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01-CV-2009-901113.00

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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

US BANK NA AS TRUSTEE v. ERICA CONGRESS
01-CV-2009-901113.00

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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

U.S. BANK, NA AS TRUSTEE FOR THAT CERTAIN POOLING AND SERVICING AGREEMENT, SERIES #2007-EMX1, POOL #40896,	)	
Plaintiff,	)	**CV-2009-901113.00**
v.	)	
ERICA SUMPTER CONGRESS,	)	
Defendant.	)	

U.S. BANK, NA'S POST-TRIAL BRIEF

COMES NOW the Plaintiff, U.S. Bank, N.A., as Trustee for That Certain Pooling and Servicing Agreement, Series #2007-EMX1, Pool #40896 ("U.S. Bank"), and respectfully submits this Post-trial Brief.

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I. INTRODUCTION

This is a simple ejectment case in which there is no dispute that the Defendant failed to make her mortgage payments for many months, forcing U.S. Bank to foreclose. There is also no dispute that U.S. Bank easily satisfied the statutory elements for ejectment and that the Defendant has the burden of proving any defenses which seek to challenge the validity of the prior foreclosure.

In an effort to meet her burden of proof in this case, the Defendant attempted to raise a vast array of purely technical and procedural defenses, none of which change the undisputed fact that she repeatedly defaulted under the terms of her loan. Simply stated, this is not a case in which the borrower claims that she should not have faced foreclosure. To the contrary, the Defendant does not even attempt to deny that she defaulted on her mortgage loan and that, as a result, she properly faced foreclosure and eviction. In essence, therefore, the Defendant concedes that she failed to abide by the terms of her mortgage, that foreclosure was the inevitable result of such failure on her part, and that the foreseeable and unavoidable consequence of that process is that she is required to surrender possession of the property.

Instead, the Defendant in the present case desperately hopes to distract this Court by attempting to raise almost entirely hypothetical questions about the proper identity of the party entitled to carry out the foreclosure. In other words, there is no question that the Defendant is due to be dispossessed of the property; leaving only questions about whether U.S. Bank is the entity with the right to seek the dispossession.

The Defendant attempted to raise those questions in the present case by improperly invoking contracts and transactions to which she is not a party and therefore on which she has no legal standing to rely. The law is clear that such attempts by the Defendant are improper and cannot serve as a basis for challenging the foreclosure and subsequent ejectment.

Further, the elaborate theories conjured up by the Defendant in this case represent a doomed attempt to circumvent entirely the application of modern commercial transaction law, including Alabama's version of the Uniform Commercial Code. Many of the objections raised by the Defendant to the manner and process by which the Defendant's loan and mortgage were assigned to U.S. Bank are specifically permitted and encouraged by the UCC.

Finally, when confronted with uncontroverted evidence that the Defendant's loan was properly assigned to U.S. Bank, the Defendant resorted to hurling unfounded accusations of forgery and fabrication. The Defendant's accusations are scurrilous and totally without any evidentiary support. Conspiracy theories and conjecture are no substitute for evidence and there is simply no basis whatsoever for any claim that the documents submitted by U.S. Bank are anything other than completely authentic.

In the end, this Court is left with a simple ejectment case in which the Defendant has thrown everything conceivable up on the wall of the courtroom in a desperate but ultimately vain attempt to try to find something that might stick. Despite her best efforts, however, it remains undisputed that the Defendant defaulted under the terms of her mortgage loan and was, as a consequence, subject to foreclosure. Further, there is no dispute that U.S. Bank is the holder of the Defendant's Note and therefore entitled to foreclose. As a consequence, this Court should enter judgment for U.S. Bank.

II. FACTS

A. Underlying Facts and Background of Foreclosure

This is a case for ejectment from real property following a non-judicial foreclosure. (*See* Complaint.) The former owner of the real property is Defendant Erica Sumpter Congress ("Defendant") who refinanced a mortgage on the real property located at 414 23rd Ave. NE, Birmingham, AL 35215 (hereinafter the "Property"). (*See* Plaintiff's trial Exhibit 2, the

Mortgage given by Defendant on the Property, hereinafter the "Mortgage.") Defendant refinanced the Mortgage with Mortgage Lender's Network on July 26, 2006. (*See* Mortgage.) The Mortgage identified Mortgage Electronic Registration Systems, Inc. ("MERS") as the mortgagee of record, strictly in a nominee capacity for Mortgage Lender's Network, its successors and assigns. (*See* Mortgage at p. 1.) The Mortgage secured an Adjustable Rate Note signed by Defendant on the same date in the amount of $104,400.00. (*See* Plaintiff's trial Exhibit 15, a copy of the original Note and Allonge, reviewed by the Court at trial and admitted as evidence, and hereinafter referred to collectively as the "Note," except where necessary to refer to the "Allonge" separately.)

Subsequent to its execution, Defendant's loan was securitized and pooled with other mortgage loans. (*See* Plaintiff's trial Exhibit 20 (Pooling and Servicing Agreement referred to hereinafter as "PSA"); Plaintiff's trial Exhibit 19 (Mortgage Loan Schedule referred to hereinafter as "Mortgage Loan Schedule").) This was accomplished by the use of a document called a Pooling and Servicing Agreement, which defines the rights and obligations of those managing the loans on behalf of the certificateholders of the trust. (*See* PSA.) It is undisputed that Defendant is neither a party to nor a third party beneficiary of the PSA. (Trial Transcript (hereinafter referred to as "T.") at 263:22-25, 264:1, 265:2-4, 265:11-14 (Testimony of Defendant's expert Thomas J. Adams)). Defendant agreed in the Mortgage that the Note could be sold one or more times without prior notice to the borrower (*See* Mortgage ¶ 20.)

The loans which are included in the trust are set forth in a Mortgage Loan Schedule that is attached to the PSA. (*See* Mortgage Loan Schedule.) Defendant's loan was securitized into a particular trust identified as the 2007-EMX1 Trust (hereinafter "Trust"),[1] and her loan is

[1] The Trust identified in the PSA is the same Trust on behalf of which U.S. Bank is prosecuting this action. (T. 149:7-18.) Although Defendant initially alleged that her loan was also identified as being included in one or

identified on the Mortgage Loan Schedule as a loan that is included in the Trust. (*See* Mortgage Loan Schedule; T. 275:16-19 (stipulation that Defendant's loan is included on the Mortgage Loan Schedule); T. 270:13-15 (Testimony of Thomas J. Adams that the Mortgage Loan Schedule lists the loans that are supposed to be in the Trust).)

The PSA contains representations and warranties among the parties thereto that upon the execution of the PSA all loans listed on the Mortgage Loan Schedule were transferred into the Trust in compliance with the terms of the PSA. The PSA was filed with the Securities and Exchange Commission on March 27, 2007 as an exhibit to a Form 8-K, which was filed under oath and recited that the Trust was formed and funded with certain mortgage loans on March 12, 2007. (*See* Plaintiff's trial Exhibit 20 (Form 8-K).) The operative provisions conveying these Mortgage Loans are also found in the PSA and read in pertinent part as follows:

> The Depositor,[2] concurrently with the execution and delivery hereof, does hereby assign to the Trustee[3] in respect of the Trust Fund without recourse all the right, title and interest of the Depositor in and to (i) the Mortgage Loans, including all interest and principal on or with respect to the Mortgage Loans due on or after the Cut-off Date (other than Monthly Payments due in the month of the Cut-off Date); and (ii) all proceeds of the foregoing.

(PSA at § 2.01(a)) (emphasis added.)

> In connection with such assignment, and contemporaneously with the delivery of this Agreement, except as set forth in Section 2.01(c) below and subject to Section 2.01(d) below, the Depositor does hereby (1) with respect to each Mortgage Loan, deliver to the Master Servicer (or an Affiliate of the Master Servicer) each of the documents or instruments described in clause (ii) below (and the Master Servicer shall hold (or cause such Affiliate to hold) such documents or instruments in trust for the use and benefit of all present and

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more other trusts, she subsequently was required to withdraw that allegation and concede that her loan was solely included in the trust on behalf of which U.S. Bank is prosecuting the present action. (T. 433:1-245, 434:1-7.)

[2] The Depositor represented and warranted to the Trustee that it had good title to, and was the sole owner of, the mortgage loans. (PSA § 2.03(b).)

[3] U.S. Bank, as Trustee, acknowledged the assignment and receipt of the mortgage loans, as well as the delivery of the custodial files to it. (PSA § 2.05(a).)

> future Certificateholders), (2) with respect to each MOM Loan,[4] deliver to, and deposit with, the Trustee, or the Custodian, as the duly appointed agent of the Trustee for such purpose, the documents or instruments described in clauses (i) and (v) below. . . .
>
> (i) The original Mortgage Note, endorsed without recourse to the order of the Trustee and showing an unbroken chain of endorsements from the originator thereof to the Person endorsing it to the Trustee . . . .

(PSA at § 2.01(b)) (emphasis added.) Furthermore, in § 2.02, the Trustee acknowledged receipt of each of the documents referenced in § 2.01(b)(i), thus acknowledging receipt of the Defendant's original Note with an unbroken chain of endorsements. (*See* PSA § 2.02).

GMAC Mortgage[5] is the servicer for the Trust which owns the Defendant's loan. (T. 124:18.) GMAC also has a power of attorney to act on behalf of U.S. Bank. (T. 125:11-14.) GMAC began servicing Defendant's loan in February 2007, and Defendant first defaulted on the Mortgage and Note in that same month. (T. 130:1-20; Plaintiff's Exhibit 3, the payment history for the Defendant's loan.) A default letter was sent to Defendant by GMAC, informing her of the default under the Note and Mortgage and giving her the opportunity to cure the default. (T. 130:8-9; Plaintiff's trial Exhibit 4 (May 7, 2007 Breach Letter).) Over the next year, Defendant remained in default and was sent five additional breach letters, informing her of her default on the loan and offering her the opportunity to bring the loan current. (T. 133-37; Plaintiff's trial Exhibits 5-9 (Breach Letters).) On May 5, 2008, Defendant was sent a last default letter and this is the letter which immediately preceded the foreclosure on the Property after Defendant failed to bring the loan current. (T. 137-38; Plaintiff's trial Exhibit 9 (May 5, 2008 Breach Letter).) GMAC attempted to allow Defendant to complete one more repayment plan in June 2008, but

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[4] Because the loan subject to these proceedings is a "MOM Loan" the only documents that were needed were those described in categories (i), (ii), and (v). A MOM Loan is defined as one that is held by MERS as mortgagee, but solely as nominee for the lender.

[5] GMAC and Homecomings merged in mid-2008. Defendant dealt with Homecomings as the servicer of her loan. Homecomings is now known as GMAC, and all references throughout this brief refer to GMAC and not Homecomings.

that plan failed due to Defendant's checks being returned for insufficient funds. (T. 139:4-20.) Defendant's loan was approved for foreclosure on June 24, 2008 and the loan was referred to a law firm to perform a foreclosure. (T. 139-41; Plaintiff's trial Exhibit 3.) At the time the Defendant's loan was approved for foreclosure, it was past due for the March, April, May and June 2008 payments. (T. 140-141.)

Defendant claims that during this time she spoke with someone at GMAC who told her that the foreclosure would not go forward because she was working with GMAC's loss mitigation department. (T. 441:5-17.) Defendant never received any agreement in writing from GMAC that the foreclosure would be delayed, postponed, or cancelled. (T. 455:3-8.) GMAC's corporate representative, Bill Haughton, testified that it was the policy of GMAC when talking to a borrower about loss mitigation or options to avoid foreclosure that the borrower is told that foreclosure will continue until an agreement is reached in writing and a plan approved. (T. 140:2-10.) The borrower is never told that the foreclosure will be put on hold. (T. 140:11-14.) It is incumbent on the borrower to follow up with GMAC and the borrower cannot be forced to participate in the loss mitigation process. (T. 140:15-23.) GMAC's business records do not indicate that any such conversation as testified to by Defendant ever occurred. (T. 141-43; Plaintiff's trial Exhibit 3.) Once notes are inserted into GMAC's business records, they cannot be changed. (T. 98:7-14, 143:22-25, 144:1-3.)

In June 2008, Defendant's loan was referred to Colleen McCullough at Sirote & Permutt, P.C. to begin foreclosure proceedings in accordance with Alabama law. (T. 44:16-18, 139:21-25.) McCullough was the attorney who oversaw the foreclosure of Defendant's loan. (T. 43:11-44:9.) In the referral, Homecomings, as the mortgage servicer of Defendant's loan, informed McCullough that the Trust was the current holder of the Note. (T. 59-60.) After ordering and reviewing a title report for the Property, McCullough decided that an assignment to the Trustee

was necessary to secure title insurance because MERS was the then-mortgagee of record. (T. 49:20-25, 51:11-22, 78.)

In accordance with the signing authority granted to her by MERS and Homecomings (the predecessor in interest to GMAC), McCullough executed an Assignment of Mortgage (Plaintiff's Trial Exhibit 13) from MERS to U.S. Bank, as Trustee for the Trust. (T. 62.) Her signature was then notarized as required by Alabama law (T. 47:16-21, 70.) At trial, McCullough confirmed (1) that the signature on the Assignment was, in fact, her signature, (2) that she intended the Assignment to be accurate, (3) that she has no reason to doubt the accuracy of the Assignment, and (4) that she executed the Assignment in accordance with the signing authority granted to her by MERS and Homecomings. (T. 79.) McCullough further testified that the Assignment is meant only to formally assign the mortgage and change the record mortgagee in the Probate Records, and that it is not intended to effectuate a negotiation of the Note. (T. 76, 78:17-19.) She explained that the language of the Assignment is similar to that of a quitclaim deed, operating to vest whatever interest MERS may have, if any, in the Mortgage and underlying debt. (T. 55.)

McCullough further confirmed that she prepared the Acceleration Letter and that it was sent to Defendant, and that notice of the foreclosure sale was published in accordance with Alabama law. (T. 75-76.) The Assignment was recorded on the same day as, although prior to, the Foreclosure Deed. (T. 53-54.)

At the foreclosure sale on August 12, 2008, U.S. Bank, N.A. as trustee for that certain pooling and servicing agreement, Series # 2007-EMX1, Pool #40896 was the highest and best bidder and the Property therefore reverted to U.S. Bank. (Plaintiff's trial Exhibit 4, which is a copy of the foreclosure deed executed and delivered in regard to the sale, referred to hereinafter as "Foreclosure Deed.") U.S. Bank's bid at the sale was $49,600.00. (Foreclosure Deed.) The value of the Property just prior to the foreclosure sale was estimated to be $61,500.00. (T.

493:13-15; Plaintiff's trial Exhibit 22 (Broker's Price Opinion of the Property just prior to the foreclosure sale).) Even though Defendant attempted to testify to the value of the property at trial, her testimony was based on the tax appraisal of the Jefferson County Tax Assessor. (T. 461:1-3.)

Following the foreclosure sale, U.S. Bank demanded possession of the Property from Defendant. (*See* Plaintiff's trial Exhibit 14 (Demand for Possession).) Defendant has failed to deliver possession of the Property. (T. 469:14-17.) The Property is currently in a serious state of disrepair, as illustrated by pictures taken during the week of trial. (*See* Plaintiff's trial Exhibits 24 and 25.) In fact, Defendant no longer even lives in the house and has moved all of her personal belongings out of the house. (T. 463:9-20.) Defendant also testified that no other person is living in the house at this time. (T. 465:12-23.) No one other than GMAC has ever contacted Defendant about the debt owed on the Note and Mortgage. (T. 464:3-12.) Specifically, none of the parties listed in the endorsements on the Note (EMAX Financial Group, LLC and Residential Funding Company, LLC) or in the PSA (Residential Asset and Securities Corporation) have called Defendant about the loan or attempted to collect the debt. (T. 464:3-12.)

B. <u>Summary of the Testimony of Thomas J. Adams</u>

Defendant called Thomas J. Adams ("Adams") as a purported expert witness in this case to testify to the practices of the mortgage-backed securitization industry. (*See* Defendant's Rule 26 Expert Disclosures.) Adams testified that he is not an expert in the Alabama Uniform Commercial Code and is only testifying to "ownership" of the Note. (T. 267-268.) Adams is a lawyer from New York who formerly worked with certain insurers of mortgage-backed securities. (T. 212-13.) Adams previously gave an Affidavit in these proceedings stating that the Trust did not own Defendant's loan because the documents he reviewed did not conform to the

requirements of the PSA. (*See* Adams's Aff., filed March 8, 2010.) Adams's opinion was based on a copy of the Note that did not include the endorsements and the Allonge that the original Note does include. (*See* Plaintiff's trial Exhibits 15 and 18 (copies of original Note and Allonge).) Because these issues were raised by Defendant in her motion to set aside the judgment in favor of U.S. Bank in the previous trial, U.S. Bank requested that GMAC send it the original Note and collateral file. This original Note and collateral file were inspected by this Court, and a copy of the entire file was introduced into evidence in this case. (Plaintiff's trial Exhibit 18.)

Adams's issue with the Note consists of the endorsements on the Note, which he said did not conform to the endorsement requirements set forth in the PSA. (*See* Adams's Affidavit; T. 245:16-23.) Adams's initial Affidavit contended that the PSA required that the Note be specifically endorsed to U.S. Bank, as trustee for the specific trust name. (*See* Adams's Affidavit; T. 245:16-23.) Regarding this point, the PSA provides that the Note should be endorsed as follows: "The original Mortgage Note, endorsed without recourse to the order of the Trustee and showing an unbroken chain of endorsements from the originator thereof to the Person endorsing it to the Trustee. . . ." (PSA at § 2.01(b)(i) (emphasis added.) The original Note is so endorsed, with the last endorsement on the Allonge as follows: "PAY TO THE ORDER OF U.S. Bank National Association as Trustee WITHOUT RECOURSE . . . ." (Plaintiff's trial Exhibit 15 and 18.)

Adams testified that the endorsement on the Allonge does not reference the particular trust that U.S. Bank is acting on behalf of when taking ownership of the Note pursuant to the PSA. (T. 236:17-21.) Adams later conceded, however, that the endorsement on the Allonge was effective to transfer the Note to U.S. Bank, as trustee. (T. 259:15-19.) Adams further conceded that the endorsement on the Allonge complies with the § 2.01(b)(i) of the PSA. (T. 299:12-16)

("Q: . . . [T]hat specific endorsement, then, at the end of the day to U.S. Bank trustee, complied with the terms of the pooling and servicing agreement, doesn't it? A: Yes.").)

Adams's opinion, when pressed by the Court, is merely that "there's nothing that would lead me to change my conclusion that I can't know for certain that this -- there is no way for me to know that this trust owns this note." (T. 256:11-14.) Adams's position is apparently based on his understanding that "there is no evidence that this trust was the owner of this note." (T. 267:2-8.) In formulating his opinion, Adams did not review the Mortgage Loan Schedule for the Trust. (T. 269:15-24.) Adams admitted, however, that the Mortgage Loan Schedule lists the loans that are in the Trust. (T. 270:13-18.) U.S. Bank introduced the Mortgage Loan Schedule as its trial Exhibit 19 and Defendant stipulated that Defendant's loan was, in fact, contained within the Mortgage Loan Schedule. (T. 275:16-23.) Adams agreed that the PSA sets forth within its terms how mortgage loans are transferred to the Trust and that the loans on the Mortgage Loan Schedule were represented within the PSA as having been transferred to the Trust contemporaneous with the closing of the PSA. (T. 278-284.) Adams also agreed that the only evidence before the Court regarding which trust owns the Defendant's loan is the Mortgage Loan Schedule showing that the Defendant's loan was transferred to the Trust via the PSA. (T. 321:11-14.) Adams's ultimate opinion under cross-examination on the ownership of the Defendant's loan was only that he "can't tell if the plaintiff owns the mortgage." (T. 322:15-18.)

Defendant attempted to introduce a "Free Writing Prospectus" for a different trust as evidence in this case. (T. 177:14; Defendant's trial Exhibit 2, hereinafter "FWP".) Defendant's Exhibit 2 is a "Free Writing Prospectus" that lists a preliminary schedule of loans that may make up the pool of mortgages to be securitized into the anticipated trust, 2006-EMX9. (FWP.) Using this exhibit, Adams attempted to testify that Defendant's loan was listed in another mortgage loan schedule, thereby implying that the 2006-EMX9 trust owns, or could own, Defendant's

loan. (T. 246:20-25, 247:1-5.) Defendant's counsel represented to the Court that Defendant's loan information was listed in both trusts. (T. 274:13-15) ("Well, but it's in two different trusts. It's in '06, the EMX9, and its in '07, the EMX1."); (T. 275:11-12) ("It's the same information that's in the '06-EMX9."); (T. 237:15-23).)

The FWP is not a pooling and servicing agreement, but is merely a preliminary disclosure document. (T. 310:21-25.) The loan number for Defendant's loan is, in fact, in the FWP. (*See* FWP; T. 172-177.) The Defendant went on to introduce the pooling and servicing agreement for the 2006-EMX9 trust, but failed to submit the mortgage loan schedule for the 2006-EMX9 trust with that agreement, which would have shown whether Defendant's loan ended up in the final pool of mortgage loans for the 2006-EMX9 trust. (T. 289:13-25, 290:1-22; Defendant's trial Exhibit 9 (pooling and servicing agreement for the 2006-EMX9 trust).) It was later determined that Defendant's loan is not contained within the final mortgage loan schedule for the 2006-EMX9 trust. (T. 433-434.) Defendant's counsel therefore withdrew their argument that the Defendant's loan was contained in the 2006-EMX9 trust and stipulated that the only trust that Defendant's loan appears in is the Trust in this case. (T. 433.)

C. Summary of the Testimony of Ira Mark Bloom

Defendant hired Ira Mark Bloom, a professor at Albany Law School, as an expert in New York law governing trusts and estates. (T. 337.) Bloom admitted that he does not consider himself to be an expert in Alabama law, in UCC law, or REMIC tax law. (T. 350:14-16, 363:9-15, 368:12-20, 393:10, 375:23-25.)

Bloom was offered primarily to testify that, in his expert opinion, New York law holds that any act taken by a trustee that exceeds the trustee's authority is void. (T. 360:23-15.) While Bloom testified that he could not offer an opinion as to the burden of proof for a claim of non-compliance with trust documents, he later agreed that it is generally true that a Trustee is

presumed to have acted in good faith, and that the burden of proving a breach of duty is on the party asserting the breach (T. 354:3-9, 357:10-25.) Bloom admitted that Defendant is not a party or third-party beneficiary of the PSA. (T. 358:10-15.)

Although admittedly not an expert in New York UCC law, Bloom believes that the Note did not become an asset of the Trust because of the problems he perceives with the method of attaching the Allonge to the Note, and, consequently, he believes that the "owner" of the Note is EMAX. (T. 344:16-18, 348:17-20.) Bloom testified that it was his understanding that New York is one of only two states that has not yet adopted the Revised UCC. (T. 341:19-24). Bloom testified that, in his non-expert opinion, New York's version of the UCC requires that an endorsement be on the instrument itself or on a paper firmly affixed to the instrument. (T. 344:20-345:4.) While Bloom believes that gluing or stapling the Allonge to the Note would satisfy New York UCC law, he did not believe that a rubber band would suffice because "New York has—you know, is very concerned about staples." (T. 346:2-8, 363:21-24, 379:15-16.) Bloom is, however, unaware of any case holding that a rubber band is insufficient to satisfy New York law. (T. 365:3-6.)

Bloom admitted that he was unaware of any evidence, other than his questions about the method of attaching the Endorsement to the Note, that the Note was not transferred to the Trust by the date specified in the PSA. (T. 422:23-4523:3.). Regarding evidence of the transfer of the Note to the Trust, the following exchange took place:

> Q. Okay. So in the absence of your objection to allonge, you have the evidence I just mentioned, the representations, the warranties, the listing in the mortgage loan schedule, the endorsement to the trustee, and you can't tell me any evidence over here that it wasn't done, right?
>
> A. I'm not aware of any evidence as to when or—when it was done.
>
> Q. And you don't know one way or the other when that note with the allonge was delivered to the trust, right?

A. To the trustee, no.

. . .

A. Yeah. I mean, I guess as far as I know, I don't know any evidence as to when the transfer occurred.

Q. You have no opinion and you cannot say one way or the other whether that note with the allonge was transferred by the cutoff date?

A. I can absolutely not say that one way or the other.

(T. 425:23-426:9, 426:23-427:5.) He also could not provide a citation or case name for any case in which a third party had a right to challenge the Trust. (T. 421:10-422:7.)

Bloom also examined a few of the provisions of the PSA. He admitted that § 10.01 of the PSA, which purportedly prohibits U.S. Bank from accepting any assets into the Trust if there may be adverse tax consequences and no opinion of counsel is otherwise provided, is not intended to benefit Defendant. (T. 371:19-24.) Bloom also has no knowledge as to whether an opinion of counsel was provided in the event that the Trust accepted Defendant's loan beyond the cutoff date. (*See* T. 373:3-8, 378:20-22.) Bloom recognized that, even though one section of the PSA states that the agreement is to be governed by New York law, other PSA provisions are intended to be governed by the law of other jurisdictions. (T. 388:20-25.) Bloom also testified that the representations and warranties contained in the PSA could be mere recitals and do not convince him that the actions described therein actually occurred. (*See* T. 401:17-402:10.)

Although offered only as an expert in New York trust law, and admittedly not as an expert in UCC law or, presumably, property law nationwide, Bloom offered the following general propositions: that one who has the note can sue on the mortgage (T. 432:5-12), that the holder of the Note can foreclose (T. 394:6), and that Defendant's Note and Mortgage are governed by Alabama, rather than New York, law (T. 393:16-24).

D. Summary of the Testimony of Chase Greene

Chase Greene, a lay witness, was offered by Defendant to testify about the ease of creating documents. (T. 195.) Greene, a Staples copy center employee, was specifically offered only as a lay witness, and Defendant's counsel stated that he was not offering Greene as an expert witness. (T. 196, 204:2-7.) In fact, Greene testified that he had no specialized training in document verification (T. 206.)

Greene, who admitted that he had no personal knowledge as to whether the Allonge was fabricated, testified that it appeared that one of the signatures was a digital signature and that it had been digitally re-sized to fit a box on the endorsement. (T. 208, 199-201.) He further testified that another signature was placed on the document via a rubber stamp. (T. 202.) Greene's sole basis for believing that the Allonge was fabricated was the ease of its reproduction. (T. 198:6, 208:23-209:7.)

III. RELEVANT LEGAL STANDARDS

A. Burden of Proof

1. U.S. Bank's burden of proof.

As the Plaintiff, U.S. Bank bears the burden to prove its case for ejectment by a preponderance of the evidence. To prove its case, U.S. Bank was required to prove that it has both legal title to the Property and a right to immediate possession. *See Muller v. Seeds*, 919 So. 2d 1174, 1177 (Ala. 2005).[6] Furthermore, if U.S. Bank produces the Mortgage, the Foreclosure Deed, and the demand for and refusal to deliver possession, then it will have established all of the necessary elements of ejectment. *See id.*

[6] U.S. Bank's Counsel is currently contesting whether the elements set forth in *Muller* are the actual necessary elements under Ala. Code § 6-6-280 to succeed in an ejectment action, particularly the element regarding the need for a demand for possession. As service of the demand for possession is not at issue in these proceedings, Counsel has cited *Muller* as containing the elements for this ejectment action and has complied will all such stated elements.

2. Defendant's burden of proof.

(a) Defendant bears the burden of proving her affirmative defenses.

The Alabama Supreme Court has held that the proponent of an affirmative defense bears the burden of proving the essential elements of his affirmative defense. *Ex parte Ramsay*, 829 So. 2d 146, 152 (Ala. 2002) (quoting in turn *Ex parte Blue Cross & Blue Shield of Alabama*, 773 So. 2d 475, 478 (Ala. 2000))); *see also McCullough v. McCullough*, 24 So. 2d 123, 124 (Ala. 1945) (holding that a mortgagor "who claims credits on or full payment of the mortgage indebtedness [ ] has the burden to establish it by satisfactory evidence . . . .").

In an analogous situation, the Alabama Court of Civil Appeals recently observed that, in the foreclosure context, where a borrower seeks to defend the foreclosure by asserting payment of the debt, payment constitutes an affirmative defense, and the borrower bears the burden of proof. *See Ross v. Rogers*, 25 So. 3d 1160, 1167 (Ala. Civ. App. 2009) (citing *Adams v. Baker*, 105 So. 2d 703 (Ala. 1958)). In this case, Defendant asserted the general defense of "wrongful foreclosure" to U.S. Bank's action for ejectment. At trial, Defendant attempted to prove (a) that U.S. Bank was not the owner or holder of the Note, and (b) that U.S. Bank had failed to comply with the terms of the PSA. First, there is no Alabama authority which permits a defaulting borrower to defend an ejectment by alleging that a Trustee did not comply with the terms of a PSA.[7] Second, if these allegations do bear on the ejectment issue, these issues are affirmative defenses, much like the defense of payment, for which Defendant bears the burden of proof. *See Ross*, 25 So. 3d at 1167; *see also Hawkins v. LaSalle Bank, N.A.*, 24 So. 3d 1143, 1152 (Ala. Civ. App. 2009) (recognizing wrongful foreclosure as an affirmative defense to claim for ejectment).

[7] Indeed, the federal courts have recently held that "whether the assignment to [the Trustee] followed the chain dictated in the PSA is not probative of the validity of [the Trustee's] interest . . . ." *Peterson-Price v. U.S. Bank Nat. Ass'n*, 2010 WL 1782188, *10 (D. Minn. 2010).

(b) Defendant must prove her allegations of forgery by clear and convincing evidence.

Throughout trial, Defendant asserted and attempted to elicit evidence that the Assignment and Allonge were forged. Alabama law requires Defendant to provide "clear and convincing evidence" that the Assignment and/or Allonge were forged. *See Finley v. Finley*, 480 So. 2d 1178, 1180 (Ala. 1985); *Thompson v. Mitchell,* 337 So.2d 1317, 1318 (Ala. 1976). Clear and convincing evidence is "[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion." *L.M. v. D.D.F.*, 840 So. 2d 171, 179 (Ala. Civ. App. 2002) (internal citations and quotations omitted; *see also* Ala. Code § 6-11-20(b)(4) ("Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt."). For example, in *Thompson v. Mitchell,* the Court held that where a deed is attacked as a forgery, the attacking party must "show that it was a forgery by clear and convincing evidence, reaching a high degree of certainty, leaving no doubt of the truthfulness of such fact." 337 So. 2d 1317, 1318 (Ala. 1976).[8]

B. Alabama Law, and not New York Law, Applies to this Case.

In an effort to distract and sidetrack this Court in the present case, the Defendant introduced a veritable boatload of confusing and ultimately inconsequential issues into her defense. Paramount among these red herrings[9] is the Defendant's insistence that New York trust,

[8] *See also Briggs v. Glass*, 420 So. 2d 46, 48 (Ala. 1982) (evidence offered by the appellants that the deed was a forgery failed to achieve the "high degree of certainty, leaving no doubt of the truthfulness of such fact" standard that is required to invalidate an acknowledged instrument); *Chapman v. Turner*, 255 Ala. 423, 425 (Ala. 1951) (complainant failed "to show by clear and convincing evidence reaching a high decree of certainty, leaving upon the mind no fair just doubt of their truthfulness" any evidence of forgery).

[9] The origin of the term "red herring" as signifying the confusion of an issue by the interjection of something irrelevant dates to the 18th century when escaping criminals were said to drag pungent cured (and thus, red) herring across their paths to cause pursuing bloodhounds to lose their scent. *See The Facts on File Encyclopedia of Word and Phrase Origins* 568 (1997); *The American Heritage Dictionary of Idioms* 536 (1997). In current parlance, a

commercial and real property law applies to this Alabama action for statutory ejectment. The Defendant and her expert witnesses rely on New York's "idiosyncratic" law to determine everything from the efficacy and validity of the endorsements on the Allonge, to whether the Allonge was properly affixed to the Note, to whether all of the loan documents had to be stored in Minnesota as opposed to Iowa.

The Defendant's sole argument for the intrusion of New York law is the "choice of law" provision in the PSA. In the absence of that contractual provision, there is no dispute that this ejectment case would be governed from start to finish by the law of Alabama. This is an Alabama ejectment action following an Alabama foreclosure with a mortgage and promissory note executed in Alabama on real property located in Alabama. *See Hibernia Nat. Bank v. Sones*, 105 F.3d 653, 654 (5th Cir. 1996) ("[C]onflict of law rules dictate that the law of the situs of the secured property govern foreclosure procedures applicable to the real estate within the state regardless of any choice of law provision in the contract evidencing the underlying debt."); *Restatement (Second) of Conflict of Laws* § 229 (1971) ("The method for the foreclosure of a mortgage on land and the interests in the land resulting from the foreclosure are determined by the local law of the situs.").[10]

"red herring" is an argument introduced to distract attention from the real issue. Interestingly, in the securities industry a "red herring" is another name for a preliminary prospectus, similar to Defendant's Exhibit 2 which was initially represented to this Court to be evidence that the Defendant's loan had been sold to more than one trust, a position later retracted and conceded. *See Cafe La France, Inc. v. Schneider Securities, Inc*., 281 F. Supp. 2d 361, 366 (D.R.I. 2003); BLACK'S LAW DICTIONARY, "Prospectus" 1259 (8th ed. 2004).

[10] *See also Resolution Trust Corp. v. Atchity*, 913 P.2d 162, 172 (1996) ("[T]he substantive as well as procedural law of the situs applies to a mortgage foreclosure."); *Restatement (Second) of Conflict of Laws* § 228 (1971) ("(1) Whether a mortgage creates an interest in land and the nature of the interest created are determined by the law that would be applied by the courts of the situs. (2) These courts would usually apply their own local law in determining such questions."). At a minimum, the Defendant's Mortgage expressly states that it is governed by Alabama law since the real property involved is obviously located in Alabama. *See* Mortgage. Further, "Alabama law follows the traditional conflict-of-law principles of *lex loci contractus* and *lex loci delicti.* Under the principles of *lex loci contractus,* a contract is governed by the law of the jurisdiction within which the contract is made. Under the principle of *lex loci delicti,* an Alabama court will determine the substantive rights of an injured party according to the law of the state where the injury occurred." *Lifestar Response of Alabama, Inc. v. Admiral Ins. Co.*, 17 So. 3d 200, 213 (Ala. 2009). Thus, any alleged "wrongful foreclosure" had to have occurred in Alabama.

As the Defendant's own expert admitted, however, Defendant is neither a party to nor a third party beneficiary of the PSA. (*See* T. 358:10-15.) As a non-party to the PSA, the Defendant has no right or ability to invoke or rely on the choice of law clause in the agreement**.** *See Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1169 (11th Cir. 2009) ("A choice of law clause, like an arbitration clause, is a contractual right that cannot ordinarily be invoked by or against a party who did not sign the contract in which the provision appears.").[11] This prohibition against a non-party's ability to rely on or invoke a contractual choice of law provision is, of course, hardly surprising since both Alabama and New York law provide that non-parties to a contract cannot sue for breach of that contract and cannot enforce contractual terms against the contracting parties. *See Caprer v. Nussbaum*, 825 N.Y.S.2d 55, 76 (N.Y. App. Div. 2006) ("In order to be entitled to enforce a contractual obligation, a plaintiff must be a party to or an intended beneficiary of the contract.").

In addition, while it is clear that the parties to the PSA might have wanted their internal disputes concerning the agreement resolved according to New York law, it does not follow that the parties wanted New York law to govern their dealings with non-parties including the localized details of the $700 million in mortgage loans from across the nation that comprise this Trust.[12] The choice of law provision in the PSA states:

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[11] *See also Paracor Finance, Inc. v. General Elec. Capital Corp.*, 96 F.3d 1151, 1165 (9th Cir. 1996) ("A choice-of-law clause … is a contractual right and generally may not be invoked by one who is not a party to the contract in which it appears."); *Agostino v. Quest Diagnostics Inc.*, 256 F.R.D. 437, 465 (D.N.J. 2009) ("In a contract suit brought by a third party beneficiary, the Court need not give effect to a contractual choice of law provision in the absence of express language making the provision applicable to the third party."); *In re Mushroom Transp. Co., Inc.,* 247 B.R. 395, 399 (Bankr. E.D. Pa. 2000) ("It is one thing for a party, with rights and obligations under a contract, to seek [a choice of law provision's] enforcement against others. It is quite another, however, for a non-party individual or organization to seek to enforce a particular clause against a contracting party. It stretches logic and reason to assert that non-parties with absolutely no rights or obligations under a contract (indeed, who were nowhere in the picture when the contract was signed) should be allowed to enforce a clause against a party to the contract in later litigation.").

[12] The Note states that it "is a uniform instrument with limited variations in some jurisdictions." (Note at § 11).

> This agreement and the Certificates shall be governed and construed in accordance with the laws of the State of New York, without regard to the conflict of laws principles thereof . . . and the obligations, rights and remedies of the parties hereunder shall be determined in accordance with such laws.

(PSA at §11.04). This provision limits the contractual application of New York law to the determination of the obligations, rights and remedies of the parties to the PSA. (*See id.*) The Defendant's obligations, rights and remedies, however, are determined only by Alabama law.

Further, the type of language employed in the PSA's choice of law clause has been narrowly construed by the courts so that extra-contractual claims and disputes which are not based on the PSA are not governed by the choice of law expressed in the contract. *See SouthTrust Bank of Alabama, N.A. v. Webb-Stiles Co., Inc.*, 931 So. 2d 706, 712 (Ala. 2005) ("Webb-Stiles's duty to reimburse SouthTrust arises solely out of Webb-Stiles's position as surety for Transact. If Webb-Stiles must pay that obligation, it has the remedy against Transact that it accepted when it became Transact's surety. This remedy is not subject to the choice-of-law and forum-selection clauses in the contract.") (emphasis added); *Torain v. Clear Channel Broadcasting, Inc.*, 651 F. Supp. 2d 125, 149 (S.D.N.Y. 2009) ("While New York courts give effect to choice-of-law provisions in a contract, under New York law, extra-contractual claims 'are outside the scope of contractual choice-of-law provisions that specify what law governs construction of the terms of the contract.'.[13]

[13] *See also Williams v. Norwest Financial Alabama, Inc.,* 723 So. 2d 97, 101 (Ala. Civ. App. 1998) ("[Plaintiff's] claims sound in tort and allegedly arise from the facts and circumstances surrounding the making of the loan and security agreement. Therefore, the choice-of-law clause does not supersede the rule of '*lex loci delicti*.'"); *Klock v. Lehman Bros. Kuhn Loeb, Inc.,* 584 F. Supp. 210, 215 (S.D.N.Y. 1984) (under New York law "[a] contractual choice of law provision governs only a cause of action sounding in contract"); *Cooper v. Meridian Yachts, Ltd.* 575 F.3d 1151, 1162 (11th Cir. 2009) ("In determining whether a choice of law clause contained in a contract between two parties also governs tort claims between those parties, a court must first examine the scope of the provision. A choice of law provision that relates only to the agreement will not encompass related tort claims."); *Green Leaf Nursery v. E.I. DuPont De Nemours and Co.*, 341 F.3d 1292, 1301 (11th Cir. 2003) ("The [choice of law] clause does not refer to related tort claims or to any and all claims or disputes arising out of settlement or arising out of the relationship of the parties. This type of narrow choice-of-law clause calls for the application of the selected law to determine only the scope and effect of the [agreement containing it]."); *Sunbelt Veterinary Supply, Inc. v. International Bus. Sys. U.S., Inc.,* 985 F. Supp. 1352, 1354 (M.D. Ala. 1997) (explaining that a clause stating

An Alabama ejectment action does not involve a contractual claim that arises under the PSA. "An action in the nature of ejectment is 'not only . . . an efficient means for the adjudication of the right to possession, but also [is] a favored action for the trial of the legal title to land, that action being similar in nature to both an action in trespass and an action to quiet title." *Jones v. Regions Bank*, 25 So. 3d 427, 440 (Ala. 2009) (emphasis in original).

Because the Defendant is not a party to the PSA, and because this ejectment action does not involve a contract claim based on the PSA, the contractual choice of law provision does not govern the parties' rights and obligations in this case. In particular, New York law has no bearing on whether the endorsements were proper or whether the Allonge is effective, or ultimately, whether U.S. Bank properly foreclosed in this matter. To the extent those issues are even remotely relevant to whether U.S. Bank has satisfied the elements of ejectment, those matters and issues are governed exclusively by the law of Alabama.

IV. ARGUMENT

A. U.S. Bank Presented a Prima Facie Case of Its Case for Ejectment.

U.S. Bank is entitled to a judgment in its favor for ejectment against Defendant because (a) U.S. Bank possesses superior legal title to the Property, and (b) Defendant is wrongfully occupying the Property. *See* Ala. Code § 6-6-280 (1975); *Muller v. Seeds*, 919 So. 2d 1174, 1177 (Ala. 2005). The Alabama Supreme Court has outlined the "proper method of resolving a statutory ejectment action":

> A "plaintiff who establishes that he has both legal title to the property when his complaint is filed and a right to immediate possession has established the elements for statutory ejectment. *Atlas Subsidiaries v. Kornegay*, 288 Ala. 599, 264 So. 2d 158 (1972). Further, if the mortgage and foreclosure deed . . . are produced, as well as proof of both demand for and refusal to deliver possession, then all the necessary elements of ejectment are established. *Jones v. Butler*, 286 Ala. 69, 237 So. 2d 460 (1970)."

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that a contract would be "governed by and construed under" California law was not broad enough to prevent application of Alabama's tort law).

Muller, 919 So. 2d at 1177 (quoting *Taylor v. Bryars*, 602 So. 2d 378 (Ala. 1992)). The recorded Foreclosure Deed vested U.S. Bank with superior legal title to the Property, and consequently, U.S. Bank is entitled to immediate possession. *See, e.g., id.* ("Muller purchased the property at the foreclosure sale; thus legal title . . . vested in him, and he was entitled to take immediate possession.") (emphasis added) (citing Ala. Code § 35-10-12 (1975))[14].

To prove its legal title and right to immediate possession, U.S. Bank established at trial that: (a) U.S. Bank foreclosed the Mortgage via the power of sale contained in the Mortgage (s*ee* Mortgage, Assignment and Foreclosure Deed); (b) following the foreclosure sale, U.S. Bank demanded possession of the Property pursuant to Ala. Code § 6-5-251 (*see* Demand for Possession); and (c) Defendant refused to deliver possession of the Property, therefore requiring U.S. Bank to bring this action for ejectment against Defendant. (T. 469:14-17.) Consequently, U.S. Bank presented a prima facie case under the elements set forth in *Muller*, establishing that it is indisputably entitled to possession of the real property at issue. *See Muller*, 919 So. 2d at 1177. Therefore, U.S. Bank is entitled to a judgment in its favor on its claim for ejectment.

B. Defendant Failed to Present Substantial Evidence to Support Her Affirmative Defense of Wrongful Foreclosure.

1. U.S. Bank properly foreclosed the Mortgage in accordance with Alabama law.

Defendant asserts, as an affirmative defense to the ejectment action, that U.S. Bank wrongfully foreclosed the Mortgage because U.S. Bank allegedly lacked the authority to own the Note at the time of the foreclosure sale. It is critical to note that there is no requirement under

[14] *See also Palmer v. Resolution Trust Corp.*, 613 So. 2d 373, 375 (Ala. 1993) ("However, the RTC, as holder of the foreclosure deed, has full legal title, subject only to the right of redemption, . . . and has a right to immediate possession of the property.") (citations omitted and emphasis added). Defendant, however, has not requested or attempted to redeem the property from the foreclosure, and, the one year statutory right of redemption having expired on August 12, 2009 (one year after the date of the foreclosure sale) that option is now foreclosed to Defendant. *See* Ala. Code § 6-5-248(b).

Alabama law that a foreclosing party must "own" the underlying debt at the time of foreclosure. Rather, Alabama law specifically provides that "[w]here a power to sell lands is given in any mortgage, the power is part of the security and may be executed by any person, or the personal representative of any person who, by assignment or otherwise, becomes entitled to the money thus secured." Ala. Code § 35-10-12 (emphasis added). Thus, Alabama law clearly provides that the party entitled to enforce the Note secured by the Mortgage (the indebtedness referenced in §35-10-12) has the legal right under Alabama law to foreclose the mortgage. *See id*. Moreover, it has long been established under Alabama law, as under the law of most other states, that the nominal holder of an instrument has standing to enforce the instrument. *See Dawsey v. Kirven*, 83 So. 338 (Ala. 1919) (the fact that the holder of the legal title of a negotiable instrument is not entitled to the proceeds of the judgment constitutes no defense to the maker in an action of the holder against him).

To date, Defendant has provided no authority establishing, and the undersigned is unaware of, any requirement under Alabama law that a foreclosing entity must "own" the underlying promissory note in order to foreclose a mortgage. Alabama Code § 35-10-12, the controlling Alabama statute that governs who may enforce a power of sale, requires only two elements: (1) that the power of sale be granted in a mortgage, and (2) that the power of sale be executed by the person (or that person's representative) entitled to the money secured by the mortgage. *See* Ala. Code § 35-10-12. The evidence at trial was not contested that (a) that the Mortgage contained a power of sale (*see* Mortgage), thus invoking § 35-10-12; and (b) that the Foreclosure Sale was conducted by a representative of U.S. Bank, the entity holding the Note representing the indebtedness secured by the Mortgage (*see* Mortgage, Note, Foreclosure Deed).

Defendant was wholly unable to present any evidence to the contrary. Consequently, Defendant's argument that U.S. Bank did not "own" the Note is wholly without merit.[15]

(a) Alabama law governs the foreclosure of Defendant's mortgage.

In this case, it is clear that Alabama law governs the foreclosure of Defendant's Mortgage. The Mortgage itself provides that it is "governed by federal law and the law of the jurisdiction in which the Property is located." *See* Mortgage, ¶ 16. The Property is located in Jefferson County, Alabama. *See* Mortgage, Legal Description—Exhibit A. Additionally, Alabama law follows the traditional conflict-of-law principles of *lex loci contractus* and *lex loci delicti*.[16] *See Liberty Mut. Ins. Co. v. Wheelwright*, 851 So. 2d 466 (Ala. 2002). Therefore, the Mortgage is governed under Alabama law.

First, the Note and Mortgage were entered into in Alabama (*see* Note). Thus, those contracts and the rights and obligations of the parties thereto, must be governed by Alabama law. *See Brown*, 582 So. 2d at 502. Second, Defendant's claim of wrongful foreclosure should be governed by the *lex loci delicti* principle. Because the foreclosure occurred in Alabama, and thus the presumed injury occurred in Alabama, Alabama law applies. *See Lifestar Response*, 17 So. 3d at 213.

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[15] Many other courts to have considered whether a foreclosing entity must produce the note prior to foreclosure in the absence of an express requirement to do so "have routinely held that Plaintiff's 'show me the note' argument lacks merit." *See Diessner v. Mortgage Electronic Registration Systems*, 618 F. Supp. 2d 1184, 1187 - 1188 (D. Ariz. 2009); *see also Mansour v. Cal-Western Reconveyance Corp.*, 2009 WL 1066155, at *2 (D. Ariz. April 21, 2009) (citing *Ernestberg v. Mortgage Investors Group*, 2009 WL 160241, at *5 (D. Nev. Jan. 22, 2009); *Putkkuri v. Recontrust Co.*, 2009 WL 32567, at *2 (S.D. Cal. Jan. 5, 2009); *San Diego Home Solutions, Inc. v. Recontrust Co.*, 2008 WL 5209972, at *2 (S.D. Cal. Dec. 10, 2008); *Wayne v. HomEq Servicing, Inc.*, 2008 WL 4642595, at *3 (D. Nev. Oct. 16, 2008)).

[16] Under the principles of *lex loci contractus*, a contract is governed by the law of the jurisdiction within which the contract is made. *Cherry, Bekaert & Holland v. Brown*, 582 So. 2d 502 (Ala. 1991). Under the principle of *lex loci delicti*, the court will determine the substantive rights of an injured party according to the law of the state where the injury occurred. *Fitts v. Minnesota Mining & Mfg. Co.,* 581 So.2d 819 (Ala. 1991).

(b) Because U.S. Bank held the Note, it was entitled to the money secured by the Mortgage.

Defendant asserts a convoluted and tortuous theory to support her contention that U.S. Bank is not the "owner" of the Note—namely, that U.S. Bank has failed to demonstrate compliance with various terms of the PSA.[17] First, this argument attempts to improperly shift to U.S. Bank the Defendant's burden to prove her affirmative defense. *See Ross v. Rogers*, 25 So. 3d 1160, 1167 (Ala. Civ. App. 2009). Second, this argument wholly ignores decades of Alabama law governing the enforceability of negotiable instruments, as well as the clear distinction between the concepts of the "owner" of an instrument and the "holder" of an instrument. Therefore, Defendant's insistence that U.S. Bank must prove that it "owned" the Note is due to be disregarded in its entirety.

Throughout trial, Defendant continually conflated the concept of the "holder" of the note with that of the "owner" of the note. The two terms, however, are not interchangeable. There is no requirement under Alabama law that one must "own" a negotiable instrument in order to demand payment. Indeed, Alabama Code § 7-3-301, which sets forth categories of "persons entitled to enforce [negotiable] instrument", expressly forecloses this argument because it specifically provides that "[a] person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument." *Id.* (emphasis added.)[18] Furthermore, Alabama Code § 7-3-301 provides that a holder of an instrument is entitled to enforce the instrument. Defendant offers no legal authority to support the proposition that the holder of a

[17] This despite the fact that Defendant expressly agreed in the Mortgage that the Note could be transferred without prior notice to her. (*See* Mortgage ¶ 20.)

[18] The Committee Comments to Ala. Code § 7-3-203 specifically recognize the distinction between a "holder" and "owner" of an instrument: "The right to enforce an instrument and ownership of the instrument are two different concepts. A thief who steals a check payable to bearer becomes the holder of the check and a person entitled to enforce it, but does not become the owner of the check." (Emphasis added.) The Committee Comments go on to state that such a thief can negotiate the check, and one who purchases the check from a thief in good faith becomes a holder in due course. *Id.* Thus, it is clear that a party who does not own the instrument may, in fact, be entitled to enforce the instrument under Alabama law. *See id.*

note is not entitled to enforce the Note. Thus, Defendant's argument that U.S. Bank must be the "owner" of the Note is wholly without merit.

It is black letter law that the holder of a negotiable instrument is entitled to enforce the terms of the instrument. *See* Ala. Code § 7-3-301. It is undisputed that the Note is a negotiable instrument under Alabama law. The Note is an unconditional promise to pay $104,400.00 to Mortgage Lenders Network USA, Inc. d/b/a Lenders Network or the subsequent holder of the Note, with the total amount of the Note due on August 1, 2036. (*See* Note.) Additionally, the Note is specially endorsed to U.S. Bank, as Trustee, without recourse; therefore, the Note is payable to U.S. Bank. *See* Note and Allonge; *see also* § 7-1-201(21)(A) (defining "holder" as a person in possession of an instrument that is payable to an identified person that is the person in possession); § 7-3-205 (an instrument endorsed to an identified person is payable to that person).[19]

The testimony and evidence at trial firmly established that U.S. Bank possessed the Note through its records custodian, Wells Fargo. (*See* T. 122:20-24, 113:14-19; PSA.) The Note is specially endorsed to U.S. Bank via the Allonge, in compliance with the requirements of the PSA.[20] Therefore, the Note is payable to U.S. Bank, and U.S. Bank is a "person entitled to

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[19] A holder may enforce a note in his own name. *Blake v. Coates*, 294 So. 2d 433, 435 (Ala. 1974). Furthermore, the Alabama Supreme Court has held that, for a negotiable instrument, the "fact, if it was made to appear (which is not done here), that the holder of the legal title is not entitled to the proceeds of the judgment, is no defense to the makers in an action by the holder against them." *Dawsey v. Kirven*, 83 So. 338, 339 (Ala. 1919) (emphasis added).

[20] Under Alabama law, an Allonge is a permissible method of negotiating a Note. *See* Ala. Code § 7-3-204(a) and committee comments thereto. In this case, the Allonge was rubber-banded to the Mortgage and various related documents and enclosed in a folder-sleeve. (T. 121:20-122:11.) Furthermore, the Allonge itself provided that it is to be "affixed" to the Note. (*See* Allonge (stating that it is "is affixed and becomes a permanent part of said Note").) The predecessor of § 7-3-204(a) required that an endorsement may be made on the face of the instrument or on a paper firmly affixed thereto. *See* prior version of Ala. Code § 7-3-204. No such language appears in the current statute (adopted in 1995) thus reflecting a legislative intent to relax, if not altogether abandon, the "firmly affixed" requirement. *See, e.g., Livonia Property Holdings, L.L.C. v. 12840-12976 Farmington Road Holdings, L.L.C.*, 2010 WL 1956867 (E.D. Mich. 2010) ("The previous version of this rule, then in M.C.L. § 440.3202, required an allonge to be so firmly affixed [to the Note] as to become a part thereof. A 1993 amendment rewrote this section, which now requires only that the allonge be affixed. The change in language suggests an intent to expand, rather than restrict, the use of allonges."). Thus, this Court should hold that the Allonge is properly affixed to the Note so as to negotiate the Note.

enforce" the note. *See id.* § 7-3-301. The evidence established that Defendant was in default of the Mortgage loan. (*See* T. 140-141.) Therefore, the evidence at trial established that the Trust was entitled to foreclose the Mortgage as the holder of the Note. *See* Ala. Code § 7-1-201(21)(A), § 35-10-12.

Furthermore, Alabama Code § 7-3-305[21] identifies the defenses that may be brought in an action to enforce a negotiable instrument. The Committee comments to § 7-3-305 outline other defenses to payment on a Note:

> Article 3 defenses are nonissuance of the instrument, conditional issuance, and issuance for a special purpose (Section 3-105(b)); failure to countersign a traveler's check (Section 3-106(c)); modification of the obligation by a separate agreement (Section 3-117); payment that violates a restrictive indorsement (Section 3-206(f)); instruments issued without consideration or for which promised performance has not been given (Section 3-303(b)), and breach of warranty when a draft is accepted (Section 3-417(b)). The most prevalent common law defenses are fraud, misrepresentation or mistake in the issuance of the instrument.

Id. (committee comments). Defendant has not alleged any of these defenses, but instead claims that U.S. Bank could not foreclose the Mortgage because it is not the "owner" of the indebtedness. Alabama law does not provide for such a defense. Consequently, Defendant's argument that U.S. Bank was not the "owner" does nothing to help her in this case.

(c) Even under New York law, U.S. Bank is properly considered the holder of the Note.

As the testimony at trial demonstrated, the Note was properly endorsed to U.S. Bank, as Trustee, via the Allonge. First, this Court should hold that the Allonge was properly "affixed" to the Note. The UCC is meant to "modernize the law governing commercial transactions" and, under both Alabama and New York law, should be liberally construed so as to effectuate this

[21] These defenses include infancy, duress, lack of legal capacity, illegality of the transaction, fraud in the inducement, and bankruptcy of the obligor. *See* Ala. Code § 7-3-305(a).

intention. *See* N.Y. U.C.C. Law § 1-102(1); Ala. Code § 7-1-103.[22] The Allonge was attached to the Note and other Mortgage-related documents via a rubber band, and enclosed in an envelope folder. Moreover, the Allonge itself provides that it "is affixed and becomes a permanent part of said Note," referencing Defendant's Note by name, address, date, principal amount, and loan number. (*See* Allonge.) This demonstrates an intent to affix the Allonge to the Note. *See Livonia Property Holdings, L.L.C. v. 12840-12976 Farmington Road Holdings, L.L.C.*, No. Civ. 10-11589, 2010 WL 1956867 (E.D. Mich. 2010); *see also, e.g., In re Weisband*, 427 B.R. 13 (Bankr. D. Ariz. 2010) (suggesting that an allonge that contains identifying numbers and/or references the note to which it should be attached is sufficient to overcome the general rule that the allonge must be physically attached to the note).

Despite Professor Bloom's opinion that New York law "is very concerned about staples" when it comes to allonges to notes, another New York statute governing service of process permits the use of a rubber band as a sufficient method of "affixation." "The statute [governing the perfection of service] requires 'affixing' the summons to the door. 'The affixing of a summons to the door is accomplished by use of a nail, tack, tape, rubber band or some other device which will ensure a genuine adherence.'" *DeSalvatore v. Washburn*, 747 N.Y.S.2d 695, 697 (N.Y. Sup. Ct. 2002) (quoting *Werner v. Schweit*, 526 N.Y.S.2d 175 (N.Y. Sup. Ct. 1988)). Thus, New York law clearly considers the use of a rubber band to "ensure genuine adherence" in the same manner as a nail, tack, or tape. *See id.*

(d) Even if U.S. Bank is not the holder of the Note, under Alabama law, it is still entitled to enforce the Note.

If, however, this Court holds that the allonge is not properly affixed to the Note, U.S. Bank undoubtedly acquired the rights of a holder, which would permit U.S. Bank to enforce the

[22] As noted herein, U.S. Bank expressly disputes the application of New York law to any aspect of the present case.

Note. The Note is endorsed to EMAX, which then, via the Allonge, transferred the Note to RFC, who in turn transferred the Note to U.S. Bank. Consequently, U.S. Bank took RFC's right to the Note, who had previously taken EMAX's right to the Note. Consequently, at the very least, U.S. Bank is a non-holder in possession of the Note with the rights of a holder as contemplated by Alabama Code § 7-3-301(ii).

The evidence submitted at trial clearly indicated intent to transfer the rights to the Note to U.S. Bank. First, U.S. Bank had possession of the Note through its custodian, Wells Fargo. (T. 113:14-19, 122:20-24.) *See Vaughan v. Borland*, 175 So. 367 (Ala. 1937) ("In the absence of evidence to the contrary, possession of property raises a rebuttable presumption of ownership.") Second, the PSA assigned "all right, title, and interest of the Depositor in and to the Mortgage Loans" listed on the Mortgage Loan Schedule. (*See* PSA.) Third, Defendant's loan was listed on that schedule. (*See* Mortgage Loan Schedule.) Therefore, the evidence demonstrates that Defendant's loan was properly transferred to U.S. Bank. Furthermore, despite introducing several other pooling and servicing agreements for separate trusts, Defendant was unable to identify any other trust or entity that claims an interest in her loan. Consequently, the evidence at trial demonstrated that U.S. Bank had the right to enforce the Note, and Defendant was unable to present any evidence to the contrary.

(e) Defendant failed to produce any evidence of fraud or forgery regarding the Allonge.

At trial, Defendant continually asserted without support that U.S. Bank had forged or fabricated the signatures on the Allonge. As noted above, the Defendant bore the burden of proving these scurrilous allegations by clear and convincing evidence, something she wholly failed to do. Moreover, all signatures on the Note and Allonge are presumed authentic. Rule 902(9) of the Alabama Rules of Evidence provides that commercial paper, signatures thereon, and documents relating thereto, to the extent provided by general commercial law, are self-

authenticated. *See* Ala. R. Evid. 902(9). Alabama Code § 7-3-308 provides, in pertinent part, as follows:

> (a) In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature."

Ala. Code § 7-3-308(a). This is not an action to enforce the liability of any of the endorsers of the Note; consequently, § 7-3-308(a) and Alabama Rule of Evidence 902(9) provide that all endorsement signatures are presumed to be authentic and authorized. *See id*. Thus, all signatures appearing on the Note and Allonge are presumed authentic.

Section 7-1-206 governs presumptions, and it provides: "Whenever this title creates a 'presumption' with respect to a fact, or provides that a fact is 'presumed,' the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence." Ala. Code § 7-1-206. Defendant, however, failed to produce any evidence whatsoever that the signatures on the Allonge had been fabricated, but could only offer testimony that it was possible that the Allonge was fabricated. In support of her claims, Defendant offered Chase Greene, a lay witness,[23] to testify about the ease of replicating documents. (T. 195.) Greene, who admitted that he had no personal knowledge as to whether the Allonge was fabricated, testified only that (1) it appeared that one signature was a digital signature and (2) that another signature appeared to have been placed on the Allonge via a rubber stamp. (T. 202, 208, 199-201.)

With respect to whether the Allonge was fabricated, the following exchange took place:

[23] Greene, a Staples copy center employee, was specifically offered only as a lay witness, and Defendant's counsel stated that he was not offering Greene as an expert witness. (T. 196, 204:2-7.) In fact, Greene testified that he had no specialized training in document verification. (T. 206.)

> Q. You don't, of course, have any knowledge about whether GMAC fabricated this document, do you?
>
> A. No factual knowledge.
>
> Q. None at all.
>
> A. Just my personal opinion.
>
> Q. Your personal opinion is that they fabricated this document?
>
> A. Yes, because I easily could reproduce that with anybody's signature.

(T. 208:23-209:7.) Thus, Greene's sole basis for believing that the Allonge was fabricated was the ease of its reproduction. (T. 209:4-7, 198:6). Clearly, the ease of reproduction of a signature or a document is not a legal (or even logical) basis for this Court to hold that the signatures or the document were, in fact, forged. Defendant offered no evidence (and certainly not clear and convincing evidence) that the Allonge signatures were forgeries, unauthorized, unrecognized, or even suspect.

Further, Alabama UCC law squarely addresses the use of stamps and digital signatures. Alabama Code § 7-1-201(37) states that the term "signed" "includes using any symbol executed or adopted with present intention to adopt or accept a writing." The Committee Comments to § 7-1-201(37) provide, in pertinent part, as follows:

> This provision also makes it clear that, as the term "signed" is used in the Uniform Commercial Code, a complete signature is not necessary. The symbol may be printed, stamped or written; it may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. No catalog of possible situations can be complete and the court must use common sense and commercial experience in passing upon these matters. The question always is whether the symbol was executed or adopted by the party with present intention to adopt or accept the writing.

See id. Thus, clearly the Favor signature, which is admittedly a stamped signature, falls within the definition of "signed" under the Alabama UCC, and it is effective to endorse the Note. Furthermore, § 7-3-401(b) provides that a "signature may be made (i) manually or by means of a

device or machine, and (ii) by the use of any name, including a trade name or assumed name, or by a word, mark or symbol executed or adopted by a person with present intention to authenticate a writing." The Committee Comments to § 7-3-401(b) provide that a 'signature may be handwritten, typed, printed, or made in any other manner." Clearly, § 7-3-401(b) encompasses digitally created signatures as either "typed, printed, or made in any other manner." Thus, the Hasbrook signature is also effective to endorse the Note.

As stated above, U.S. Bank is entitled to the presumption that all signatures on the Note and Allonge were authorized and authentic. Defendant bore the burden of presenting clear and convincing evidence to support a finding that the signatures were not authentic. The only testimony offered by Defendant was that the Allonge was easy to reproduce. This testimony, offered by a lay witness, is insufficient to support a finding that the signatures were unauthentic or unauthorized. Consequently, Defendant failed to rebut the presumption of authorization and authenticity, and this Court must find that the signatures are authorized and authentic. *See* Ala. Code §§ 7-3-308(a), 7-1-206.

2. Under Alabama law, the Assignment of the Mortgage from MERS to U.S. Bank is valid and enforceable.

(a) Defendant lacks standing to challenge the Assignment.

As a non-party to the Assignment, Defendant lacks standing to attack it. The U.S. District Court for the Eastern District of Michigan recently held that a borrower lacks standing to challenge the assignment of her mortgage because she was not a party to the assignment. In *Livonia Property Holdings, L.L.C. v. 12840-12976 Farmington Road Holdings, L.L.C.*, 2010 WL 1956867 (E.D. Mich. 2010), the court observed that while the borrower certainly had an interest in avoiding foreclosure, the validity of the mortgage assignment did not effect whether she owed her obligations, but only to whom she was obligated. *Id.* at *7. The court observed:

> Although a debtor may assert certain defenses that render an assignment absolutely invalid (such as nonassignability of the right assigned), he generally may not assert any ground which may render the assignment voidable "because the only interest or right which an obligor of a claim has in the instrument of assignment is to insure him or herself that he or she will not have to pay the same claim twice." 6A C.J.S. Assignments § 132. A debtor, for example, cannot raise alleged acts of fraud, or question the motive or purpose underlying an assignment. *Id.*

Id. at *8. The court noted that despite the assignment, the borrower's rights remained the same, and she could not now step into the assignor's shoes to asserts its contractual rights.[24] Thus, the court held that the borrower "may not challenge the validity of assignments to which it was not a party or third-party beneficiary, where it has not been prejudiced, and the parties to the assignments do not dispute (and in fact affirm) their validity." *Id.* at *10.

This Court should adopt the reasoning of the *Livonia* court and hold that because Defendant is neither a party to nor a third party beneficiary of the Assignment, she cannot now seek to attack the Assignment where none of the parties to the Assignment dispute its validity. Defendant lacks standing to challenge the Assignment because she does not seek to assert her rights, but in fact seeks to assert the rights of either MERS, as the assigning entity, or Mortgage Lenders' Network, as the original payee on the Note. She cannot do so. As the United States Supreme Court has observed, one of the prudential limitations on standing is that a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Worth v. Seldin*, 422 U.S. 490, 498-99, (1975).

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[24] To support this finding, the court cited the following authorities: *Liu v. T & H Mack, Inc.,* 191 F.3d 790 (7th Cir. 1999) (party to underlying contract lacks standing to "attack any problems with the reassignment" of that contract); *Blackford v. Westchester Fire Ins. Co.*, 101 F. 90 (8th Cir.1900) ("As long as no creditor of the assignor questions the validity of the assignment, a debtor of the assignor cannot do so."); *Byczek v. Boelter Cos*., 230 F. Supp. 2d 843 (N.D. Ill.2002) (same); *Nicolls Pointing Coulson, Ltd. v. Transp. Underwriters of La., Inc.,* 777 F. Supp. 493 (E.D. La. 1991) ("a debtor cannot challenge an assignment of a debt by a creditor unless he can show he is prejudiced by the assignment"); *In re Holden*, 271 N.Y. 212, 2 N.E.2d 631 (N.Y.1936) ("The assignments were valid upon their face. The assignee was the legal owner of the claims assigned. No one could question the validity of the assignments except the assignors."); Richard A. Lord, 29 WILLISTON ON CONTRACTS § 74:50 (4th Ed.) ("the debtor has no legal defense [based on invalidity of the assignment] ... for it cannot be assumed that the assignee is desirous of avoiding the assignment.") (emphasis added).

(b) Alabama law permits MERS to assign mortgages.

Defendant also argued that the Assignment from MERS to U.S. Bank was invalid. The Alabama Court of Civil Appeals, however, has recently held that MERS may assign a mortgage. In *Crum v. LaSalle Bank*, 2009 WL 2986655 (Ala. Civ. App. Sept. 18, 2009), a borrower executed a note in favor of National City Bank and also executed a mortgage in favor of MERS as mortgagee. *Id.* at *1. The mortgage contained the same operative language as identified in Paragraph 3 of the Mortgage at issue in this case. *See id.*; Mortgage. Some time later, MERS executed an assignment of the mortgage to an assignee, and the assignee initiated foreclosure proceedings and auctioned the property at a foreclosure sale. *See Crum*, 2009 WL 2986655 at *2. The assignee was the highest bidder at the foreclosure sale, and it subsequently brought an action against Crum seeking possession of the property. *Id.* Crum argued that the assignment was not effective to transfer the power of sale. *Id.* The trial court granted summary judgment in favor of the assignee, and Crum appealed. *Id.*

On appeal, Crum argued that the assignee did not receive good title to the property because MERS, who was only the lender's nominee, did not own the debt and thus could not convey any right to the assignee such that would entitle the assignee to the money secured by the debt. *Id.* Crum cited the case of *Carpenter v. First National Bank of Birmingham*, 181 So. 239, 240 (Ala. 1938) for the proposition that a mere agent of a mortgage holder to whom the mortgage is delivered merely for the purposes of foreclosure is not authorized to foreclose in its own name and execute a deed in its name to the purchaser because it does not own the debt. *Id.*

The Court of Civil Appeals disagreed and held that the language of the operative mortgage governed the actions that MERS was permitted to take. *Id.* at *3. The court noted that in the mortgage, Crum expressly acknowledged that MERS had any or all of the lender's interests in the mortgaged property and that MERS had the power to take any action required of

the lender. *Id.* Furthermore, the mortgage expressly provided that the mortgage and note could be sold to a third party without notice to the borrower. *Id.* Thus, in executing the mortgage to MERS, Crum authorized MERS to perform any act on the lender's behalf as to the property, including assigning the mortgage to a third party. *See id.*[25]

In accordance with the *Crum* decision, this Court should hold that Alabama law permitted MERS to assign the Mortgage to U.S. Bank by virtue of the language in the Mortgage. By executing the Mortgage and naming MERS as mortgagee, Defendant acknowledged that MERS had any or all of the interests of the lender, its successors or assigns, and she specifically agreed that MERS had the right to assign the Mortgage. *See id.; see also* Mortgage. Defendant's Mortgage provided expressly, in pertinent part, as follows:

> . . . Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

See Mortgage (emphasis added). Defendant signed the Mortgage (*see* Mortgage), and she has made no allegations that she was not capable of understanding the Mortgage. The Alabama Supreme Court has held that "a person who signs a contract is on notice of the terms therein and is bound thereby even if he or she fails to read the document." *Locklear Dodge City, Inc. v. Kimbrell*, 703 So. 2d 303, 306 (Ala. 1997) (citing *Power Equipment Co. v. First Alabama Bank*,

[25] Similarly, New York courts have held that a mortgage is personal property and can be assigned by the person holding legal title. *See McCarthy v. Stanley*, 151 A.D. 358, 361 (3d Dep't 1912). These positions are consistent with the Second Restatement of Contracts which states that a contract right, unless precluded by statute or contract, is freely assignable so long as it does not materially alter the duty of the obligor or materially increase the burden or risk imposed on the obligor by his contract. Restatement (Second) of Contracts § 317 (1981). Defendant's mortgage agreement was not personal in nature and did not explicitly forbid assignment by the mortgagee. MERS held title to Defendant's property and, therefore, retained the right to assign it freely.

585 So. 2d 1291 (Ala. 1991)). Even if Plaintiff did not read the Mortgage, she cannot avoid the effect of the Mortgage's provisions:

> To hold otherwise would turn the concept of "sanctity of contract" upside down. Allowing parties to avoid their contractual obligations by merely claiming that they did not read a contract would encourage irresponsibility. Those responsible enough to read their contracts would be bound to their terms, while those reckless enough not to read their contracts could avoid their terms; in addition to avoiding the contract terms, the party who did not read the contract could file a legal action against the other party for suppressing something that was stated clearly in the contract. This is too perverse a result to contemplate. Moreover, modern society relies on written agreements.

Id. In accordance with the terms of the Mortgage and the *Crum* decision, this Court should hold that the Assignment of the Mortgage from MERS to U.S. Bank is valid and enforceable.

Additionally, the Alabama Supreme Court has held that recordation of a mortgage assignment prior to foreclosure is unnecessary. *See Dixon v. Windsor*, 596 So. 2d 898 (Ala. 1992) (stating that Alabama "cases have long held that the requirement of recordation is for the protection of parties without notice.") Alabama law clearly permits MERS to remain the mortgagee of record on behalf of the holder of a note:

> The mortgage is but an incident to the debt, and passes to the assignee of notes upon their assignment. 'Tis true, the legal estate in the mortgage lands is still in the mortgagee, until the mortgage itself is assigned; but he holds it in trust for the holder of the notes, who, without an assignment of it, may, after the law day, proceed in his own name, in a court of equity, to foreclose it against the mortgagor.

Center v. Planters' & Merchants' Bank, 1853 WL 457 (Ala. 1853). Additionally, the Alabama Supreme Court has held that "the security being the mere incident of the indebtedness, an assignment of the debt passes the title in the pledge to the assignee of the debt, unless the parties agree otherwise." *Folmar v. Beall*, 85 So. 540 (Ala. 1920) (emphasis added). Thus, Alabama law clearly contemplates that one may retain title to a mortgage on behalf of the owner of the debt.

(c) Defendant failed to demonstrate that the Assignment was fraudulently executed.

At trial, Defendant argued that McCullough was not authorized to execute the Assignment, moving to strike the Assignment from the Probate Records of Jefferson County. (T. 80-81.) The Assignment itself demonstrates that McCullough was authorized by MERS to execute the Assignment. McCullough was authorized by MERS to "execute any and all documents necessary to remove MERS as titleholder of the property or modify MERS interest in a property. . . ." *See* Assignment, pp. 4-5. Defendant introduced no testimony from a MERS representative (other than McCullough, who testified that she was authorized to execute the Assignment (T. 62)) that McCullough was not authorized to execute the Assignment. Consequently, Defendant wholly failed to carry her burden of proof on this issue,[26] and her motion to strike the Assignment from the Probate Records should be denied, and this Court should disregard any argument that the Assignment was not authorized.

(d) The Assignment served only to transfer legal title to the Mortgage, and it did not serve to transfer the Note.

At trial, Defendant's counsel insisted that the Assignment of Mortgage was the operative moment for the transfer of the Note. The testimony of Colleen McCullough, foreclosure counsel for U.S. Bank, however, firmly established that the Assignment was intended to transfer only the mortgage itself, as the following exchanges demonstrate:

> Q. (Mr. Lay) And what did you intend to do by preparing [the Assignment]?
>
> A. I intended to effectuate a transfer of the mortgage itself in the probate records for purposes of the title insurance.
>
> Q. Okay. Did you intend to transfer the debt?
>
> A. No.

[26] As discussed above, Defendant bore the burden of proving the signatures were forged by clear and convincing evidence. *See Thompson v. Mitchell,* 337 So.2d 1317, 1318 (Ala. 1976).

Q. Why does it say that in there?

A. This is a form document that's used by my firm and several other firms, and it's intended to transfer any interest that may be held, sort of a [quitclaim] deed.

(T. 70:18-71:4.)

Q. (Mr. Ragsdale) Have you ever taken the position at any time that this assignment of mortgage as the transfer of the note to U.S. Bank?

A. No.

Q. To your knowledge has anybody on our side ever taken the position that this document is the transfer of the note?

A. Of the note, no.

Q. It is intended, is it not, to transfer whatever interest MERS has to U.S. Bank?

Mr. Lay: Objection, Your Honor.

The Court: Overrule.

Q. Correct?

A. Correct.

Q. And if it purports to transfer things that MERS doesn't have, it doesn't transfer those things, right?

A. Correct.

(T. 77.)

Defendant's insistence that the Assignment is the operative transfer of the Note to U.S. Bank completely ignores the circumstances of the Note and Mortgage. When Defendant executed the Note, the identified lender was Mortgage Lender's Network. (*See* Mortgage.) The Mortgage, however, identified the mortgagee as MERS as nominee for Mortgage Lender's Network. (*See* Mortgage.) The Mortgage specifically distinguished between MERS, who would be considered the mortgagee, and Mortgage Lender's Network, who would be considered the lender and original beneficiary of the Note. (*See* Mortgage.) Consequently, MERS never purported to hold an interest in the Note, and Defendant elicited no testimony to the contrary.

The only evidence at trial established that the holder of the Note was U.S. Bank as trustee for the Trust, and that MERS, who was the nominal mortgagee of record, simply assigned its remaining interest in the Mortgage in order to reflect the current holder of the Note in the probate records.

The fact that the Assignment, an admittedly form document, contains language that references the Note does not dictate a finding that the Note was assigned on that day. As explained by McCullough, the Assignment was meant to transfer any remaining interest that MERS held in the Property and underlying debt, if any at all. It is established under Alabama law that a grantor cannot convey a greater interest in property than he owns. *Chancy v. Chancy Lake Homeowners Ass'n, Inc.*, 2010 WL 2172698 (Ala. Civ. App. 2010). Furthermore, the Alabama Court of Civil Appeals has held that an ineffectual attempt to convey a greater estate or interest than the grantor has does not invalidate the conveyance of the balance of the property that was conveyable. *See id.* Consequently, the Assignment served to transfer MERS's interest in the Mortgage only, and the superfluous language regarding the debt secured by the Mortgage should be interpreted as equivalent to a quitclaim deed.

(e) The Assignment of Mortgage was not necessary for foreclosure.

Defendant attempts to make much of the fact that the assignment of mortgage was executed on a date after the first publication of the sale. This is completely irrelevant, however, as U.S. Bank was entitled to exercise the power of sale due to the fact that it was "entitled to the money thus secured," as set forth above. In fact, even if no assignment of mortgage had ever been executed or recorded, the foreclosure would have been just as proper. In the commentary to the RESTATEMENT (THIRD) OF PROPERTY: § 5.4(a) *Transfer Of Mortgages And Obligations Secured By Mortgages* (2010), it is stated that "[r]ecordation of a mortgage assignment is not

necessary to the effective transfer of the obligation or the mortgage securing it."[27] *Id.* at cmt. b. (referring to sub-section (a) of § 5.4 of the same treatise). Section 5.4(a) reads as follows: "(a) A transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise." Public recordings, such as the Assignment of Mortgage at issue here, are merely done to put the world on notice of those holding an interest in the property and to preserve priority with regard to others who may attempt to claim an interest. Because the obligation secured by the Mortgage has already been conveyed to U.S. Bank (and therefore the power of sale in the mortgage has been conveyed), the later execution, delivery, and recording of the Assignment is a mere formality used to illustrate in the public record a private transfer that has already occurred. (*See* T. 76, 78:17-19.)

Even if it is held by this Court that the Assignment of Mortgage is the determinative legal document controlling the exercise of the power of sale, U.S. Bank's actions leading up to the foreclosure were merely preparatory in nature and the actual exercise of the power of sale did not occur until the consummation of the sale, at which time the Assignment of Mortgage had already been executed and delivered. Simply put, it is not the publication of the sale that invokes and exercises the power of sale, it is the actual sale of the property on the courthouse steps that is the actual exercise of the power of sale.

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[27] The Restatement also provides insight into the rationale for why recording assignments, albeit a good idea, is unnecessary from a legal standing perspective:

> Recordation of a mortgage assignment is not necessary to the effective transfer of the obligation or the mortgage securing it. However, assignees are well advised to record. One reason is that, if the assignment is not recorded, the original mortgagee appears in the public records to continue to hold the mortgage. If the mortgagee and mortgagor subsequently enter into and record a purported discharge or modification of the mortgage without the assignee's knowledge or involvement, and the real estate is then transferred to a good faith purchaser for value, the latter is entitled to rely on the record. The result is to prevent the assignee from enforcing the mortgage, in its original form, against the purchaser.

RESTATEMENT (THIRD) OF PROPERTY: § 5.4 *Transfer Of Mortgages And Obligations Secured By Mortgages*, at cmt. b.

The United States District Court for the Southern District of Alabama has found that publication is merely preparatory in nature and is not the actual exercise of the power of sale. *Hardy v. Jim Walter Homes, Inc.*, 2007 WL 174391 at *6 (S.D. Ala. 2007). In *Hardy*, the found as follows:

> Here the Complaint alleges nothing more than that WMC "scheduled a foreclosure sale" of plaintiffs' property. (Complaint, ¶ 15.) Plaintiffs have cited no Alabama authority, and the undersigned has found none, under which the mere scheduling of a foreclosure sale, without more, has been found to constitute a mortgagee's exercise of the power of sale. A plain reading of that legal standard strongly suggests that it cannot, and that the power of sale is exercised by selling, not merely by running a newspaper advertisement preparatory to selling.

Id. at *6 (emphasis added).

3. Defendant failed to present competent evidence to support an argument that the bid price obtained at the foreclosure sale was so low as to "shock the conscience."

At trial Defendant attempted to introduce evidence regarding the value of the property, arguing that the price realized at the foreclosure sale was so inconsistent with the value of the property that an excessive deficiency was created that shocks the conscience of the Court. (T. 447-53, 471-75.) As a threshold matter, this defense was never raised at any point in this case. Defendant's attorney argued at trial that "[i]t was raised also before in a previous trial in another case that we had with Judge Vance." (T. 472:1-3.) Affirmative defenses are required to be set forth either by pleading or motion or they are deemed waived. *Robinson v. Morse*, 352 So. 2d 1355, 1356 (Ala. 1977).

Defendant has actually never filed an answer to the Complaint as re-served in this action. Her answer to the initial Complaint (service of which was quashed) listed only the generic categorical defense of "wrongful foreclosure." The defense of low bid at the foreclosure sale actually sounds in fraud and therefore should be required to be set forth with particularity. *See* Ala. R. Civ. P. 9(b). U.S. Bank's counsel objected to the introduction of this defense at trial and

moved to strike this affirmative defense. (T. 471.) The issue was therefore not tried by consent of the parties such as to become an amendment to the pleadings under Ala. R. Civ. P. 15(b). The Court denied U.S. Bank's oral motion to strike at trial, but U.S. Bank reinstates that motion here and requests that the Court strike any testimony related to the value of the property and specifically preclude Defendant from asserting the affirmative defense of low bid at the foreclosure sale.

Even if the Court considers this defense, Defendant utterly failed to carry her burden of proof. At the foreclosure sale on August 12, 2008, U.S. Bank, N.A. was the highest and best bidder and the Property therefore reverted to U.S. Bank. (Foreclosure Deed.) U.S. Bank's bid at the sale was $49,600.00. (*Id*.) The value of the Property just prior to the foreclosure sale was estimated to be $61,500.00. (T. 493:13-15; Plaintiff's Trial Exhibit 22 (Broker's Price Opinion of the Property just prior to the sale).) Even though Defendant testified to the value of the property at trial, her testimony was based on the tax appraisal of the Jefferson County Tax Assessor, which is patently incompetent and inadmissible evidence. (T. 461:1-3.)[28]

It is well-established that under Alabama law, tax assessor's records are notoriously unreliable with regard to the value of property and are therefore completely incompetent. *See Pressley v. B.I.C. Constr., Inc.*, 2009 WL 2840815 at *8 (Ala. Civ. App. Sept. 4, 2009) (citing *State v. Griffith*, 290 So. 2d 162, 163-64 (Ala. 1974); 2 Charles W. Gamble, McElroy's Alabama Evidence § 267.04 (5th ed. 1996)). In *Presley* the Alabama Court of Civil Appeals held that the witness who testified to the value of the property actually rebutted her own testimony by basing her valuation on the tax assessor's records. *Id.* This was the basis of U.S. Bank's objection to this testimony on these points. (T. 450:9-12.)

[28] U.S. Bank timely objected to this testimony. (T. 448:10-12, 450:9-12.)

The only evidence that Defendant introduced of value other than her inadmissible tax record based testimony was the appraisal done in July 2006. (T. 453; Defendant's Exhibit 24.) U.S. Bank offered evidence and testimony that the value of the property at the time of foreclosure was approximately $61,500.00. (T. 493:13-15; Plaintiff's Trial Exhibit 22.) The only calculation that truly matters with regard to this issue is the value of the property at the time of foreclosure. Therefore, as it stands, Defendant has adduced no competent evidence on the value of the property at the time of foreclosure, and this argument is due to be disregarded.[29]

4. Defendant's scant allegations about "representations" from "the mortgage company" that the foreclosure would not go forward so long as she was speaking to Homecomings (GMAC) are unfounded.

Defendant claimed at trial that during the time she was in default of the Note and Mortgage that she spoke with someone at GMAC who told her that the foreclosure would not go forward because she was working with GMAC's loss mitigation department. (T. 441:5-17.) Defendant never received or executed any agreement in writing from GMAC that the foreclosure would be delayed, postponed, or cancelled. (T. 455:3-8.)[30] GMAC's business records do not indicate that any such conversation as testified to by Defendant ever occurred. (T. 141-43; Plaintiff's Trial Exhibit 3.)

Defendant never stated with specificity the person she spoke with who she allegedly had the conversation with that "the mortgage company" would not foreclose if she was talking to "them." (T. 441:5-17.) She simply stated that she spoke with a "guy" and that "the guy on the phone told me that he didn't see anything that indicated that the house was going to be

[29] Furthermore, Defendant's Counsel conceded at trial that Defendant does not want this case decided on this issue. (T. 475:20-22.)

[30] GMAC's policy when talking to a borrower about loss mitigation or options to avoid foreclosure that the borrower is told that foreclosure will continue until an agreement is reached in writing and a plan approved. (T. 140:2-10.) The borrower is never told that the foreclosure will be put on hold, (T. 140:11-14), and it is incumbent on the borrower to follow up with GMAC and the borrower cannot be forced to participate in the loss mitigation process. (T. 140:15-23.)

foreclosed on." (T. 441:10-11.) Defendant admits, however, that she never followed up with the call and never called the servicer back after this call. (T. 454:14-17.) Defendant never called the attorney who sent the letter to her advising her of the foreclosure, despite the instructions on the letter to do so. (T. 454:18-24.)

To the extent the Court considers the testimony of Defendant on these points, her testimony does not meet her burden of proof that there was some sort of agreement to not foreclose on the property. In fact, Defendant has failed to offer any proof whatsoever that she provided any consideration for such an agreement to forbear, postpone, or delay the foreclosure. On the day of the alleged conversation, any obligations that Defendant had already existed and she has offered no evidence of any new consideration for the agreement.

Regardless, even if such representations were made to Defendant (which U.S. Bank affirmatively denies), those oral representations alone could not serve to vary the terms, duties, rights, or obligations found in the mortgage. Any promise to forbear collection of a consumer debt in an amount more than $25,000.00 must be in writing in order to be enforceable. *See* Ala. Code § 8-9-2(7). Defendant has essentially alleged that U.S. Bank (through its agent servicer) orally agreed to forbear collection or enforcement of its debt secured by the mortgage. (T. 455:3-8.) Section 8-9-2(7) of the Alabama Code states that "[e]very agreement or commitment to lend money, delay or forebear repayment thereof or to modify the provisions of such an agreement or commitment except for consumer loans with a principal amount financed less than $25,000" must be in writing. Ala. Code § 8-9-2(7) (emphasis added). The promise or representation alleged by Defendant was not in writing, is consequently void and unenforceable, and could not have been reasonably relied on by Defendant.

5. U.S. Bank complied with the default notice and acceleration notice provision in the mortgage prior to foreclosure.

Defendant appears to assert that that U.S. Bank failed to properly notify her of the default in the Mortgage. To the contrary, the evidence clearly establishes that GMAC and U.S. Bank complied with both contractual and statutory requirements. *See Redman v. Fed. Home Mortgage Corp.,* 765 So. 2d 630, 634 (Ala. 1999) (applying § 35-10-13 and finding that debtor has sufficient notice of default and foreclosure sale where mortgagee complied with § 35-10-13 and with the notice provisions of mortgage by sending letter of default to debtor's address).

Under the terms of the mortgage pursuant to which U.S. Bank claims possession, notice had only to be sent by first class mail and addressed to the property address set forth in the Mortgage. (*See* Mortgage.) The default letters sent by GMAC complied in this regard. (*See* Plaintiff's Trial Exhibits 5-9.) These letters were all sent to the property address set forth in the Mortgage, and there is no requirement in the Mortgage that GMAC actually confirm receipt of the notice prior to proceeding with foreclosure. (*See* Mortgage at ¶ 15.)

Notice of the default, acceleration, and demand for possession were all made at the property address set forth in the mortgage. [31] (*See* Plaintiff's Trial Exhibits 5-9, 11, and 14.) Notice was provided on May 5, 2008 concerning the default on the loan. (*See* Plaintiff's Trial Exhibit 9.) On July 11, 2008 the intent to accelerate the loan was sent to the property address identified in the Mortgage. (*See* Plaintiff's Trial Exhibit 11.) The foreclosure sale was published on July 12, 19, and 26, 2008 in a paper of general circulation in Jefferson County, Alabama, the county where the property is located. (Plaintiff's Trial Exhibit 10); *See Constantine v. Fist Alabama Bank of Birmingham,* 465 So. 2d 419, 422 (Ala. Civ. App. 1984) (citing *Davis v. National Homes Acceptance Corporation,* 523 F. Supp. 477 (N.D. Ala. 1981)) (holding that a

[31] Pursuant to the terms of the Mortgage, "[a]ny notice . . . shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means." (*See* Mortgage at ¶ 15.)

foreclosure notice published in the *Alabama Messenger* is valid). Consequently, Defendant's testimony that she did not receive notices is not credible and is due to be disregarded.

C. Defendant's Challenges to the Trustee's Compliance with the Terms of the PSA Must Fail as a Matter of Law.

1. Defendant failed to present substantial evidence that another entity owns her Note and thus there is no justiciable controversy regarding the ownership of the Note.

In a fruitless effort to convince this Court that some other securitized trust also owned her loan, Defendant attempted to introduce a "Free Writing Prospectus" for a different trust as evidence in this case. (T. 177:14; Defendant's trial Exhibit 2, hereinafter "FWP".) The "Free Writing Prospectus" for Trust 2006-EMX9 lists a preliminary schedule of loans that may make up the pool of mortgages to be securitized into the anticipated trust, 2006-EMX9. (FWP.) Admittedly, Defendant's loan did appear in the preliminary schedule for the 2006-EMX9 Trust. (*See* FWP; T. 172-177.) The FWP, however, is not a pooling and servicing agreement, but is instead merely a preliminary disclosure document. (T. 310:21-25.) Defendant, however, failed to submit the final mortgage loan schedule with the pooling and servicing agreement for the 2006-EMX9 Trust, which would have shown if Defendant's loan ended up in the final pool of mortgage loans for the 2006-EMX9 trust. (T. 289:13-25, 290:1-22; Defendant's trial Exhibit 9 (pooling and servicing agreement for the 2006-EMX9 trust).)

U.S. Bank subsequently demonstrated that Defendant's loan is not contained within the final mortgage loan schedule for the 2006-EMX9 trust. (T. 433-434.) Defendant's counsel therefore withdrew their argument that the Defendant's loan was contained in the 2006-EMX9 trust and were forced to concede that the only trust that Defendant's loan appears in is the Trust in this case. (T. 433.) In this regard, the following exchange occurred:

> MR. RAGSDALE: One last housekeeping. Y'all were going to bring the mortgage loan schedule for that 2006 thing.

MR. WOOTEN: I represent to the Court that the mortgage loan schedule for the other trust, the final one, does not have that loan number in it.

MR. RAGSDALE: And we would move to strike whatever it was, Defendant's Exhibit 2, which was the preliminary prospectus which was represented that it was included with that. I heard you say it.

MR. WOOTEN: Well, represented –

MR. RAGSDALE: It was not included.

MR. WOOTEN: We represented that the loan was on the schedule in the preliminary prospectus.

MR. RAGSDALE: Can we stipulate, then, that the only one of these stacks of PSAs, the only place where Ms. Congress's loan appears in any mortgage loan schedule is on the trust we're here about today.

MR. WOOTEN: Yeah.

MR. RAGSDALE: It's not in any of the others.

MR. WOOTEN: And we did not find it in any final document.

THE COURT: I had thought you said it was in the --

MR. WOOTEN: I apologize if I misled the Court in any way.

THE WITNESS: -- the trust '09.

MR. WOOTEN: We meant it was in the prospectus as a preliminary pool.

(T. 433:1-25, 434:1-7.) Therefore, Defendant was wholly unable to prove that any other securitized trust owns her mortgage loan.

Furthermore, Defendant testified that no other entity has contacted her regarding her loan or demanded payment on the loan:

Q. Has anybody else called you about this note, this mortgage, or this debt?

A. No.

Q. Has EMAX Financial Group, LLC called you about this debt?

A. No.

Q. How about Residential Funding Corporation, LLC?

A. No.

Q. Residential Asset and Securities Corporation?

A. No.

(T. 463-64.). Adams could not offer any opinion as to who owned the Note. (T. 256:11-14.) Thus, the evidence at trial firmly established (1) that U.S. Bank was in possession of the Note (*See* T. 122:20-24, 113:14-19; PSA.); (2) Defendant's loan was included on the mortgage loan schedule for the Trust (T. 321:11-14; Mortgage Loan Schedule); (3) Defendant's loan was not included any other mortgage loan schedule introduced by Defendant (T. 433:1-25, 434:1-7); and (4) no other entity has demanded payment on the debt or attempted to foreclose the Mortgage (T. 463-64). The sum of this evidence clearly proves that the Trust, through its trustee U.S. Bank, owned the Note, and no other entity has asserted a superior right, title, or claim to the loan.

Because no other entity has asserted that it owns the Note (and indeed, at no time has Defendant asserted that she owns the Note), there is not a justiciable controversy regarding the Note's ownership. Defendant's argument that another entity owns her Note is wholly unsupported by the evidence. Thus, this Court should disregard this argument in its entirety without regard to the terms of the PSA or Defendant's arguments based on that document.

2. Defendant lacks standing to raise an affirmative defense to the ejectment concerning the PSA because she is neither a party nor a third-party beneficiary to that agreement

Defendant's challenge to U.S. Bank's right to foreclose the Mortgage is brought as an affirmative defense to the action for ejectment. Whether a defendant must possess standing to assert an affirmative defense to a plaintiff's cause of action appears to be a question of first impression in Alabama. In *Federal Deposit Insurance Corp. v. Main Hurdman*, 655 F. Supp. 259 (E.D. Cal. 1987), the United States District Court for the Eastern District of California

thoroughly analyzed whether a defendant must have standing to assert an affirmative defense to a plaintiff's claim:

> . . . [H]ere defendant raises a true affirmative defense seeking to litigate questions not encompassed by plaintiff's case-in-chief. In such a configuration, defendant's posture is wholly analogous to that of a plaintiff in a typical standing dispute. There appears to be no reason in logic not to require a defendant who seeks to litigate the lawfulness of the [plaintiff] government's conduct in such a context to demonstrate its right to obtain a judicial determination of its contention. Indeed, as the FDIC points out, in criminal cases where the government is the plaintiff, defendants must demonstrate standing to raise issues, even issues of constitutional dimension. . . . Moreover, on the occasions where a civil defendant's standing is in issue, the court engages in standard standing analysis. *NAACP v. Alabama,* 357 U.S. 449, 458-60, (1958) (defendant in civil contempt); *Barrows v. Jackson,* 346 U.S. 249, 254-60, 73 S.Ct. 1031, 1033-37, 97 L.Ed. 1586 (1953) (defendant in contract action). I thus conclude that a plaintiff may raise the question of whether a defendant has standing to pursue a true affirmative defense.

Id. (emphasis added); *see also Miller v. Allstate Insurance Co.*, 751 N.W.2d 463 (Mich. 2008) (holding that an automobile insurer lacked statutory standing to challenge corporate status of health care provider as affirmative defense in action by provider to recover personal protection insurance benefits on behalf of licensed physical therapist because only Attorney General had standing to challenge).

Further, the Alabama Legislature has expressed this same reasoning by virtue of its enactment of Alabama Code § 7-3-305(c). Defendant, as the maker of the Note, is barred by § 7-3-305(c) from asserting as a defense to her obligation on the Note a claim of a third party to the Note, unless that third party is joined in the lawsuit and asserts the claim itself. This demonstrates the Alabama Legislature's intent to prevent litigants from asserting the rights of others as a defense to their own obligations, which is very similar to an analysis regarding standing. *See, e.g., Wyeth, Inc. v. Blue Cross and Blue Shield of Alabama*, 2010 WL 152123, 3-4 (Ala. Jan. 15, 2010).

Defendant lacks the necessary standing to challenge any transactions between parties to the PSA because, as both of her experts admit, she is neither a party to the PSA nor a third-party

beneficiary to the PSA. (T. 263:22-25, 264:1, 265:2-4, 265:11-14, 358:10-15). It is undisputed that Defendant is not a named party to the PSA. The PSA was entered into by Residential Asset Securities Corporation as the depositor, Residential Funding Company, LLC as master servicer, and U.S. Bank National Association as trustee (collectively, the "PSA Parties"). (*See* PSA.) New York and Alabama law both dictate that a non-party to a contract does not have standing to bring a claim against that contract. *Faggionato v. Lerner*, 500 F. Supp. 2d 237, 248 (S.D.N.Y. 2007) (holding that "where claim asserted is contractual and plaintiff is not party to contract or third party beneficiary of contract, claim must be dismissed for lack of standing"); *see also Ex parte Warren*, 718 So. 2d 45, 47 (Ala. 1998).

Defendant, as a non-party to the PSA, cannot bring an action to void a transaction of U.S. Bank, as trustee, under New York law. In *Cashman v. Petrie*, 14 N.Y.2d 426, 429 (1964), the court held that the "only persons who would have any right to object in this instance…would be income beneficiaries" of the trust. Cashman involved an action by a testamentary trustee of a trust holding 49% of stock in corporations against the testamentary trustee of another trust holding 51% of stock to compel distribution of a larger proportion of the earnings of the corporations by way of dividends. The New York Court of Appeals held that the trustee holding 49% of stock lacked standing since the trust holding 51% of the stock had different beneficiaries and remaindermen. The court emphasized that a "person who might incidentally benefit from the performance of a trust but is not a beneficiary thereof cannot maintain a suit to enforce the trust or to enjoin a breach." *Id*. at 430; *see also City Bank Farmers Trust Co. v. MacFadden,* 70 N.Y.S.2d 559, 563 (N.Y.Sup. 1947).

Because she is not a named party to the agreement, Defendant's only other basis to assert a claim is as a third-party beneficiary. Under New York law, a "non-party [to a contract] may sue for breach of contract only if it is an intended, and not a mere incidental, beneficiary."

*LaSalle Natl. Bank v Ernst & Youn*g, 285 A.D.2d 101, 108 (N.Y. App. Div. 2001) (emphasis added); *see also Alicea v. New York*, 145 A.D.2d 315, 317 (N.Y. App. Div. 1st Dep't 1988) (emphasizing the difference between an incidental and intended beneficiary). Alabama law is substantially identical. *Cincinnati Ins. Cos. v. Barber Insulation, Inc.*, 946 So. 2d 441, 443 (Ala. 2006); *Harris Moran Seed Co., Inc. v. Phillips*, 949 So. 2d 916, 920 (Ala. Civ. App. 2006); *Federal Mogul Corp. v. Universal Const. Co.*, 376 So. 2d 716, 723 -724 (Ala. Civ. App. 1979) (holding that "a third person has no rights under a contract between others unless the contracting parties intend that the third person receive direct benefit enforceable in court as opposed to an incidental benefit"). The best evidence of the contracting parties' intent to bestow a benefit upon a third party is the language of the contract itself. *243-249 Holding Co., LLC v. Infante*, 4 A.D.3d 184 (N.Y. App. Div. 2004).

A reading of the PSA evidences that the PSA Parties did not intend to confer a direct benefit on Defendant. Sections 11.09 and 11.10 of the PSA identify the Swap Counterparty and the Certificate Insurer as express third party beneficiaries. *See* PSA §§ 11.09-11.10(a). Defendant has failed to identify any provision of the PSA that evidences that the PSA Parties intended to bestow a direct benefit upon her. Indeed, an examination of the PSA reveals exactly the opposite: because the PSA Parties expressly identified the Swap Counterparty and the Certificate Insurer as the intended third-party beneficiaries to the PSA, the legal maxim *expressio unius est exclusio alterius* ("to express or include one thing implies the exclusion of the other") dictates that the parties to the contract intentionally excluded mortgagors, including Defendant, as intended beneficiaries of the PSA. *See Drago v. A/S Inger*, 194 F. Supp. 398, 408 (E.D.N.Y. 1961) ("While the shipowner is not specified as a beneficiary…two other classes are…It would seem, therefore – *expressio unius est exclusio alterius* – that the parties to the contract did not intend to make the shipowner a beneficiary of this specific…clause."). The absence of language

directly conferring third-party-beneficiary status on Defendant indicates that no party to the PSA intended to confer a direct benefit on Defendant.

Other courts to consider the question have held that borrowers lack standing to enforce provisions of servicing agreements between a mortgage servicer and the beneficiary of a mortgage note. *See, e.g., Roberts v. Cameron-Brown Co.,* 556 F. 2d 356 (5th Cir. 1977) (rejecting a borrower's claim that he was a third-party beneficiary of a Housing and Urban Development Handbook which established guidelines for servicers of HUD mortgages); *Choi v. Chase Manhattan Mortg. Co*., 63 F. Supp. 2d 874 (N.D. Ill. 1999) (holding that mortgagors were not third-party beneficiaries of contract between mortgagee and mortgage servicing company, and mortgagors thus lacked standing to sue for damages arising out of servicing company's alleged breach of contract which led to tax sale of mortgagors' home, even though mortgagors would have benefitted from servicing company's responsible performance of its contractual obligations to make necessary tax payments when due and to perform other mortgage servicing duties); *Blair v. Source One Mortg. Servs. Corp.,* 1997 WL 732407, at *2 (E.D. La. Nov. 20, 1997) (finding that borrower's potential benefit from servicing agreement was incidental to agreements primary purpose and granting summary judgment in favor of mortgage lender on third-party beneficiary claim); *Hinton v. Federal Nat. Mortg. Ass'n,* 945 F. Supp. 1052 (S.D. Tex. 1996) (holding that borrower was neither the third party beneficiary of the service contract entered into by the Federal National Mortgage Association and the company which serviced the loan).

Furthermore, New York courts follow the test outlined in the Restatement (Second) of Contracts which requires a party claiming third party beneficiary status to prove:

> (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost.

State of Cal. Publ. Employees' Re. Sys. v. Shearman & Sterling, 741 N.E.2d 101, 104 (N.Y. 2000). Alabama law is substantially identical, requiring a party claiming third-party beneficiary status to demonstrate (1) that the contracting parties intended, at the time the contract was created, to bestow a direct benefit upon a third party; (2) that the complainant was the intended beneficiary of the contract; and (3) that the contract was breached. *Harris Moran Seed Co., Inc. v. Phillips*, 949 So. 2d 916, 920 (Ala. Civ. App. 2006). A review of the PSA reveals that the primary purpose of the Agreement is to govern the relationship between U.S. Bank, the Depositor, and the Master Servicer to the Agreement. Defendant has identified no provision of the Agreement which confers upon her the right to complain about, and seek redress before a court concerning, an alleged noncompliance of a party to that Agreement. Because Defendant's interest in the PSA is, at most, incidental, she fails to satisfy the standing requirements under both New York and Alabama law and her argument regarding U.S. Bank's alleged noncompliance with the PSA is due to be disregarded in its entirety.

3. Defendant cannot assert the purported claim of a third party to the Note as a defense to payment.

By arguing that U.S. Bank does not own the Note, and thus, presumably, that some other entity owns the Note instead, Defendant seeks to assert the rights of an unidentified third party to the instrument. First, Defendant has not identified the party which she contends has the right to enforce the Note,[32] nor has she provided any evidence that such a party has demanded payment. Second, this claim is expressly foreclosed as a defense to payment of a negotiable instrument under Alabama law.

> Except as stated in subsection (d), in an action to enforce the obligation of a party to pay the instrument, the obligor may not assert against the person entitled to enforce the instrument a defense, claim in recoupment, or claim to the instrument

[32] Indeed, Adams, the securitization expert, testified that he could not identify the party who owned the Note. (T. 256:11-14). Bloom, who is not an expert in UCC law, testified that EMAX Financial owned the Note because of perceived issues with the Allonge. (T. 344:16-18, 348:17-20.)

> (Section 7-3-306) of another person, but the other person's claim to the instrument may be asserted by the obligor if the other person is joined in the action and personally asserts the claim against the person entitled to enforce the instrument

Ala. Code § 7-3-305(c). This section provides that Defendant can assert the claim that some other entity owns the Note **only** if (1) she joins to this action the party who she contends owns the Note, and (2) that party personally asserts its claim to the Note against U.S. Bank.

A substantially identical statute was considered by the Court of Appeals of South Carolina in *Osborn v. Chicaro Development Corp.*, 363 S.E.2d 108 (S.C. App. 1987). In *Osborn*, the holder of a note sued to enforce the note, and the makers argued that the transfer of the note from the original payee to the holder was illegal. The court in *Osborn* rejected this claim, holding that the maker of the note lacked standing under South Carolina's version of the U.C.C. to assert the defense that the transfer of the note from the payee to the holder-plaintiff was illegal, because "the claim of any third person to the instrument, not a holder in due course, is not available as a defense to any person liable thereon unless the third person (in this case, [the original payee]) himself defends the action for such party." *Id.* at 110.

In this case Defendant seeks to assert the same defense to U.S. Bank's claim as holder of the Note as that rejected by the *Osborn* court. Defendant essentially claims that the transfer to the Trust violated Trust documents and was thus illegal. This argument is foreclosed by Alabama Code § 7-3-305(c). Defendant has not joined to this lawsuit the entity which she claims is the proper party to enforce the Note; indeed, she has not even identified any other party claiming an interest in the Note. (T. 463-64.) Furthermore, no other party is present in this action and asserting a claim to the proceeds of the Note. Instead, Defendant claims that GMAC continues to own the loan, despite all evidence to the contrary. Consequently, applicable Alabama governing the enforceability of negotiable instruments does not permit Defendant to

argue that another entity owns the Note held by U.S. Bank, and her argument to this effect is due to be disregarded in its entirety.

4. Other courts have disregarded similar securitization theories.

Similar complaints based on these "securitization" theories are not gaining favor in other courts and have been consistently dismissed. The United States District Court of Minnesota recently dismissed a plaintiff's claim based on U.S. Bank's alleged non-compliance with a PSA. *See Peterson-Price v. U.S. Bank Nat. Ass'n.*, 2010 WL 1782188 at *10 (D. Minn. May 4, 2010). In *Peterson-Price*, the court found that relevant state statutory law would override the arguments advanced by the plaintiff and noted as follows:

> Plaintiff attempts to buttress her challenge to whether the record adequately shows that U.S. Bank is the holder of the underlying debt instrument by claiming that "the chain of endorsement" of the note and mortgage did not conform to the chain of endorsement specified in the PSA. Plaintiff explains that the failure to comply with the PSA is evidence that "tends to make the existence of the fact of the assignment from Trimark to U.S. Bank as trustee less probably (sic) than it would be without the evidence." The Court disagrees. Whether the assignment to U.S. Bank followed the chain dictated in the PSA is not probative of the validity of U.S. Bank's interest under the Minnesota Recording Act. If U.S. Bank had been assigned the mortgage from a party other than the mortgagee of record, noncompliance with the PSA might be relevant, but the undisputed evidence is that Trimark was the mortgagee of record when it assigned to U.S. Bank.

Id. (internal citations omitted). In fact, the Seventh Circuit Court of Appeals, in a decision by Judge Posner has held, in considering a securitized pool of loans, that "[t]he trust holds the legal title to the mortgages." *See CW Capital Asset Management, LLC v. Chicago Props., LLC* 2010 WL 2574190 *2 (7th Cir. Ct. App. June 29, 2010). It is clear that Defendant's arguments and evidence in this case do not disprove the fact that the Trust holds legal title to her mortgage, and now the property by virtue of the foreclosure.

A situation similar to *Peterson-Price* is presented in the present case, which does not involve the assignment of mortgage (which is a MERS mortgage assignment), but the conveyance of the debt into the Trust according to the PSA. It being clearly shown herein that

the debt was properly conveyed to the Trust by the PSA and the AAA, Alabama statutory and common law thereafter dictates U.S. Bank's actions in foreclosing on the Property. As set forth previously in this Trial Brief, all statutory, contractual, and common law requirements were complied with in effecting the foreclosure. U.S. Bank, as Trustee, was the holder of the debt at the time of the foreclosure. Therefore, this Court can, similar to the Minnesota District Court, hold that "[w]hether the assignment to U.S. Bank followed the chain dictated in the PSA is not probative of the validity of U.S. Bank's interest under [Alabama's Uniform Commercial Code and relevant statutory foreclosure law]." *Peterson-Price.*, 2010 WL 1782188 at *10.[33]

D. <u>The PSA Representations Prove that the Defendant's Mortgage Loan was Already a Part of the Trust Upon the Closing Date.</u>

Even if this Court were to allow the Defendant to raise U.S. Bank's compliance, or non-compliance, with the terms of the PSA as a defense, the terms of that document establish on their face that the Defendant's Mortgage Loan was transferred into the Trust in a timely fashion and in

[33] The Minnesota District Court is not alone in its disregard of the securitization arguments: *Ciardi v. The Lending Co.*, 2010 WL 2079735 (D. Ariz. May 24, 2010) (holding that there is no need for the lender to "show the note" and in dismissing the Plaintiffs' amended complaint noted "that Plaintiffs' amended complaint is not the model of clarity. Plaintiffs do not allege any specific causes of action, and much of their amended complaint is simply a narrative concerning the mortgage securitization industry."); *Zambrano v. HSBC Bank USA, Inc.*, 2010 WL 2105164 (E.D. Va. May 25, 2010) (dismissing plaintiff's complaint alleging wrongful foreclosure and holding as follows: "Plaintiff too asserts a 'double recovery' theory based on an incorrect understanding of credit default swaps, 'credit enhancements,' and loan securitization. According to Plaintiff's theory, Defendants may have received a credit 'payoff' or swap upon Plaintiff's default. Therefore, the foreclosure on the Property resulted in a double recovery. Plaintiff's double recovery theory fails because it is unsupported by any factual allegations and is contrary to law."); *Ruggia v. Washington Mutual*, 2010 WL 1957218 (E.D. Va. May 13, 2010) (dismissing plaintiffs' complaint which apparently alleged wrongful foreclosure based on some aspects of a securitization theory); *U.S. Bank v. Hahnel*, 2010 WL 2817588 (Conn. Super. Jun. 9, 2010) (holding that plaintiff lender had standing to foreclose as the "holder" of the note, and completely ignoring defendant's arguments on securitization); *Sipe v. Countrywide Bank*, 2010 WL 2773253 at *14 (E.D. Cal. July 13, 2010) (same); *Suss v. JP Morgan Chase Bank, N.A.*, 2010 WL 2733097 at *1 (D. Md. July 9, 2010) (holding that "[t]he various arguments that Plaintiff advances to support his theory that the securitization rendered the Note unenforceable are also without legal support."); *Steiniger v. Gerspach*, 2010 WL 2671767 *2 (D. Ariz. July 2, 2010) ("To the extent that Plaintiffs contend that the note has been 'bundled with other notes [and] sold as a mortgage-backed security,' Plaintiffs fail to explain why this is a legal basis that entitles them to relief. Plaintiffs do not point to any law indicating that securitization of a mortgage is unlawful."); *Chavez v. Calif. Reconveyance Co.*, 2010 WL 2545006 *2 (D. Nev. June 18, 2010) ("The alleged securitization of Plaintiffs' loan did not invalidate the Deed of Trust, create a requirement of judicial foreclosure, or prevent Defendants from being holders in due course.") and ("Plaintiffs' mortgage was governed by an express contract under which Defendants were entitled to repayment. This contract was not destroyed by the alleged securitization of Plaintiffs' loan.").

full compliance with the terms of the PSA. The PSA states that it is to be construed under New York law. (PSA § 11.04.) New York law provides that "no words used by the testator should be cast aside as meaningless, but that effect must be given, if possible to every word and provision. . . ." *In re Olney's Estate*, 20 N.Y.S.2d 884, 892 (N.Y. Sur. 1940). Therefore, the provisions of the Trust must be taken, as a matter of law, at face value for the representations, transfers, and conveyances recited therein.

The PSA was filed with the Securities and Exchange Commission on March 27, 2007 as an exhibit to a Form 8-K. This Form 8-K was filed under oath and recited that the Trust was formed and funded with the certain Mortgage Loans on March 12, 2007. (*See* Form 8-K.) These particular mortgage loans were conveyed to the Trustee (for the Trust) via the terms of the PSA and another document called an Assignment and Assumption Agreement (hereinafter "AAA"). (*See* PSA and AAA.) The particular mortgage loans transferred to the Trust were defined in the PSA. (PSA at Definitions: Mortgage Loans, p. 15) (hereinafter "Mortgage Loans.") The operative provisions conveying these Mortgage Loans are found in the PSA and conclusively state that: (1) the Depositor of the trust has assigned the Mortgage Loans to the Trustee (PSA at § 2.01(a)); (2) that the Depositor has delivered the Mortgage Loans to the Master Servicer (PSA at § 2.01(b)); (3) that the Trustee has acknowledged receipt of the Mortgage Loans, including the promissory notes relating to the Mortgage Loans (PSA at § 2.02); (4) that the Depositor has warranted to the Trustee that at the time of transfer of the Mortgage Loans that the Depositor had good title to the Mortgage Loans (PSA at § 2.03(b); and (5) that the Trustee has acknowledged the assignment and physical delivery to it of the Mortgage Loans (PSA at § 2.05(a)). Defendant stipulated at trial that her loan was included in the Mortgage Loan Schedule of loans to be transferred to the Trust. (T. 433:16-21.)

Each and every one of these provisions must be given the effect of the representations made therein. *See In re Olney's Estate*, 20 N.Y.S.2d at 892. It is clear from these provisions in the PSA that by at least March 12, 2007 each and every Mortgage Loan listed in the Mortgage Loan Schedule was conveyed to the Trust (PSA § 2.01), and the Trust acknowledged such conveyance (PSA § 2.05). The Form 8-K was filed on March 27, 2007 and stated that the transaction conveying the Mortgage Loans to the Trust was completed as of March 12, 2007. (*See* Form 8-K.)

Defendant's argument is that her loan was not conveyed to the Trust in a timely fashion, or alternatively that it was not conveyed according to the form set forth in the PSA. As shown above, however, every Mortgage Loan listed on the Mortgage Loan Schedule was transferred into the Trust on or before March 12, 2007. The Mortgage Loan Schedule, which was also attached to the Form 8-K and filed with the SEC, lists and identifies a Mortgage Loan bearing the investor number for Defendant's loan. (*See* Mortgage Loan Schedule.) Defendant stipulated that the only trust that her loan appears in is the Trust in this case. (T. 433.)

E. As Trustee, U.S. Bank was Permitted to Take Any Actions Necessary to Accomplish the Purposes of the Trust.

Even under New York law, U.S. Bank was permitted to take any actions necessary to accomplish the purposes embodied in the PSA. New York courts adhere to the Second Restatement of Trusts, which states that a trustee can "exercise such powers and only such powers as are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust." Restatement (Second) of Trusts § 186 (1959). In New York, the duties and powers of a trustee are defined by the terms of the trust agreement. *In re Application of IBJ Schroder Bank & Trust Co.*, 706 N.Y.S.2d 114, 115 (N.Y.A.D. 2000). Nevertheless, trustee duties do not have to be explicitly stated in the trust agreement. Some powers "may be implied to accomplish the settlor's intentions and purpose of the trust and to

enable the trustee to perform his duties." *In re Proctor's Will*, 284 N.Y.S. 675, 679 (N.Y.Sur. 1935). The extent of these implied powers are to be determined from the trust instrument and the surrounding circumstances, including the nature and condition of the trust when it was established. *Id.* Additionally, a trustee must exercise a certain level of care and diligence in administering the trust. New York courts have held that a trustee must "employ diligence and prudence in the care and management of a trust equivalent to that of a prudent person of discretion and intelligence in managing his or her own affairs." *In re Saxton*, 274 A.D.2d 110, 118 (N.Y. App. Div. 2000). Whether a fiduciary has employed such diligence and prudence is a factual determination. *Id.*

In *IBJ Shroder*, the trustee maintained he had authority to enter into a settlement agreement in an underlying action. *In re Application of IBJ Schroder Bank & Trust Co*., 706 N.Y.S.2d 114, 114 (N.Y.A.D. 2000). The court construed the trust agreement clause that gave the trustee the power to "take such action as shall be necessary" with respect to the subject matter of the underlying action to include the power to settle that action. *Id. at 115.*

The PSA governing U.S. Bank's duties and powers with respect to the Trust expressly permits U.S. Bank to take those actions necessary to accomplish the purposes of the Trust. *See* PSA § 2.06. Even if this Court finds that the conveyance of Defendant's loan to the Trust did not meet all hyper-technical requirements imposed by the PSA, because U.S. Bank was empowered to take those actions necessary to accomplish the purposes of the PSA, this Court should find that U.S. Bank was authorized to accept Defendant's loan. To hold otherwise would be to deny the Trust an asset—Defendant's mortgage loan—a result surely not dictated by the PSA.[34]

[34] Defendant has failed to identify any provision of the Trust which states that if U.S. Bank does not take possession of the mortgage loan as of a date certain, the mortgage loan fails to be included in the Trust. Likewise, Defendant has failed to identify any provision of the mortgage loan which requires an assignment of the Mortgage to

V. CONCLUSION

For the above-stated reasons, U.S. Bank respectfully requests this Court to issue an order in its favor, holding as follows:

1. That a Final Judgment be entered in favor of the plaintiff, U.S. Bank, N.A. as Trustee for that Certain Pooling and Servicing Agreement, Series #2007-EMZ1, Pool #40896 and against Defendant Erica Sumpter Congress regarding possession of the property.

2. That U.S. Bank be awarded possession of the real property set out below as set forth in U.S. Bank's complaint and that any lawful sheriff of the County of Jefferson be ordered to restore possession of the real property to U.S. Bank:

> Lot 2, according to the amended map of Third Addition to Morningside, as same as recorded in the Office of the Judge of Probate of Jefferson County, Alabama in Map Book 52, Page 97.
>
> Also known as **414 23rd Avenue Northeast, Birmingham, Alabama 35215.**

3. That by virtue of Defendant Erica Sumpter Congress's failure of to deliver possession after being given ten day written notice by the U.S. Bank, she has forfeited her right of redemption.

4. That Defendant Henrietta Jackson be dismissed as a party defendant to this action.

5. That costs be taxed as paid.

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the Trust as of a date certain. Indeed, numerous provisions of the PSA permit a mortgage assignment from MERS to U.S. Bank. *See, e.g.,* PSA §§ 3.01, 7.02(b).

/s/ R. Ryan Daugherty

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2010, I electronically filed the foregoing with the Clerk of the Court using the Alafile e-filing system, which will send notification of such filing to the following and have served the non-registered agents via United States Mail:

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