70140-1

70140-1

No. 70140-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION ONE

♦

BLAIR LA MOTHE,
Appellant,

vs.

US BANK NATIONAL ASSOCIATION, AS TRUSTEE OF THE BANC OF AMERICA FUNDING 2007-D, ITS SUCCESSORS IN INTEREST AND/OR ASSIGNS,

Respondent.

♦

ON APPEAL FROM KING COUNTY SUPERIOR COURT
STATE OF WASHINGTON, THE HONORABLE JOAN DUBUQUE

♦

**OPENING BRIEF**

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## I. ASSIGNMENT OF ERROR

The Judge of the Superior Court committed reversible error in not dismissing the underlying Amended Complaint because Respondent was not the real party in interest and lacked standing to seek a judicial foreclosure.

## II. STATEMENT OF ISSUES

Whether Respondent was the real party in interest and/or had standing to initiate the foreclosure and whether the Amended Complaint should have been dismissed.

## III. STATEMENT OF THE CASE

### A. Factual Background

Appellant Blair La Mothe ("Appellant") is the rightful owner and superior titleholder of the subject real property located at 8115 Northeast 110th Place, Kirkland, Washington 98034. Appellant obtained a loan from his lender Wells Fargo Bank, National Association ("Wells Fargo") for seven hundred thousand dollars ($700,000.00). Clerk's Papers Pages ("CP") 46 - 50. The loan is an "adjustable rate" note with a starting interest rate of 6.000%, scheduled to fluctuate throughout the life of the loan.

A Deed of Trust ("DOT") was recorded against Appellant's real property on November 18, 2005 in the King County, Washington

Auditor's File number 20051118002510, in the amount of seven hundred thousand dollars ($700,000.00), naming Northwest Trustee Services, LLC as Trustee. CP 12 – 37. Wells Fargo is s identified on the note and DOT as the "Lender" as well as the beneficiary.

On June 20, 2006, a Boundary Line Adjustment was recorded in the King County, Washington Auditor's File as number 20060620900012. CP 52 - 53. In connection with said Boundary Line Adjustment, Prarit Garg and Kavita S. Garg (the "Gargs") conveyed and quit claimed to Appellant, the owner of Lot B, a four square feet portion of their adjoining lot, Lot C.

The Quitclaim Deed was recorded on October 3, 2006 in the King County, Washington Auditor's File number 20061003000996. CP 38 – 40.

On May 10, 2010, a Notice of Default was issued by Northwest Trustee Services Inc. (not the Trustee, Northwest Trustee Services, LLC) identifying Respondent US Bank National Association, as Trustee of the Banc of America Funding 2007-D ("Respondent") and Wells Fargo as beneficiaries. CP 225 – 227.

On May 25, 2010, an Assignment of Deed of Trust was recorded in the King County, Washington Auditor's File as number 20100525001201. CP 51. This alleged assignment purported to transfer the DOT from Wells Fargo to Respondent three years after the May 1, 2007 cut-off date and the

May 31, 2007 closing date of the Banc of America Funding 2007-D trust, as further discussed below, and as indicated in the Pooling and Servicing Agreement identified as "Plaintiff's Exhibit 6" at trial. *See* Transcript of Trial February 13, 2013, Pages 39 and 40.

The Assignment was purportedly executed by Jeff Stenman as Assistant Vice President of Northwest Trustee Services, Inc., attorney in fact by power of attorney recorded 1/04/2010 under Auditor's File No. 20100104000781.

On that same day, Wells Fargo purportedly recorded a substitution of Trustee naming Northwest Trustee Services, Inc. as the new Trustee. CP 230. This substitution was purportedly executed by Anne Neely as Wells Fargo's Vice President of Loan Documentation, Attorney in Fact US Bank.

Respondent initiated a nonjudicial foreclosure, which it later canceled to resolve the boundary line issue, however, Appellant maintains he did not receive a notice of acceleration or of the nonjudicial foreclosure. CP 289 – 290.

**B. Procedural History**

Respondent filed a Complaint for deed of trust judicial foreclosure and declaratory relief on August 4, 2011, which Complaint was amended on August 11, 2011. CP 1 - 53.

Appellant filed his Answer and Affirmative Defenses to the Amended Complaint on August 2, 2012, as well as served Respondent with 18 Interrogatories and 25 Requests for Production of Documents. CP 84 – 90.

The interests of the Gargs were addressed by way of a Disclaimer of interest and Order of Dismissal filed on December 22, 2011. CP 112 – 117.

On January 14, 2013, Respondent filed a Motion to Shorten time, which was subsequently denied by the Superior Court. CP 118 – 123. Appellant filed his opposition thereto on January 15, 2013. CP 132 – 142.

On January 16, 2013, Appellant filed a Motion to Continue Trial, which was granted by the Superior Court on January 28, 2013. CP 146 – 151.

On that same day, Appellant filed a Motion to Compel and Motion to Strike Objections to Untimely Requests for Production due to Respondent's failure to respond to Appellant's Interrogatories and requests for document production which was granted by the Superior Court on January 16, 2013. CP 152 – 188.

On January 28, 2013, Appellant's oral motion to continue trial was granted. CP 239 – 241. A bench trial was held on February 13, 2013, the result of which Respondent was the prevailing party. CP 253 – 254. On

February 21, 2013, Respondent moved for entry of judgment and decree of foreclosure and order for sale as well as for award of attorneys fees and costs. CP 260 – 288.

A judgment, order and decree of foreclosure were entered on March 1, 2013 CP 341 – 346, 352 – 353. A judgment and order for an award of attorneys' fees and costs were entered on March 1, 2013 CP 347 – 351. A notice of appeal was filed on March 29, 2013. CP 356 – 375.

## IV. STANDARD OF REVIEW

A Superior Court's conclusions of law are reviewed de novo. *Union Boom Co. v. Samish River Boom Co.,* 33 Wn. 144, 152-153 (1903).

## V. ARGUMENT

The Judge of the Superior Court committed reversible error in not dismissing the underlying Amended Complaint because Respondent was not the real party in interest and lacked standing to seek a judicial foreclosure. Nearly identical to its federal counterpart, Washington Superior Court Civil Rules, CR 17(a) provides:

> **Every action shall be prosecuted in the name of the real party in interest**. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought.
>
> Wa. R. Super. Ct. Civ. CR 17 (emphasis added).

To maintain a cause of action, a "real party in interest" must show "that he has some real interest in the cause of action. 'His interest must be a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest, and he must show that he will be benefited by the relief granted.'" *State ex rel. Hays v. Wilson,* 17 Wn.2d 670, 672 (1943).

In the instant case, the record fails to establish that the original lender, Wells Fargo ever properly negotiated and transferred the subject note to Respondent, sufficient to create a present interest and ownership of the subject note and deed of trust owned and held by Wells Fargo. *See e.g., Davis v. Bartz,* 65 Wn. 395, 400 (1911) ("the only distinction between an owner and a mortgagee as a party to the lien foreclosure is that the owner is a necessary party to any valid foreclosure, while a mortgagee is a proper party. The only distinction, so far as here material, between a necessary party and a proper party is that a foreclosure of the lien without the one is absolutely void, while a foreclosure without the other is void only as to him"). Thus, Respondent's reliance upon the subject Assignment to create a chain of title between Wells Fargo and Respondent fails, and Respondent lacked standing to initiate a judicial foreclosure and sue herein. Without a complete chain of title supported by valid and enforceable transfers of the subject Note and Deed of Trust and

contractual rights thereunder, Respondent lacked standing to sue below, and accordingly the superior court committed reversible error in not dismissing the underlying Amended Complaint.

**A. Respondent lacked actual and contractual authority to initiate the judicial foreclosure.**

The record is unclear as to whether or not the subject note was ever properly negotiated and transferred to Respondent, and thus whether Respondent had standing to initiate a judicial foreclosure and sue herein. Respondent had absolutely no authority to accept any assignment after the Trust closed, even if it had such authority, there was never a valid assignment from the original lender, Wells Fargo to Respondent.

Under the common law, a person entitled to enforce a mortgage must also be the holder of the secured promissory note. As explained in the Restatement (Third) of Property (Mortgages) § 5.4:

> **§ 5.4 Transfer Of Mortgages And Obligations Secured By Mortgages**
>
> (a) A transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.
>
> (b) Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise.

> (c) A mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures.

Generally, possession of an indorsed promissory note, in compliance with the requirements of Article III of the Uniform Commercial Code (adopted in Washington as RCW Chapter 62A) is essential before an entity may conduct a foreclosure. However, there is no evidence in this record that Respondent was the holder of Appellant's note when it filed its complaint below. The disputed Assignment is wholly insufficient to establish this elemental fact. As the Supreme Court of Vermont explained in *U.S. Bank Nat. Ass'n v. Kimball*, 27 A.3d 1087 (Vt. 2011):

> 13. To foreclose a mortgage, a plaintiff must demonstrate that it has a right to enforce the note, and without such ownership, the plaintiff lacks standing. *Wells Fargo Bank, N.A. v. Ford*, 418 N.J.Super. 592, 15 A.3d 327, 329 (2011). While a plaintiff in a foreclosure should also have assignment of the mortgage, it is the note that is important because "[w]here a promissory note is secured by a mortgage, the mortgage is an incident to the note." *Huntington v. McCarty*, 174 Vt. 69, 70, 807 A.2d 950, 952 (2002). Because the note is a negotiable instrument, it is subject to the requirements of the UCC. Thus, U.S. Bank had the burden of demonstrating that it was a "[p]erson entitled to enforce'" the note, by showing it was "(i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument." 9A V.S.A. § 3–301. On appeal, U.S. Bank asserts that it is entitled to enforce the note under the first category—as a holder of the instrument.

> 14. A person becomes the holder of an instrument when it is issued or later negotiated to that person. 9A V.S.A. § 3–201(a). Negotiation always requires a transfer of possession of the instrument. Id. § 3–201 cmt. When the instrument is made payable to bearer, it can be negotiated by transfer alone. Id. §§ 3–201(b), 3–205(a). If it is payable to order—that is, to an identified person—then negotiation is completed by transfer and endorsement of the instrument. Id. § 3–201(b). An instrument payable to order can become a bearer instrument if endorsed in blank. Id. § 3–205(b). Therefore, in this case, because the note was not issued to U.S. Bank, to be a holder, U.S. Bank was required to show that at the time the complaint was filed it possessed the original note either made payable to bearer with a blank endorsement or made payable to order with an endorsement specifically to U.S. Bank. *See Bank of N.Y. v. Raftogianis*, 418 N.J.Super. 323, 13 A.3d 435, 439–40 (2010) (reciting requirements for bank to demonstrate that it was holder of note at time complaint was filed).
>
> 15. U.S. Bank lacked standing because it has failed to demonstrate either requirement. Initially, U.S. Bank's suit was based solely on an assignment of the mortgage by MERS.

*Id.* at 1092.

The Ninth Circuit Bankruptcy Appellate Panel in *In re Veal*, 450 B.R. 897 (9th Cir. B.A.P. 2011), also carefully analyzed the doctrine of standing in the context of an alleged mortgagee. *Veal*, similar to the present case, involved an alleged mortgage loan holder's claim against a bankruptcy debtor's real property. In that case, the Bankruptcy Appellate Panel concluded that the alleged mortgage loan holder failed to establish its authority to foreclose, because it provided no evidence that it possessed

the promissory note, beyond a mere "assignment" of mortgage. The Court explained:

> [U]nder the common law generally, the transfer of a mortgage without the transfer of the obligation it secures renders the mortgage ineffective and unenforceable in the hands of the transferee. Restatement (Third) of Property (Mortgages) § 5.4 cmt. e (1997) ("in general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation"). As stated in a leading real property treatise:
>
> When a note is split from a deed of trust "the note becomes, as a practical matter, unsecured." Restatement (Third) of Property (Mortgage) § 5.4 cmt. a (1997). Additionally, if the deed of trust was assigned without the note, then the assignee, "having no interest in the underlying debt or obligation, has a worthless piece of paper."
>
> 4 Richard R. Powell, Powell on Real Property, § 37.27[2] (2000). *Cf. In re Foreclosure Cases*, 521 F.Supp.2d 650, 653 (S.D.Ohio 2007) (finding that one who did not acquire the note which the mortgage secured is not entitled to enforce the lien of the mortgage); *In re Mims*, 438 B.R. 52, 56 (Bankr.S.D.N.Y.2010) ("Under New York law 'foreclosure of a mortgage may not be brought by one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity.' ") (quoting *Kluge v. Fugazy*, 145 A.D.2d 537, 536 N.Y.S.2d 92, 93 (N.Y.App.Div.1988)).
>
> . . . .
>
> This rule appears to be the common law rule. *See, e.g.,* Restatement (Third) of Property (Mortgage) § 5.4 (1997); *Carpenter v. Longan*, 83 U.S. 271, 274–75, 16 Wall. 271, 21 L.Ed. 313 (1872) ("The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the

note carries the mortgage with it, while an assignment of the latter alone is a nullity."); *Orman v. North Alabama Assets Co.,* 204 F. 289, 293 (N.D. Ala. 1913); *Rockford Trust Co. v. Purtell*, 183 Ark. 918, 39 S.W.2d 733 (1931). While we are aware that some states may have altered this rule by statute, that is not the case here.

As a result, to show a colorable claim against the Property, Wells Fargo had to show that it had some interest in the Note, either as a holder, as some other "person entitled to enforce," or that it was someone who held some ownership or other interest in the Note. *See In re Hwang*, 438 B.R. 661, 665 (C.D.Cal.2010) (finding that holder of note has real party in interest status). None of the exhibits attached to Wells Fargo's papers, however, establish its status as the holder, as a "person entitled to enforce," or as an entity with any ownership or other interest in the Note.

Not surprisingly, Wells Fargo disagrees. It argues that it submitted documents in support of its relief from stay motion which established a "colorable claim" against property of the estate. In this regard, it cites *In re Robbins*, 310 B.R. 626, 631 (9th Cir. BAP 2004) (which in turn cites *Grella*, 42 F.3d at 32). However, neither *Robbins* nor *Grella* dealt with a challenge to the movant's standing which, as we have said, is an independent threshold issue. Simply put, the colorable claim standard set forth in *Robbins* does not free Wells Fargo from the burden of establishing its status as a real party in interest allowing it to move for relief from stay, as this is the way in which Wells Fargo satisfies its prudential standing requirement.

In particular, because it did not show that it or its agent had actual possession of the Note, Wells Fargo could not establish that it was a holder of the Note, or a "person entitled to enforce" the Note. In addition, even if admissible, the final purported assignment of the Mortgage was insufficient under Article 9 to support a conclusion that Wells Fargo holds any interest, ownership

> or otherwise, in the Note. Put another way, without any evidence tending to show it was a "person entitled to enforce" the Note, or that it has an interest in the Note, Wells Fargo has shown no right to enforce the Mortgage securing the Note. Without these rights, Wells Fargo cannot make the threshold showing of a colorable claim to the Property that would give it prudential standing to seek stay relief or to qualify as a real party in interest.
>
> Accordingly, the bankruptcy court erred when it granted Wells Fargo's motion for relief from stay, and we must reverse that ruling.

*Id.* at 915-18 (footnotes omitted). *See also, In re Weisband*, 427 B.R. 13, *18 (Bkrtcy. D. Ariz. 2010) ("If GMAC is the holder of the Note, GMAC would be a party injured by the Debtor's failure to pay it, thereby satisfying the constitutional standing requirement. GMAC would also be the real party in interest under Fed.R.Civ.P. 17 because under Ariz.Rev.Stat. ("A.R.S.") § 47–3301, the holder of a note has the right to enforce it. However, as discussed below, GMAC did not prove it is the holder of the Note.").

Further, Respondent provided no evidence that a transfer of possession of the subject Note from the original lender, Wells Fargo to itself had ever occurred to entitle it to enforce the terms of the Note and Mortgage. The Note, which is a negotiable instrument governed under the Uniform Commercial Code, could not have been conveyed by any "assignment." Instead, said instrument had to have been negotiated in

compliance with the requirements of Article III of the Uniform Commercial Code, adopted in Washington as RCW Chapter 62A.

Pursuant to RCW 62A.3-203 governing negotiable instruments:

> (a) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.
>
> (b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.
>
> **(c) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.**
>
> (d) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this Article and has only the rights of a partial assignee.
>
> RCW 62A.3-203 (emphasis added.)

Respondent, who is otherwise a complete stranger to the subject note and mortgage, without presenting any evidence thereof, argued below that the subject mortgage loan was properly conveyed to it. Respondent's

only recorded link to the original lender, Wells Fargo, is the recorded May 2010 Assignment of Mortgage purportedly transferring the interests of the subject Mortgage from Wells Fargo to Respondent. Respondent's relied upon Assignment of Mortgage alone, however, is insufficient to establish standing, as no interest in the debt is assigned without proper negotiation and transfer of the note. This is because a mortgage is but an incident to the debt which it is intended to secure and cannot exist independently.

The Washington Supreme Court in *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 110 (2012) also carefully analyzed the doctrine of standing in the context of foreclosures wherein it held that Mortgage Electronic Registration System ("MERS") lacked the authority to foreclose under the Washington deeds of trust act, Revised Code of Washington ("RCW") Chapter 61.24 ("DTA") where it did not hold the underlying mortgage loan. Therein, the Court held MERS is an "ineligible beneficiary within the terms of the [DTA], if it never held the promissory note or other debt instrument secured by the deed of trust." (internal quotation marks omitted). The Court explained that "[a] plain reading of the statute leads us to conclude that **only the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary** with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property." *Id.* at 89 (emphasis added).

In *Walker v. Quality Loan Service Corp.,* 176 Wn.App. 294 (Wn. Ct. App. 2013) this Court reasoned that, because only a properly appointed successor trustee has authority to issue a notice of trustee's sale, "when an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee's sale." This Court held such actions to be material violations of the DTA.

Similarly, this Court in reiterated the same doctrine in *Rucker v. Novastar Mortg., Inc.,* 311 P.3d 31, 37-38 (Wn. Ct. App. 2013), wherein it held:

> Because the DTA dispenses with many protections commonly enjoyed by borrowers, "lenders must strictly comply with the statutes, and courts must strictly construe the statutes in the borrower's favor." *Amresco Independence Funding, Inc. v. SPS Props., LLC,* 129 Wash.App. 532, 537, 119 P.3d 884 (2005). Applying these principles, our Supreme Court has explained that "**only the actual holder of the promissory note** or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to **proceed with a nonjudicial foreclosure on real property**." Bain, 175 Wash.2d at 89, 285 P.3d 34. "[W]hen an ***38** unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee's sale." *Walker v. Quality Loan Serv. Corp.,* —— Wash.App. ——, ——, 308 P.3d 716 (2013). Such actions by the improperly appointed trustee, we have explained, constitute "material violations of the DTA." *Walker,* —— Wash.App. at ——, 308 P.3d 716.

Emphasis added.

Thus, Respondent's reliance upon the Assignment of Mortgage to create a chain of title in the instant case fails. Without a complete chain of title supported by valid and enforceable transfers of the subject Note and contractual rights thereunder, Respondent neither demonstrated its standing to sue below, nor its entitlement to initiate a judicial foreclosure.

**B. The subject mortgage loan was not properly securitized in 2007, and Respondent Trustee had no authority to accept the subject mortgage loan after the Trust closed in 2007, nor did it have any authority to initiate a judicial foreclosure.**

The doctrine of standing is even more complex in the context of a securitized mortgage trust. "In a foreclosure filed by a trustee on behalf of a securitized trust, the Pooling and Servicing Agreement is the key piece of documentation needed from the bank in order for the Judge to determine whether the trust owns the loan being foreclosed." Adam J. Levitin & Tara Twomey, Mortgage Servicing, 28 YALE J. ON REG. 1, 23 (2011).

In this case, Respondent, in its capacity as Trustee had absolutely no authority to accept any assignment, fraudulent or lawful, after the Trust closed three years prior on May 31, 2007. Respondent claimed to have obtained the subject mortgage loan pursuant to a May 2010 Assignment of Mortgage, but it presented no evidence whatsoever that the subject mortgage loan was ever properly transferred to it and securitized in 2007,

which is necessary to establish its standing to sue. As explained by a recent Stetson Law Review article:

> Although they play no role in actually creating the securitized mortgage bundled loans, the trustee and servicer are in a position to do the most damage to the trust when it comes to establishing proper standing in a mortgage foreclosure action. Once the bundled mortgages are given to a depositor the [Pooling and Servicing Agreement] and the I.R.S. tax code provisions require that the mortgages be transferred to the trust within a certain time frame, usually 90 days from the date the trust is created. After such time, the trust closes and any subsequent transfers are invalid.

Roy D. Oppenheim and Jacquelyn K. Trask, Deconstructing the Black Magic of Securitized Trusts: How the Mortgage-Backed Securitization Process is Hurting the Banking Industry's Ability to Foreclose and Proving the Best Offense for a Foreclosure Defense, STETSON L. REV. (footnotes omitted).

The May 2010 Assignment of Mortgage upon which Respondent relied upon to establish its standing below, was executed and recorded three years after the subject Trust closed, and after which time the Respondent had no authority to accept any new Mortgage loans on behalf of the trust. The subject trust in this case had a "Cut-Off Date" of May 1, 2007 (defined in Section 1.01 of the Trust), and a "Closing Date" of May 31, 2007.

Pursuant to the plain language of the Trust, Respondent as the Trustee had no authority to accept any new assets on behalf of the Trust after May 1, 2007. In fact, Article II, Section 2.01 of the Trust specifically provides in relevant part:

> **SECTION 2.01. Conveyance of Mortgage Loans.** (a) The Depositor, concurrently with the execution and delivery hereof, hereby sells, transfers, assigns, sets over and otherwise conveys to the Trustee on behalf of the Trust for the benefit of the Certificateholders, without recourse, all the right, title and interest of the Depositor in and to the Mortgage Loans and the related Mortgage Files, including all interest and principal received on or with respect to the Mortgage Loans (other than payments of principal and interest due and payable on the Mortgage Loans on or before the Cut-off Date) and the Depositor's rights under the BANA Servicing Agreement and under the Mortgage Loan Purchase Agreement, including the rights of the Depositor as assignee of the Sponsor with respect to the Sponsor's rights under the Servicing Agreements (other than the BANA Servicing Agreement). The foregoing sale, transfer, assignment and set over does not and is not intended to result in a creation of an assumption by the Trustee of any obligation of the Depositor or any other Person in connection with the Mortgage Loans or any agreement or instrument relating thereto, except as specifically set forth herein. In addition, the Depositor, concurrently with the execution and delivery hereof, hereby sells, transfers, assigns, sets over and otherwise conveys to the Trustee on behalf of the Trust for the benefit of the Certificateholders, without recourse, the Depositor's rights to receive any BPP Mortgage Loan Payment. It is agreed and understood by the parties hereto that it is not intended that any mortgage loan be included in the Trust that is a "High-Cost Home Loan" as defined in any of (i) the New Jersey Home Ownership Act effective November 27, 2003, (ii) the New Mexico Home Loan Protection Act

effective January 1, 2004, (iii) the Massachusetts Predatory Home Loan Practices Act effective November 7, 2004 or (iv) the Indiana Home Loan Practices Act, effective January 1, 2005.

(b) In connection with such transfer and assignment, the Depositor has delivered or caused to be delivered to the Trustee, or a Custodian on behalf of the Trustee, for the benefit of the Certificateholders, the following documents or instruments with respect to each Mortgage Loan so assigned:

(i) the original Mortgage Note, endorsed by manual or facsimile signature in the following form: "Pay to the order of U.S. Bank National Association, as trustee for holders of Banc of America Funding Corporation Mortgage Pass-Through Certificates, Series 2007-D, without recourse," with all necessary intervening endorsements showing a complete chain of endorsement from the originator to the Trustee (each such endorsement being sufficient to transfer all right, title and interest of the party so endorsing, as noteholder or assignee thereof, in and to that Mortgage Note) and, in the case of any Mortgage Loan originated in the State of New York documented by a NYCEMA, the NYCEMA, the new Mortgage Note, if applicable, the consolidated Mortgage Note and the consolidated Mortgage; (ii) except as provided below and other than with respect to the Mortgage Loans purchased by the Sponsor from Wells Fargo, the original recorded Mortgage with evidence of a recording thereon, or if any such Mortgage has not been returned from the applicable recording office or has been lost, or if such public recording office retains the original recorded Mortgage, a copy of such Mortgage certified by the applicable Servicer (which may be part of a blanket certification) as being a true and correct copy of the Mortgage; (iii) subject to the provisos at the end of this paragraph, a duly executed Assignment of Mortgage to "U.S. Bank National Association, as trustee for the holders of Banc of America Funding Corporation Mortgage Pass-Through Certificates, Series 2007-D"

(which may be included in a blanket assignment or assignments), together with, except as provided below and other than with respect to the Mortgage Loans purchased by the Sponsor from Wells Fargo, originals of all interim recorded assignments of such mortgage or a copy of such interim assignment certified by the applicable Servicer (which may be part of a blanket certification) as being a true and complete copy of the original recorded intervening assignments of Mortgage (each such assignment, when duly and validly completed, to be in recordable form and sufficient to effect the assignment of and transfer to the assignee thereof, under the Mortgage to which the assignment relates); provided that, if the related Mortgage has not been returned from the applicable public recording office, such Assignment of Mortgage may exclude the information to be provided by the recording office; and provided, further, if the related Mortgage has been recorded in the name of Mortgage Electronic Registration Systems, Inc. ("MERS") or its designee, no Assignment of Mortgage in favor of the Trustee will be ---- required to be prepared or delivered and instead, the Master Servicer shall enforce the obligations of the applicable Servicer to take all actions as are necessary to cause the Trust to be shown as the owner of the related Mortgage Loan on the records of MERS for purposes of the system of recording transfers of beneficial ownership of mortgages maintained by MERS; (iv) the originals of all assumption, modification, consolidation or extension agreements, if any, with evidence of recording thereon, if any; (v) other than with respect to the Mortgage Loans purchased by the Sponsor from Wells Fargo, any of (A) the original or duplicate original mortgagee title insurance policy and all riders thereto, (B) a title search showing no lien (other than standard exceptions) on the Mortgaged Property senior to the lien of the Mortgage or (C) an opinion of counsel of the type customarily rendered in the applicable jurisdiction in lieu of a title insurance policy; (vi) the original of any guarantee executed in connection with the Mortgage Note; (vii) for each Mortgage Loan, if any, which is secured by a residential long-term

lease, a copy of the lease with evidence of recording indicated thereon, or, if the lease is in the process of being recorded, a photocopy of the lease, certified by an officer of the respective prior owner of such Mortgage Loan or by the applicable title insurance company, closing/settlement/escrow agent or company or closing attorney to be a true andcorrect copy of the lease transmitted for recordation; (viii) the original of any security agreement, chattel mortgage or equivalent document executed in connection with the Mortgage. . .

Similarly, Section 2.02 of the Trust provides in relevant part:

**SECTION 2.02. Acceptance by the Trustee or Custodian of the Mortgage Loans.** Subject to the provisions of the following paragraph, the Trustee declares that it, or a Custodian as its agent, will hold the documents referred to in Section 2.01 and the other documents delivered to it or a Custodian as its agent, as the case may be, constituting the Mortgage Files, and that it will hold such other assets as are included in the Trust Estate delivered to it, in trust for the exclusive use and benefit of all present and future Certificateholders. Upon execution and delivery of this document, the Trustee shall deliver or cause a Custodian to deliver to the Depositor, the Master Servicer and the NIMS Insurer a certification in the form attached hereto as Exhibit K (the "Initial Certification") to the effect that, except as may be specified in a list of exceptions attached thereto, such Person has received the original Mortgage Note relating to each of the Mortgage Loans listed on the Mortgage Loan Schedule.

Within 90 days after the execution and delivery of this Agreement, the Trustee shall review, or cause a Custodian, on behalf of the Trustee, to review, the Mortgage Files in such Person's possession, and shall deliver to the Depositor, the Master Servicer and the NIMS Insurer a certification in the form attached hereto as Exhibit L (the "Final Certification") to the effect that, as to each Mortgage Loan listed in the Mortgage Loan

Schedule, except as may be specified in a list of exceptions attached to such Final Certification, such Mortgage File contains all of the items required to be delivered pursuant to Section 2.01(b). In performing any such review, the Trustee or a Custodian, as the case may be, may conclusively rely on the purported genuineness of any such document and any signature thereon.

If, in the course of such review, the Trustee or a Custodian finds any document constituting a part of a Mortgage File which does not meet the requirements of Section 2.01 or is omitted from such Mortgage File or if the Depositor, the Master Servicer, the Trustee, a Custodian, the NIMS Insurer or the Securities Administrator discovers a breach by a Servicer, North Fork Bank, the Sponsor or the Depositor of any representation, warranty or covenant under the Servicing Agreements, the North Fork Assignment Agreements, the Mortgage Loan Purchase Agreement or this Agreement, as the case may be, in respect of any Mortgage Loan and such breach materially adversely affects the interest of the Certificateholders in the related Mortgage Loan (provided that any such breach that causes the Mortgage Loan not to be a "qualified mortgage" within the meaning of Section 860G(a)(3) of the Code shall be deemed to materially and adversely affect the interests of the Certificateholders), then such party shall promptly so notify the Master Servicer, the Sponsor, such Servicer, North Fork Bank (if applicable), the Securities Administrator, the Trustee, the NIMS Insurer and the Depositor of such failure to meet the requirements of Section 2.01 or of such breach and request that the applicable Servicer, North Fork Bank, the Sponsor or the Depositor, as applicable, deliver such missing documentation or cure such defect or breach within 90 days of its discovery or its receipt of notice of any such failure to meet the requirements of Section 2.01 or of such breach.

Thus, the plain language of the Trust required that any mortgage backed assets be transferred and delivered as of the Cut-Off Date of the

Trust May 1, 2007, and certified by the Trustee by the May 31, 2007 Closing Date, after which time the Trustee had no authority to accept or certify any additional assets on behalf of the Trust, such as the subject Note and Mortgage herein, which were only purportedly assigned to Respondent three years later in 2010.

Furthermore, the law applicable to trustees prohibits the Trustee from doing anything that it is not authorized to do under the express language of the Trust. 90A C.J.S. Trusts § 323 (2011):

> The doctrine of ultra vires applies when the trustee is without authority to perform an act in any circumstances or for any purpose. If a trustee exceeds his or her powers, his or her acts are a nullity and, in the absence of other considerations, are ordinarily without force and effect. Furthermore, acts done by a trustee in contravention of the trust, and not authorized by a statute are void.

*See also, Lurie v. Blackwell*, 285 Mont. 404, 408, 948 P.2d 1161, 1163 (1997) ("the doctrine of ultra vires applies when a trustee is without authority to perform an act in any circumstances or for any purpose.").

Thus, based upon the conflict between the Assignment relied upon by Respondent here, and the very specific securitization requirements of the Trust, the subject note was not properly securitized and transferred into the Trust as required for it to enforce the loan and foreclose. Therefore, Appellant maintains that Respondent as Trustee lacked contractual

authority to initiate a judicial foreclosure of the mortgage, and similarly lacked standing to sue below.

**C. The Endorsed Note relied upon by Respondent at trial is inadmissible.**

Respondent's primary witness at trial was, an alleged officer of Wells Fargo, not its own bank, an individual by the name of Brock Wiggins, the supposed Vice President of loan documentation for Wells Fargo. Mr. Wiggins testified at trial in an attempt to authenticate certain exhibits, including the subject Note between Wells Fargo, as lender, and Appellant, as Borrower, the subject deed of trust between Wells Fargo, as lender, and Appellant, as Borrower, the pooling and servicing agreement dated May 31, 2007, the May 2010 Assignment from Wells Fargo to Respondent, and an assignment, assumption and recognition agreement, among other exhibits.

Mr. Wiggins admittedly represented that he does not have the requisite personal knowledge to authenticate the note containing the allonge endorsement. As to the note, Mr. Wiggins testified that the note provided was the original but that he has "no personal knowledge," of when the endorsements were made, and that he has "never personally touched the promissory note." Transcript of Trial February 13, 2013, Pages 32 and 42 respectively. Moreover, when asked about the allonge,

Mr. Wiggins testified that he "didn't see anybody stamp it." Transcript of Trial February 13, 2013, Page 31.

To properly authenticate the endorsed note, however, Mr. Wiggins needed to testify at the very least that the Note was the original Note and that it was in Respondent's possession. *See Aurora Loan Services, LLC v. Carlsen,* 332 Wis.2d 807 (Wis. App. 2011) (the testimony of lender's employee was insufficient to authenticate assignment of note as she did not assert that the assignment was an original or that the lender had possession of the original document).[1] Nowhere in Mr. Wiggins's testimony does he state that he had personal knowledge of the stamped endorsement, that the exhibit offered was in the fact the original note, and that he has personal knowledge that Respondent is in possession of the original note containing the endorsement.

Nowhere in Mr. Wiggins's testimony does he even state that note, the deed of trust, and the assignment are in fact the original documents. Rather, Mr. Wiggins states that the reviewed Wells Fargo's business records to familiarize himself with the subject mortgage loan. Thus, Mr.

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[1] In some jurisdictions, testimony that the custodian is in possession of the original note is not sufficient. *See PHH Mortgage Corporation v. Kolodziej*, 332 Wis. 2d 804, 798 N.W.2d 319 (Wis. App. 2011) (the testimony of lender's employee that the original note was in his possession was not sufficient to establish his personal knowledge of the note as there was no averment that he witnessed the borrower or the endorsers sign the note or that he was able to identify the note based upon its contents).

Wiggins's Declaration falls short of the necessary foundation needed to authenticate the documents. *See In re Vargas*, 396 B.R. 511, 519 (Bankr. C.D. Cal. 2008) (a promissory note cannot be admitted into evidence unless it is authenticated).

Even if Respondent could properly authenticate the endorsed note, the deed of trust, the assignment and other documents testified to, the documents would nonetheless constitute inadmissible hearsay. To be admissible, the documents would have to fall under an exception to the hearsay rule. In an effort to bring the documents in under Rule 803(a)(6) of the Washington Rules of Evidence ("ER"), also known as the business records exception, Mr. Wiggins states that in his capacity as the Vice President of loan documentation:

> [B]efore coming into court to testify, I have to review the business records to actually see when the loan became a part of the trust.
>
> . . .
>
> It's my duty to assist counsel in preparing for trials, depositions. I also testify in contested matters as I'm here today. I also have to do a thorough review of the business record, verifying information . . . I work in a legal capacity.

*See* Transcript of Trial February 13, 2013, Pages 35.

Ordinarily, such language may be sufficient to apply the business records exception, however, unless Mr. Wiggins was previously employed by Wells Fargo or Respondent at the time the note was endorsed and had

firsthand knowledge of the endorsement, which he does not claim to be, he simply was not qualified to testify that the note, the deed of trust, or any of the other loan documents were made "at or near the time of such activities." *See Palisades Collection LLC v. Kalal,* 324 Wis. 2d 180, 781 N.W.2d 503, (Wis. App. 2010) (a "qualified person" means a person who has firsthand knowledge of how the records were prepared and that they were prepared as part of the ordinary course of the business).

Respondent, therefore, cannot provide the necessary certification required to admit the documents under the business records exception, and the lower court erred in admitting the documents. Accordingly, these documents should have been excluded from consideration, as these documents constitute inadmissible hearsay. Given the endorsed note was inadmissible because it was not properly authenticated, there is no factual showing that the note is payable to Respondent. Consequently, Respondent lacked standing to sue or to initiate the judicial foreclosure because Respondent failed to provide any evidence whatsoever to prove the original lender, Wells Fargo ever properly negotiated and endorsed the Note to Respondent.

**D. Respondent's undated allonge is insufficient to establish Respondent's standing, because beyond the Assignment discussed above, Respondent produced no other admissible evidence demonstrating when the subject note was transferred to it.**

The allonge presented by Respondent and attached to the note, is undated. Other than Mr. Wiggins's incomplete and inadmissible testimony, Respondent has produced no other evidence demonstrating when the note was transferred from Defendant's lender, Wells Fargo. Thus, it remains unknown when the subject note was transferred, which timing is essential in order for Respondent to qualify as a rightful holder of the note with standing when it filed its complaint herein and prior to the trust closing date.

A New York foreclosure court in *PNMAC Mortgage Co. v. Friedman*, 2012 WL 1231027 (N.Y. Sup. March 21, 2012), recently explained in a similar foreclosure action:

> A prima facie case in foreclosure is established by the mortgagee's production of the mortgage, the unpaid note and evidence of the mortgagor's default. However, where, as here, a plaintiffs standing has been placed in issue, it bears the initial burden of proving same before it is entitled to any relief (see *Citimortgage, Inc. v. Stosel*, 89 AD3d 887 [2nd Dept 2011]).
>
> A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is the holder or assignee of both the mortgage and underlying note, "either by physical delivery or execution of a written assignment prior to the commencement of the action" (id. at 888 [internal quotation marks omitted]). While the mortgage passes with the debt as an inseparable incident thereof (see *US Bank NA v. Sharif*, 89 AD3d 723, 725 [2nd Dept 2011]), the reverse is not true, i.e., an assignment of the mortgage without the underlying note

is a nullity (id., see *Citimortgage, Inc. v. Stosel*, 89 AD3d at 888).

In the instant case, plaintiff asserts its ownership of the note by claiming that the erroneous endorsement to nonparty Wells Fargo was properly voided when the endorser, ABC, subsequently added an "allonge endorsed en blanc" while in possession of the note (see Affirmation of Daniel H. Richland, Esq., paras 23-25). . . The document is undated . . . .

Nevertheless, there is no proof in the papers presently before the Court as to when the subject note was negotiated or transferred to plaintiff. As a result of this failure to establish that it was the lawful holder of both the note (whether by delivery or assignment) and mortgage prior to the commencement of this action, plaintiff has failed to sustain its burden of demonstrating its standing to commence this foreclosure action (see *US Bank NA v. Sharif*, 89 AD3d at 725; *Deutsche Bank Nati Trust Co v. Barnett*, 88 AD3d 636, 637-638 [2nd Dept 2011]). Accordingly, defendants' motion to dismiss is granted.

Id. at *2 - *3.

## V. CONCLUSION

For each and all of the foregoing reasons, the Superior Court's order, judgment and decree of foreclosure, as well as order and judgment for attorneys fees and costs should be reversed and the case remanded for further proceedings on the merits.

Dated this 19th day of November, 2013.

GARY VICTOR DUBIN, Pro Hac Vice
SCOTT E. STAFNE, WSBA 6964
JOSHUA B. TRUMBULL, WSBA 40992
Attorneys for Appellant
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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2013, I caused to be served a copy of the foregoing document on the following person(s) by U.S. Postal Service to the following address(es):

Lane Powell
Ronald E. Beard
David C. Spellman
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RCO Legal
Valerie In-Hwa Holder
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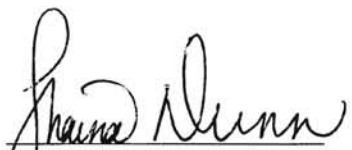
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed on this 2nd day of December, 2013, at Arlington, Washington.



Shaina Dunn
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