No. 232 Page 566  
Tunica County, Mississippi Susie White, Chancery Clerk  
By Cindy Fields DC



BOOK **232** PAGE **566**

**PREPARED BY:**

**ADAMS & EDENS**  
Foreclosure Department  
A Professional Association  
POST OFFICE BOX 400  
BRANDON, MISSISSIPPI 39043  
(601) 825-9508  
MS Bar No. 9731  
A&E #26484

Grantor:  
6400 Legacy Drive  
Plano, TX 75024-3632  
Phone: 972-608-6438

**BAC/Jones/McClaurin**  
INDEXING INSTRUCTIONS:  
Lot 17, Franklin S/D, Sec. 5, T5S,  
R11W, Tunica Co., MS

**RETURN TO:**

**ADAMS & EDENS**  
Foreclosure Department  
A Professional Association  
POST OFFICE BOX 400  
BRANDON, MISSISSIPPI 39043  
(601) 825-9508

Grantee:  
6400 Legacy Drive  
Plano, TX 75024-3632  
Phone: 972-608-6438

**ASSIGNMENT OF DEED OF TRUST**

FOR VALUE RECEIVED, the receipt and sufficiency of which are hereby acknowledged, the undersigned, Mortgage Electronic Registration Systems, Inc., does hereby grant, bargain, sell, convey and assign unto BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, LP, all its right, title and interest in and to that certain Deed of Trust executed on August 23, 2007, by Renardo Jones, a single man, and Bernice McClaurin, a single woman, to Recon Trust Co., Trustee for the use and benefit of Mortgage Electronic Registration Systems, Inc., which Deed of

Jan Simmons is not the Asst Sec of MERS but a lawyer for  
Adams & Edens.

A&E File #26484

BOOK 232 PAGE 567

Trust is on file and of record in the office of the Chancery Clerk of Tunica County, Mississippi, in Deed of Trust Book 215 at Page 670 thereof, together with the note, debt, and claim secured by said Deed of Trust, in the sum of \$125,000.00 and all monies due or to become due thereunder with the interest thereon.

IN WITNESS WHEREOF, the undersigned has caused this instrument to be executed by its duly authorized officer, on this 23<sup>rd</sup> day of April, 2010.

Mortgage Electronic Registration Systems, Inc.

BY:

Jan Simmons  
JAN SIMMONS

TIS: Assistant Secretary

STATE OF MISSISSIPPI

COUNTY OF RANKIN

PERSONALLY, came and appeared before me, the undersigned authority in and for the jurisdiction aforesaid Jan Simmons, with whom I am personally acquainted and who acknowledged that she is the Assistant Secretary, of the within named Mortgage Electronic Registration Systems, Inc., and that she signed, sealed and delivered the within and foregoing assignment on the day and year therein mentioned for and on behalf of said corporation, and as its own act and deed for the purposes therein mentioned, having been first duly authorized so to do.

Witness my signature and official seal on this, the 23 day of April, 2010.

Kelli S. Scott  
NOTARY PUBLIC



My Commission Expires:

# ADAMS & EDENS

A PROFESSIONAL ASSOCIATION  
Attorneys At Law

Legal Services: 877-825-9570  
Lender Services: 800-898-1061



ENJOYING A REPUTATION OF HARD WORK AND INTEGRITY FOR OVER 30 YEARS...

## Jan Simmons



Tel.: (601) 825-9508  
Email: [jan.simmons@aelawyers.com](mailto:jan.simmons@aelawyers.com)  
Facsimile: (601) 825-4756

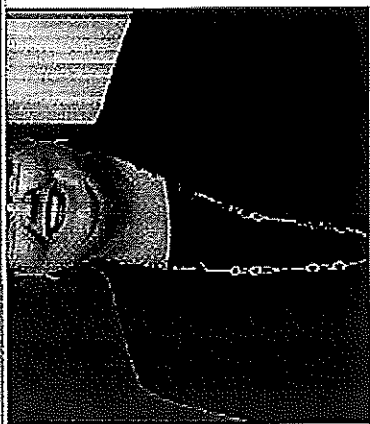
Jan joined the firm in 1990 and provides over 25 years of experience in the legal field. Jan has extensive experience in the areas of legal management, foreclosure, bankruptcy, real estate and business services as well as estate planning.

> Lender Services Group Overview

> Jan Simmons

SEARCH TOPICS

*Over Blogs*  
> DIVORCE



Jan joined the firm in 1990 and provides over 25 years of experience in the legal field. Jan has extensive experience in the areas of legal management, foreclosure, bankruptcy, real estate and business services as well as estate planning and probate matters. Jan currently serves as the firm's Administrator, and directs the firm's Lender Services Group.

#### Education:

University of Southern Mississippi, Paralegal Studies (1989)

#### Member:

Association of Legal Administrators  
Mississippi Paralegal Association, Inc.  
Mississippi Bankruptcy Conference  
United Trustees Association  
National Association of Professional Mortgage Women

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Marriage and Money

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Estate Planning - For What?

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## SEE OUR PRACTICE AREAS

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LOCATED IN VERANDON, MISSISSIPPI, ADAMS & EDENS, P.A. IS A FULL-SERVICE LAW FIRM SERVING JACKSON, FLOWOOD, RIDGEWOOD, MADISON, CANTON, FLORENCE, RICHLAND, VICKSBURG, AND ALL OF MISSISSIPPI. ATTORNEY PRACTICE AREAS INCLUDE: INVESTMENT, BUSINESS SERVICES, CORPORATE LAW, PERSONAL INJURY, AUTOMOBILE ACCIDENTS, ESTATE PLANNING, TRUCKING ACCIDENTS, PROBATE, REAL ESTATE, FORECLOSURE, DIVORCE, ADOPTION, CHILD CUSTODY, CHILD SUPPORT COLLECTION, AND WILL & TRUST DISPUTES. THE

## ADAMS & EDENS

A PROFESSIONAL ASSOCIATION

*Attorneys At Law*

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Our Practice Areas  
Lender Services Group



## Lender Services Group

Adams & Edens, P.A.'s Lender Services Group represents mortgage banking clients from across the United States, providing foreclosure, bankruptcy, title curative work, REO and traditional mortgage loan closings, regulatory legal matters and all other related services throughout Mississippi.

The Lender Services Group is staffed by experienced attorneys and support staff, who are equipped with the latest technology to enable the expeditious, efficient and quality service needed by our mortgage banking clients.

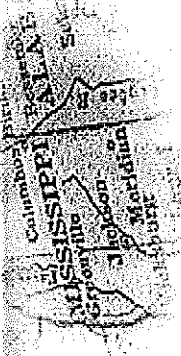
Adams & Edens, P.A., is a member of the USFN, American Legal & Financial Network and the Mortgage Bankers Association.

For more information and a fee schedule of the services provided by our Lender Services Group, please click here to download our Lender Services brochure

### CONTACT INFORMATION

jan.simmons@aelawyers.com  
2001 Creek Cove Suite A  
Brandon, Mississippi 39042  
Phone Number (601) 825-9508  
Fax (601) 825-0022

### MAP AND DRIVING DIRECTIONS



► Lender Services Group Overview

► Jan Simmons

### SEARCH TOPICS

GO

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WARNING - Check Those Taxes!

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CRL L#: 0124168667  
Assignee L#: 4001644691  
Investor L#: 0124168667  
Custodian: 85  
Effective Date: 02/11/2009

#### ASSIGNMENT OF MORTGAGE

FOR GOOD AND VALUABLE CONSIDERATION, the sufficiency of which is hereby acknowledged, the undersigned, CITI RESIDENTIAL LENDING INC., AS ATTORNEY-IN-FACT FOR AMERIQUEST MORTGAGE COMPANY, WHOSE ADDRESS IS 10801 E. 6TH STREET, RANCHO CUCAMONGA, CA 91730, (ASSIGNOR), by these presents does convey, grant, sell, assign, transfer and set over the described mortgage together with the certain note(s) described therein together with all interest secured thereby, all liens, and any rights due or to become due thereon to DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR, AMERIQUEST MORTGAGE SECURITIES INC. ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2005-R7, UNDER THE POOLING AND SERVICING AGREEMENT DATED AUGUST 1, 2005, WHOSE ADDRESS IS 1761 EAST ST. ANDREW PLACE, SANTA ANA, CA 92705-4934, (ASSIGNEE)

Mortgage dated 06/22/2005, made by ARTHUR DURANT AND MARYANN DURANT to AMERIQUEST MORTGAGE COMPANY in the principal sum of \$235,000.00 and recorded on 07/01/2006 in Liber page, CRFN # 2006000374134 in the office of the Registry of BRONX County, N.Y.

Prop Addr: 3720 DYRE AVENUE  
BRONX, NY 10466

This Assignment is not subject to the requirements of section 275 of the Real Property Law because it is an assignment within the secondary mortgage market.

Dated: THIS 15TH DAY OF JANUARY IN THE YEAR 2009  
CITI RESIDENTIAL LENDING INC., AS ATTORNEY-IN-FACT FOR AMERIQUEST MORTGAGE COMPANY  
POA RECORDED 11/01/2007 DOC#: 2007000549456

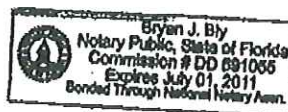
By [Signature]  
CRYSTAL MOORE VICE PRESIDENT

By [Signature]  
VILMA CASTRO witness

STATE OF FLORIDA COUNTY OF PINELLAS  
THIS 15TH DAY OF JANUARY IN THE YEAR 2009, before me, the undersigned, personally appeared CRYSTAL MOORE, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument, and that such individual made such appearance before the undersigned in PINELLAS County, State of FLORIDA

BRYAN J. BLY Notary Public  
Residing in the county of PINELLAS  
My commission expires 07/01/2011

SEAL



Document Prepared By: Jessica Fretwell/NTC, 2100 Alt. 19 North, Palm Harbor, FL 34683 (800)346-9152  
Property ID(S/B/L): B: 4950 L: 73  
Return by Mail to: AMERICAN HOME MTG SERVICING  
C/O NTC 2100 Alt. 19 North  
Palm Harbor, FL 34683

CRLAS 9181732 1/31 CJ2023152 \$42.00



\*9181732\*





# NOTARY PUBLIC COMMISSION APPLICATION

Florida Department of State  
Notary Commission (850) 245-6071

153124560

Complete and Return to:  
National Notary Association  
P.O. Box 10240  
Tallahassee, FL 32302-0240

The applicant must be the legal holder of a valid Florida driver's license and not be under any legal restraint or any other legal disability.

First Name: BLV Last Name: Bryan Title: J  
Home Address: 3991 Gulfway Dr City: Clearwater FL Zip: 34625  
Place of Employment: Notary Public Title: Commissioner If Employed: U.S. Notary  
Business Address: 1100 Alcazar City: Palm Beach FL Zip: 33468  
Mobile Phone: None Office Phone: None Fax: None  
Home Phone: 727-415-5621 Business Phone: 727-771-4800 Extension: None  
E-Mail Address: blv@blv.com For What Term: Commission  
Florida Driver's License: None Date of Birth: 8-13-1958

1. Are you a legal resident of Florida? Yes ☒ No ☐ If No, please provide explanation of legal residence in the space provided below.
2. Are you a United States citizen? Yes ☒ No ☐ If No, please provide explanation of citizenship in the space provided below.
3. Are you now or have you ever been arrested or convicted of a felony? No ☒ Yes ☐ If Yes, please provide explanation of arrest and conviction in the space provided below.
4. Have you been disciplined by a regulatory agency, including the Florida Real Estate Commission, within the last five years? No ☒ Yes ☐ If Yes, please provide explanation of discipline in the space provided below.
5. Have you been convicted of a felony, including a crime involving fraud, within the last five years? No ☒ Yes ☐ If Yes, please provide explanation of conviction in the space provided below.

STATE OF Florida AFFIDAVIT OF CHARACTER Notary  
I, Blaine Castro, as commission and term of office Bryan J. Blv  
do hereby certify that the above named person is a resident of the State of Florida and is a citizen of the United States  
My address is 6315 Remond Dr. APT 28 City: FL Zip: 33451  
I solemnly swear that I, the undersigned, have read the foregoing application and that the contents are true and correct.  
State: None X Blaine Castro  
Notary Public: 727-771-4800

DATE OF BIRTH: 8-13-1958 DATE OF OFFICE: Notary  
I do solemnly swear that I am a resident of the State of Florida and a citizen of the United States and that I am not under any legal restraint or any other legal disability.  
I do hereby certify that the above named person is a resident of the State of Florida and is a citizen of the United States.  
X Bryan J. Blv Bryan J. Blv 8-13-1958  
Notary Public: 727-771-4800

Important: Please See Other Side

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## Stewart Lender Services

### Solid processes complemented by knowledgeable people

Stewart Lenders Services (SLS) is a nationwide provider of centralized origination, loss mitigation and REO asset management solutions for mortgage lenders and servicers. With more than a century of experience matched with the industry's leading technologies, SLS helps lenders meet the rapidly changing demands of today's market. We have the financial strength, industry knowledge and proven flexibility to perform throughout the life cycle of a loan.

We offer specialized services to help eliminate bottlenecks and streamline processes. Our knowledgeable staff will collaborate with you to develop a solution to meet your specific business requirements. Combining industry-leading technology with centralized services, we can help you improve efficiency, reduce production costs, minimize environmental impact and provide a superior borrower experience.

#### Visit us at these conferences:

Sept. 19-22 - [FiveStar Default Servicing Conference and Expo](#)

Aug. 8-10 - [15th Annual Western States Loan servicing conference](#)

Oct. 24-27 - [MBA's 97th Annual Convention & Expo](#)

Oct. 20-23 - [REOMAC Fall Conference](#)

Nov. - [Texas Mortgage Bankers Association](#)

Nov. 6-9 - [35th Annual Education Conference & Trade Show \(United Trustee Association\)](#)

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# **ALLONGE TO Fixed Rate Consumer Note and Security Agreement**

NC ID #: 2356

NCC Account #: 012054585021818

Allonge to one certain Fixed Rate Consumer Note and Security Agreement Dated: 7/17/2006 *11/7/2006*

and Executed by: GREGORY SEPANSKI JR  
Debtor(s)

With a Principle Amount of \$75,900.00

Property Address: 5926 PATIO DR  
BOCA RATON, FL 33433

Pay to the order of: **JPMORGAN CHASE BANK, NA**

Without Recourse

National City Bank

By: *E. Denise Tennill*

E. Denise Tennill

Vice President

## E. Denise Tennill

Post Closing Manager at Stewart Lender Services

Houston, Texas Area

- Past**
- Project Manager at Mortgage Dynamics, Inc
  - Post Closing Manager at Stewart Lender Services
  - Government Insuring at Bank United
  - Government Insuring Lead at National City Mortgage
  - Insuring Coordinator at Mellon Mortgage
  - Veterinary Technical Assistant at PetsMart Veterinary Services
  - Veterinary Assistant at Antoine-Little York Animal Clinic

[see less...](#)

- Education**
- ITT Technical Institute
  - University of Houston

**Connections** 13 connections

**Industry** Financial Services

## E. Denise Tennill's Summary

To obtain a position with a company that allows me to apply my skills and education and provides me with the opportunity for advancement. SKILLS

Hard working team player, with excellent organization and communication skills.

Proficient at multitasking and problem solving.

Experienced in managing and training 20+ associates.

Competent in Microsoft Windows, Excel, PowerPoint, Access, Visio, and Adobe Acrobat Professional 8.

Experienced in client contract agreements

Collaborated on new system development

### E. Denise Tennill's Specialties:

accountancy, administration, banking, bookkeeping, closing, contract management, customer relations, database administration, government, imaging, inventory management, microsoft access, performance analysis, programming, proposal writing, quality, quick, reports, research, sales, scanners, shipping, teamwork,

## E. Denise Tennill's Experience

### Project Manager

#### Mortgage Dynamics, Inc

(Financial Services industry)

August 2009 — November 2009 (4 months)

Manage government insuring project for major lender

Hire and manage 10+ auditors.

Create training tools for multiple programs required to create electronic FHA and VA insuring packages.

Aide in the various systems needed for remote access.

Review and analyze weekly and monthly client reports

## **Post Closing Manager**

### **Stewart Lender Services**

(Public Company; 10,001 or more employees; STC; Financial Services industry)

April 2000 — August 2009 (9 years 5 months)

- Manage staff of 20+ employees for multiple large insuring projects
- Oversee the daily operations of the Post Closing department involved in creating closing documents, banking, funding, and shipping of loans, government insuring and investor exception clearing.
- Manage a staff of 20 + employees for multiple projects and daily work flow.
- Implement policy and procedures, while establishing departmental goals.
- Promote a sense of teamwork and quality within the team.
- Assist with proposals and contracts for new projects.
- Develop and analyze reporting needs.
- Oversee projects and ensure for contractual requirements
- Collaborate with programmer to develop multiple databases for various applications.
- Worked with sales staff in boarding new clients as well as equipment and systems required.

**Imaging Manager**

- Maintain a constant flow of work through a series of scanners for export to various media.
- Manage a staff of 30 to 50 fulltime and temporary employees which varied due to project flow.
- Oversee the daily operation of inventory flow, through each division of the department.
- Completed performance appraisals rewarding and disciplining of employees.
- Manager of the year 2004, and 2006, Community Service Award 2004

## **Government Insuring**

### **Bank United**

(Financial Services industry)

January 2000 — April 2000 (4 months)

- Cleared exceptions in order to submit FHA loans for an out of business mortgage company.

## **Government Insuring Lead**

### **National City Mortgage**

(Public Company; 1001-5000 employees; pnc; Banking industry)

April 1998 — December 1999 (1 year 9 months)

- Directed work flow for production and exception clearing teams.
- Installed FHA Connection and instructed employees on its use.
- Maintain reports and handled special projects.

## **Insuring Coordinator**

### **Mellon Mortgage**

(Financial Services industry)

September 1996 — April 1998 (1 year 8 months)

- Identify and resolve problems in research unit.
- Initiate new procedures to expedite the flow of files.
- Create learning tool for quick review and research teams.

## **Veterinary Technical Assistant**

### **PetsMart Veterinary Services**

(Financial Services industry)

December 1994 — September 1996 (1 year 10 months)

- Administrative and technical care of outpatient clients, client education
- Patient check-in, vaccinations, laboratory tests, and product sales
- Administration of anesthesia, surgical and instrument preparation, patient monitoring.

### **Veterinary Assistant**

#### **Antoine-Little York Animal Clinic**

(Financial Services industry)

June 1988 — April 1992 (3 years 11 months)

Bookkeeping, accounting, and data/key file maintenance.  
Assisted veterinarian in patient care and client education.  
General hospital maintenance.

Activities

## **E. Denise Tennill's Education**

### **ITT Technical Institute**

Associate , Computer Network Systems , 2009 — 2011 (expected)

*Activities and Societies:* National Honor Society, IEEE

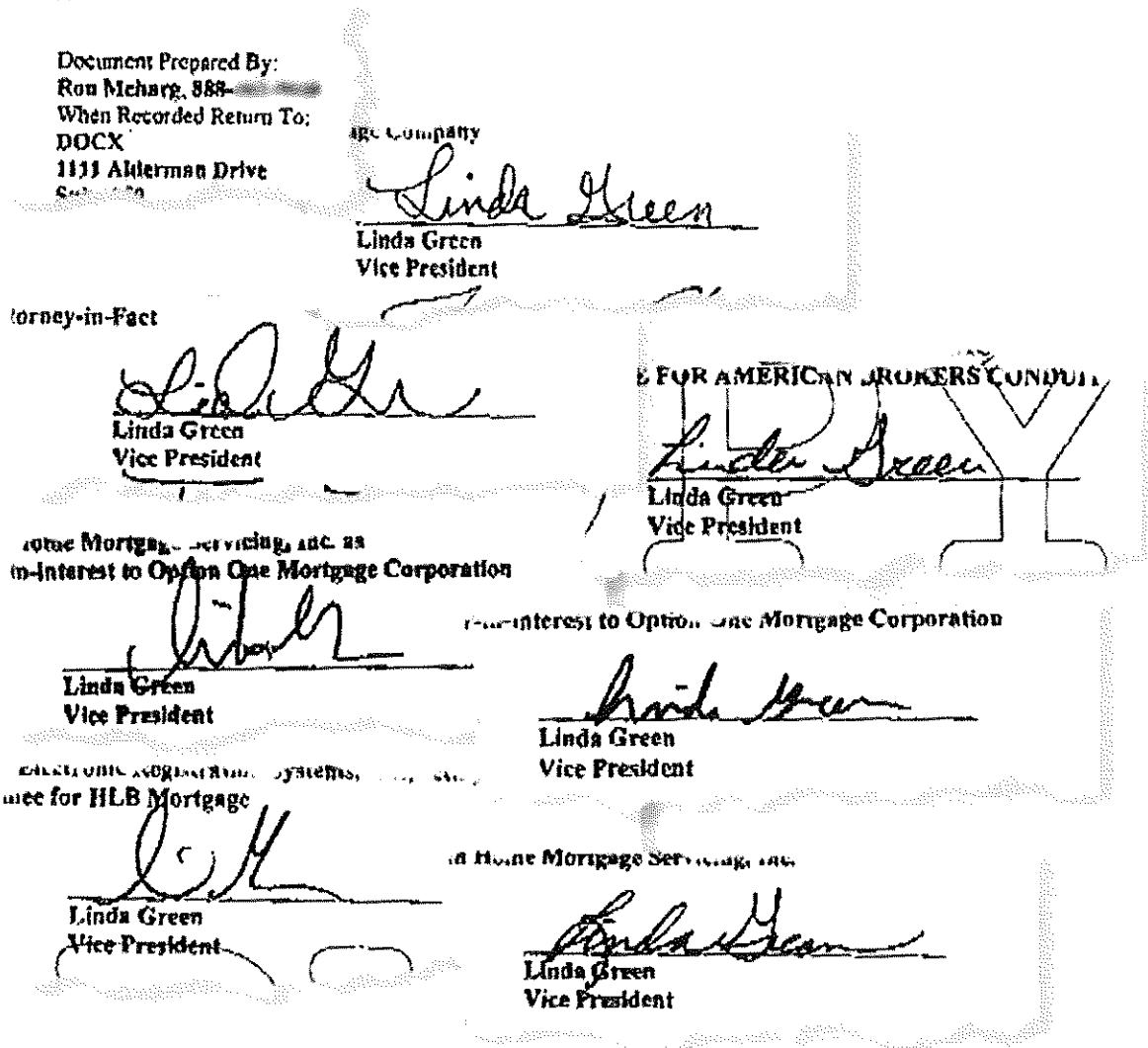
### **University of Houston**

Biology

## Linda Green's changing signature

In Georgia, an employee of a document processing company, Linda Green, for years claimed to be executives of Bank of America, Wells Fargo, U.S. Bank and dozens of other lenders while signing off on tens of thousands of foreclosure affidavits. In many cases, her signature appeared to be forged by different employees.

Green worked for a foreclosure document company owned by Lender Processing Services. The company is being investigated by a U.S. attorney in Florida for allegedly using improper documentation to speed foreclosures.



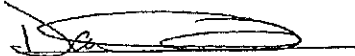
SOURCE: | The Washington Post - Sept. 23, 2010


COMPARE THESE SIGNATURES & TITLES ON MORTGAGE DOCUMENTS


LYNN E. SZYMONIAK, ESQ. (SZYMONIAK@MAC.COM)

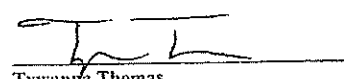
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 07/29/2009.

Mortgage Electronic Registration Systems, Inc. as nominee for American Home Mortgage Acceptance, Inc.

  
Witness: Dawn Williams

  
Linda Green  
Vice President

  
Witness: Christina Huang

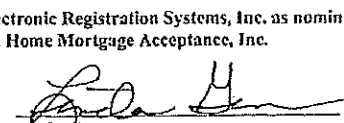
  
Tywana Thomas  
Asst. Secretary

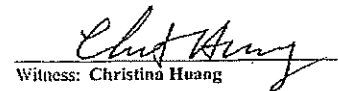
C. JONES

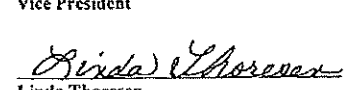
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 03/04/2009.

Mortgage Electronic Registration Systems, Inc. as nominee for American Home Mortgage Acceptance, Inc.

  
Witness: Korell Harp

  
Linda Green  
Vice President

  
Witness: Christina Huang

  
Linda Thoresen  
Asst. Secretary

S. BOWIE

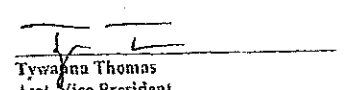
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 09/02/2009.

American Home Mortgage Acceptance, Inc.

  
Witness: Dawn Williams

  
Korell Harp  
Vice President

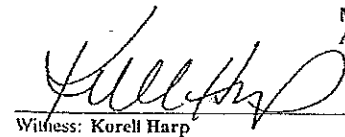
  
Witness: Christina Huang

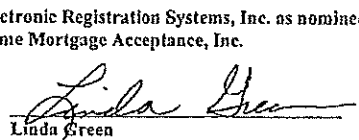
  
Tywana Thomas  
Asst. Vice President

J. MANTOYA

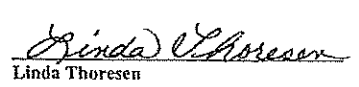
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 01/07/2009.

Mortgage Electronic Registration Systems, Inc. as nominee for American Home Mortgage Acceptance, Inc.

  
Witness: Korell Harp

  
Linda Green  
Vice President

  
Witness: Christina Huang

  
Linda Thoresen  
Asst. Secretary

J. CHEEK



COMPARE THESE SIGNATURES & TITLES ON MORTGAGE DOCUMENTS

LYNN E. SZYMONIAK, ESQ. (SZYMONIAK@MAC.COM)

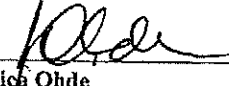
A. JABLON

062

AMPTON

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 05/07/2009.

MORTGAGE ELECTRONIC REGISTRATIONS SYSTEMS,  
INC. AS NOMINEE FOR CHEVY CHASE BANK FSB

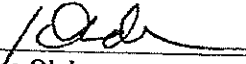
  
Jessica Ohde  
Vice President

Z. KROTKI

RTOWN

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 05/29/2009.

Bank of America, N.A.

  
Jessica Ohde  
Vice President

COMPARE THESE SIGNATURES & TITLES ON MORTGAGE DOCUMENTS

LYNN E. SZYMONIAK, ESQ. (SZYMONIAK@MAC.COM)

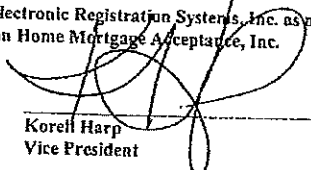
C. CATTAFI

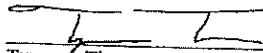
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 06/14/2009.

  
Witness: Dawn Williams

  
Witness: Christina Huang

Mortgage Electronic Registration Systems, Inc. as nominee for American Home Mortgage Acceptance, Inc.

  
Korell Harp  
Vice President

  
Tywana Thomas  
Asst. Secretary


S. CAMPOS

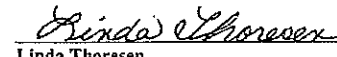
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 01/06/2009.

  
Witness: Korell Harp

  
Witness: Christina Huang

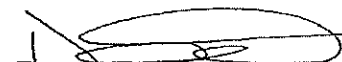
Mortgage Electronic Registration Systems, Inc. as nominee for American Home Mortgage Acceptance, Inc.

  
Linda Green  
Vice President

  
Linda Thoresen  
Asst. Secretary


S. DOOFAN

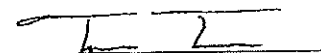
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 06/16/2009.

  
Witness: Dawn Williams

  
Witness: Christina Huang

Mortgage Electronic Registration Systems, Inc. as nominee for American Home Mortgage Acceptance, Inc.

  
Korell Harp  
Vice President

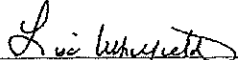
  
Tywana Thomas  
Asst. Secretary

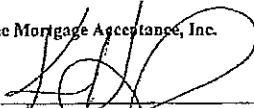
# COMPARE THESE SIGNATURES & TITLES ON MORTGAGE DOCUMENTS

LYNN E. SZYMONIAK, ESQ. (SZYMONIAK@MAC.COM)

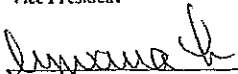
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 05/14/2009.

American Home Mortgage Acceptance, Inc.

  
Witness: Lisa Whitfield

  
Korell Harp  
Vice President

  
Witness: Christina Huang

  
Tywana Thomas  
Asst. Vice President

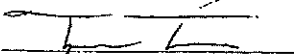
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 06/22/2009.

Mortgage Electronic Registration Systems, Inc. as nominee for American Home Mortgage Acceptance, Inc.

  
Witness: Dawn Williams

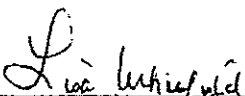
  
Korell Harp  
Vice President

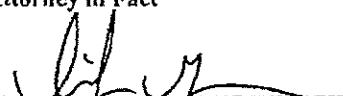
  
Witness: Christina Huang

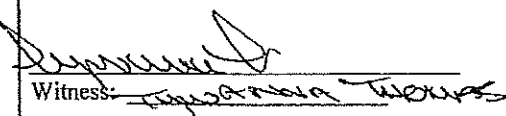
  
Tywana Thomas  
Asst. Secretary

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 05/06/2009.

Argent Mortgage Company, LLC by Citi Residential Lending, Inc., as Attorney in Fact

  
Witness: Lisa Whitfield

  
Linda Green  
Vice President & Asst Secretary

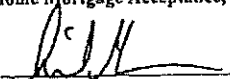
  
Witness: Tywana Thomas

  
Korell Harp  
Vice President & Asst Secretary

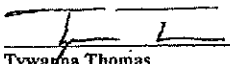
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 07/06/2009.

Mortgage Electronic Registration Systems, Inc. as nominee for American Home Mortgage Acceptance, Inc.

  
Witness: Dawn Williams

  
Linda Green  
Vice President

  
Witness: Christina Huang

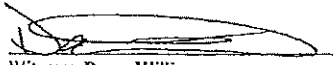
  
Tywana Thomas  
Asst. Secretary

COMPARE THESE SIGNATURES & TITLES ON MORTGAGE DOCUMENTS

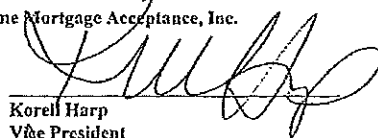
LYNN E. SZYMONIAK, ESQ. (SZYMONIAK@MAC.COM)

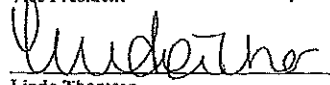
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 07/23/2009.

American Home Mortgage Acceptance, Inc.

  
Witness: Dawn Williams

  
Witness: Christina Huang

  
Korell Harp  
Vice President

  
Linda Thoresen  
Asst. Vice President

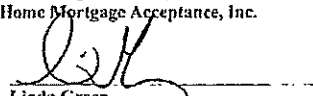
D. MANEIS

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 08/28/2009.

Mortgage Electronic Registration Systems, Inc. as nominee for American Home Mortgage Acceptance, Inc.

  
Witness: Dawn Williams

  
Witness: Christina Huang

  
Linda Green  
Vice President

  
Tywana Thomas  
Asst. Secretary

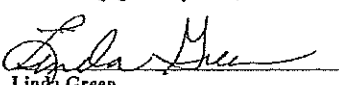
Y. LEE

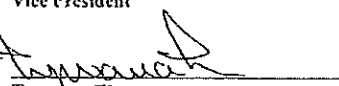
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 07/30/2009.

Mortgage Electronic Registration Systems, Inc. as nominee for American Home Mortgage Acceptance, Inc.

  
Witness: Dawn Williams

  
Witness: Christina Huang

  
Linda Green  
Vice President


  
Tywana Thomas  
Asst. Secretary

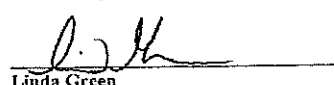
M. PERALTA

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 07/31/2009.

Mortgage Electronic Registration Systems, Inc. as nominee for American Home Mortgage Acceptance, Inc.

  
Witness: Dawn Williams

  
Witness: Christina Huang

  
Linda Green  
Vice President

  
Tywana Thomas  
Asst. Secretary

L. LOEBACH

COMPARE THESE SIGNATURES & TITLES ON MORTGAGE DOCUMENTS

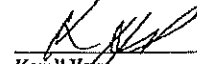
LYNN E. SZYMONIAK, ESQ. (SZYMONIAK@MAC.COM)

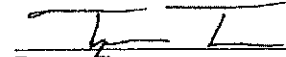
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 06/16/2009.

American Home Mortgage Acceptance, Inc.

  
Witness: Dawn Williams

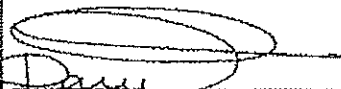
  
Witness: Christina Huang

  
Korell Harp  
Vice President

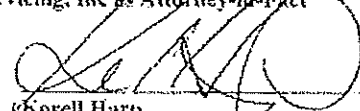
  
Tywana Thomas  
Asst. Vice President


A. MORALES

Deutsche Bank National Trust Company as Indenture Trustee for  
American Home Mortgage Investment Trust 2005-2  
Mortgage-Backed Notes, Series 2005-2 by American Home  
Mortgage Servicing, Inc. as Attorney-in-Fact

  
Witness: Dawn Williams

  
Witness: Christina Huang

  
Korell Harp  
Vice President

  
Tywana Thomas  
Asst. Vice President

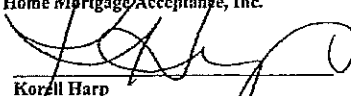
J. VARGAS  
6-18-09

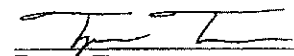
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 05/29/2009.

Mortgage Electronic Registration Systems, Inc. as nominee  
for American Home Mortgage Acceptance, Inc.

  
Witness: Dawn Williams

  
Witness: Christina Huang


  
Korell Harp  
Vice President

  
Tywana Thomas  
Asst. Secretary

G. HAFNER

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 05/26/2009.

USAA FEDERAL SAVINGS BANK

  
Korell Harp  
Authorized Signer

J. CALLAHAN

01060  
KANTON


COMPARE THESE SIGNATURES & TITLES ON MORTGAGE DOCUMENTS

LYNN E. SZYMONIAK, ESQ. (SZYMONIAK@MAC.COM)

LEIGH SMITH

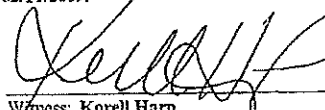
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 04/20/2009.

Bank of America, N.A.

  
Linda Green  
Vice President

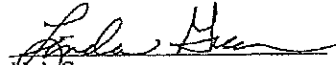
L. Batchelder

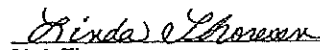
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 02/11/2009.

  
Witness: Korell Harp

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., acting solely as nominee for AMERICAN HOME MORTGAGE

  
Witness: Christina Huang

  
Linda Green  
Vice President

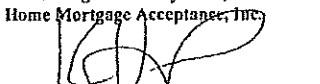
  
Linda Thoresen  
Asst. Secretary

J. Bartolotti

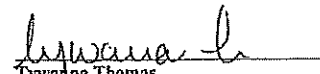
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 04/29/2009.

Mortgage Electronic Registration Systems, Inc. as nominee for American Home Mortgage Acceptance, Inc.

  
Witness: Dawn Williams

  
Korell Harp  
Vice President

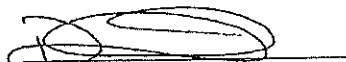
  
Witness: Christina Huang

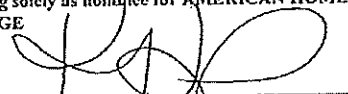
  
Tywana Thomas  
Asst. Secretary

Walters, L.

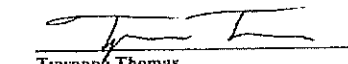
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 05/28/2009.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., acting solely as nominee for AMERICAN HOME MORTGAGE

  
Witness: Dawn Williams

  
Korell Harp  
Vice President

  
Witness: Christina Huang

  
Tywana Thomas  
Asst. Secretary

COMPARE THESE SIGNATURES & TITLES ON MORTGAGE DOCUMENTS

LYNN E. SZYMONIAK, ESQ. (SZYMONIAK@MAC.COM)

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 10/15/2008.

Mortgage Electronic Registration Systems, Inc. as nominee for American Home Mortgage Acceptance, Inc.

Witness: Korell Harp

Linda Green  
Vice President

Witness: Christina Huang

Jessica Ohde  
Asst. Secretary

B. TAYLOR

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 04/09/2009.

Bank of America, N.A.

Linda Green  
Vice President

K. CHAN

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 04/29/2009.

Mortgage Electronic Registration Systems, Inc. as nominee for American Home Mortgage Acceptance, Inc.

Witness: Dawn Williams

Korell Harp  
Vice President

Witness: Christina Huang

Tywanha Thomas  
Asst. Secretary

H. BENAVIDES

Party Address: 22 ARBORCREST T  
MATTAPAN, MA 02

B. TESTA

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 04/22/2009.

American Home Mortgage Servicing, Inc. as successor-in-interest to Option One Mortgage Corporation

Witness: Dawn Williams

Korell Harp  
Vice President

Witness: Christina Huang

Tywanha Thomas  
Asst. Vice President

COMPARE THESE SIGNATURES & TITLES ON MORTGAGE DOCUMENTS

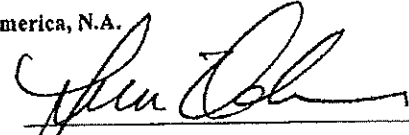
LYNN E. SZYMONIAK, ESQ. (SZYMONIAK@MAC.COM)

W. LUTHERN

DWN

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 03/10/2009.

Bank of America, N.A.


  
Jessica Ohde  
Vice President

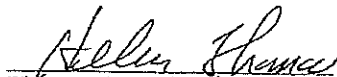
M. MENDEZ


IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 08/11/2008.

Mortgage Electronic Registration Systems, Inc. as nominee for American Home Mortgage Acceptance, Inc.

  
Witness: - Korell Harp

  
Linda Green  
Vice President

  
Witness: - HELEN THOMAS

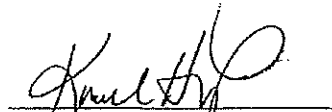
  
Jessica Ohde  
Asst. Secretary

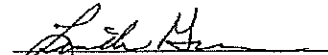
State of GA  
County of Fulton


R. POWERS

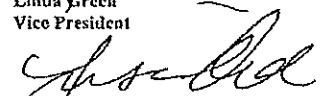
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 09/30/2008.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.  
AS NOMINEE FOR AMERICAN BROKERS CONDUIT

  
Witness: Korell Harp

  
Linda Green  
Vice President

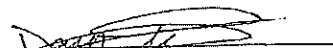
  
Witness: Christina Huang

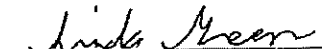
  
Jessica Ohde  
Asst. Secretary

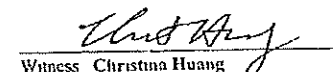
G. MACK

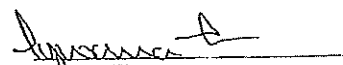
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 03/28/2009

Mortgage Electronic Registration Systems, Inc. as nominee for American Home Mortgage Acceptance, Inc.

  
Witness Dawn Williams

  
Linda Green  
Vice President

  
Witness Christina Huang

  
Tyannna Thomas  
Asst. Secretary



COMPARE THESE SIGNATURES & TITLES ON MORTGAGE DOCUMENTS


LYNN E. SZYMONIAK, ESQ. (SZYMONIAK@MAC.COM)

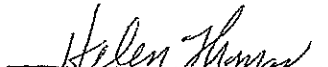
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 08/13/2008.

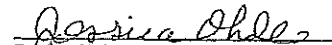
Mortgage Electronic Registration Systems, Inc. as nominee for American Home Mortgage Acceptance, Inc.

M. FORTI

  
Witness: Korell Harp

  
Linda Green  
Vice President

  
Witness: Helen Thomas

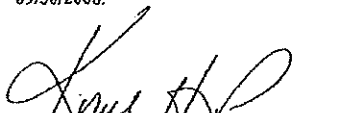
  
Jessica Ohde  
Asst. Secretary


State of GA  
County of Fulton

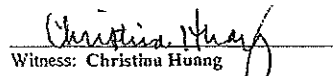
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 09/30/2008.

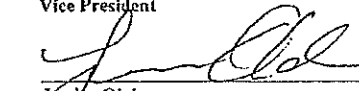
Mortgage Electronic Registration Systems, Inc. as nominee for American Home Mortgage Acceptance, Inc.

N. MADERO

  
Witness: Korell Harp

  
Linda Green  
Vice President

  
Witness: Christina Huang


  
Jessica Ohde  
Asst. Secretary

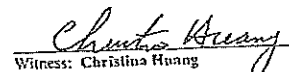
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 10/17/2008.

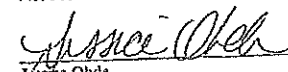
American Home Mortgage Servicing, Inc. as successor-in-interest to Option One Mortgage Corporation

SZYMONIAK

  
Witness: Korell Harp

  
Linda Green  
Vice President

  
Witness: Christina Huang

  
Jessica Ohde  
Asst. Vice President

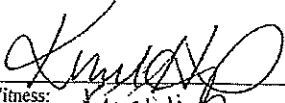
COMPARE THESE SIGNATURES & TITLES ON MORTGAGE DOCUMENTS

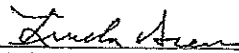
LYNN E. SZYMONIAK, ESQ. (SZYMONIAK@MAC.COM)

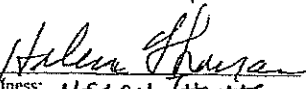
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 08/11/2008.

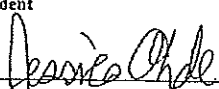
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., acting solely as nominee for AMERICAN HOME MORTGAGE

L. WEBER

  
Witness: - Korell Harp

  
Linda Green  
Vice President

  
Witness: HELEN THOMAS


  
Jessica Ohde  
Asst. Secretary

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 09/25/2008.


Mortgage Electronic Registration Systems, Inc. as nominee for American Home Mortgage Acceptance, Inc.

J. TOKAY

  
Witness: Korell Harp

  
Linda Green  
Vice President

  
Witness: Christina Huang

  
Jessica Ohde  
Asst. Secretary

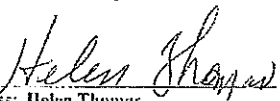
IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 08/14/2008.

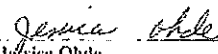
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., acting solely as nominee for AMERICAN HOME MORTGAGE

J. Beckhauser

  
Witness: Korell Harp

  
Linda Green  
Vice President

  
Witness: Helen Thomas

  
Jessica Ohde  
Asst. Secretary

COMPARE THESE SIGNATURES & TITLES ON MORTGAGE DOCUMENTS

LYNN E. SZYMONIAK, ESQ. (SZYMONIAK@MAC.COM)

L. BUREOS

CHELSEA, MA 02150

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 07/20/2009.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., acting solely as nominee for AMERICAN HOME MORTGAGE

Witness: Dawn Williams

Witness: Christina Huang

Korel Harp  
Vice President

Tywanua Thomas  
Asst. Secretary

M. MARTORELLA

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 07/06/2009.

Mortgage Electronic Registration Systems, Inc. as nominee for American Home Mortgage Acceptance, Inc.

Witness: Dawn Williams

Witness: Christina Huang

Linda Green  
Vice President

Tywanua Thomas  
Asst. Secretary

N. BAPTISTA

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 07/06/2009.

Sand Canyon Corporation f/k/a Option One Mortgage Corporation

Witness: Dawn Williams

Witness: Christina Huang

Linda Green  
Vice President

Tywanua Thomas  
Asst. Vice President

# THE SIGNERS OF DAKOTA COUNTY, MINNESOTA

MATCH THE SIGNATURE WITH:

THE EMPLOYEE OF  
LENDER PROCESSING SERVICES

1.

Attest:

2.

3.

4.

WITNESS my hand and official seal this day 15 of Jan.

Notary Public:

My commission expires:

5.

6.

7.

\*NOTARY PUBLIC

8.

By:

USE BANK  
instrument, &  
JN to do so.

9.

10.

(Signature: Witness #1 SIGNED BY  
THE SAME AS WITNESS #1 ABOVE)

ARY PUBLIC

11.

12.

NOTARY PUBLIC

A. LIQUENDA ALLOTEY

B. MATTHEW BANASZEWSKI

C. MARK BISCHOFF

D. JAMES CHUA

E. LAURA HESCOTT

F. MATTHEW HOLMES

G. BETHANY HOOD

H. TOPAKO LOVE

I. SHOUA MOUA

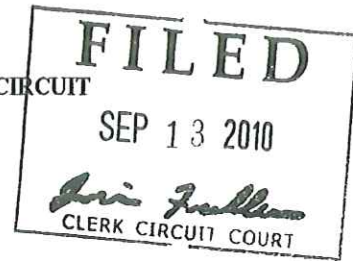
J. CHRISTINA SAUERER

K. PANG VANG

L. RICK WILKEN

ANSWER KEY: 1H; 2A; 3G; 4B; 5F; 6C; 7J; 8L; 9D; 10K; 11E; 12I

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



THE BANK OF NEW YORK MELLON TRUST  
COMPANY, NATIONAL ASSOCIATION FKA  
THE BANK OF NEW YORK TRUST  
COMPANY, N.A. AS SUCCESSOR TO  
JPMORGAN CHASE BANK N.A. AS TRUSTEE,  
Plaintiff,

CASE NO.: 16-2009-CA-018563  
DIVISION: CV-D

vs.  
HYACINTH H HUGHES , et al,

Defendant(s).  
\_\_\_\_\_ /

NOTICE

Pursuant to Rule 4-3.3, Rules of Professional Conduct of the Rules Regulating The Florida Bar, the undersigned law firm hereby notifies the Court as follows:

1. An affidavit of indebtedness was served in the above-styled matter in support of Plaintiff's motion for summary judgment, ("the Affidavit").
2. The undersigned law firm has recently been notified that the information in the Affidavit may not have been properly verified by the affiant; and accordingly, the Affidavit is hereby withdrawn.
3. The undersigned law firm was not aware of the foregoing information when the Affidavit was filed with the Court.
4. The undersigned law firm drafted the Affidavit based upon the information and business records provided by its client, and to the best of its knowledge and information, believes, in good faith, that the amounts reflecting the indebtedness contained therein accurately reflected the information provided by its client and were believed to be correct when filed.
5. A new, properly verified affidavit will be filed when and as appropriate.

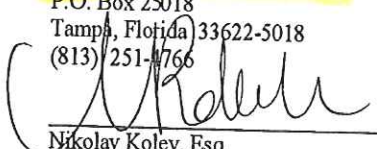


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all parties listed on the attached service list on this 9th day of September, 2010.

Respectfully submitted,

Florida Default Law Group, P.L.  
P.O. Box 25018  
Tampa, Florida 33622-5018  
(813) 251-4766

  
Nikolay Kolev, Esq.

Florida Bar No. 0028005

✓ Andrea Pidala, Esq.

Florida Bar No. 0022848

Colleen E. Lehmann, Esq.

Florida Bar No. 0033496

Attorneys' for Plaintiff

F09108504

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

HSBC BANK USA AS TRUSTEE FOR DALT  
2007-0A5,

Plaintiff,

vs.

CANDACE ANN TAMPOSI A/K/A CANDACE A. TAMPOSI, et al,

CASE NO.: 50-2009-CA-001974

DIVISION: AW

Defendant(s).  
\_\_\_\_\_ /

NOTICE

Pursuant to Rule 4-3.3, Rules of Professional Conduct of the Rules Regulating The Florida Bar, the undersigned law firm hereby notifies the Court as follows:

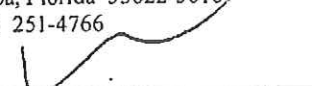
1. An affidavit of indebtedness was served in the above-styled matter in support of Plaintiff's motion for summary judgment, ("the Affidavit").
2. The undersigned law firm has recently been notified that the information in the Affidavit may not have been properly verified by the affiant; and accordingly, the Affidavit is hereby withdrawn.
3. The undersigned law firm was not aware of the foregoing information when the Affidavit was filed with the Court.
4. The undersigned law firm drafted the Affidavit based upon the information and business records provided by its client, and to the best of its knowledge and information, believes, in good faith, that the amounts reflecting the indebtedness contained therein accurately reflected the information provided by its client and were believed to be correct when filed.
5. A new, properly verified affidavit will be filed when and as appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all parties listed on the attached service list on this 10 day of September, 2010.

Respectfully submitted,

Florida Default Law Group, P.L.  
P.O. Box 25018  
Tampa, Florida 33622-5018  
(813) 251-4766

  
Nikolay Kolev, Esq.  
Florida Bar No. 0028005  
Andrea Pidala, Esq.  
Florida Bar No. 0022848  
Colleen E. Lehmann, Esq.  
Florida Bar No. 0033496  
Attorneys' for Plaintiff

F09002949





**Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender also may require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

*Paul Verity*  
PAUL VERITY

(Seal)  
-Borrower

(Seal)  
-Borrower

(Seal)  
-Borrower

(Seal)  
-Borrower

(Seal)  
-Borrower

(Seal)  
-Borrower

(Seal)  
-Borrower

(Seal)  
-Borrower

(Sign Original Only)

I HAVE NEVER SEEN ONE OF THESE: AN ENDORSEMENT VIA ALLONGE.



PAY TO THE ORDER OF:  
**EMAX FINANCIAL GROUP, LLC**  
WITHOUT RECOURSE  
By: MORTGAGE LENDERS NETWORK USA, INC.  
*Richard L. Carr*  
RICHARD L. CARR  
REGIONAL COMPLIANCE SPECIALIST

**ALLONGE TO PROMISSORY NOTE**

**FOR PURPOSES OF FURTHER ENDORSEMENT OF THE FOLLOWING DESCRIBED NOTE, THIS  
ALLONGE IS AFFIXED AND BECOMES A PERMANENT PART OF SAID NOTE**

**POOL:**

**0**

**LOAN ID: 9931780**



**NOTE DATE: 07/28/2005**

**LOAN AMOUNT:**

**\$370,000.00**

**BORROWER NAME: PAUL VERITY**

**PROPERTY ADDRESS: 139 LINCOLN STREET, MONTCLAIR, NJ 07042**

**WITHOUT RECOURSE**

**PAY TO THE ORDER OF**

**RESIDENTIAL FUNDING CORPORATION**

**EMAX FINANCIAL GROUP, LLC**

**By:**

**Name: John Hagebock**

**Title: Vice President**

**Residential Funding Corporation as Attorney in Fact for;**

**EMAX FINANCIAL GROUP, LLC**

**PAY TO THE ORDER OF  
U.S. Bank National Association as Trustee  
WITHOUT RECOURSE  
Residential Funding Corporation**

**By: Judy Faber,  
Judy Faber, Vice President**



Bk: 23371 Pg: 60 Page: 1 of 5  
Recorded: 09/14/2009 10:04 AM

93254  
Received & Recorded  
PLYMOUTH COUNTY  
REGISTRY OF DEEDS  
18 NOV 2008 02:31PM  
JOHN R. BUCKLEY, JR.  
REGISTER  
Bk: 36539 Pg: 254-255

### LIMITED POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENT, that JPMorgan Chase Bank, National Association ("JPMorgan Chase"), successor in interest to the loans and mortgage notes formerly serviced by Washington Mutual Bank, by and through its officers hereby constitutes and appoints LPS Default Solutions, Inc. ("LPS") its true and lawful Attorney-in-Fact, in its name, place and stead and for its benefit, with full power of substitution in connection with mortgage loans or mortgage notes serviced by JPMorgan Chase on its own behalf or those serviced for others that are referred by JPMorgan Chase to LPS to provide administrative default support services.

LPS shall discharge its duties and exercise the authority granted under this Limited Power of Attorney by and through the following employees of LPS:

Bill Newland	1 <sup>st</sup> Vice President	Christina Allen	Manager
Chris Hymer	1 <sup>st</sup> Vice President	Eric Tate	Manager
Greg Lyons	Vice President	Jeanette Gray	Manager
Matthew Rogina	Vice President	Jodi Sobotta	Manager
Scott Walter	Vice President	Laura Hescott	Manager
Amy Weis	Assistant Vice President	Liquenda Allotey	Manager
Christine Anderson	Assistant Vice President	Mathew Casey	Manager
Chrys Houston	Assistant Vice President	Reginald Lynch	Manager
Dory Goebel	Assistant Vice President	Rick Wilken	Manager
John Cody	Assistant Vice President		

JPMorgan Chase hereby grants to LPS the authority to act in any manner necessary and proper to exercise the powers enumerated in the paragraph below and in accordance with that certain Default Services Agreement, as it may be amended or extended from time to time (the "Agreement") between Washington Mutual Bank and LPS (and its predecessor FNFS), pursuant to which LPS is providing certain foreclosure, bankruptcy and other mortgage loan related administrative support services to JPMorgan Chase in furtherance of its servicing obligations.

LPS is permitted to sign authorized documents for the following enumerated transactions on behalf of JPMorgan Chase as Attorney-in-Fact as fully as JPMorgan Chase might or could do in its servicing capacity with respect to any of the mortgage loans and mortgage notes secured thereby and nothing herein or in the Agreement shall be construed to the contrary: (a) applications for order of foreclosure; (b) assignments of mortgages or deeds of trust; (c) substitutions of trustee in deeds of trust, deeds to secure the debt, or co-ops and other forms of security instruments in accordance with state law; (d) assignments and transfers of lien; (e) foreclosure deeds; and (f) such other documents as may be necessary and proper to carry out the powers granted herein or to provide foreclosure and other related default services as requested by JPMorgan Chase.

This appointment is to be construed and interpreted as a limited power of attorney. The enumeration of specific items, rights, acts or powers herein is not intended to, nor does it give rise to, and it is not to be construed as, a general power of attorney.

Page 1 of 2

Doc # 0003284 Jul 2, 2009 3:02 PM  
Cook County Registry of Deeds  
Carole A. Lamirande, Registrar

ARMSTRONG LAW OFFICES, P.C.  
800 CALIFORNIA ST.  
SUITE 100  
SAN FRANCISCO, CA 94104

BK1280PG0572

If LPS stopped signing documents in 2008, then this POA from JP Morgan Chase filed on November 18, 2008 does not make much sense to me.

Nothing contained herein shall (a) limit in any manner any indemnification provided by LPS under the Agreement, or (b) be construed to grant LPS the power to initiate or defend any suit, litigation or proceeding in the name of JPMorgan Chase except as specifically provided. If LPS receives any notice of suit, litigation or proceeding in the name of JPMorgan Chase, beneficiary, mortgagee or investor in connection with one of the mortgage loans or mortgage notes serviced by JPMorgan Chase, then LPS shall promptly forward a copy of same to JPMorgan Chase.

This limited power of attorney is not intended to extend the powers granted to LPS under the Agreement or to allow LPS to take any action with respect to the mortgage loans or mortgage notes not authorized by the Agreement.

This Limited Power of Attorney shall be effective October 22, 2008, and shall continue until the earliest of: (a) the date of its revocation by JPMorgan Chase; or (b) May 31, 2012.

IN WITNESS WHEREOF, JPMorgan Chase Bank, National Association, has caused this Limited Power of Attorney to be signed and acknowledged in its name and on its behalf by an authorized officer this 22 day of October, 2008.

JPMorgan Chase Bank, National Association

By: James Miller  
James Miller  
Its: Senior Vice President

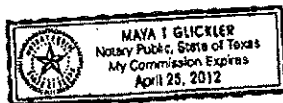
#### NOTARY ACKNOWLEDGMENT

STATE OF Tx )  
 ) ss.  
COUNTY OF Dallas )

I certify that I know or have satisfactory evidence that James Miller is the person who appeared before me, and said person acknowledged that s/he signed this instrument, on oath stated that s/he was authorized to execute the instrument and acknowledged it in his/her capacity as Senior Vice President of JPMorgan Chase Bank, National Association to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated: October 22, 2008

M. J. Glickler  
Notary Public, State of Texas  
My appointment expires: 04/20/12



The foregoing is a true copy from the  
Plymouth County Registry of Deeds.  
Book 36539 Page 254  
Attest: John R. Buckley Jr.  
Register

Page 2 of 2

BK 1280PG0573

## JPMORGAN CHASE BANK, NATIONAL ASSOCIATION

## INCUMBENCY CERTIFICATE

I HEREBY CERTIFY that I am an Assistant Secretary of JPMorgan Chase Bank, N.A. and that the following individual, holding the title set forth opposite his/her name, is a duly elected officer of JPMorgan Chase Bank, N.A. and is authorized to sign deeds, endorsement, assignments, leases, affidavits, modification and assumption agreements, substitutions of trustee, documents relating to foreclosures and bankruptcies, contracts and any other instruments that are appropriate in the ordinary course of servicing loans including but not limited to, instruments to convey, sell, assign, encumber, lease, release, discharge, disclaim or otherwise transfer any interest in real or personal property ownership by the Company or in which the Company has a security or other interest.

## Name:

## Title to which appointed:

Karime Arias	Vice President
Colleen Irby	Vice President
Deborah Brignac	Vice President
Huey-Jen Chiu	Vice President
Hana Konupek,	Vice President
Shalonda Anderson	Vice President
Barbara Batten	Vice President
Sharon Beatty	Vice President
Blake Beltz	Vice President
Jennifer Benton	Vice President
Rodger Berry	Vice President
Elizabeth Boutton	Vice President
Tracey Brown	Vice President
Olene Michelle Buckelew	Vice President
Robyn Carbonell	Vice President
Jonathan Courson	Vice President
Margaret Dalton	Vice President
Joanne Dyson	Vice President
Jimmie Edwards	Vice President
Michael Fisher	Vice President
Helen Ann Garbis	Vice President
Tracy Graves	Vice President
Barbara Hindman	Vice President
Brenda Huyck	Vice President
Alexander Mack	Vice President
Erin McCarthy	Vice President
Elnara McDowell	Vice President
Angie Mena	Vice President
Patricia Miner	Vice President
Brian Oloole	Vice President
Greg Prelog	Vice President
Lois Ruffalo	Vice President
Stephanie Roberts	Vice President
Roderick Rocky Soda	Vice President
Guy Terrill	Vice President
Shelley Thievin	Vice President
Janine Timmons	Vice President
Michelle Waczkowski	Vice President



Bk: 44504 Pg: 319 Doc: VOTE  
Page: 1 of 2 02/06/2009 09:23 AM

Attested hereto  
*Francis M. Roache*  
Francis M. Roache  
Register of Deeds



Bk: 62242 Pg: 252 Doc: VOTE  
Page: 1 of 2 02/17/2009 11:31 AM

COMMONWEALTH OF MASSACHUSETTS  
MIDDLESEX S.S. FEB 18 2009  
SOUTH DIST REGISTRY OF DEEDS  
CAMBRIDGE, MA  
I HEREBY CERTIFY THE FOREGOING  
IS A TRUE COPY OF A PAPER  
RECORDED IN BOOK 50242

PAGE 252

*Eugene C. Burns*  
REGISTER

Harmon Law Offices, P.C.  
HARMON LAW OFFICES, P.C.  
P.O. BOX 810288  
NEWTON HIGHLANDS, MA 02461-0288

BK1280PG0574

Lauren V. Harris  
Lauren V. Harris, Assistant Secretary

Dated: January 26, 2009

STATE OF New Jersey  
COUNTY OF Middlesex

On this 26<sup>th</sup> day of January, 2009, before me the undersigned notary public, personally appeared Lauren V. Harris, Assistant Secretary of JPMorgan Chase Bank, N.A., who proved to me through satisfactory evidence of identification, which was to be the person whose name is signed on this document, and acknowledged to me that she signed it voluntarily for its stated purpose, and signed this document as her free act and deed, and the free act and deed of JPMorgan Chase Bank, N.A., in her capacity as Senior Vice President.

G. Hauer  
Notary Public  
My Commission Expires FEB 03 2011

SUFFOLK REGISTRY  
OF DEEDS

FEB 06 2009

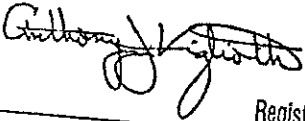
THIS IS A TRUE COPY OF AN INSTRUMENT  
RECORDED IN THE SUFFOLK COUNTY  
REGISTRY OF DEEDS AT THE BOOK AND  
PAGE ON THE FIRST PAGE HEREOF.

ATTEST:

Francis M. Roache  
FRANCIS M. ROACHE  
REGISTER OF DEEDS

BK 1280 PG 0575

ATTEST: WORC. Anthony J. Vigliotti, Register

WORCESTER, SS.  
A true copy of record of  
WORCESTER DISTRICT REGISTRY OF DEEDS  
Book 43825 Pages 222-225  
Attest:  
  
Register

BK 1280PG0576

Recording Requested By:  
Title Court Service

Recording requested by:

When recorded mail to:

One West Bank FSB  
6900 Beatrice Drive  
Kalamazoo, MI 49009



PLACER, County Recorder  
JIM MCCAULEY

DOC- 2009-0055104-00

Acct 100-TITLE COURT SERVICE, INC

Thursday, JUN 25, 2009 09:16:22

MIC \$3.00:AUT \$2.00:SBS \$1.00

ERD \$1.00:RED \$1.00:REC \$4.00

Ttl Pd \$12.00

Rept # 0001938052

sod/SD/1-2



Space above this line for recorders use

TS # CA-09-280982-TC  
MERS MIN No.:  
100024200016807758

Order # 090337261-CA-DCO

Loan # 3002797193  
Investor No. 1704579691

### Assignment of Deed of Trust

For value received, the undersigned corporation hereby grants, assigns, and transfers to

**OneWest Bank FSB**

all beneficial interest under that certain Deed of Trust dated 3/27/2007 executed by **KYLE H. CROOKE , A MARRIED MAN AS HIS SOLE AND SEPARATE PROPERTY**, as Trustor(s) to **STEWART TITLE**, as Trustee and recorded as Instrument No. 2007-0035540-00, on 4/9/2007, in Book xxx, Page xxx of Official Records, in the office of the County Recorder of **PLACER** County, **CA** together with the Promissory Note secured by said Deed of Trust and also all rights accrued or to accrue under said Deed of Trust.

Page 1 of 2

TWO ASSIGNMENTS ON THE SAME PROPERTY



Effective Date: 5/8/2009 1:06 PM

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,  
INC., AS NOMINEE FOR AMERICAN BROKERS  
CONDUIT

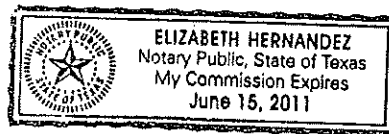
By: Dennis Kirkpatrick  
Vice President

State of Texas  
County of Williamson

On 6/17/09 before me, Elizabeth Hernandez a notary public,  
personally appeared Dennis Kirkpatrick, who proved to me on the basis of  
satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and  
acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that  
by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the  
person(s) acted, executed the instrument. I certify under PENALTY OF PERJURY under the laws of the  
State of Texas that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Elizabeth Hernandez (Seal)





PLACER County Recorder  
JIM MCCAULEY

**DOC- 2010-0025059-00**

Check Number 2767jc

Monday, APR 05, 2010 11:24:28

MIC \$3.00:AUT \$4.00:SBS \$3.00

ERD \$1.00:RED \$1.00:REC \$6.00

Ttl Pd \$18.00

Rcpt # 0002038879

jlc/JC/1-4

**RECORDING REQUESTED BY:**

Prepared by and after Recording Return )

to: )

Name: ELIZABETH HUNTER )

PITTS )

Firm/Comp PROMMIS SOLUTIONS, )

any: LLC )

Address: ATTN: ASSIGNMENTS )

Address 2: 1544 OLD ALABAMA )

ROAD )

City, State, ROSWELL, GA 30076 )

Zip: )

Phone: (800) 275-7171 )

-----Above This Line Reserved For Official Use Only-----

Assessor's Property Tax Parcel/Account

Number: 327-350-024-000

CHL#: 873335882

**ASSIGNMENT OF DEED OF TRUST**

**Name and Address of Assignor:**

Mortgage Electronic Registration  
Systems, Inc., solely as nominee for  
American Brokers Conduit whose address  
is 3300 SW 34th Avenue, Suite 101,  
Ocala, FL 34474

**Name and Address of Assignee:**

BAC Home Loans Servicing, L.P. fka  
Countrywide Home Loans Servicing,  
L.P. whose address is 7105 Corporate  
Drive, Mail Stop PTX-C-35, Plano, TX  
75024

FOR VALUE RECEIVED, the receipt and sufficiency of which is hereby acknowledged, the undersigned, Mortgage Electronic Registration Systems, Inc., solely as nominee for American Brokers Conduit, "Assignor", whose address is above, does hereby grant, sell, assign, transfer and convey to BAC Home Loans Servicing, L.P. fka Countrywide Home Loans Servicing, L.P., "Assignee," whose address is above, all interest of the undersigned Assignor in and to the following described deed of trust:

**Date of Mortgage:**

March 27, 2007

**Maturity**

April 1, 2022

**Date:**

Executed by Kyle H. Crooke  
(Mortgagor(s)):

Original Trustee: A Married Man As His Sole and Separate Property  
Stewart Title

To and in favor of Mortgage Electronic Registration Systems, Inc., solely as  
(Mortgagee): nominee for American Brokers Conduit

Filed of Record: In , Page ,  
Book

Document/Inst. 2007-0035541-00 , in the Office of the Registry of deeds  
No.

of Placer County, California, on April 9, 2007

Property: 304 Lambeth Court, Lincoln, California 95648  
(As described in Legal Description attached hereto as Exhibit A.)

Given: to secure a certain Promissory Note in the \$ 74,000.00  
amount of  
payable to Mortgagee.

Together with the note(s) and obligations therein described or referred to, the  
money due and to become due thereon, with interest, and all rights accrued or to accrue  
under said Deed of Trust.

TO HAVE AND TO HOLD the same unto Assignee and unto its successors and  
assigns forever, subject only to the terms and conditions of the above-described  
Mortgage.

Assignor is the present holder of the above-described Deed of Trust.

IN WITNESS WHEREOF, this assignment was executed by the undersigned  
Assignor on this the 14 day of January, 2010.

MIN: 100024200016810729

MERS PHONE: 1-888-679-6377

Mortgage Electronic Registration Systems, Inc.,  
solely as nominee for American Brokers  
Conduit

BY NAME:  
TITLE:

  
Nichole Clavados  
Certifying Officer

State of California

County of Ventura

On Jan. 14, 2010 before me,  
Jean L. Viraldo, Notary Public personally appeared  
Nichole Clavadetscher, who

proved to me on the basis of satisfactory evidence to be the person(s) whose name(s)  
is/are subscribed to the within instrument and acknowledged to me that he/she/they  
executed the same in his/her/their authorized capacity(ies), and that by his/her/their  
signature(s) on the instrument the person(s), or the entity upon behalf of which the  
person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that  
the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature

Jean L. Viraldo

(Seal)

(Crooke)

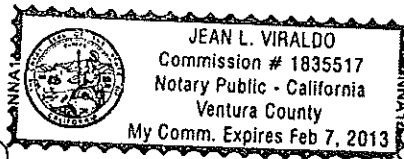


Exhibit A

LOT 65, AS SHOWN ON THE OFFICIAL MAP OF "LINCOLN CROSSING, VILLAGE 6C", FILED IN THE OFFICE OF THE RECORDER OF PLACER COUNTY, CALIFORNIA, ON OCTOBER 20, 2005 IN BOOK AA OF MAPS, AT PAGE 63.

4

RECORDED AT REQUEST OF  
AND MAIL TO

*Brown & Associates*  
*10592-A Fuqua*  
*PMB 426*  
*Houston, TX 77089*

Recorded In Official Records, County of San Bernardino



**LARRY WALKER**  
Auditor/Controller - Recorder

C Priority Mail

6/05/2008  
4:14 PM  
LM

Doc#: 2008-0257487



Titles: 1 Pages: 1

Fees	14.00
Taxes	0.00
Other	0.00
PAID	\$14.00

## ASSIGNMENT OF DEED OF TRUST

Lenders Loan Number: 19365204  
MIN :100024600193652044

MERS Phone: 1-888-679-6377

FOR VALUE RECEIVED, NEW CENTURY MORTGAGE CORPORATION, its successors and assigns, hereby assigns and transfers to MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC., its successors and assigns, PO Box 2026, Flint, MI 48501-2026, all it right, title and interest in and to a certain Deed of Trust executed by **PHILLIP L. BENNETT AND BETTE M. BENNETT, HUSBAND AND WIFE AS JOINT TENANTS**, to **HOME123 CORPORATION** and bearing the date of 4/11/2006 in the original amount of \$336000 and filed in the office of the Recorder of **SAN BERNARDINO** County, State of CA in Document Number **2006-0268836**.

Signed on the 17th day of April, 2008.

NEW CENTURY MORTGAGE CORPORATION  
BY ITS ATTORNEY IN FACT, BROWN & ASSOCIATES  
(AND DESIGNEE OF FEDERAL NATIONAL MORTGAGE  
ASSOCIATION BY JOSEPH GRIMES)

  
Signor: Lori A. Lowe

Signor Title: Assistant Secretary

STATE OF TEXAS §

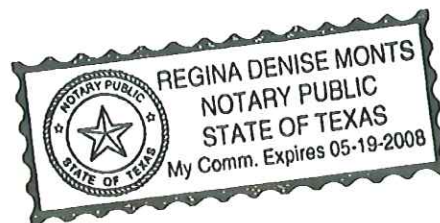
COUNTY OF HARRIS §

On the 17<sup>th</sup> day of April, 2008, before me, a Notary Public, personally appeared Lori A. Lowe, to me known, whom being duly sworn, did say that she is the Assistant Secretary of Brown & Associates, and that said instrument was signed on behalf of said corporation.

  
Notary Public

RETURN TO:  
Brown & Associates  
10592-A Fuqua, PMB 426  
Houston, TX 77089

Prepared By:  
Brown & Associates  
10592-a Fuqua PMB 426  
Houston, TX 77089



*Four Assignments on the  
same property*

**LARRY WALKER**  
Auditor/Controller - Recorder

893 LPS Default Title &amp; Closing

[RECORDING REQUESTED BY  
Fidelity National Title Insurance Company  
c/o Trustee Corps

AND WHEN RECORDED MAIL TO:]

Litton Loan Servicing, LP  
4828 Loop Central Drive  
Houston, TX 77081-2226

Doc #: 2009-0472732



Titles: 1 Pages: 2

Fees	15.00
Taxes	.00
Other	.00
PAID	15.00

[Space above this line for recorder's use only]

Trustee Sale No. CA0529791 Loan No. 19365204 Title Order No. 080160741

## ASSIGNMENT OF DEED OF TRUST

FOR VALUE RECEIVED, the undersigned hereby grants, assigns and transfers to **LITTON LOAN SERVICING, L.P.**, all beneficial interest under that certain Deed of Trust dated **04/11/2006**, executed by **PHILLIP L BENNETT AND BETTE M BENNETT, HUSBAND AND WIFE AS JOINT TENANTS**, as Trustor; to **FINANCIAL TITLE COMPANY**, as Trustee; and **Recorded on 04/20/2006 as Document No. 2006-0268836** of official records in the Office of the County Recorder of **San Bernardino** County, **California**, real property described as follows:

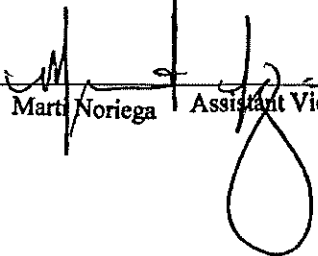
**PARCELS 1 AND 3 OF PARCEL MAP 5441, IN THE CITY OF RANCHO, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, AS PER PLAT RECORDED IN BOOK 62 OF PARCEL MAPS, PAGES 21 AND 22, RECORDS OF SAID COUNTY.**

TOGETHER with the note or notes therein described and secured thereby, the money due and to become due thereon, with interest, and all rights accrued or to accrue under said Deed of Trust including the right to have reconveyed, in whole or in part, the real property described therein.

Dated: 1/24/09

Beneficiary:

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

By:  Assistant Vice President

Trustee Sale No. CA0529791  
Loan No. 19365204  
Title Order No. 080160741

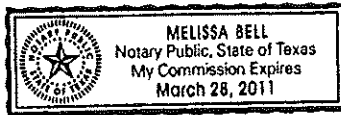
STATE OF TX  
COUNTY OF Harris

On 6/24/09 before me, Melissa Bell  
\_\_\_\_\_, a notary public, personally appeared Marti Noriega who proved to me on the basis of  
satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged  
to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their  
signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the  
instrument.

I certify under PENALTY OF PERJURY under the laws of the State of TX that the foregoing  
paragraph is true and correct.

WITNESS my hand and official seal.

Melissa Bell



Notary Public in and for said County and State



**LARRY WALKER**

Auditor/Controller - Recorder

893 LPS Default Title &amp; Closing

[RECORDING REQUESTED BY  
Fidelity National Title Insurance Company  
c/o Trustee Corps

AND WHEN RECORDED MAIL TO:]

Litton Loan Servicing, LP  
4828 Loop Central Drive  
Houston, TX 77081-2226

Doc #: 2010-0204157



Titles:	1	Pages:	2
Fees			15.00
Taxes			.00
Other			.00
PAID			15.00

[Space above this line for recorder's use only]

Trustee Sale No. CA0529791 Loan No. 19365204 Title Order No. 080160741

## ASSIGNMENT OF DEED OF TRUST

FOR VALUE RECEIVED, the undersigned hereby grants, assigns and transfers to LITTON LOAN SERVICING, L.P. all beneficial interest under that certain Deed of Trust dated 04/11/2006, executed by PHILLIP L BENNETT AND BETTE M BENNETT, HUSBAND AND WIFE AS JOINT TENANTS, as Trustor; to FINANCIAL TITLE COMPANY, as Trustee; and Recorded on 04/20/2006 as Document No. 2006-0268836 of official records in the Office of the County Recorder of San Bernardino County, California, real property described as follows:

**PARCELS 1 AND 3 OF PARCEL MAP 5441, IN THE CITY OF RANCHO, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, AS PER PLAT RECORDED IN BOOK 62 OF PARCEL MAPS, PAGES 21 AND 22, RECORDS OF SAID COUNTY.**

TOGETHER with the note or notes therein described and secured thereby, the money due and to become due thereon, with interest, and all rights accrued or to accrue under said Deed of Trust including the right to have reconveyed, in whole or in part, the real property described therein.

Dated: NOV. 9. 2009

Beneficiary:

**MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.**By: 

Maria Noriega  
Assistant Vice President

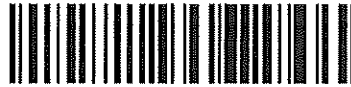


**LARRY WALKER**

Auditor/Controller - Recorder

893 LPS Default Title &amp; Closing

Doc #: 2010-0251465



Titles: 1 Pages: 2

Fees 15.00

Taxes .00

Other .00

PAID 15.00

RECORDING REQUESTED BY  
Fidelity National Title Insurance Company  
c/o Trustee Corps

AND WHEN RECORDED MAIL TO:]

Litton Loan Servicing, LP  
4828 Loop Central Drive  
Houston, TX 77081-2226

[Space above this line for recorder's use only]

Trustee Sale No. CA0529791 Loan No. 19365204 Title Order No. 080160741

## ASSIGNMENT OF DEED OF TRUST

FOR VALUE RECEIVED, the undersigned hereby grants, assigns and transfers to **FEDERAL NATIONAL MORTGAGE ASSOCIATION** all beneficial interest under that certain Deed of Trust dated **04/11/2006**, executed by **PHILLIP L BENNETT AND BETTE M BENNETT, HUSBAND AND WIFE AS JOINT TENANTS**, as Trustor; to **FINANCIAL TITLE COMPANY**, as Trustee; and **Recorded on 04/20/2006 as Document No. 2006-0268836** of official records in the Office of the County Recorder of **San Bernardino County, California**, real property described as follows:


**PARCELS 1 AND 3 OF PARCEL MAP 5441, IN THE CITY OF RANCHO, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, AS PER PLAT RECORDED IN BOOK 62 OF PARCEL MAPS, PAGES 21 AND 22, RECORDS OF SAID COUNTY.**

TOGETHER with the note or notes therein described and secured thereby, the money due and to become due thereon, with interest, and all rights accrued or to accrue under said Deed of Trust including the right to have reconveyed, in whole or in part, the real property described therein.

Dated: 6/24/09

Beneficiary:

LITTON LOAN SERVICING, L.P.

By:   
Diane Dixon Assistant Vice President

Trustee Sale No. CA0529791  
Loan No. 19365204  
Title Order No. 080160741

STATE OF TX  
COUNTY OF Harris

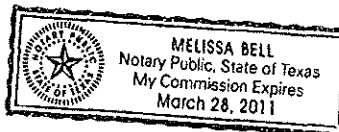
On 6/24/09 before me, Melissa Bell  
Diane Dixon, a notary public, personally appeared \_\_\_\_\_ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of TX that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Melissa Bell

Notary Public in and for said County and State



# EXHIBIT ASM-2

Inst No: 2009016103; 06/04/09 09:10AM; Book: 1710 Page: 1780; Total Pgs: 2  
GAIL WADSWORTH, FLAGLER Co.

Document Prepared By:  
Ron Micharg, 888-362-9638  
When Recorded Return To:  
DOCX  
1111 Alderman Dr.  
Suite 350  
Alpharetta, GA 30005

DOCX: eDOCX™ platform supports mortgage assignments, lien releases, modifications, quit claim deeds and many more mortgage industry documents from document review and creation, fulfillment and recordation. \*

LPS Document Solutions, a division of Lender Processing Services (NY: LPS)

ANMA	647	33180351
------	-----	----------

They have appeared in from a Notary claiming to be the Vice-President and Witness on May 28, 2009.

There is evidence of thousand of different Signatures from the same individuals; more likely FORGERY has been occurred.

The same Notary Brittany Snow has sworn that they personally appeared and produced document s satisfactory for her and she notarized this document.  
\*Please look Evidence I to IX.

6/03/2009-PRM-A031-POI  
22/209-Print Batch ID:5835  
100071700014796348  
Telephone #: 888/679-6377  
Address:  
YACHT HARBOR DRIVE #C 17  
COAST, FL 32137  
© 2009 DOCX Copyright 2009 by DOCX LLC



Original Prospectus Memorandum dated March 29, 2007 for 1,901,018,000 Billions showed that;

Cut-Off Date March 1, 2007

Closing Date March 30, 2007

\*for more details see EXHIBIT SPM of this Report

This documents said it was recorded on January 06, 2007, but on top of this document said that it was recorded on June 04, 2009 at 9:10am on Book 1710 page 1780 after the Foreclosure Complaint was filed.

**What can we expect from this type of Concealment?,  
a conspiracy to defraud the Homeowner...**

## ASSIGNMENT OF MORTGAGE

FOR GOOD AND VALUABLE CONSIDERATION the receipt and sufficiency of which is hereby acknowledged, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., whose address is 6501 Center Drive, Irvine, CA 92614, does by these presents hereby grant, bargain, sell, assign, transfer, set over and deliver unto Deutsche Bank National Trust Company as Indenture Trustee for an Home Mortgage Investment Trust 2007-1, Mortgage-Backed Notes and Grantor Trusts, Series 2007-1, whose address is 1761 East St. Andrew Place Santa Ana, CA 92705-4934, the described mortgage, securing the payment of a certain promissory note(s) for the sum listed below, with all rights therein and thereto, all liens created or secured hereby, all obligations therein described, by due and to become due thereon with interest, and all rights accrued or to accrue under such mortgage.

Original Borrower(s): RUSSELL F. YOUNG, II, A SINGLE PERSON

Original Mortgagee: MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR AMERICAN BROKERS CONDUIT

Date of Mortgage: 01/16/2007

Loan Amount: \$690,000.00

Recording Date: 01/23/2007 Book: 1533 Page: 755 Document #: 2007004820

Misc. Comments: ASSIGNMENT EFFECTIVE DATE 9/1/2008

NO CORPORATE SEAL

LEGAL DESCRIPTION: UNIT C-277, THE CONDOMINIUMS AT YACHT HARBOR VILLAGE, A CONDOMINIUM ACCORDING TO THE DECLARATION OF CONDOMINIUM RECORDED IN OFFICIAL RECORDS BOOK 1002, PAGE(S) 284, AS AMENDED, OF THE PUBLIC RECORDS OF FLAGLER COUNTY, FLORIDA.

and recorded in the official records of the County of Flagler, State of Florida affecting Real Property and more particularly described on said Mortgage referred to herein.

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed on this date of 05/28/2009

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

Witness: Dore Williams

Korell Harp  
Vice President

Witness: Christina Howard

Tymonna Thomas  
Asst. Secretary

## SUMMARY OF PROSPECTUS SUPPLEMENT

*The following summary is a brief description of the important features of the notes and grantor trust certificates and does not contain all of the information that you should consider in making your investment decision. To understand all of the terms of the notes and grantor trust certificates, read carefully this entire prospectus supplement and the entire base prospectus. A glossary is included at the end of this prospectus supplement. Capitalized terms used but not defined in the glossary at the end of this prospectus supplement have the meanings assigned to them in the glossary at the end of the base prospectus.*

<b>Issuing Entity or Trust</b>	American Home Mortgage Investment Trust 2007-1.
<b>Title of Series</b>	Mortgage-Backed Notes and Grantor Trust Certificates, Series 2007-1.
<b>Cut-off Date</b>	March 1, 2007.
<b>Closing Date</b>	On or about March 30, 2007.
<b>Depositor</b>	American Home Mortgage Securities LLC.
<b>Sponsor</b>	American Home Mortgage Acceptance, Inc., an affiliate of the depositor and the servicer.
<b>Master Servicer</b>	Wells Fargo Bank, N.A.
<b>Servicer</b>	American Home Mortgage Servicing, Inc.
<b>Indenture Trustee</b>	Deutsche Bank National Trust Company.
<b>Owner Trustee</b>	Wilmington Trust Company.
<b>Securities Administrator</b>	Wells Fargo Bank, N.A.
<b>Class A-1-A Swap Provider, Class A-1-B Swap Provider, Class A-1-C Swap Provider, Class A-2 Swap Provider and Class A-3 Swap Provider</b>	Deutsche Bank AG New York Branch.
<b>Payment Dates</b>	Payments on the notes and grantor trust certificates will be made on the 25th day of each month, or, if such day is not a business day, on the next succeeding business day, beginning in April 2007.



## RECOVERY

## GETNET™ DOCUMENT

DOCX's GetNet™ Document Recovery solution is a national network of runners that is engaged to provide document recovery, expedited recordation services, title searches, and insurance submissions.

The service is unique in that our clients can request that DOCX obtain any missing recordable documents through this web site through our online GetNet™ Work Order Form. Status of existing projects can also be obtained through our Online Services. We also accept work orders the "old fashioned" way via fax or mail. Upon receipt of the work order, DOCX will access the national network of runners, place the order and follow up to ensure prompt delivery.

GetNet™ was designed to assist mortgage servicers in meeting agency certifications and to avoid costly penalties for filing late satisfaction pieces.

### GetNet™ Features

- A National Network of title runners retains presence in every county jurisdiction nationwide.
- Obtains missing mortgage documents, assignments, title policies and LGC/MICs.
- Expedites recordation by physically walking documents in to county recorder offices.
- Provides title searches to identify mortgage holders.
- Provides online reporting capabilities.

### GETNET™ RATE SHEET

	SERVICE	AMOUNT
INF1	Obtain PIN Number from Online Public Records	\$5.50 + SH
INF2	Obtain from Online Public Records Lot Block or Section	\$5.50 + SH
INF3	Obtain Property Address	\$5.50 + SH
INF4	Obtain Recorded Mortgage, Book, Page or Instrument Number	\$12.95 + TPC
INF5	Obtain Vehicle Identification Number	\$12.95 + SH

CT01	Cursory Title Search to Identify Mortgagee of Record	\$15.95 + TPC
TS01	Perform Complete Title Search	\$15.95 + TPC
SI01	Obtain Copy of Mortgage	\$12.95 + TPC
SI02	Cure Defective Mortgage	\$12.95 + TPC
SI03	Retrieve Certified Copies of Mortgages	\$12.95 + TPC
PA01	Obtain Copy of Power of Attorney or Name Certification	\$12.95 + TPC
PA02	Record Power of Attorney	\$12.95 + TPC
PA03	Obtain Clerk Certified Copy of Power of Attorney	\$12.95 + TPC
IC01	Obtain Copy of Installment Contract from VA	\$15.95 + SH
SA01	Obtain Copy of Subordination Agreement	\$15.95 + TPC
MA02	Obtain Copy of Modification	\$15.95 + TPC
MI01	Obtain Copy of MIC	\$12.95 + SH
MI02	Correct MIC	\$12.95 + SH
LG01	Obtain Copy of LGC	\$12.95 + SH
LG02	Correct LGC	\$12.95 + SH
TP01	Obtain Copy of Title Policy Within 7 years (based on calender year)	\$19.95 + TPC
TP02	Correct Existing Title Policy	\$19.95 + TPC



TP03	Obtain Copy of Title Policy over 7 years (based on calendar year)	\$29.95 + TPC
TP04	Obtain Quotes to Write and Order New Lenders Title Policy	\$29.95 + TPC
TP05	Obtain Abstract from Title Company (State of Iowa)	\$15.95 + TPC
TE02	Correct Title Policy Endorsement	\$15.95 + TPC
LN02	Create Lost Note Affidavit	\$12.95 + SH
NA01	Create Note Allonge	\$12.95 + SH
NC01	Name Affidavit	\$12.95 + SH
IA01	Obtain Copy of Assignment	\$15.95 + TPC
IA02	Retrieve Certified Copies of Assignments	\$15.95 + TPC
IA03	Create Missing Intervening Assignment	\$35.00 + TPC
IA04	Record Prepared Assignments	\$12.95 + TPC
IA05	Cure Defective Assignment	\$12.95 + TPC
IS01	FHA and VA Mortgage Insurance Submission	\$95.00 + TPC
UC01	Retrieving a UCC Package	\$15.95 + TPC
CF01	Recreate Entire Collateral File	\$95.00 + TPC
ER01	Expedited Recordation: Hand Carry Recordable Documents	\$25.00 + TPC

**Contact DOCX for volume discounts on orders of 200 items or more.**

TPC = Third Party Costs include Title Runner, County Jurisdictional, courier and postage costs.

SH = Shipping costs.

*The DOCX Service Fee will be invoiced upon receipt of the work order.*

*TPC and SH costs will be billed upon completion of the work order.*

*You can also place orders online at [www.docx.com](http://www.docx.com).*

## ***Getting Started***

To get started using the DOCX GetNet Service:

- Complete the **DOCX GetNet™** Service Agreement and obtain a Client ID. **CALL DOCX Marketing at: 888/DOCX-NET 888/362-9638 888/362-9638 or email [sales@docx.com](mailto:sales@docx.com)** for an Agreement and Client ID.
- Once you complete the agreement and obtain a Client ID you can submit **GetNet™ Work Order Forms**. Clients can send work orders via the internet, email, fax, or mail. **CALL DOCX Marketing at: 888/DOCX-NET 888/362-9638 888/362-9638 or email [sales@docx.com](mailto:sales@docx.com)** for a Work Order form, *or* how to submit **GetNet™ Work Order Forms** online.
- Contact **DOCX Support at 800/723-0215 800/723-0215 Ext 3014 or email [support@docx.com](mailto:support@docx.com)** for requirements and procedures of email and online **GetNet™ Work Order Form**.

# PSA Samples

## Waiver of Equity of Redemption

NCGS § 53-426. Waiver of equity of redemption.

(a) Notwithstanding any other provision of law, except to the extent otherwise set forth in the transaction documents relating to a securitization, all of the following apply:

(1) Any property, assets, or rights purported to be transferred, in whole or in part, in a securitization or in connection with a securitization are considered no longer the property, assets, or rights of the transferor, to the extent purported to be transferred.

(2) A transferor in the securitization, its creditors, and, in any insolvency proceeding with respect to the transferor or the transferor's property, a bankruptcy trustee, receiver, debtor, debtor in possession, or similar person, to the extent the transfer is governed by State law, has no rights, legal or equitable, to reacquire, reclaim, recover, repudiate, disaffirm, redeem, or recharacterize as property of the transferor any property, assets, or rights purported to be transferred to the special purpose entity, in whole or in part, by the transferor.

(3) In the event of a bankruptcy, receivership, or other insolvency proceeding with respect to the transferor or the transferor's property, to the extent the transfer of property, assets, and rights are governed by State law, the property, assets, and rights are not considered part of the transferor's property, assets, rights, or estate.

(b) Nothing in this Article:

(1) Requires any securitization to be treated as a sale for federal or state tax purposes;

(2) Precludes the treatment of any securitization as debt for federal or state tax purposes; or

**(3) Changes any applicable laws relating to the perfection and priority of security or ownership interests of persons other than the transferor, any hypothetical lien creditor of the transferor, or, in the event of a bankruptcy, receivership, or other insolvency proceeding with respect to the transferor or its property, a bankruptcy trustee, receiver, debtor, debtor in possession, or other similar person. (2002-88, s. 1; 2002-159, s. 33.)**

## Are You PSA Literate?

If you are an attorney trying to help people save their homes, you had better be PSA literate or you won't even begin to scratch the surface of all you can do to save their homes. This is an open letter to all attorneys who aren't PSA literate but show up in court to protect their client's homes.

First off, what is a PSA? After the original loans are pooled and sold, a trust hires a servicer to service the loans and make distributions to investors. The agreement between depositor and the trust and the trustee and the servicer is called the Pooling and Servicing Agreement (PSA).

According to UCC § 3-301 a "person entitled to enforce" the promissory note, if negotiable, is limited to:

- (1) The holder of the instrument;
- (2) A nonholder in possession of the instrument who has the rights of a holder; or
- (3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 3-309 or section 3-418(d).

A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

Although "holder" is not defined in UCC § 3-301, it is defined in § 1-201 for our purposes to mean a person in possession of a negotiable note payable to bearer or to the person in possession of the note.

So we now know who can enforce the obligation to pay a debt evidenced by a negotiable note. We can debate whether a note is negotiable or not, but I won't make that debate here.

Under § 1-302 persons can agree "otherwise" that where an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, that the transferee is granted a special right to enforce an "unqualified" indorsement by the transferor, but the code does not "create" negotiation until the indorsement is actually made.

So, that section allows a transferee to enforce a note without a qualifying endorsement only when the note is transferred for value. □ Then, under § 1-302 (a) the effect of provisions of the UCC may be varied by agreement. This provision includes the right and ability of persons to vary everything described above by agreement.

This is where you MUST get into the PSA. You cannot avoid it. You can get the judges to this point. I did it in an email. Show your judge this post.

If you can't find the PSA for your case, use the PSA next door that you can find on at [www.secinfo.com](http://www.secinfo.com). The provisions of the PSA that concern transfer of loans (and servicing, good faith and almost everything else) are fairly boilerplate and so PSAs are fairly interchangeable for many purposes. You have to get the PSA and the mortgage loan purchase agreement and the hearsay bogus electronic list of loans before the court. You have to educate your judge about the lack of credibility or effect of the lifeless list of loans as the Uniform Electronic Transactions Act specifically exempts Residential Mortgage-Backed Securities from its application. Also, you have to get your judge to understand that the plaintiff has given up the power to accept the transfer of a note in default and under the conditions presented to the court (out of time, no delivery receipts, etc). Without the PSA you cannot do this.

Additionally the PSA becomes rich when you look at § 1-302 (b) which says that the obligations of good faith, diligence, reasonableness and care prescribed by the code may not be disclaimed by agreement, but may be

enhanced or modified by an agreement which determine the standards by which the performance of the obligations of good faith, diligence reasonableness and care are to be measured. These agreed to standards of good faith, etc. are enforceable under the UCC if the standards are "not manifestly unreasonable."

The PSA also has impact on when or what acts have to occur under the UCC because § 1-302 (c) allows parties to vary the "effect of other provisions" of the UCC by agreement.

Through the PSA, it is clear that the plaintiff cannot take an interest of any kind in the loan by way of an "A to D" assignment of a mortgage and certainly cannot take an interest in the note in this fashion.

Without the PSA and the limitations set up in it "by agreement of the parties", there is no avoiding the mortgage following the note and where the UCC gives over the power to enforce the note, so goes the power to foreclose on the mortgage.

So, arguing that the Trustee could only sue on the note and not foreclose is not correct analysis without the PSA. □ Likewise, you will not defeat the equitable interest "effective as of" assignment arguments without the PSA and the layering of the laws that control these securities (true sales required) and REMIC (no defaulted or nonconforming loans and must be timely bankruptcy remote transfers) and NY trust law and UCC law (as to no ultra vires acts allowed by trustee and no unaffixed allonges, etc.).

The PSA is part of the admissible evidence that the court MUST have under the exacting provisions of the summary judgment rule if the court is to accept any plaintiff affidavit or assignment.

If you have been successful in your cases thus far without the PSA, then you have far to go with your litigation model. It is not just you that has "the more considerable task of proving that New York law applies to this trust

( and that the PSA does not allow the plaintiff to be a "nonholder in possession with the rights of a holder."

And I am not impressed by the argument "This is clearly something that most foreclosure defense lawyers are not prepared to do."□Get over that quick or get out of this work! Ask yourself, are you PSA adverse? If your answer is yes, please get out of this line of work. Please.

I am not worried about the minds of the Circuit Court Judges unless and until we provide them with the education they deserve and which is necessary to result in good decisions in these cases.

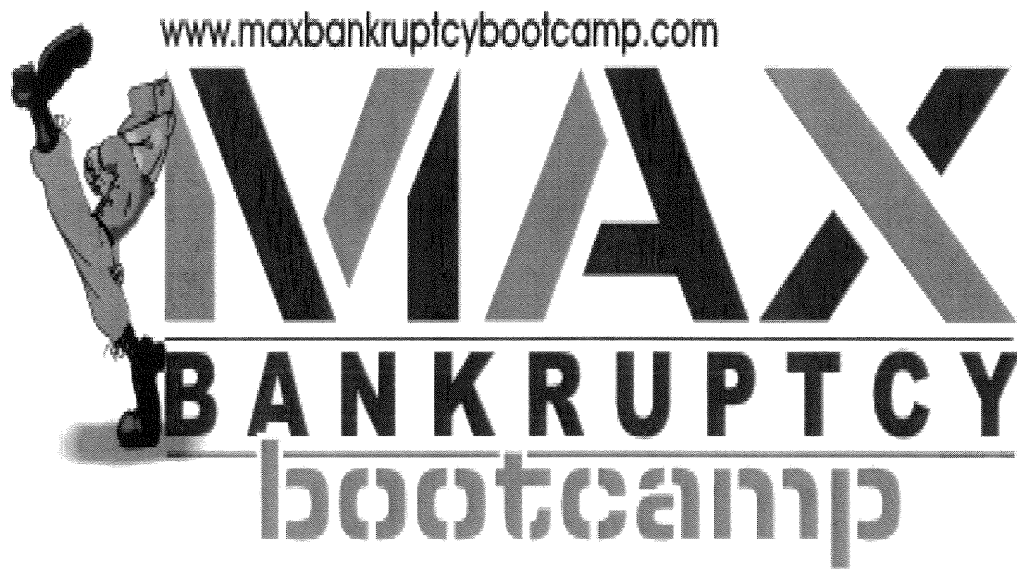
It is correct that the PSA does not allow the Trustee to foreclose on the Note. But you only get there after looking at the PSA in the context of who has the power to foreclose under applicable law.

( It is not correct that the Trustee has the power or right to sue on the note and PSA literacy makes this abundantly clear.

Are you PSA literate? If not, don't expect your judge to be. But if you want to become literate, a good place to start is by attending Max Gardner's Mortgage Servicing and Securitization Seminar.

April Carrie Charney@jaxlegalaid.org





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## Mortgage Backed Security

### Pooling and Servicing Agreement

February 12, 2009

#### **§1 Introduction**

This article is meant to help interpret the contractual relationships that generally exist in a Pooling and Servicing Agreement (PSA) of a Mortgage Backed Security (MBS). The majority of PSAs look very similar, so the example used in this article will likely correlate with your PSA.

#### **§2 Mortgage Backed Security**

To help begin to understand a PSA it is first important to be familiar with Mortgage Backed Securities. Essentially a Mortgage Backed Security is a collection of single mortgage loans gathered into one securitized pool. The pool is then divided into tranches based on the degree of risk and transferred as a whole to a trust. The trust then issues a series of bonds and these bonds

are then sold to investors. It seems like an excessive amount of handling, but the theory is that pooling the loans gives investors opportunities to gain rewards that would not be available in a single loan. Of course, with the opportunity for financial returns, there is always risk involved. However, the theory is, or was, that by creating a diverse pool of loans it will decrease the investors' risk.

### **§3 Pooling and Servicing Agreement**

Once a loan has been securitized, the need for a PSA becomes apparent. The PSA is essentially a contract that exists between the parties involved in the securitization of the loans. This contract will dictate how the investment proceeds and losses will be distributed to the parties and investors. Most important though it will also describe how the Mortgage Backed Security pool of loans will be serviced and transferred from the parties.

### **§4 Parties Involved in a PSA**

In general there are four parties involved in a MBS PSA and each has important responsibilities. The following is a list of the parties most often involved in the securitization of a loan along with their individual responsibilities:

Depositor: The entity that accumulates the mortgages and transfers them to the Trust along with the issuance of the securities to the certificate holders. The Depositor can be the seller of a portfolio of mortgages or an entity established just for the purpose of holding the mortgages until the pool accumulation is completed.

Master Servicer: The Master Servicer services the loans in the pool through maturity and is regularly expected to process all requests made by the borrower. However, if the borrower defaults then they may subcontract duties to a Special or Sub-Servicer but the Master Servicer is still generally responsible for their performance.

Securities Administrator/ Custodian: Responsible for safeguarding the financial assets. The role of a custodian is to hold the assets in safekeeping, arrange settlement of any purchases and sales of securities, and collect information on the income from the assets.

Special Servicer: In the event of a default or other specified incident, the loan's administration is transferred to the Special Servicer. They also have the authority to oversee actions such as loan assumptions. Furthermore, the Special Servicer may have the right to "put" the defaulted loan

back to the loan originator in the event of a document defect or breach of a representation or warranty by the borrower which materially and adversely affects the value of the loan.

*Credit Risk Manager*: Evaluates the credit risk and communicates with the Trustee.

*Trustee*: Holds loan documents and distributes payments received from the Master Servicer to the bondholders and is often granted a broad authority regarding aspects of the loan under the pooling and servicing agreement. However, it is usual for them to delegate authority to the Special Servicer or the Master Servicer. Because the Trustee holds the loan documents, the Trustee is the one who will be named in lawsuits or non-judicial foreclosures.

**EXAMPLE:** THIS POOLING AND SERVICING AGREEMENT, dated as of April 1, 2007, among HSI ASSET SECURITIZATION CORPORATION, as depositor (the “Depositor”), WELLS FARGO BANK, N.A., a national banking association, as master servicer (in such capacity, the “Master Servicer”), as securities administrator (in such capacity, the “Securities Administrator”) and as custodian (in such capacity, “the Custodian”), OFFICETIGER GLOBAL REAL ESTATE SERVICES INC., as credit risk manager (the “Credit Risk Manager”), and DEUTSCHE BANK NATIONAL TRUST COMPANY, a national banking association, as trustee (the “Trustee”).

## §5 Contents of a PSA

This section is an overview of what one would expect to find in a MBS PSA along with an interpretation of the intended objective of each Article.

Again, the PSA can most often be found in file 8-K of the Current Report in the Prospectus. As with most large legal documents there is a Table of Contents. The following is an example Table of Contents that are generally found in a PSA:

Article I: Definitions

Article II: Conveyance of Mortgage Loans; Representations and Warranties

Article III: Administration and Servicing of Mortgage Loans

Article IV: Distributions

Article V: Certificates

Article VI: Depositor

Article VII: Default

Article VIII: Concerning the Trustee

Article IX: Administration of the Mortgage Loans by the Master Servicer

Article X: Concerning the Securities Administrator

Article XI: Termination

Article XII: Miscellaneous Provisions

Exhibits

## **Article I**

### **Definitions**

The following is a list of important terms pulled from this article that are specifically relevant to the relationship and contractual obligations of the PSA.

Assignment of Mortgage: An assignment of the Mortgage, notice of transfer or equivalent instrument in recordable form reflecting the sale of the Mortgage to the Trustee.

Certificateholder or Holder: The person in whose name a Certificate is registered in the Certificate Register, and is the owner of the bond that is sold.

Closing Date: This is the day the agreement starts.

Cut-off Date: This is the day the last loan is allowed into the pool.

Debt Service Reduction: With respect to any Mortgage Loan, a reduction by a court of competent jurisdiction in a proceeding under the United States Bankruptcy Code in the Scheduled Payment for such Mortgage Loan which became final and non-appealable, except such a reduction resulting from a Deficient Valuation or any reduction that results in a permanent forgiveness of principal.

EDGAR: The Security and Exchange Commission Electronic Data Gathering and Retrieval System. This data base can be found at [www.sec.gov](http://www.sec.gov) under the Filing and Forms section.

Final Recovery Determination: With respect to any defaulted Mortgage Loan or any REO Property the Servicer, in its reasonable good faith judgment, expects to be finally recoverable in respect thereof have been so recovered.

Form 8-K Disclosure Information: This form.

Liquidated Mortgage Loan: A defaulted Mortgage Loan (including any REO Property) which was liquidated in the preceding calendar month. As to which a Servicer has certified to the Securities Administrator that it has received all amounts it expects to receive in connection with the liquidation of such Mortgage Loan.

Loan-to-Value Ratio or LTV: As of any date and as to any Mortgage Loan, the ratio (expressed as a percentage) of the outstanding principal balance of the Mortgage Loan in relation to its appraised value at the time of sale or at the time of the refinancing or modification.

MERS: Mortgage Electronic Registration Systems, Inc., is an electronic mortgage filing service that allows for little to no paper work.

Mortgage: The mortgage, deed of trust or other instrument identified on the Mortgage Loan Schedule as securing a Mortgage Note.

Mortgage File: The items pertaining to a particular Mortgage Loan contained in either the Servicing File or Custodial File.

Mortgage Loan: An individual Mortgage Loan that is the subject of this Agreement, each Mortgage Loan originally sold and subject to this Agreement being identified on the Mortgage Loan Schedule.

Mortgage Loan includes: the Mortgage File, the Scheduled Payments, Principal Prepayments, Liquidation Proceeds, Subsequent Recoveries, Condemnation Proceeds, Insurance Proceeds, REO Disposition proceeds, Prepayment Charges, and all other rights, benefits, proceeds and obligations arising from or in connection with such Mortgage Loan, excluding replaced or repurchased Mortgage Loans.

Mortgage Loan Seller: Any entity which sold Mortgage Loans to the Sponsor pursuant to a Transfer Agreement.

Mortgage Loan Schedule: A schedule of Mortgage Loans prepared by the Depositor, delivered to the Trustee on the Closing Date and referred to on Schedule I, such schedule setting forth the Data Tape Information with respect to each Mortgage Loan.

Mortgage Note: The note or other evidence of the indebtedness of a Mortgagor under a Mortgage Loan.

Mortgaged Property: With respect to each Mortgage Loan, the real property (or leasehold estate, if applicable) identified on the Mortgage Loan Schedule as securing repayment of the debt evidenced by the related Mortgage Note.

Mortgagor: The obligor(s) on a Mortgage Note.

REO Property or Real Estate Owned: A Mortgaged Property acquired by the Trust Fund through foreclosure or deed-in-lieu of foreclosure in connection with a defaulted Mortgage Loan.

Responsible Officer: When used with respect to the Trustee, the Securities Administrator, the Master Servicer, any vice president, any assistant vice president, any assistant secretary, any assistant treasurer, any associate, or any other officer of the Trustee, the Securities Administrator or the Master Servicer customarily performing functions similar to those performed by any of the above designated officers who at such time shall be officers to whom, with respect to a particular matter, such matter is referred because of such officer's knowledge of and familiarity with the particular subject and who, in each case, shall have direct responsibility for the administration of this Agreement.

Sub-Servicer: Any Person that services Mortgage Loans on behalf of a Servicer, and is responsible for the performance (whether directly or through sub-servicers or Subcontractors) of servicing functions required to be performed under this Agreement.

Trust Fund: The trust fund consists of (i) the Mortgage Loans and all interest and principal with respect thereto received on or after the related Cut-off Date; (ii) the Collection Account, the

Distribution Account, the Cap Termination Receipts Account, the Cap Replacement Receipts Account the Swap Termination Receipts Account, the Swap Replacement Receipts Account; (iii) property that secured a Mortgage Loan and has been acquired by foreclosure, deed-in-lieu of foreclosure or otherwise; (iv) the Insurance Policies.

## **Article II**

### **Conveyance of Mortgage Loans; Representations and Warranties**

#### **§2.01 Conveyance of Mortgage Loans**

This section sets out how the Loans are to be transferred from the Depositor to the Trustee.

- a) The Depositor will sell, transfer, assign, set over and otherwise convey to the Trustee all rights, title and interest with respect to the Mortgage Loans on or after the Cut-Off date.
- b) In connection with the transfer and assignment of each Mortgage Loan, the Depositor delivers the Custodian the original Mortgage Note. If the original Mortgage Note cannot be located then the Mortgage Loan Seller must send an affidavit and record of the Mortgage being recorded in a public recording office. If the Mortgage had been previously assigned there must be evidence of the complete chain of ownership from the originator to the last assignee.
- c) The parties agree that is the policy and intention to acquire Mortgage Loans meeting the requirements set forth in the Transfer Agreements and in the Purchase Agreements.
- d) The Trustee has the power and authority to accept the sale, transfer, and assignment for the Trustee of the right, title and interest that is held by the Depositor.

## **§2.02 Acceptance by the Custodian of the Mortgage Loans**

The Custodian will hold the documents named in §2.01 for the benefit of the present and future investors. The Custodian is required to inform the Depositor, Securities Administrator, the Trustee and the Servicer by facsimile certifying that they received the Mortgage Note and Assignment of Mortgage for each Mortgage Loan (exhibit E). Furthermore, within 90 days of the Closing Date the Custodian shall have all of the required documents for each Mortgage Loan listed in the Mortgage Loan Schedule. This basically means that they must have every document for every Mortgage Loan within 90 days of the Closing Date.

## **§2.03 Remedies for Breaches of Representation and Warranties with Respect to the Mortgage Loans**

- a) Upon the removal of a Deleted Mortgage Loan the Custodian shall release the Mortgage File to the applicable Mortgage Loan Seller and the Trustee. Upon receipt of a Request for Release, all amounts required to be deposited have been deposited in the related Collection Account. The Trustee shall execute and deliver at the applicable Mortgage Loan Seller's direction such instruments of transfer or assignment prepared by the applicable Mortgage Loan Seller that are necessary to vest title in the applicable Mortgage Loan Seller of the Trustee's interest in any Deleted Mortgage Loan substituted for pursuant to this Section 2.03.
- b) The Sponsor shall indemnify the Depositor, any of its Affiliates, the Master Servicer, each Servicer, the Securities Administrator, the Trustee and the Trust and hold such parties harmless against any losses, damages, penalties, judgments and other costs and expenses resulting from any third party claim resulting from, a breach by the Sponsor of any of its representations and warranties or obligations contained in this Agreement.
- c) Upon receipt of a Request for Release, at the direction of the Servicer, the Custodian shall release the Custodial File to the related Mortgage Loan Seller or the Sponsor. The Trustee shall execute and deliver instruments of transfer or assignment as shall be necessary to transfer title from the Trustee. The Securities Administrator shall notify each Rating Agency of a purchase of a Mortgage Loan pursuant to this Section 2.03 or pursuant to a Transfer Agreement.
- d) The Trustee acknowledges that the Sponsor shall not have any obligation or liability with respect to any breach of a representation or warranty made by it with respect to a Mortgage Loan sold by it provided that such representation or warranty was also made by a Mortgage Loan Seller with respect to the related Mortgage Loan.  
The representations and warranties of the Sponsor and assigned to the Trustee by the Depositor shall survive the transfer of the Mortgage Loans by the Depositor to the Trustee on the Closing Date. It will insure the benefit of the Trustee and the Certificateholders any restrictive or qualified endorsement on any Mortgage Note or Assignment of Mortgage and shall continue throughout the term of this Agreement. Upon the discovery by any of the Sponsor, the Depositor, the Securities Administrator, the Trustee, the Master Servicer or any Servicer of a breach of any of the Sponsor's representations and warranties the party discovering the breach shall give prompt written notice to the others.

## **§2.04 Execution and Delivery of Certificates**

The Trustee acknowledges that the execution and delivery of the Certificates are in authorized denominations evidencing the entire ownership of the Trust Fund.

### **§2.05 REMIC Matters**

This states that the Preliminary Statement (which can be found prior to the Table of Contents) sets forth that the Trust meets federal income tax code for Real Estate Mortgage Investment Conduits (REMIC).

### **§2.06 Representation and Warranties of the Depositor**

The Depositor warrants and covenants that as of the date of the agreement that:

- a) They exist in good standing under Delaware law;
- b) They have the power to convey the Mortgage Loans and enter into these types of agreements;
- c) They understand they are entering into a legally binding agreement;
- d) That it is not required to inform any governmental authority of the transactions prior to the Closing Date;
- e) That this agreement does not break any of their by-laws or breach other agreement that they are a part of or violate any law, rule, or regulation;
- f) There are no actions or investigations against them;
- g) They are not in default with any government;
- h) That they had good title and was the sole owner of each Mortgage Loan and that they transferred all interest in each Mortgage Loan to the Trustee.

## **Article III**

### **Administration and Servicing of Mortgage Loans**

#### **§3.01 Establishment of Certain Accounts**

This section sets forth how the Securities Administrator will set up the Excess Fund Account and Distribution Account. The sub-sections of §3.01 go into further detail as to how the Securities Administrator maintain the Distribution Account and how the Servicers pay into the Distribution Account.

#### **§3.02 Investment of Funds in Distribution Account**

The Securities Administrator may invest funds from the Distribution Account and any income gained by the investment is for the benefit of the Securities Administrator. However, if there is a loss then the Securities Administrator is liable to the Trust for that amount.

#### **§3.03 Report on Assessment of Compliance with Relevant Servicing Criteria**

This section sets forth a policy that once a calendar year the Master Servicer, the Securities Administrator and the Custodian will furnish a report on an assessment of compliance with the Relevant Servicing Criteria set forth in Exhibit S to the Securities Administrator and the Depositor. The report will contain a statement regarding each party's assessment of compliance



with the Relevant Servicing Criteria, including, any material instance of noncompliance with the Relevant Servicing Criteria.

Furthermore, after receipt of the report the Depositor will review each such report and consult with the Master Servicer, the Securities Administrator, the Custodian, as to the nature of any material instance of noncompliance. Furthermore, the Securities Administrator shall confirm that the assessment addresses all of the Servicing Criteria for each party as set forth on Exhibit S or in the applicable Servicing Agreement.

The Master Servicer will enforce any obligation of each Servicer and submit an annual report on assessment of compliance to the Securities Administrator within the time frame set forth in the Servicing Agreement.

### **§3.04 Report on Attestation of Compliance with Relevant Servicing Criteria**

This section sets forth a policy that once a calendar year the Master Servicer, the Securities Administrator and the Custodian will furnish a Certified Public Accountants to furnish an attestation report to the Securities Administrator and the Depositor. The attestation report includes information regarding the Relevant Servicing Criteria.

### **§3.05 Annual Officer's Certificates**

The Master Servicer and the Securities Administrator will deliver an Officer's Certificate to the Depositor which states that the Officer reviewed the business activities of their party. Furthermore, the Certificates must adhere to the standards of the Sarbanes-Oxley Act.

### **§3.06 Indemnification**

The Depositor, Master Servicer, Securities Administrator, Custodian, Trustee, and any Servicing Participant are considered an "Indemnifying Party." In the case that any one of those parties fail to submit any required information, data or materials that party is indemnified and held harmless from and against any and all claims, losses, damages, penalties, fines, forfeitures, reasonable legal fees and related costs, judgments and other costs and expenses. So long as that dispute arose out of or based upon (a) any breach by such party of any if its obligations hereunder; (b) any material misstatement or omission in any information, data or materials provided by such party including any material misstatement or material omission, or (c) the negligence, bad faith or willful misconduct in connection with its performance hereunder.

If the indemnification provided is unavailable or insufficient to hold the party harmless then each Indemnifying Party agrees that it shall contribute to the amount paid or payable as a result of any claims, losses, damages or liabilities incurred by the at fault party. Furthermore, the indemnification shall survive the termination of this Agreement or the termination of any party to this Agreement.

The Depositor, the Securities Administrator, the Custodian and the Trustee shall immediately notify the Master Servicer if a claim is made by a third party with respect to this Agreement or the Mortgage Loans. Whereupon, the Master Servicer shall assume the defense of any such claim and pay all expenses to discharge and satisfy any judgment. If any indemnified parties

have a conflict of interest with respect to any such claim, the indemnified party shall have the right to retain separate counsel.

### **§3.07 Advances**

This section states a number of ways that the advances can be made to the pursuant to the Servicing Agreement.

## **Article IV** **Distributions**

### **§4.01 The Distribution Account**

The Master Servicer will deposit the funds collected into Distribution Account pursuant to the Servicing Agreements.

### **§4.02 Priorities of Distribution**

On each Distribution Date the Securities Administrator will distribute payments pursuant to REMIC standards. Furthermore, this section states how the funds will be distributed to different sets of investors. The investors will often times set up accounts to invest in different classes or tranches. The classes with the less risk will be paid first with the higher risk classes to be paid last.

### **§4.03 Monthly Statements to Certificateholders**

The Securities Administrator is required to have a report available on each Distribution Date for the Master Servicer, the Servicers, the Credit Risk Manager, the Depositor, the Trustee, and each Certificateholder. The report will have information about the balances and interest in each of the accounts. More importantly, the report will have the following (1) the number and aggregate outstanding principal balances of Mortgage Loans that are delinquent 31 to 60 days, 61 to 90 days and 91 or more days, (2) that have become REO Property, (3) that are in foreclosure and (4) that are in bankruptcy, as of the close of business on the last Business Day of the immediately preceding month.

### **§4.04 Certain Matters Relating to the Determination of LIBOR**

This section basically states that the Securities Administrator will use the London Interbank Offered Rate (LIBOR) to determine interest. However, they have option of choosing which Reference Bank that will determine the LIBOR.

### **§4.05 Allocation of the Applied Realized Loss Amount**

The Securities Administrator will apply a loss to the Class M Certificates.

### **§4.06 Supplemental Interest Trust**

The section requires the Securities Administrator to set up a Supplemental Interest Trust for the purpose of managing Permitted Investments and Swap accounts. A Swap is a side agreement between two parties to exchange or insure future cash flows.

#### **§4.07 Rights of the Swap Counterparty**

The Swap Counterparty shall be deemed a third-party beneficiary of this Agreement to the same extent as if it were an original party and shall have the right to enforce its rights under this Agreement.

#### **§4.08 Termination Receipts**

This section details what would happen if a Swap is terminated and where the money invested will be deposited.

### **Article V The Certificates**

This article gives information in regard to how the certificates are originated and how they can be transferred. A certificate in this context is basically legal proof of ownership in a specific Class. The section also gives information on who can be deemed an owner and how a list of the owners.

### **Article VI**

#### **The Depositor**

#### **§6.01 Liabilities of the Depositor**

The Depositor is liable for the obligations set forth in this section.

#### **§6.02 Merger or Consolidation of the Depositor**

The Depositor will remain a franchise or corporation under the laws of the United States for the purposes of protecting the validity and enforceability of the Agreement and any of the Mortgage Loans.

#### **§6.03 Limitation on Liability of the Depositor and Others**

The section begins by stating that neither the Depositor nor its agents are liable to the Certificateholders for any act or omission to act that is made in good faith or error of judgment. The Depositor may rely in good faith on any document of any kind properly executed and submitted by any Person respecting any matters arising hereunder.

The Depositor shall be indemnified by the Trust Fund and held harmless against any loss, liability or expense incurred in connection with any audit, controversy or judicial proceeding relating to government taxing, or any legal action relating to this Agreement. However, that

excludes any loss, liability or expense related to any specific Mortgage Loan or Mortgage Loans. Furthermore, the Depositor would be liable for any breach of representations or warranties, willful misfeasance, bad faith, negligence, or reckless disregard of obligations and duties. The Depositor is not under any obligation to appear in any legal action that is not in relation to its duties. However, the Depositor may in its discretion undertake any such action that it may deem necessary or desirable.

## **Article VII**

### **Default**

#### **§7.01 Master Servicer to Act; Appointment of Successor**

The Master Servicer or Trustee can decide to terminate any Sub-Servicer and appoint a new Servicer without limitation. If they decide to terminate a Sub-Servicer then they will have a period (not to exceed 90 days) to complete the transfer of all servicing data and correct or manipulate servicing data as may be required to correct any errors or insufficiencies to service the Mortgage Loans properly and effectively.

Any successor to a Servicer shall be an institution which is willing to service the Mortgage Loans and which executes and delivers to the Depositor, the Master Servicer and the Trustee an agreement accepting all of the rights, powers, duties, responsibilities, obligations, and liabilities of Servicer, as if originally named as a party to such Servicing Agreement.

#### **§7.02 Notification of Certificateholders**

The Securities Administrator is required to notify the Certificateholders if there is a termination of a servicer.

## **Article VIII**

### **Concerning the Trustee**

#### **§8.01 Duties of the Trustee**

In the event that the Master Servicer is unable to perform its duties pursuant to this Agreement the Trustee has the power to act as the Servicer. In that case the Trustee is to be furnished with all of the documents the Master Servicer held. Upon receipt the Trustee shall examine the documents but is not responsible for the accuracy or content. However, the Trustee is not to be relieved of any liability for negligence or willful misconduct.

- a) No implied covenants or obligations shall be read into this Agreement. The Trustee can rely that the documents are true and correct.
- b) The Trustee shall not be liable for error in judgment made in good faith unless the Trustee was negligent in ascertaining pertinent facts.
- c) The Trustee shall not be liable for any action taken in good faith for the Certificate Holders.

#### **§8.02 Certain Matters Affecting the Trustee**

- a) The Trustee can rely upon any document believed to be true and shall not have any responsibility to confirm the genuineness.

- b) The Trustee can receive advice from counsel or advisors that is done in good faith.
- c) The Trustee is not liable for any action or omission taken in good faith.
- d) The Trustee does not need to investigate any matters dealing with the genuineness of the documents unless requested by 25% of the Certificateholders.
- e) The Trustee may perform duties through its agents and is not responsible for the negligence of any agent appointed with due care.
- f) The Trustee is not required to expend its own funds in performance of its duties.
- g) The Trustee is not liable for any loss on investment pursuant to this Agreement.
- h) The Trustee is not responsible for knowledge of a Master Servicer being unable to perform until receiving written notice from the Master Servicer.
- i) The Trustee is not obligated to conduct or defend any litigation

#### **§8.03 Trustee Not Liable for Certificates or Mortgage Loans**

This section states that the Trustee assumes not responsibility for the correctness of and document related to this agreement or the Mortgage Loans. Furthermore, they state that the Trustee is not responsible to maintain the perfection of any security interest or lien granted to it.

#### **§8.04 Trustee May Own Certificates**

The Trustee may own or pledge Certificates.

#### **§8.05 Trustee Fees Indemnification and Expense-**

- a) The Trustee is compensated by the Master Servicer own funds pursuant to a separate agreement. The Trustee cannot put a lien on the Trust for the payment of fees.
- b) The Trustee can be reimbursed for any liability or expense associated with any claim or legal action. There are a number of exceptions which include willful misconduct or bad faith by the Trustee.

#### **§8.06 Eligibility Requirements for the Trustee**

The Trustee must be a corporation operating under United States law. This section also requires that the corporation have fifty million dollars in capital pursuant to federal authority and if it fails to do so the Trustee shall resign.

#### **§8.07 Registration and Removal of the Trustee**

The Trustee can resign or be removed at any time. If the Trustee does resign they must give written notice 60 days in advance.

#### **§8.08 Successor Trustee**

When a successor Trustee is appointed they must be eligible under 8.06 and must inform the Depositor, Servicers, and Certificateholders.

#### **§8.09 Merger or Consolidation of Trustee**

Any corporation that merges or consolidates must be eligible under 8.06.

#### **§8.10 Appointment of Co-Trustee or Separate Trustee**

The Trustee can appoint co-trustees or separate trustees and are said to have the same right and powers as the Trustee. No Trustee shall be held personally liable and the Trust Fund will be liable for payments.

#### **§8.11 Tax Matters**

This section states that the assets are intended to be qualify as Real Estate Mortgage Investment Conduits (REMIC) as defined by the Internal Revenue Service. Furthermore, it states that it is the Securities Administrator's responsibility to act as the agent to prepare, file, and maintain the REMIC assets.

#### **§8.12 Commission Reporting**

The Securities Administrator is responsible for preparing and filing reports with the Securities and Exchange Commission via EDGAR.

### **Article IX**

#### **Administration of the Mortgage Loans by the Master Servicer**

##### **§9.01 Duties of the Master Servicer; Enforcement of Servicer's Obligations**

This section delineates the contractual obligations of the Master Servicer.

- a) The Master Servicer will, in good faith, monitor the obligations and performance of the Sub-Servicers as it relates to the Servicing Agreement.
- b) The Maaster Servicer or the Trustee pay the cost of monitoring the Sub-Sericers.
- c) If the Master Servicer or Trustee replace a Sub-Servicer as successor, the successor does not assume liability for the representations and warranties of the replaced Sub-Servicer.
- d) Only the Master Servicer or Trustee can legally consent to the assignment of Sub-Servicer's obligations.

##### **§9.02 [Reserved]**

##### **§9.03 [Reserved]**

##### **§9.04 Maintenance of Fidelity Bond and Errors and Omissions**

This section sets forth that the Master Servicer is required to have a blanket fidelity bond and an insurance policy that covers any errors or omissions in the performance of the its obligations. Furthermore, the insurance policy and fidelity bond should be in an amount generally acceptable for master servicers or trustees.

#### **§9.05 Representation and Warranties of the Master Servicer**

- a) The Master Servicer represents and warrants that as of the Closing Date:
  - i. They are a national banking association in good standing and have the power to transact in any and all business contemplated in this agreement;
  - ii. That this agreement does not break any of their by-laws or breach other agreement that they are a part of or violate any law, rule, or regulation;
  - iii. They understand they are entering into a legally binding agreement;
  - iv. They are not in default with any government;
  - v. They are not a party to or bound by any agreement or charter provision that would adversely affect its ability to perform its obligations.
  - vi. There are no actions or investigations against them;
  - vii. That it is not required to inform any governmental authority of the transactions prior to the Closing Date;
- b) If the Master Servicer materially breaches their representation and warranties set forth in §9.05 they will indemnify the Depositor, Securities Administrator, and Trustee.

#### **§9.06 Master Servicer Event of Default**

The following constitute an Event of Default:

- a) Failure to deposit a payment made by a Sub-Servicer into the Distribution Account for longer than two days;
- b) Failure to observe or perform any covenants that continue unresolved for thirty days;
- c) An order of the court entered against the Master Servicer for liquidation or bankruptcy that is unresolved for sixty days or more;
- d) If the Master Servicer attempts to assign its duties and obligations to another party without the consent of the Depositor or Securities Administrator;
- e) If the Master Servicer is indicted for fraud or criminal activity in performance of its duties under this Agreement;
- f) Failure of the Master Servicer to provide annual statements of compliance.

#### **§9.07 Waiver of Default**

An Event of Default can be waived by the Trustee along with 51% of the Certificateholders votes.

#### **§9.08 Successor Master Servicer**

Upon termination of a Master Servicer the Depositor will appoint a successor. The successor must be an approved Fannie Mae or Freddie Mac servicer in good standing. In the event the Master Servicer is terminated they still must perform their duties until a successor is appointed. If no successor can be appointed within ninety days the Trustee will become the successor and be subject to the liabilities of the former Master Service but will not be obligated to monitor Sub-Servicers.

#### **§9.09 Compensation of the Master Servicer**

The Master Servicer is paid the Master Servicing Fee. The Master Servicing Fee can generally be found in the Definitions.

#### **§9.10 Merger or Consolidation**

Any Person that is merged or consolidates with the Master Servicer must agree to service the Mortgage Loans in accordance with Fannie Mae and Freddie Mac guidelines and have a net worth no less than twenty-five million dollars.

#### **§9.11 Resignation of the Master Servicer**

This section states that the Master Servicer cannot resign unless it is no longer allowed, by law, to be the Master Servicer. If the Master Servicer does resign then it is not effective until another Master Servicer assumes the duties. In this PSA the Master Servicer and the Security Administrator are the same company therefore if the company resigns as the Master Servicer it must also resign as the Securities Administrator.

#### **§9.12 Assignment or Delegation of Duties by the Master Servicer**

The Master Servicer is not allowed to assign its duties or obligations to anyone unless the upon written consent of the Depositor.

#### **§9.13 Limitation on Liability of the Master Servicer**

The Master Servicer is has no liability to the Trustee or Certificateholders for any act, omission, or error in judgment made in good faith. However, the Master Servicer will be liable for willful misfeasance, bad faith, negligence, or reckless disregard for its obligations. The Master Servicer is not liable for any acts or omissions of any Sub-Servicer. However, the Master Servicer can be liable if the Sub- Servicer acts with willful misfeasance, bad faith, negligence, or reckless disregard for its obligations.

The Master Servicer may rely in good faith on any document that is properly executed and submitted.

The Master Servicer is under no obligation to appear in any legal action that is not in relation to its duties. However, the Master Servicer may in its discretion undertake any such action that it may deem necessary or desirable.

#### **§9.14 Indemnification; Third Party Claims**

The Master Servicer indemnifies the Trustee as successor master servicer from any claims that the Trustee may sustain as a result of liability or obligations of the Master Servicer and in connection with the Trustee's assumption of the Master Servicer's obligations, duties or responsibilities under such agreement.



The Trust will indemnify the Master Servicer against any and all claims that the Master Servicer may incur in connection with this Agreement. The Master Servicer would be entitled to reimbursement for any indemnified amount. However, if the liability or expense is related to

- i) a material breach of the Master Servicer's representations and warranties,
- ii) the Master Servicer's willful malfeasance, bad faith or negligence or by reason of its reckless disregard of its duties and obligations or
- iii) failure to provide the assessment, attestation and annual statement of compliance in accordance with Sections 3.03, 3.04 and 3.05

The Master Servicer is not liable for any action taken by a Servicer with respect to loss mitigation of defaulted Mortgage Loans at the direction of the Credit Risk Manager pursuant to a Credit Risk Management Agreement. Furthermore, the Master Servicer is not liable for the performance of a Servicer under any Credit Risk Management Agreement.

#### **§9.15 Duties of the Credit Risk Manager**

This section begins by stating the name of the Credit Risk Manager. The Credit Risk Manager provides reports and recommendations in relation to delinquent and defaulted Mortgage Loans, and the collection of Prepayment Charges. The reports are based on information given in a Monthly Statement by the Master Servicer and Sub-Servicers.

#### **§9.16 Limitation Upon Liability of the Credit Risk Manager**

The Credit Risk Manager has no liability to the Trustee, Securities Administrator, Depositor, or Certificateholders for any act, omission, or error in judgment made in good faith. However, the Credit Risk Manager will be liable for willful misfeasance, bad faith, negligence, or reckless disregard for its obligations. The Master Servicer is not liable for any acts or omissions of any Sub-Servicer. However, the Master Servicer can be liable if the Sub-Servicer acts with willful misfeasance, bad faith, negligence, or reckless disregard for its obligations. The Credit Risk Manager may rely in good faith upon the accuracy of any document furnished by the Servicers.

**§9.17 Removal or Resignation of Credit Risk Manager-** This section allows for the Credit Risk Manager to be removed by the Certificateholders by a two-thirds vote. The section also states that five years from the date of the Agreement and annually thereafter the Credit Risk Manager can resign or be terminated by the Depositor.

### **Article X**

#### **Concerning the Securities Administrator**

#### **§10.01 Duties of Securities Administrator**

The Securities Administrator is responsible for obtaining all of the documents in the Agreement and examine them to make sure they are in the required form specified in the Agreement. However, the Securities Administrator is not responsible for the accuracy or content of the document. If the Securities Administrator finds that a document does not conform to the requirements then they are to request a corrected document. If at that time they do not receive a corrected document then they must notify the Certificateholders.

The Securities Administrator is not to be relieved of any liability for negligence or willful misconduct.

- a) The Securities Administrator is only liable for the duties set forth in the Agreement. No implied covenants or obligations shall be read into this Agreement. The Securities Administrator can rely on the documents furnished to them as true and correct.
- b) The Securities Administrator shall not be liable for error in judgment made in good faith unless the Trustee was negligent in ascertaining pertinent facts.
- c) The Securities Administrator shall not be liable for any action taken in good faith for the Certificate Holders.
- d) The Securities Administrator shall have no liability for the acts or omission of the Master Servicer or the Trustee.

#### **§10.02 Certain Matters Affecting the Securities Administrator**

- a) The Securities Administrator can rely upon any document believed to be true and shall not have any responsibility to confirm the genuineness.
- b) The Securities Administrator can receive advice from counsel or advisors that is done in good faith.
- c) The Securities Administrator is not liable for any action or omission taken in good faith.
- d) The Securities Administrator does not need to investigate any matters dealing with the genuineness of the documents unless requested by 25% of the Certificateholders.
- e) The Securities Administrator may perform duties through its agents and is not responsible for the negligence of any agent appointed with due care.
- f) The Securities Administrator is not required to expend its own funds in performance of its duties.
- g) The Securities Administrator is not responsible for the performance or obligations of the Master Servicer or the Trustee.
- h) The Securities Administrator is generally not obligated to conduct or defend any litigation that is not incidental to its duties.

#### **§10.03 Securities Administrator Not Liable for Certificates or Mortgage Loans**

The Securities Administrator assumes no responsibility for the correctness of the Certificates because the Certificates are statements of the Depositor. The Securities Administrator makes no representation or warranty of any Mortgage Loan or related document. The Securities Administrator executes the Certificates on behalf of the Trust Fund and not in its individual capacity or personal undertaking.

#### **§10.04 Securities Administrator May Own Certificates**

The Securities Administrator may own or pledge Certificates.

#### **§10.05 Securities Administrator Fees and Expense**

- a) The Securities Administrator is compensated from the investment funds earned from the Distribution Account during the Float Period. The Trustee cannot put a lien on the Trust for the payment of fees.

- b) The Securities Administrator can be indemnified by the Trust for any liability or expense associated with a claim or legal action. However, there are a number of exceptions which include willful misconduct or bad faith by the Trustee.

#### **§10.06 Eligibility Requirements for the Securities Administrator**

The Securities Administrator must be a corporation operating in good standing under United States law. This section also requires that the corporation have fifty million dollars in capital pursuant to federal authority and if it fails to do so the Securities Administrator shall resign.

#### **§10.07 Registration and Removal of the Securities Administrator**

The Securities Administrator can resign or be removed at any time. If the Trustee does resign they must give written notice 60 days in advance.

#### **§10.08 Successor Securities Administrator**

When a successor Securities Administrator is appointed they must be eligible under 10.06 and must inform the Depositor, Servicers, and Certificateholders.

#### **§10.09 Merger or Consolidation of Securities Administrator**

Any corporation that merges or consolidates must be eligible under 10.06.

#### **§10.10 Assignment or Delegation of Duties by the Securities Administrator**

The Securities Administrator is not allowed to assign its duties or obligations to anyone unless the upon written consent of the Depositor.

### **Article XI**

#### **Termination**

##### **§11.01 Termination upon Liquidation or Purchase of the Mortgage Loans**

This section gives information on how the purchase price will be calculated in the event of liquidation or an Option to Purchase the Mortgage Loans.

##### **§11.02 Final Distribution on the Certificates**

This section states how the Final Distribution will be announced and paid in the event of maturity or purchase.

##### **§11.03 Additional Termination Requirements**

In the event of an Option to Purchase the Trust Fund will terminate and the Securities Administrator must give REMIC information to the buying party.

## **Article XII**

### **Miscellaneous Provisions**

#### **§12.01 Amendment**

This section list the reasons why the Agreement may be amended at anytime. There is a clear policy that an amendment cannot be made to adversely affect the Certificateholders.

Furthermore, the Agreement can be amended to maintain qualification with REMIC standards and avoid any tax with regards to any REMIC.

If there are any amendments made the Certificateholders and Rating Agency must be notified.

#### **§12.02 Recordation of Agreement; Counterparts**

The Agreement is to be recorded in all appropriate public offices for real property records in all jurisdictions in which the Mortgaged Properties are situated. The recordation of the Agreement can take place simultaneously with the use of counterparts. Furthermore, those counterparts constitute as the original instrument.

#### **§12.03 Governing Law**

This section states the applicable governing law.

#### **§12.04 Intention of Parties**

It is Depositor's intention to convey all right, title and interest in the property as a sale of property not a grant of security interest to secure a loan.

However, if the conveyance is deemed to be a security interest then: (i) the rights and obligations of the parties are pursuant to the Agreement; (ii) the Trustee is obligated to secure payment of the certificates; (iii) the Agreement constitutes a security agreement under the governing law.

If the Agreement is deemed to be a security interest in the Mortgage Loans the Depositor must take reasonable actions to ensure that the security interest is perfected and maintained under applicable law. The Depositor will make all initial fillings and forward a copy to the Trustee.

Furthermore, the Depositor must prepare and file the necessary documents to perfect the Trustee's security interest or lein on the Mortgage Loans. Those documents include: any change of name or jurisdiction of the Depositor, Sponsor, or Trustee; any transfer of interest of the Sponsor or Depositor in any Mortgage Loan; any change under relevant UCC or other applicable laws.

#### **§12.05 Notices**

This section set forth a number of causes that the Securities Administrator must notify the Rating Agency. Included in the list is the repurchase or substitution of Mortgage Loans.

#### **§12.06 Severability of Provision**

Each provision in the Agreement is considered severable so that if one provision is found to be invalid it does not affect the validity or enforceability of any other provision.

#### **§12.07 Certificates Nonassessable and Fully Paid**

The Certificateholders shall not be personally liable for the obligations of the Trust Fund.

**§12.10 Rules of Construction**

This states that the article and section heading are only for the purpose of making the document convenient to read and are to show the intent of the parties.

**§12.11 Waiver of Jury Trial**

This section states that each party waives their right to a jury trial and that any dispute will be tried before a judge.

BELOW IS AN EXERPT FROM THE PSA REGARDING PROHIBITION OF MORTGAGE LOAN MODIFICATIONS.  
TO SEE THE ENTIRE PSA, GO TO:

<http://www.sec.gov/Archives/edgar/data/1360498/000095013606004651/file4.htm>

EX-4.1 4 file4.htm POOLING AND SERVICING AGREEMENT

Execution Copy

=====

MORGAN STANLEY ABS CAPITAL I INC.,

as Depositor,

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,

as Master Servicer, Backup Servicer and Securities Administrator,

SAXON MORTGAGE SERVICES INC.

as Servicer,

MASTER FINANCIAL, INC.,

as Servicer,

IXIS REAL ESTATE CAPITAL INC.,

as Unaffiliated Seller,

and

DEUTSCHE BANK NATIONAL TRUST COMPANY,

as Trustee and Custodian.

POOLING AND SERVICING AGREEMENT

Dated as of May 1, 2006

IXIS REAL ESTATE CAPITAL TRUST 2006-HE2

MORTGAGE PASS-THROUGH CERTIFICATES,  
SERIES 2006-HE2

### ARTICLE III

#### ADMINISTRATION AND SERVICING OF MORTGAGE LOANS

##### Section 3.01 Servicers to Service Mortgage Loans.

(a) For and on behalf of the Certificateholders, each Servicer shall service and administer the Mortgage Loans for which it is acting as Servicer in accordance with the terms of this Agreement and the respective Mortgage Loans and, to the extent consistent with such terms, in the same manner in which it services and administers similar mortgage loans for its own portfolio, giving due consideration to customary and usual standards of practice of prudent mortgage lenders and loan servicers administering similar mortgage loans but without regard to:

(i) any relationship that such Servicer, any Subservicer or any Affiliate of such Servicer or any Subservicer may have with the related

shall execute a separate power of attorney in favor of each Servicer for the purposes described herein to the extent necessary or desirable to enable the Servicers to perform its duties hereunder. The Trustee shall not be liable for the actions of the Servicers or any Subservicers under such powers of attorney.

(b) Subject to Section 3.09(b), in accordance with the standards of the preceding paragraph, each Servicer shall advance or cause to be advanced funds as necessary for the purpose of effecting the timely payment of taxes and assessments on the Mortgaged Properties, which advances shall be Servicing Advances reimbursable in the first instance from related collections from the Mortgagors pursuant to Section 3.09(b), and further as provided in Section 3.11. Any cost incurred by a Servicer or by Subservicers in effecting the timely payment of taxes and assessments on a Mortgaged Property shall not be added to the unpaid principal balance of the related Mortgage Loan, notwithstanding that the terms of such Mortgage Loan so permit.

(c) Notwithstanding anything in this Agreement to the contrary, each Servicer may not make any future advances with respect to a Mortgage Loan (except as provided in Section 4.01) and no Servicer shall (i) permit any modification with respect to any Mortgage Loan (except in the case of a defaulted Mortgage Loan) that would change the Mortgage Rate, reduce or increase the principal balance (except for reductions resulting from actual payments of principal) or change the final maturity date on such Mortgage Loan (except for a reduction of interest payments resulting from the application of the Servicemembers Civil Relief Act or any similar state statutes) or (ii) permit



any modification, waiver or amendment of any term of any Mortgage Loan that would both (A) effect an exchange or reissuance of such Mortgage Loan

under Section 1001 of the Code (or final, temporary or proposed Department of the Treasury regulations promulgated thereunder) and (B) cause any REMIC created hereunder to fail to qualify as a REMIC under the Code or the imposition of any tax on "prohibited transactions" or "contributions after the startup day" under the REMIC Provisions, or (iii) except as provided in Section 3.07(a), waive any Prepayment Charges.

(d) Each Servicer may delegate its responsibilities under this Agreement; provided, however, that no such delegation shall release such Servicer from the responsibilities or liabilities arising under this Agreement.

(e) In the event that the Mortgage Loan Documents relating to any Mortgage Loan contain provisions requiring the related Mortgagor to submit to binding arbitration of any disputes arising in connection with such Mortgage Loan, the applicable Servicer shall be entitled at its sole discretion to waive any such provisions on behalf of the Trust and to send written notice of such waiver to the related Mortgagor, although the Mortgagor may still require

# Sample Document Custody Agreements

**Exhibit 10.16.2**

EXECUTION VERSION

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Barclays Bank PLC, as Administrative Agent

and

American Home Mortgage Acceptance, Inc., as a Seller

and

American Home Mortgage Corp., as a Seller

and

American Home Mortgage Investment Corp., as a Seller

and

American Home Mortgage Servicing, Inc., as a Seller

and

Deutsche Bank National Trust Company, as Custodian

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**CUSTODIAL AGREEMENT**

As of November 14, 2006

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**TABLE OF CONTENTS**

	<b>Page</b>
Section 1. <u>Definitions.</u>	1
Section 2. <u>Deposit of Mortgage Loans; Effecting a Transaction; Funding Account.</u>	6
Section 3. <u>Repurchase Date.</u>	7
Section 4. <u>Trust Receipt.</u>	8
Section 5. <u>Wet Funded Mortgage Loans.</u>	9
Section 6. <u>Reserved.</u>	10
Section 7. <u>Obligations of the Custodian; Certain Representations and Warranties.</u>	10
Section 8. <u>Substitution.</u>	11
Section 9. <u>Additional Purchased Assets.</u>	12
Section 10. <u>Future Defects.</u>	12
Section 11. <u>Release for Servicing.</u>	12
Section 12. <u>Limitation on Release.</u>	13
Section 13. <u>Release for Payment.</u>	14
Section 14. <u>Fees of Custodian.</u>	14
Section 15. <u>Removal or Resignation of Custodian With Respect to Some or All of the Purchased Assets.</u>	14
Section 16. <u>Examination and Copies of Mortgage Loan Files.</u>	15
Section 17. <u>Insurance of Custodian.</u>	16
Section 18. <u>Covenants of Sellers.</u>	16
Section 19. <u>Periodic Statements.</u>	16
Section 20. <u>Governing Law; Counterparts.</u>	17
Section 21. <u>No Adverse Interest of Custodian.</u>	17
Section 22. <u>Custodian Representations.</u>	17

Section 23. <u>Cumulative Rights.</u>	17
Section 24. <u>Notices.</u>	17
Section 25. <u>Successors and Assigns; Benefits of Custodial Agreement.</u>	19
Section 26. <u>Reliance of Custodian.</u>	20
Section 27. <u>Indemnification.</u>	20
Section 28. <u>Obligations of the Custodian With Respect to the Trust Receipts.</u>	21
Section 29. <u>Authorized Representatives.</u>	22
Section 30. <u>Reproduction of Documents.</u>	23
Section 31. <u>Amendment; Waiver; Entire Agreement; Severability.</u>	23
Section 32. <u>Consent to Jurisdiction.</u>	23
Section 33. <u>Confidentiality.</u>	24

-i-

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## **APPENDIXES**

### APPENDIX A ADDITIONAL DEFINITIONS

## **EXHIBITS**

EXHIBIT 1 FORM OF TRUST RECEIPT

EXHIBIT 2 FORM OF REQUEST FOR RELEASE OF DOCUMENTS AND RECEIPTS

EXHIBIT 3 AUTHORIZED REPRESENTATIVES OF THE CUSTODIAN

EXHIBIT 4 AUTHORIZED REPRESENTATIVES OF SELLER

EXHIBIT 5 AUTHORIZED REPRESENTATIVES OF SELLER'S DESIGNEE

EXHIBIT 6 AUTHORIZED REPRESENTATIVES OF THE ADMINISTRATIVE AGENT

EXHIBIT 7 FORM OF LOAN SCHEDULE

EXHIBIT 8 FORM OF CUSTODIAL DELIVERY

EXHIBIT 9 FORM OF NOTICE TO CUSTODIAN

EXHIBIT 10 FORM OF REPURCHASE RELEASE

EXHIBIT 11 FORM OF LOST NOTE AFFIDAVIT

EXHIBIT 12 RESERVED

EXHIBIT 13 FORM OF TRANSMITTAL LETTER

EXHIBIT 14 RESERVED

EXHIBIT 15 FORM OF TRANSACTION NOTICE

EXHIBIT 16 FORM OF WET FUNDED TRUST RECEIPT

-ii-

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**THIS CUSTODIAL AGREEMENT**, dated as of November 14, 2006, is made by and among Barclays Bank PLC, as buyer ("Buyer"), a public limited company organized under the laws of England and Wales, American Home Mortgage Acceptance, Inc., as seller ("AHMA" and a "Seller"), a Maryland corporation, American Home Mortgage Corp., as seller ("AHMC" and a "Seller"), a New York corporation, American Home Mortgage Investment Corp., as seller ("AHMIC" and a "Seller"), a Maryland corporation, and American Home Mortgage Servicing, Inc., as seller ("AHMS", a "Seller" and, together with AHMA, AHMC and AHMIC, the "Sellers"), a Maryland corporation, and Deutsche Bank National Trust Company, a national banking association ("DBNTC"), as custodian (in such capacity, together with each successor custodian, the "Custodian").

**WITNESSETH:**

WHEREAS, the Administrative Agent, for the benefit of the Buyers, and the Sellers may, from time to time, enter into transactions (each, a "Transaction") in which a Seller sells to the Buyers certain Purchased Assets against payment by such Buyer of a purchase price therefor, with a simultaneous

agreement by Sellers to repurchase from such Buyer that same Purchased Asset and to pay to such Buyer a repurchase price, all as provided in that certain Master Repurchase Agreement, dated as of November 14, 2006, between Sellers and Barclays Bank PLC as buyer (the "Buyer") and as Administrative Agent (as amended, restated, supplemented or otherwise modified from time to time, the "Master Repurchase Agreement"). Sellers shall deliver to the Custodian, upon execution of this Agreement, a true and correct copy of the Master Repurchase Agreement.

WHEREAS, the Administrative Agent has requested DBNTC to act as Custodian on behalf of the Registered Holder(s) for purposes of holding the Purchased Assets pursuant to the Repurchase Agreement;

WHEREAS, DBNTC is a national banking association, and a bank (as defined in Section 9-102(a) of the Uniform Commercial Code), is otherwise authorized to act as Custodian pursuant to this Agreement, and has agreed to act as Custodian/bailee for hire for the Registered Holder(s), all as more particularly set forth herein; and

WHEREAS, Sellers shall from time to time deliver to the Custodian Purchased Assets that are subject to each Transaction and have agreed to deliver or cause to be delivered to the Custodian certain documents with respect to such Purchased Assets in accordance with the terms and conditions hereof;

NOW, THEREFORE, in consideration of the mutual undertakings herein expressed, the parties hereto hereby agree as follows:

Section 1. Definitions. Capitalized terms (including those contained in the preamble hereof) used but not defined herein shall have the meanings assigned to them in the Master Repurchase Agreement. All references to times in this Agreement shall be references to New York City time unless otherwise stated herein.

In addition, the following terms shall have the respective meanings set forth below:

"Additional Purchased Assets": has the meaning set forth in Section 9 hereof.

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"Affiliate": has the meaning set forth in the Master Repurchase Agreement.

"Agreement" (or "this Agreement"): means this Custodial Agreement and all exhibits, attachments and supplements hereto, as amended from time to time.

"Appraised Value": has the meaning set forth in the Master Repurchase Agreement.

"Asset Schedule": means the list of Purchased Assets delivered by Sellers to the Administrative Agent and the Custodian in the form set forth in Exhibit 7 hereto. Each Asset Schedule shall set forth, as to each Purchased Asset, the related Mortgagor's name, the address of the related Mortgaged Property and the outstanding principal balance of the Purchased Asset as of the initial Purchase Date, together with any other information specified by the Administrative Agent from time to time in good faith.

“Assignment of Mortgage”: means an assignment of the Mortgage, notice of transfer or equivalent instrument in recordable form (excluding only the name of the assignee, if delivered in blank), sufficient under the laws of the jurisdiction where the related Mortgaged Property is located to reflect the transfer of the Mortgage to the party indicated therein.

“Authorized Representative”: has the meaning set forth in Section 29 hereof.

“Business Day”: means any day other than (i) a Saturday or Sunday or (ii) a day upon which the New York Stock Exchange, the Federal Reserve Bank of New York or the Custodian is authorized or obligated by law or executive order to be closed.

“Buyer”: means each of Barclays Bank PLC and Sheffield Receivables Corp., and their respective successors in interest and assigns.

“Collateral”: has the meaning set forth in Section 7 of the Master Repurchase Agreement.

“Computer Medium”: means a computer tape or other electronic medium generated by or on behalf of Sellers and delivered or transmitted to Administrative Agent and Custodian which provides information relating to the Purchased Assets, including the identity of the related servicer with respect to each Mortgage Loan and the information set forth in the Asset Schedule, in a format reasonably acceptable to Administrative Agent.

“Confidential Information”: has the meaning set forth in Section 33 hereof.

“Confirmation”: has the meaning set forth in the Master Repurchase Agreement.

“Custodial Delivery”: means the letter executed by the applicable Seller in order to deliver the Mortgage Loan Files to the Custodian pursuant to this Agreement on the related Purchase Date, a form of which is attached as Exhibit 8 hereto.

-2-

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“Custodial Delivery Failure”: has the meaning set forth in Section 27(b) hereof.

“Custodian”: means Deutsche Bank National Trust Company, or any successor in interest, assigns, or any successor to the Custodian under this Agreement as herein provided.

“Dry Mortgage Loan” means a Mortgage Loan for which the Mortgage Loan File has been delivered to the Custodian.

“Electronic Agent”: shall mean MERSCORP, INC, and its successors in interest or assigns.

“Electronic Tracking Agreement”: has the meaning set forth in the Master Repurchase Agreement.



“Event of Default”: has the meaning set forth in the Master Repurchase Agreement.

“Exception Report”: means the exception report prepared by the Custodian pursuant to this Agreement, which report shall contain a loan schedule identifying each Mortgage Loan delivered pursuant hereto, and any items of noncompliance with the review criteria set forth in Section 4(a) hereof (except with respect to Wet Funded Mortgage Loans, only a loan schedule).

“Fannie Mae”: means Fannie Mae, the government sponsored enterprise formerly known as the Federal National Mortgage Association.

“Freddie Mac”: means Freddie Mac, the government sponsored enterprise formerly known as the Federal Home Loan Mortgage Corporation, or any successor thereto.

“Income”: has the meaning set forth in the Master Repurchase Agreement.

“Interim Funder”: means with respect to each MERS Mortgage Loan, the Person named on the MERS System as the interim funder pursuant to the MERS Procedures Manual.

“Margin Call”: has the meaning set forth in the Master Repurchase Agreement to satisfy a Margin Deficit.

“Master Repurchase Agreement”: has the meaning set forth in the preamble hereof.

“MERS”: means Mortgage Electronic Registration Systems, Inc., a corporation organized and existing under the laws of the State of Delaware or any successor thereto.

“MERS Designated Mortgage Loan”: has the meaning assigned to such term in Section 3 of the Electronic Tracking Agreement.

“MERS Identification Number”: means the eighteen digit number permanently assigned to each MERS Mortgage Loan.

-3-

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“MERS Procedures Manual”: means the MERS Procedures Manual attached as Exhibit B to the Electronic Tracking Agreement, as it may be amended, supplemented or modified from time to time.

“MERS Report”: means the schedule listing MERS Designated Mortgage Loans and other information prepared by an electronic agent pursuant to the Electronic Tracking Agreement.

“MERS<sup>®</sup> System”: means an Electronic Agent’s mortgage electronic registry system, as more particularly described in the MERS Procedures Manual.

“Mortgage”: means the mortgage, deed of trust, or other instrument that creates a Lien on the related Mortgaged Property and secures a Note.

“Mortgage Interest Rate”: means the rate of interest borne on a Mortgage Loan from time to time in accordance with the terms of the related Mortgage Note.

“Mortgage Loan”: has the meaning set forth in the Master Repurchase Agreement.

“Mortgage Loan File”: has the meaning set forth in Appendix A attached hereto.

“Mortgage Note”: means the promissory note or other evidence of the indebtedness of a Mortgagor secured by a Mortgage.

“Mortgaged Property”: has the meaning set forth in the Master Repurchase Agreement.

“Mortgagor”: means the obligor or obligors on a Mortgage Note, including any Person who has assumed or guaranteed the obligations of the obligor thereunder.

“Notice to the Custodian”: has the meaning set forth in Section 28(b) hereof.

“Person”: means any legal person, including any individual, corporation, partnership, association, joint-stock company, trust, limited liability company, unincorporated organization, governmental entity or other entity of similar nature.

“Price Differential”: has the meaning set forth in the Master Repurchase Agreement.

“Program Documents”: has the meaning set forth in the Master Repurchase Agreement.

“Property”: means any right or interest in or to property of any kind whatsoever, whether real, personal or mixed and whether tangible or intangible.

-4-

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“Purchase Date”: means the date on which Purchased Assets are to be transferred by Sellers to the Administrative Agent. The Purchase Date shall be specified in the Confirmation.

“Purchase Price”: has the meaning set forth in the Master Repurchase Agreement.

“Registered Holder”: has the meaning set forth in Section 28(a) hereof.

“Repurchase Agreement”: has the meaning set forth in the preamble hereof.

“Repurchase Date”: has the meaning set forth in the Master Repurchase Agreement.

“Repurchase Price”: has the meaning set forth in the Master Repurchase Agreement.

“Request for Release”: has the meaning set forth in Section 11 hereof.

“Responsible Officer”: means, when used with respect to the Custodian, any officer assigned to the corporate trust office located at 1761 East St. Andrew Place, Santa Ana, California 92705, Attention: Mortgage Custody AH06BC (or any successor thereto), including any Vice President, Assistant Vice President, Trust Officer, any Assistant Secretary, any trust officer or any other officer of the Custodian customarily performing functions similar to those performed by any of the above designated officers and having direct responsibility for the administration of this Agreement and designated on Exhibit 3 attached hereto (which will be updated from time to time by the Custodian and provided to the Administrative Agent and Sellers); when used with respect to Sellers or an Administrative Agent, its Chief Executive Officer, President, Chief Financial Officer, any Vice President or Treasurer; and, when used with respect to any Person (including the foregoing), any other officer authorized by such Person.

“Sellers”: has the meaning set forth in the preamble hereto.

“Sellers’ Authorized Representatives”: means each Authorized Representative of each Seller set forth on Exhibit 4 hereto (as the same may be modified from time to time) and each Authorized Representative of each Seller’s Designee set forth on Exhibit 5 hereto (as the same may be modified from time to time) as described in Section 29.

“Sellers’ Designee”: has the meaning set forth in Section 29 hereof.

“Servicer”: means any Person approved by Administrative Agent in its sole discretion exercised in good faith.

“Substitute Assets”: has the meaning set forth in the Master Repurchase Agreement.

“Transaction”: has the meaning set forth in the preamble hereof.

-5-

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“Transaction Notice”: means a written request of Sellers to enter into a Transaction, which is delivered to the Administrative Agent, in the form attached as Exhibit 15 hereto.

“Transferee”: has the meaning set forth in Section 28(b) hereof.

“Trust Receipt”: means a trust receipt issued by the Custodian evidencing the Purchased Assets it holds, in the form attached hereto as Exhibit 1, and delivered to the Administrative Agent by the Custodian in accordance with Section 4 hereof.

“Uniform Commercial Code”: has the meaning set forth in the Master Repurchase Agreement.

“Wet Funded Mortgage Loan” means a closed fully funded Mortgage Loan which the Sellers are selling to the Administrative Agent for the benefit of the Buyers and for which the Mortgage Loan File has not been delivered to the Custodian.

“Wet Funded Delivery Date” means with respect to each Wet Funded Mortgage Loan, the date of delivery of the Mortgage Loan File to the Custodian, which shall not be later than the seventh (7<sup>th</sup>) Business Day following the Purchase Date.

“Wet Funded Trust Receipt” means a trust receipt issued by the Custodian evidencing Purchased Assets which are Wet Funded Mortgage Loans, substantially in the form attached hereto as Exhibit 16, and delivered to the Administrative Agent by the Custodian in accordance with Section 5 hereof.

“Written Instructions”: means written communications received by a Responsible Officer of the Custodian from an Authorized Representative of the Administrative Agent or the related Seller, including communications received by any means permitted by Section 24 hereof.

Section 2. Deposit of Mortgage Loans; Effecting a Transaction; Funding Account.

(a) With respect to any Mortgage Loan that a Seller desires to sell on a Purchase Date, the applicable Seller, the Custodian and the Administrative Agent agree to follow the process set forth below with respect to such Mortgage Loan:

- The applicable Seller will deliver to the Administrative Agent the related Transaction Notice, and to the Custodian the Custodial Delivery, the Mortgage Loan File and the related Asset Schedule on a Computer Medium via electronic transmission no later than 4:00 p.m. (New York City time) on the Business Day immediately preceding the proposed Purchase Date;
- The Administrative Agent will notify the Custodian and the related Seller, no later than 11:00 a.m. (New York City time) on the Purchase Date, of any Mortgage Loan not accepted by the Buyers, and thereupon the Custodian shall remove such Mortgage Loan from the related Asset Schedule;

-6-

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- Together with such notification, the Administrative Agent will also deliver to the applicable Seller such additional information in respect of the accepted Mortgage Loans as required under the Master Repurchase Agreement;

- With respect to Mortgage Loans other than Wet Funded Mortgage Loans, the Custodian shall deliver to the Administrative Agent a copy of the Exception Report for the new Mortgage Loans being purchased by Buyers, along with a cumulative Exception Report for all Purchased Assets, and a Trust Receipt relating cumulatively to all Purchased Assets. Such schedules and reports shall be provided on a Computer Medium via electronic transmission no later than 2:00 p.m., (New York City time) on the proposed Purchase Date;
- With respect to Mortgage Loans other than Wet Funded Mortgage Loans, the Custodian shall deliver to the Administrative Agent a copy of the Exception Report for the new Mortgage Loans purchased on such Purchase Date along with a cumulative Exception Report for all Mortgage Loans purchased and a cumulative Trust Receipt (together with the cumulative Exception Report) relating to all Mortgage Loans purchased, in each case, via overnight courier for delivery on the Business Day immediately following the related Purchase Date; and
- By 5:00 p.m. (New York City time) of each Business Day other than a Purchase Date, the Custodian shall deliver to the Administrative Agent a cumulative Exception Report on a Computer Medium via electronic transmission.

(b) Upon the issuance of any new cumulative Exception Report, the prior Exception Reports attached to the Trust Receipts for such Purchased Assets shall be deemed amended and restated in their entirety by such new cumulative Exception Report. It is understood and agreed that the Custodian shall not be required to review more than 500 Mortgage Loan Files subject to this Agreement on any one Business Day.

(c) The Custodian shall hold the Mortgage Loan Files as Custodian and bailee for hire for the exclusive benefit of the Registered Holder and shall not act upon written instructions of the Administrative Agent or Sellers to deliver the Purchased Assets other than as expressly provided in this Agreement.

### Section 3. Repurchase Date.

The Sellers shall pay to the Administrative Agent, by no later than 4:00 p.m. (New York City time) on such Repurchase Date, in immediately available funds, the Repurchase Price for such Purchased Asset, including the unpaid Price Differential related thereto and together with all other payments due and payable by Sellers to Administrative Agent under the Program Documents in relation to such Purchased Asset. Upon receipt by the Custodian of written notice from the Registered Holder in the form of Exhibit 10 hereto (or via facsimile or e-mail confirmation from an Authorized Representative of the Administrative Agent) stating that the Registered Holder has received the Repurchase Price for the Purchased Assets subject to, and in accordance with the terms of, such Transactions, the Custodian shall

release to the related Seller or its designee the Mortgage Loan Files with respect to such repurchased Purchased Assets and shall deliver to the related Registered Holder an amended Trust Receipt with an Exception Report

-7-

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attached thereto, listing all of the Purchased Assets still subject to one or more Transactions. So long as the notice to the Custodian from the Registered Holder or Authorized Representative of the Administrative Agent is received by 5:00 p.m. (New York City time), the delivery of the related Mortgage Loan Files at the direction of Sellers shall occur as soon as reasonably possible, but no later than five Business Days following receipt of such direction from Sellers; provided, however, if the Sellers direct the Custodian to transfer such Mortgage Loan Files to another custodianship with the Custodian, the Custodian shall immediately effectuate such transfer.

Section 4. Trust Receipt.

(a) No later than the time set forth in Section 2 and provided that the Custodian has timely received the items required pursuant to Section 2 herein for up to 500 Mortgage Loan Files subject to this Agreement (with one additional Business Day to review up to an additional 500 Mortgage Loan Files subject to this Agreement in excess of such limit), the Custodian shall issue and deliver to the Administrative Agent an original Trust Receipt relating to the Purchased Assets (other than Wet Funded Mortgage Loans) (with an Exception Report attached thereto) delivered hereunder and shall deliver to the related Seller an original of such Trust Receipt via overnight courier, to evidence its possession of the Purchased Assets and the Mortgage Loan Files and its certification that each such document in the Mortgage Loan Files is complete and appears regular on its face and each such document in the Mortgage Loans Files purporting to be an original appears on its face to be so.

(b) The Exception Report attached to any Trust Receipt shall be amended on each Business Day via electronic transmission to the Administrative Agent and each subsequently transmitted Exception Report shall automatically supersede each prior Exception Report with respect to such Trust Receipt, and shall render all previously transmitted Exception Reports relating to such Trust Receipt null and void. Each Registered Holder may request the Custodian to provide such Registered Holder with a paper copy of the most recent Exception Report transmitted by the Custodian via electronic transmission with respect to a related Trust Receipt. The Custodian shall be under no duty to review, inspect or examine such documents to determine that any of them are enforceable or appropriate for their prescribed purpose, conform to their stated definitions or that they are other than what they purport to be on their face; provided, however, that nothing in this sentence shall limit the obligations of the Custodian set forth in clause (a) above. The Custodian shall not be required to determine whether any Mortgage Loan File is required to include documents or instruments identified in paragraphs (b), (d), and (h) of the definition of Mortgage Loan File and delivery of any Trust Receipt shall be deemed to acknowledge

receipt of such documents or instruments only to the extent of Custodian's actual possession of such items, if any. It is specifically agreed that the Custodian shall have no responsibility for determining whether any document is valid and binding, whether the text of any assignment or endorsement is in proper or recordable form or whether any document has been recorded in accordance with the requirements of any applicable jurisdiction.

(c) The Sellers shall be solely responsible for providing each and every document required for each Mortgage Loan File to the Custodian in a timely manner and for completing or correcting any missing, incomplete or inconsistent documents, and the Custodian shall not be responsible or liable for taking any such action, causing any Seller or any other Person to do so or notifying any

-8-

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Person (other than the Administrative Agent to the extent specifically required in this Agreement) that any such action has or has not been taken. The Custodian makes no representations as to and shall not be responsible to verify (i) the validity, legality, enforceability, sufficiency, due authorization, recordability, or genuineness of any document in any Mortgage Loan File or any of the Purchased Assets identified on the Asset Schedule or the Exception Report or (ii) the collectability, insurability, effectiveness, perfection, priority or suitability of any such Purchased Asset. Except as expressly set forth herein, the Custodian shall not be required to review the content (except as necessary to certify its review in accordance with Section 4(a)) of any document described in this Section 4 in order to deliver the Trust Receipt.

#### Section 5. Wet Funded Mortgage Loans.

(a) With respect to each Wet Funded Mortgage Loan, on or prior to 2:00 p.m. (New York City time) on the related Purchase Date, the Custodian shall issue to the Administrative Agent a Wet Funded Trust Receipt certifying that the Custodian has received the Asset Schedule identifying such Wet Funded Mortgage Loans as Purchased Assets.

(b) With respect to Wet Funded Mortgage Loans, upon receipt of the Wet Funded Trust Receipt and Asset Schedule from the Custodian, in form and substance acceptable to the Administrative Agent, the Administrative Agent shall transfer to the Sellers immediately available funds in an amount equal to the related Purchase Price in accordance with the terms of the Master Repurchase Agreement.

(c) No later than 9:00 a.m. (New York City time) on the Wet Funded Delivery Date, the related Seller shall deliver or cause to be delivered to the Custodian the Mortgage Loan Files with respect to the related Wet Funded Mortgage Loans. On or prior to 5:00 p.m. (New York City time) on such Wet Funded Delivery Date, the Custodian shall issue a Trust Receipt in accordance with Section 2 hereof which shall identify such Wet Funded Mortgage Loan as a Dry Purchased Asset.

(d) The Custodian shall notify the Administrative Agent in writing by 5:00 p.m. (New York City time) on the Wet Funded Delivery Date in the event that either the Custodian does not receive a Mortgage Loan File relating to a Wet Funded Mortgage Loan or such Mortgage Loan File has been received but does not include the documents necessary for the Custodian to include such Wet Funded Mortgage Loan on an Asset Schedule to a Trust Receipt on such Wet Funded Delivery Date. If such Wet Funded Mortgage Loan is not included on an Asset Schedule to a Trust Receipt by 5:00 p.m. (New York City time) on the Wet Funded Delivery Date, the Custodian shall continue to hold the Mortgage Loan File relating to such Wet Funded Mortgage Loan as agent and bailee for the Administrative Agent until the receipt of instructions to the Custodian in writing to release the related Mortgage Loan File as provided therein.

-9-

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Section 6. Reserved.

Section 7. Obligations of the Custodian; Certain Representations and Warranties.

(a) Without prejudice to DBNTC's or the Custodian's functions and obligations under Sections 2 and 5 hereof, with respect to the Mortgage Loan Files delivered to the Custodian or which come into the possession of the Custodian, the Custodian is, following the related transfer pursuant to Sections 2 and 5 above, the custodian, bailee, and agent for the Buyer, and if different from the Buyer, the Registered Holder, as well. The Custodian shall, following the related transfer pursuant to Sections 2 and 5 above, hold all documents received by it for the exclusive use and benefit of the Administrative Agent, and, if different from the Administrative Agent, the Registered Holder, as well, and shall make disposition thereof only in accordance with this Agreement and written instructions furnished by such Registered Holder. The Custodian shall segregate and maintain continuous custody of the Mortgage Loan Files in secure and fire-resistant facilities in accordance with customary standards for such custody.

(b) The Custodian shall promptly notify the Administrative Agent (and, if different, the Registered Holder) if (i) Sellers fail to pay any amount due to the Custodian under this Agreement or any separate fee agreement related hereto; (ii) a Responsible Officer of the Custodian has written notice that any mortgage, pledge, lien, security interest or other charge or encumbrance has been placed on the Mortgage Loan Files other than in the ordinary course of business; or (iii) any representation, warranty and covenant contained in Section 22 were to become untrue or incorrect at any time during the term of this Agreement.

(c) No provision of this Agreement shall require Custodian to expend or risk its own funds or otherwise incur financial liability (other than expenses or liabilities otherwise required to be incurred by the express terms of Section 15 (c), Section 17 or Section 27(c) of this Agreement) in the performance of its duties under this Agreement if it shall have reasonable grounds for believing that repayment of such funds or indemnity satisfactory to it is not reasonably assured to it.



(d) Other than as provided herein, the Custodian shall not be liable for any action or omission to act hereunder except for its own negligence or lack of good faith or willful misconduct and for the actions or omissions of its officers, directors and employees in connection with this Agreement. In no event shall Custodian have any responsibility to ascertain or take action except as expressly provided herein. None of the Custodian's officers, directors or employees shall have any personal or individual liability hereunder.

(e) Custodian shall have no duties or responsibilities except those that are specifically set forth in this Agreement. Custodian shall have no responsibility for duty with respect to any Mortgage Loan File while not in its possession. No representation, warranty, covenant, agreement, obligation or duty of the Custodian shall be implied with respect to this Agreement or the Custodian's services hereunder other than those specifically set forth in this Agreement.

-10-

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(f) The Custodian, the Administrative Agent and each Seller each hereby represents and warrants to each other party that this Agreement has been duly authorized, executed and delivered by such party and constitutes the legal, valid, and binding obligation of such party enforceable in accordance with its terms except as the enforceability thereof may be limited by (a) bankruptcy, insolvency, liquidation, receivership, moratorium, reorganization or other similar laws affecting the enforcement of the rights of creditors and (b) general principles of equity, whether enforcement is sought in a proceeding in equity or at law.

(g) In the event that (i) the Administrative Agent, a Seller, or the Custodian shall be served by a third party with any type of levy, attachment, writ, or court order with respect to any Mortgage Loan File or any document included within a Mortgage Loan File or (ii) a third party shall institute any court proceeding by which any Mortgage Loan File or a document included within a Mortgage Loan File shall be required to be delivered otherwise than in accordance with the provisions of this Agreement, the party receiving such service shall promptly deliver or cause to be delivered to the other parties to this Agreement copies of all court papers, orders, documents and other materials concerning such proceedings. The Custodian shall, to the extent permitted by law or court order continue to hold and maintain all the Mortgage Loan Files that are the subject of such proceedings pending a final, nonappealable order of a court of competent jurisdiction permitting or directing disposition thereof. Upon final determination of such court, the Custodian shall dispose of such Mortgage Loan File or any document included within such Mortgage Loan File as directed by the Administrative Agent which shall give a direction consistent with such determination. Expenses of the Custodian (including reasonable attorneys' fees and related expenses) incurred as a result of such proceedings shall be borne by Seller.

Section 8. Substitution.

(a) On the Business Day of Custodian's receipt of a Request for Release executed by a Seller and Registered Holder, as applicable, in the form of Exhibit 2 attached hereto (with box 4 checked), and provided that the Custodian has delivered to the Administrative Agent a Trust Receipt with respect to the Substitute Assets, the Custodian will transfer, or cause to be transferred, the Mortgage Loan Files or portions thereof then held by Custodian related to the Purchased Assets specified in such Request to the related Seller or its designee in exchange for the simultaneous transfer by such Seller to the Custodian of Mortgage Loans. The related Seller must deliver or cause to be delivered to Custodian, the Mortgage Loan Files for the Substitute Assets together with a Custodial Delivery and Asset Schedule in accordance with the provisions of Section 2 hereof. It is expressly understood and agreed that the Custodian shall have no duty to perform any valuation of collateral and shall have no responsibility to ascertain the adequacy of any Substitute Assets or their conformity to the definition of "Substitute Assets".

(b) The Custodian shall deliver to the related Registered Holder and the Administrative Agent, if the Administrative Agent is not the Registered Holder, an amended Exception Report and cumulative Trust Receipt that reflects the release of the applicable Purchased Assets and the delivery of the Substitute Assets in accordance with the provisions of Section 2 hereof and Section 4 hereof.

-11-

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#### Section 9. Additional Purchased Assets.

(a) In satisfaction of its obligations with respect to a Margin Call pursuant to Section 6(a) of the Master Repurchase Agreement, Sellers, with the prior written consent of the Administrative Agent, may, from time to time, deliver to the Custodian, additional Purchased Assets (the "Additional Purchased Assets") as an addition to the Purchased Assets already held by the Custodian in accordance with the provisions of this Custodial Agreement. In such event, Sellers shall deliver to the Custodian the Mortgage Loan Files for the Additional Purchased Assets together with a Custodial Delivery, with a copy to the Registered Holder(s) and, if the Administrative Agent is not the applicable Registered Holder at such time, the Administrative Agent, stating that the Additional Purchased Assets are being delivered pursuant to Section 6 of the Master Repurchase Agreement and delivery of the related Asset Schedule to the Custodian shall occur no later than 2:00 p.m. (New York City time) on the proposed day of substitution. If such Additional Purchased Assets are already in the Custodian's possession or if such Additional Purchased Assets are Wet Funded Mortgage Loans, the Custodian shall in turn deliver by electronic transmission to the Administrative Agent the related Exception Report on a Computer Medium no later than 3:00 p.m. (New York City time) on the proposed day of substitution. If new Additional Purchased Assets are delivered to the Custodian with the Asset Schedules, such delivery must occur by 12:00 p.m. (New York City time) and the Custodian shall in turn deliver such related Exception Report no later than 4:00 p.m. (New York City Time) of that day. The Administrative Agent shall notify the Custodian no later

than 4:30 p.m. (New York City time) on the proposed day of substitution of any Mortgage Loans not accepted by Administrative Agent as Additional Purchased Assets.

(b) The Custodian shall deliver to the related Registered Holder and the Administrative Agent, if the Administrative Agent is not the Registered Holder, a cumulative Trust Receipt and amended Exception Report that reflects the delivery of the Additional Purchased Assets in accordance with the provisions of Section 2 hereof, Section 4 hereof and this Section 9.

Section 10. Future Defects. During the term of this Agreement, if the Custodian discovers any defect with respect to any Mortgage Loan File, the Custodian shall give written specification via the Exception Report of such defect to the related Seller, the Registered Holder(s) and, if the Administrative Agent is not a Registered Holder, the Administrative Agent. For purposes of this Section, "defect" means a failure of a document to conform to the review requirements set forth in Section 4(a). Sellers shall be solely responsible for completing or correcting any missing, incomplete or inconsistent documents, and the Custodian shall not be responsible or liable for taking or failing to take any such action, causing any Seller or any other person or entity to do so or notifying any Person that any such action has or has not been taken.

Section 11. Release for Servicing.

(a) From time to time and as appropriate for the foreclosure or servicing of any of the Purchased Assets or in connection with a sale of a group of Mortgage Loans by Sellers to a third party investor, the Custodian is hereby authorized, upon receipt in written form of a Request for Release from the related Seller in the form of Exhibit 2 attached hereto ("Request for Release"), with respect to releases of files relating to fifteen (15) or more Purchased Assets on any one date, with the written acknowledgement of the

-12-

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applicable Registered Holder and, if the Administrative Agent is not the applicable Registered Holder at such time, the Administrative Agent, release or cause to be released to such Seller or such Seller's Authorized Representative the related Mortgage Loan File or the documents of the related Mortgage Loan File set forth in such Request for Release; provided, that if the Mortgage Loan File is released to such Seller or its designee for any purpose other than one of the reasons set forth for boxes 1-5 of Exhibit 2 attached hereto, such Seller shall ensure that any document released to it or its Authorized Representative pursuant to a Request for Release shall be returned to Custodian no later than ten (10) days from the date of such Request for Release.

(b) All Mortgage Loan Files or documents of Mortgage Loan Files released by the Custodian to Sellers or, at Sellers' written direction, Sellers' Authorized Representative pursuant to this Section 11 shall be held

by Sellers or Sellers' Authorized Representative, as applicable, in trust for the benefit of the related Registered Holder unless and until either such Mortgage Loan Files or documents of Mortgage Loan Files are returned by Sellers or Sellers' Authorized Representative to the Custodian or the related Mortgage Loan is liquidated, sold or repurchased and all related proceeds have been paid to the Registered Holder, or following and during the continuance of an Event of Default under the Repurchase Agreement, deposited into the Collection Account. Sellers or Sellers' Authorized Representative or the Servicer, as applicable, shall return to the Custodian, the Mortgage Loan File or other such documents of Mortgage Loan Files when the need therefor in connection with servicing or such other purpose specified in box 6 of Exhibit 2 attached hereto no longer exists (but in any event no later than ten (10) days from the date of such Request for Release), unless the Mortgage Loan shall be liquidated, repurchased or sold as provided above. If the Custodian has previously released a Mortgage Loan File as documents for servicing under Section 11(a), and such Mortgage Loan is liquidated or required to be sold, transferred or repurchased, Sellers or, if the Mortgage Loan File or documents were released to Sellers' Authorized Representative, Sellers' Authorized Representative shall deliver to Custodian an additional Request for Release that has been acknowledged and agreed by the Administrative Agent Registered Holder, certifying such liquidation, sale or transfer.

(c) The Custodian shall keep a record of the release and return, if any, of any Mortgage Loan Files. Upon confirmation of the liquidation, sale or transfer of any Mortgage Loan, the Custodian shall amend the related mortgage loan schedule included in the Exception Report to remove reference to such Mortgage Loan and deliver promptly such amended Mortgage Loan Schedule to the Registered Holder and, if the Administrative Agent is not the Registered Holder at such time, the Administrative Agent.

Section 12. Limitation on Release. Upon notice from the Administrative Agent to the Custodian that the Mortgage Loan Files relating to twenty-five (25) Purchased Assets in the aggregate have been released and are outstanding at one time (other than in connection with a sale of a group of Purchased Assets by Seller to a third party investor), the procedure for release of Mortgage Loan Files relating to a total of more than twenty-five (25) Purchased Assets at any one time shall be determined by the Registered Holder and, if the Administrative Agent is not the Registered Holder, the Administrative Agent and the Custodian at the time of such request. Any document a part of, or relating to, a Mortgage Loan File requested to be released by Sellers or Sellers' Authorized Representative may be released only upon the written acknowledgment of the Request for Release by the Registered Holder(s). The limitations of this

-13-

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paragraph shall not apply to the release of Mortgage Loan Files to Sellers or, at Sellers' written direction, Sellers' Authorized Representative under Section 13 below or to the release of Mortgage Loan Files to third party purchasers in connection with sales of Purchased Assets to third party purchasers in accordance with Section 11.

Section 13. Release for Payment. Upon the payment in full of any Mortgage Loan, and upon receipt by the Custodian of a Request for Release from Sellers (with the written approval of the Administrative Agent) certifying that such payment in full has been received or delivered to the Administrative Agent in immediately available funds (with Sellers to provide a copy to the applicable Registered Holder and, if the Administrative Agent is not the applicable Registered Holder at such time, the Administrative Agent), the Custodian shall promptly release the related Mortgage Loan File to Sellers or, at Sellers' written direction, Sellers' Authorized Representative and amend the related mortgage loan schedule included in the Exception Report to remove reference to such Purchased Asset.

Section 14. Fees of Custodian. The Custodian shall charge such fees for its services under this Agreement as are set forth in a separate agreement between the Custodian and Sellers, the payment of which fees, together with the Custodian's expenses in connection herewith (including reasonable attorneys' fees and costs), shall be solely the obligation of Sellers. In the event of the resignation or termination or discharge of the Custodian from its duties hereunder, all then accrued unpaid fees due the Custodian shall be paid by Sellers.

Section 15. Removal or Resignation of Custodian With Respect to Some or All of the Purchased Assets.

(a) The Custodian may at any time resign and terminate its obligations under this Custodial Agreement upon at least 60 days' prior written notice to the Sellers and the Administrative Agent. Promptly after receipt of notice of the Custodian's resignation, the Administrative Agent shall appoint, in its sole discretion, after notice to Sellers, a successor Custodian to act on behalf of the Administrative Agent; provided, however, if no Event of Default has occurred and is continuing, the Administrative Agent's appointment of a successor Custodian shall be subject to written approval by Sellers (which consent shall not be unreasonably withheld). One original counterpart of such instrument of appointment shall be delivered to each of the Administrative Agent, Sellers, the Custodian and the successor custodian. If the successor Custodian shall not have been appointed within 60 days of the Custodian's providing such notice, the Custodian may petition any court of competent jurisdiction to appoint a successor Custodian; provided that the Custodian may not terminate its obligations until a successor custodian is appointed.

(b) The Administrative Agent may require the Custodian to complete the endorsements on the Mortgage Notes in the name of the applicable Registered Holder at the expense of Sellers. In the event the Custodian breaches any of its representations or warranties hereunder, or otherwise fails to satisfy its obligations hereunder, the Administrative Agent may remove and discharge, the Custodian from the performance of its duties under this Agreement with respect to some or all of the Mortgage Loans by at least 30 days' written notice from the Administrative Agent to the Custodian, with a copy to each other party to this Agreement. In the event

that the Administrative agent removes the Custodian from the performance of its duties under this Agreement with respect to all of the Mortgage Loans, the Administrative Agent may, in its sole discretion, after notice to Sellers, appoint a successor Custodian to act on behalf of the Administrative Agent by written instrument; provided, however, if no Event of Default has occurred and is continuing, the Administrative Agent's appointment of a successor Custodian shall be subject to written approval by Sellers (which consent shall not be unreasonably withheld).

(c) In the event of any such new appointment as contemplated in subsections (a) and (b) above, the Custodian shall promptly, upon the simultaneous surrender of any outstanding Trust Receipts held by the Administrative Agent, transfer to the successor Custodian or the applicable Registered Holder, as directed by the Administrative Agent, the applicable Mortgage Loan Files being held by the Custodian under this Agreement. The cost of the shipment of Mortgage Loan Files arising out of the resignation of Custodian shall be at the expense of Custodian; provided, however, that if a reason for Custodian's resignation is due to the non-payment of fees and expenses due to it hereunder by the Sellers, then the shipment cost of such shipment of the Mortgage Loan Files shall be at the expense of Sellers. Sellers shall be responsible for the cost of shipment in all other circumstances and shall be responsible in all cases for the fees and expenses of the successor custodian and for endorsing the Mortgage Notes and assigning the Mortgages to the successor custodian, if required.

(d) In the event of termination of this Agreement, the Custodian shall follow the reasonable instructions of the Registered Holder(s) with respect to the disposition of the respective Mortgage Loan Files. Concurrently with the transfer and release of all of the Mortgage Loan Files by the Custodian, the Registered Holder(s) shall submit the related Trust Receipts to the Custodian for cancellation. Notwithstanding the foregoing, in the event that the Administrative Agent terminates this Agreement with respect to some, but not all, of the Mortgage Loans, this Agreement shall remain in full force and effect with respect to any Mortgage Loans for which this Agreement is not terminated. In addition, the Administrative Agent and the Custodian may, at the sole option of the Administrative Agent, enter into a separate Custodial Agreement which shall be mutually acceptable to the parties with respect to any or all of the Mortgage Loans with respect to which this Agreement is terminated.

#### Section 16. Examination and Copies of Mortgage Loan Files.

(a) Upon two Business Days written request to the Custodian by a Registered Holder, Seller or the Administrative Agent, such Registered Holder, Sellers or the Administrative Agent, as applicable, and its respective agents, accountants, attorneys, auditors and prospective purchasers will be permitted, during normal business hours to examine the related Mortgage Loan Files and any other documents, records and papers in the possession of or under the control of the Custodian relating to any or all of the Mortgage Loans. The Sellers shall be responsible for any reasonable expenses in connection with its examinations and the Buyer and Sellers shall be responsible for any reasonable expenses in connection with any other such examinations to be shared among them in accordance with Section 32 of the Master Repurchase Agreement.

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(b) Upon the written request of the Administrative Agent, a Registered Holder, or a Seller, the Custodian shall provide the Sellers, the Administrative Agent or such Registered Holder, as the case may be, at such requesting party's expense, with copies of the Mortgage Notes, Mortgages, Assignment of Mortgages and other documents relating to one or more of the Mortgage Loans.

Section 17. Insurance of Custodian. At its own expense, the Custodian shall maintain at all times during the existence of this Agreement and keep in full force and effect fidelity insurance, theft of document insurance, forgery insurance, and errors and omissions insurance. All such insurance shall be in amounts, with standard coverage and subject to standard deductibles, as is customary for insurance typically maintained by institutions which act as custodian of collateral substantially similar to the Purchased Assets or the Collateral and act in a custodial capacity. The minimum coverage under any such bond and insurance policies shall be at least equal to the corresponding amounts required by Fannie Mae in the Fannie Mae Mortgage-Backed Securities Selling and Servicing Guide or by Freddie Mac in the Freddie Mac Seller's & Servicer's Guide. A certificate of the Custodian as to such coverage shall be furnished to the Administrative Agent or Sellers upon request stating that it is in full force and effect.

Section 18. Covenants of Sellers. Each Seller covenants to the Administrative Agent as of the date that any Mortgage Loan File documents are released to Sellers or Sellers' subservicer pursuant to a Request for Release that:

(a) if the Request for Release has been submitted for the release of a Purchased Asset that has been paid in full, all amounts representing principal and interest received in connection with the payment in full of the Purchased Asset have been paid to the Administrative Agent in immediately available funds as provided in the Repurchase Agreement prior to or simultaneously with the release of such files; provided, however, that if such prepayment in full occurs on any date on which an Event of Default has occurred and is continuing, all amounts received in connection with the payment in full of the Purchased Asset shall be paid to the Administrative Agent in immediately available funds as provided in the Repurchase Agreement prior to or simultaneously with the release of the related files;

(b) if item No. 3 has been checked on the Request for Release, the Repurchase Price for the applicable Purchased Asset has been paid to the Administrative Agent in immediately available funds;

(c) if item No. 4 has been checked on the Request for Release, a Custodial Delivery has been delivered simultaneously therewith listing the Substitute Assets; and

(d) if item No. 5 has been checked on the Request for Release, all proceeds of foreclosure, insurance, condemnation or other liquidation have been finally received by the Administrative Agent and credited to the Sellers pursuant to the Repurchase Agreement and this Agreement.

Section 19. Periodic Statements. Upon the reasonable written request of the Administrative Agent, Sellers, or a Registered Holder, the Custodian shall provide to the Administrative Agent, Sellers or Registered Holder, as the case may be, a list, on a Computer Medium, of all the Purchased Assets for which the Custodian holds a Mortgage Loan File pursuant to this Agreement.

-16-

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Section 20. Governing Law; Counterparts. This Agreement shall be governed by the internal laws of the State of New York, without giving effect to the conflict of laws principles thereof (except for Sections 5-1401 and 5-1402 of the New York General Obligations Law). For the purpose of facilitating the execution of this Agreement as herein provided and for other purposes, this Agreement may be executed simultaneously in any number of counterparts, each of which counterparts shall be deemed to be an original, and such counterparts shall constitute and be one and the same instrument.

Section 21. No Adverse Interest of Custodian. By execution of this Agreement, the Custodian represents and warrants that it currently holds, and during the existence of this Agreement shall hold, no adverse interest, by way of security or otherwise, in any Purchased Asset, and hereby waives and releases any such interest which it may have in any Purchased Asset as of the date hereof. The Purchased Assets shall not be subject to any security interest, lien or right of set-off by Custodian, or its Affiliates, or any third party claiming through Custodian, and Custodian shall not pledge, encumber, hypothecate, transfer, dispose of, or otherwise grant any third party interest in, the Purchased Assets.

Section 22. Custodian Representations. The Custodian (and any successor custodian as of the appointment of such custodian) hereby represents and warrants as of the date hereof and as of each date it delivers an executed Trust Receipt (and as of the date of appointment with respect to any successor custodian) that:

- (a) it is duly organized, validly existing and in good standing as a national banking association and has all licenses necessary to carry on its business as it is now being conducted;
- (b) it has proper authority to perform its duties hereunder;
- (c) it is not controlled by, under common control with or otherwise affiliated with or related to any Seller and covenants and agrees with the Administrative Agent that prior to any such affiliation in the future, it shall obtain the prior written approval of the Administrative Agent;

Section 23. Cumulative Rights. The rights, powers and remedies of the Administrative Agent under this Agreement shall be in addition to all rights, powers and remedies given to the Administrative Agent by virtue of any statute or rule of law, the Master Repurchase Agreement or any other agreement, all of which rights, powers and remedies shall be cumulative and may be exercised successively or



concurrently without impairing the Administrative Agent's ownership interest and security interest of the Administrative Agent, in the Purchased Assets and the Collateral.

Section 24. Notices. All demands, notices and communications hereunder (including, without limitation, Trust Receipts) shall be in writing and shall be deemed to have been duly given if mailed, by registered or certified mail, return receipt requested, or, if by other means, including electronic mail, facsimile or similar electronic telecommunication device capable of transmitting or

-17-

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creating a written record directly to the office of the recipient, when received by the recipient party at the address shown below, or at such other addresses as may hereafter be furnished to the other parties by like notice. Any such demand, notice or communication hereunder shall be deemed to have been received on the date delivered to or received at the premises of the addressee (as evidenced, in the case of registered or certified mail, by the date noted on the return receipt, or in the case of electronic mail, facsimile or similar electronic telecommunication, the date noted on the confirmation of such transmission).

if to Administrative Agent:

Barclays Bank PLC

c/o Barclays Capital Services LLC

200 Cedar Knolls Road

Whippany, NJ 07981

Facsimile: (973) 576-3059

Attn: Glenn Pearson

Hansel Nieves

Email: Glenn.Pearson@barclayscapital.com

hansel.nieves@barcap.com

asgoperations@barcap.com

with a copy to:

Barclays Capital Inc.

200 Park Avenue

New York, NY 10166

Facsimile: (212) 412-6846

Attn: Jay Kim

David Lister

Michael Dryden

Email: jay.kim@barcap.com

david.lister@barcap.com

michael.dryden@barcap.com

-18-

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if to Sellers:

American Home Mortgage Acceptance, Inc.

538 Broadhollow Road

Melville, New York 11747

Attn: Craig S. Pino

Email: cpino@americanhm.com

American Home Mortgage Corp.

538 Broadhollow Road

Melville, New York 11747

Attn: Craig S. Pino

Email: cpino@americanhm.com

American Home Mortgage Investment Corp.

538 Broadhollow Road

Melville, New York 11747

Attn: Craig S. Pino

Email: cpino@americanhm.com

American Home Mortgage Servicing, Inc.

538 Broadhollow Road

Melville, New York 11747

Attn: Craig S. Pino

Email: cpino@americanhm.com

with a copy to:

American Home Mortgage Acceptance, Inc.

538 Broadhollow Road

Melville, New York 11747

Attention: Alan B. Horn

if to Custodian:

Deutsche Bank National Trust Company

1761 East St. Andrew Place

Santa Ana, CA 92705

Attention: Mortgage Custody—AH06BC

Facsimile: (714) 247-6035

Telephone: (714) 247-6000

or as such other address or number may be changed by like notice.

Section 25. Successors and Assigns; Benefits of Custodial Agreement. This Agreement shall inure to the benefit of the successors and assigns of the parties hereto. No other Person, including any Mortgagor shall be entitled to any benefit or equitable

-19-

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right, remedy or claim under this Agreement. Administrative Agent may assign its rights hereunder as provided in the Master Repurchase Agreement to the extent permitted by, and on the terms and conditions of, Section 15 of the Master Repurchase Agreement (which section is incorporated herein by reference). The Custodian may not assign its rights or obligations hereunder without the prior written consent of the Administrative Agent and Sellers; provided that if an Event of Default has occurred and is continuing, the consent of Sellers shall not be required. Notwithstanding the foregoing, any Person into which the Custodian may be merged or consolidated, or any national association resulting from any merger, conversion or consolidation to which the Custodian is a party, or any Person succeeding to all or substantially all of the business of the Custodian, shall be the successor to the Custodian hereunder. Seller may not assign its rights or obligations hereunder without the prior written consent of the Administrative Agent.

Section 26. Reliance of Custodian.

(a) In the absence of bad faith on the part of the Custodian, the Custodian may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon any request, instruction, certificate, opinion or other document furnished to the Custodian, reasonably believed by the Custodian to be genuine and to have been signed or presented by the proper party or parties and conforming on its face to the requirements of this Custodial Agreement; but in the case of any request, instruction, document or certificate which by any provision hereof is specifically required to be furnished to the Custodian, the Custodian shall be under a duty to examine the same in accordance with the requirements of this Custodial Agreement.

(b) If the Custodian requests instructions from the Administrative Agent with respect to any act, action or failure to act in connection with this Agreement, the Custodian shall be entitled to refrain from taking such action and continue to refrain from acting unless and until Custodian shall have received Written Instructions from the Administrative Agent with respect to a Mortgage Loan File without incurring any liability therefor to the Administrative Agent, Seller or any other Person.

(c) To help fight the funding of terrorism and money laundering activities, the Custodian will obtain, verify, and record information that identifies individuals or entities that establish a relationship or open an account with the Custodian. The Custodian will ask for the name, address, tax identification number and other information that will allow the Custodian to identify the individual or entity who is establishing the relationship or opening the account. The Custodian may also ask for formation documents such as articles of incorporation, an offering memorandum, and other identifying documents to be provided.

Section 27. Indemnification.

(a) The Sellers, jointly and severally, agree to reimburse, indemnify, defend and hold the Custodian and its directors, officers, agents and employees harmless against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, or out-of-pocket expenses of any kind or nature whatsoever, including reasonable attorneys' fees, that may be imposed on, incurred by, or asserted against it or them in any way relating to or arising out of this Agreement or any action taken or not taken by it

-20-

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or them hereunder unless such liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, or out-of-pocket expenses were imposed on, incurred by or asserted against the Custodian due to the breach, negligence, lack of good faith or willful misconduct on the part of the Custodian or any of its directors, officers, agents or employees. The foregoing indemnification shall survive any resignation or removal of the Custodian or the termination or assignment of this Agreement.

(b) In the event that the Custodian fails to produce a Mortgage Note, Assignment of Mortgage or any other document related to a Mortgage Loan that was in its possession pursuant to Section 2 within five (5) Business Days after written request therefor by the Administrative Agent or Sellers in accordance with the terms and conditions of this Custodial Agreement; and provided that (i) the Custodian previously delivered to the Administrative Agent a Trust Receipt and Custodial Delivery which did not list such document as an exception on the related date of pledge; (ii) such document is not outstanding pursuant to a Request for Release in the form annexed hereto as Exhibit 2; and (iii) such document was held by the Custodian on behalf of the Sellers or the Administrative Agent, as applicable (a "Custodial Delivery Failure"), then the Custodian shall (a) with respect to any missing Mortgage Note, promptly deliver to the Administrative Agent or the Sellers upon request, a Lost Note Affidavit in the form of Exhibit 11 hereto and (b) with respect to any missing document related to such Mortgage Loan, including but not limited to a missing Mortgage Note, indemnify Sellers and the Administrative Agent in accordance with the succeeding paragraph of this Section 27.

(c) The Custodian agrees to indemnify and hold the Administrative Agent, Sellers, and their respective officers, designees, successors and assigns harmless against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, or out-of-pocket expenses, including reasonable attorney's fees, that may be imposed on, reasonably incurred by, or asserted against it or them solely and directly relating to or arising out of such Custodial Delivery Failure or the Custodian's negligence, willful misconduct, lack of good faith, or any breach of the conditions, representations or warranties contained herein. The foregoing indemnification shall survive any termination or assignment of this Agreement.

Section 28. Obligations of the Custodian With Respect to the Trust Receipts.

(a) The Custodian shall keep a register in which the Custodian shall provide for the registration of transfers of Trust Receipts as provided herein and in which it shall record the name and address of the Person to whom such Trust Receipt is issued (the "Registered Holder"). The Administrative Agent, shall be the initial Registered Holder for all Purchased Assets. Each Trust Receipt, upon initial issuance or reissuance, shall be dated the date of such issuance or reissuance and shall evidence the receipt and possession by the Custodian on behalf of the Registered Holder of the Trust Receipt of the related Mortgage Loan Files and the Registered Holder's right to possess those Mortgage Loan Files. The Custodian shall treat the person or entity in whose name the Trust Receipt is registered as the person or entity entitled to possession of the Mortgage Loan Files evidenced by such Trust Receipt for all purposes whatsoever, subject to the terms of this Agreement, and the Custodian shall not be affected by notice of any facts to the contrary. No Trust Receipt shall be valid for any purpose unless substantially in the form set forth in Exhibit 1 to this Agreement and executed by manual signature of an Authorized Representative of the Custodian. Such signature upon any Trust Receipt shall be conclusive

-21-

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evidence, and the only evidence, that such Trust Receipt has been duly delivered under this Agreement. Trust Receipts bearing the manual signatures of individuals who were, at the time when such signatures were affixed, Authorized Representatives of the Custodian shall bind the Custodian, notwithstanding that such individuals have ceased to be so authorized prior to the delivery of those Trust Receipts. Each Trust Receipt shall have attached thereto an Exception Report with respect to the applicable Purchased Assets and shall otherwise comply with the second paragraph of Section 4 of this Agreement. Any transferee or assignee of the Trust Receipt shall succeed to all the rights of the transferring Registered Holder under this Agreement with respect to such Trust Receipt and the related Purchased Assets upon notice to the Custodian and delivery to the Custodian of the appropriate evidence of such transfer and assignment.

(b) The Registered Holder may transfer its interest in the Mortgage Loan Files covered by any Trust Receipt by delivering to the transferee (the "Transferee") such Trust Receipt, together with an

appropriate notice to the Custodian in the form of Exhibit 9 hereto (the “Notice to the Custodian”). Within three (3) Business Days of receipt of the Notice to the Custodian and receipt by the Custodian of the Trust Receipt from the Transferee, the Custodian shall deliver, in accordance with the written instructions of the Transferee, a Trust Receipt issued in the name of the Transferee and to the place indicated in any such written direction from the Transferee; provided that the Custodian shall not be required to issue a Trust Receipt to such Transferee until the date which is three (3) Business Days following the date that the Custodian has received all information necessary to allow the Custodian to complete its internal “Know Your Customer” procedures with respect to such Transferee. Upon receipt of the Notice to the Custodian from the Registered Holder, the Custodian shall change its records to reflect that such Transferee is the Registered Holder of the Mortgage Loan Files.

(c) In the event that (i) any mutilated Trust Receipt is surrendered to the Custodian, or the Custodian receives evidence to its satisfaction of the destruction, loss or theft of any Trust Receipt and (ii) there is delivered to the Custodian such security or indemnity as may be required by it to save it harmless, then, in the absence of notice to the Custodian that such Trust Receipt has been acquired by a bona fide purchaser, the Custodian shall execute and deliver a new Trust Receipt to such Registered Holder in exchange for or in lieu of any such mutilated, lost or stolen Trust Receipt.

(d) Simultaneously with the relinquishment of a Trust Receipt to the Custodian by the Registered Holder thereof and the delivery by the Custodian of the related Mortgage Loan Files to Sellers or their designee pursuant to Section 3 above or to such Registered Holder or a designee of the Registered Holder, the Trust Receipt shall be canceled and the related Mortgage Loan Files will no longer be subject to this Agreement.

Section 29. Authorized Representatives. Each individual designated as an authorized representative of the Custodian, Sellers and the Administrative Agent (each, an “Authorized Representative”), is authorized to give and receive notices, requests and instructions and to deliver certificates and documents in connection with this Agreement on behalf of the Custodian, Sellers, Sellers’ Designee or the Administrative Agent, respectively, and the specimen signature for each such Authorized Representative of the Custodian, Sellers, Sellers’ Designee or the Administrative Agent initially authorized hereunder is set forth on Exhibits 3, 4,

-22-

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5, and 6, respectively. From time to time, the Custodian, Sellers and the Administrative Agent may, by delivering to the others a revised exhibit, change the information previously given pursuant to this Section, but each of the parties hereto shall be entitled to rely conclusively on the then current exhibit until receipt of a superseding exhibit. Sellers shall deliver or cause to be delivered to Custodian an Authorized Representatives exhibit for each subservicer designated by Sellers in connection with Sections 9, 10, and 11 of this Agreement (each, a “Sellers’ Designee”); provided, that the Custodian shall

not recognize any request from Sellers' subservicer unless and until Sellers have given the Custodian written notice identifying such subservicer and such Authorized Representatives exhibit is received by the Custodian. The Custodian shall be entitled to rely conclusively upon (i) written notice from Sellers identifying a subservicer authorized to give instructions under Sections 9, 10 and 11 of this Agreement until receipt of written notice from Sellers revoking such authority and (ii) the most recent Authorized Representatives exhibit delivered to it by a subservicer of Sellers until receipt of a superseding exhibit. If the Custodian shall at any time receive conflicting instructions from Sellers and a subservicer of Sellers, the Custodian shall be entitled to rely on the instructions of Sellers.

Section 30. Reproduction of Documents. This Agreement and all documents relating thereto, including, without limitation, (i) consents, waivers and modifications which may hereafter be executed, and (ii) certificates and other information previously or hereafter furnished, may be reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic or other similar process. The parties agree that any such reproduction shall be admissible in evidence as the original itself in any judicial or administrative proceeding, whether or not the original is in existence and whether or not such reproduction was made by a party in the regular course of business, and that any enlargement, facsimile or further reproduction of such reproduction shall likewise be admissible in evidence.

Section 31. Amendment; Waiver; Entire Agreement; Severability. No amendment or waiver of any provision of this Agreement nor consent to any departure herefrom shall in any event be effective unless the same shall be in writing and signed by all the parties hereto, and then such amendment, waiver or consent shall be effective only in the specific instance and for the specific purpose for which given. This Agreement, together with the Exhibits, Appendixes, Annexes and other writings referred to herein or delivered pursuant hereto, constitute the entire contract among the parties relating to the subject matter hereof and supersede any and all previous agreements and understandings, oral or written, relating to the subject matter hereof. If any provisions of this Agreement shall be held invalid or unenforceable, this Agreement shall be construed as if not containing such provisions, and the rights and obligations of the parties hereto shall be construed and enforced accordingly.

Section 32. Consent to Jurisdiction. EACH PARTY HERETO HEREBY WAIVES TRIAL BY JURY. EACH HEREBY IRREVOCABLY CONSENTS TO THE NON-EXCLUSIVE PERSONAL JURISDICTION OF ANY COURT OF THE STATE OF NEW YORK, OR IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, ARISING OUT OF OR RELATING TO THE PROGRAM DOCUMENTS IN ANY ACTION OR PROCEEDING. EACH HEREBY SUBMITS TO, AND IRREVOCABLY WAIVES ANY OBJECTION SUCH SELLER MAY HAVE TO, NON-EXCLUSIVE PERSONAL JURISDICTION AND VENUE IN THE COURTS OF THE STATE OF NEW YORK AND THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, WITH RESPECT TO ANY DISPUTES ARISING OUT OF OR RELATING TO THE PROGRAM DOCUMENTS.



Section 33. Confidentiality. Custodian hereby acknowledges and agrees that (i) all written or computer-readable information provided by Administrative Agent or Sellers regarding (a) Administrative Agent or Sellers, or (b) the Purchased Assets, as set forth on the related Asset Schedule, and (ii) the terms of this Agreement and the Repurchase Agreement (the “Confidential Information”), shall be kept confidential and shall not be divulged to any Person other than the parties hereto without Administrative Agent’s and Sellers’ prior written consent except to the extent that (i) Custodian reasonably deems necessary to do so in working with legal counsel, auditors, taxing authorities or other governmental agencies or regulatory bodies or in order to comply with any applicable federal or state laws, (ii) any portion of the Confidential Information is in the public domain other than due to a breach of this covenant by Custodian or any disclosure authorized by this Agreement or (iii) to the extent that Custodian is required to disclose Confidential Information pursuant to the requirements of any legal proceeding, Custodian shall notify the Administrative Agent and the related Seller within one Business Day of its knowledge of such legally required disclosure (unless such legally required disclosure is pursuant to a grand jury subpoena or disclosure of such request is otherwise prohibited by law) so that the Administrative Agent or Sellers may seek an appropriate protective order and/or waive Custodian’s compliance with this Agreement. Notice shall be both by telephone and in writing. In the absence of a protective order or waiver, Custodian may disclose the relevant Confidential Information if (i) in the written opinion of its counsel, failure to disclose such Confidential Information would subject Custodian to liability for contempt, censure or other legal penalty or liability or (ii) Custodian has not received such protective order or waiver by the time that it is obligated to comply with such legal proceeding requirement.

-24-

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IN WITNESS WHEREOF, the Sellers, Administrative Agent and the Custodian have caused their names to be duly signed hereto by their respective officers thereunto duly authorized, all as of the date first above written.

BARCLAYS BANK PLC, as Administrative  
Agent

By:     /s/ Jeffrey Goldberg

Name: Jeffrey Goldberg

Title: Associate Director

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AMERICAN HOME MORTGAGE  
ACCEPTANCE, INC., as Seller

By: /s/ Alan B. Horn

\_\_\_\_\_  
Name: Alan B. Horn

Title: Executive Vice President

General Counsel & Secretary

AMERICAN HOME MORTGAGE CORP., as  
Seller

By: /s/ Alan B. Horn

\_\_\_\_\_  
Name: Alan B. Horn

Title: Executive Vice President

General Counsel & Secretary

AMERICAN HOME MORTGAGE  
INVESTMENT CORP., as Seller

By: /s/ Alan B. Horn

\_\_\_\_\_  
Name: Alan B. Horn

Title: Executive Vice President

General Counsel & Secretary

AMERICAN HOME MORTGAGE  
SERVICING, INC., as Seller

By: /s/ Alan B. Horn

\_\_\_\_\_  
Name: Alan B. Horn

Title: Executive Vice President

DEUTSCHE BANK NATIONAL TRUST  
COMPANY, as Custodian

By: /s/ Angel Sanchez

Name: \_\_\_\_\_  
Angel Sanchez

Title: Authorized Signer

By: /s/ Tsutomu Yoshida

Name: \_\_\_\_\_  
Tsutomu Yoshida

Title: Assistant Vice President

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## **APPENDIX A**

### **ADDITIONAL DEFINITIONS**

In addition to the Definitions set forth in Section 1, the following words and phrases, unless the context otherwise requires, shall have the following meanings:

Mortgage Loan File: With respect to each Mortgage Loan, the following original documents constituting an original Mortgage Loan File:

(a) the original Mortgage Note bearing all intervening endorsements (or allonges), endorsed “Pay to the order of \_\_\_\_\_, without recourse” and signed in the name of the last endorsee (the “Last Endorsee”) by an authorized officer (in the event that the Mortgage Loan was acquired by the Last Endorsee in a merger, the signature must be in the following form: “[the Last Endorsee], successor by merger to [name of predecessor]”; in the event that the Mortgage Loan was acquired or originated while doing business under another name, the signature must be in the following form: “[the Last Endorsee], formerly known as [previous name]”);

(b) the original of any guarantee executed in connection with the Mortgage Note (if any);

(c) the original Mortgage with evidence of recording thereon or a copy certified by Sellers, its agent or the title company on behalf of Sellers that have been sent for recording;

(d) the originals of all assumption, modification, consolidation or extension agreements, with evidence of recording thereon or copies certified by Sellers, its agent or the title company on behalf of Sellers to have been sent for recording, if any;

(e) Except with respect to Mortgage Loans registered on MERS, the original assignment of Mortgage in blank for each Mortgage Loan, in form and substance acceptable for recording and signed in the name of the last endorsee thereof (in the event that the Mortgage Loan was acquired by the last endorsee in a merger, the signature must be in the following form: “[the last endorsee], successor by merger to [name of predecessor]”; in the event that the Mortgage Loan was acquired or originated while doing business under another name, the signature must be in the following form: “[the last endorsee], formerly known as [previous name]”);

(f) the originals of all intervening assignments of mortgage with evidence of recording thereon or copies certified by Sellers to have been sent for recording (intervening assignments shall not be required for any Mortgage that has been originated in the name of MERS and registered under the MERS System), if any;

(g) the original of any security agreement, chattel mortgage or equivalent document executed in connection with the Mortgage (if any);

#### Appendix A-1

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(h) the original or copy of mortgagee policy of title insurance, to the extent delivered; and

(i) the original power of attorney, if any, or a copy thereof certified by Sellers to have been sent for recording, for any document described above.

# Freddie Mac Handbook

## Document Custody



We make home possible

**DOCUMENT CUSTODY  
PROCEDURES HANDBOOK**

## Freddie Mac Document Custody Procedures Handbook

### Table of Contents

Contents	Table of Contents	1
Preface	Preface (08/08)	2
Chapter 1	Custodial Options and Requirements (08/08)	4
	Overview (08/08)	4
	Custodian Options (08/08)	4
	Eligibility (08/08)	6
	Application and Approval Process (08/08)	6
	Annual Reporting (08/08)	6
	Terminating the Custodial Relationship (08/08)	6
Chapter 2	Duties and Responsibilities (08/08)	8
	Compliance and Controls (08/08)	8
	Changes to Institution Information (08/08)	11
	Insurance Coverage (08/08)	12
Chapter 3	Document Delivery and Processing Procedures (08/08)	14
	Background (08/08)	14
	Documentation to be Verified (08/08)	15
	Verification Requirements (08/08)	15
	Data Verification (08/08)	16
	Note Verification (08/08)	21
	Borrower's Signature (08/08)	21
	Uniform Instruments (08/08)	24
	Lost Note Affidavits (08/08)	25
	Endorsements (08/08)	26
	Assignments (08/08)	28
	Reviewing Supplemental Documentation (08/08)	30
	Resolving Discrepancies (08/08)	31
	Retention Period (08/08)	31
	New York Consolidation, Extension and Modification Agreements ("NY CEMAs") (08/08)	31
	MERS-Registered Mortgages (08/08)	32
Chapter 3A	MIDANET® Delivery and Processing Procedures (08/08)	34
	Introduction (08/08)	34
	Verify Data and Documentation (08/08)	34
	Resolving Discrepancies (08/08)	35
	Completing Certification (08/08)	35
	MERS Registered Mortgages (08/08)	36
Chapter 4	Document Release Procedures (08/08)	37
	Introduction (08/08)	37
	Form 1036 Requirements (08/08)	37
	Document Release Types (08/08)	38

	New York Consolidation, Extension and Modification Agreement ("NY CEMA") Mortgage Note Release Procedures (08/08)	39
	Return of Released Documents (08/08)	39
	Control and Safekeeping of Released Documents (08/08)	39
	Retention Period (08/08)	40
Chapter 5	Subsequent Transfers of Servicing and Custody Procedures (08/08)	41
	Introduction (08/08)	41
	General Responsibilities (08/08)	42
	Evidence of Transferee Custodian Approval (08/08)	42
	Transferor Custodian Responsibilities (08/08)	42
	Transferee Custodian Responsibilities (08/08)	43
	Transfers of Servicing of MERS Mortgages (08/08)	44
	Termination of Custodial Agreement (08/08)	45
	Extension Approval (08/08)	45
Chapter 6	Processing Balloon/Reset Mortgages (08/08)	46
	Overview (08/08)	46
	Processing Balloon/Reset Mortgages (08/08)	46
	Certifying Balloon Loan Modifications (08/08)	46
	Loan Modification Custody (08/08)	47
Appendix	Appendix A: Job Aids (08/08)	48





## Freddie Mac Document Custody Procedures Handbook

### Preface (08/08)

This handbook is intended to supplement the requirements and information in Freddie Mac's *Single-Family Seller/Servicer Guide* (the Guide, which is one of the Purchase Documents). The Guide has priority over this handbook, so that any conflict between them, such as may occur when the Guide is updated or amended, should be resolved to favor the Guide. Similarly, conflicts between the Guide and Form 1035, the Custodial Agreement, are resolved to favor the Guide; thus, Form 1035 need not be re-executed or amended to reflect changes in the Guide. We intend to update the handbook periodically.

Capitalized terms used in the handbook are defined in the Guide; however, please note that certain terms and phrases, including the following, may be used differently in the handbook:

- "Note" refers to the note evidencing a borrower's indebtedness, and includes any power of attorney or modifying instrument, such as a modification agreement, conversion agreement, and assumption of liability or release of liability agreement. "Notes" may also refer to all documents held for Freddie Mac, as the context requires. "Assignment" refers to the intervening assignments and includes any instrument used to assign the security instrument to Freddie Mac. See Guide Section 18.1.
- While "Seller/Servicer" refers to the entity primarily or exclusively selling Mortgages to, or servicing Mortgages for, Freddie Mac, we have tried to use either the term "Seller" or "Servicer" where that is more accurate. However, absent a Transfer of Servicing, the same entity may be both Seller and Servicer, although you may be interacting with different personnel. Using this convention should help clarify the different roles.
- References to "Form 1034" may refer collectively to all versions or to a specific version, as the context requires. Because the handbook assumes that Mortgages are delivered to Freddie Mac through the Selling System, most references will be to Form 1034E, the version of Custodial Certification Schedule used for electronic deliveries. Form 1034B, Custodial Certification Schedule Balloon Loan Modification, is used in conjunction with Balloon/Reset Loan modifications. Form 1034S, Custodial Certification Schedule Summary, is a summary form of the hardcopy Form 1034 (fixed-rate mortgages) or 1034A (ARMs) that may contain a list of data corrections. Form 1034T, Subsequent Transfer Custodial Certification Schedule, summarizes information for Mortgages transferred in a Transfer or Servicing or transfer of custody.

For information on certification and custody of mortgages originated electronically, please refer to Freddie Mac's eMortgage Handbook, found on our website at [www.freddiemac.com/singlefamily/elm/pdf/eMortgage\\_Handbook.pdf](http://www.freddiemac.com/singlefamily/elm/pdf/eMortgage_Handbook.pdf).

We hope that you find this handbook helpful, and would appreciate hearing from you regarding any comments and questions that you have about your status as a Freddie Mac Custodian and the custodial duties and functions.

## Freddie Mac Document Custody Procedures Handbook

### Chapter 1: Custodial Options and Requirements (08/08)

Topic	Page
Overview	2
Custodian Options	2
Eligibility	3
Application and Approval Process	3
Annual Reporting	4
Terminating the Custodial Relationship	4

#### Overview (08/08)

A Seller/Servicer selling Mortgages to Freddie Mac must ensure that the Notes, assignments, and related documents are delivered to you according to the Freddie Mac Single-Family Seller/Servicer Guide (Guide). This chapter describes Custodian options available to Seller/Servicers for certifying and safeguarding our Notes.

#### Custodian Options (08/08)

Seller/Servicers must select either Freddie Mac's Document Custodial Operations (DCO), or a Freddie Mac approved Document Custodian, for the Mortgages sold and/or serviced for each Seller/Servicer number. See Guide Section 18.1.

The following chart identifies the general requirements for each Custodian option.

Custodian	Contract Requirements	Document Requirements	Fees
Third-Party Custodian	Requires approval from Freddie Mac and an executed Form 1035 Tri-Party Custodial Agreement	Seller sends Notes, supplemental documents and assignments to the Third-Party Custodian.	Servicer and Custodian negotiate fee structure
Self-Custodian	Requires approval from Freddie Mac and an executed Form 1035 Tri-Party Custodial Agreement	Seller sends Notes, supplemental documents and assignments to its trust department,	Servicer and Custodian negotiate fee structure

		which has trust powers granted by its primary regulator.	
DCO	None	<p>Seller sends Notes and supplemental documents to DCO.</p> <p>Seller sends assignments to the Servicer to retain in a fire resistant storage area.</p>	See Guide Section 18.8

Compensation for custodial services is the sole responsibility of the Servicer. See Guide Section 18.1. Seller/Servicer and Custodian should enter into a written agreement regarding Custodian's charges and fees for certifying, holding, releasing, copying, etc. Notes, however, the agreement may not contain terms that conflict with the Guide or this Handbook, such as Freddie Mac's ability to gain access to the Notes without the Seller/Servicer's consent. A Document Custodian may not act in a manner that might adversely affect Freddie Mac or its interests, or fail to perform its custodial duties because it has not been paid by a Seller/Servicer.

A Custodian location will be assigned only one Custodian number, regardless of the number of Seller/Servicers for which it holds Notes for Freddie Mac. Each relationship between a Seller/Servicer number and a Third-Party or Self-Custodian requires a separate Custodial Agreement. Mortgages sold under a particular Seller/Servicer number will automatically be associated with DCO or with the Custodian assigned to that number unless custody is transferred or terminated in accordance with the Guide. A Seller/Servicer must have a separate Seller/Servicer number for each custodial relationship. See Guide Sections 18.1(a) and 18.3.

**Note:** Custodians with more than one vault location will need a separate Custodian number from Freddie Mac for each location.

The agreement that governs the certification and safeguarding of Notes sold to Freddie Mac is the Tri-Party Custodial Agreement (Form 1035), which is a tri-party agreement between Freddie Mac, the Seller/Servicer, and the Custodian. By executing the Form 1035, the Seller/Servicer and the Custodian represent and warrant to each other and to Freddie Mac that the Custodian satisfies our document custody eligibility requirements, found in Form 1035, this handbook and the Guide, as they may be amended from time to time. See Form 1035 and Guide Section 18.3 for more information. If a Custodian fails to maintain or comply with the eligibility requirements (see Guide Section 18.4), the Seller/Servicer must contact Freddie Mac's Counterparty Credit Risk Management department (CCRM) immediately at:

Attn: Counterparty Credit Risk Management  
Freddie Mac  
1551 Park Run Drive, MS D3A McLean,  
VA 22102-3110

Phone: (571) 382-3434 opt. 2  
Fax: (866) 743-0087

## **Eligibility (08/08)**

Basic Document Custodian eligibility requirements appear in Section 18.2 of the Guide. A Document Custodian must meet the requirements found within Section 18.2 in order to qualify to become a Freddie Mac approved Document Custodian including, but not limited to, being a financial institution that is supervised and regulated; meeting Freddie Mac's minimum net worth requirement; and performing the document custody function in a trust department that is established and operated under trust powers granted by the Document Custodian's primary regulator. For additional information on Document Custodian eligibility requirements, please refer to Guide Section 18.2.

## **Application and Approval Process (08/08)**

A Seller/Servicer electing to use a Custodian must contact CCRM to apply for approval.

The document custodial applicant must contact CCRM for information on the application process and the required documentation. When the necessary documentation is received, CCRM will review it to determine whether to grant approval, and notify both the Seller/Servicer and applicant of its decision. See Guide Sections 18.2 and 18.3 for eligibility criteria and further information.

Freddie Mac must receive an original, fully executed Form 1035 before the

- Seller/Servicer delivers any documents to a Custodian pursuant to Guide Section 16.8, or
- Custodian accepts any documents from a Seller/Servicer.

We will send a copy of the fully executed Form 1035 to both the Seller/Servicer and Custodian, for their records. See Guide Section 18.3.

## **Annual Reporting (08/08)**

By March 31<sup>st</sup> of each year, each Custodian must complete the Annual Document Custodian Eligibility Certification Report and submit it to CCRM. Custodians must also submit any other information that Freddie Mac may request in conjunction with the Annual Report or otherwise. See Form 1035.

Concurrent with submission of its Form 16SF, Annual Eligibility Certification Report, to CCRM, Seller/Servicer certifies its Custodian, or Custodians, if applicable, continues to meet all the document custodian eligibility requirements stated in the Guide. Seller/Servicers must also submit any other information that Freddie Mac may request. See Form 1035 and Guide Section 4.9 for more information.

## **Terminating the Custodial Relationship (08/08)**

Any party to a Form 1035 may terminate it upon proper notice to the other parties. Upon such notice, all Freddie Mac Notes must be transferred to a new approved Custodian or DCO within 30 days as described in Chapter 5 of this handbook and Chapter 18.7 of the Guide. The Custodian being terminated must fulfill the custodial duties until all Notes have been transferred to and recertified by the Transferee Custodian.

**Freddie Mac** may terminate any Custodial Agreement between Freddie Mac, a Seller/Servicer and a Custodian in our sole discretion upon 30 days written notice.

**Freddie Mac** may terminate a Form 1035 immediately if we modify our requirements for custody or if a Seller/Servicer:

- is suspended or disqualified, or
- is unable to comply with our eligibility standards, or
- performs unsatisfactorily

or if a Custodian:

- does not meet the eligibility requirements or criteria for custody, or
- performs unsatisfactorily, or
- if any circumstance occurs or exists that might adversely affect the Custodian or our Notes or assignments or the interests of Freddie Mac.

See Guide Sections 18.1 and 18.7 and Section 6 of Form 1035 for more information.

A **Custodian** may terminate the Form 1035 upon at least 30 days written notice to the Seller/Servicer and to CCRM.

A **Seller/Servicer** may terminate a Form 1035 upon 30 days written notice to the Custodian and CCRM. The Seller/Servicer must then select either DCO or a new Custodian.

## Freddie Mac Document Custody Procedures Handbook

### Chapter 2: Duties and Responsibilities (08/08)

Topic	Page
Compliance and Controls	2
Changes to Institution Information	7
Insurance Coverage	8

#### Compliance and Controls (08/08)

The Custodian must certify the Notes and assignments delivered by a Seller/Servicer and hold them in trust for us. Custodians must certify and safeguard Notes and assignments as required by the Guide, Form 1035 and this handbook and adhere to the highest professional and ethical standards.

In order to protect Borrower privacy, Custodians should not release original documents, copies of documents, or ANY information about a Borrower or a Mortgage held in custody for Freddie Mac to anyone except Freddie Mac or the Servicer, even if the person asking is the Borrower or someone claiming to be the Borrower. If the person is claiming to be the Borrower, you should direct him or her to the current Servicer. Because of periodic reporting requirements relating to certain mortgage-backed securities, the Seller or a previous Servicer of a Mortgage may request loan-level information; you should direct all such inquiries to the current Servicer. Please contact Document Custodial Operations (DCO) if you have any questions regarding Borrower privacy.

Pursuant to Form 1035, Freddie Mac may, with or without prior notice, perform an on-site audit that relates to Notes and assignments held for Freddie Mac, on the following:

- all records and documents held by a Custodian.
- the vault itself (facilities, security, etc.).
- the Custodian's policies and procedures relating to the custodial functions.

The chart below identifies a number of compliance controls; this information is not all-inclusive.

Custodial Functions	Compliance Controls
Hold Notes and assignments in trust for the	Do not enter into any understanding,

sole benefit of Freddie Mac	agreement or relationship with any party to obtain, retain or claim any interest, including ownership or security, in Mortgages owned by Freddie Mac, unless specifically approved in writing, in advance by us.
Maintain custody and control of the Notes and assignments	<ul style="list-style-type: none"> <li>• Track Notes held for Freddie Mac in accordance with note tracking requirements set forth in the Guide and this handbook.</li> <li>• Affix the Freddie Mac loan number to the Note, if advised by the Seller/Servicer that Freddie Mac requires it.</li> <li>• Segregate Freddie Mac Notes from those held for other investors, if advised by Freddie Mac to do so.</li> </ul> <p>See Guide Sections 18.2 and 18.6 for further information.</p>
Certify Notes, supplemental documents and assignments	See Chapter 3 of this handbook for detailed information.
Release documents to Servicer	See Chapter 4 of this handbook for detailed information.
Release documents to Transferee Custodian	See Chapter 5 of this handbook for detailed information.

**Note:** If a Note cannot be found in the vault after delivery to and certification by the Custodian, the Custodian should contact Freddie Mac for instructions.

The chart below identifies activities that the Custodian must perform in order to maintain its eligibility as a Custodian and properly certify and safeguard the Notes. See Guide Chapter 18.

Activity	Requirement
Employ internal controls and use prudent business practices to safeguard and maintain our Notes and assignments	<ul style="list-style-type: none"> <li>• Provide fire-resistant storage with a minimum of two hours protection. See Guide Section 18.2(b).</li> <li>• Provide fire extinguishers or other fire retardant equipment or devices in vaults.</li> </ul>
Ensure that staff is knowledgeable in handling Notes and assignments, and performing other custodial duties. See Guide Section 18.2(b)	<p>Provide access to our reference materials and publications, including:</p> <ul style="list-style-type: none"> <li>• The Guide (available on ALLREGS)</li> <li>• This handbook</li> <li>• The Document Custodial Operations website:  <a href="http://www.freddiemac.com/service/cim/">http://www.freddiemac.com/service/cim/</a>, and</li> </ul>

	<ul style="list-style-type: none"> <li>• Bulletins and Industry Letters</li> </ul>
Self-Custodians must ensure that document custody functions are separate from Mortgage origination, selling, or servicing. See Guide Section 18.2(c), (d) and (e)	The document custody department and staff must be independently and separately managed from any functional area that performs Mortgage origination, selling, or servicing, and must maintain separate records, files and operations.
Develop and maintain an independent document tracking and reporting system to monitor Notes and assignments, to track Note releases and returns, and to identify physical location of Notes. See Guide Section 18.2(b)	<ul style="list-style-type: none"> <li>• Include the Freddie Mac loan number in the system. The Custodian must reference the Freddie Mac loan number on all correspondence and related documents.</li> </ul> <p><b>Note:</b> If the Freddie Mac loan number begins with a "0", the "0" must be included in your tracking system.</p> <ul style="list-style-type: none"> <li>• Include the Servicer's loan number in the system.</li> <li>• Cross-reference the Freddie Mac loan number for each Mortgage with the Servicer's loan number.</li> <li>• Custodians must ensure that their tracking system is separate and independent of the Servicer's system.</li> </ul> <p><b>Note:</b> Periodically, you will be required to provide an electronic list of the Freddie Mac loan numbers for all Notes you hold for each Servicer number. You should provide a separate text file of the Notes you hold for each Servicer. Please ensure that the complete 9-digit loan number is provided, including any preceding zeros, to avoid having that loan flagged as an invalid loan number.</p> <p><b>Note:</b> We do not use the contract number after funding. Subsequent loan transactions, including Transfers of Servicing, are tracked by Freddie Mac loan number.</p>



Maintain and regularly update written procedures. See Guide Section 18.2(b)	Compare your procedures to this handbook, the Guide and Form 1035 to ensure that they meet our requirements.
Maintain a disaster recovery (business continuity) plan. See Guide Section 18.2(b)	<p>Your plan must include:</p> <ul style="list-style-type: none"> <li>• Immediate (within 24 hours) notice to DCO if your facility is affected by a disaster, <ul style="list-style-type: none"> <li>- Email address: <i>FMMDM@freddiemac.com</i></li> <li>- Phone number: (703) 724-3000</li> <li>- Fax number: (703) 738-2141</li> </ul> </li> <li>• A process for physical recovery/restoration of documents,</li> <li>• Plans to recover tracking system data, including electronically maintained information,</li> <li>• Relocation/restoration of facilities to ensure ability to perform custodial functions, and</li> <li>• Periodic testing and updating of the plan.</li> </ul> <p><b>Note:</b> If necessary, DCO will help you complete certifications until you become fully operational after a disaster.</p>
Submit Annual Document Custodian Eligibility Certification Report. See Form 1035	<p>In order to maintain eligibility, submit the Annual Document Custodian Eligibility Certification Report by March 31<sup>st</sup> each year.</p> <p>Refer to our website: <i>www.freddiemac.com/service/cim/docs/dc_elig_cert_report.doc</i> or contact: <i>institutional_eligibility@freddiemac.com</i> .</p>
Terminate custodial relationship with Servicer	<p>See Chapter 1 of this handbook for further information.</p> <p><b>Note:</b> As Custodian, you are responsible for ensuring a smooth transfer of all Notes, supplemental documents and assignments.</p>

## Changes to Institution Information (08/08)

To ensure that Freddie Mac's records for Custodians are accurate, Custodians must notify Freddie Mac, as set forth below, of an institution name or address change for the vault,

changes in the vault contact person or institutional organizational changes, such as mergers or consolidations.

Event	Description
Custodian address change	<p>Certain changes will necessitate a new Form 1035. For instance, if you move Notes held for one or more Servicers to a new location, but will continue to maintain the Notes for other Servicers at the old location, you will need an additional Custodian number and Form 1035 that documents the relationship between your new location and the particular Seller/Servicer numbers supported there.</p> <p><b>Note:</b> Moving Notes (except pursuant to a Form 1036 Request for Release of Documents) requires prior approval by Freddie Mac.</p> <p><b>Note:</b> All Freddie Mac Notes associated with a particular Seller/Servicer number must be held in the same Custodian location or at DCO.</p> <p><b>Note:</b> Each Custodian location must have a unique Freddie Mac-assigned Custodian number.</p>
Custodian name change, organizational change, eligibility contact name change	<p>Provide written notification to:  Freddie Mac CCRM  1551 Park Run Drive, MS D3A  McLean, VA 22102-3310</p>
Custodian operational contact name change and Custodian name change	<p>Provide written notification to:  Freddie Mac DCO  21550 Beaumeade Circle, MS 507  Ashburn, VA 20147</p>

## Insurance Coverage (08/08)

Custodians must maintain the following insurance coverage, at a minimum:

- **Errors and Omissions Insurance** covering claims resulting from the Custodian's breach of duty, neglect, errors and omissions, misstatement, misleading statements or other wrongful acts committed in the conduct of document Custodial services.
- **Financial institution bond** or equivalent insurance covering any loss resulting from employee dishonesty, physical damage or destruction to, or loss of any Notes or

- assignments while these documents are located on the Custodian's premises.
- **Transit Insurance:** Notes that move between Custodians or from one Custodian's vault location to another must be covered by transit insurance. If Custodian and Seller/Service provider agree in writing that the Custodian will assume liability for the Notes during the move, then Custodian must maintain insurance that covers physical damage to and destruction or loss of the Notes. If there is no written agreement allocating liability, then the Seller/Service provider is liable for the Notes and must obtain insurance as described in Guide Section 18.4(c).

For additional information, see Guide Sections 18.2 and 18.4.

## Freddie Mac Document Custody Procedures Handbook

### Chapter 3: Document Delivery and Processing Procedures (08/08)

Topic	Page
Background	2
Documentation to be Verified	2
Verification Requirements	3
Data Verification	4
Note Verification	10
Borrower's Signature	10
Uniform Instruments	14
Lost Note Affidavits	14
Endorsements	15
Assignments	18
Reviewing Supplemental Documentation	20
Resolving Discrepancies	22
Retention Period	22
New York Consolidation, Extension and Modification Agreements ("NY CEMAs")	22
MERS-Registered Mortgages	24

#### Background (08/08)

Document Custodians are responsible for verifying certain information contained in the Notes and related documents for the Mortgages sold to Freddie Mac and for certifying that you have performed those verifications and that the original documents are in your possession. We refer to this process as "certification" or "certifying" the Notes.

This chapter details our requirements for certifying Notes being sold to Freddie Mac, including those sold with a Concurrent Transfer of Servicing. For information on Subsequent Transfers of Servicing, see Chapter 56 of the Guide and Chapter 5 of this handbook. Unless the Custodian receives a copy of the Purchase Documents between the Seller/Servicer and Freddie Mac, including the first page with the Seller/Servicer number, the pages with the exceptions detailed, and the signature pages, the Custodian must not deviate from the requirements of this handbook or the Guide.

The process for certifying Mortgages sold to Freddie Mac through the Selling System can be found in this chapter. The process for certifying Notes sold to Freddie Mac through

MIDANET® is described in Chapter 3A. Except as specifically noted in Chapter 3A, all of the requirements to certify Notes sold through the Selling System also apply to Notes sold through MIDANET.

The information in this chapter is intended to help you fulfill your responsibilities as an approved Custodian. This handbook is a reference tool, that complements Freddie Mac's Single-Family Seller/Servicer Guide (the Guide). It does not replace the requirements in the Guide, and in the event of a conflict, the Guide controls.

Before you may accept a delivery of Notes from a Seller, you must be an approved Custodian for the Servicer that will service the Mortgages. Refer to Chapter 1 of this handbook for additional information on becoming an approved Custodian.

Sellers may use independent delivery agents, particularly for bulk or seasoned loan portfolio sales through MIDANET. If such an agent contacts you or you receive loan data with respect to the Mortgages from a third party, you should ask to see written evidence of their relationship with the Seller, such as a copy of the first and signature pages of their contract with the Seller or the paragraph in the Freddie Mac Master Commitment that recognizes the agency arrangement. You may rely on the representations of such an agent as if the Seller made them, as the Seller remains liable for the accuracy and completeness of all data. Contact Document Custodial Operations (DCO) if you have any questions regarding delivery by an agent.

## **Documentation to be Verified (08/08)**

The Seller must deliver to you, as the approved Custodian, the Note, the assignments, and the related documentation for each Mortgage it is selling to Freddie Mac. The applicable Form 1034 or Note Delivery Cover Sheet will accompany each delivery of Notes. You may also receive documents that provide additional Note terms, clarify legal terms, and/or complete the required documentation for a particular Mortgage.

Examples of these supplemental documents include

- Addendum to the Note
- Agreement to Convert
- Assumption Agreement
- Modification Agreement
- Power of Attorney
- Name Affidavit
- Signature Affidavit

An Allonge, because it is physically a part of the Note, is not technically a supplemental document, and it must be delivered as part of the Note.

## **Verification Requirements (08/08)**

Upon receipt of a delivery of Notes from the Seller, you must

- Verify the data. The information on each Note must match the corresponding information in the Selling System or applicable Form 1034.
- Verify the Note. The Note must be original and complete. The Note must also be originated on a Fannie Mae/Freddie Mac, a Freddie Mac, or a Fannie Mae Uniform Instrument. See Guide Exhibit 4 for a complete list of current Uniform Instruments.
- Verify the chain of endorsements (Note).
- Verify the chain of assignments (security instrument).

Once you have verified the accuracy of the data and that the documents comply with our requirements, you may certify the loan. Certification is complete in the Selling System when you

- Indicate in the Selling System that you have certified individual loans or loans in batch; or
- Submit proposed data corrections to the Seller, and the Seller accepts the proposed changes.

## Data Verification (08/08)

The table below lists the data elements requiring verification for all Notes. You must compare these data elements in the Selling System to the information contained on each applicable Note. For additional information on these data elements, particularly as they relate to special delivery requirements for certain Mortgage Products, see Form 11 and Form 13SF.

**Note:** Freddie Mac systems and publications are not always consistent in their terminology. In the table below, we list the various terms for the same data elements in the following order: Selling System (Form 1034E), Form 11 and Form 13SF, and MIDANET (Form 1034).

**Note:** The parenthetical numbers in the data elements column correspond to the numbered boxes on Job Aids 1-5.

**Note:** Freddie Mac no longer requires that the Freddie Mac loan number be affixed to the face of the Note, in most circumstances. See Guide Sections 16.4(e) and 18.6(a).

Data Elements	Compare to Note
Freddie Mac loan number <b>(1)</b>	Nine-digit loan number, provided to the Seller by Freddie Mac (must appear in the upper right-hand corner of each Note, if required). If the Freddie Mac loan number is on the Note, it must be verified.
Note date <b>(2)</b>	The original Note Date that appears on the first page of the Note.

Date of Note (Forms 11, 13SF, and 1034)	If there is a discrepancy, contact the Seller.
Property street <b>(3)</b>	<p>Street address for the Mortgaged Premises as indicated on the Note <b>may</b> include</p> <ul style="list-style-type: none"> <li>• Street type (e.g., Circle; Court; Avenue; Road; Boulevard),</li> <li>• Unit number, if applicable, and</li> <li>• Direction, if applicable (e.g., 123 East Main Street, 1000 Connecticut Avenue, NW).</li> </ul> <p>Standard abbreviations for street type and direction are acceptable.</p> <p><b>Note:</b> Misspelled street designations are acceptable, provided that the intended word is still apparent. For example:</p> <ul style="list-style-type: none"> <li>• "Road" spelled as "Raod";</li> <li>• "Street" spelled as "Streeet"; or</li> <li>• "Circle" spelled as "Cricle"</li> </ul> <p><b>Note:</b> For certain Mortgages, such as Construction to Permanent Mortgages, the street address on the Note may not be complete. Enter the discrepancy in the Selling System, and contact the Seller for documentation confirming the address to certify the Note.</p>
Property city <b>(4)</b>	City or town in which the Mortgaged Premises is located indicated on the Note.
Property state <b>(5)</b>	State in which the Mortgaged Premises is located indicated on the Note.
Property zip code <b>(6)</b>	<p>Postal Zip Code of the Mortgaged Premises indicated on the Note.</p> <p><b>Note:</b> Zip Codes sometimes change. If a Zip Code has been altered on the Note, it is not necessary for the Borrower to initial that change. If the Zip Code delivered in the Selling System does not match the Zip Code on the Note, you may certify the Note if the U.S. Postal Service website (<a href="http://zip4.usps.com/zip4/welcome.jsp">http://zip4.usps.com/zip4/welcome.jsp</a>) confirms that the Zip Code delivered in the system is correct for the property address. We recommend keeping a print out of the web page in the file.</p>
Original Loan Amount <b>(7)</b> (Forms 11 and 13SF)	Original principal amount indicated on the Note. For Mortgages that have been modified or converted prior to delivery, the loan amount as of the modification or conversion.
Original Interest Rate <b>(8)</b>	The original interest rate indicated on the Note.

Note Interest Rate (Forms 11 and 13SF)	
Original P & I Payment Date <b>(9)</b>  Date of First P & I Payment (Forms 11 and 13SF)	<p>The Due Date of the first full principal and interest (P &amp; I) payment indicated on the Note.</p> <p>For Mortgages that have been modified or converted prior to delivery, the due date of the first full P&amp; I payment of the modified Mortgage as indicated in the modification or conversion agreement.</p> <p>For Initial Interest Mortgages, the due date of the first monthly interest-only payment indicated on the Note.</p>
Original Maturity Date <b>(10)</b>  Note Maturity Date (Forms 11 and 13SF)	The date of the final P & I payment indicated on the Note.
Original P & I Payment <b>(11)</b>  Monthly P & I Payment (Forms 11 and 13SF)	<p>The full monthly principal and interest (P &amp; I) payment indicated on the Note.</p> <p>For modified or converted Mortgages, the monthly P &amp; I payment in effect after the modification or conversion as specified in the modification or conversion agreement.</p> <p>For Initial Interest Mortgages, the amount of the first interest-only payment specified in the Initial Interest Note.</p>
Borrower name <b>(12)</b>	First name, middle name or initial, and last name of the first Borrower indicated on the Note.
Co-Borrower name <b>(13)</b>	First name, middle name or initial, and last name of Co-Borrower indicated on the Note.
Modification/ Conversion date <b>(24)</b>  Mod/Conv Date (Forms 11 and 13SF)	<p>For modified or converted Mortgages, the date on which the modification or conversion was effective.</p> <p>For one closing construction to permanent Mortgages, the due date of the first P &amp; I payment of the permanent Mortgage.</p> <p>For Construction Conversion and Renovation Mortgages using Integrated Documentation, the Due Date of the first principal and interest payment of the Permanent Financing.</p> <p>For Initial Interest Mortgages, the Due Date of the first monthly fully amortizing P &amp; I payment as stated in the Note.</p>

**Note:** If you have difficulty identifying a Mortgage as one of the types mentioned above, contact the Seller for additional information.

**Note:** Freddie Mac does not require that you verify the 18-digit MERS Identification



Number (MIN).

**Note:** You should verify the six-digit Seller/Servicer number; this enables you to track the Notes properly through your tracking system, and to verify that you have a Form 1035 with that Seller/Servicer.

In addition to the data elements in the table above, you must also verify the following data elements for all ARMs.

Data Elements	Compare to Note
Convertible <b>(23)</b>	Indicates whether the ARM has a feature that allows the loan to convert to a fixed rate. If the ARM is a Convertible ARM, the option to convert will be stated on the Note.
First rate adjustment date <b>(14)</b>	The First Change Date indicated on the Note.
Index Source <b>(15)</b>	<p>The source of the fluctuating economic indicator specified in the Note, the value of which is used to adjust the Note Rate periodically. See Guide Exhibit 30.</p> <p><b>Note:</b> Because all Notes in a single PC pool must have the same Index Source, Sellers may experience a “fail” after you have certified a Note.</p>
Index Lookback Days <b>(16)</b>	<p>The number of days between the Interest Change Date and the date the Index value is determined. Expressed in the Note as the number of days before the Interest Change Date.</p> <p><b>Note:</b> For most ARMs, the number of days indicated in the Note will be 45. For certain ARMs that have a “First Business Day (FBD) of the month immediately preceding the month in which the Interest Change Date occurs”, the number of days is 25.</p> <p><b>Note:</b> Because all Notes in a single PC pool must have the same Index Lookback Days, Sellers may experience a “fail” after you have certified a Note.</p>
Note margin <b>(17)</b>	Percentage added to the Index value to determine the new interest rate (Note Rate) on each adjustment date. The mortgage margin is indicated on the Note.
Interest Rate Rounded <b>(18)</b>	The percentage to which the interest rate (Note Rate) will be rounded on each Interest Date. This amount will be .125% for all ARMs, unless another percentage or calculation is authorized in the Purchase Documents.
1 <sup>st</sup> Rate Adjustment max rate <b>(19)</b>	The maximum interest rate (Note Rate) to which an ARM may adjust at the First Change Date. Expressed as a

	percentage in the Note (may need to be calculated).
1 <sup>st</sup> Rate Adjustment min rate <b>(20)</b>	The minimum interest rate (Note Rate) to which an ARM may adjust at the First Change Date. Expressed as a percentage in the Note (may need to be calculated).
Periodic Interest Rate Cap <b>(21)</b>	The maximum increase or decrease in the interest rate (Note Rate) on any Interest Change Date after the first Interest Change Date. Expressed as a percentage in the Note.
Life-of-loan max rate <b>(22)</b>	The maximum interest rate (Note Rate) to which an ARM may adjust over the life of the loan. Expressed as a percentage in the Note.

If you discover discrepancies between any of the data elements in the Selling System and the applicable Note for a given Mortgage, you must not certify it. You must enter the data discrepancy in the Selling System or, if you and the Seller agree, you may use an alternate method to report discrepancies, even though references through this chapter direct you to enter the discrepancy in the Selling System.

If you have proposed changes, the Seller may receive an email notice, or the Seller may monitor outstanding certification issues through the Selling System. The Seller may accept or reject the proposed changes. If the Seller

- Accepts all proposed changes and there are no document discrepancies outstanding, the Note will be automatically certified. You need not perform any further action to complete the certification.
- Rejects any of the proposed changes or documentation discrepancies, you must work with the Seller to resolve the issues.

<b>Issue</b>	<b>Resolution</b>
Borrower Name in the Selling System differs from Note	Enter the discrepancy in the Selling System. The Seller must send you evidence of a name change or a Name Affidavit.
Note data elements do not agree with the data in the Selling System	Enter the proposed changes to the data in the Selling System. The Seller must either <ul style="list-style-type: none"> <li>• Accept your changes, in which case no further action on your part is necessary; or</li> <li>• Reject your changes. You may not certify the Note unless the Seller provides you with corrected documentation.</li> </ul>
Changes on Note; white-outs and cross-outs are not initialed by Borrowers	Enter the discrepancy in the Selling System and return Note to the Seller to have the Borrower initial all changes.  Changes to Freddie Mac loan number, closing location, typed name under signature and Zip Code do not require Borrower's initials.
Freddie Mac loan number is changed on the Note	No action is required, provided that the Freddie Mac loan number that appears on the Note matches the Freddie Mac

	loan number in the Selling System.
FHA case number is changed or incorrect on the Note	No action required. This is not a certified field.

Refer to Section 2 of the *Certifying Mortgages for Freddie Mac* manual for the process for entering proposed data changes.

## Note Verification (08/08)

The Note must be original and complete. Freddie Mac will not accept Notes marked as "duplicate original," "corrected copy," or similar, even if there is an original signature, or if the words "duplicate original" or "corrected copy" are crossed through with or without initials. Please contact DCO immediately if you receive such a Note.

A Seller's Purchase Documents may permit certain variances from requirements, such as original Notes or Uniform Instruments. You must receive a copy of the relevant portion of the Seller's Purchase Documents that waive or supplement our standard Guide requirements before you may certify the Note.

## Borrower's Signature (08/08)

You must verify that the signature on the Note for each Borrower is an original ink signature. Signatures in pencil are not acceptable. Stamped or other non-traditional methods of signing may be acceptable in certain circumstances, such as the Borrower's physical impairment. In these cases, a Signature Affidavit or supporting documentation, such as a court order, is required.

The name as signed must not conflict with the Borrower's name in the Selling System or any typed or printed name that may appear under the signature. There is no requirement that the Borrower's name be typed or printed under the signature line of the Note.

If a Borrower initials one page of the Note, then those initials must appear on every page except the signature page. While there is no requirement that the Borrower initial the Note, you may not certify a Note where some pages of the Note are initialed and others are not.

**Note:** With respect to living trusts, the "settlor" is the person who contributes the property to the trust, who may also be referred to as the "grantor."

## *Oversigning or Undersigning Documents*

Borrowers may "oversign" or "undersign" their name.

- Oversigning occurs when something is included in the Borrower's signature that does not appear in the typed or printed name on the Note and/or in the Selling System.
- Undersigning occurs when the Borrower's signature does not contain everything that is included in the typed or printed name on the Note and/or in the Selling System.

Oversigning and undersigning are acceptable and do not require a Name Affidavit or Signature Affidavit provided there is no conflict between the signed name and the typed or printed name on the Note and/or in the Selling System.

You may encounter the following situations:

Acceptable	Unacceptable
Signature <u><i>John Q. Public</i></u> Typed Name John Quincy Public Signature is undersigned, but does not conflict with the typed name	Signature <u><i>John Z. Public</i></u> Typed Name John Quincy Public Signature conflicts with typed name. This is acceptable only if a signature affidavit is provided showing that John Quincy Public signs documents as John Z. Public.
Acceptable	Unacceptable
Signature <u><i>John Public</i></u> Typed Name John Quincy Public Signature is undersigned, but does not conflict with the typed name.	Signature <u><i>John Q. Public</i></u> Typed Name John Quincy Public, Trustee For a Borrower that is a living trust (may also be referred to as a inter vivos trust or revocable trust), the signatures of both the settlor and the trustee must appear on the Note. See signature by trustee below.
Acceptable	Unacceptable
Signature <u><i>John Quincy Public</i></u> Typed Name John Q. Public Signature is oversigned, but does not conflict with the typed name	Signature <u><i>John Quinn Public</i></u> Typed Name John Quincy Public Signature conflicts with typed name. This is acceptable only if a Signature Affidavit is provided showing that John Quincy Public signs documents as John Quinn Public.



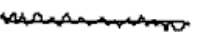
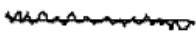
### ***Illegible Signature and Signature Contradictions***

A Signature Affidavit or Name Affidavit is required when the Borrower's signature contradicts or is not consistent with the typed or printed name below the signature line on the Note or in the Selling System. We prefer a notarized original Affidavit, however, a copy is acceptable.

If a Signature Affidavit is used, the signature on the Affidavit must closely resemble the signature on the Note.

A Borrower's illegible signature is acceptable if the typed or printed name on the Note and the Borrower's name in the Selling System match.

When the Borrower's signature is illegible and there is no typed or printed name on the Note, enter this as a document discrepancy in the Selling System. You will need to obtain copies of other legal documents, such as the Name Affidavit or Signature Affidavit, that contain the Borrower name and signature, to compare. If they closely resemble each other, the signature is acceptable.

May be Acceptable	May be Acceptable
Signature  Typed Name John Quincy Public  A Signature Affidavit or Name Affidavit must accompany this delivery, showing that John Q. Public's legal signature is "X".	Signature  Typed Name John Quincy Public  A Signature Affidavit or Name Affidavit must accompany this delivery, showing that John Q. Public's legal signature is "☺".
May be Acceptable	May be Acceptable
Signature is illegible and name is NOT typed under signature   Compare the signature to the signature on a Signature Affidavit or other legal, notarized document and match the typed name on that document to the name in the Selling System	Signature is illegible  Typed Name John Quincy Public  Acceptable if the typed or printed name on Note matches the Borrower name in the Selling System

### ***Signature by a Trustee***

If a Note is secured by a Mortgaged Premises held in a living trust (inter vivos or revocable), the Note must be signed by both the Borrower as settlor and the trustee as trustee for the trust; the same person may sign in each role, or different people may sign. See Guide Section 22.10.

Acceptable	Acceptable
Signature <i><b>John Q. Public</b></i> Typed Name John Quincy Public, Settlor and Trustee of the John Quincy Public Trust  One signature used to indicate that the signatory is executing the document as settlor and as trustee.	Signature <i><b>John Q. Public</b></i> Typed Name John Quincy Public Signature <i><b>John Q. Public</b></i> Typed Name John Quincy Public, Trustee of the John Quincy Public Trust  Borrower executed the Note with one signature as settlor plus a second signature as trustee.

### ***Signature by a Conservator or Guardian***


A conservator is someone who has been given authority over the affairs of an individual deemed to be legally incompetent. If a conservator signs a Note as Borrower, then a copy of the court document that appoints that person as conservator for the Borrower must be included with the Note.

### ***Power of Attorney***

If the Note is executed on behalf of the Borrower by an attorney-in-fact pursuant to a Power of Attorney (POA), it must be clear that the Note has been signed by an attorney-in-fact. You must verify that the POA is dated on or before the Note Date.

The Seller must deliver the original notarized POA. The Custodian is not expected to review the content of the POA. See Guide Section 16.5 for additional information.

Freddie Mac requires that a POA be notarized even if state law or local customs do not.

Acceptable	May be Acceptable
<p>Signature <u><i>Samuel Signatory, Attorney-in-Fact for John Quincy Public</i></u></p> <p>Typed Name John Quincy Public</p> <p>The signature indicates that Samuel Signatory is executing the document under a Power of Attorney from John Quincy Public.</p> <p>The POA designating Samuel Signatory as John Quincy Public's Attorney-In-Fact for execution of Mortgage documents that is in effect on the date the documents were signed must be received and attached to the Note.</p>	<p>Signature <u><i>Samuel Signatory</i></u></p> <p>Typed Name John Quincy Public</p> <p>This is not acceptable if the Note is received with no additional documentation.</p> <p>Seller must provided documentation to support Samuel Signatory's authority to execute the Note on the Borrower's behalf.</p> <p> This manner of signature is not a preferred method of executing a document under a POA, since it is not clear why or under what authority Samuel Signatory is executing the document.</p>

Freddie Mac will accept a POA that is notarized by a military officer if the notarization is made pursuant to Service member's Civil Relief Act §506(b), which permits a service member during a period of military service to make an affidavit "before... any superior commissioned officer." See also Guide Section 82.1.

If the original POA is missing:

- A copy is acceptable if the original POA has been sent to the recorder's office.
- You must notify the Servicer if the original POA is missing for Notes in a Transfer of Servicing.
- You may not certify the Note without either the original POA, a copy of the POA, or the recordation information.

See Guide Section 16.5.

## Uniform Instruments (08/08)

The Guide requires that all Notes be executed on the Uniform Instruments (1-4 Family) for the jurisdiction where the Mortgaged Premises are located. Freddie Mac does not expect Custodians to conduct further verification regarding the printed or standard text of the Note if the agency tagline indicating a Uniform Instrument is present. See Guide Section 6.7; the Forms are listed in Exhibit 4 "Single-Family Uniform Instruments," and at [www.FreddieMac.com](http://www.FreddieMac.com).

The following apply to ensure that the Note(s) meet the Uniform Instruments requirement.

- The agency identifier tagline must appear on each page of the Note; a Note without the agency tagline is non-standard.
- Unless specified in the Purchase Documents, the Custodian may not certify a Note that is not executed on a Uniform Instrument. The Seller must be contacted and the Note returned.
- Sellers may reprint Uniform Instruments on their own letterhead, by computer, or otherwise as they choose. However, the text of the Uniform Instruments must remain unchanged and the tagline identifying the instrument as a Uniform Instrument must

remain a part of the document—either “Fannie Mae/Freddie Mac,” “Freddie Mac” or “Fannie Mae.”

- We do not object to supplemental tag line information by forms companies or the lender, however, there should be no change made to the tag line of the Uniform Instrument itself.
- Form numbers do not change when Guide Exhibit 4 is updated.
- As new generations of instruments are developed, and electronic format replaces hard copy forms, Freddie Mac may explore new methods of denoting legally required changes in the Uniform Instrument form number.

**Note:** The Spanish translations of certain Uniform Instruments that are available on Freddie Mac's website are for borrower education and reference only and are not acceptable as original, signed mortgage documents.

## Lost Note Affidavits (08/08)

In certain instances, you may receive a Lost Note Affidavit (LNA) instead of the original Note. If the LNA meets these requirements, you may verify loan data on the Note copy attached to the LNA. The LNA should be filed in the Note file in lieu of the Note.

- The LNA must be an original, signed in ink by an officer of the Seller.
- The LNA must be notarized.
- The LNA must be addressed to Freddie Mac.
- The LNA must include:

The name of each Borrower on the Note,

The original principal amount of the Note, and

The Note Date.

- A complete copy of the entire missing Note must be attached to the LNA, including all required signatures and endorsements complete to the Seller.
- The Seller must provide you with evidence that Freddie Mac has approved delivery of an LNA. This may include a copy of the portion of the Purchase Documents between Freddie Mac and the Seller that identifies specific Mortgages. If there is a specific mortgage list, the Custodian must ensure that each LNA received is included on that list. If the Seller submits other written documentation, it must indicate that Freddie Mac has approved the LNAs and list the affected Mortgages.

If the LNA meets these requirements, you may verify the loan data from the Note copy attached to the LNA. The LNA and Note copy should be filed in the Note file in lieu of the Note.

**Note:** If the copy of the Note does not include the complete endorsement chain, the LNA must contain a statement to the effect that the photocopy of the Note was made in the ordinary course of business prior to the Note's endorsement. Original

endorsements on the Note copy are not acceptable.

## Endorsements (08/08)

When a Note is sold to Freddie Mac, the Seller must endorse the Note in blank "Pay to the order of ..." Please contact DCO if you receive an endorsement in another form or with alternate language. While you may certify a Note endorsed "Payable to ...", we will ask the Seller to change their practice for the future. The following must be clearly typed or printed:

- The name of the institution making the endorsement ("Seller-endorser"), and
- The name and title of the individual authorized to sign only, however, for intervening assignments, the name alone is acceptable if legible.

**Note:** If the endorser is "doing business as," it should provide both the formal corporate name and the "dba" name.

The following are examples of blank endorsements:

### Without Recourse

PAY TO THE ORDER OF	(Leave Blank)
WITHOUT RECOURSE	(Name of Seller-endorser) (Signature of duly authorized officer) (Typed name and title of signatory)

### With Recourse

PAY TO THE ORDER OF	(Leave Blank)
	(Name of Seller-endorser) (Signature of duly authorized officer) (Typed name and title of signatory)

**Note:** Most Notes are sold to Freddie Mac without recourse; however, Custodians are not required to check recourse status of the Notes and have no way of doing so.

### Allonges

Allonges are often used to provide additional space for endorsements. You may certify a Note that has an Allonge attached if

- The Allonge is permanently affixed to the Note (taping or pasting the Allonge to the Note are not acceptable), and



- The Allonge references the Borrower's name, the property address, and the original principal balance of the Note.

If you receive a non-conforming Allonge, enter the discrepancy in the Selling System and await corrective action by the Seller. See Guide Section 16.4(f).

**Note:** If you receive an Allonge that is dated, you may certify only if the date is on or after the Note date.

If you frequently receive Notes from a Seller endorsed this way, please contact DCO so that we can remind the Seller of our requirements.

### ***Endorsement Chains***

The Seller must endorse each Note in blank. When the Seller of the Mortgage is not the original payee on the Note, you must verify that the chain of endorsements on the Note is proper and complete from the original payee to the Seller.

After Freddie Mac purchases the Mortgage, no other endorsements or changes to endorsements on the Notes are permitted without Freddie Mac's prior written consent. In particular, a Transferee Servicer may not endorse or change any endorsement on a Note owned by Freddie Mac.

**Note:** You may certify Notes endorsed to Freddie Mac rather than endorsed in blank, but if you frequently receive Notes from a Seller endorsed this way, please contact DCO so that we can remind the Seller of our requirements.

Endorsements may indicate that the endorsing entity is the "successor in interest to" or "successor by merger to" the preceding endorser; this is acceptable. If, however, there is a break in the endorsement chain and the Seller indicates that it is due to a name change or a merger, acquisition or other event that is not indicated in the endorsements themselves, the Seller should deliver documentation (such as an explanatory letter) to substantiate that event. Such documentation might consist of a regulator's documentation from the state corporation commission (or similar authority) of the state in which the mortgaged premises is located.

In certain circumstances, the endorsement may not match the formal legal name of the entity. For example, for a company named "Standard Federal Mortgage Bank Incorporated," the following abbreviations are acceptable if the Custodian has a document signed by the Seller's attorneys stating that those abbreviations are acceptable:

- STD FED MTG BK INC.
- STANDARD FEDERAL MTG
- THE STANDARD FEDERAL MORTGAGE BANK

- STND FED MTG INC

Issue	Resolution
Endorsement is missing a signature	Enter the discrepancy in the Selling System and wait for corrective action from the Seller.  If the Seller advises you that the institution is no longer in business and it is unable to obtain the signature, you must not certify the Note.
Endorsement is a facsimile signature	Acceptable (the Seller must retain documentation in its files to support use of facsimile signatures but the Custodian need not verify).
Endorsement does not include title of signatory	Enter the discrepancy in the Selling System and wait for corrective action from the Seller.
Endorsement errors or missing endorsements	Enter the discrepancy in the Selling System and wait for corrective action from the Seller.
Date has been inserted on blank endorsement	Contact DCO so that we may remind the Seller of our requirements
Endorsement has been voided	Acceptable. (The "voided" endorsement must be initialed by an authorized signatory of the lending institution.)  <b>Note:</b> When voiding errors on endorsements, be certain that only the erroneous endorsement is marked through or marked "void"; otherwise, it may appear that the entire Note is voided.

## Assignments (08/08)

You must receive an original assignment of the Security Instrument that has been recorded from the original mortgagee on the Security Instrument to the Seller or, if there is a concurrent Transfer of Servicing, to the Servicer (NOT to Freddie Mac). An officer of the transferring institution must sign the assignment, and the assignment must contain the officer's name and title.

You must verify that there is no break in the assignment chain. Assignments of the Security Instrument must begin with the original mortgagee (the payee on the Note) and continue unbroken to the Seller, or to the Servicer, if there is a concurrent Transfer of Servicing, or to MERS.

- You must hold all assignments with their related Notes, unless the Mortgage is registered with MERS, and/or
- Servicer has provided you with documentation indicating that it will hold all assignments for Freddie Mac-owned Notes in its Mortgage files. See Guide Section 47.3.

**Note:** We do not accept assignments to "blank".

The following chart identifies different assignment issues and the conditions for Freddie Mac acceptance.

<b>Issue</b>	<b>Resolution</b>
Blanket assignments are delivered	Freddie Mac does not accept mortgages assigned using blanket assignments.  Enter the discrepancy in the Selling System and return assignment to the Seller.
The recorder's office does not record assignments	This is not common, however; pursuant to Guide Section 22.14, if the Seller indicates this in an affidavit delivered with the Note, you may accept it and retain it in your file with the Note.
The recorder's office does not return the recorded documents	A certified and true copy of the document that was sent for recording is acceptable.
The assignment does not have a notary stamp or seal	Enter the discrepancy in the Selling System and wait for corrective action from the Seller.
The assignment does not have a corporate seal	If the assignment is otherwise acceptable, you may certify the Note.
The assignment contains a facsimile signature	Assignments must contain original signatures. Enter the discrepancy in the Selling System and wait for corrective action from the Seller.
The certified copy of the assignment is missing the date or the recordation information, or the recordation information is illegible	Enter the discrepancy in the Selling System; the Seller must provide this information.
Assignment is made to Freddie Mac	Return to Seller to destroy. Refer to Guide Chapter 22.
Servicer wishes to assign Freddie Mac's interest in a Mortgage to a new lender in a Texas refinance	This is not permitted. The Mortgage does not need to be assigned to the new lender for the refinance.
Custodian is holding a certified and true copy of the assignment, but subsequently receives the original recorded assignment	File the recorded assignment with the original Note, and destroy the copy or return it to the Seller/Servicer as determined by your agreement.
Intervening assignment(s) not included with affidavit stating that the jurisdiction does not require that assignments be recorded	Enter the discrepancy in the Selling System and notify the Seller who must provide intervening assignment(s). Do not certify until resolved.
Intervening assignments for whole or participation Notes not included with delivery	Enter the discrepancy in the Selling System and request the Seller to provide intervening assignment(s). Do not certify until resolved.
Intervening assignments sent for recordation, but only a copy is received	Enter the discrepancy in the Selling System and ask the Seller to certify and deliver to you a copy (a "Seller-certified copy") of the assignment that was sent for

	recordation.
Assignment chain is broken	Enter the discrepancy in the Selling System and notify the Seller of the break. Do not certify until corrected.
Assignment is to blank	Return to Seller; Freddie Mac does not accept assignments to blank. You may not certify. See Guide Chapter 22.

**Note:** See Guide Section 22.14 for additional requirements and for the requirements for Mortgages that have been registered with MERS.

## Reviewing Supplemental Documentation (08/08)

We require that the Seller deliver originals of the assignments and related documentation to you. Sometimes the original is not available because it has been sent to the recorder's office for recordation and has not been returned to the Seller for delivery to you. In such cases, you may certify the Note based on a Seller-certified copy of the assignment or related documentation.

The Chart below indicates when original documents are required for certification and when certified copies of documents may be used in lieu of originals.

Document	What is Acceptable
Note	Original only.
Note Addendum (for example, Balloon Note Addendum)	Original only.
Assumption Agreement	Original only.
Power of Attorney (POA)	Originals unless the original has been sent to the recorder's office. See Guide Section 16.5.
Recorded assignment	Original; <ul style="list-style-type: none"> <li>If original is at the recorder's office for recordation, then a Seller-certified copy is acceptable (until original is received), or</li> <li>Copy certified by clerk of court or recorder's office if the original recorded document is not available.</li> </ul>
Multistate Agreement to Convert (Form 3180)	
NY CEMA (Form 3172)	
Modification	
Name Affidavit or Signature Affidavit	Original or copy.

Custodians may receive documentation from the Seller/Servicer after certification is complete. This may occur when the Seller submits a certified copy of a document with the delivery and then sends you the original document after recordation.

When this happens, you should

- Verify the documentation as you would for any document delivery. You must also ensure that the Freddie Mac loan number is on the document (except for the assignments).
- If the document is an addendum to or modification to the Note, attach it to the Note. Otherwise, place the document in your file with the Note.
- If the document is the original, replace any copy with original, and destroy the copy, unless you have a written agreement with the Servicer to return it to them for destruction.
- If you receive an original Note for a loan that you certified based on an LNA, void the LNA and return it to the Servicer for destruction.

## **Resolving Discrepancies (08/08)**

You must enter any data or document discrepancies for a Note in the Selling System. The Seller may receive an email notice that there are proposed changes. The Seller has the option of accepting the proposed data changes or rejecting them. If the Seller

- Accepts all proposed data changes and there are no document discrepancies outstanding, the loan will be automatically certified. You are not required to perform any further action to complete the certification.
- Rejects any of the proposed changes or documentation discrepancies, you must work with the Seller to resolve the issues.

Refer to Chapter 2 of the *Certifying Mortgages for Freddie Mac* manual for the process for reviewing certification issues after you have entered proposed changes or documentation discrepancies in the Selling System.

You must not certify a Mortgage for which you have identified data or document discrepancies until the discrepancies have been corrected. See Chapter 3A of this handbook for the process for handling discrepancies for Notes being sold to Freddie Mac through MIDANET.

## **Retention Period (08/08)**

For loans certified in the Selling System, Custodians are not required to retain a copy of Form 1034E. See Guide Section 18.6(g) or Chapter 3A of this handbook for retention requirements for Mortgages sold to Freddie Mac through MIDANET.

## **New York Consolidation, Extension and Modification Agreements ("NY CEMAs") (08/08)**

A New York Consolidation, Extension and Modification Agreement (Form 3172) is often used to finance debt secured by property in New York state in lieu of canceling and releasing an existing lien, and is for use only in New York State. The NY CEMA process permits borrowers to avoid the amount of the mortgage recordation tax due for a transaction: because the tax on the outstanding mortgage balance has already been paid, the borrower pays tax only on the amount of money borrowed that exceeds the balance of the existing mortgage. The result is that the Borrower has a single, consolidated loan obligation, evidenced by a Consolidated Note that is payable in accordance with the terms of the NY CEMA.

## ***Certification***

If Freddie Mac purchases a Mortgage originated with a NY CEMA, the delivery must include a new original Consolidated Note, together with the NY CEMA with applicable Exhibits and all assignments. The following checklist identifies all documents should be present for proper certification of a NY CEMA Mortgage:

- In connection with a current financing evidenced by a NY CEMA, Form 3172 1/01 and Form 3172, 1/01 (rev. 5/01), the Borrower must execute a new original Note, referred to as the Consolidated Note, that consolidates, extends and modifies the Original Old Money Note and the Original New Money (Gap) Note, if any. A Consolidated Note was not required with NY CEMA Form 3172 7/86, although one may have been executed.
- If a Seller delivers a NY CEMA Mortgage that refinanced a NY CEMA Mortgage previously owned by Freddie Mac, you may receive for certification the Note and assignments that you released along with a new original Consolidated Note, a new NY CEMA and a new assignment. The new NY CEMA Mortgage will have a new Freddie Mac loan number, and you should track it using this new number.

**Note:** The NY CEMA, Form 3172, is a Fannie Mae/Freddie Mac Uniform Instrument, and may be used for Mortgaged Premises located in New York only.

See Guide Sections 6.8.1 and 16.8(a) for further information on documentation required to certify NY CEMA Mortgages for Freddie Mac.

If the recorder's office has not returned the recorded NY CEMA in time for it to be delivered for certification, the Seller must deliver a copy the document (or the NY CEMA) sent for recordation, certified by a corporate officer of the Seller as a true and complete copy. If the original recorded NY CEMA is returned by the recording office, the Servicer must forward it to you for maintenance in the Mortgage file.

## ***Assignments***

If the Seller delivering the NY CEMA is not named in the prior mortgages listed in the NY CEMA, you should receive a recorded intervening assignment for each change in mortgage ownership. (Refer to "MERS Registered Mortgages" below in this chapter for information on assignments for those loans.)

## **MERS-Registered Mortgages (08/08)**

MERS is the Mortgage Electronic Registry System, Inc., a database that is accessible on-line and contains real property and ownership information commonly found in closing documents, public land records, and Mortgage assignments. Mortgages registered with MERS appear in the public land records with MERS as the Mortgagee of Record.

Freddie Mac purchases MERS-registered Mortgages closed with MERS as the Original Mortgagee of Record, as well as those closed with MERS as the assignee. All MERS-registered Mortgages are subject to the same representations and warranties as the other mortgages that we purchase.

Each MERS-registered Mortgage must have either a recorded assignment to MERS or be closed on a security instrument that names MERS as the nominee. Your Seller must include

the MIN (the 18-digit Mortgage Identification Number assigned to each Mortgage registered with MERS); it remains with the Mortgage throughout its term. Custodians are not required to verify the MIN.

If the Mortgage was closed with MERS as the original mortgagee (a MOM loan), the Seller must inform you that the Mortgage was closed on a security instrument that names MERS as the Mortgagee of Record and transmit the MIN with the delivery data. The Servicer may elect to hold the assignments for MERS-registered mortgages; in this case, the Servicer certifies the MERS assignment chain.

If you have general questions about MERS or MERS-registered mortgages, please contact the MERS corporate offices.

**Note:** For mortgages registered with MERS after sale to Freddie Mac, the Servicer will inform MERS that we are the investor and give MERS the Freddie Mac loan number; MERS will then notify Freddie Mac. You and the Servicer must agree as to how the Servicer will notify you of the change in status of these mortgages.

## Freddie Mac Document Custody Procedures Handbook

### Chapter 3A: MIDANET® Delivery and Processing Procedures (08/08)

Topic	Page
Introduction	2
Verifying Data and Documentation	2
Resolving Discrepancies	2
Completing Certification	3
MERS-Registered Mortgages	4

#### Introduction (08/08)

The process for certifying Notes through MIDANET® differs slightly from the process for certifying Notes sold through the Selling System. For Selling System deliveries, Custodians certify Notes directly in the system at the loan level. However, for loans delivered through MIDANET®, Custodians must submit certification for all of the loans listed on the Form 1034 or Form 1034A to Freddie Mac via the Form 1034S or Form 1034SM.

Sellers occasionally use independent delivery agents, particularly for bulk or seasoned loan portfolio sales through MIDANET®. If such an agent contacts you or you receive loan data with respect to the Mortgages from a third party, you should ask to see written evidence of their relationship with the Seller, such as a copy of their contract with the Seller or the paragraph in the Freddie Mac Master Commitment that recognizes the agency arrangement. You may rely on the representations of, and documents delivered by, such an agent as if the Seller made them. Contact Document Custodial Operations (DCO) if you have any questions regarding delivery by an agent.

#### Verify Data and Documentation (08/08)

The Custodian must verify data and documentation for Mortgages delivered through MIDANET® as it does for Mortgages delivered through the Selling System, except that the process is slightly different.

You must:

- Compare the data elements for all Mortgages from the Form 1034 or Form 1034A to the Note. For more information regarding each data element, refer to the tables in Chapter 3 of this handbook.
- Verify the documents in accordance with the requirements of Chapter 3 of this handbook and Guide Section 18.6.



## Resolving Discrepancies (08/08)

If you discover data or documentation discrepancies for any of the Mortgages listed on the Form 1034 or Form 1034A, you must not submit certification to Freddie Mac until all the issues for those loans are resolved.

**Note:** In the Selling System, if one Mortgage in a contract has discrepancies, it is only that Mortgage that you may not certify; however, for Mortgages certified for MIDANET®, if one Mortgage on the Form 1034 or Form 1034A cannot be certified, none of the loans can be certified until all discrepancies are resolved.

To resolve discrepancies for MIDANET deliveries, the Custodian must:

- Notify the Seller immediately to resolve the issue(s),
- Return the documentation to the Seller/Servicer, if necessary,
- Receive written approval from the Seller prior to submitting data corrections to Freddie Mac, and
- Document data corrections directly on the Form 1034S or Form 1034SM prior to submitting certification to Freddie Mac.

You should not execute Form 1034 or Form 1034A, and should not deliver Form 1034S or Form 1034SM, until all issues have been resolved.

## Completing Certification (08/08)

Once you have verified the data and documentation and resolved all discrepancies, you must execute the Form 1034/1034A and deliver Form 1034S/1034SM to Freddie Mac. In Form 1034S, the Seller and Custodian each represent and warrant to Freddie Mac that they make the certifications on Form 1034 or 1034A and that each shall be bound by the information and their respective certifications. Delivering Form 1034S to Freddie Mac completes the certification.

Form 1034SM is similar to Form 1034S, but it applies to multiple contracts. You must complete Form 1034SM manually and then e-mail it to Freddie Mac. Certification is complete when Freddie Mac receives the Form 1034SM.

**Note:** The Form 1034SM is located on our website or contact DCO for an Excel version.  
[www.freddie.mac.com/cim/forms](http://www.freddie.mac.com/cim/forms)

Although the Custodian delivers the Form 1034 to Freddie Mac to complete certification, the Seller is responsible for ensuring that the Custodian receives the Notes and that all discrepancies and issues are resolved prior to the deadline for certification.

To complete certification, you must:

- Complete and execute the Form 1034 or 1034A,
- Complete Form 1034S, or Form 1034SM for certifying multiple contracts,
- Send one copy of each form to the Seller/Servicer,
- Send a copy of Form 1034S or 1034SM via fax or email to DCO, and
- Retain the original or an imaged copy of all forms for at least three months from the date of certification.

**Note:** Although the Custodian faxes the Form 1034S or emails the Form 1034SM to DCO, the Seller is ultimately responsible for ensuring that certification is complete and that DCO receives the Form 1034S or 1034SM in time to meet the requested Funding Date.

See Guide Section 18.6(e).

### **MERS Registered Mortgages (08/08)**

Each Form 1034 may include both MERS-registered and non-MERS registered Mortgages together. For MERS-registered Mortgages, a field on the Form 1034 will include the MIN. Freddie Mac will notify MERS that we have bought a MERS-registered Mortgage.

**Note:** The MIN is not required to appear on the Note.

If the Mortgage was closed with MERS as the original mortgagee (a MOM loan), the Seller must inform you that the Mortgage was closed on a security instrument that names MERS as the Mortgagee of Record. In this case, there is no recorded assignment to MERS, and assignments are not needed in subsequent transfers between MERS members.

## Freddie Mac Document Custody Procedures Handbook

### Chapter 4: Document Release Procedures (08/08)

Topic	Page
Introduction	2
Form 1036 Requirements	2
Document Release Types	3
New York Consolidation, Extension and Modification Agreement ("NY CEMA") Mortgage Note Release Procedures	3
Return of Released Documents	4
Control and Safekeeping of Released Documents	4
Retention Period	4

#### Introduction (08/08)

As Custodian, you are responsible for safeguarding Freddie Mac's Notes. When you receive a Form 1036, *Request for Release of Documents*, from the Servicer, you are responsible for releasing the requested documents to the Servicer. All Notes and assignments that you release to the Servicer which are not "paid and canceled" will be held by the Servicer, in trust, for our benefit.

You are responsible for tracking the release, and if applicable, return of these documents in accordance with the requirements in the Guide and this handbook.

#### Form 1036 Requirements (08/08)

The Custodian must verify that the Form 1036 contains the following data elements:

- Name and address of Custodian
- Custodial Agreement number
- Custodian Number
- Mortgage information, including:
  - Freddie Mac loan number
  - Primary Borrower's last name

Original Note date

Seller/Servicer loan number

Property address

- Type of document requested for release (e.g., modifying instrument)
- Reason for document request
- Authorized signature of Servicer, including name, title, and date signed.

If the form is incomplete, you must contact the Servicer to resolve the issue.

If the Custodian verifies the Form 1036 contains all the required data elements, the Custodian should sign and date the release, indicating the name and title of the signer, and return the form to the Servicer along with the requested document. You should also update your Note tracking system to indicate, at a minimum, the date the document was released and the reason it was released.

**Note:** If a requested Note is lost or badly damaged, see Chapter 3 of this handbook on Lost Note Affidavits.

An **electronic or system-generated** Form 1036 must contain all of the information that appears on the paper form. A single electronic form can be used to request multiple Notes, provided that a Note list is attached. You must record the reason the documents were returned and file the Form 1036 with the returned documents.

If an electronic Form 1036 is used, the Custodian must retain it and the list of individuals who have been designated by the Servicer to request the release of the documents electronically. See Guide Section 18.6 for details on these alternative versions of the Form 1036 and the required agreement between the Custodian and the Servicer.

## **Document Release Types (08/08)**

Upon receipt of a properly completed and executed Form 1036, you must release the requested documents to the Servicer and retain the original or an imaged copy of the form pursuant to the requirements of Guide Section 18.6.

Below are examples of release types:

- Maturity
- Foreclosure
- Recordation of assignment
- Substitution

- Assumption
- Prepayment
- Repurchase
- Other (for example, consolidation/extension)
- Modification
- Conversion

## **New York Consolidation, Extension and Modification Agreement (“NY CEMA”) Mortgage Note Release Procedures (08/08)**

Servicers may occasionally request release of an original Note and assignments to facilitate refinancing. To consolidate, extend and modify a Mortgage secured by Mortgaged Premises in New York State and owned by Freddie Mac, a Borrower must notify the Servicer of their intention to refinance using a NY CEMA. The servicer must request release in order to prepare the documents needed to facilitate the NY CEMA process.

We strongly recommend that you make a complete copy of the Notes and assignments that you release in anticipation of a refinancing using NY CEMAs, and we require both you and the Servicer to track all such released documents. The Servicer should notify the Custodian when the Note is paid in full or return the released documents if the refinance is cancelled or closing does not occur within 60 days. We suggest that you prompt the Servicer if they have not received either the released Notes and assignments or notice of the payment in full within 45 days after the document release. If the Servicer does not respond within 60 days after the document release, you should contact DCO so that we may follow-up with the Servicer and take any necessary action.

## **Return of Released Documents (08/08)**

If a Note was released to the Servicer and subsequently returned to your custody, you should receive a copy of the Form 1036 from the Servicer, together with the Note and related documents if it was in hardcopy. You must review the documents to ensure that you have received all of the documents that you released: again, it is helpful to have a complete photocopied set to use for verification. You should then update your note tracking system to reflect return of the documents.

Paid-in-full Notes must be returned to the Servicer pursuant to Guide Section 59.3, which requires that statutory timeframes be met. In many states, the Servicer must receive the Note back within 30 days.

## **Control and Safekeeping of Released Documents (08/08)**

You must document the reason for release of all documents except for those released due to Maturity, Prepayment, or Repurchase. You must update the Note tracking system to reflect the date on which documents are returned.

See Guide Section 18.6(e) for more information about the control and safekeeping of released documents.

### **Retention Period (08/08)**

You must retain the original or imaged copy of the Form 1036 for our inspection for at least three months in either a central location or the related Mortgage file after the loan is paid off or the Note is returned to you. As with all documents that contain Borrower information, you should maintain and dispose of Form 1036 in a manner that ensures Borrower confidentiality and privacy. See Guide Sections 18.6(e) and (g).

## Freddie Mac Document Custody Procedures Handbook

### Chapter 5: Subsequent Transfers of Servicing and Custody Procedures (08/08)

Topic	Page
Introduction	2
General Responsibilities	2
Evidence of Transferee Custodian Approval	3
Transferor Custodian Responsibilities	3
Transferee Custodian Responsibilities	3
Transfers of Servicing of MERS Mortgages	5
Termination of Custodial Agreement	6
Extension Approval	6

#### Introduction (08/08)

This chapter provides the requirements and guidelines necessary to move or recertify Freddie Mac Notes and assignments as part of a Subsequent Transfer of Servicing (TOS) or transfer of custody. It also identifies the roles and responsibilities for all parties, including the:

- Transferor Servicer
- Transferor Custodian
- Transferee Servicer
- Transferee Custodian
- Freddie Mac's Document Custodial Operations (DCO)

Please refer to Guide Chapters 18 and 56, or consult with the Seller/Servicer, as appropriate, for more information.

**Note:** A TOS or transfer of custody requiring Freddie Mac's approval may occur as a result of an organization change to, or merger or acquisition of, a Servicer or Custodian. See Guide Section 4.13 and Chapter 2 of this handbook for additional information.

## **General Responsibilities (08/08)**

Within 30 days following the Effective Date of Transfer, the Transferor Servicer must deliver an executed Form 1034T, Subsequent Transfer Custodial Certification Schedule, and the Transferor Custodian must deliver the Notes, together with any documentation regarding MERS-registered Mortgages and those closed with MERS as the original Mortgagee of record, to the Transferee Custodian.

Within 180 days following the Effective Date of Transfer for a TOS and 180 days following written notice of a transfer for a transfer of custody, on behalf of itself and the Transferee Servicer, the Transferee Custodian must deliver the Form 1034T to DCO. By executing and submitting the Form 1034T, both the Transferor Servicer and Custodian represent and warrant to Freddie Mac that the information regarding the Notes is accurate and that the required certifications have been made.

**Note:** For Transfers of Servicing where there is no change in Custodian, you must receive and review assignments from the Transferor Servicer prior to submitting the Form 1034T to Freddie Mac and by the certification due date. Note recertification is not required.

The procedure is the same for transfers of custody, except that the Transferor Servicer must deliver the signed Form 1034T to the Transferee Custodian within 30 days following written notice of the transfer.

Questions regarding the Custodian's role in the transfer process should be directed to the Servicer or DCO. Questions regarding the approval of a Custodian should be directed to Freddie Mac's Counterparty Credit Risk Management (CCRM).

**Note:** The Effective Date of Transfer for a Subsequent TOS is always the 16th day of the month.

**Note:** The Transferee and Transferor Custodian should receive at least 30 days prior notice from the Servicer or Freddie Mac of a transfer of custody. Freddie Mac can require an immediate transfer.

## **Evidence of Transferee Custodian Approval (08/08)**

As the Transferor Custodian, you must verify that Freddie Mac approved the Transferee Custodian to hold Freddie Mac Notes and assignments for the Transferee Servicer. A copy of the first page and the signature page(s) of a fully executed Form 1035 evidences this approval. The Transferor Custodian must never move the files to another Custodian without this evidence.

## **Transferor Custodian Responsibilities (08/08)**

Within 30 days of the Effective Date of Transfer, the Transferor Custodian should receive from the Transferor Servicer:



- A copy of the executed Form 981 evidencing approval of the transfer.
- Form 1034T listing all Notes included in the TOS.
- A properly prepared and recorded assignment for each Note.
- A copy of the first page and the signature page of a fully-executed Form 1035.

The Transferor Custodian must:

- Verify that Freddie Mac has approved the transfer and that there is an executed Form 1035 for that Servicer/Transferee Custodian relationship, and
- Forward the Form 1034T and the Notes along with the newly prepared assignments to the Transferee Custodian. If DCO will hold the Notes, forward the assignments to the Transferee Servicer.

## Transferee Custodian Responsibilities (08/08)

Within 30 days of the Effective Date of Transfer, the Transferee Custodian should receive from the Transferor Custodian the original Form 1034T listing all Notes included in the TOS, the Notes (including all Note file contents), and the assignments relating to this transfer.

The Transferee Custodian must:

1. Ensure that the Form 1035 has been approved by Freddie Mac prior to receipt of the Notes and assignments.
2. Verify the following data on the Form 1034T to the data on the Notes:
  - Borrower's Name
  - Property address (number and street, city, state)
  - Freddie Mac loan number, if present on the face of the Note; otherwise, validate the Freddie Mac loan number against data in electronic files or records provided by the Transferee Servicer.
3. Verify that the chain of Note endorsements begins with the original payee of the loan and ends with an endorsement in blank.
4. Verify that the chain of Note assignments begins with the original payee and ends with an assignment to the Transferee Servicer or that there is evidence that the loan is registered with MERS. See Chapter 22 of the Guide for details.
5. Notify the Transferee Servicer of any discrepancies with the Notes and assignments and must not certify until resolved by the Transferee Servicer.
6. Once all issues are resolved and recertification is complete, forward the original Form 1034T to Freddie Mac within 180 days of the Effective Date of Transfer for a TOS or 180 days of receipt of written notice of a transfer of custody. See Guide Section 56.9(b) and Chapter 3 of this handbook.

**Note:** The Transferor Custodian must cooperate with the Transferee Custodian, or DCO, to affect a smooth and orderly transfer. It is the responsibility of the Transferor Custodian to work with the Transferor and Transferee Servicers, the Transferee

Custodian and Freddie Mac to cure all document deficiencies prior to recertification of the Notes. If you have questions, contact the Servicer.

## Transfers of Servicing of MERS Mortgages (08/08)

If the TOS is ...	And the Mortgage was ...	Then the Transferee Custodian Needs ...
MERS member to MERS member	Recorded in MERS' name via a standard assignment	<ul style="list-style-type: none"> <li>The original assignments to MERS.</li> <li>Any intervening assignments from transfers occurring before the Mortgage was registered on MERS.</li> </ul>
	Originated on a security instrument that named MERS as Mortgage of Record	<ul style="list-style-type: none"> <li>Notice from the Transferor Custodian or Transferee Servicer that the Mortgage was closed with MERS as Mortgagee of Record.</li> <li>Any intervening assignments from transfers including prior transfers that involved Servicers who were not members of MERS.</li> </ul>
Non-MERS member to MERS member	Recorded in MERS' name via a standard assignment	<ul style="list-style-type: none"> <li>The recorded assignment to MERS (usually from Transferor Servicer to MERS, if the Transferor and Transferee Servicers both agree to forego the assignment from the Transferor to the Transferee, and the assignment from the Transferee Servicer to MERS).</li> <li>Any intervening assignments.</li> </ul>
	Closed on a security instrument that named MERS as original Mortgagee of Record	This scenario should not happen for recently originated mortgages.
To MERS member that holds the assignments for MERS-registered Mortgages	Originated on a security instrument that named MERS as original Mortgagee of Record  <b>or</b>  Recorded in MERS' name via a standard assignment	<ul style="list-style-type: none"> <li>Notice that the Transferee Servicer will hold the assignments for all its MERS-registered mortgages.</li> <li>No assignments are certified.</li> </ul>
MERS member to non-MERS member	Recorded in MERS' name via a standard assignment  <b>or</b>	<ul style="list-style-type: none"> <li>Recorded assignment from MERS to the Transferee Servicer.</li> <li>Any intervening assignments from servicing transfers that occurred before the Mortgage was registered</li> </ul>

	Closed on a security instrument that named MERS as Mortgagee of Record	on MERS.
--	--	----------

## Termination of Custodial Agreement (08/08)

If you receive notice that your Form 1035 is to be terminated, you must forward the Notes you hold to the Transferee Custodian or DCO as instructed by the Servicer and/or Freddie Mac.

As Transferor Custodian for Notes being sent to DCO, you must send the assignments to the Servicer.

You are not released from your obligations pursuant to Form 1035 until recertification of the transferred Notes is complete, which may be six months following physical transfer of the Notes.

## Extension Approval (08/08)

If recertification of Notes cannot be completed by the 180-day deadline, the Transferee Custodian must notify DCO prior to the deadline and request an extension. The request must include a description of the issues outstanding and indicate the Seller/Servicer number contact name, address, phone number and email address. The Servicer is ultimately responsible for delivering the Form 1034T to us.

**Note:** The Transfer of Servicing Extension Request and Issues Log is available on [Freddiemac.com](http://www.freddiemac.com/cim/forms.html) in the following location:  
<http://www.freddiemac.com/cim/forms.html>

## Freddie Mac Document Custody Procedures Handbook

### Chapter 6: Processing Balloon/Reset Mortgages (08/08)

Topic	Page
Overview	2
Processing Balloon/Reset Mortgages	2
Certifying Balloon Loan Modifications	3
Loan Modification Custody	4

#### Overview (08/08)

A Balloon/Reset Mortgage is a fixed-rate, level payment Mortgage with principal and interest payments based on an amortization schedule that would pay off the principal balance in 360 months. The unpaid principal balance (UPB) of the Balloon Note is due as a lump sum after either five or seven years on the Balloon Maturity Date, unless the Borrower exercises the Reset Option pursuant to the Balloon Note Addendum and the Balloon Option of Modification. This chapter describes the Custodians responsibilities if the Borrower elects to reset their Balloon/Reset Mortgage. Guide Chapter 83 provides detailed information on the reset process and documentation.

#### Processing Balloon/Reset Mortgages (08/08)

Servicers must deliver the following documentation for the Reset Mortgage to the Custodian that holds the original Note in time for the documents to be certified:

- Multistate Balloon Loan Modification (Form 3293). See Guide Exhibit 4, Single-Family Uniform Instruments
- Custodial Certification Schedule Balloon Loan Modification (Form 1034B)

#### Certifying Balloon Loan Modifications (08/08)

The Form 1034B must be delivered to Freddie Mac no later than 10 calendar days after the Balloon Maturity Date. For any Form 1034B received after the 10th calendar day, the Servicer will be assessed a one-time late charge of \$100.

The Custodian must verify that the information on the executed Balloon Loan Modification (Form 3293) is complete and matches the information on Form 1034B as detailed in the following chart.

Data Elements	Is there a discrepancy?
Freddie Mac loan number	<b>No:</b> <ul style="list-style-type: none"> <li>• Certify the Balloon Loan Modification.</li> </ul> <b>Yes:</b> <ul style="list-style-type: none"> <li>• Notify the Servicer immediately.</li> <li>• Return the documentation to the Servicer for correction.</li> <li>• Wait for replacement documentation from the Servicer.</li> <li>• Execute Form 1034B when the correction is completed or you receive new documentation.</li> </ul>
Property address	
• Property street address	
• Property city	
• Property state	
• Property Zip Code	
Principal amount	
Principal & Interest (P & I) amount	
Balloon Maturity Date	
Seller/Servicer	
Interest Start Date	
First P & I Payment Due Date	
Payment start date	

## Loan Modification Custody (08/08)

The Servicer and Custodian must both sign and date Form 1034B to acknowledge the delivery is complete and accurate, and that it satisfies the requirements for Balloon Loan Modification certification.

The Custodian must also:

1. Make two copies of Form 1034B.
2. Retain one copy, either as an image or for at least three months after the date of certification.
3. Send the remaining copy and the original to the Servicer.
4. Attach one executed Balloon Loan Modification to the Balloon Note.

After certification, the Custodian must attach the Balloon Loan Modification to the original Balloon Note held in the Note file.

The Custodian may deliver the certified Form 1034B directly to DCO with the Servicer's permission. The Servicer is ultimately responsible for ensuring that we receive Form 1034B no later than 10 calendar days after the Balloon Maturity Date, and may incur a penalty if the Form 1034B is not received by the deadline or if DCO cannot certify the Balloon Loan Modification. See Guide Section 83.103.

**Note:** If the Custodian is unable to locate the original Balloon Note, the Servicer must contact DCO.



## Freddie Mac Document Custody Procedures Handbook

### **Appendix A: Job Aids (08/08)**

# DOCUMENT CUSTODY PROCEDURE OVERVIEW

# Document Custody Procedure Overview

## Contents

Topic	Page
<b>General Requirements for All Custodians</b>	4
<b>Process Overview</b>	5
<b>Certification</b>	
Overview	7
What is Certification?	8
Who Performs Certification?	8
What Are The Certification Forms?	9
What Fields Must Be Certified For Both Fixed Rate and Adjustable Rate Mortgages?	10
What Are the Additional Fields, Which Must Be Certified For Adjustable Rate Mortgages?	10
Why Are the Lookback and Index Fields Important?	11
What Fields Are Certified For MERS?	12
What If Data Does Not Match the Form 1034 or 1034A?	13
What Are The Tools You Use To Help Resolve Discrepancies?	14
What Certification Documents Must Be Sent To Freddie Mac or Retained?	15
Note Certification Flowchart	16
<b>Transfers of Servicing</b>	
Overview	17
What Are The Types Of Transfers?	17
What Are The Basic Transfer Requirements?	18
Concurrent Transfer of Servicing Note Certification Flowchart	19
Subsequent Transfer of Servicing Note Recertification Flowchart	20






# Document Custody Procedure Overview

## Contents, *continued*



Topic	Page
<b>Signatures</b>	
Overview	21
What Is Over-Signing And Under-Signing And When Is It Acceptable?	21
When Is A Signature Or Name Affidavit Required?	22
When Is A Signature By A Trustee Required?	22
When Is A Power Of Attorney Required?	23
<b>Endorsements</b>	
Overview	24
What Is A Blank Endorsement And Where Is It To Be Placed?	24
What Is The Proper Endorsement Chain?	25
How Are Endorsement Issues Resolved?	26
<b>Assignments</b>	
Overview	27
What Is An Assignment?	27
What Are The Types Of Assignments?	28
Examples Of Valid Chain Of Assignments And Endorsements	29
Examples Of Invalid Chain Of Assignments And Endorsements	30
How Are Assignment Issues Resolved?	31
<b>Supplemental Documentation</b>	
Overview	32
What Is Supplemental Documentation?	32
When Are Originals Or Certified Copies of Supplemental Documentation Required For Certification?	33

## GENERAL REQUIREMENTS FOR ALL CUSTODIANS

MANDATORY REQUIREMENTS	EXPLANATION
1. <b>Meet and maintain all eligibility Requirements to be Custodian</b>	<ul style="list-style-type: none"> <li>✗ Chapter 18.2 of the <i>Single-Family Seller/Servicer Guide</i> (“Guide”) provides details</li> </ul>
2. <b>Execute a FORM 1035</b>  	<ul style="list-style-type: none"> <li>✗ The Form 1035 (Tri-Party agreement between the Seller/Servicer (S/S), Custodian and Freddie Mac) must be fully executed before you may begin to hold Freddie Mac’s assets</li> <li>✗ The Tri-party agreement governs the custody of Notes and assignments for Mortgages serviced for Freddie Mac when the S/S elects to use a Custodian</li> <li>✗ The Custodian must have a Form 1035 for EACH Freddie Mac Seller/Servicer number for which they hold notes</li> <li>✗ Notes may be sent to Freddie Mac’s DCS at anytime, even if a Seller/Servicer has elected to use a Custodian</li> </ul> <p><b>NOTE:</b> You may not release Notes to a Custodian without receiving a copy of their fully executed Form 1035. No Form 1035 is required when transferring Notes to Freddie Mac’s DCS.</p>
3. <b>Prepare and maintain detailed Custodial Procedures</b>	<ul style="list-style-type: none"> <li>✗ Examples of what procedures must include:</li> <li>✗ Detailed steps which you perform to receive, reconcile errors, certify, maintain, transfer, release and track notes</li> <li>✗ Identification of controls which ensure compliance with procedures</li> </ul>
4. <b>Prepare and maintain detailed Disaster Recovery procedures</b>	<p>Examples of what Disaster Recovery procedures must include:</p> <ul style="list-style-type: none"> <li>✗ Identification of controls and measures to ensure safety and recovery of Freddie Mac Assets</li> <li>✗ Include a step to notify Freddie Mac within 24 hours of a disaster (Manager CIPA, 703-724-3000 or email: <a href="mailto:fmmdm@freddiemac.com">fmmdm@freddiemac.com</a>)</li> </ul>
5. <b>Subscribe and be familiar with Freddie Mac’s <i>Single-Family Seller/Servicer Guide</i></b>	<p>Call 1-800-Freddie to order the Guide or contact ALL REGS to and subscribe to its online publication</p> <ul style="list-style-type: none"> <li>✗ The main chapters are relevant to Custody 2, 16, 17, 18, 19, 22, 39, 53, 56</li> </ul>
6. <b>Obtain and use the Document Custody Procedure Handbook</b>	<p>The Handbook is found on our Website <a href="http://www.freddiemac.com/cim">www.freddiemac.com/cim</a></p> <ul style="list-style-type: none"> <li>✗ The handbook defines Freddie Mac rules for Document custodians</li> <li>✗ The Seller/Servicer Guide is frequently updated and will include some changes which have not yet made it to the Handbook</li> </ul>
7. <b>Maintain an Independent Note Tracking System</b>	<p>All notes held by you for Freddie Mac MUST be entered in your Independent Note Tracking system</p> <ul style="list-style-type: none"> <li>✗ This system must be totally independent from the Seller/Servicer’s system</li> <li>✗ The system must track:               <ul style="list-style-type: none"> <li>❑ Freddie Mac Loan Number</li> <li>❑ Release of Notes for other than payoff, prepayment, repurchase</li> <li>❑ Outstanding recorded assignments when you have only received the certified &amp; true copy</li> </ul> </li> </ul>
8. <b>Upon request, provide CIPA electronic list of Freddie Mac Loan Numbers</b>	<ul style="list-style-type: none"> <li>✗ Periodically, we may request that you send an electronic file listing only the Freddie Mac loan numbers, sorted by Seller/Servicer number</li> <li>✗ The data must come from your Independent Note Tracking system</li> </ul>

PROCESS OVERVIEW			
	CUSTODIAN	SELLER/SERVICER (S/S)	FREDDIE MAC (FM)
<b>CONTRACT REQUIREMENTS</b>	<ul style="list-style-type: none"> <li>✗ Receive FM approval to be a Custodian</li> <li>✗ Execute Form 1035</li> <li>✗ Comply with the Form 1035, S/S Guide and Custodian Handbook requirements</li> </ul>	<ul style="list-style-type: none"> <li>✗ Receive FM approval</li> <li>✗ Execute Form 1035 when received from FM, ensure selected Custodian executes Form 1035, return fully executed Form 1035 to Freddie Mac</li> <li>✗ Ensure Custodian's compliance with eligibility, S/S Guide, &amp; Handbook</li> </ul>	<b>Mortgage Asset Acquisition and Custody (MAA&amp;C):</b> <ul style="list-style-type: none"> <li>✗ Approve Custodian</li> <li>✗ Execute Form 1035</li> <li>✗ Provide a copy of the Form 1035 to the S/S and to Custodian</li> <li>✗ Retain one original</li> </ul>
<b>CERTIFICATION AND DOCUMENT REQUIREMENTS</b> 	<ul style="list-style-type: none"> <li>✗ Receive &amp; verify data on Notes to Forms 1034/1034A</li> <li>✗ Reconcile conflicting data</li> <li>✗ Verify supplemental documentation and assignments</li> <li>✗ Sign and retain Form 1034/1034A and send copy to S/S</li> <li>✗ Email or Fax Form 1034S or Form 1034S with any corrections to DCS</li> <li>✗ Retain the Form 1034S</li> <li>✗ Track FM loan numbers in your independent system</li> </ul>	<ul style="list-style-type: none"> <li>✗ Send Form 1034/1034A &amp; 1034S, Notes, supplemental documentation and assignments to Custodian</li> <li>✗ Reconcile data and document conflicts</li> <li>✗ Receive Form 1034 or 1034/A &amp; 1034S from Custodian and retain for one month after Funding</li> </ul>	<b>CIPA (Collateral Instrument Program Administration):</b> <ul style="list-style-type: none"> <li>✗ Provide assistance as required</li> </ul> <b>CIM (Collateral Instrument Management) :</b> <ul style="list-style-type: none"> <li>✗ Receive Fax of Form 1034S</li> <li>✗ Set certification field to notify Mortgage Purchase of certification</li> </ul>
<b>SUBSEQUENT TRANSFER OF SERVICING REQUIREMENTS</b> 	<b>Transferor (T/or) Custodian:</b> <ul style="list-style-type: none"> <li>✗ Obtain copy of T/ee Custodian's executed Form 1035 <b>before</b> releasing Notes (If Notes go to Freddie Mac's DCS the Form 1035 is not applicable)</li> <li>✗ Release Notes <b>within 30</b> days after TOS effective date</li> <li>✗ Reconcile all TOS issues with T/ee Custodian &amp; S/S</li> </ul> <b>Transferee (T/ee) Custodian:</b> <ul style="list-style-type: none"> <li>✗ Accept Notes only if you have an original executed Form 1035 for this S/S</li> <li>✗ Verify all Notes, documentation and assignments</li> <li>✗ Reconcile issues with S/S, T/or Custodian &amp; T/or S/S</li> <li>✗ Contact CIPA as necessary</li> <li>✗ Send executed Form 1034T to CIPA within 180 days of TOS effective date</li> <li>✗ Request extension if you are unable to complete recertification within the 180 days. The request must provide detail of the issues which are holding up the recertification</li> </ul>	<b>Transferor S/S (T/or S/S):</b> <ul style="list-style-type: none"> <li>✗ Receive list of approved TOS Notes from CIPA</li> <li>✗ Provide 1034T to T/or Custodian</li> <li>✗ Resolve problems with T/or and T/ee Custodians to ensure that recertification is complete by 180 days after the TOS effective date</li> </ul> <b>Transferee S/S (T/ee S/S):</b> <ul style="list-style-type: none"> <li>✗ Send copy of executed 1035 to T/or Custodian</li> <li>✗ Work with T/ee Custodian &amp; T/or S/S to resolve problems</li> <li>✗ Verify with T/ee Custodian that Notes, documentation and assignments are recertified within 180 days of TOS effective date</li> </ul>	<b>FM Servicing:</b> <ul style="list-style-type: none"> <li>✗ Receive TOS request from Transferor S/S</li> <li>✗ Approve or reject TOS</li> </ul> <b>CIPA:</b> <ul style="list-style-type: none"> <li>✗ Send list of TOS Notes to T/or S/S as courtesy</li> <li>✗ Track compliance - receipt of Form 1034T</li> <li>✗ Provide assistance when requested</li> <li>✗ Receive executed Forms 1034T</li> <li>✗ Track both T/or and T/ee Custodian performance</li> <li>✗ Review request for extension and determine if the request will be approved</li> </ul>

## PROCESS OVERVIEW, *continued*

	CUSTODIAN	SELLER/SERVICER (S/S)	FREDDIE MAC (FM)
<b>CONCURRENT OR CO-ISSUE TRANSFER OF SERVICING CERTIFICATION AND DOCUMENT REQUIREMENTS</b>  	<ul style="list-style-type: none"> <li>✎ Receive the Notes, documentation and Forms 1034, or 1034A and Form 1034S from Seller of the Notes to Freddie Mac for certification for the transferee Servicer</li> <li>✎ Receive &amp; verify data on Notes to Forms 1034/1034A</li> <li>✎ Reconcile conflicting data</li> <li>✎ Verify supplemental documentation and assignments</li> <li>✎ Sign and retain Form 1034/1034A and send copy to S/S</li> <li>✎ Fax Form 1034S with any corrections to DCS</li> <li>✎ Retain the Form 1034S</li> <li>✎ Track FM loan numbers in your independent system</li> </ul> <i>(See section of workbook which provides Concurrent transfer of servicing detail)</i>	<ul style="list-style-type: none"> <li>✎ Send Form 1034/1034A &amp; 1034S, Notes, supplemental documentation and assignments to the co-issue Servicer's Custodian</li> <li>✎ Reconcile data and document conflicts with the Servicer's Custodian to ensure that certification will occur</li> <li>✎ Servicer is to receive Form 1034 or 1034A and 1034S from Servicer's Custodian and retain for one month after Funding</li> </ul>	<b>CIPA:</b> <ul style="list-style-type: none"> <li>✎ Provide assistance as required</li> </ul> <b>CIM:</b> <ul style="list-style-type: none"> <li>✎ Receive Fax of Form 1034S</li> <li>✎ Resolve issues with the Servicer's Custodian</li> <li>✎ Set certification field to notify Mortgage Purchase of certifications</li> </ul>
<b>TRANSFER OF CUSTODY REQUIREMENTS</b> <i>(Change in Custodian - No change in S/S)</i>	<b>Transferor (Old) Custodian</b> <ul style="list-style-type: none"> <li>✎ Follow steps in Transfer above</li> </ul> <b>Transferee (New) Custodian</b> <ul style="list-style-type: none"> <li>✎ Receive 3 original Form 1035s from Seller/Servicer</li> <li>✎ Execute all 3 and mail to S/S</li> <li>✎ Receive 1 fully executed original and retain</li> <li>✎ Follow steps in Transfer above</li> </ul>	<b>Transferor S/S (T/or S/S):</b> <ul style="list-style-type: none"> <li>✎ Request approval from Mortgage Asset Acquisition and Custody (MAA&amp;C) to change Custodians</li> <li>✎ Receive Form 1035</li> <li>✎ Execute 3 originals and send to new Custodian to execute</li> <li>✎ Receive 3 executed originals from new Custodian</li> <li>✎ Forward all originals to MAA&amp;C</li> <li>✎ Receive 2 originals executed by MAA&amp;C</li> <li>✎ Keep 1 original and send the other to new Custodian</li> </ul>	<b>Mortgage Asset Acquisition and Custody (MAA&amp;C):</b> <ul style="list-style-type: none"> <li>✎ Receive Change of Custodian Request from S/S</li> <li>✎ Approve or reject</li> <li>✎ If approved, send 3 original Form 1035s to S/S</li> <li>✎ Receive 3 executed originals</li> <li>✎ Execute, retain 1, send 2 originals to S/S</li> </ul>
<b>NOTE RELEASE REQUIREMENTS</b>  	<ul style="list-style-type: none"> <li>✎ Receive from S/S Form 1036 (Release Request) in hard copy or electronic version</li> <li>✎ Verify that Form 1036 is complete and release note</li> <li>✎ Track release in Tracking System</li> <li>✎ Sign Form 1036 and retain</li> <li>✎ Track return of Notes other than paid off, prepayment, repurchase</li> <li>✎ Periodically remind S/S to return Notes which are no longer necessary for them to hold</li> </ul>	<ul style="list-style-type: none"> <li>✎ Prepare, sign and send hard copy or electronic version of Form 1036 to Custodian</li> <li>✎ Receive Note and copy of Form 1036 signed by Custodian</li> <li>✎ Track and return Note to Custodian when it is no longer needed. This includes all Notes released for other than pay off, prepayment, repurchase</li> </ul>	

**REMEMBER: FREDDIE MAC OWNS THE LOANS; THE SELLER/SERVICER DOES NOT.**

Abbreviations:  
S/S = Seller/Servicer

DCS = Document Custodial Services  
CIM = Collateral Instrument Management

CIPA = Collateral Instrument Program Administration

T/or = Transferor  
T/ee = Transferee

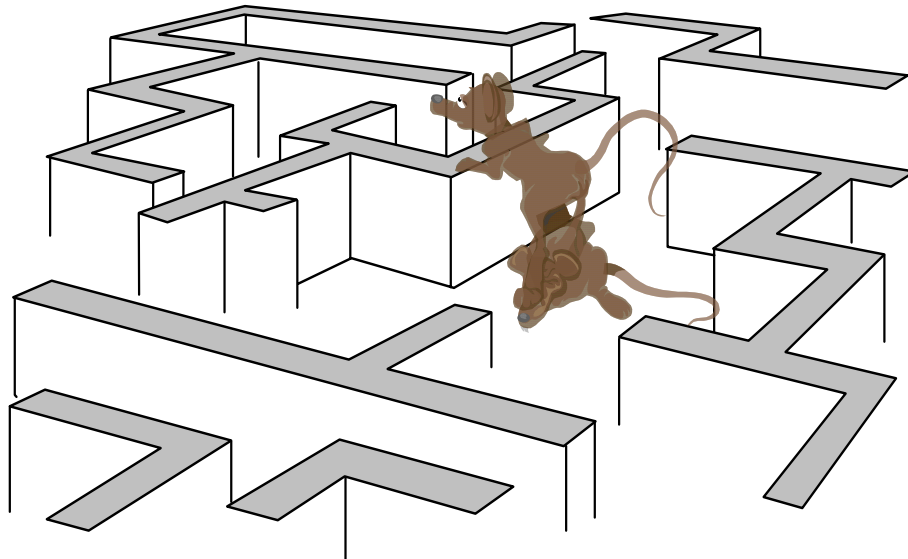
TOS = Transfer of Servicing

# CERTIFICATION

## Overview

This chapter covers

- ✂ What is Certification?
- ✂ Who Performs Certification?
- ✂ What are the Certification Forms?
- ✂ What Fields must be Certified for Both Fixed Rate and Adjustable Rate Mortgages?
- ✂ What are the Additional Fields Which Must be Certified for Adjustable-Rate Mortgages?
- ✂ Why are the Lookback and Index Fields Important?
- ✂ What Fields are Certified for MERS?
- ✂ What if Data does not Match the Form 1034 or 1034A?
- ✂ What are the Tools to Help Resolve Discrepancies?
- ✂ What Documents Must be Sent to Freddie Mac?



# WHAT IS CERTIFICATION?

## Certification begins with

- ✎ *Comparing* the data on individual Notes to the data on the Form 1034/1034A (list of loans submitted to Freddie Mac for funding) to ensure they match
- ✎ *Reviewing* assignment and endorsement chains and other supplemental documentation
- ✎ *Reviewing* the accuracy of signatures
- ✎ *Working* with the Seller/Servicer to resolve issues and *preparing* a correction sheet to send to Freddie Mac, if applicable

## And concludes with

- ✎ *Executing* the Form 1034/1034A and sending a copy to the Seller/Servicer to retain for one month following funding
- ✎ *Faxing* the Form 1034S to CIM (Form 1034S is the Custodian's testimony in writing that they have verified the information and reviewed the documentation and that it is accurate and conforms to Freddie Mac policy. Form 1034S is faxed only for MIDANET® deliveries.)
- ✎ *Retaining* the original Form 1034/1034A and a copy of the Form 1034S along with correction sheets



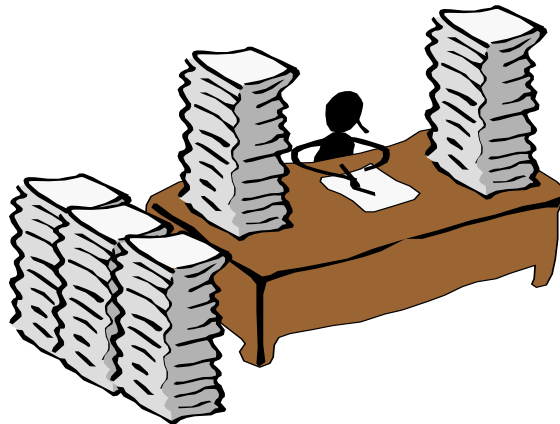
# WHO PERFORMS CERTIFICATION?

## Certification of Notes for Freddie Mac is performed by either

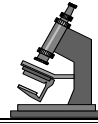
- ✎ Freddie Mac's Document Custodial Services (DCS) or
- ✎ You, as Custodian
- ✎ You must have an executed Form 1035 - Tri Party Agreement Contract for each Seller/Servicer number prior to certification or storage of Freddie Mac's assets.

## WHAT ARE THE CERTIFICATION FORMS?

FORM NUMBER	FORM NAME	PURPOSE
<b>Form 1034</b>	<i>Fixed Rate Custodial Certification Schedule</i>	Used for fixed-rate Mortgages only at the time of purchase, including Concurrent Transfers of Servicing, which require certification.
<b>Form 1034A</b>	<i>ARM Custodial Certification Schedule</i>	Used for adjustable-rate Mortgages only at the time of purchase, including Concurrent Transfers of Servicing, which require certification.
<b>Form 1034S</b>	<i>Certification Schedule Summary</i>	Used to signify that you have certified all the loans in the delivery. This form is to be sent to CIM by the Custodian prior to the applicable delivery date.
<b>Form 1034T</b>	<i>Subsequent Transfer Custodial Certification Schedule</i> <i>and</i> <i>Transfer of Custody</i>	Used for all Mortgages <ul style="list-style-type: none"> <li>✗ Owned by Freddie Mac</li> <li>✗ When servicing rights are sold by the current Servicer to another approved Servicer</li> <li>✗ When custody rights have been transferred to a new Document Custodian or DCS</li> </ul>



## WHAT FIELDS MUST BE CERTIFIED FOR BOTH FIXED RATE AND ADJUSTABLE RATE MORTGAGES?




<b>FIXED RATE &amp; ARM DATA ELEMENTS</b>	<b>DESCRIPTION</b>
Freddie Mac Loan Number	Nine (9) digit loan number, provided to the Seller by Freddie Mac (must appear in the upper right-hand corner of each Note)
Borrower Name	First name, middle name, and last name of the Borrower
Co-Borrower Name	First name, middle name, and last name of the Co-Borrower
Property Address	Street address
Property City	City
Property State	State
Property Zip Code	Postal Zip Code
Original Note Date	Note Date
Loan Amount	Original loan amount
Interest Rate	Interest rate
First P&I Date	Due Date of the first Principal and Interest Payment
Maturity Date	Maturity date on which payment of an obligation is due in full
P& I Amount	Principal and interest amount

## WHAT ARE THE ADDITIONAL FIELDS, WHICH MUST BE CERTIFIED FOR ADJUSTABLE-RATE MORTGAGES?

<b>ARM DATA ELEMENTS</b>	<b>DESCRIPTION</b>
First Rate Adjustment	The first "Change Date"
Mortgage Margin	Percentage added to the current index to establish new coupon/interest rate
Percent Rounded	Expressed as a percentage
Periodic Cap	Expressed as a percentage
Life Rate Cap	Expressed as a percentage
1 <sup>st</sup> Adjustment minimum rate	Expressed as a percentage
1 <sup>st</sup> Adjustment maximum rate	Expressed as a percentage
Convertibility	Indicated on convertible adjustable-rate Notes only
Index	Expressed as a published Interest Rate as indicated in the Note
Lookback Period	The number of days before the Interest Change Date as indicated in the Note



**Remember to check**   
**each data field for accuracy!**

## **WHY ARE THE LOOKBACK AND INDEX FIELDS IMPORTANT?**

- ✎ As of January 1, 2004, The Lookback and Index fields are on the Note and will be printed on the Form 1034A
- ✎ All loans listed on the Form 1034A must have the same Index Type and Lookback Period. You must review each Note in the contract and ensure that they all have the same Index Type and Lookback Period as referenced on the Form 1034A at the loan-level.



### ***Note***

#### ***Remember:***

**YOU** are responsible for verifying the Index Type and the Lookback Period on the Form 1034A are the same on each Note. As of January 1, 2004, the information no longer is to be written at the top of the 1034A.

## WHAT FIELDS ARE CERTIFIED FOR MERS?

- ✎ *None!!* However, the MIN (Mortgage Identification Number) will appear on the Form 1034, Form 1034A, Form 1034G, or Form 1034E for those loans where the Seller/Servicer provided Freddie Mac with a MIN (see the table below)
- ✎ When selling Freddie Mac a mortgage already registered on MERS, the Seller/Servicer must include the MIN with their delivery information (via MIDANET® or Gold Connection® for Delivery [GCD] or the Selling System (Enterprise Cash))

DELIVERY METHOD	HOW TO KNOW IF THE NOTE IS MERS-REGISTERED
MIDANET®	<ul style="list-style-type: none"><li>✎ The MIN must be on Form 1034, 1034A, 1034G, 1034E (Forms 1034) under the Loan number.</li><li>✎ If the MIN is not on Forms 1034, you <b>must not certify the loan without</b> intervening assignments</li></ul> <p><b>NOTE:</b> The Seller is required to provide the MIN to Freddie Mac upon delivery (this is what triggers the MIN on the Forms 1034).</p>
<p><b>NOTES:</b></p> <ul style="list-style-type: none"><li>✎ <b>MERS AS ORIGINAL MORTGAGEE</b> - The Seller/Servicer must notify you if any of the Notes in the delivery are for mortgages originated with MERS as Original Mortgagee. These mortgages will not have assignments.</li><li>✎ <b>MERS MEMBER</b> - If you are a MERS member you will receive reports and have access to the MERS database which will help you determine MERS status for loans.</li></ul>	



## WHAT IF DATA DOES NOT MATCH FORM 1034 OR 1034A?

If you find a discrepancy between the Form 1034 and the Note Data, you must do the following:

VERIFY ORIGINAL NOTE DATA MATCHES FORM 1034	IF A DISCREPANCY...
Signature for each Borrower is: <input type="checkbox"/> Original <input type="checkbox"/> Complete <input type="checkbox"/> Correct	
Freddie Mac nine (9) digit loan number is on the right-hand corner of Note and on all supplemental documentation	<b>Does not exist:</b> <input type="checkbox"/> <b>Certify</b> the Note
Property Address (City, State, Zip)	<b>Does exist:</b>
Original Note Date	<input type="checkbox"/> <b>Notify</b> the Seller/Servicer immediately and request they verify the data
Loan Amount	<input type="checkbox"/> <b>Return</b> the documentation to the Seller/Servicer for correction and wait for the replacement
Interest Rate	<input type="checkbox"/> <b>Document</b> all corrections on Form 1034S and <b>fax</b> to Freddie Mac: <b>Please use the fax numbers or email addresses below.</b>
First P&I Due Date	
Maturity Date	
P & I Amount	
First Rate Adjustment (ARM only)	<input type="checkbox"/> <b>Postpone</b> execution of Form 1034 or Form 1034A until you receive the new or corrected documentation
Mortgage Margin (ARM only)	
Percent Rounded (ARM only)	
Periodic Cap (ARM only)	
1 <sup>st</sup> Adjustment Minimum Rate (ARM Only)	
1 <sup>st</sup> Adjustment Maximum Rate (ARM Only)	
Life Rate Cap (ARM only)	
Convertibility (ARM only)	
Index (ARM only)	
Lookback Period (ARM only)	




**Note:** Do not certify a Loan until you have the original correct Note and the documentation.

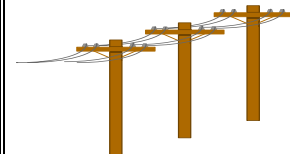
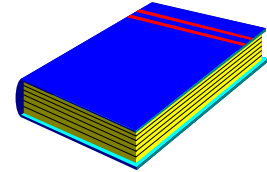
**REMEMBER:** You must fax your Form 1034S and correction sheets, if needed, to Freddie Mac at the fax numbers below.

### WHERE TO EMAIL OR FAX FORM 1034S OR FORM 1034S MULTIPLE CONTRACTS

Location	Email Address	Fax Number
Pacific	FMPacific@freddiemac.com	703/738-2160 or (571) 382-5453
Mountain	FMMountain@freddiemac.com	703/738-2150 or (571) 382-5452
Central	FMCentral@freddiemac.com	703/738-2144 or (571) 382-5451
Eastern	FMEastern@freddiemac.com	703/738-2140 or (571) 5450

## WHAT ARE THE TOOLS YOU USE TO HELP RESOLVE DISCREPANCIES?

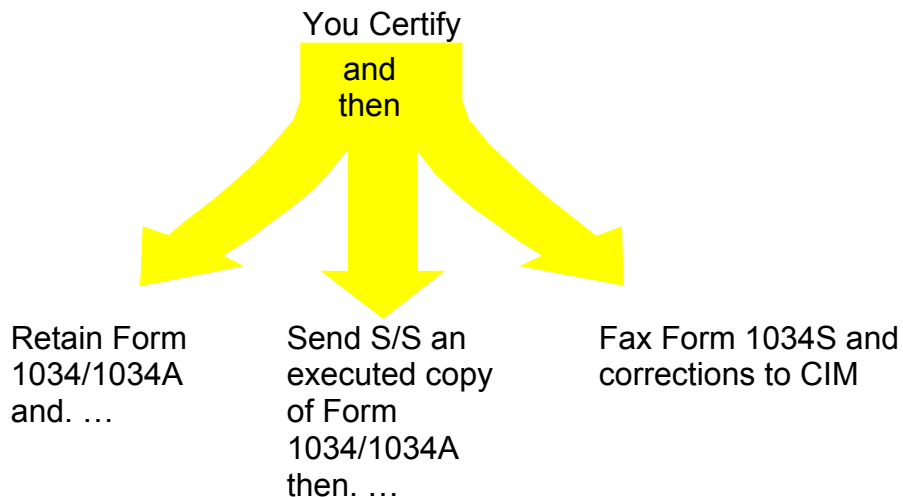
CHECK IN THIS ORDER:	TOOLS
1	<ul style="list-style-type: none"> <li>✎ <b>FREDDIE MAC SELLER/SERVICER GUIDE</b></li> <li>✎ <b>LATEST FREDDIE MAC SELLER/SERVICER BULLETINS</b></li> </ul>
2	<b>FREDDIE MAC DOCUMENT CUSTODY PROCEDURE HANDBOOK</b>
3	<b>FREDDIE MAC'S LATEST CUSTODIAN QUESTION AND ANSWER DOCUMENT</b>
4  	<p>When you have exhausted all the above resources,</p> <p><b>CALL OR EMAIL DAVE OR CIPA</b></p> <ul style="list-style-type: none"> <li>✎ David_Wilson@freddiemac.com 703-724-3061</li> <li>✎ fmmdm@freddiemac.com</li> </ul> <p>Fax number: 703-724-3075</p>



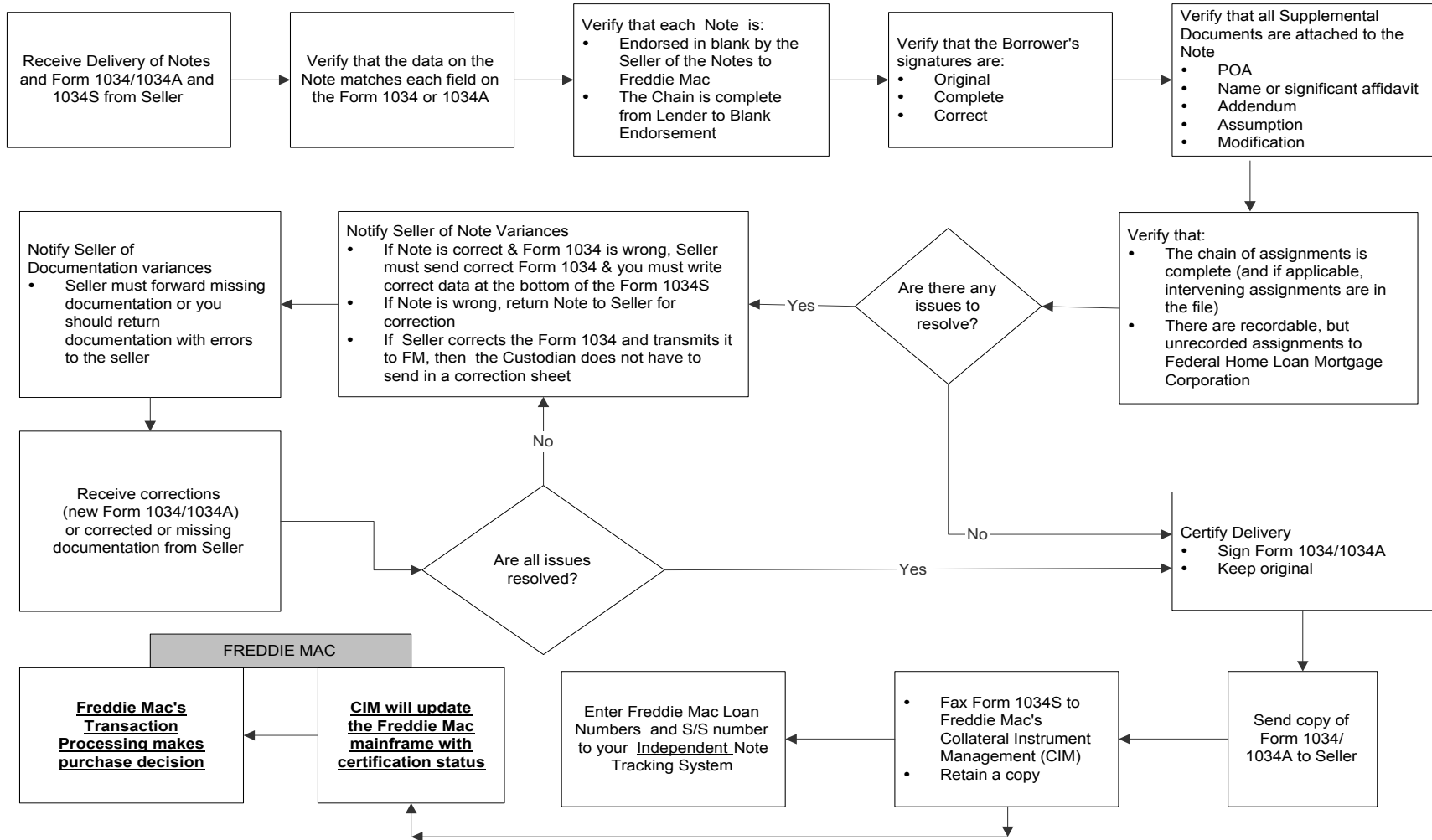
## WHAT CERTIFICATION DOCUMENTS MUST BE SENT TO FREDDIE MAC OR RETAINED?

- ✎ Form 1034S and any data corrections must be faxed to Freddie Mac's Collateral Instrument Management (CIM) Unit
- ✎ A copy of Form 1034S must be retained in your file
- ✎ Upon receipt of Form 1034S, CIM will insert a certification code into the Freddie Mac system
- ✎ A copy of the executed Form 1034 or Form 1034A must be sent to your Seller/Servicer
- ✎ The Seller/Servicer will retain the Form for a minimum of 30 days following the funding by Freddie Mac of the loans

### PATH FOR CERTIFICATION DOCUMENTS



# NOTE CERTIFICATION



Note: If there is a Concurrent Transfer (co-issue), where Seller (A) sells the loans to Freddie Mac and the servicing to a Servicer (B), then the Notes must be sent to the Servicer's (B) Custodian for certification.

# TRANSFERS OF SERVICING

## Overview

This chapter covers




- ✎ What are the Types of Transfers?
- ✎ What are the Basic Transfer Requirements?

## WHAT ARE THE TYPES OF TRANSFERS?

TRANSFER OF	MAY BE INITIATED BY	WITH
Servicing – <i>Concurrent or Co-Issue</i>	Seller/Servicer or Freddie Mac	<ul style="list-style-type: none"><li>✎ Prior approval from Freddie Mac’s TOS Department</li><li>✎ All Notes and assignments delivered by the Seller to the <b>Transferee Custodian to certify prior to the funding date.</b></li></ul>
Servicing - <i>Subsequent</i>	Seller/Servicer or Freddie Mac	<ul style="list-style-type: none"><li>✎ Prior approval from Freddie Mac’s TOS Department</li><li>✎ All Notes and assignments must be moved to the Transferee Custodian within 30 days of the Effective Date of Transfer</li></ul>
Note Custody	Custodian	<ul style="list-style-type: none"><li>✎ 30 days advance written notice to the Seller/Servicer and Freddie Mac</li></ul>
	Seller/Servicer	<ul style="list-style-type: none"><li>✎ Sufficient notice to the original Custodian to move the Notes and assignments to the new Custodian or to us within the required 30 days</li></ul>
	Freddie Mac	<ul style="list-style-type: none"><li>✎ 30 days notice to the Seller/Servicer before the Transfer of Custody Effective Date</li><li>✎ No notice if Freddie Mac determines an urgent need to Transfer Custody of the Notes</li></ul>



## WHAT ARE THE BASIC TRANSFER REQUIREMENTS?

TRANSFER OF	TRANSFEROR SELLER	TRANSFeree CUSTODIAN
Servicing – <b>Concurrent or Co-Issue</b>	<ul style="list-style-type: none"> <li>✎ Receive prior approval from Freddie Mac</li> <li>✎ Obtain a copy of the Concurrent Transferee's executed Form 1035</li> <li>✎ Deliver all Notes and assignments to the Concurrent Transferee's Custodian to certify</li> </ul>	<ul style="list-style-type: none"> <li>✎ Receive Notes and assignments from the Seller</li> <li>✎ Follow all Freddie Mac certification requirements</li> <li>✎ Fax Form 1034S to CIM by the applicable Delivery Due Date</li> </ul>  <b>Note: Seller's Custodian does NOT perform the certification.</b>
Servicing - <b>Subsequent</b>	<ul style="list-style-type: none"> <li>✎ Receive prior approval from our TOS Department</li> <li>✎ Obtain a copy of the Subsequent Transferee's executed Form 1035</li> <li>✎ Receive a Form 1034T from FM</li> <li>✎ Ensure that all Notes and assignments are moved to the Transferee Custodian within 30 days of the Effective Date of Transfer</li> </ul>	<ul style="list-style-type: none"> <li>✎ Receive all Notes and assignments from the Transferee Custodian within 30 days of the Effective Date of Transfer</li> <li>✎ Receive a Form 1034T from FM</li> <li>✎ Re-certify the documents and send the executed Form 1034T to FM within 180 days of the Effective Date of Transfer</li> </ul>  <b>Note: Deliver assignments to the Transferee Servicer when DCS holds the Notes.</b>
Note Custody	<ul style="list-style-type: none"> <li>✎ Receive prior approval from Institutional Eligibility</li> <li>✎ Receive a copy of the new Custodian's Form 1035</li> <li>✎ Receive a Form 1034T from FM</li> <li>✎ Ensure that Notes are moved to the new Custodian within 30 days of the Effective Date of the Custody Change.</li> </ul>	<ul style="list-style-type: none"> <li>✎ Receive all Notes and assignments from the Transferee Custodian within 30 days of the Effective Date of Transfer</li> <li>✎ Receive a Form 1034T from FM</li> <li>✎ Re-certify the documents and send the executed Form 1034T to FM within 180 days of the Effective Date of Transfer</li> </ul>  <b>Note: Deliver assignments to the Transferee Servicer when DCS holds the Notes.</b>



### Notes:

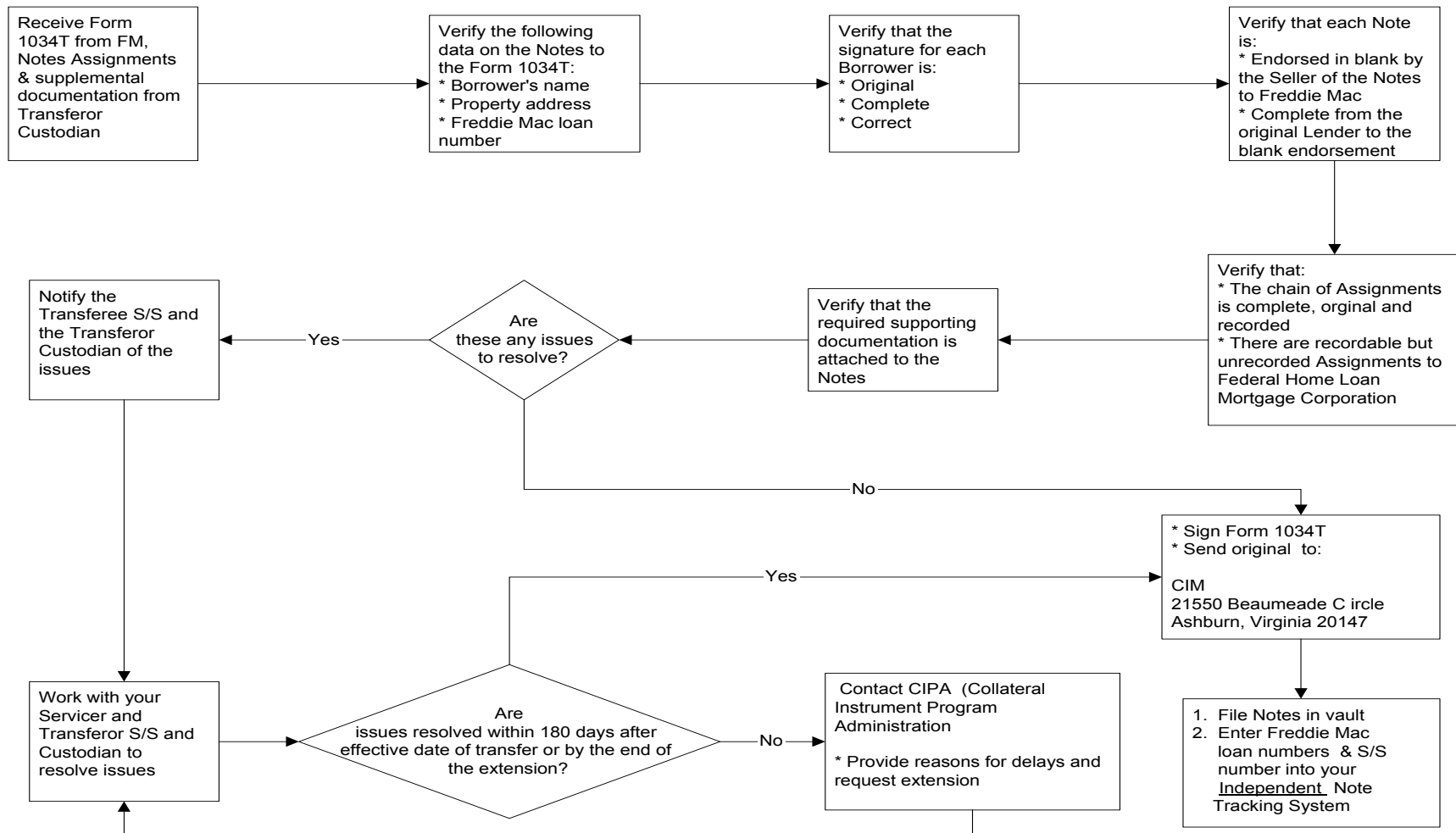
#### Remember:

1. When endorsing Notes, the endorsements must remain blank until the Notes are paid off or until we give you special instructions. In the case of a Transfer of Servicing, the Note endorsement is not adjusted; it remains blank until the Note is paid off. At time of payoff, the current Servicer of record inserts their name and the date so they can mark the Note paid and cancel the Note.
2. The Transferor and Transferee Seller/Servicer have a responsibility to work with each other to remedy any unresolved document problems during the Transfer of Servicing prior to the Transferee Custodian's certification.





## SUBSEQUENT TRANSFER OF SERVICING NOTE RECERTIFICATION



# SIGNATURES

## Overview

This chapter covers


- ✎ What is Over-signing and Under-signing and when is it acceptable?
- ✎ When is a Signature/Name Affidavit required?
- ✎ When is a Signature of a Trustee required?
- ✎ When is a Power of Attorney required?

## WHAT IS OVER-SIGNING AND UNDER-SIGNING AND WHEN IS IT ACCEPTABLE?

SIGNATURE AND TYPED NAME ON NOTE	EXAMPLES OF OVER-SIGNING AND UNDER-SIGNING AND DEFINITIONS:
<i>George Andrew Smith</i> George A. Smith	<b>Over</b> <ul style="list-style-type: none"><li>✎ Something additional (Andrew instead of just the initial A) <b>is included in the signature</b> that is not in the typed name</li><li>✎ The signature is acceptable because it does not contradict the typed name</li></ul>
<i>Glenda B. Cooper</i> Glenda Byrne Cooper	<b>Under</b> <ul style="list-style-type: none"><li>✎ Something additional (Byrne) <b>is included in the typed name</b>, but it is not included in the signature</li><li>✎ The signature is acceptable because it does not contradict the typed name</li></ul>



## WHEN IS A SIGNATURE OR NAME AFFIDAVIT REQUIRED?

SIGNATURE AND TYPED NAME ON NOTE	EXAMPLES OF WHEN AFFIDAVITS ARE REQUIRED:
 Shana J. Wagner	<ul style="list-style-type: none"> <li>Signature Affidavit is required</li> <li>The signature is <b>illegible</b> and there is no way to compare it to the Typed Name on the Note</li> </ul>
Hamilton Michael Taylor	<ul style="list-style-type: none"> <li>Name Affidavit or Signature Affidavit is required</li> <li>The signature <b>contradicts</b> the Typed Name and there is no way to determine that this is his Name and Signature</li> </ul>



## WHEN IS A SIGNATURE BY A TRUSTEE REQUIRED?

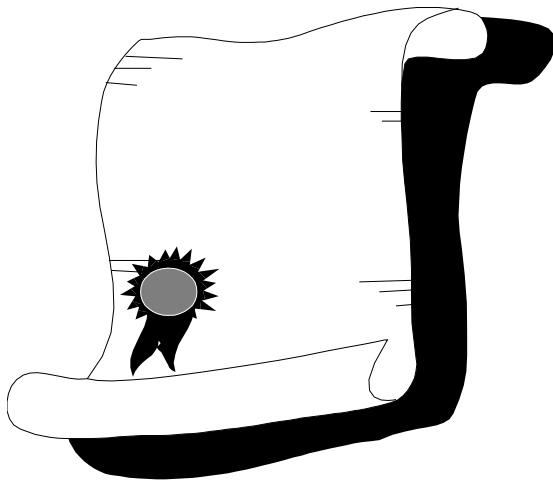
When a Security Interest in real property held in trust secures the Note, the Note must be signed by both the Borrower and the trustee - as trustee for the trust.

SIGNATURE AND TYPED NAME ON NOTE	ACCEPTABLE OR UNACCEPTABLE?
Ben Albertson Ben Albertson Ben Albertson as Trustee for the Donald Family Trust	<b>Acceptable</b> <ul style="list-style-type: none"> <li>The trustee signed as the borrower and the trustee</li> </ul>
_____ Janet Miller Janet Miller as Trustee for John Chandler Family Trust	<b>Unacceptable</b> <ul style="list-style-type: none"> <li>Janet Miller only signed as the trustee; there is no borrower signature</li> </ul>

## WHEN IS A POWER OF ATTORNEY REQUIRED?

The Borrower may elect to have an attorney-in-fact execute the Note in his/her absence. The signature must include the words attorney-in-fact as part of the signature.

SIGNATURE AND TYPED NAME ON NOTE	ACCEPTABLE OR UNACCEPTABLE?
Walter Sawyer by Dan Joiner, his attorney-in- fact Walter Sawyer	<b>Acceptable</b> ✎ The attorney-in-fact included his title
Barbara Weaver by Jane Shepard Barbara Weaver	<b>Unacceptable</b> ✎ The attorney-in-fact is not included in the title



**Note:** The original Power of Attorney is required unless it has been sent for recordation, in which case you may certify using a certified copy of the power of attorney.

# ENDORSEMENTS

## Overview



This chapter covers

- ✎ What is a Blank Endorsement?
- ✎ What is a proper Chain of Endorsement?
- ✎ How are Endorsement Issues Resolved?

## WHAT IS A BLANK ENDORSEMENT AND WHERE IS IT TO BE PLACED?

An endorsement is a method of transferring title to a negotiable instrument, in this case the Note, by inserting “Pay to the order of,” and signing the previous owner’s name, title, and institution name on the reverse side of the Note.

The following are the two types of endorsements that you may certify:

### Examples of Correct Endorsements:

WITHOUT  
RECOURSE

**PAY TO THE ORDER OF** \_\_\_\_\_ *(Leave Blank)*  
**WITHOUT RECOURSE**  
\_\_\_\_\_  
(Name of Seller-endorser)  
\_\_\_\_\_  
Signature of duly  
authorized officer  
\_\_\_\_\_  
(Typed name and title of signatory)

WITH  
RECOURSE

**PAY TO THE ORDER OF** \_\_\_\_\_ *(Leave Blank)*  
\_\_\_\_\_  
(Name of Seller-endorser)  
\_\_\_\_\_  
Signature of duly  
authorized officer  
\_\_\_\_\_  
(Typed name and title of signatory)

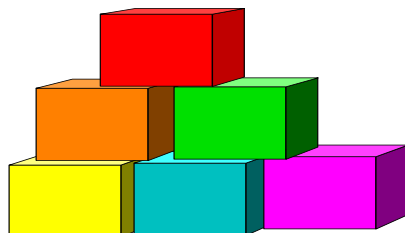


### **Note**

- ✎ The endorsement must be blank
- ✎ The endorsement must not be dated

## WHAT IS THE PROPER ENDORSEMENT CHAIN?

You must verify that the chain of endorsements on Notes is proper and complete from the original payee to each successive owner of the Loan (holder-in-due course).



NOTE HISTORY	PROPER ENDORSEMENT CHAIN
State Mortgage originates the Loan and sells it to Blue Bank	State Mortgage endorses the original Note to Blue Bank
Blue Bank sells the Loan to Field Bank	Blue Bank endorses the original Note to Field Bank
Field Bank sells the Loan to Freddie Mac	Field Bank endorses the original Note to blank
Field Bank transfers servicing to Lucky Bank	<b>No additional endorsement</b>



### **Note**

Remember to check the Note endorsement and assignment chains separately for completeness.



### **Note**

- ✎ The endorsements stop with the blank endorsement from the institution selling the loan to Freddie Mac
- ✎ Freddie Mac is the owner (holder-in-due course) of the property
- ✎ The Servicer does not own the loan; therefore, they may not endorse the Note
- ✎ Since a servicing transfer does not transfer loan ownership, the transferor Servicer **must not** endorse the Note

# HOW ARE ENDORSEMENT ISSUES RESOLVED?

The following chart identifies various endorsement issues and required action steps:

ISSUE	ACTION REQUIRED
Endorsement says “Pay to the order of ( )”	None
Note has been endorsed “Pay to the order of <u>Freddie Mac</u> ”	<p>Notify Seller/Servicer that endorsements on <b>all future deliveries must be blank. Notify CIPA if Seller/Servicer does not comply</b></p> <ul style="list-style-type: none"> <li>✎ POA from Freddie Mac is required for you to be able to cancel Note, <b>or</b></li> <li>✎ At time of payoff, Note must be sent to Freddie Mac’s Document Custodial Services (DCS) to be marked paid and canceled</li> </ul>
Date on endorsement is completed	Notify Seller/Servicer that endorsements on all future deliveries <b>must not</b> be dated
Dateline is not included as part of endorsement	None. The approved <i>Guide</i> endorsement does not include a date
Endorsement is completed using a facsimile signature stamp	<ul style="list-style-type: none"> <li>✎ Ensure documentation supporting use of facsimile signature exists and is available to Freddie Mac upon request</li> <li>✎ Ensure signature is a Seller/Servicer corporate official whose authority has been designated by Seller/Servicer Board of Directors and that the list of approved signatories has been received by the Custodian</li> <li>✎ Ensure affidavit authenticating signature is available to Freddie Mac upon request</li> <li>✎ Ensure Seller/Servicer legal counsel’s opinion that a facsimile signature is valid has been provided to Freddie Mac</li> </ul>
Endorsement not on the Note, but an allonge is used	<ul style="list-style-type: none"> <li>✎ Endorsements are to be on the Note unless there is no room on the front or the back of the Note.</li> <li>✎ An allonge may be used, however, the allonge must reference the Note – Example: borrower’s name, address, Freddie Mac loan number</li> </ul>
Transferor Seller/Servicer endorsed Note to Transferee Seller/Servicer	Transferor Seller/Servicer must void endorsement to Transferee and have Seller re-endorse in blank
Signature of a corporate officer is missing from endorsement	Notify Seller/Servicer and return Note to Seller/Servicer for a corporate officer’s signature
Endorsement from original payee to Seller is missing	<ul style="list-style-type: none"> <li>✎ Return to Seller/Servicer to complete chain of endorsement (Custodian’s responsibility)</li> <li>✎ Obtain endorsement from original payee to Seller/Servicer (Seller/Servicer’s responsibility)</li> </ul>
Blank endorsement is missing	Notify Seller/Servicer that Note will be returned for endorsement to be affixed



# ASSIGNMENTS

## Overview

This chapter covers

- ✎ What is an Assignment?
- ✎ What are the Types of Assignments?
- ✎ What is a proper Chain of Assignments?
- ✎ How are Assignment Issues Resolved?

## WHAT IS AN ASSIGNMENT?




An assignment of Security Instrument is a document that transfers ownership of a Mortgage or Deed of Trust. The Seller/Servicer must execute assignments of the Security Instrument for all Mortgages sold to Freddie Mac. Assignments must be prepared in accordance with state and county/local requirements.

Mortgages registered on the MERS database appear in the public land records with MERS as mortgagee of record (“Mortgagee of Record” refers to the beneficiary named in the land records. For a non-MERS loan, Mortgagee of Record is usually the current Servicer). This is accomplished through one of two means:

- (1) The registering member assigns the existing security instrument to MERS as Assignee via a standard form of assignment that is recorded in the public land records.
- (2) The originator of the mortgage (must also be a MERS member) closes the loan on a security instrument that names MERS as a nominee for the lender and the security instrument is duly recorded in the public land records with MERS as Original Mortgagee. In this case, there is no assignment.

Effective January 1, 2003, Freddie Mac requires that Seller/Servicer no longer prepare and maintain unrecorded, but recordable Assignment to the Federal Home Loan Mortgage Corporation.

## WHAT ARE THE TYPES OF ASSIGNMENTS?

ASSIGNMENT TYPE	EXPLANATION	WHAT HAPPENS WHEN SERVICING IS TRANSFERRED?
<b>Intervening</b>	<p>Intervening assignments are those that have been prepared and recorded from the original payee to each succeeding Seller/Servicer.</p> <ul style="list-style-type: none"> <li>✗ If the original payee sells the loan to Freddie Mac there is no intervening assignment</li> <li>✗ You must compare the original payee on the face of the Note and the chain of endorsements to the assignments (see chart on next page)</li> </ul> <p>You may accept “Certified and True” copies of these assignments while you wait for the original recorded assignment. However, you must track the receipt of the recorded original and file it with the Note.</p>	If servicing is transferred, the transferor Servicer must prepare, execute and record an intervening assignment from themselves to the transferee Servicer.
<b>Unrecorded but Recordable</b> 	Effective January 1, 2003, Freddie Mac requires that Seller/Servicer no longer prepare and maintain unrecorded, but recordable Assignment to the Federal Home Loan Mortgage Corporation.	There should not be a recordable but unrecorded assignment to Federal Home Loan Mortgage Corporation.
<b>Assignments to MERS</b>	<p>Freddie Mac’s policies regarding assignments support the MERS requirements.</p> <ul style="list-style-type: none"> <li>✗ Each MERS-registered mortgage must have either a recorded assignment to MERS, or be closed on a security instrument that names MERS as nominee</li> </ul>	<p>If the transfer is from a MERS member to a Servicer that <b>is not</b> a MERS member, an assignment is necessary from MERS to the transferee Servicer.</p> <p>If the transfer is between two MERS members, <b>no</b> new assignment is needed.</p>

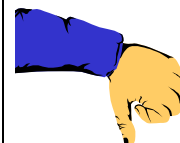
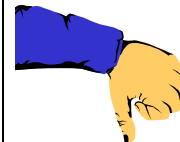
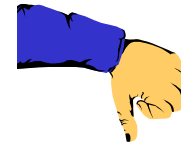
# EXAMPLES OF VALID CHAIN OF ASSIGNMENTS AND ENDORSEMENTS

COMPARISON	VALID CHAINS AND REASONS
<b>Endorsements</b> A to B B to D D to F F to Blank <b>Assignments</b> A to B B to D D to F F to G	<b>Valid - endorsements and assignments</b> <b>Reasons:</b> <ul style="list-style-type: none"> <li>✗ No break in chain from original Lender A to current Seller/Servicer F who sold the Mortgage to Freddie Mac</li> <li>✗ Chain progresses from A to F even though C and E did not endorse or record assignments</li> <li>✗ Endorsement stops with F who sold the loan to Freddie Mac</li> <li>✗ Assignment continues to G because each Servicer must continue to record the assignments</li> </ul>
<b>Endorsements</b> A to F F to Blank <b>Assignments</b> A to F	<b>Valid - endorsements and assignments</b> <b>Reasons:</b> <ul style="list-style-type: none"> <li>✗ No <b>break</b> in chain from original Lender A to current Seller/Servicer F who sold the Mortgage to Freddie Mac</li> <li>✗ Chain progresses from A to F even though B, C, D and E did not endorse or record assignments</li> </ul>
<b>Endorsements</b> A to B B to C C to Blank <b>Assignments</b> A to MERS	<b>Valid - endorsements and assignments</b> <b>Reasons:</b> <ul style="list-style-type: none"> <li>✗ No break in endorsement chain from original Lender A to current Seller/Servicer C who sold the Mortgage to Freddie Mac</li> <li>✗ Assignment was recorded by the Mortgagee of Record to MERS and no further assignments are necessary if the loan remains active on the MERS database</li> </ul>
<b>Endorsements</b> A to B B to C C to Blank <b>Assignments</b> A to B B to MERS	<b>Valid - endorsements and assignments</b> <b>Reasons:</b> <ul style="list-style-type: none"> <li>✗ No break in endorsement chain from original Lender A to current Seller/Servicer C who sold the Mortgage to Freddie Mac</li> <li>✗ Assignment is correct because the Mortgagee of Record recorded the assignment to the next Servicer (B) who is a MERS member and they recorded the assignment to MERS. No further assignments are necessary if the loan remains active on the MERS database</li> </ul>



# EXAMPLES OF INVALID CHAIN OF ASSIGNMENTS AND ENDORSEMENTS

COMPARISON	INVALID CHAINS, REASONS, AND RESOLUTIONS
<p><b>Endorsements</b> A to B B to C E to F</p> <p><b>Recorded Assignments</b> A to B B to C E to F</p> <p><b>Unrecorded but Recordable</b> C to FM</p>	<p><b>Invalid - endorsements and assignments</b></p> <p><b>Reasons:</b></p> <ul style="list-style-type: none"> <li>✗ <b>Break in both chains</b> after the endorsement and assignment from Lender C</li> <li>✗ Chain does not progress from A to F</li> <li>✗ Lender C did not endorse or assign to Lender E, therefore E cannot endorse or assign to F</li> </ul> <p><b>Resolution:</b></p> <ul style="list-style-type: none"> <li>✗ Current Seller/Servicer must obtain an endorsement and assignment from C to E</li> <li>✗ Destroy unrecorded but recordable assignment from C. As of January 1, 2003, Freddie Mac does not allow unrecorded but recordable assignments.</li> </ul>
<p><b>Endorsements</b> A to B B to C C sold to FM C to D D to Blank</p> <p><b>Recorded Assignments</b> A to B B to C C to D</p>	<p><b>Invalid - endorsements and assignment</b></p> <p><b>Reasons:</b></p> <ul style="list-style-type: none"> <li>✗ Endorsement must stop with C, because C sold the loan to Freddie Mac</li> </ul> <p><b>Resolution:</b></p> <ul style="list-style-type: none"> <li>✗ Endorsement to D must be voided</li> <li>✗ C must endorse in blank and no further endorsements are allowed because Freddie Mac is the Holder in Due Course</li> </ul>
<p><b>Endorsements</b> A to B B to C C sold to FM C to D</p> <p><b>Recorded Assignments</b> A to B B to MERS C to D D to FM</p>	<p><b>Invalid - endorsements and assignment</b></p> <p><b>Reasons:</b></p> <ul style="list-style-type: none"> <li>✗ C sold loan to FM and must be the last endorser</li> <li>✗ No assignment from MERS to C</li> <li>✗ Assignment is <b>recorded</b> to Freddie Mac</li> </ul> <p><b>Resolution:</b></p> <ul style="list-style-type: none"> <li>✗ Endorsement to D must be voided</li> <li>✗ C must endorse in blank. <b>No further</b> endorsements are allowed because Freddie Mac is the Holder in Due Course</li> <li>✗ C is not a member of MERS. There must be an assignment from MERS to C</li> <li>✗ Recorded assignment to FM must remain, but this is a <b>violation</b> of Freddie Mac policy and Seller/Servicer must terminate this practice</li> </ul>

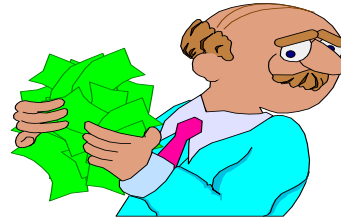


## HOW ARE ASSIGNMENT ISSUES RESOLVED?

ISSUE:	ACCEPTABLE FOR CERTIFICATION?	REMEMBER:
Recorded Assignment has minor changes that were not initialed by Lender	<b>YES, if</b> State/County recorder's office accepts and records the assignment.	The assignment may be a certified and true copy if the original has been sent out for recordation.  ( <b>NOTE:</b> The copy must be certified as a true and complete copy of what was sent for recordation and be signed by a duly authorized officer of the Seller/Servicer.)
Unrecorded, but recordable to Freddie Mac contains errors that have been crossed out	Effective January 1, 2003, Freddie Mac requires that Seller/Servicer no longer prepare and maintain unrecorded, but recordable Assignment to the Federal Home Loan Mortgage Corporation.	
Blanket assignments are delivered	<b>YES, if</b> State/County recorder's office accepts and records the assignments. All assignments covered by a Blanket Assignment must be for the same State/County recorder's office. A list of the Notes must accompany the Blanket Assignment.	
Recordable but unrecorded assignment with missing recording information of the security interest	Effective January 1, 2003, Freddie Mac requires that Seller/Servicer no longer prepare and maintain unrecorded, but recordable Assignment to the Federal Home Loan Mortgage Corporation.	The Seller/Servicer must promptly deliver and Custodian must track receipt of the original recorded assignment.
Intervening assignments are not prepared because the previous Seller/Servicer is the same legal entity as the current Seller/Servicer	<b>YES, if</b> you have an affidavit from the Seller/Servicer indicating that the current Seller/Servicer is the Successor-in-Interest to the previous Seller.	
Recorded intervening assignment is a copy	<b>YES, if</b> the original recorded intervening assignment is lost and the copy contains the recording information and the book and page	Seller/Servicers must provide certified and true copy of all intervening assignments sent for recording.
Original Mortgage was re-recorded due to error, but the assignment was not recorded	<b>YES, if</b> the assignment properly references the Mortgage.	The Seller/ Servicer warrants the validity of the assignment and title coverage.
Recording Jurisdiction does not record assignments	<b>YES, if</b> Seller/Servicer provides an affidavit that is attached to the unrecorded assignment.	
Assignment to Freddie Mac is recorded	<b>YES, but this violates</b> Freddie Mac policy per the Seller/Servicer Guide. Loans purchased after 1995 must <b>not</b> be recorded to Freddie Mac. <ul style="list-style-type: none"> <li>⌘ No further assignments are allowed when Freddie Mac is "of record"</li> <li>⌘ Contact the Seller/Servicer and tell them to STOP recording assignments to Freddie Mac and to contact CIPA, Manager (703) 724-3000</li> </ul>	Assignments must not be prepared and/or recorded to Federal Home Loan Mortgage Corporation.
No assignment is received for MERS registered Loans	<b>YES, if</b> the Loan number field on Form 1034 or 1034A also has MERS indicated <b>AND</b> the S/S has notified you that MERS is the Original Mortgagee. <b>YES, if</b> Gold Connection for Custodians is the certification system and the Seller/Servicer has provided information indicating that loans are MERS-Registered <b>AND</b> the S/S has notified you that MERS is the Original Mortgagee.	Assignments must not be prepared and/or recorded to Federal Home Loan Mortgage Corporation.
Assignment was recorded to Freddie Mac and afterwards an assignment was recorded to the Seller/Servicer	<b>NO</b> , contact Seller/Servicer and tell them to contact CIPA Manager (703) 724-3000.	
No assignment received for Non-MERS loans or Assignment chain is broken	<b>NO</b> , inform Seller/Servicer of the break and do not certify until it is corrected.	

# SUPPLEMENTAL DOCUMENTATION

## Overview



This chapter covers

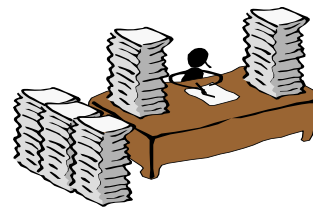
- ✎ What is Supplemental Documentation?
- ✎ When are Originals or Certified Copies of Supplemental Documentation Required for Certification?

## WHAT IS SUPPLEMENTAL DOCUMENTATION?

Supplemental Documentation relates to instruments other than the Note, which evidence the indebtedness secured by the Security Instrument, along with the originals that legally complete the Note.

Supplemental documentation includes

- ✎ Multi-state Agreement to Convert
- ✎ Addendum (Balloon, etc.)
- ✎ Name Affidavit
- ✎ Signature Affidavit
- ✎ Assumption Agreement
- ✎ Modification Agreement
- ✎ New York Consolidation, Extension and Modification Agreement
- ✎ Power of Attorney



## WHEN ARE ORIGINALS OR CERTIFIED COPIES OF SUPPLEMENTAL DOCUMENTATION REQUIRED FOR CERTIFICATION?

DOCUMENT	REQUIREMENT? <i>ORIGINAL, CERTIFIED COPY, OR COPY?</i>
Addendum (example: Balloon addendum, agreement to convert)	<b>ORIGINAL</b>
Name affidavit or Signature affidavit	
Multi-state Agreement to Convert (Form 3180)	<b>ORIGINAL or CERTIFIED COPY</b> <ul style="list-style-type: none"> <li>✎ If the original is sent for recordation, the certified copy is acceptable</li> <li>✎ When the original recorded document is received it is to be put in the file</li> <li>✎ A copy of the recorded document is acceptable if it contains the book and page and recorder's stamp/date/signature</li> </ul>
Recorded Assignment	
Assumption Agreement	
New York Consolidation, Extension and Modification Agreement (Form 3172) for New York properties	
Modification	
Power of Attorney	<b>ORIGINAL</b> <ul style="list-style-type: none"> <li>✎ But under certain circumstances - certified copy or copy</li> </ul>

## **Endorsements (01/10)**

When a Note is sold to Freddie Mac, the Seller must endorse the Note in blank "Pay to the order of .....", Please contact DCO if you receive an endorsement in another form or with alternate language. While you may certify a Note endorsed "Payable to ...", we will ask the Seller to change their practice for the future. The following must be clearly typed or printed:

- The name of the institution making the endorsement ("Seller-endorser")
- The name and title of the individual authorized to sign.
- Document Custodians cannot act as Attorney-in-Fact, Agent or Delegatee to endorse Notes for the Seller

Note If the endorser is "doing business as," it **must** provide both the formal corporate name and the "dba" name

Note Endorsements must be complete from the payee on the Note to the Seller of the Mortgage to Freddie Mac. There may not be further endorsements as long as Freddie Mac owns the Mortgage

The following are examples of blank endorsements:

### **Without Recourse**

PAY TO THE ORDER OF	<u>(Leave Blank)</u>
WITHOUT RECOURSE	<u>(Name of Seller-endorser)</u> <u>(Signature of duly authorized officer)</u> <u>(Typed name and title of signatory)</u>

### **With Recourse**

PAY TO THE ORDER OF	<u>(Leave Blank)</u>
	<u>(Name of Seller-endorser)</u> <u>(Signature of duly authorized officer)</u> <u>(Typed name and title of signatory)</u>

Note Most Notes are sold to Freddie Mac without recourse; however, Document Custodians are not required to check recourse status of the Notes and have no way of doing so

### **Allonges**

Allonges are often used to provide additional space for endorsements. You may certify a Note that has an Allonge attached if



- The Allonge is permanently affixed to the Note (taping or pasting the Allonge to the Note are not acceptable), and
- The Allonge references the Borrower's name, the address of the Mortgaged Premises, and the original principal balance of the Note.

If you receive a non-conforming Allonge, enter the discrepancy in the Selling System and await corrective action by the Seller. See Guide Section 16.4(f).

**Note** If you receive an Allonge that is dated, you may certify only if the date is on or after the Note date.

If you frequently receive Notes from a Seller endorsed this way, please contact DCO so that we can remind the Seller of our requirements

### **Endorsement Chains**

The Seller must endorse each Note in blank. When the Seller of the Mortgage is not the original payee on the Note, you must verify that the chain of endorsements on the Note is proper and complete from the original payee to the Seller.

After Freddie Mac purchases the Mortgage, no other endorsements or changes to endorsements on the Notes are permitted without Freddie Mac's prior written consent. In particular, a Transferee Servicer may not endorse or change any endorsement on a Note owned by Freddie Mac.

**Note** You may certify Notes endorsed to Freddie Mac rather than endorsed in blank, but if you frequently receive Notes from a Seller endorsed this way, please contact DCO so that we can remind the Seller of our requirements

Endorsements may indicate that the endorsing entity is the "successor in interest to" or "successor by merger to" the preceding endorser; this is acceptable. If, however, there is a break in the endorsement chain and the Seller indicates that it is due to a name change or a merger, acquisition or other event that is not indicated in the endorsements themselves, the Seller **must** deliver documentation (such as an explanatory letter) to substantiate that event. Such documentation might consist of a regulator's documentation from the state corporation commission (or similar authority) of the state in which the mortgaged premises is located.

In certain circumstances, the endorsement may not match the formal legal name of the entity. For example, for a company named "Standard Federal Mortgage Bank Incorporated," the following abbreviations are acceptable if the Document Custodian has a document signed by the Seller's attorneys stating that those abbreviations are acceptable:

- STD FED MTG BK INC
- STANDARD FEDERAL MTG
- THE STANDARD FEDERAL MORTGAGE BANK
- STND FED MTG INC

Issue	Resolution
-------	------------

Endorsement is missing a signature	<p>Enter the discrepancy in the Selling System and wait for corrective action from the Seller</p> <p>If the Seller advises you that the institution is no longer in business and it is unable to obtain the signature, you must not certify the Note</p>
Endorsement is a facsimile signature	Acceptable (the Seller must retain documentation in its files to support use of facsimile signatures but the Document Custodian need not verify)
Endorsement does not include title of signatory	Enter the discrepancy in the Selling System and wait for corrective action from the Seller
Endorsement errors or missing endorsements	Enter the discrepancy in the Selling System and wait for corrective action from the Seller
Date has been inserted on blank endorsement	Contact DCO so that we may remind the Seller of our requirements
Endorsement has been voided	<p>Acceptable, <b>provided that</b> an authorized signatory of the <b>endorsing institution has initialed the "voided" endorsement</b></p> <p>Note: When voiding errors on endorsements, be certain that only the <u>erroneous endorsement</u> is marked through or marked "void"; otherwise, it may appear that the entire Note is voided</p>

## Assignments (01/10)

You must receive an original assignment of the Security Instrument that has been recorded from the original mortgagee on the Security Instrument to the Seller or, if there is a concurrent Transfer of Servicing, to the Servicer (NOT to Freddie Mac). An officer of the transferring institution must sign the assignment, and the assignment must contain the officer's name and title.

You must verify that there is no break in the assignment chain. Assignments of the Security Instrument must begin with the original mortgagee (the payee on the Note) and continue unbroken to the Seller, or to the Servicer, if there is a concurrent TOS, or to MERS.

- You must hold all assignments with their related Notes, unless the Mortgage is registered with MERS, and/or
- Servicer has provided you with documentation indicating that it will hold all assignments for Freddie Mac-owned Notes in its Mortgage files. See Guide Section 47.3.

**Note** We do not accept assignments to "blank". Assignments must include the legal name of the entity to which the beneficial interest is being assigned

The following chart identifies different assignment issues and the conditions for Freddie Mac acceptance.

Issue	Resolution
Blanket assignments are delivered	Freddie Mac does not accept mortgages assigned using blanket assignments  Enter the discrepancy in the Selling System and return assignment to the Seller
The recorder's office does not record assignments	This is not common, however; pursuant to Guide Section 22.14, if the Seller indicates this in an affidavit delivered with the Note, you may accept it and retain it in the Note file with the Note
The recorder's office does not return the recorded documents	A certified and true copy of the document that was sent for recording is acceptable.
The assignment does not have a notary stamp or seal	Enter the discrepancy in the Selling System and wait for corrective action from the Seller
The assignment does not have a corporate seal	If the assignment is otherwise acceptable, you may certify the Note
The assignment contains a facsimile signature	Assignments must contain original signatures. Enter the discrepancy in the Selling System and wait for corrective action from the Seller
The certified copy of the assignment is missing the date or the recordation information, or the recordation information is illegible	Enter the discrepancy in the Selling System; the Seller must provide this information
Assignment is made to Freddie Mac	Return to Seller to destroy. Refer to Guide Section 22.
Servicer wishes to assign Freddie Mac's interest in a Mortgage to a new lender in a Texas refinance	This is not permitted. The Mortgage does not need to be assigned to the new lender for the refinance
Document Custodian is holding a	File the recorded assignment with the original Note, and destroy

certified and true copy of the assignment, but subsequently receives the original recorded assignment	the copy or return it to the Seller/Service as determined by your agreement
Intervening Assignment(s) not included with affidavit stating that the jurisdiction does not require that assignments be recorded	Enter the discrepancy in the Selling System and notify the Seller who must provide Intervening Assignment(s). Do not certify until resolved
Intervening Assignments for whole or participation Notes not included with delivery	Enter the discrepancy in the Selling System and request the Seller to provide Intervening Assignment(s). Do not certify until resolved
Intervening Assignments sent for recordation, but only a copy is received	Enter the discrepancy in the Selling System and ask the Seller to certify and deliver to you a copy (a "Seller-certified copy") of the Intervening Assignment that was sent for recordation
Assignment chain is broken	Enter the discrepancy in the Selling System and notify the Seller of the break. Do not certify until corrected
Assignment is to "blank"	Return to Seller; Freddie Mac does not accept assignments to "blank". You may not certify. See Guide Section 22

Note      See Guide Section 22.14 for additional requirements and for the requirements for Mortgages that have been registered with MERS

# FREDDIE MAC DOCUMENT CUSTODY PROCEDURES

## ALERTS for DEFECTS / PROBLEMS with ASSIGNMENTS

- ❖ There must be an ORIGINAL ASSIGNMENT OF THE SECURITY INSTRUMENT that has been recorded *from the original mortgagee* on the Security instrument *to the Seller* (or – in the case of concurrent Transfer of Servicing, *to the Servicer* – NOT to Freddie Mac).
- ❖ Officer of the transferring institution must sign the assignment *and* the assignment must contain the officer's name and title.
- ❖ *Verification of no break in the assignment chain.* Assignments must begin with the original mortgagee (payee on the Note) and continue unbroken to the Trustee.
- ❖ All assignments *must be held with their related* Notes unless the Mortgage is registered with MERS, and/or Servicer has provided documentation indicating that it will hold all assignments for Freddie Mac-owned Notes in its Mortgage files.
- ❖ Assignments to "blank" are not accepted – assignments *must include the legal name of the entity* to which the beneficial interest is being assigned.
- ❖ Freddie Mac does not accept mortgages assigned using blanket assignments. The assignment is returned to the Seller.
- ❖ In the event that the recorder's office does not record an assignment, the Seller must indicate this in an affidavit accompanying the Note and the unrecorded assignment and affidavit are accepted and retained in the file with the Note.
- ❖ In the event that the recorder's office does not return the recorded documents, a certified and true copy of the document sent for recording is acceptable.

- ❖ In the event that an assignment does not have a notary stamp or seal, the Seller is responsible for correcting this deficiency.
- ❖ If the assignment is otherwise acceptable, but does not have a corporate seal, the Note may be certified by Freddie Mac.
- ❖ Assignment *must contain **original signatures***. Stamped signatures or copies of signatures or electronic signatures are not acceptable. The Seller is responsible for correcting any deficiency.
- ❖ If the certified copy of the assignment is missing the date or the recordation information, or the information is illegible, the Seller *must* provide this information.
- ❖ If the assignment is made to **Freddie Mac**, it is defective! If Freddie Mac receives an assignment made to Freddie Mac, the assignment is returned to the Seller to be destroyed. There must be an unbroken chain of assignments from the originator.
- ❖ A servicer is not permitted to assign Freddie Mac's interest in a mortgage to a new lender in a refinance.
- ❖ In the event a Document Custodian is holding a certified and true copy of the assignment but later receives the original recorded assignment, the DC should destroy the copy or return it to the Seller/Servicer per their agreement.
- ❖ Intervening Assignment(s) must be included with an affidavit stating that the jurisdiction does not require that assignments be recorded. Seller is responsible for providing Intervening Assignment(s).
- ❖ Intervening Assignment(s) for whole or participation Notes must be included with delivery. Seller is responsible for providing Intervening Assignment(s).
- ❖ Seller is responsible for certifying and delivering a "Seller-certified copy" of the Intervening Assignment that was sent for recordation.
- ❖ Seller is responsible that the Assignment chain is unbroken.

- ❖ Notes must be endorsed and duly transferred with delivery and transfer receipts and asset purchase agreements in an unbroken chain from the originator.



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[Print this page](#)

## Document Custody Contacts

### Important Mailing Addresses

#### Document Custodial Services

Freddie Mac  
 21550 Beaumeade Circle  
 Ashburn, VA 20147

**General Office Number:** (703) 724-3000

**Document Execution Request Line:** (703) 724-3492

[General Inquires](#)

#### Document Custodian Eligibility

\*For Form 1035S  
 Counterparty Credit Risk Management  
 1551 Park Run Drive, MS D3A  
 McLean, VA 22102

**E-mail:**

[institutional\\_eligibility@freddiemac.com](mailto:institutional_eligibility@freddiemac.com)

### Form Submission

Submit Forms 1034S, *Custodian Certification Schedule Summary* or Form 1034SM, *Custodian Certification Schedule Summary for Multiple Purchase Contracts*, to Freddie Mac at the following e-mail addresses or fax numbers, as applicable.

Email Addresses	Fax Numbers
FMEastern@freddiemac.com	(703) 738-2140
FMCentral@freddiemac.com	(703) 738-2144
FMMountain@freddiemac.com	(703) 738-2150
FMPacific@freddiemac.com	(703) 738-2160

### Document Custody Contacts

Expertise	Contact	Phone Number
Settlement Operations Director	<b>Frederick Lyne</b>	(703) 918-5050
Document Custodial Operations Manager	<b>Carol Andrade</b>	(703) 918-5697
Document Custodial Operations Manager	<b>Sharon L. Novak</b>	(703) 724-3061
Balloon Reset Certification	<b>Courtney Clarke</b>	(703) 724-3070
Mortgage Electronic Registration Systems (MERS)	<b>Courtney Clarke</b>	(703) 724-3070
Document Execution	<b>Helen Thai</b>	(703) 724-3037
Transfers of Document Custody	<b>Wende Hart</b>	(703) 724-3029
Document Custodian Eligibility	<b>Amy Odiorne</b>	(571) 382-3936

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# Investor Accounting Manager

## A High-Quality Tool for the Proactive Management of Your Portfolio

Investor Accounting Manager<sup>SM</sup> leads the way as Freddie Mac's premier tool for investor accounting. This tool is an efficient and easy-to-use investor accounting application that expands your ability to reduce errors, synchronize data files with ours, and monitor your cash position. Since its introduction, Investor Accounting Manager has become one of our most popular applications.

Investor Accounting Manager provides a high-quality tool for the proactive management of your mortgage portfolio through timely and flexible access to Freddie Mac data. When you find a specific loan error, you can correct it quickly and easily by using Investor Accounting Manager to do a "deep dive" of your portfolio to extract loan-by-loan data. If a discrepancy exists on a loan, you are automatically provided key loan data that can facilitate research and data correction.

## Key Features

- Receive 18 reports quickly and easily
- Structure tailored reports that meet your specific investor reporting needs through a "Create Your Own Reports" option
- Remit funds online -- a function that gives you greater control and more options when remitting funds to us
- Obtain cash data on a daily basis by reviewing your *Seller/Servicer Remittance Analysis* and accessing drilldown information to identify amounts due
- Download data to text files or other applications

## Servicer Benefits

Investor Accounting Manager helps you proactively manage your portfolio so that you have the power to

- Improve the quality of your servicing portfolio
- Reduce servicing costs
- Reduce Freddie Mac fees
- Improve your Servicer Performance Profile rating
- Improve your cash-flow management

## Receive Reports Quickly

You can receive the following 18 reports quickly and easily

### Loan Reporting Status:

- *System-Cleared Edits Report*
- *Edits-To-Be-Cleared Report*
- *Loan-Level Missing Report*

### Portfolio Reconciliation:

- *Loan Reconciliation Difference Report*
- *Monthly Account Statement*
- *Loan-Level Trial Balance*
- *Newly Funded Loans Report*
- *Newly Transferred-In Loans Report*
- *Loan Modification Report*

### Adjustable-Rate Mortgage (ARM) Management:

- *ARM Notification Report*
- *ARM Detail Report*
- *Current Cycle ARM Adjustments*

**Cash Remittance:**

- *Remittance Detail Report*
- *Seller/Servicer Remittance Analysis*
- *Seller/Servicer Amount Due Drilldown*
- *Seller/Servicer Amount Received Drilldown*
- *Detail Adjustment Report*
- *Negotiated Payoff Report*

You can also create your own reports with the Custom Report Writer. With this feature, you can conduct portfolio searches by loan characteristics and create your own customized reports.

## Availability

Investor Accounting Manager is available as an online application, along with a variety of other Freddie Mac software products.

## For More Information

- Call (800) FREDDIE
- Contact a Freddie Mac servicing representative
- Print an [Investor Accounting Manager factsheet](#) [PDF 178K]

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## Investor Accounting Manager

### Proactively Manage Your Portfolio with Instant Access to Key Data and Reports

Investor Accounting Manager<sup>SM</sup> enables you to reduce reporting errors, monitor your cash position and easily synchronize data files with ours.

Through timely and flexible access to Freddie Mac data, you can proactively manage your portfolio and even do a “deep dive” to extract loan-by-loan data when specific errors are identified. Additionally, if a discrepancy exists on a loan, you are automatically provided key loan data to facilitate research and data correction.

#### > Key Features

- Improve your mortgage portfolio by taking advantage of 18 report options
- Create customized reports that meet your specific investor reporting requirements
- Remit funds online
- Obtain cash data on a daily basis and access drilldown information to identify amounts due with the *Seller/Servicer Remittance Analysis* report
- Download data to text files or other applications

#### > Servicer Benefits

Leverage Investor Accounting Manager's powerful reporting capabilities to:

- Enhance the quality of your servicing portfolio
- Lower your servicing costs
- Reduce your Freddie Mac fees
- Strengthen your Servicer Performance Profile rating
- Improve your cash flow management

REPORTS	
<b>Loan Reporting Status</b>	<ul style="list-style-type: none"> <li>• <i>System-Cleared Edit Report</i></li> <li>• <i>Edits-To-Be-Cleared Report</i></li> <li>• <i>Loan-Level Missing Report</i></li> </ul>
<b>Portfolio Reconciliation</b>	<ul style="list-style-type: none"> <li>• <i>Loan Reconciliation Difference Report</i></li> <li>• <i>Monthly Account Statement</i></li> <li>• <i>Loan-Level Trial Balance</i></li> <li>• <i>Newly Funded Loans Report</i></li> <li>• <i>Newly Transferred-In Loans Report</i></li> <li>• <i>Loan Modification Report</i></li> </ul>
<b>Adjustable-Rate Mortgage (ARM) Management</b>	<ul style="list-style-type: none"> <li>• <i>ARM Notification Report</i></li> <li>• <i>ARM Detail Report</i></li> <li>• <i>Current Cycle ARM Adjustments</i></li> </ul>
<b>Cash Remittance</b>	<ul style="list-style-type: none"> <li>• <i>Remittance Detail Report</i></li> <li>• <i>Seller/Servicer Remittance Analysis</i></li> <li>• <i>Seller/Servicer Amount Due Drilldown</i></li> <li>• <i>Seller/Servicer Amount Received Drilldown</i></li> <li>• <i>Detail Adjustment Report</i></li> <li>• <i>Negotiated Payoff Report</i></li> </ul>
<b>Custom Report Writer</b>	Conduct portfolio searches by loan characteristics and create your own customized reports.

***Learn more about Investor Accounting Manager:***

- Call (800) FREDDIE
- Visit [www.FreddieMac.com/service/factsheets/iammgrfm.html](http://www.FreddieMac.com/service/factsheets/iammgrfm.html)

# Annual Document Custodian Eligibility Certification Report

All Freddie Mac approved Document Custodians are required to submit this report annually.  
It is due by March 31<sup>st</sup> of each calendar year.

## Document Custodian Information

(The following information is directed to an existing custodian only. This is not an application.)

Document Custodian Number 	Telephone Number ( )	Fax Number ( )
Document Custodian Name		
Vault/Certification Address		
City, State, Zip		
Mailing Address (if different from above address)		
City, State, Zip		E-mail Address
Document Custodian Contact Name		Title

## Relationship of Document Custodian institution to Seller/Service(s):

(Check each box that applies)

- ☐ Self  
☐ Unaffiliated third-party  
☐ Affiliated third-party

## Please complete the following questions:

- Yes ☐ No ☐ Are you, the Document Custodian, a Freddie Mac Seller/Service?
- If Yes, please provide your primary Freddie Mac Seller/Service number: \_\_\_\_\_
- Yes ☐ No ☐ Do you act as Document Custodian for more than one Freddie Mac Seller/Service number?

## Executed Cust. Agmnt. (Form 1035)

Please provide the following information for each Seller/Service (S/S) number for which you hold Freddie Mac Notes:

	S/S Name	S/S number	Cust. Agmnt. Number	# FM Notes Held
Yes <input type="checkbox"/>				
No <input type="checkbox"/>				
<input type="checkbox"/>				
<input type="checkbox"/>				
<input type="checkbox"/>				
<input type="checkbox"/>				

(If more space is required, please provide attachment.)

**Total # of Notes Held for FM=** \_\_\_\_\_  
as of: \_\_\_\_/\_\_\_\_/\_\_\_\_

**Total # of Notes and other files (i.e., securities) held=** \_\_\_\_\_  
(FM plus all other investors/self production)

**What is the vault's document capacity=** \_\_\_\_\_  
(the total number of files it can accommodate)

## Questions Relating to Document Custodian Eligibility Requirements

The following questions refer to Freddie Mac's Document Custodian eligibility requirements. Answer each question based on your institution's current operations. Please check all appropriate boxes, whether or not you currently meet the requirement. Contact your Counterparty Credit Risk Management Representative at [Institutional\\_eligibility@freddiemac.com](mailto:Institutional_eligibility@freddiemac.com) with any questions.

### GENERAL REQUIREMENTS:

#### 1. **Financial Institution that is Supervision and Regulation**

Yes No

- A. ☐ ☐ Custodian is a financial institution that is directly supervised and regulated? If yes, check the appropriate box below:
- ☐ Federal Deposit Insurance Corporation (FDIC)
  - ☐ Board of Governors of the Federal Reserve System
  - ☐ Office of the Comptroller of the Currency (OCC)
  - ☐ Office of Thrift Supervision (OTS)

OR

- B. ☐ ☐ Custodian is a Federal Home Loan Bank

OR

- C. ☐ ☐ If yes, Custodian is a third party Custodian that is a subsidiary of financial institution listed in A. Please specify the name of the parent: \_\_\_\_\_

Yes OR No

- ☐ ☐ Custodian has all necessary authority to perform trust services. Please specify source of the authorization (regulator, state statute, etc.): \_\_\_\_\_

- D. If the response was no to each of A, B, and C above, please describe the Custodian's institution type and specify its regulator: \_\_\_\_\_

#### 2. **Receivership, Conservatorship, or Liquidation**

Yes No

- ☐ ☐ Custodian and/or parent of the Custodian are in receivership, conservatorship, or liquidation.

#### 3. **Single-Family Seller/Servicer Guide**

Yes No

- ☐ ☐ Custodian has access to the Freddie Mac *Single-Family Seller/Servicer Guide* (the "Guide").

#### 4. **Document Custody Procedure Handbook**

Yes No

- ☐ ☐ Custodian has access to and complies with Freddie Mac's Document Custody Handbook Procedures (<http://www.freddiemac.com/cim/handbook.html>).

#### 5. **Acceptable Net Worth**

Yes No

- ☐ ☐ Custodian has an Acceptable Net Worth (as defined in the Glossary of the Guide) at least equal to the minimum required for Custodians in Section 18.2 (b) 3 of the Guide.

## GENERAL REQUIREMENTS (CONTINUED):

### 6. **Fire-resistant Storage Facilities**

- Yes      No
- ☐      ☐ Custodian is equipped with secure, fire-resistant storage facilities with adequate access controls to ensure the safety and security of the notes held in custody that (check the appropriate box below):
- ☐ Meet the fire resistant requirements set by the Custodian's regulator
  - ☐ Provide a minimum two-hour fire protection as recommended by Freddie Mac
  - ☐ Meet requirements set by the Custodian's regulator, but do not provide a minimum two-hour fire protection as recommended by Freddie Mac

### 7. **Knowledgeable Employees**

- Yes      No
- ☐      ☐ Custodian's employees are knowledgeable in the handling of notes and the functions and duties of a Custodian as required by Freddie Mac.

### 8. **Insurance Coverage**

- Yes      No
- ☐      ☐ Custodian's insurance coverage defines mortgage notes as "negotiable instruments" per Section 3-104 of the Uniform Commercial Code.
- ☐      ☐ Custodian's insurance coverage meets the minimum requirements of Section 18.2(b) of the Guide.

#### **A. Financial Institution Bond**

- Yes      No
- ☐      ☐ The insurance coverage maintained by the Custodian includes a Financial Institution bond or equivalent insurance covering loss resulting from (check all that currently are covered):
- ☐ Employee dishonesty
  - ☐ Physical damage or destruction to, or loss of, any notes while documents are located on Custodian's premises
- Yes      No
- ☐      ☐ If Custodian is a Seller/Service, is Custodian's note custody covered under Seller/Service's fidelity institution bond policy? If yes, Go to B. In-transit section.

If Custodian is not a Freddie Mac Seller/Service or covered under the Seller/Service's fidelity institution bond policy, please complete the following information:

Insurance Carrier (not Broker): \_\_\_\_\_

Insurance Broker: \_\_\_\_\_

Document Custodian specifically named as covered in policy? Yes ☐ No ☐

Agent Name: \_\_\_\_\_

Agent Street Address: \_\_\_\_\_

City, State, Zip: \_\_\_\_\_

Agent Phone Number: \_\_\_\_\_

Policy Number: \_\_\_\_\_

Coverage Amount: \$ \_\_\_\_\_

Deductible: \$ \_\_\_\_\_

Expiration date of policy: \_\_\_\_\_

#### **B. In-transit**

- Yes      No
- ☐      ☐ Custodian and/or your Seller/Service(s) have contractually agreed to assume liability for notes while in-transit **and to maintain coverage for loss of, damage or destruction to notes while in-transit to or from between Custodian's premises.**

#### D. Errors and Omissions

Yes ☐ No ☐

The insurance coverage maintained by the Custodian includes errors and omissions insurance covering claims resulting from the Custodian's breach of duty, neglect, errors or omissions, misstatement, misleading statement or other wrongful acts committed in the conduct of document custodial services.

Yes ☐ No ☐

If Custodian is also a Seller/Servicer, is its note custody covered under Seller/Servicer's errors and omissions policy? If yes, Go to Question 9.

If Custodian is not a Freddie Mac Seller/Servicer or covered under the Seller/Servicer's errors and omissions policy, please complete the following information:

Insurance Carrier (not Broker): \_\_\_\_\_

Insurance Broker: \_\_\_\_\_

Document Custodian specifically named as covered in policy? Yes ☐ No ☐

Agent Name: \_\_\_\_\_

Agent Street Address: \_\_\_\_\_

City, State, Zip: \_\_\_\_\_

Agent Phone Number: \_\_\_\_\_

Policy Number: \_\_\_\_\_

Coverage Amount: \$ \_\_\_\_\_

Deductible: \$ \_\_\_\_\_

Expiration date of policy: \_\_\_\_\_

#### 9. Tracking and Reporting System

Yes ☐ No ☐

Custodian has and maintains an independent document tracking and reporting system. The system allows the Custodian, at a minimum to (check all that apply):

- ☐ Track Freddie Mac loan numbers
- ☐ Track Seller/Servicer number
- ☐ Monitor the receipt of notes and related documentation (for example, modifying instruments)
- ☐ Track the physical location of all documents held
- ☐ Accurately account for documents transferred or released
- ☐ Provide, in an electronic format acceptable to Freddie Mac, an accounting of all Notes held for Freddie Mac identified by Freddie Mac loan number and Seller/Servicer loan number as required in Section 18.2 (b) 9 of the Guide
- ☐ Cross-reference the Freddie Mac loan number for each mortgage with the Seller/Servicer loan number.

**Note: with this Report, you must attach a screen print from your tracking system that illustrates that all requirements of Section 18.2 (b) 9 of the Guide are met.**

#### GENERAL REQUIREMENTS (CONTINUED):

#### 10. Disaster Recovery Plan

Yes ☐ No ☐

Custodian has and maintains a disaster recovery plan. The plan documents include (check all that apply):

- ☐ The process by which the physical recovery/restoration will occur
- ☐ The recovery of tracking system data, including any electronically maintained information
- ☐ The relocation/restoration of the facilities to ensure continuing ability to perform the required custodial functions
- ☐ Provisions for the testing and maintenance of the plan
- ☐ A provision to notify Freddie Mac's Document Custodial Operations of a disaster according to Section 18.6(d) of the Guide



11. **Written Procedures**

Yes No

☐ ☐ Custodian has implemented written procedures that ensure compliance with Freddie Mac requirements and prudent practices in performing its duties. These written procedures include (check all that apply):

- ☐ Certification of documents and validation of loan data
- ☐ Filing, maintenance, and safeguarding of documents
- ☐ Release and transfer of documents
- ☐ Access to documents
- ☐ Tracking and reporting of documents

12. **Privacy**

Yes No

☐ ☐ Custodian maintains a system of internal controls designed to ensure compliance with all applicable federal, state and local laws relating to data privacy and the safeguarding of Borrower personal information, including, without limitation, the Gramm-Leach-Bliley Act and all relevant implementing rules, regulations and guidance prescribed by the Custodian's regulator(s).

13. **Organizational Changes**

Yes No

☐ ☐ Custodian is considering major organizational change to its (check all that apply):

- ☐ Physical facilities
- ☐ Management
- ☐ Corporate structure
- ☐ Other

Describe change including timing:

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## QUESTIONS ABOUT ADDITIONAL ELIGIBILITY REQUIREMENTS

In addition to the requirements listed above, certain Custodians must meet additional requirements based on their relationship with the Seller/Service(s) and whether they are also a warehouse lender. Relationship types consist of: a Seller/Service acting as Custodian, a third-party Custodian affiliated with a Seller/Service, or a third-party Custodian unaffiliated with a Seller/Service.

**Please complete the sections below as they apply to you and the Seller/Service(s) for which you are an approved Custodian.**

**Note: All Custodians must complete the section that concerns warehouse lenders if both document custodial functions and warehouse lending functions are performed by the institution.**

### SELF-CUSTODIANS:

Yes No

14. ☐ ☐ Custodian is the same institution as the Seller/Service. **If no**, go to question 19.

15. ☐ ☐ Custodial function is performed in a trust department that is established and operated under trust powers granted by the Seller/Service's primary regulator.

If yes, the trust powers were granted by \_\_\_\_\_ (name of regulator) on \_\_\_\_\_ (date). If no, where is the document custodial function performed?

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16. ☐ ☐ The custodial function is independently and separately managed from functional areas that perform mortgage origination, selling or servicing.

17. ☐ ☐ The custodial function maintains separate records, files and operations, and access is limited to authorized personnel.

## SELF-CUSTODIANS (CONTINUED):

- |     | Yes                      | No                       |  |
|-----|--------------------------|--------------------------|--|
| 18. | <input type="checkbox"/> | <input type="checkbox"/> | The custodial function is performed by personnel not engaged in mortgage origination, selling or servicing.  |
| 19. | <input type="checkbox"/> | <input type="checkbox"/> | The custodial function has custodial officers who are duly authorized to act on behalf of the Custodian in its trust capacity and empowered to enter into custodial agreements with Freddie Mac and Seller/Serviceers. |
| 20. | <input type="checkbox"/> | <input type="checkbox"/> | Custodian is subject to periodic review, examination and inspection by the regulator granting the trust powers.  |

**Note: with this Report, you must attach poof of trust powers along with a current organizational chart showing your document custody function in relation to originations, sales, servicing and other mortgage functions.**

## THIRD-PARTY CUSTODIANS

- |   | Yes                      | No                       |  |
|---|--------------------------|--------------------------|--|
| 21.   | <input type="checkbox"/> | <input type="checkbox"/> | Custodian is affiliated with the Seller/Serviceer(s). If yes, complete the second part of the question below. If no, proceed to question 22.                   |
|   | <input type="checkbox"/> | <input type="checkbox"/> | Custodial function is performed in a trust department that is established and operated under trust powers granted by the Seller/Serviceer's primary regulator. |
| If yes, the trust powers were granted by _____ (name of regulator) on _____ date). If no, where is the document custodial function performed? |                          |                          |  |
| <hr/>   |                          |                          |  |
| 22.   | <input type="checkbox"/> | <input type="checkbox"/> | The Custodian is independently and separately managed from the Seller/Serviceer(s).  |
| 23.   | <input type="checkbox"/> | <input type="checkbox"/> | The custodial function is independently and separately managed from functional areas that perform mortgage origination, selling and servicing.                 |
| 24.   | <input type="checkbox"/> | <input type="checkbox"/> | The custodial function maintains separate records, files and operations from functional areas that perform mortgage origination, selling and servicing.        |
| 25.   | <input type="checkbox"/> | <input type="checkbox"/> | The custodial function is performed, by personnel not engaged in the functions of mortgage origination, selling and servicing.                                 |

**Note: with this Report, affiliated third-party Custodians must attach poof of trust powers along with a current organizational chart showing your document custody function in relation to originations, sales, servicing and other mortgage functions.**

## DOCUMENT CUSTODIANS THAT ARE ALSO WAREHOUSE LENDERS

- |     | Yes                      | No                       |   |
|-----|--------------------------|--------------------------|---|
| 26. | <input type="checkbox"/> | <input type="checkbox"/> | The institution that is the Document Custodian also acts as a warehouse lender. If no, do not answer question 24  |
| 27. | <input type="checkbox"/> | <input type="checkbox"/> | The custodial function shares some personnel with the warehouse lending function. If yes, the custodial function has (check all that apply): <ul style="list-style-type: none"><li><input type="checkbox"/> A separate tracking and reporting system that provides a clear distinction between Freddie Mac's assets and the collateral held for the warehouse lender</li><li><input type="checkbox"/> Separate record keeping from other functional areas including warehouse lending</li><li><input type="checkbox"/> Operating controls that provide a clear distinction between activities that an employee performs for the benefit of the warehouse lender and activities performed for Freddie Mac</li><li><input type="checkbox"/> Operating controls that provide a clear distinction between management decisions that apply to collateral held as security for a warehouse line and those that apply to notes that are held for the sole benefit of Freddie Mac</li></ul> |

NOTE: Along with submitting the updated Annual Document Custodian Eligibility Certification Report (2008), all Freddie Mac Document Custodians are required to submit a newly executed Form 1035 for each Seller/Servicer for which you have a custodial agreement with, a screen print from your tracking system that illustrates that all requirements of Section 18.2 (b) 9 of the Guide are met, and a current organizational chart showing your document custody function in relation to originations, sales, servicing and other mortgage functions. In addition to the above requirements, self and affiliate third-party custodians will also be required to submit proof of trust powers.

Please check boxes for all documentation that Custodian is submitting:

Yes	No	
<input type="checkbox"/>	<input type="checkbox"/>	<b>Updated Annual Document Custodian Eligibility Certification Report (2008)</b>
<input type="checkbox"/>	<input type="checkbox"/>	<b>Form 1035</b> for each S/S for which you have a custodial agreement with.
<input type="checkbox"/>	<input type="checkbox"/>	<b>Screen print</b> from your <b>Tracking System</b> that illustrates that all requirements per section 18.2 (b) 9 of the Guide are met
<input type="checkbox"/>	<input type="checkbox"/>	<b>Proof of Trust Powers</b> for Self and Affiliated third-party custodians
<input type="checkbox"/>	<input type="checkbox"/>	<b>Current Organizational Chart</b> showing your document custody function in relation to originations, sales, servicing and other mortgage functions.

# CERTIFICATION

*If this Report has been downloaded and/or printed from Freddie Mac's web-site, Custodian represents and warrants it has not altered, modified, deleted, or added any additional terms to this Report, and that the terms of this Report are identical to the terms of the Report as currently available on Freddie Mac's website.*

The undersigned authorized representative of the Custodian hereby certifies that the:

- (i) Representations and information set forth in this Annual Document Custodian Certification Report (including any required attachments thereto) are complete and correct and acknowledges that Freddie Mac relies on such representation and information.
- (ii) Custodian has access to the Guide. Custodian agrees to comply with Guide provisions and requirements as they may be amended from time to time as a condition of continuing eligibility.
- (iii) Exceptions to compliance with Freddie Mac's Document Custodian requirements are noted below:

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*(continue on additional sheets as necessary)*

In addition, the undersigned authorized representative of the Custodian:

- Acknowledges its obligation to correct any noncompliance issues identified above and intends to be in compliance with the requirements cited above by \_\_\_\_\_ (date).
- Understands that Freddie Mac reserves the right to require additional relevant information, regardless of the Custodian's periodic reporting requirements.
- Acknowledges that any misrepresentation constitutes cause for suspension or disqualification to act as a Custodian for Freddie Mac assets and may be cause for Freddie Mac to exercise any other remedies available.
- Agrees that the Custodian shall submit this Annual Document Custodian Eligibility Certification Report by facsimile transmission to Freddie Mac and maintain legible original Annual Document Custodian Eligibility Certification Report in its files.

As the authorized representative of the Custodian, I agree that by signing my name in the "signature" box below and submitting a facsimile copy of this Annual Document Custodian Eligibility Certification Report containing a facsimile copy of my signature to Freddie Mac by facsimile transmission, I have fully bound the Custodian to the terms and conditions of this Report in the same manner that the Custodian would be bound if I had delivered the original paper Annual Document Custodian Eligibility Certification Report to Freddie Mac completed and signed by me in writing.

\_\_\_\_\_  
Signature of Authorized Officer of the Custodian

\_\_\_\_\_  
Date

\_\_\_\_\_  
Officer's Name and Title (typed or printed)

\_\_\_\_\_  
Officer's Telephone Number

\_\_\_\_\_  
Custodian Number (typed or printed)

\_\_\_\_\_  
Officer's Office E-mail Address

\_\_\_\_\_  
Custodian Name (typed or printed)

## COMPLETED REPORT AND OTHER DOCUMENTATION REQUIRED

*with the exception of the original Form 1035(s)*

MAY BE SUBMITTED VIA FACSIMILE OR A PDF ATTACHED TO AN E-MAIL TO:

Document Custodian Eligibility

Freddie Mac

Fax # (866) 743-0087

[institutional\\_eligibility@freddiemac.com](mailto:institutional_eligibility@freddiemac.com)

## ORIGINAL FULLY EXECUTED FORM 1035(s) MUST BE SUBMITTED TO:

Freddie Mac

Counterparty Credit Risk Management

1551 Park Run Drive, MS D3A

McLean, VA 22102

CUSTODIAN CERTIFICATION SCHEDULE SUMMARY

Seller/Servicer number: \_\_\_\_\_ Freddie Mac Contract number: \_\_\_\_\_ Custodian number: \_\_\_\_\_

First Freddie Mac loan number of delivery: \_\_\_\_\_

Last Freddie Mac loan number of delivery: \_\_\_\_\_ (if applicable)

Total Notes: \_\_\_\_\_

For Concurrent Transfers of Servicing, provide the following:

Transferor’s Seller/Servicer number: \_\_\_\_\_ Transferee’s Seller/Servicer number: \_\_\_\_\_

Transferor’s Custodian number: \_\_\_\_\_ Transferee’s Custodial number: \_\_\_\_\_

\_\_\_\_\_  
Preparer’s Name Telephone Number Date

In accordance with Section 1.3 of the Freddie Mac *Single-Family Seller/Servicer Guide* (“Guide”), as it may be amended from time to time, and the provisions of the Freddie Mac Form 1035 Custodian Agreement between Custodian and Freddie Mac (“Form 1035”), Seller/Servicer and Custodian are not required to return the signed Freddie Mac Form 1034 Fixed Rate Custodial Certification Schedule (“Form 1034 Schedule”), or Form 1034A ARM Custodial Certification Schedule (“Form 1034A Schedule”) to Freddie Mac; provided that the Custodian submits, on behalf of the Seller/Servicer and Custodian, this Form 1034S Custodian Certification Schedule Summary (“Form 1034S Summary”) to Freddie Mac. Further, in accordance with Section 1.3 of the Guide as it may be amended from time to time and the provisions of Form 1035, respectively, Seller/Servicer adopts as its signature its Freddie Mac Seller/Servicer number, which is stated in this Form 1034S Summary, and Custodian adopts as its signature its Freddie Mac Custodian number, which is also stated in this Form 1034S Summary. Custodian may transmit this Form 1034S Summary to Freddie Mac via facsimile transmission or email.

Seller/Servicer and Custodian hereby represent and warrant to Freddie Mac that they have made the certifications contained in the signed Freddie Mac Form 1034 Schedule and Form 1034A Schedule and that each of them shall be bound by the information and their respective certifications contained in the Freddie Mac Form 1034 Schedule and Form 1034A Schedule that are delivered to the Custodian. With the submission of this Form 1034S Summary, Freddie Mac is relying on the representations and warranties of the Seller/Servicer and the Custodian that they have made the certifications contained in the Freddie Mac Form 1034 Schedule and Form 1034A Schedule.

Custodial Certification Corrections

Please fill in this section ONLY if loan data information has changed during the loan certification process. Please list the Freddie Mac loan number and the changes in the loan data information. You’ll also need to list the name of the loan data field. If necessary, use an additional sheet for corrections.

	Freddie Mac Loan No.	Name of Loan Data Field	Changed Loan Data
Sample 1	000000001	Property Address	12460 South Main Street
Sample 2	000000002	Interest Rate	12%
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			

☐ Please indicate number of corrections pages here ONLY if there are additional pages to follow.

## Annual Document Custodian Eligibility Certification Report

All Freddie Mac approved Document Custodians are required to submit this report annually.  
It is due by March 31<sup>st</sup> of each calendar year.

### Document Custodian Information

(The following information is directed to an existing custodian only. This is not an application.)

Document Custodian Number ( ) ( ) ( ) ( ) ( ) ( ) ( ) ( )	Telephone Number ( ) ( ) ( ) ( ) ( ) ( ) ( ) ( )	Fax Number ( ) ( ) ( ) ( ) ( ) ( ) ( ) ( )
Document Custodian Name		
Vault/Certification Address		
City, State, Zip		
Mailing Address (if different from above address)		
City, State, Zip		E-mail Address
Document Custodian Contact Name		Title

### Relationship of Document Custodian Institution to Seller/Service(s):

(Check each box that applies)

- ☐ Self  
☐ Unaffiliated third-party  
☐ Affiliated third-party

### Please complete the following questions:

- Yes ☐ No ☐ Are you, the Document Custodian, a Freddie Mac Seller/Service?
- If Yes, please provide your primary Freddie Mac Seller/Service number: \_\_\_\_\_
- Yes ☐ No ☐ Do you act as Document Custodian for more than one Freddie Mac Seller/Service number?

**Executed Cust. Agmt. (Form 1035)** Please provide the following information for each Seller/Service (S/S) number for which you hold Freddie Mac Notes:

	S/S Name	S/S number	Cust. Agmt. Number	# FM Notes Held
Yes <input type="checkbox"/> No <input type="checkbox"/>				
<input type="checkbox"/>				
<input type="checkbox"/>				
<input type="checkbox"/>				
<input type="checkbox"/>				
<input type="checkbox"/>				
<input type="checkbox"/>				

(If more space is required, please provide attachment.)

Total # of Notes Held for FM= \_\_\_\_\_  
as of: \_\_\_\_/\_\_\_\_/\_\_\_\_

Total # of Notes and other files (i.e., securities) held= \_\_\_\_\_  
(FM plus all other investors/self production)

What is the vault's document capacity= \_\_\_\_\_  
(the total number of files it can accommodate)

## Questions Relating to Document Custodian Eligibility Requirements

The following questions refer to Freddie Mac's Document Custodian eligibility requirements. Answer each question based on your institution's current operations. Please check all appropriate boxes, whether or not you currently meet the requirement. Contact your Counterparty Credit Risk Management Representative at [Institutional\\_eligibility@freddiemac.com](mailto:Institutional_eligibility@freddiemac.com) with any questions.

### GENERAL REQUIREMENTS:

#### 1. *Financial Institution that is Supervision and Regulation*

Yes No  
A. ☐ ☐ Custodian is a financial institution that is directly supervised and regulated? If yes, check the appropriate box below:

- ☐ Federal Deposit Insurance Corporation (FDIC)  
☐ Board of Governors of the Federal Reserve System  
☐ Office of the Comptroller of the Currency (OCC)  
☐ Office of Thrift Supervision (OTS)

OR

B. ☐ ☐ Custodian is a Federal Home Loan Bank

OR

C. ☐ ☐ If yes, Custodian is a third party Custodian that is a subsidiary of financial institution listed in A. Please specify the name of the parent: \_\_\_\_\_

Yes OR No

☐ ☐ Custodian has all necessary authority to perform trust services. Please specify source of the authorization (regulator, state statute, etc.): \_\_\_\_\_

D. If the response was no to each of A, B, and C above, please describe the Custodian's institution type and specify its regulator: \_\_\_\_\_

#### 2. *Receivership, Conservatorship, or Liquidation*

Yes No  
☐ ☐ Custodian and/or parent of the Custodian are in receivership, conservatorship, or liquidation.

#### 3. *Single-Family Seller/Service Guide*

Yes No  
☐ ☐ Custodian has access to the Freddie Mac *Single-Family Seller/Service Guide* (the "Guide").

#### 4. *Document Custody Procedure Handbook*

Yes No  
☐ ☐ Custodian has access to and complies with Freddie Mac's Document Custody Handbook Procedures (<http://www.freddiemac.com/cim/handbook.html>).

#### 5. *Acceptable Net Worth*

Yes No  
☐ ☐ Custodian has an Acceptable Net Worth (as defined in the Glossary of the Guide) at least equal to the minimum required for Custodians in Section 18.2 (b) 3 of the Guide.



## GENERAL REQUIREMENTS (CONTINUED):

### 6. **Fire-resistant Storage Facilities**

Yes No

- ☐ ☐ Custodian is equipped with secure, fire-resistant storage facilities with adequate access controls to ensure the safety and security of the notes held in custody that (check the appropriate box below):
- ☐ Meet the fire resistant requirements set by the Custodian's regulator
  - ☐ Provide a minimum two-hour fire protection as recommended by Freddie Mac
  - ☐ Meet requirements set by the Custodian's regulator, but do not provide a minimum two-hour fire protection as recommended by Freddie Mac

### 7. **Knowledgeable Employees**

Yes No

- ☐ ☐ Custodian's employees are knowledgeable in the handling of notes and the functions and duties of a Custodian as required by Freddie Mac.

### 8. **Insurance Coverage**

Yes No

- ☐ ☐ Custodian's insurance coverage defines mortgage notes as "negotiable instruments" per Section 3-104 of the Uniform Commercial Code.
- ☐ ☐ Custodian's insurance coverage meets the minimum requirements of Section 18.2(b) of the Guide.

#### **A. Financial Institution Bond**

Yes No

- ☐ ☐ The insurance coverage maintained by the Custodian includes a Financial Institution bond or equivalent insurance covering loss resulting from (check all that currently are covered):
- ☐ Employee dishonesty
  - ☐ Physical damage or destruction to, or loss of, any notes while documents are located on Custodian's premises
- Yes No
- ☐ ☐ If Custodian is a Seller/Service, is Custodian's note custody covered under Seller/Service's fidelity institution bond policy? If yes, Go to B. In-transit section.

If Custodian is not a Freddie Mac Seller/Service or covered under the Seller/Service's fidelity institution bond policy, please complete the following information:

Insurance Carrier (not Broker): \_\_\_\_\_

Insurance Broker: \_\_\_\_\_

Document Custodian specifically named as covered in policy? Yes ☐ No ☐

Agent Name: \_\_\_\_\_

Agent Street Address: \_\_\_\_\_

City, State, Zip: \_\_\_\_\_

Agent Phone Number: \_\_\_\_\_

Policy Number: \_\_\_\_\_

Coverage Amount: \$ \_\_\_\_\_

Deductible: \$ \_\_\_\_\_

Expiration date of policy: \_\_\_\_\_

#### **B. In-transit**

Yes No

- ☐ ☐ Custodian and/or your Seller/Service(s) have contractually agreed to assume liability for notes while in-transit and to maintain coverage for loss of, damage or destruction to notes while in-transit to or from between Custodian's premises.

#### D. Errors and Omissions

Yes ☐ No ☐

The insurance coverage maintained by the Custodian includes errors and omissions insurance covering claims resulting from the Custodian's breach of duty, neglect, errors or omissions, misstatement, misleading statement or other wrongful acts committed in the conduct of document custodial services.

Yes ☐ No ☐

If Custodian is also a Seller/Service, is its note custody covered under Seller/Service's errors and omissions policy? If yes, Go to Question 9.

If Custodian is not a Freddie Mac Seller/Service or covered under the Seller/Service's errors and omissions policy, please complete the following information:

Insurance Carrier (not Broker): \_\_\_\_\_

Insurance Broker: \_\_\_\_\_

Document Custodian specifically named as covered in policy? Yes ☐ No ☐

Agent Name: \_\_\_\_\_

Agent Street Address: \_\_\_\_\_

City, State, Zip: \_\_\_\_\_

Agent Phone Number: \_\_\_\_\_

Policy Number: \_\_\_\_\_

Coverage Amount: \$ \_\_\_\_\_

Deductible: \$ \_\_\_\_\_

Expiration date of policy: \_\_\_\_\_

#### 9. Tracking and Reporting System

Yes ☐ No ☐

Custodian has and maintains an independent document tracking and reporting system. The system allows the Custodian, at a minimum to (check all that apply):

- ☐ Track Freddie Mac loan numbers
- ☐ Track Seller/Service number
- ☐ Monitor the receipt of notes and related documentation (for example, modifying instruments)
- ☐ Track the physical location of all documents held
- ☐ Accurately account for documents transferred or released
- ☐ Provide, in an electronic format acceptable to Freddie Mac, an accounting of all Notes held for Freddie Mac identified by Freddie Mac loan number and Seller/Service loan number as required in Section 18.2 (b) 9 of the Guide
- ☐ Cross-reference the Freddie Mac loan number for each mortgage with the Seller/Service loan number.

**Note: with this Report, you must attach a screen print from your tracking system that illustrates that all requirements of Section 18.2 (b) 9 of the Guide are met.**

#### GENERAL REQUIREMENTS (CONTINUED):

#### 10. Disaster Recovery Plan

Yes ☐ No ☐

Custodian has and maintains a disaster recovery plan. The plan documents include (check all that apply):

- ☐ The process by which the physical recovery/restoration will occur
- ☐ The recovery of tracking system data, including any electronically maintained information
- ☐ The relocation/restoration of the facilities to ensure continuing ability to perform the required custodial functions
- ☐ Provisions for the testing and maintenance of the plan
- ☐ A provision to notify Freddie Mac's Document Custodial Operations of a disaster according to Section 18.6(d) of the Guide

11. **Written Procedures**

Yes No

☐☐

Custodian has implemented written procedures that ensure compliance with Freddie Mac requirements and prudent practices in performing its duties. These written procedures include (check all that apply):

☐

Certification of documents and validation of loan data

☐

Filing, maintenance, and safeguarding of documents

☐

Release and transfer of documents

☐

Access to documents

☐

Tracking and reporting of documents

12. **Privacy**

Yes No

☐☐

Custodian maintains a system of internal controls designed to ensure compliance with all applicable federal, state and local laws relating to data privacy and the safeguarding of Borrower personal information, including, without limitation, the Gramm-Leach-Bliley Act and all relevant implementing rules, regulations and guidance prescribed by the Custodian's regulator(s).

13. **Organizational Changes**

Yes No

☐☐

Custodian is considering major organizational change to its (check all that apply):

☐

Physical facilities

☐

Management

☐

Corporate structure

☐

Other

Describe change including timing:

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## QUESTIONS ABOUT ADDITIONAL ELIGIBILITY REQUIREMENTS

In addition to the requirements listed above, certain Custodians must meet additional requirements based on their relationship with the Seller/Service(s) and whether they are also a warehouse lender. Relationship types consist of: a Seller/Service acting as Custodian, a third-party Custodian affiliated with a Seller/Service, or a third-party Custodian unaffiliated with a Seller/Service.

*Please complete the sections below as they apply to you and the Seller/Service(s) for which you are an approved Custodian.*

*Note: All Custodians must complete the section that concerns warehouse lenders if both document custodial functions and warehouse lending functions are performed by the institution.*

### SELF-CUSTODIANS:

Yes No

14.

☐☐

Custodian is the same institution as the Seller/Service. If no, go to question 19.

15.

☐☐

Custodial function is performed in a trust department that is established and operated under trust powers granted by the Seller/Service's primary regulator.

If yes, the trust powers were granted by \_\_\_\_\_ (name of regulator)  
on \_\_\_\_\_ date). If no, where is the document custodial function performed?

---

16.

☐☐

The custodial function is independently and separately managed from functional areas that perform mortgage origination, selling or servicing.

17.

☐☐

The custodial function maintains separate records, files and operations, and access is limited to authorized personnel.

### SELF-CUSTODIANS (CONTINUED):

18. ☐ Yes ☐ No The custodial function is performed by personnel not engaged in mortgage origination, selling or servicing.
19. ☐ Yes ☐ No The custodial function has custodial officers who are duly authorized to act on behalf of the Custodian in its trust capacity and empowered to enter into custodial agreements with Freddie Mac and Seller/Serviceers.
20. ☐ Yes ☐ No Custodian is subject to periodic review, examination and inspection by the regulator granting the trust powers.

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21. ☐ Yes ☐ No Custodian is affiliated with the Seller/Serviceer(s). If yes, complete the second part of the question below. If no, proceed to question 22.
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26. ☐ Yes ☐ No The institution that is the Document Custodian also acts as a warehouse lender. If no, do not answer question 24
27. ☐ Yes ☐ No The custodial function shares some personnel with the warehouse lending function. If yes, the custodial function has (check all that apply):
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Please check boxes for all documentation that Custodian is submitting:

Yes	No	
<input type="checkbox"/>	<input type="checkbox"/>	Updated Annual Document Custodian Eligibility Certification Report (2008)
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<input type="checkbox"/>	<input type="checkbox"/>	Screen print from your Tracking System that illustrates that all requirements per section 18.2 (b) 9 of the Guide are met
<input type="checkbox"/>	<input type="checkbox"/>	Proof of Trust Powers for Self and Affiliated third-party custodians
<input type="checkbox"/>	<input type="checkbox"/>	Current Organizational Chart showing your document custody function in relation to originations, sales, servicing and other mortgage functions.

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*(continue on additional sheets as necessary)*

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- Acknowledges its obligation to correct any noncompliance issues identified above and intends to be in compliance with the requirements cited above by \_\_\_\_\_ (date).
- Understands that Freddie Mac reserves the right to require additional relevant information, regardless of the Custodian's periodic reporting requirements.
- Acknowledges that any misrepresentation constitutes cause for suspension or disqualification to act as a Custodian for Freddie Mac assets and may be cause for Freddie Mac to exercise any other remedies available.
- Agrees that the Custodian shall submit this Annual Document Custodian Eligibility Certification Report by facsimile transmission to Freddie Mac and maintain legible original Annual Document Custodian Eligibility Certification Report in its files.

As the authorized representative of the Custodian, I agree that by signing my name in the "signature" box below and submitting a facsimile copy of this Annual Document Custodian Eligibility Certification Report containing a facsimile copy of my signature to Freddie Mac by facsimile transmission, I have fully bound the Custodian to the terms and conditions of this Report in the same manner that the Custodian would be bound if I had delivered the original paper Annual Document Custodian Eligibility Certification Report to Freddie Mac completed and signed by me in writing.

\_\_\_\_\_  
Signature of Authorized Officer of the Custodian

\_\_\_\_\_  
Date

\_\_\_\_\_  
Officer's Name and Title (typed or printed)

\_\_\_\_\_  
Officer's Telephone Number

\_\_\_\_\_  
Custodian Number (typed or printed)

\_\_\_\_\_  
Officer's Office E-mail Address

\_\_\_\_\_  
Custodian Name (typed or printed)

### COMPLETED REPORT AND OTHER DOCUMENTATION REQUIRED

*with the exception of the original Form 1035(s)*

MAY BE SUBMITTED VIA FACSIMILE OR A PDF ATTACHED TO AN E-MAIL TO:

Document Custodian Eligibility  
Freddie Mac  
Fax # (866) 743-0087  
[institutional\\_eligibility@freddiemac.com](mailto:institutional_eligibility@freddiemac.com)

### ORIGINAL FULLY EXECUTED FORM 1035(s) MUST BE SUBMITTED TO:

Freddie Mac  
Counterparty Credit Risk Management  
1551 Park Run Drive, MS D3A

McLean, VA 22102

## Request for Release of Documents

<b>TO: Name of Custodian ("Custodian")</b>		<b>Custodial Agreement number</b>	
Address			
<p>In connection with the administration of the Mortgages you hold in custody for Freddie Mac, the undersigned Seller/Service requests the release of the Mortgage documents described below in accordance with Section 2(c) of the Custodial Agreement entered into between the Seller/Service, the Custodian (identified as Freddie Mac Custodian no. _____), and Freddie Mac, and for the reason indicated below. All documents released to the Seller/Service shall be held in trust by the Seller/Service for the benefit of Freddie Mac, and the Seller/Service's possession of such documents shall be solely for the purpose indicated below. The Seller/Service shall promptly return the documents to the Custodian when the Seller/Service's need therefore no longer exists, except where the Mortgage is paid in full or otherwise disposed of in accordance with Freddie Mac's <i>Single-Family Seller/Service Guide</i>.</p>			
Freddie Mac Loan Number		Seller Service Loan Number	
Borrower's last name		Property address (number, street, city, state)	
Note Date		Documents requested for release <input type="checkbox"/> Note <input type="checkbox"/> Modifying instrument (description) <input type="checkbox"/> Assignment <input type="checkbox"/> Entire File	
<b>Reason for requesting documents</b> <div style="display: flex; flex-wrap: wrap;"> <div style="width: 50%;"><input type="checkbox"/> Maturity</div> <div style="width: 50%;"><input type="checkbox"/> Foreclosure</div> <div style="width: 50%;"><input type="checkbox"/> Modification</div> <div style="width: 50%;"><input type="checkbox"/> Recordation of Assignment</div> <div style="width: 50%;"><input type="checkbox"/> Prepayment</div> <div style="width: 50%;"><input type="checkbox"/> Substitution</div> <div style="width: 50%;"><input type="checkbox"/> Conversion</div> <div style="width: 50%;"><input type="checkbox"/> Other (must explain)</div> <div style="width: 50%;"><input type="checkbox"/> Repurchase</div> <div style="width: 50%;"><input type="checkbox"/> Assumption</div> <div style="width: 50%;"><input type="checkbox"/> New York CEMA</div> </div>			
Seller/Service name		Seller/Service number	
Authorized signature of Seller/Service		Date	Phone:
Name (typed or printed)		Title	E-mail address:
<b>To Custodian: You must retain this form for your file in accordance with the terms of the Custodial Agreement.</b> Authorized signature of Custodian                      Date of release			
Name (typed or printed)		Title	
Reason given by Seller/Service for return to custody (foreclosure discontinued, assumption completed, modification completed, etc.)			
Attach copy of supporting document (assumption agreement, etc.)			
Authorized signature of Custodian (acknowledging receipt of returned document)		Date document returned to custody	
Name (typed or printed)		Title	





## Execution of Legal Documents

Document Custodial Operations (DCO) is authorized to sign documents prepared for "Federal Home Loan Mortgage Corporation" signature for Discharges, Satisfactions, Releases, Reconveyances, Assignments and Deeds only if an assignment to Freddie Mac has been recorded. You must prepare the appropriate document for "Federal Home Loan Mortgage Corporation" signatures and send the prepared document to us at the following address:

**Federal Home Loan Mortgage Corporation**  
**Attn: Document Execution**  
**21550 Beaumeade Circle**  
**Ashburn, VA 20147**

Your prepared document must reference all recording information. We cannot sign documents until we identify the loan and the current loan status. You must include the following supporting information with your request in order for us to identify the loan:

- Freddie Mac 9-digit loan number (if available)
- Borrower Name on the Mortgage or Deed of Trust
- Complete property address with zip
- Original Note date and loan amount
- [Document Execution Request Form](#) [PDF 61K]

You should also provide a title report which indicates exceptions and/or copies of the recorded Mortgage and Assignments along with a brief description of the issue you need to resolve. Please allow at least **five business days** for research and processing of your request. If a closing date has been scheduled for a subsequent loan against the property, please include the date of the scheduled closing in your description of the issue. We will make every effort to meet your deadline.

If you want the signed document to be returned via overnight mail, please include a pre-addressed overnight return envelope billed to your account. Otherwise, documents will be returned to the address you provide via U. S. Postal Service. You can submit questions about this topic by by calling (703) 724-3000 or by sending us an [email](#).

# Bulletin

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NUMBER: 2009-16

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TO: All Freddie Mac Seller/Servicers

June 30, 2009

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## SUBJECTS

Both selling and Servicing requirements are amended with this *Single-Family Seller/Servicer Guide* (“Guide”) Bulletin.

With this Bulletin, we are announcing that beginning **October 1, 2009**, Freddie Mac will no longer directly provide Note certification and custody services, and has selected The Bank of New York Mellon Trust Company, N.A. (BNYM) to perform such services for its Mortgages as Freddie Mac’s Designated Custodian (Designated Custodian). Among other things, this Bulletin describes the transition of certification responsibilities and custody of Notes to BNYM. The transition period begins October 1, 2009, and will extend to the effective date of the custodial relationship the Seller/Servicer must establish with either the Designated Custodian or another third-party Custodian. The effective date of either such arrangement is referred to in this Bulletin as the “Custodial Agreement Effective Date.”

The following topics related to this change are addressed in this Bulletin:

- Seller and Servicer responsibilities related to Note delivery, certification and custody during the transition period
- The process and requirements with respect to contracting with the Designated Custodian or, at the Seller/Servicer’s option, another third-party Custodian
- The announcement of a new Form 1035DC, *Designated Custodial Agreement: Single-Family Mortgages*, that must be used to establish a custodian relationship with BNYM
- Document custody fees and charges
- Other miscellaneous matters

As a result of this change, we are also announcing the following:

- Sellers selling Mortgages to Freddie Mac through the Freddie Mac Selling System (Selling System) Servicing Released Sales Process (SRSP) must establish a custodial relationship with the Designated Custodian and deliver Notes for such Mortgages to the Designated Custodian for certification
- Sellers must deliver the Intervening Assignments when delivering Notes for certification to the Document Custodian, including BNYM, in its capacity as vendor/agent for Freddie Mac or as Designated Custodian
- In connection with Transfers of Servicing or transfers of custody, Servicers must deliver the Intervening Assignments to the Document Custodian, including BNYM, in its capacity as vendor/agent for Freddie Mac or as Designated Custodian

## **Key Date - October 1, 2009**

As noted above, the transition period begins **October 1, 2009**, and:

- The Notes and related documents currently held by Freddie Mac at its Document Custodial Operations (DCO) facility will be moved to a BNYM vault on or before this date
- Beginning on this date, Sellers that use DCO to certify Notes and Sellers selling Mortgages under the Selling System SRSP must deliver the Notes and Intervening Assignments for certification to DCO, in care of BNYM at a new address. In addition, for Mortgages sold through MIDANET® Sellers must also deliver a separate data file (see “[Certification – sale of Mortgages](#)” below for additional information).
- BNYM, in its capacity as vendor/agent for Freddie Mac, will perform Note certification and custodial services for the Notes delivered or transferred to it beginning on this date and through the Custodial Agreement Effective Date

In addition, **on or before October 1, 2009**, each Seller/Servicer currently using DCO must submit either of the following:

- Form 1035DC and related forms to BNYM to establish a relationship with BNYM, as Designated Custodian (see “[Contracting with the Designated Custodian](#)” below for additional information); or
- Form 1035, *Custodial Agreement: Single-Family Mortgages*, executed by the Seller/Servicer and another Freddie-Mac approved third-party Custodian, to Freddie Mac requesting approval to enter into a custodial relationship with a third-party Custodian (see “[Contracting with another third-party Custodian](#)” below for additional information)

## **SELLER AND SERVICER RESPONSIBILITIES DURING THE TRANSITION PERIOD**

### **Through September 30, 2009**

For Sellers and Servicers currently using DCO, the Notes for Mortgages being sold to Freddie Mac or for which the Servicer acquires the Servicing, should continue to be delivered to DCO in accordance with existing Guide requirements.

Servicers should continue to deliver supplemental documents, return previously released documents to and request release of documents from DCO in accordance with existing instructions. Because Notes may be in transit to BNYM between the date of this announcement and early October, Servicers should provide as much notice as possible when requesting release of Notes to enable processing in a timely manner.

### **Between October 1, 2009 and the Custodial Agreement Effective Date**

Between October 1, 2009 and the Custodial Agreement Effective Date, BNYM, as Freddie Mac’s vendor/agent, will certify the Notes for Mortgages delivered to Freddie Mac (in care of BNYM) and provide other custodial services for Notes in its custody. Seller/Servicers should direct questions related to Note certification and other custodial matters to BNYM during this period by calling the BNYM Document Custody Support Line at (800) 211-2677.

Sellers and Servicers are advised that there may be delays in certification, funding and other services if documents and/or requests are not delivered in accordance with the following instructions.

Between October 1, 2009 and the Custodial Agreement Effective Date, Sellers and Servicers must use the following address when delivering Notes for certification to DCO, delivering supplemental documents or returning previously released documents:

Freddie Mac – Document Custodial Operations  
c/o The Bank of New York Mellon Trust Company, N.A.  
2220 Chemsearch Blvd., Suite 150  
Irving, TX 75062

### *Certification – sale of Mortgages*

In connection with the delivery of Notes to Freddie Mac, beginning **October 1, 2009**:

- Sellers must also deliver the Intervening Assignments to BNYM for such Mortgages, unless the Mortgage is registered with MERS and the Seller elects to retain the assignments in its files, as provided in Guide [Section 22.14\(e\)](#).
- For Mortgages sold through the Selling System, Sellers will continue to assign the Note to DCO (“Custodian 9999999”) for certification

For Mortgages sold through MIDANET, the Seller must also provide a separate data file containing all of the data that must be certified for each Mortgage in the delivery. The data file must be in the form of an Excel spreadsheet and should be sent to the Designated Custodian via secure email or by emailing the file using a WinZip advanced encryption or 128-bit Advanced Encryption Standard (AES) with password protection. Please contact the Designated Custodian for further information and/or assistance.

The data file must include the following data elements in the order specified below:

<b>BNYM Data Term</b>	<b>Freddie Mac Form 1034/1034A Term</b>
1. Freddie Mac Loan Number	FHLMC Ln #
2. Seller/Servicer Number	Seller/Servicer number
3. Seller Loan Number	Seller Ln #
4. Date of Note	Note Date
5. Property Address	Property Street
6. City	Property City
7. State	St
8. ZIP	Zip code
9. Original Loan Amount	Loan Amt
10. Original Interest Rate	Interest Rate
11. Original P&I	P&I Amount
12. Date of First P&I Payment	1 <sup>st</sup> P&I
13. Original Maturity Date	Maturity Date
14. Original P&I Payment	P&I Amount
15. Borrower Name	Borrower Name
16. Co Borrower Name	Co-Borrower Name
17. Modification/Conversion Date	Mod/Conv date
For ARMs, include the following additional data elements	
18. Convertible	Convrt
19. First Rate Adjust Date	1 <sup>st</sup> Rate Adj
20. Index Source	Index
21. Index Lookback Days	Lookback
22. Note Margin	Mtg Margin
23. Interest Rate Rounded	% Round
24. First Rate Adjustment MAX	1 <sup>st</sup> Adj Max Initial Rate
25. First Rate Adjustment MIN	1 <sup>st</sup> Adj Min Initial Rate
26. Periodic Interest Rate Cap	Period Cap
27. Life of Loan Max Rate	Life Cap

In addition to the above, Sellers must comply with all other Guide requirements in connection with the delivery of Notes for certification, including:

- For Mortgages sold through MIDANET, the delivery of [Form 1034, Fixed-Rate Custodial Certification Schedule](#), or [Form 1034A, ARM Custodial Certification Schedule](#), as applicable
- For Mortgages sold through the Selling System, the delivery of Form 1034E, *Custodial Certification Schedule*, or Note Delivery Cover Sheet

*Release of documents/Transfer of Servicing or transfer of custody*

During the transition period, for Notes held by DCO and transferred to BNYM, Servicers must continue to submit requests for release of documents to DCO directly, in accordance with existing requirements. In addition, for Notes transferred to BNYM as a result of a Transfer of Servicing or transfer of custody, Servicers must deliver the Intervening Assignments in accordance with the requirements for Transfers of Servicing when utilizing a third-party Custodian, pursuant to Guide [Sections 18.6, 18.7](#) and [56.9](#).

**Contracting with the Designated Custodian**

Beginning on **July 17, 2009**, Freddie Mac will email to Servicers currently using DCO to hold the Notes for Mortgages they service for Freddie Mac the materials necessary to enter into an agreement with BNYM as Designated Custodian (the Designated Custodian Registration Forms). The email will be addressed to the Primary Freddie Mac Business Contact as indicated on the [Form 16SF, Annual Eligibility Recertification Report](#). The Designated Custodian Registration Forms consist of the following documents:

- Form 1035DC
- Additional documents required by BNYM, including
  - ☐ Customer Verification Form (“Know Your Customer” form)
  - ☐ W-9, Request for Taxpayer Identification Number and Certification
  - ☐ Electronic Funds Transfer Authorization
  - ☐ Web Access/Release Request Authorization
  - ☐ Designated Custodian Fee Schedule

If you are an impacted Servicer and do not receive this email package by **July 24, 2009**, please contact Counterparty Credit Risk Management (CCRM) by email to [institutional\\_eligibility@freddiemac.com](mailto:institutional_eligibility@freddiemac.com) or by calling the CCRM customer service line at (571) 382-3434, Opt. 2.

In addition, Sellers electing to sell Mortgages to Freddie Mac through the Selling System SRSP must complete the Designated Custodian Registration Forms to establish a relationship with the Designated Custodian. Such Sellers must contact CCRM directly to arrange to receive the registration forms.

As indicated, documents in the Designated Custodian Registration Forms must be completed and signed as appropriate, and received by BNYM at the following address by **October 1, 2009**:

The Bank of New York Mellon Trust Company, N.A.  
ATTN: New Agreement Execution  
2220 Chemsearch Blvd., Suite 150  
Irving, TX 75062

Any questions regarding the Designated Custodian Registration Forms should be directed to BNYM via email at [FreddiemacCustodian@bnymellon.com](mailto:FreddiemacCustodian@bnymellon.com), or by calling the BNYM Document Custody Support Line at (800) 211-2677.

When review of the Designated Custodian Registration Forms is completed, Seller/Service providers will be notified of their Custodial Agreement Effective Date.

### **Contracting with another third-party Custodian**

A Seller/Service provider currently using DCO that elects to use a third-party Custodian other than BNYM should follow the procedures set forth in Guide [Chapter 18](#) with respect to contracting with a Document Custodian and transfers of custody. These procedures include, but are not limited to, submitting Form 1035, executed by the Seller/Service provider and the Document Custodian, to Freddie Mac.

After reviewing the Form 1035 and any other required documentation and approving the request, Freddie Mac will execute the Form 1035 and communicate the Custodial Agreement Effective Date to each Seller/Service provider electing to establish another third-party Custodian relationship.

Any questions regarding the Form 1035 should be directed to Freddie Mac via email to **institutional\_eligibility@freddiemac.com**, or by calling the CCRM customer service line at (571) 382-3434, Opt. 2.

As noted above, the option to deliver Notes to another Document Custodian is not available for Mortgages being sold to Freddie Mac under the Selling System SRSP. These Notes must be sent to the Designated Custodian for certification and custody.

### **Document custody fees and service charges**

Prior to the Custodial Agreement Effective Date, Freddie Mac will continue to bill the Seller/Service provider for document custody fees and related charges pursuant to [Guide Section 18.8](#).

#### *Using the Designated Custodian*

Beginning with the Custodial Agreement Effective Date, BNYM, as the Designated Custodian, will bill the Seller/Service provider directly for custodial fees associated with certification and custody services occurring on or after that date. BNYM has agreed that it will not increase fees beyond the fee schedule set forth in [Guide Section 18.8](#) or impose additional charges prior to **September 1, 2010**, provided, however, that any request for expedited release of files or documents will be billed to the Seller/Service provider's courier account. Seller/Service providers completing Designated Custodian Registration Forms and submitting them to BNYM by **October 1, 2009** will not incur on-boarding (e.g., transportation or recertification) fees due to the transfer of Notes to the Designated Custodian.

#### *Using a third-party Custodian*

Seller/Service providers choosing to transfer custody to another Document Custodian must negotiate their fee structure directly with that Custodian, and should consult with that Custodian as to any on-boarding, recertification and other costs that might be associated with the transfer of custody. Seller/Service providers will be charged release fees, will incur expenses for shipping, and must have transit insurance for any Notes being shipped.

#### *Compensation for custodial services*

As a reminder, compensation for the custodial services is the sole responsibility of the Seller/Service provider. Failure to remit payments to the Document Custodian as required by the Guide is a breach of the Seller/Service provider's agreement with Freddie Mac and may be cause for termination or other adverse action.

### **Timing of data in selling system, receipt of Notes, timing of certification and settlement**

As always, to ensure timely funding, the Seller should submit the Notes and related data to the Document Custodian in sufficient time to permit certification, in accordance with the instructions in Guide [Section 16.8](#) and the [Document Custody Procedures Handbook](#), available in AllRegs. For service standards for the Designated Custodian, please refer to the Service Levels attached to Form 1035DC as Exhibit A.

Sellers delivering Notes to BNYM after **October 1, 2009** must provide BNYM no less than two business days' notice for deliveries involving more than 500 Notes in order for the Notes to be certified by the desired funding date. It is the Seller's responsibility to inform the Designated Custodian in advance of any deliveries in excess of 500 Notes and to deliver such Notes to the Designated Custodian within the time frames indicated by the Service Levels attached to Form 1035DC as Exhibit A. Seller/Service providers choosing to use the services of another Document Custodian must negotiate their service level agreement directly with that Custodian.

### **Form 16SF – Identity of Document Custodians that hold Notes on behalf of Freddie Mac**

[Form 16SF](#) automatically populates with information Freddie Mac has on record. The Seller/Service provider must verify the accuracy of the information and correct it as necessary. For Seller/Service providers currently using DCO, until the Custodial Agreement Effective Date, the [Form 16SF](#) should indicate that Freddie Mac holds the Notes.

Inquiries on the [Form 16SF](#) should be directed to CCRM by either email to **institutional\_eligibility@freddiemac.com**, or by calling the CCRM customer service line at (571) 382-3434, Opt. 2.

### **Special Provisions**

Seller/Service providers with special provisions in their Purchase Documents related to custodial matters must inform their new Document Custodian (either the Designated Custodian or other third-party Document Custodian, as applicable) as to the content of those provisions. Seller/Service providers should provide the special provision(s) to the Designated Custodian by email to [FreddiemacCustodian@bnymellon.com](mailto:FreddiemacCustodian@bnymellon.com).

### **Functions that will remain at Freddie Mac**

Freddie Mac will continue to perform oversight of document custody program requirements and overall management of the certification processes and requirements. As such, all Document Custodians will continue to submit to Freddie Mac the following completed and executed forms, as applicable:

- In connection with the sale of Mortgages to Freddie Mac through MIDANET, Forms [1034S](#), *Custodian Certification Schedule Summary*, and [1034SM](#), *Custodian Certification Summary for Multiple Purchase Contracts*, upon verifying the documents and performing the certifications required in accordance with Guide [Section 18.6](#)
- [Form 1034B](#), *Custodian Certification Schedule – Balloon Loan Modification*, upon certifying the information contained in a Balloon Loan Modification, in accordance with the requirements of Guide [Section 83.103](#)
- [Form 1034T](#), *Subsequent Transfer Custodial Certification Schedule*, upon performing the verifications and certifications in connection with a Transfer of Servicing/transfer of custody

DCO will continue to:

- Process requests for assistance with Mortgage discharges, satisfactions, releases of lien or similar and other matters related to the chain of title for Mortgages owned by Freddie Mac when we are identified as the lien holder in the land records. Please use the Request for Assistance form found on our web page at <http://www.freddiemac.com/cim/docex.html>.
- Process MERS Transfer of Beneficial Rights and resolve issues concerning transactions affecting Freddie Mac on the MERS residential system



## **REVISIONS TO THE GUIDE**

We will be updating applicable Guide chapters with a future Bulletin to reflect these changes.

## **CONCLUSION**

If you have any questions about the matters addressed in this Bulletin, please contact your Freddie Mac representative or call (800) FREDDIE.

Sincerely,

A handwritten signature in black ink, appearing to read "Patricia J. McClung", with a stylized flourish at the end.

Patricia J. McClung  
Vice President  
Offerings Management