MAINE SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

Law Docket No. YOR-09-549

HSBC BANK USA, N.A.

Plaintiff/Appellee

v.

Frank C. FISBEE, II

Defendant/Appellant

ON APPEAL FROM THE DISTRICT COURT

(TENTH DISTRICT, WESTERN YORK)

BRIEF FOR APPELLANT

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STATEMENT OF FACTS

On April 25, 2007 Delta Funding Corporation ("Delta") made a residential mortgage loan to 73-year-old Frank C. Frisbee, ("Frisbee"). This loan is evidenced by Frisbee's note payable to Delta, (A. 14). The note is secured by a mortgage, (A. 18), to "MERS (solely as nominee for Lender and Lender's successors in interest)" (A. 20, 1st paragraph, 1st sentence) on Frisbee's home in Kittery Maine, a home that has been in the Frisbee family for generations. In the mortgage, the term "Lender" is defined to be Delta, (A. 18, ¶ D), and MERS is defined as "Mortgage Electronic Registration Systems, Inc. [which] . . . is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns." (A. 18, ¶ C). This "Uniform Instrument" mortgage, (A. 18-35), names "MERS" on the bottom of each of its 18 pages of text and includes a number of internal references to MERS. Neither the full name of MERS nor the acronym appears anywhere in the note; there is no reference to MERS anywhere in the note.

On January 29, 2008 an entity calling itself "Ocwen Loan Servicing, LLC" ("Ocwen") sent a notice of default and right to cure letter to Frisbee, (A. 71), asserting that unspecified mortgage payments were in default. That letter does not identify the name of the entity on whose behalf it was sent nor state what relationship Ocwen bears to the loan.

HSBC Bank USA, N.A. ("HSBC") commenced this foreclosure action by a complaint dated April 17, 2008, (A. 10), filed with the District Court on April 22, 2008. Attached to the Complaint as Exhibit A, (A. 14), is a copy of the note payable to Delta , but it is unindorsed. Attached to the Complaint as Exhibit B, (A. 18), is a

copy of the mortgage to MERS as nominee for Delta. The complaint, in Paragraph 6, (A. 11), alleges that "[t]he mortgage was assigned to HSBC . . . by assignment to be recorded", implying that the assignment was in existence and was awaiting recording.

HSBC moved for summary judgment on August 21, 2008. (A. 38, 49, & 52). The August 21, 2008 statement of material fact of HSBC is referred to as the "1st PSMF". The first supporting affidavit filed by HSBC, (A. 52), is called the "1st Ocwen affidavit" and is by an employee of Ocwen, with Ocwen being indentified as the servicer of the loan. (A. 52, ¶ 1). Frisbee filed timely opposition to that motion on September 9, 2008. (A. 40, 57, 58 & 64). His opposing statement of material fact is referred to as the "1st DSMF". Instead of filing a reply statement of material fact as required by M.R.Civ. P. 56(h)(3), HSBC moved on November 14, 2008, (A. 75), for leave to file a supplemental statement of material fact and a supplemental affidavit. An order was entered allowing these filings. (A.3, 12/22/08 entry).

HSBC's supplemental statement of material fact is dated November 14, 2008, (A. 44), (the "2nd PSMF") and the supplemental affidavit, by a different employee of Ocwen, is dated November 12, 2008 (A. 6) (the "2nd Ocwen affidavit"). The "supplemental" summary judgment filings of HSBC are, in effect, an entire new motion for summary judgment, filed in an attempt to cure its failure to show on its initial summary judgment papers that HSBC had any interest in the Frisbee mortgage loan. HSBC's initial summary judgment filings on August 21, 2008 are referred to as the "first summary judgment motion", and its "supplemental" filings on November 14, 2008 are referred to as the "second summary judgment motion".

HSBC's second summary judgment motion, introduced into the record for the first time, through the 2nd Ocwen affidavit, an assignment of the mortgage from MERS to HSBC dated April 28, 2008. (A. 70). The 2nd Ocwen affidavit also introduced into the record for the first time an "allonge"[1], also dated April 28, 2008. (A. 69). Faced with these newly introduced documents, Frisbee sought, (A. 4, 5/11/09 entry), and was granted leave, (A. 4, 5/13/09 entry), to file a supplemental statement of material facts, (A. 45) (the "2nd DSMF") and a supplemental opposing brief (A. 77).

When the assignment of the mortgage first appeared over six months after the beginning of this suit, as Exhibit D to the 2nd Ocwen affidavit (A. 70), it revealed that the mortgage, had not been assigned as of the date of the complaint, but was in fact assigned later, on April 28, 2009, eleven days after the date of the Complaint, and after the date on which this action was commenced.

The allonge, which also appeared for the first time as Exhibit C attached to the 2nd Ocwen affidavit, (A. 69), filed over six months after the commencement of the case, is also dated April 28, 2008. That allonge, purporting to be an indorsement[2] of the note, is not mentioned in the 1st Ocwen affidavit even though that affidavit was signed under oath on April 30, 2008, two days after the date on

[1] "An indorsement on a separate sheet of paper is technically called an "allonge" *Freeport v. Ring*, 1999 ME 48, ¶ 10, fn. 7, 901 A.2d 901, 905.

[2] Throughout this brief the words "indorsement", "indorsed" and "indorse" are used for the sake of consistency with Article 3 of the Maine Uniform Commercial Code, 11 M.R.S.A. §§1-1101 et. seq., although the words are spelled with the initial letter "e" in 14 M.R.S.A. §6321 and M.R.Civ.P. 56(j).

the allonge. The 1st Ocwen affidavit asserts, (A. 5, ¶ 2), that the copy of the note attached to the Complaint as Exhibit A, (A. 14), and which has no indorsement upon it or affixed to it, is a "true copy" of the note. (A. 52, ¶ 1, last sentence). The purported allonge attached as a single page Exhibit C to the 2nd Ocwen affidavit, (A. 69), is not attached or affixed to the note or to a copy of the note. There is no affidavit assertion that the allonge is affixed to the note

The District Court entered a Judgment of Foreclosure in favor of HSBC on October 18, 2009. Frisbee filed a timely notice of appeal to the Law Court on November 5, 2009.

ISSUES PRESENTED FOR REVIEW

I. DID HSBC FAIL TO PROVE THAT IT HAS THE RIGHT TO ENFORCE THE NOTE SECURED BY THE MORTGAGE UPON WHICH IT WAS FORECLOSING?

   A. DID HSBC FAIL TO PROVE THAT IT IS IN POSSESSION OF THE NOTE?

   B. DID HSBC FAIL TO PROVE THAT THERE IS AN INDORSEMENT TO THE NOTE?

   C. DID MERS, WHICH WAS NEVER A HOLDER OF THE NOTE, LACK THE ABILITY TO MAKE AN EFFECTIVE INDORSEMENT OF THE NOTE?

   D. DID HSBC FAIL TO MEET THE REQUIREMENT OF THE UCC TO PRODUCE THE NOTE IN ORDER TO OBTAIN JUDGEMENT UPON IT?

II. SHOULD THE SUMMARY JUDGMENT IN FAVOR OF HSBC BE VACATED DUE TO THE EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT AND FOR THE REASON THAT IT IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW?

III. DID HSBC'S LACK OF STANDING TO BRING THIS ACTION MEAN THAT THE DISTRICT COURT HAD NO JURISDICTION TO ENTER JUDGEMENT IN ITS FAVOR?

   A. DID HSBC'S LACK OF AN INTEREST IN THE NOTE AND LACK OF AN INTEREST IN THE MORTGAGE MEAN THAT IT LACKED THE STANDING NEEDED TO BRING THIS ACTION?

   B. WAS THE SUBSEQUENT ACQUISTION OF THE NOTE AND MORTGAGE BY HSBC SUFFICIENT TO CURE ITS LACK OF STANDING?

   C. SHOULD THIS ACTION BE DISMISSED DUE TO THE LACK OF STANDING OF HSBC AND THE LACK OF JURISDICTION OF THE COURT TO ENTER JUDGEMENT IN FAVOR OF HSBC?

SUMMARY OF ARGUMENT

A party attempting to foreclose on a defendant's home should not be allowed to bring a foreclosure action unless it is the named mortgagee or a party who has been assigned the mortgage. Nor should a party attempting to foreclose be allowed to bring a foreclosure action unless it has the legal right to enforce the note secured by that mortgage. On a motion for summary judgment in a foreclosure action, the moving party should be denied judgment if it fails to allege and prove that it has the right to enforce the note and foreclose upon the mortgage.

Those are the simple premises upon which this appeal is based. The record shows that HSBC had no legally enforceable interest in the note or the mortgage at the time that it brought this foreclosure action. Because HSBC lacked standing as a foreclosure plaintiff, the District Court did not have jurisdiction to hear the case or to enter a summary judgment against Frisbee.

HSBC tried to cure its lack of standing by attempting to acquire interests in the note and mortgage after it commenced suit. It may have obtained an assignment of the mortgage, but failed to acquire an enforceable interest in the note. The purported indorsement of the note that it did acquire did not meet the requirements of the UCC for indorsements, and MERS, as the party who attempted to give that indorsement, did not have any legal capacity that would allow it to indorse the note.

Thus, Frisbee argues that the judgment of foreclosure against him must be vacated and that this case must be dismissed due to the Plaintiff's lack of standing and the corresponding lack of jurisdiction in the District Court to hear this foreclosure action.

ARGUMENT

I. INTRODUCTION--A FORECLOSURE LITIGATION SYSTEM UNDER STRESS.

Maine's trial courts are repeatedly facing the issues presented by this appeal as they labor to deal with the present flood of foreclosure cases. This case presents the issue of whether the plaintiff had standing to initiate the foreclosure action, an issue continually arising in cases in the trial courts. Also presented by this case are issues arising out of a foreclosure plaintiff's pushing a case into the summary judgment process without adequate support for its motion, another problem being constantly faced by Maine's trial courts.

This appeal is the middle one in a series of five foreclosure case recently presented or now awaiting consideration by the Law Court. *Deutsche Bank v. Raggiani,* 2009 ME 120, ___ A.2d ___, and *Chase Home Finance, LLC v. Higgins*, 2009 ME 136, ___ A.2d ___, have recently been decided. Following this case are *Deutsche Bank v. Stratton,* KEN-09-533, and *Mortgage Electronic Registration Systems, Inc., v. Saunders*, CUM-09- 640. All five cases involve, in whole or in part, issues arising out of summary judgment decisions in the District Court. All but *Chase* involve questions of whether the plaintiffs proved that they were the parties entitled to enforce the notes secured by the mortgages being foreclosed upon. This case, along with *Deutsche Bank v. Stratton* and *Mortgage Electronic Registration Systems, Inc., v. Saunders,* involves significant standing issues.

These five cases arise out of the projected wave of over 6,000 residential foreclosure cases that swept across the Maine judicial system in the past year.

Center for Responsible Lending, *Maine Foreclosures: Impact and Opportunities*, available at http://www.responsiblelending.org/mortgage-lending/tools-resources/factsheets/me-foreclosure-fact-sheet.pdf, cited in the *Report of the Judicial Branch, Commission on Foreclosure Diversion*, (June 8, 2009). The volume of foreclosures in Maine in 2010 has the potential to be significantly higher. In the first three months after P.L. 2009, ch. 402 became effective on June 15, 2009, more than 3,000 residential mortgage loan defaults were reported to the Maine Bureau of Consumer Credit Protection. (As amended, 14 M.R.S.A. §6111 (3-A) requires mortgagees to notify the Bureau within 3 days of the sending any notice of default and right to cure letter to a mortgagor.) Maine Bureau of Consumer Credit Protection, *Quarterly Foreclosure Report-PL 402* to Joint Standing Committee on Insurance and Financial Services (September 23, 2009). Projected over a 12-month period, this data suggests an annual level of Maine mortgage loan defaults of 12,000. How many of these defaults turn into actual foreclosures is not known, but they are suggestive of a number of foreclosures for the year 2010 substantially above the 6,000 level projected for 2009.

The experience of a cross section of participants in Maine foreclosure litigation suggest that seventy percent of foreclosure cases are not responded to by homeowners. *Report of the Judicial Branch*, *id.* at 18. Undoubtedly, a significant portion of the remaining thirty percent of foreclosure cases involves homeowners attempting to represent themselves, since the legal services community estimates that it is able to represent only about six percent[4] of foreclosure defendants, there

[4] Nan Heald, *Miles to justice: Many traveled, many to go,* 24 Me. Bar J., 216 (2009)

are very few homeowners in foreclosure who can afford to pay for legal representation, and the pool of volunteer lawyers willing and able to provide pro bono foreclosure representation is small.

In a substantial majority of foreclosure cases where homeowners are represented, summary judgments are being denied at the trial court level. Examples of such denials, where there have been summary judgment denials with reasons stated, since the beginning of 2008, include the following: *Deutsche Bank v. Philbrick,* Re-07-70 (Me. Dist. Ct. 12, Farmington, January 28, 2008) (Stanfill, J.) (no evidence of note being assigned); *PHH Mortgage v. Mosher,* Re-08-10 (Me. Dist. Ct. 12, Farmington, May 6, 2008) (Stanfill, J.) ("issue as to whether plaintiff has any interest in note it seeks to enforce"); *Countrywide v. D'Amico*, RE-07-204 (Me. Dist. Ct. 10, Biddeford, December 3, 2008) (O'Neil, J.) (no indorsement of note; business records not attached to summary judgment affidavit); *LaSalle Bank v. Frye*, RE-08-41 (Me. Dist. Ct. 11, So. Paris, January 14, 2009) (Cote, J.) (plaintiff not the owner of note and mortgage when it commenced case); *Aurora Loan Services v. Simpson*, RE-08-07 (Me. Dist. Ct. 6, Wiscasset, April 16, 2009) (Hjelm, J.) (no evidence of facts supporting plaintiff's claim of holder status; proper notice of default notice to defendant not proved on summary judgment) *U.S. Bank Nat'l Ass'n v. Hartman*, RE-08-026 (Me. Dist. Ct. 7, Augusta, May 11, 2009) (Mulhurn, J.) (possibly improper indorsement; failure to produce indorsement in response to discovery requests); *Wells Fargo Bank v. Clark*, RE-08-295 (Me. Dist. Ct. 10, June 9, 2009) (standing issue--no mortgage assignment or note indorsement at commencement of case) (Douglas,

J.); *Quicken Loans v. Brown*, RE-08-258 (Me. Sup. Ct. Cum., February 12, 2009) (Warren, J.) *U.S. Bank v. Jaenisch*, RE-09-23 (Me. Dist. Ct. 13, Dover-Foxcroft, July 31, 2009) (Stitham, J.) (no proof of plaintiff's interest in note); *CIT v. Bernier*, 2008 Me. Super. LEXIS 166 (July 29, 2008, Cole, J.) (no mortgage assignment in summary judgment record); *Bank of New York v. Taggert*, 2009 Me. Super. LEXIS 105 (July 20, 2009, Cole, J.) (failure to prove that defendant was given the right to cure default). There are many more lower court summary judgment denials dealing with these issues where there are no written opinions.

An improperly presented summary judgment motion is time consuming and expensive for all involved including homeowners, and expensive for the justice system when pro bono lawyers are required to devote their limited hours responding to such efforts. In addition a summary judgment action that fails to prove a foreclosure plaintiff's right to judgment burdens the court hearing the motion and burdens this Court when an erroneous result leads to an appeal. One judge dealing with repeated deficient filings in foreclosure cases noted that such filings "are proving to be a colossal waste of judicial resources." *Wells Fargo Bank v. Davilmar*, 2007 NY Slip Op 51682U, 16 Misc. 3d 1133A, 847 N.Y.S.2d 906. The institutional lenders filing these motions in Maine should by now be experts in summary judgment procedure. Yet, as shown in *Deutsche Bank v. Raggiani* and *Chase* and the lower court cases listed above, the same failures in proof are happening time and again.

Moreover, with the astonishing levels of summary judgment denials in cases where homeowners are represented and presenting the issues to the trial court,

there simply must be an even greater incidence of cases where summary judgments that have not been properly supported are being entered against unrepresented homeowners—the vast majority of foreclosure defendants.

Lawyers representing homeowners facing foreclosure face additional unnecessary burdens from foreclosing lenders beyond defending against improper summary judgment motions. When defense attorneys undertake discovery to determine the facts as to the identity the holder of the note, compliance with default and notice to cure requirements, and details regarding payment histories and how amounts due were determined, they are faced with enormous challenges. A small window into this discovery quagmire was recently opened in the discovery opinion in *JPMorgan Chase v. Brousseau*, RE-09-023 (Me. Dist. Ct. 10, Biddeford, December 23, 2009) (Douglas, J.) where sanctions were imposed for substantial delays by the plaintiff in responding to interrogatories and requests for production of documents, and where deadlines in the Scheduling Order were ignored. Delays, multiple and questionable objections, and the necessity of pursuing M.R.Civ.P. 26(g) discovery conferences are common obstacles faced by foreclosure defense counsel. That process consumes lawyer time and client fees. Because there are usually no written motions, almost never any written orders, and almost never a record in proceedings under M.R.Civ.P. 26(g), it is almost impossible for discovery abuses occurring in the District Court to be exposed to the Law Court or for systematic abuses to be revealed.

An overriding reality to all of this is that, due to the fee shifting provisions contained in virtually all institutionally generated residential mortgage loans, including those in this case, homeowners, must defend themselves against the legal

fees claims of the plaintiffs, even for dealing with the kinds of issues described in this brief.

As a result of these burdens, the representation of homeowners in foreclosure cases has become so difficult, and so time consuming that very few private attorneys are willing to take on the defense of homeowners facing foreclosure, either on a fee paying or pro bono basis. Counsel for the few homeowners who are represented cannot responsibly ignore issues of whether a plaintiff has a legal right to enforce a mortgage and/or the note it secures, nor can they responsibly ignore summary judgment motions where proper elements of a foreclosing plaintiff's claims are not proved. Thus, they are expending their clients' meager funds on dealing with these issues if they are paid counsel, or, if they are pro bono counsel, they are depleting the limited numbers of volunteer hours that they are able to devote to pro bono cases. The resources of the legal services community are being consumed in these unnecessarily difficult and time consuming cases to such an extent that the numbers of homeowners that they can help are being diminished. And the number of volunteer lawyers willing and able to deal with these difficult and time-consuming issues is being severely limited.

In *Chase, id.,* the Law Court began to address some of the systemic problems being revealed in the foreclosure litigation system. This case presents an opportunity to continue that effort and to enforce established law in a manner that should reduce the repetitive filing of foreclosure cases that are premature, reduce the repetitive filing of deficient summary judgment motions, and reduce the volume of unsupported judgments being entered against unrepresented homeowners.

II. STANDARD OF REVIEW ON SUMMARY JUDGMENT.

This appeal is from a summary judgment decision of the District Court that produced a judgment of foreclosure in favor of HSBC . As recently stated, the Law Court will "review the entry of summary judgment de novo." *North Star Capital v. Victor,* 2009 ME 129, ¶ 8, ___ A.2d ___ . The parties' statements of material fact and record references are to be viewed in the light most favorable to the Appellant. *Id.; Reliance National Indemnity v. Knowles Industrial Services Corp*., *2005* ME 29, ¶ 7, 868 A.2d 220, 224. A foreclosure plaintiff is required to strictly comply with statutory requirements. *Camden National Bank v. Peterson,* 2008 ME 85, ¶ 21, 948 A.2d 1251, 1257.

On many contested summary judgment motions, a genuine issue of fact arises when the non-moving party disputes an essential fact put forward by the moving party. Here, HSBC Bank simply failed to assert the facts necessary to prove its right to judgment. Thus, the standard in *Levine v. R.B.K. Caly Corp*., 2001 ME 77, ¶ 5, 770 A.2d 653, comes into play: "A party who moves for a summary judgment must properly put the motion and, most importantly, the material facts before the court, or the motion will not be granted, regardless of the adequacy, or inadequacy, of the nonmoving party's response." See also *North Star,* 2009 ME 129, ¶8, ___A.2d ___.

III. HSBC IS NOT ENTITLED TO A JUDGMENT OF FORECLOSURE BECAUSE IT FAILED TO PROVE ITS RIGHT TO ENFORCE THE NOTE SECURED BY THE MORTGAGE.

A. A party asserting the right to enforce a note as a holder must prove that it is in possession of the note and that the note is indorsed to it or is indorsed in blank.

The Uniform Commercial Code, Article 3-A, set forth in 11 M.R.S.A. §§3-1101 et. seq.,[5] applies to promissory notes that are negotiable instruments and determines who is entitled to enforce them. *Maine Family Federal Credit Union v. Sun Life Assur. Co*., 199 ME 43, ¶ 10, 727 A.2d 335, 337. There is no exception in the UCC, or in Maine's foreclosure statutes, 14 M.R.S.A. §§ 6101 et. seq., that excludes the applicability of the Article 3-A of the UCC, "Negotiable Instruments", because a negotiable note is secured by a mortgage on real estate.

The note in this case is a negotiable instrument as defined in §3-1104. It is payable "to the order of Lender"--§3-1104(1)(a). It is payable at a definite time--§3-1104(1)(b). And, it does not contain any provision prohibited by §3-1104(1)(c). Thus it is an "instrument". §3-1104(2). HSBC claims that it is the "holder" of the instrument. (A. 38--¶ 3; A. 52--¶¶ 1 & 2; A. 43--¶1; A. 66--¶¶ 1 & 2). For it to be determined the holder of the instrument, HSBC must prove the facts (1) that it is in possession of the note and (2) that the note is indorsed, either to it or in blank. 11 M.R.S.A. §1-201(20)[6]. It is only that legal status as holder of the note that would give HSBC the right to enforce the note here. UCC §3-1301(1)[7].

With proof of possession of the note being a key fact in determining the right of HSBC to enforce the note, possession is a "material fact" because it has "the

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[5] Section 1-101 of Title 11 states that the Maine version of the UCC may be referred to as the "Uniform Commercial Code". For the remainder of this brief it is more simply referred to as the "UCC".

[6] Effective February 15, 2010, the correct citation for the definition of "holder" will be 11 M.R.S.A. 1-1201(21).

[7] Subparts (2) and (3) of §3-1301 define the rights of parties, who do not claim holder status, to enforce an instrument. HSBC does not assert a right to enforce the note under those subparts.

potential to affect the outcome of the suit." *Burdzel v. Sobus,* 2000 ME 84, ¶ 6, 750 A.2d 573, 575. M.R.Civ.P. 56(h) does not allow HSBC to rest on its legal conclusion that it is the holder of the note. Rather, the Rule requires that HSBC set forth in its statements of material fact and prove in its affidavits the actual facts that give rise to that claimed holder status, possession and indorsement, something that it utterly fails to do.[8]

B. HSBC did not allege or prove the facts necessary to establish its right to enforce the note.

1. In its statements of material fact HSBC did not state that it is in possession of the note.

HSBC does not assert that it is in possession of the note in either the 1st PSMF or 2nd PSMF. In the 1st PSMF, (A. 38, ¶ 3), HSBC asserts that it "is the current holder of the Note and the Mortgage", but it makes no assertion that it is in possession of the note or that the note has the necessary indorsement. HSBC makes the same assertion of holder status in Paragraph 1 of its 2nd PSMF, and again it makes no assertion that it is in possession of the note or that there is an indorsement.

HSBC 's assertion of "holder" status in its statements of material fact is a conclusion of law, not a statement of fact.[9] A statement that a party is the holder of a

[8] The summary judgment motion in this case was filed on August 21, 2008. As noted in *Chase*, 2009 ME 136 at ¶ 11, n. 2, the 2009 amendments to the foreclosure statutes and Rule 56 do not apply to summary judgment motions filed before their effective dates. Therefore those amendments do not apply to this motion for summary judgment and are not discussed in this brief.

[9] In *Deutsche Bank .v Raggiani*, 2009 ME 120 at ¶ 6, the Law Court faced a similar plaintiff statement of material fact asserting that the plaintiff was a holder of the note and mortgage, but without any statement of the underlying facts giving rise to that legal status. Raggiani denied the holder claim but did not raise on appeal the issue of the failure of the Deutsche

note is "an inadmissible legal conclusion"; it is proof of the facts of possession and indorsement that are required. *In re Wilhelm*, 407 B.R. 392, 402, (Bankr. D. Idaho, 2009). Only the court can make the legal determination of whether HSBC fits the definition of a holder of a note set forth in UCC §1-201(20). In order to make that determination, the court must first make the factual finding, based upon actual facts stated, by HSBC in its statements of material fact, and proved by record citations, that HSBC is in possession of the note and that it is indorsed. UCC §1-201(20). . There is nothing in HSBC 's two statements of material fact that would allow the court to make these two essential factual findings.

HSBC , as the moving party on summary judgment, has "the burden to demonstrate that each element of its claim is established without dispute as to material fact within the summary judgment record." *North Star,* 2009 ME 129 at ¶ 8. All essential facts must be in HSBC's statements of material fact; it does not suffice to include a material fact statement in any other document, such as a supporting affidavit, if the fact is not also included in the actual statement of material fact. *Chase,* 2009 ME at 126, ¶ 12, n. 4. If an essential fact is missing from the moving party's statement of material fact that party has failed to meet the requirement of M.R.Civ.P. 56(c) to show that it is entitled to judgment as a matter of law. That failure of proof requires that summary judgment be denied, "regardless of

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Bank to state and prove the fact elements that give rise to holder status. Thus, in that case the Law Court accepted the parties' characterization the claim of holder status as being a statement of fact, a characterization which Frisbee contests here.

the adequacy or inadequacy of the non-moving party's response." *Levine,* 2001 ME 77 at ¶ 5, 770 A.2d at 655.

2. HSBC did not prove in its supporting affidavits that it is in possession of the note.

HSBC fares no better if the Court considers record references outside of its statements of material fact, because HSBC offered no proof of possession of the note in the two Ocwen affidavits. There is no record citation for the "holder" assertion in Paragraph 3 of the 1st PSMF. (A. 38, ¶ 3). Overlooking that issue and going directly to Paragraph 2 of the 1st Ocwen affidavit, (A. 52, ¶ 2), the affiant simply says that HSBC "is the holder of a certain promissory note" without making any statement as to who is in possession of the note.

The same problem appears in the HSBC 's second summary judgment motion. There, the "holder" allegation appears in Paragraph 1 of the 2nd PSMF, (A. 43, ¶1), and a record citation is made to Paragraphs 2 & 3 of the 2nd Ocwen affidavit (A. 66, ¶¶ 2 & 3), although the note is not mentioned in Paragraph 3. Paragraph 2 of the 2nd Ocwen affidavit contains the same "holder" statement as is in the 1st Ocwen affidavit. It too is devoid of any statement as to who is in possession of the note. HSBC cannot evade its obligation to prove the underlying factual prerequisites to a determination of holdership status. The bare conclusory statements in the two Ocwen affidavits as to who is the holder of the note are "[c]onclusions of fact and law (that) do not belong in an affidavit filed in support for a motion for summary judgment." *Town of Orient v. Dwyer*, 490 A.2d 660, 662 (Me. 1985) citing 10 A. C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* §2783 at 486-89 (2d ed. 1983). See also *In re Wilhelm, id.*

A party opposing summary judgment is required by M.R.Civ.P. 56(h)(2) to respond to "the facts asserted" by the moving party. Thus Frisbee was not required to respond to bare legal conclusions in HSBC's statement of material fact, such as HSBC's assertion that it is a "holder." Nevertheless, in the 1st DSMF, (A. 40), and 2nd DSMF (A. 45--erroneously dated in 2008, instead of the correct 2009), Frisbee denied the assertions of HSBC that it was the holder of the note. Because HSBC never made the assertions in its two statements of material facts that it was in possession of the note, or that the note was indorsed, HSBC never presented Frisbee with the need or opportunity to respond to such assertions.

3. In its statements of material facts HSBC did not state that the note is indorsed to it or is indorsed in blank.

Since HSBC claims to be the holder of the note, it must set forth in its statements of material fact a statement that the note is indorsed to it or is indorsed in blank. 11 M.R.S.A. §1-201(20). HSBC fails to do this. Frisbee has already shown that HSBC 's two statements of material fact contain only conclusions of law on the holder issue. Just as they fail to establish the fact of possession, they fail to establish that there is an indorsement meeting the requirements of §1-201(20) and §3-1204. That failure requires a finding by the Court that a second essential fact is missing from HSBC 's statements of material fact, and that it has failed to meet its burden under M.R.Civ.P. 56(c) to show that it is entitled to judgment as a matter of law. *Chase,* 2009 ME 136 at ¶ 12, n. 4. That failure of proof is a further basis for requiring that summary judgment be denied, "regardless of the adequacy or inadequacy of the non-moving party's response." *Levine,* 2001 ME 77 at ¶ 5.

4. HSBC did not prove in its supporting affidavits or the attached documents that the note is indorsed to it or is indorsed in blank.

If the court looks behind HSBC 's deficient statements of material fact to search its supporting affidavits, proof of an affixed indorsement will not be found. The so-called allonge is not an effective indorsement of the note. "An indorsement on a separate piece of paper is technically called an allonge." *Freeport v. Ring,* 1999 ME 48, ¶ 10, n. 7, 727 A.2d 901, 905. However, for an allonge to be effective as an indorsement, it must be "affixed" to the note. §3-1204(1). *Id.*

There is no statement in the 1st Ocwen affidavit, (A. 52), about an indorsement. In the 2nd Ocwen affidavit, the only assertion about an indorsement is the statement that "[a] true copy of the Allonge to the Note endorsing the Note to Plaintiff is attached hereto as Exhibit C." (A. 66-67, ¶ 2, and A. 69). There is no statement in the 2nd Ocwen affidavit that the original allonge is affixed to the original note. In fact, the copy of the allonge, as it is attached to that affidavit as Exhibit C is unaffixed to anything--Exhibit C is a single piece of paper. (A. 69).

Moreover, the 2nd Ocwen affidavit offers strong evidence that the so-called allonge is <u>not</u> affixed to the note. In Paragraph 1 of the 2nd Ocwen affidavit, (A. 66, ¶ 1, last sentence), it states that the exhibits attached to the complaint "are true copies of the original documents". In Paragraph 2, (A. 66, ¶ 2), the affiant states that a copy of the note is attached to the complaint as Exhibit A. This "true copy" of the note, which is Exhibit A to the complaint, (A. 14-17), has no indorsement upon it or affixed to it. If Exhibit A to the complaint really is a "true copy" of the note as stated,

then the original note is unendorsed. Thus a fair reading of the 2nd Ocwen affidavit is that the note is unindorsed.

HSBC 's failure to prove that the allonge is affixed to the note is not cured by the language in the allonge stating the intent that it "shall be annexed to the original note . . . for the purpose of transferring same . . . " (A. 69). In similar circumstances, a document stating "[t]he undersigned . . . who affixes his signature as indorser . . . " was not sufficient to actually be an indorsement without the paper on which those words appeared being attached to the note. *Hills v. Gardiner Savings Institution*, 309 A.2d 877, 880 (Me. 1973) (construing a provision in the old Uniform Negotiable Instruments Act (formerly Ch. 188 of R.S. 1954) that was replaced by the UCC.) The purported allonge here states that it "shall be" annexed to the note, but there is no proof that it is in fact affixed to the note.

There are sound policy reasons for requiring HSBC to show that it is in possession of the note and that the purported allonge is affixed to it:

> 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.

Adams v. Madison Realty, 853 F.2d 163, 168 (3d Cir. 1988). The Third Circuit points out that courts are unanimous in upholding this requirement, stating that "the unanimity of the courts [in requiring that an indorsement be attached or affixed] in cases where the signature is separate from the instrument can be explained by a

judicial perception that it is sound policy to require the indorsement to be on the instrument." *Id. c*iting 1 Aldermann, *A Transactional Guide to the Uniform Commercial Code,* 633 n. 294 (2d ed. 1983). If Frisbee is required to pay HSBC even though it lacks possession and lacks the required indorsement, Frisbee could remain liable to Delta if it later turns out that Delta never ceased being the holder of the note.

The negotiability rules of the UCC at issue here were designed to benefit the financial services industry and to promote the free exchange of financial instruments without the necessity for subsequent holders of instruments to investigate the transactions giving rise to the instruments. See *Maine Family Federal Cr. Union*, 1999 ME 43 at¶ 36, 727 A.2d at 344. The Third Circuit, in *Adams* stated "[the bank] is not in a strong position to justify equitable relaxation in the formality of the Code. That longstanding provision (requiring indorsements to be affixed) was enacted, after all, for the benefit of the parties in [the bank's] position, commercial sophisticates in that trade in the secondary market for negotiable instruments." *Adams*, 853 F.2d at 169. As the Third Circuit went on to state "[f]inancial institutions, noted for insisting on their customers' compliance with numerous ritualistic formalities, are not sympathetic petitioners in urging relaxation of an elementary business practice. It is a tenet of commercial law that 'holdership and the potential for becoming holders in due course should only be accorded to transferees that observe the historic protocol'" citing Hillman, McDonnell, & Nickles, *Common Law and Equity Under the Uniform Commercial Code*, ¶ 11.02[1][b], at 11-17.

There being no proof that the purported allonge is "affixed" to the note, there is a failure by HSBC to prove that the note is indorsed to it or in blank. This, compounds HSBC failure to prove that it is in possession of the note. Thus, HSBC failed to prove either of the two essential facts needed for the court to make a determination that it is a holder of the note (§1-201(20)) with the right to enforce it pursuant to § 3-1301(1). This failure of proof by HSBC demonstrates that there are material issues of disputed facts that are fatal to its motion for summary judgment.

5. MERS signed the allonge, but it was not a party that could indorse the note because it was not a holder at the time of its purported indorsement.

MERS lacked the power to make an effective indorsement the note. For an indorsement to be effective, it must be made by an entity that meets the §1-201(20) definition of "holder". See §3-1201(2) stating "if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder." Here, Delta is the initial holder since the note is payable to it. (A. 14, ¶ 1). Negotiation by Delta to HSBC required transfer of possession to HSBC and indorsement <u>by Delta</u>.

The allonge at issue here did not negotiate the note to HSBC . It contains the following attempted indorsement, (A. 69):

> Pay to the order of
>
> **HSBC BANK USA, N.A., AS INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2007-2**
> without recourse, representation or warranty
> express or implied this 28th day of April, 2008.
>
> MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ACTING SOLELY AS NOMINEE FOR DELTA FUNDING CORPORATION
>
> By: _____/s/_____
> Name: Scott Anderson
> Title: Vice President

The entity attempting to indorse, Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Delta was not a holder of the note, because the note was not payable to it. The note is an "instrument payable to an identified person", §1-201(20). Here that identified person is Delta , not MERS.

The note, in Section 1 states:

> I promise to pay U.S. $662,000.00 (this amount called "Principal"), plus interest, to the order of the Lender. The Lender is **Delta Funding Corporation.**

(A. 14). MERS is not mentioned anywhere in the note. The note is not payable to MERS as nominee for Delta.

Contrast the language of the note with the mortgage, identified on the bottom of each of its 17 pages as a MERS form, (A. 18-35), defining who MERS is in Paragraph (**C**) on page one, (A. 18), and at the top of page 3, (A. 20), containing the following statement:

> I mortgage, grant and convey the property to MERS (solely as nominee for Lender and Lenders successors and assigns) with mortgage covenants, subject to the terms of this Security Instrument, to have and to hold all of the Property to MERS (solely as nominee for Lender and Lender's successors and assigns.

The mortgagee goes on to state on the same page: "I understand and agree that MERS holds only legal title to the rights granted by me in this Security Instrument . . ." (emphasis added). And on page 4, (A. 21, under Covenants), the mortgage states: "If I signed the Note, I will pay to Lender when due the principal and interest due under the note . . . " (emphasis added), thereby making clear that Delta remained the payee of the note, and not MERS as its nominee. MERS is never mentioned in the note, and there is nothing in the mortgage to suggest that MERS ever received any interest in the note. MERS received only the "legal title to the rights" explicitly granted to it in the mortgage, those legal rights being the ownership in a nominee capacity of the mortgage interest.

Issues involving MERS are ones of first impression in this Court, but they have been the subject of extensive litigation around the country. See *Landmark Nat'l Bank v. Kesler,* 289 Kan. 528, 216 P.3d 158 (Kan., 2009), *In re Mitchell,* 2009 Bankr. LEXIS 879 (Bankr. D. Nev.) and cases cited therein.[10]

The business of MERS has been described as follows:

> MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members' interests to MERS. MERS is listed as

[10] See also Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, UNIVERSITY OF CINCINNATI LAW REVIEW (*forthcoming* Spring 2010) (draft available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1469749)

> the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members.

Mortgage Electronic. Registration. Systems., Inc. v. Nebraska Depart. of Ins., 270 Neb. 529, 530, 704 N.W.2d 784, 785 (2005), a case in which MERS itself presented evidence and argued that it "does not own the promissory notes secured by the mortgages and has no rights to payments made on the notes. *Id* at 533.

The note and mortgage in *Landmark* contained language identical to the loan documents at issue in this case. There, the Kansas Supreme Court discussed decisions from a number of other courts in reaching its decision that MERS was not a necessary party to a foreclosure action. In discussing *Mortgage Elec. Reg. Sys. Inc. .* 270 Neb. at 530, the Kansas court in *Landmark* noted the finding that "MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages." *Landmark,* 216 P.3d at 164. In discussing *Bellistri v. Ocwen Loan Servicing, LLC,* 284 S.W.3d 619, 624 (Mo. App. 2009) the Kansas court in *Landmark* noted the finding in Missouri that "MERS never held the promissory note . . . " *Landmark,* 216 P.3d at 167. The Kansas court in *Landmark* also noted the finding of the Idaho bankruptcy Court that the "standard mortgage note language does not expressly or implicitly authorize MERS to transfer the note. *Id.,* citing In *re Wilhelm,* 407 B.R. 392 (Bankr. D. Idaho 2009). As can be seen from the notation on the bottom of each page of the note signed by Frisbee in this case, (A. 14-16), it is also a "Fannie Mae/Freddie Mac Uniform Instrument".

HSBC may not rely upon language in the mortgage assignment as authority for MERS to indorse the note in this case. However, it must be noted at the outset that the mortgage assignment cannot operate as an endorsement because it is not affixed to the note. The mortgage assignment, (A. 70), states that MERS is including in its assignment to HSBC , in addition to its rights in the mortgage, "any and all notes and obligations therein described or referred to, the debt respectively secured thereby, and all sums of money due and to become due thereon . . ." However, MERS could not convey interests that it did not own. The note gave it no interest in the note or the underlying debt--MERS is not even mentioned in the note. The mortgage gave it only the "legal title to the rights granted by" Frisbee in the mortgage, none of which included any interest in the note. As the court noted on identical facts in *Saxon Mortgage Services, Inc. v. Hillary*, 2008 U.S. Dist. LEXIS 100056, 2008 WL 5170180 (N.D., Cal. 2008) (unpublished opinion cited in *Landmark,* 216 P.3d at 167), "for there to be a valid assignment, there must be more than just an assignment of the deed alone; the note must also be assigned. . . MERS purportedly assigned both the deed of trust and the promissory note. . . However there is no evidence that MERS either held the promissory note or was given authority . . . to assign the note."

In this case, MERS was never a holder of the note; thus it never had the right or ability to make an effective indorsement of it. The mortgage assignment gave MERS no power to transfer the note, because neither the note nor the mortgage granted to MERS any interest in the note that it could transfer. Furthermore, the mortgage could not operate as an indorsement because it was recorded in the

registry of deeds, and not attached to the note. Consequently, the allonge gave no rights in the note to HSBC .

C. HSBC failed to produce the note and therefore was not entitled to judgment upon it.

"[A] *plaintiff producing the instrument* is entitled to payment if the plaintiff proves entitlement to enforce the instrument under section 3-1301 . . . " 11 M.R.S.A. §3-1308(2) (emphasis added), *Maine Family Fed. Cr. Union,* 1999 ME 43 at ¶ 10. By using the word "plaintiff" in this section of the UCC, the drafters were specifying what a party must do *in court* to prove a right to enforce the note. The plaintiff must produce the note. This requirement is affirmed in *Camber v. Bridges*, 520 A.2d 711 (Me. 1987) ("When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.") The only record evidence of the existence of the note is the photocopy of it attached to the Complaint as Exhibit A and the references to it in the two Ocwen affidavits (neither of which discloses whether the affiant ever saw the Complaint or its exhibits)[11]. The note itself has never been produced by HSBC . The presentation of only a photocopy of a note, especially in light of developments in the secondary market for mortgage loans, is not sufficient for a movant to show that it has the right to enforce the note. *In re Hwang,* 393 B.R. 701, 705 (Bankr. C.D. Ca., 2008).

There is no exception on a motion for summary judgment, in the UCC or anywhere else in Maine law, to the requirement that the moving party must produce

[11] The photocopy of the note attached to the Complaint as Exhibit A is referred in the 1st and 2nd Ocwen affidavits, but no copy of the note is attached to them. Rule 56(e) mandates that "all papers . . . referred to in an affidavit shall be attached thereto or served therewith." HSBC 's affidavits did not comply with this requirement.

the note in order to establish its right to enforce it. That there is no such exception was recognized by the United States District Court for the District of Maine. See *FDIC v. Bandon Associates,* 780 F. Supp. 60, 63 (D. Me. 1991) holding in a ruling upon a motion for summary judgment that "the party who has brought an action to recover on the promissory note against the maker is entitled to recover after production and admission of the validly executed note", citing *Camber, 520* A. 2d at 711. HSBC did not meet this simple but essential requirement of producing the note.

There are compelling reasons for requiring the production of the original note. First, it is by that act of production that a plaintiff claiming holder status proves its right to enforce the note. §§3-1301(1) & 3-1308(2). Second, it is only by requiring that the note be placed in the hands of the fact finder, that the fact finder is given the ability to determine that that instrument is genuine and that required indorsements are on or affixed to the note. §3-1204(1). Third, it is only by the production and surrender of the note to the court entering judgment that a party obligated on the note is protected against claims or suits by a subsequent holder of the note. A judgment entered in a summary judgment proceeding is no less a judgment then one entered after a trial, and the reasons for requiring the production of the note at summary judgment are no less then those requiring its production at trial.

1. Production of the note and its admission into the court record were required for HSBC to prove its right to enforce the note.

The summary judgment record closes at the time of the submission of the parties' final Rule 56(h) statements and supporting record material. *Deutsche Bank*

v. Raggiani, 2009 ME 120 at ¶ 7. Since only material contained in the summary judgment record may be considered by the court, *id.*, the original note must be in the summary judgment record by the time that the record closes in order for a plaintiff to meet the proof requirement of the UCC. See §3-1308(2) stating "a plaintiff producing the instrument is entitled to payment if the plaintiff proves entitlement to enforce the instrument under section 3-1301". The only way for the court deciding a motion for summary judgment to know that the moving party remains the party entitled to judgment on the note at the time of judgment is for that note to be in the summary judgment record at the time of the moving party's final submission.

HSBC may argue the provisions of Rule 56(c) allowing the attachment of sworn copies of business records to summary judgment affidavits should excuse it from producing the original note. Certainly §3-1308(2) provides no such excuse, and there should not be such an exception. A negotiable note is not just a business record--it is an operative instrument like no other piece of paper except for currency. Even if HSBC had stated in its summary judgment affidavits that it was in possession of the note (which did not occur) that still would not have proved that HSBC remained in possession at the time that judgment was entered eleven months later. Without the note having been produced with HSBC 's summary judgment papers and remaining in the court record, the requirement of §3-1308(2) was not met, and there was no basis for the court to determine, at the time of judgment on October 8, 2009, that HSBC , at that moment, remained (if indeed it ever was) a party entitled to judgment on that negotiable instrument.

The possibility of the transfer of a note between the time of the making of a motion for summary judgment and the time of a ruling upon it is not idle speculation. Many millions of negotiable homeowner notes are in circulation and are being constantly sold and re-sold. "[I]t is not uncommon for notes and mortgages to be assigned, often more than once." *Landmark,* 216 P.3d at 168, quoting *In re Schwartz*, 366 B.R. 265, 266 (Bankr. D. Mass. 2007). Instances of parties attempting to enforce homeowner's negotiable notes, even after they have transferred them are occurring. See *In re Nosek, Nosek v. Ameriquest Mortgage,* 386 B.R. 374 (Bankr. D. Mass. 2008), *affirmed in part, vacated in part sub. nom* 406 B.R. 434 (D. Mass. 2009), a case where Ameriquest began asserting, and continued to assert through multiple court hearings, the right to enforce a note five years after it had sold it. See also *In re Hwang,* 393 B.R. at 705, a case where IndyMac Federal Bank pursued efforts to enforce a note after it had sold it. Only by maintaining the requirement that the production and placement of the original negotiable note in the hands of the court rendering judgment, whether at trial or on summary judgment, as required by §3-1308(2), can a trial court properly enter judgment for the note holder.

2. Production of the note and its admission into the court record is the only means by which the court can determine that signatures are genuine and that necessary indorsements are affixed to the note.

Only by having the original note in its hands is a court able to determine that the original instrument truly exists in the plaintiff's hands, that it is free from alterations that might discharge an obligor on the note, §3-1407(2), and that any necessary indorsements are affixed to the note, §3-1204(1). Of crucial importance,

without the original note being in its hands, the court cannot determine whether there are any indorsements on the back of the last page of the note (a common occurrence in negotiable instruments transactions) that might affect the question of who the true holder of the note is. See *Hills,* 309 A.2d at 880, stating "[a]n instrument's usefulness in negotiation or transfer can only be evidenced by looking at it or any attachments and determining if any indorsements of any kind exist." Had HSBC produced the note with its summary judgment papers, there could not have been the genuine issue of material fact that now exists as to whether there is an allonge affixed to the note.

3. Production of the note and its admission into the court record is the only means by which a maker can be protected, after judgment, against subsequent demands for payment on the note.

When a person presents a negotiable check to a bank for payment, the bank pays the party presenting it and retains the check, or stamps it as paid, so that it cannot be presented for payment again. The same principle applies to negotiable notes. When a party liable on a note pays it, the holder must surrender the note to the paying party, §3-1501(2)(b)(iii), so that it cannot be presented again for payment. The same principle is also at work when a party seeks to enforce an instrument in court. Once the court renders judgment on the note, the cause of action for the indebtedness previously evidenced by the note is merged into the judgment, *Sweet v. Brackley,* 53 Me. 346 (1865), and the former holder is not entitled to retain possession of the note. The court retains the note so that the note cannot again be presented for payment to the defendant named in the court's judgment. 10 C.J.S., Bills and Notes, §325 (citations omitted); See also *McKirgan v.*

American Hospital, 37 Md. App. 85, 88, 375 A.2d 591, 583 (Md. 1977) ("The basis for this rule is that it protects a defendant against the negotiation of the instrument.") If a court, whether at trial or on summary judgment, fails to demand production of the note and to retain it in the court's files, the obligor is left vulnerable to subsequent negotiation and presentments and demands for payment.

D. There are genuine issues of material fact and HSBC was not entitled to judgment as a matter of law.

HSBC failed to establish that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law, because it has failed to assert the essential facts necessary for the Court to determine whether it is the holder of the note. Thus, there are genuine issues of material fact as to (1) whether HSBC is in possession of the note, and (2) whether the purported allonge is affixed to the note. On summary judgment the court considers "the evidence in the light most favorable to the party against whom judgment has been granted to decide whether the parties' statements of material facts and the referenced record material reveal a genuine issue of material fact." *Brawn v. Oral Surgery Assocs*., 2003 ME 11, ¶ 15, 819 A.2d 1014, 1022. Viewing the possession and indorsement evidence issues most favorably to Frisbee, the Court must conclude that the evidence presents genuine issues of material fact.

The question of the effect of the purported allonge by MERS does not even rise to the level of a dispute of material fact; rather, as a matter of law, that purported allonge could not, and did not, accomplish an indorsement of the note to HSBC . Because genuine issues of material fact do exist and because the MERS signature on the allonge cannot constitute an indorsement as a matter of law, HSBC

was not entitled to judgment as a matter of law.

IV. HSBC LACKED STANDING TO INITIATE THIS FORECLOSURE ACTION, AND THEREFORE THIS ACTION SHOULD BE DISMISSED AFTER THE JUDGMENT OF FORECLOSURE IS VACATED.

A. When it commenced this action, HSBC had no enforceable interest in the note or the mortgage, and therefore had no standing to commence this action for foreclosure upon Frisbee's home.

"Standing to sue means that the party, at the commencement of litigation, has sufficient personal stake in the controversy to obtain judicial resolution of the controversy." *Halfway House, Inc. v. Portland,* 670 A.2d 1377, 1379 (Me. 1996). Maine courts lack subject matter jurisdiction over complaints brought by parties without standing. *Stull v. First Am. Title Ins. Co.,* 2000 ME 21, ¶ 11, 745 A.2d 975, 979; *Smith v. Allstate Ins. Co.*, 483 A.2d 344, 346 (Me. 1984) citing 2 Field, McKusick & Wroth, *Maine Civil Practice* §77.1 at 361 and n. 18.30, (2nd ed. Supp 1981). The issue of standing may be raised at any time, and even on appeal for the first time. *Nemon v. Summit Floors, Inc.*, 520 A.2d 1310, 1312 (Me. 1987); *Smith v. Allstate, id.*

For a party to have the necessary personal stake to give it standing to bring a foreclosure action, it must have enforceable rights in the note and the mortgage securing it. 11 M.R.S.A. §3-1301; 14 M.R.S.A. §6321. HSBC lacked such a personal stake at the time it filed suit. On April 22, 2008, the date on which this action was filed, the note was payable to Delta , not HSBC. (A. 14). None of the documents attached to the complaint purporting to establish HSBC 's right to foreclose contain any reference to HSBC. When HSBC did eventually introduce the mortgage assignment and purported allonge into the summary judgment record, those

documents confirmed that that HSBC had no interest in the mortgage and note on the date when the complaint was filed.

There was no attempted indorsement of the note to HSBC , or in blank, until after the commencement of suit. Thus, HSBC did not meet the statutory requirements needed to give a party the right to enforce the note. 11 M.R.S.A. §1-201(20) and §3-1301(1). Lacking the right to enforce the note, HSBC had no right to commence a foreclosure action on the mortgage. See *Webb v. Flanders,* 32 Me. 175 (1850), holding that an owner of a mortgage cannot maintain an action upon it unless it has rights in the obligation secured by it. A "mortgagee without ownership of the mortgage instrument does not have an enforceable right." *Landmark,* 216 P.3d at 167, citing *In re Vargas,* 396 B.R. 511, 517 (Banker. C.D. Cal. 2008) which in turn quotes *Carpenter v. Longan,* 16 Wall. 271, 83 U.S. 271, 275, 21 L.Ed. 313 (1872) stating "[w]hile the note is 'essential' the mortgage is only 'an incident' to the note."

Only the mortgagee or a person claiming under the mortgagee may commence an action for foreclosure. 14 M.R.S.A. §6321. HSBC is not the named mortgagee. The mortgage assignment was not in existence at the time at the time that suit was commenced. Thus HSBC had no claim under the mortgage at the time that it commenced this action.

Lacking the status of a party entitled to enforce the note, and lacking the status of a party entitled to foreclose upon the mortgage securing the note, HSBC did not have standing to commence this foreclosure action. *See In re Foreclosure Cases*, 521 F. Supp. 2d 650, 653 (S.D. Ohio 2007) (“To show standing . . . in a foreclosure action, the plaintiff must show that it is the holder of the note and the

mortgage at the time the complaint was filed"); *see also id*.,noting that under federal law, like under Maine law, standing is a matter of subject matter jurisdiction.

B. HSBC 's subsequent acquisition of the mortgage and a purported interest in the note did not create standing for HSBC .

It has long been the rule in many jurisdictions that a party suing on a note, but lacking any legal interest in that note, does not have standing to commence a suit on the note, and that such a party cannot acquire standing in that wrongfully commenced case by later acquiring an interest in the note. See the long ago leading case of *Hovey v. Sebring,* 24 Mich. 232, 235, (1872) ("the plaintiff can only recover upon the cause of action he had at the commencement of his suit, and is not allowed to sue first and obtain his cause of action afterwards.").

The continued validity of that rule has been recently reconfirmed by decisions in foreclosure cases in a number of jurisdictions, including New York and Ohio. Several recent New York appellate courts have held that "a retroactive assignment cannot be used to confer standing upon the assignee in a foreclosure action commenced prior to the execution of the assignment." These decisions affirmed dismissals of foreclosure actions filed before the assignment of the mortgage or transfer of the note to the plaintiff. *Countrywide Home Loans v. Gress*, 2009 NY Slip Op 8989, 888N.Y.S.2d 914 (quoting *Wells Fargo Bank v. Marchione,* 2009 NY Slip Op 07624, 887 N.Y.S.2d 615).

The same rule holds in Ohio where the Ohio Court of Appeals ruled"[I]n a foreclosure action, a bank that was not the mortgagee when suit was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage."

Wells Fargo Bank Nat'l Ass'n v. Byrd, 2008 Ohio 4603, ¶ 16, 178 Ohio App. 3d 285, 291, 897 N.E.2d 722. The facts in *Wells Fargo v. Byrd* are similar to those in this case. At the time that the foreclosure action commenced in *Wells Fargo v. Byrd*, the bank had no interest in the note or mortgage, but when it filed for summary judgment months later, it attached to its motion an assignment that was dated a month after the complaint had been filed. *Id* at ¶ 2. The Ohio Court of Appeals held that a grant of summary judgment to Wells Fargo was in error and ruled that the dismissal of the Wells Fargo complaint without prejudice was required. *Id*. at ¶ 17.

Seven month later, in *Wells Fargo Bank Nat'l Ass'n v. Jordan,* 2009 Ohio 1092, another division of the Ohio Court of Appeals reached the same result, also on facts very similar to those now before the Law Court. In *Wells Fargo v. Jordan*, the originating lender was Delta Corporation, the same lender as in this case. Again, Wells Fargo had no interest in the note or mortgage when it commenced suit, and again the transfer documents appeared later in the suit and were dated after the suit was commenced.

In both *Wells Fargo v. Byrd* and *Wells Fargo v. Jordan* the Ohio Courts of Appeals discussed the question of whether Ohio's Rule 17(a), dealing with real parties in interest, can allow a party, without standing at the outset, to create standing by later acquiring interests in the notes and mortgages being sued upon. The court in *Wells Fargo v. Jordan* concluded that Rule 17(a) does not apply "unless the plaintiff had standing to invoke the jurisdiction of the court in the first place . . . " *Wells Fargo v. Jordan* 2009 Ohio at ¶ 21. The real party in interest rule in Maine,

M.R.Civ.P. 17(a), is nearly identical to the Ohio rule, and this court should adopt the same conclusions.

Maine Rule of Civil Procedure 17(a) is "adopted from the corresponding federal rule." *Tisdale v. Rawson*, 2003 ME 68, ¶ 17, 822 A.2d 1136, 1141-1142. In *Tisdale,* the court noted that Federal Rule 17(a) has been interpreted to allow liberal substitution of plaintiffs, but only "'when the change is merely formal and in no way alters the original complaint's factual allegations as to the events or the participants,'" quoting *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.,* 106 F.3d 11, 20 (2nd Cir. 1997). In *Tisdale,* the Court allowed the road commissioner of a road association to be substituted for the association since the association was unincorporated and had no capacity to sue in its own name. In allowing the substitution, the Court adopted an "understandable mistake" standard to allow the application of Rule 17(a). *Tisdale* at ¶ 19.

The bringing of this foreclosure case by HSBC at a point when it had no right to enforce the note under 11 M.R.S.A. §3-1301(1), and no right to foreclose under the mortgage under 14 M.R.S.A. §6321, can neither be characterized as a "mistake" of the kind dealt with in *Tisdale,* nor as being "understandable". The failure of HSBC in this case to come to court with standing is especially not "understandable", since, under very similar facts and in a decision entered six months before it began this case, HSBC was explicitly told that it could only bring a foreclosure action by "showing that it had standing . . . **when the complaint was filed** . . ." (emphasis by the court), *HSBC Bank USA v. Rayford,* 2007 U.S. Dist. LEXIS 86215 (U.S. D. C., So. Dist. Ohio, W. Div.).

In a decision based upon facts similar to those in the *Wells Fargo v. Byrd* and *Wells Fargo v. Jordan* cases, the United States District Court for the Northern District of Ohio made the following observation:

> There is no doubt every decision made by a financial institution in the foreclosure process is driven by money. And the legal work which flows from winning the financial institution's favor is highly lucrative. There is nothing improper or wrong with financial institutions or law firms making a profit -- to the contrary, they should be rewarded for sound business and legal practices. However, unchallenged by underfinanced opponents, the institutions worry less about jurisdictional requirements and more about maximizing returns.

In re Foreclosure Cases, 2007 U.S. Dist. LEXIS 84011 (D. Ohio, N.D. Oct. 31, 2007). The court there dismissed fourteen foreclosure cases without prejudice for lack of standing.

After disposing of the Rule 17(a) question in *Wells Fargo v. Jordan,* the Ohio Court of Appeals came to the following conclusions:

> In short, WFB [Wells Fargo] was not the real party in interest on the date it filed its complaint seeking foreclosure against Jordan. . . . Thus, WFB lacked standing to bring a foreclosure action against Jordan. As such, the trial court erred in granting summary judgment in favor of WFB because WFB was not entitled to judgment as a matter of law. We sustain Jordan's first assignment of error, reverse summary judgment, and order the trial court to dismiss the complaint without prejudice.

Id. at ¶¶ 25 & 26.[13] Frisbee urges the Court to make the same critical findings and rulings in this case.

In addition to protecting the integrity of the judicial process by requiring that a party have standing before invoking the jurisdiction of the court,

[13] This holding of the Ohio Court of Appeals was appealed to the Ohio Supreme Court, but that court declined without written opinion to entertain the appeal, thereby allowing the decision to stand. *Wells Fargo Bank Nat'l Ass'n v. Jordan,* 123 Ohio St. 3d 1407, 914 N.E.2d 204.

there is a compelling practical reason for requiring dismissal when a plaintiff lacking standing seeks to foreclose upon a defendant's home. Virtually all home mortgages contain fee-shifting clauses that make homeowners liable for the foreclosing plaintiffs' legal fees. A dismissal of an improperly commenced action will enable a trial judge, facing a request for an award of fees in a subsequent action, to easily separate and exclude fees for the previous improperly commenced action. A remand will leave a homeowner having to contest a fee application for the entire case that will include fees for the improper commencement of the case, and in a case such as this one, claims for the foreclosing party's legal fees right through an appellate court reversal; fees for which the homeowner should not be held liable.

V. CONCLUSION.

A. The District Court judgment in favor of HSBC should be vacated.

Because there were genuine issues of material fact, and because HSBC was not entitled to judgment as a matter of law, the District Court's judgment of foreclosure in favor of HSBC should be vacated.

The Law Court is urged to include in its order vacating the judgment of foreclosure a clear statement that, in lawsuits seeking judgment on negotiable instruments, the instrument must be produced and put into the record on a motion for summary judgment just as it must be produced and put into the record at trial. Such a rule will provide an elegant and effective method, easily understood by counsel and administered by trial courts, for dealing with these possession and indorsement issues. It will relieve defendants of the burden of having to oppose summary judgment motions on possession and indorsement issues. And it will have

the salutary effect of reducing the possibility of summary judgments being entered against unrepresented homeowners in favor of plaintiffs who might not be entitled to a judgment of foreclosure. Finally, it will fully and properly incorporate into the summary judgment process the same protections afforded at trial to note obligors.

B. After vacating the District Court Judgment in favor of HSBC , an order should be entered dismissing this case without prejudice.

HSBC commenced this foreclosure action without the legal standing to do so. The Law Court is urged to follow the recent holdings of the New York and Ohio appellate courts, and to enter an order dismissing this case without prejudice.

An opinion consistent with those in Ohio and New York holding that foreclosure cases commenced by plaintiffs not having enforceable interests in both the note and mortgage must be dismissed for lack of standing, even if enforceable interests are subsequently acquired, will reduce needless, repetitive and expensive (doubly so for homeowners facing fee shifting provisions) litigation over standing issues.

The definitive orders and rulings sought in this case have the potential to reduce the burden on the trial courts handling foreclosure cases, to reduce erroneous trial court decisions, to reduce litigation expenses of all parties, to reduce the burden on volunteer pro bono lawyers representing indigent homeowners, and to provide more just results. Such orders and rulings will have no negative impact upon foreclosure plaintiffs who commence actions with legal standing and who are prepared to properly prove their claims.

Dated: January 19, 2010

Respectfully submitted.

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CERTFICATE OF SERVICE

I, Thomas A. Cox, hereby certify that I have caused two copies of the foregoing brief to be served upon Leonard F. Morley, Jr. Esq., attorney for Plaintiff-Appellee HSBC Bank USA, N.A., and David Collins, Esq., attorney for party in interest Internal Revenue Service, by depositing them in the United States mail, postage prepaid, and addressed as follows:

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