

Tomas Espinosa, Esq.
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Attorney for defendant Muhammad Khan

IN RE:	:	SUPERIOR COURT OF NEW JERSEY
Application by BSI to issue	:	
Corrected Notice of Intent to Foreclose on	:	CHANCERY DIVISION-PASSAIC COUNTY
Behalf of identify plaintiffs in uncontested	:	
Cases	:	
	:	
	:	CIVIL ACTION
	:	
	:	DOCKET NO. F-13792-12
	:	
	:	CERTIFICATION OF COUNSEL FOR
	:	
	:	DEFENDANTS' AS OBJECTION TO
	:	
	:	THE ORDER TO SHOW CAUSE
	:	
	:	AND REQUESTING THAT THE
	:	
	:	ACCOMPANYING OBJECTION TO THE
	:	
	:	ISSUING OF THE NOI BE ACCEPTED BY
	:	
	:	THE COURT OUT OF TIME

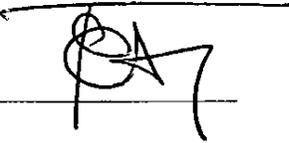
I, Tomas Espinosa, Esq., attorney for defendant Muhammad Khan with residence at
by way of objection to plaintiff's order to show cause hereby state and say:

- 1) I am fully familiar with the facts stated herein.
- 2) I request that the objection of my client Muhammad Khan be accepted out of time
because I only learned about his objection through a late communication from him and in
order for me to find out the caption and docket number I had to call Judge McVeigh's
chambers and I asked for the caption of the matters filed by the law firm of Fein, Such,
Khan & Shepard, PC.

- 3) Judge McVeigh secretary was kind in giving me the information including the docket number. The case of Mr. Khan has attorney should had been given notice. This creates a condition in which client son receiving court papers make the inference that their attorneys must have received them and filed to promptly make the attorneys aware, that attorney could interpose objection. For that reason defendants ask the court that the present objection be accepted out of time.
- 4) The case went through motion for summary judgment and went to trial.
- 5) The trial with witnesses and document took several days; the trial was before the Hon. Judge Chiocca. There were submission of statement of finding of facts and laws submitted and answered (replied) by all parties.
- 6) The case is waiting for decision.
- 7) While Guillaume address the matter of cure noting in Guillaume addresses the situation in which the case was tried and the matter of cure as well as the timeliness of such cure is the subject matter. Defendant position is that Guillaume addresses situations where the issues were not fully tried.
- 8) Furthermore, in the case of defendant the issues of standing was fully tried with witness and documents and it is awaiting decision by the court. Defendant submits the issue of standing if undercut the issue of NOI and is prior to it. The plaintiff in a foreclosure action if it does not have standing should not be permitted to issue a NOI, simply because the NOI would be false, since the foreclosure plaintiff would not have standing, ownership of the debt. The burden should be on plaintiff to be certain of standing even prior to the issuing an NOI.

I certify that the foregoing statements made by me are true, I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated 9/24/2012

A handwritten signature in black ink, appearing to be 'Tomas Espinosa', is written over a horizontal line. The signature is stylized and somewhat cursive.

Tomas Espinosa, Esq.

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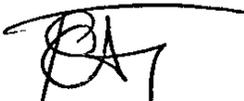
IN RE: : SUPERIOR COURT OF NEW JERSEY
Application by Wells Fargo Bank to issue :
Corrected Notice of Intent to Foreclose on : CHANCERY DIVISION-PASSAIC COUNTY
Behalf of identify plaintiffs in uncontested :
Cases :
: **CIVIL ACTION**
: **DOCKET NO. F- 13792-12**
: **CERTIFICATION OF SERVICE**

I, Tomas Espinosa, Esq. attorney for defendant hereby certify that I have served the within objection upon plaintiff's attorney and the following parties as follows:

Michael S. Hanusek, Esq. Via Fax to (973) 538-8234
Fein, Such, Kahn and Shepard, P.C.
7 Century Drive
Suite 201
Parsippany, NJ 07054

The Honorable Margaret Mary McVeigh, J.S.C. Via Regular Mail
Superior Court of New Jersey
Passaic County
71 Hamilton Street
Room 134
Paterson, NJ 07505

Dated: 9/24/2012



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MEMORANDUM OF LAW IN SUPPORT OF DEFEDANTS' OBJECTION TO PLAINTIFF'S
ORDER TO SHOW CAUSE SEEKING PERMISSION TO FILE A NOTICE OF INTENT

On the Brief:

Tomas Espinosa, Esq.

STATEMENTS OF FACTS

Defendant incorporates by reference the statements in the certification of Tomas Espinosa, Esq. as his statements of facts for the memorandum.

POINT I

THE PLAINTIFF HAS NO STANDING THEREFORE NOT ONLY CANNOT GIVE NOI BUT CANNOT FORECLOSE

Defendants submit to the court that Plaintiff did not have a legal right to judicial enforcement of the loan and in fact, because of the absence of valid endorsement defendants and no legal duty toward plaintiff and nothing was ever presented to the court below that denies these basic facts, moreover, nothing has been presented to the present Appellate Court that changes in any way this reality. The permission for a new Notice of Intent (“NOI”) should be denied to plaintiff. The plaintiff has not standing and is not the holder of the note.

The application of N.J.S.A. 12A:3-301, 12A:3-201, 12A:3-203, 12A:3-205 and other U.C.C. provisions deny that the Plaintiff ever had the right to enforce the note, because never was a holder, never owned the note and loan prior and at the time of the filing of the foreclosure action and at the time that it obtained a final judgment of foreclosure.

The U.C.C. is to the proposition that the sale of the mortgage note which is not accompanied by a separate conveyance of the mortgage does not result in the mortgage being separate from the note.

The problem of course is that the note was here not endorsed to anyone be it the sponsor, the depositor or the trust. No one had it from the loan originator by specific endorsement not by blank endorsement that would make it bearer paper. The Comment 9 of N.J.S.A. 12A:9-203,

“ A transfer of an obligation that is secured by the security interest or other lien on personal or real property also transfer the security interest”

“ It’s a common law rule, the mortgage follows the note. There is no requirement a formal assignment the transfer of the note in and of itself in equity creates the transfer of the mortgage a secured obligation”.

Here, there was no valid transfer of the note, no valid endorsement to anyone, whether specific or in blank, therefore, the mortgage did not follow the note and the assignment was also invalid.

POINT II

APPLCIATION OF NEW YORK EPTL TO THE SECURITIZATION PROCESS BARS PLAINTIFF STANDING, MAKES THE LOAN NOT TO BE OWNED BY THE TRUST AND THE TRUST NOT TO HAVE BEEN FORMED

Let start by putting to rest the proposition that defendant has not standing to bring any defense to the foreclosure based on the Pooling Service Agreement (“ PSA”).

The cases that are usually cited as denying standing to the borrower I have been most of them in jurisdiction of Deeds of Trust or Jurisdiction where the mortgage confers title that is reversible to the mortgagor upon the full payments of the loan and in jurisdictions where the Deed of Trust contains a power of sale.

The DEED of Trust and the power of the sale give the power to MERS to assign the mortgage and therefore a challenge to the assignment validity is not affected by the violation of the PSA from the side of the assignor capacity at law to make the assignment not from the trustee side, from the trustee side if the assignment is made in violation of the PSA, the assignment is not trust fund, it is void by operation of the NYEPTL. New Jersey and other jurisdictions that follow what has been called the New York line of reasoning hold that to have standing to foreclose, the party foreclosing must be on control of the underlying debt and assignment is only valid if it is authorized by the person in control of the underlying debt. Wells Fargo Bank NA

v. Ford, 418 N.J. Super, 592,597 (App. Div. 2011); **Bank of New York v. Raftogianis**, 418 N.J. Super. 323 (Ch. Div. 2010). As stated above the plaintiff/Plaintiff fails under these tests. It also failed by application of NYEPTL.

In Audobon v. Bank of New York Mellon, 2011 U.S. Dist. Lexis 138408 (U.S. Hawaii 2011) the court citing **Anderson v. Countrywide Home Loans**, 2011 U.S. Dist. Lexis 45966,2011 WL 1627945 (D. Minn. Apr. 8, 2011)and **Anderson**, in turn was based on **Peterson-Price v. United States Bank Nat'l Assn'**, 2010 U.S. Dist. Lexis 43355 denied the PSA defenses of the borrower on grounds inapplicable to the present case, since **Audobon** was based on **Anderson**, and this on **Peterson-Price**, Defendants will start with an examination of **Peterson Price**. In this case the validity of the assignment under Minnesota Law that requires recordation was in question, the court found the assignment valid under the Law of Minnesota and denied the PSA argument because the offer of the argument did not give any authority that the contravention of the PSA made the assignment invalid and the court used the privity argument under contract law to deny that borrower could bring the PSA violation as ground to invalidate the assignment. **Anderson**, applied the same argument finding independent validity of the assignment, and used the privity argument against the violation of the PSA argument made by the borrower. **Audobon** followed **Peterson-Price** and **Anderson**, finding an independent validity on the side of the assignor for the assignment and that plaintiff in that case did not cite any authority for the proposition that an assignment made in contravention with the PSA is invalid and the court of **Audobon**, also, used the privity of contract argument denying standing to the borrower to claim breach of the PSA.

I list here other illustrative cases of the line denying standing on the basis of privity.

Greene v. Home Loans Services, Inc., 2010 U.S Dist. Lexis 99222 (2010); Long v. **OneWest**

Bank, FSB, 2011 U.S. Dist. Lexis 94675 (U.S. Dist. Illinois 2011); Melissa Juarez vs. U.S. Bank National Association, 2011 U.S. Dist. Lexis 128087 (U.S. Dist. Mass. 2011); In Re Correia, 45 B.R. 319 (1st Cir. BAP, June 30, 2011).

I will refer to the cases listed above that were offered by Plaintiff against the proposition of Defendants in respect to the impact of the PSA on the issue of standing by using solely the first name in the case cited.

In Greene, the court found that the matter of the standing in respect to the PSA was not adequately pleaded and again that the borrower had no standing based on the privity of contract to challenge a breach by the Trustee of the PSA.

In Long, first this was a Deed of Trust jurisdiction, and the language of the Deed of Trust gave MERS the power to assign and sell (power of sale), again there was therefore, validity of assignment from the side of the assignor, and citing Anderson, it denied standing to challenge the assignment to the trust because the borrowers were not parties to the PSA. Moreover, it clearly stated that the borrower (plaintiff in that case) had not cited any precedent holding that an assignment is invalid because it conflicts with a PSA. Also, since the borrower did not plead that MERS failed to physically deliver the note and borrower did not show any law only speculations about possible fabrication of the note, the contention was denied.

In Melissa Juarez, this was a Massachusetts case, Massachusetts is a Mortgage Title Jurisdiction (New Jersey is a Mortgage Lien Jurisdiction, the difference is that New Jersey the title is on the mortgagor, and the mortgagee has a lien on the property, in Massachusetts the mortgage give title to the mortgagee that reverts when note is fully paid). The mortgage under Massachusetts law gave the mortgagee under a power of sale the power to foreclose and to assign. Therefore, **In Melissa Juarez**, the assignment from the side of the assignor was valid,

and the court citing In Re Correia, 45 B. R. 319 (1st Cir. BAP June 30, 2011), also a decision based on contractual privity, stated that the PSA did not provide independent basis for mortgagors to collaterally contest since they were no party in interest to the PSA. The court should read all of these cases with extra care, **they are appended to the submission of the plaintiff.**

What is clear from the cases is:

- a) That on the side of the assignor (e.g. MERS) in each one of the cases based in the jurisdictions law the validity of the assignment was upheld, either because of the existence of a recorded assignment under the recording law of the state (the Minnesota cases) or because in the Deed of Trust (in Deed of Trust jurisdiction) or because the mortgage itself gave to the assignor (mortgagee, i.e. MERS) a power of sale in a jurisdiction with title mortgage like Massachusetts, and consequently the power to assign. New Jersey does not follow any of the above. In New Jersey an assignment is valid only if authorized by the holder of the underlying debt, as shown above in Raftogianis and Mitchell. In the present case, there is no proof that the original lender authorized MERS to assign, in reality it was impossibility in light of a September 2005 closing date for the trust and an assignment in 2009.
- b) The borrowers in the said cases cited against borrowers' standing by Plaintiff(s) did not offer law that show the invalidity of the assignment because of violation of the PSA under New York EPTL law (**EPTL Section 7-2.4**) and did not show that New York Law was controlling like Defendants have done with New York case law and the borrowers in the said cases did not show the impact of the New York EPTL law

on the assignment and ownership of the loan, and on the issue of the trustee being a real party in interest.

- c) The decisions all were made on the PSA being a contract between the participants in the PSA, with the borrowers not being the intended beneficiaries of the PSA contract. There was no analysis of the PSA as the founding document of the trust under New York Law and the effect of non compliance with the PSA on the trust ownership of the note, mortgage, and assignments of the trust under New York EPTL was never raised or made.

Those arguments simply do not address the position of the Appellant in the present case on two sides the lack of proof that the assignment made by MERS was authorized by the holder of the underlying debt for the reasons that, the trust was no the owner of the underlying debt under the U.C.C. and under New York EPTL and because there was not endorsement on the note and the allonge was never signed.

THE APPLICABLE LAW IS NOT CONTRACT LAW

At the risk of being repetitious but in order to contrast the privity of contract defenses from the NY EPTL defense let me repeat again. Defendants' position is simple that under New York law, the applicant in this case is not the holder of the note and /or owner of the mortgage loan and this is not a matter of privity of contract but of the application of the NY EPTL and the case law applicable to it at the time of foreclosure filing. Moreover, the full property of the Trust (Trust Funds) had to be delivered on the closing date, and because of that, it is a conveyance that is void because it violates the PSA (The Trust Indenture) (**EPTL § 7-2.4**)

An express life trust in New York is governed by New York Law (EPTL) and it requires the property, the intention to create a trust and the beneficiaries and the actual delivery of the

property to the trust. We submit that by the language of the preliminary statement (page # 1) of the PSA, the PSA designated the property for the Trust which was the Trust Fund that upon delivery to the designated trustee created the trust. What is property or not of the trust is governed by the PSA. It is not a matter of the Defendants not having privity to enforce the PSA. What matter is if under the applicable controlling law that governs this trust and trustee, the trust was a real party in interest at the time that the foreclosure action was filed. Defendant submits that it was not and that it remains not being a real party in interest and therefore it lacks standing.

In New York, the mere intention to create a trust without delivery of the trust assets to the trustee has not legal consequences; it does not create a trust, if the Settler is the sale trustee, the transfer of Title assets is completed by recording the DEED or registering the securities or accounts in the name of the trust. If the trust names a third party as a trustee, the property, titled assets, documents evidencing ownership of the property must be formally transferred to the trustee. A transfer is not effected by mere recital of assignment, but the written assignment and all documents of property must be actually delivered to the trustee (**EPTL §7-1.8**). As stated above the property is passed to the trustee with the intention to pass legal title thereto to it as trustee. **Brown v. Spehr, 180 N.Y. 201 (N.Y. 1904)**. There is no valid trust until actual delivery of the assets to the trust. **Riegel v. Central Hanover Bank and Trust Co., 266 App. Div. 586**. There is no trust if the trust fails to acquire the property. **Kermani v. Liberty Mut. Ins. Co., 4 A.D. 2d 603 (N.Y. App. Div. 3d Depart. 1957)**.

The delivery of the property must be done to the trust as designated in the instrument creating the Trust (**EPTL §7.2.1(c)**). The PSA prescribed the specific method of transfer. This is not subject to variation because it is set in the instrument. No court can ignore and create contractual remedies that were omitted in the PSA. **Schmid v. Magnetic Head Corp., 468 NYS**

2d 649 (NY App. Div. 1983). However, the court can enforce the prescription of the PSA.

Morlee Corp. v. Manufacturer Trust Co., 172 N.E. 2d 280 (N.Y. 1961). But no court can on the basis of contract law change a trust which is specifically governed by its business indenture.

What is valid delivery to the trustee is governed by the corporate business indenture, because the Trustee in the present case is a corporate trustee. Under a corporate indenture the right of the trustee are not governed by fiduciary relationship but by the term of the agreement (the PSA). The cases that do not see that it is not simply a matter of privity failed to see that if the property is not received in the manner prescribed by the indenture, then the property is not property of the trust, and if not delivered as prescribed and delivered in violation of it, there is not trust because there has not been complete and perfected delivery of the property to the trust.

AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co., 2008 N.Y. Slip Op. 5766;

Hazard v. Chase National Bank, 159 Misc. 57, 287 N.Y.S. 541 (Sup Ct 1936) aff'd 257 A.D.

950 14 N.Y.S. 147 (1st Dept.) aff'd 282 N.Y. 652 cert. de. 311 U.S. 708 (1940). The duties and

power of the trustee are set by the agreement(PSA). **In RE IBJ Schroeder Bank and Trust**

Co., 271 A.D. 2d 322 (N.Y. App. Div. 1st Dept. 2000). This failure of the courts was because

the issues were not presented under the applicable NY EPTL. The PSA is also the agreement that

creates the trust, it is a mistake to think that under New York Law you can create a trust without

complete delivery of the designated property of the trust and in the manner specified by the

document that creates it. Without the delivery of the property designated to it, there is not trust.

The delivery under the PSA requires under the corporate indenture strict compliance with the mandatory terms of the trust indenture, because the property has to be delivered as prescribed and the securities ascertained if not no right to beneficiaries arise. **Wells Fargo Bank, N.A. v.**

Farmer, 2008 N.Y. Slip OP. 51133 U 6 (N.Y. Sup. Ct 2008) and no right in the trust arises without consideration paid (in this case the depositor to the sponsor).

The delivery necessary to consummate a gift must be perfected as to the nature of the property. There must be actual surrender and control and authority over the things surrendered must be intended. It is the consummation that completes the transaction, intention alone is not sufficient. **Vincent v. Putnam, 248 N.Y. 76 (N.Y. 1928)**. The Consummation Act of the delivery of all the property and documents is necessary. **Phillipsen v. Emigrant Inds. Saving Bank, 86 N.Y.S. 2nd 133 (N.Y. Sup. Ct. 1948)**. Therefore, if the note and the mortgage and the interim assignment were not delivered by the closing date they are not property of the trust.

The delivery rule requires that the delivery necessary to consummate a gift must be perfected as to the nature of the property and the circumstances permit. **Vincent v. Rix, 248 N.Y. 76 as cited in Gruen v. Gruen, 68 N.Y. 2d 48 (N.Y. 1986)**. See also **Sussman v. Sussman, 61 A.D, 2d 838 (N.Y. App. Div. 2d Dept, 1978)**; **Riegel v. Hanover Bank Trust Co., 266 App. Div. 586** there must be a change of dominion **over the thing intended to be given.** **Vincent v. Putnam, 248 N.Y. 76, 82-84 (N.Y. 1928)**. Undelivered note and assignments after the closing date if not contemplated in the PSA are not property of the trust. Any act, sale, and conveyance by the trustee in violation of the PSA is void under NY EPTL law § 7-2.4.

Four essential elements for valid trust property must be present:

- 1) A designated beneficiary
- 2) A designated trustee
- 3) A fund or property, sufficiently designated or identified to enable title to pass to the trustee
- 4) Actual delivery of the fund or property or the legal assignments.

In the present case, the transfer did not comply with the PSA since the assignments of mortgages occurred after the date of the closing of the trust. In fact the assignments from **MERS** occurred years after the closing date. In addition, there is no endorsement from WMC whether specific or in blank to anyone.

Moreover, the chain of delivery for the acquisition of the property by plaintiff as per the PSA was not followed, the note and the mortgage were not endorsed and assigned from **Originator to Seller to Sponsor to Depositor, to the Trust** , all in violation of the PSA. There was not a single iota of proof offered that this was the case below or in the preset application.

Moreover, the actual chain of assignment was from **MERS** (without any proof of authorization to assign from the owner of the note given to **MERS**) to the Trustee, which is not the prescribed path of the PSA agreement and all of this was done years after the closing date of the trust and after the filing of the foreclosure complaint. Any act of the trustee contrary to the trust agreement (PSA) is void (NY EPTL § 7-2.4). Therefore, the acceptance of the assignment from MERS is void.

In order to prove injury in fact the plaintiff has to prove that it has legal standing by showing that it is a real party in interest. If the plaintiff cannot prove that the loan became an asset of the trust under New York law EPTL (Trust Law) and the PSA it can never be able to prove standing.

In the **PSA Section 2.01** stipulates that as promptly as practicable subsequent to such transfer and assignment in any event within 120 days after such transfer and assignment the trustee shall cause such assignment to be recorded in the appropriate public office for real property records for assignments of the mortgages. This is because assignments of the mortgages under New York law require to be filed in order to affect as a lien the property. **N.Y. RPL Section 417** (**New York Real Property Law**) and **Section 418**. Moreover, if the documents that effect the

transfer (assignments) of property must be completely registered in the name of the trustee or the trust for the property to become property of the trust. **EPTL § 7-1.18**, the law applicable as to what becomes property of the trust is New York law. The negotiable instrument that are the property of the Trust when they become such property as per the PSA are in New York regardless that the collateral may be anywhere in the world, and the PSA is clear that New York law applies to all substantive issue and it New York Law governs the mandatory requirements to effectively transfer an asset to a trust. There has been no contest by Plaintiff that securitization trusts such as the one for which Plaintiff is the trustee are subject to New York Common Law. New York Law is a venerable and ancient law. Under New York law whether an asset is trust property is determined under the law of gifts. In order to have a valid intervivos gift there must be delivery of the gift. Since at least 1935 in *Burgoyne v. James*, 282 N.Y.S. 18,21 (1935), the New York Supreme Court recognized that business trust are deemed to be common law trust. **In Re Estate Plotkin** , 290 N.Y.S. 2d 46, 49 (N.Y.Sur. 1968) other jurisdictions agreed. **Mayfiled v. First Nat'l Bank of Chattanooga**, 137 F.2 d1013 (6th Cir. 1943). Therefore, all of the conditions stated above for the transfer of property to a trust and the ownership of the trust of such property apply also to business trust so called "Massachusetts Trusts" **In Re Plotkin Supra**.

New York delivery rule requires complete and specific dominium and endorsement specific to the trust because an endorsement of the note in blank does not make the trust owner of the property, the owner of the trust fund. Therefore, an endorsement of the note in blank destroys the specificity of the ownership to the trust. Delivery must be such that vest the donee with control and dominion over the property and absolutely divest the donor of its dominion and control and the delivery must be done with intent to vest the property in the donee, equity will not help and incomplete delivery. **Vincent v. Putnam**, 248 N.Y. 76 (N.Y. 1928). An

endorsement in blank does not accomplish this with specificity but also the lack of an assignment does not make a complete delivery. In the present case there was no evidence whether in blank or otherwise from WMC to anyone.

We have therefore, two stages here:

- a) The note was not endorsed, the allonge was not signed, there had been no proof offered that the note and the mortgage were delivered and that as to the date of the closing of the trust, therefore, the trust was not validly formed when the filing of the foreclosure complaint occurred.
- b) There is no proof offered that this condition has been cured. Moreover, there may never be any offer of proof that the condition is cured because of the consequences that such a move to cure may have for the trust that it may lose the tax exemption for the REMICS status under **IRS Code § 860**. However, this issue pertains to the beneficiary of the trust (the investors). Nevertheless, it is clear that since the corporate indenture was not followed up to the closing date of the trust, the trust even if it had received the note at that time of the filing of the complaint which clearly it has not been the case and this has not been negated by the offer of the duly signed form certification(s) as provided by the PSA **Section 2.02**, the trust was certainly not the owner of the defendant's loan and continues legally not being it and the reception of the note and loan before the filing of the foreclosure action has not been demonstrated.
- c) The assignment of the mortgage from MERS to the trust is invalid because the assignment of MERS to the Trustee was not authorized by the holder of the note, there is not such authorization produced by anyone or submitted below.

d) The creation of the trust which was intended to pool into REMICS mortgage loans under New York Law, (EPTL) never happened because the property constituting the trust was never delivered within the terms of the trust constitution and no proof of such delivery as per the PSA has been provided. Clearly it did not happen before or at the time of the filing of the foreclosure action, there is no proof that the Plaintiff was a real party in interest because it clearly did not own the property in the trust fund created by the depository. Lastly, to the question who own the loan there is no simple answer but certainly not the trust, whoever really owns it may have the right to foreclose but certainly not this plaintiff. The court should be aware that under the PSA **Section 2.02** the custodian of the trust shall acknowledge on the closing date, receipt on behalf of the trustee identified in the initial certification in the form attached to the PSA as **Exhibit** with respect to the mortgage loans that were subject to be delivered to the trust as per **Section 2.01** of the PSA. The certification has to have the date of it.

We submit that Plaintiff has not proven that it was the holder of the note at the time of the filing of the complaint and has been unable to prove the date that the note was negotiated or that it was ever negotiated after proper endorsement to it by way of transfer and physical possession at any time before and on the date of the filing of the complaint. Therefore, plaintiff has not right to file and serve a new NOI, in fact, the case should be dismissed.

THE ASSIGNMENT FROM MERS TO TRUSTEE IS INVALID

The courts throughout the nation have found that MERS because it is not a real party in interest of the loan and had no authorization, formally given that power from the real owner i.e. the original lender cannot validly assign a mortgage for which it is only the nominee. Except of

course in jurisdiction where the mortgage give a power of sale, and the Deed Trust authorizes such assignment and New Jersey is not such jurisdiction.

The rationale behind the court's denial to MERS of any power for a valid assignment absent the real party in interest written authorization (the owner of the loan, of the note and mortgage,(in this case Franklin) was expressed **In LaSalle Bank National Association v. Lamy**, 2006 WL 2251721 (N.Y. Sup. Ct. August 7, 2006) at * 2 where the court stated that it is axiomatic that to be effective" an assignment of the note and a mortgage given as security therefore, must be made by security, therefore, must be made by the owner of such note and mortgage and that assignments made by entities having no ownership interest in the note and mortgage pass no title therein to the assignee. (citation omitted). A nominee of the owner of a note and mortgage may not effectively assign the note and mortgage to another for what of an ownership interest in said note and mortgage by the nominee, the same court in the same case stated that in New York the cases are that MERS cannot assign the mortgage by itself without the authorization of the real owner in interest.

In the **Landmark National Bank vs. Kessler**, 216 P. 3d 158 (Kan. 2009) the Kansas Supreme Court held that MERS (as in the present case) although named as mortgagee in the mortgage papers, was by the same language acting solely as nominee for lender, as here in after defined and lender's successors and assigns". The court held that MERS was not a real party in interest and that as nominee MERS was "a person designated to act in place of another usually in a very limited way and as a party who holds bare legal title for the benefit of others". This definition the court went to say "suggest that a nominee possess few or no legal enforceable rights beyond those of a principal whom the nominee serves" **Landmark, Supra at 166.**

The court continued to state that MERS relationship to the owner was more akin to a straw man than to a party possessing all of the rights given to a buyer. A mortgage and a lender have intertwined rights that defy a clear separation of interest.

The fact of the matter is that the instrument (mortgage) names MERS both as nominee and as mortgagee. MERS cannot be both. MERS cannot be at the same time and in the same respect agent and principal (See Restatement (Third of Agency) First Section, it delineates that agent and principal are different persons).

The puzzle is resolved by looking at the economic reality of the transaction Major's **Furniture Mart, Inc. v. Castle Credit Corp., Inc.**, 602 F. 2d 538 (3rd Cir. 1979), the words used by the parties are not controlling. The court had looked at economic realities when construing language of contracts, security agreements for real estate and construed based on such realities even where the parties choose to describe the bargain in different language, in order to show the true nature of the transaction and contract **IN Re Berg**, 387 B.R. 524, 555 (Bank. N.D. 2008). MERS is not the party to whom family homes are mortgaged at least for three fundamental issues. First, it does not fund any loans, second, no have owner promise to pay MERS any money. MERS is never identified as a payee; third in foreclosure MERS receives no sums from the foreclosure sale proceeds. MERS does not pay any money to have the mortgage in its name to the originator lender. Moreover, in the present case there has been no showing that MERS itself did not have the authority to assign the mortgage from the real party in interest.

In a series of cases before the U.S. Bankruptcy Courts and State Courts have found the lack of MERS of economic interest that precludes it from doing a valid assignment even if the assignment would be otherwise valid. **In Re Vargas**, 396 B. R. 511 at 517 (Bank. C.D, CA 2009); **Saxon Mortgage Servs. V. Hillery**, 2008 WL 5170180 at * 5 (N.D. Cal, December 9,

2008); **Bellistri v. Oewen Loan Servicing, LLC**, 284 S.W. 3d. 623-624 2009 WL 53057 at * 3 (Mo Ct. App. 2009). The same has been sustained in other cases that MERS has not power or authorization to assign a mortgage without the expressed authorization to do so at the time of the assignment by the true owners of the loan the real party in interest. **In Re Mitchell**, Case No. BK-S-07 -16226 LBR (Bank D. Nevada March 31, 2009). See Also **In Re Marron**, Bk. Mass 10-45395-MSH; **Enderlin v. GMAC Mortgage**, bankruptcy Case No. 11-0114 (June 10, 2011) and **In Re Agard**, (US Bankruptcy Court Easter District Court of NY Case No. 10-77388)

The assignment as purported by the Plaintiff fails simply because MERS could not assign a mortgage in which it was not that the real party in interest and no proof has been submitted that the originator of the loan, the note owner gave authorization to MERS to make the assignment.

In addition to the above, the court should consider that MERS itself in arguments before other courts where it was seeking to prevent the US Trustee application by motion to treat MERS as the transferee argued that it was not a transferee of the initial mortgage (mortgagee) because under the MERS rules it states that its nominal authority may only be exercised at the direction of the note holders in this case Franklin (See page # 5 of the memorandum of decision in the case of **In Re James D. Bower** debtor chapter 7, Case No. 10-10993-WCH, with Adversary Proceedings No. 1092 Warren E. Agin, Chapter 7, trustee **plaintiff v. Mortgage Electronic Registration System, et als**, United States Bankruptcy court for the District of Massachusetts, in that case, the court citing **Bonded Fin. Servs. V. European Am. Bank**, 838 F. 2d 890 (7th Cir. 1988) as advanced by MERS **In Re: Bower Supra** that the minimum requirement for a transferee (mortgagee) is dominion over the money or other asset, the right to put the money for its own purpose, **Bonded, Supra at 893**. The Bonded Court stated that dominion and controls

means legal dominion and control” See also security First Nat. Bank V. Brunson,(In Re. Countee) 984 F. 2d 13 8,141 n. 4 (5th Cir. 1993).

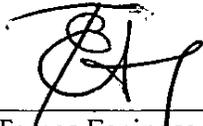
In Culhane v. Aurora Loan Servs of Nebraska, 2011 WL 592525 (D. Mass November 28, 2011) the court conducted a throughout examination of MERS status as a nominee, the deciding judge observed that by the language of the instrument MERS holds only bare title to the instrument and that consistent with a holder of bare title MERS agrees to act at the direction of the note holder. This MERS is hardly a principal at most it is an agent that the term nominee in fact connotes a narrow forum of agency a person designated to act in place of another, usually in a very limited way. The court used Black’s Law Dictionary Second definition of “Nominee” as a party who holds bare legal title for the benefit of others”.

The court then went to state that when the mortgage hold legal title to the mortgage in trust (nominee) the power to assign the mortgage must be bestowed on the mortgagee who holds only legal title, and the mortgage can only transfer title at the note holder’s request or by decree of court. For a valid foreclosure to be effected on the basis of an assignment of the bare legal title holder the power to assign it must had been bestowed by the note holder. **See Culhane, Supra at * 14-15 and at * 16.** In view of the above, the defendants object and further states that the case should be dismissed. The plaintiff should not be permitted to serve a new NOI.

CONCLUSION

For all of the above, the application of plaintiff should be denied.

Dated 9/24/2012



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Clerk's Office

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P.O. Box 971
25 Market St
Trenton, New Jersey 08625

RE: BSI vs. Muhammad Khan
Docket No. F -13792-12
Opposition to plaintiff's motion to issue and serve a new NOI

Dear Sir or Madam:

This office represents the defendant in the above mentioned action.

Enclosed please find defendant's certification of objection and also defendant's memorandum in support of his objection to the plaintiff's order to show cause to be filed with the court for the above mentioned action.

Thanks in advance.

Very Truly Yours,



Tomas Espinosa, Esq.

TE/te.

Cc: The Honorable Margaret Mary McVeigh, J.S.C. Via Regular Mail

Cc: Michael S. Hanusek, Esq.

Via Fax to (973)538-8234