UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-1821
(9:11-cv-00395-SB)

JAMES P. SCHEIDER, JR.; TAFFY G. SCHEIDER

Plaintiffs - Appellants

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee of the IndyMac INDA Mortgage Loan 2006-AR2 Mortgage Pass-through Certificates, Series 2006-AR2 under the Pooling and Servicing Agreement dated August 1, 2006; INDYMAC MORTGAGE SERVICES; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INCORPORATED; ONEWEST BANK, F.S.B.; FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHARLESTON

Defendants - Appellees

and

INDYMAC BANK FEDERAL BANK; MERS, INCORPORATED; MORTGAGE NETWORK INCORPORATED; INTERNAL REVENUE SERVICE; JOHN DOE 1-1000, inclusive, representing a class of unknown persons who claim or have the right to claim an interest in certain real property located in Beaufort County, South Carolina; INDYMAC MBS INCORPORATED

Defendants

MOTION FOR CERTIFICATION OF QUESTIONS TO NEW YORK STATE COURT OF APPEALS

Pursuant to Article VI Section 3(b)(9) of the New York State Constitution, the Plaintiffs-Appellants, James P. Scheider, Jr. and Taffy G. Scheider (hereinafter referred to as "Appellants") hereby move before this Court for an Order certifying the following questions to the New York State Court of Appeals.

1. Do Appellants have standing to challenge Appellee, Deutsche National Bank Trust Company's (hereinafter referred to as "Deutsche Bank") failure to honor the specific delivery, time sensitive, and transfer requirements for notes and mortgages under the applicable Pooling and Servicing Agreement (hereinafter referred to as "PSA"), the governing document for the trust supposedly holding Appellants' note and mortgage?

2. Does New York law control the enforceability of Appellants' note and mortgage?

3. Did the delivery and transfer of the Appellants' note to Appellee, Deutsche Bank, as trustee, after the trust's closing date render this transfer "void" as opposed to "voidable"?

4. Did the assignment of the Appellants' mortgage after the commencement of this action and contrary to the mandates of 26 U.S.C. Section 860D, render this assignment "void" as opposed to "voidable"?

5. Do Appellants have standing to challenge their loan with Mortgage Electronic Registrations Systems, Inc. (hereinafter referred to as "MERS")?

6. Do Appellants have standing to challenge the securitization of their mortgage?

Appellants respectfully submit that these issues will be determinative of the pending Appeal, may be determinative of the entire action, and have not been decided by the New York State Court of Appeals, the jurisdiction of the controlling law.

Accordingly, certification is appropriate pursuant to Article VI Section 3(b)(9) of the New York State Constitution which provides:

> The court of appeals shall adopt and from time to time may amend a rule to permit the court to answer questions of New York law certified to it by the Supreme Court of the United States, a court of appeals of the United States or an appellate court of last resort of another state, which may be determinative of the cause then pending in the certifying court and which in the opinion of the certifying court are not controlled by precedent in the decisions of the courts of New York.

BACKGROUND

On May 9, 2006, the Appellants secured a loan from Mortgage Network, Inc. (hereinafter referred to as "Mortgage Network") to refinance their home in Bluffton, South Carolina and to consolidate their debt. At the time of their closing, the Appellants had two existing loans with First Federal Savings and Loan Association of Charleston which were satisfied. The Appellants signed an adjustable rate note agreeing to pay $1,178,000.00 plus interest to the lender, Mortgage Network (a copy of said note is attached hereto and marked as Exhibit "1"). In conjunction with the note, the Appellants also signed a mortgage securing the note. That mortgage (a copy of which is attached hereto and marked as Exhibit "2") contained the following statement:

> **MERS" is Mortgage Electronic Registration Systems, Inc., MERS is a** separate corporation that is acting solely as a nominee for Lender and **Lender's successors and assigns. MERS is the mortgagee under this Security Instrument.**

In August of 2006, the Appellants received notice that Mortgage Network sold or transferred the servicing rights in their loan to Indy Mac Bank. These servicing rights were then transferred to Indy Mac Mortgage Services, or IMMS, a division of OneWest Bank.

In March of 2008, the Appellants applied for a loan modification from IMMS. The Appellants submitted numerous loan modification applications for almost two years during which time Appellants were asked repeatedly to send the same financial information. Appellants timely made all loan payments until June of 2010 when they commenced this action to determine if any entity in fact was the proper, legal holder of their note and entitled to payments under their mortgage. It was and is the Appellants' position that neither Deutsche Bank nor any of the other Defendants can demonstrate ownership of or the right to enforce the Appellants' note and mortgage.

In the course of this litigation, the following motions were filed:

(1) motion for summary judgment filed by the Appellees, Deutsche Bank National Trust Company, as Trustee of the IndyMac INDA Mortgage Loan 2006-AR2 Mortgage Pass-Through Certificates, Series 2006-AR2 under the Pooling and Servicing Agreement dated August 1, 2008 ("Deutsche Bank"); IndyMac Mortgage Services ("IMMS"); Mortgage Electronic Registration Systems, Inc. ("MERS"); and OneWest Bank ("OneWest");

(2) Appellee, Deutsche Bank's motion for partial summary judgment on the foreclosure counterclaim; and

(3) Defendant, First Federal Savings and Loan Association of Charleston's ("First Federal") motion for summary judgment.

The motion by First Federal was resolved by Consent Order.

With respect to the remaining motions, the Court held:

> With respect to...the motion for summary judgment filed by Defendants Deutsche Bank, IMMS, MERS, and OneWest – the Plaintiffs' admitted at the hearing that they had abandoned their claims for civil conspiracy and breach of contract. Thus, the remaining claims are the Plaintiffs' claims for declaratory judgment, breach of fiduciary duty, accounting, and quiet title, as well as Deutsche Bank's foreclosure counterclaim against the Plaintiffs. The Court took these latter issues

> under advisement, and it now issues this order finding that the Plaintiffs lack standing to challenge the assignments of the note or the noncompliance with the pooling and servicing agreement, but that a genuine issue of material fact exists with respect to Deutsche Bank's counterclaim based on the existence and presentation of multiple versions of the note.

A copy of the Court's Order entered on April 11, 2013 is attached hereto and marked as Exhibit "3".

Deutsche Bank did in fact present three versions of the note (copies of which are attached hereto and collectively marked as Exhibit "4"). In addition, the underlying mortgage was not assigned to Deutsche Bank until after the commencement of this action (a copy of said assignment dated August 10, 2011 is attached hereto and marked as Exhibit "5").

Based on relevant caselaw decided subsequent to the Court's Order, the Appellants filed a Motion for Reconsideration, or in the alternative, for Certification of an Interlocutory Appeal to the Court of Appeals, which Court could then certify the dispositive questions to the New York State Court of Appeals. The Appellees moved for dismissal of the foreclosure counterclaim and third-party claim *without prejudice.* By Order entered on May 29, 2013 (a copy of which is attached hereto and marked as Exhibit "6"), the Court summarily denied Appellants' Motion for Reconsideration, and granted Appellees' motion for voluntary dismissal. On June 27, 2013, Appellants timely filed a Notice of Appeal (a copy of which is attached hereto and marked as Exhibit "7") from both the Order entered on April 11, 2013 as well as the Order entered on May 29, 2013.

Attached for the Court's review are additional, relevant documents previously filed by the parties in District Court:

Exhibit "8" - Amended Complaint;

Exhibit "9" - Answer to Complaint by Deutsche Bank National Trust Company;

Exhibit "10" - Answer to Complaint by IndyMac Mortgage Services;

Exhibit "11" - Answer to Complaint by OneWest Bank;

Exhibit "12" - Answer to Amended Complaint by Mortgage Network, Inc.;

Exhibit "13" - Answer to Counterclaim by James P. Scheider, Jr., Taffy G. Scheider;

Exhibit "14" - Motion for Summary Judgment on Plaintiffs' Claims by Deutsche Bank National Trust Company, IndyMac Mortgage Services, Mortgage Electronic Registration Systems, Inc., OneWest Bank;

Exhibit "15" - Motion for Partial Summary Judgment on Foreclosure Counterclaim by Deutsche Bank National Trust Company;

Exhibit "16" – Response in Opposition to Motion for Partial Summary Judgment on Foreclosure Counterclaim. Response filed by James P. Scheider, Jr. & Taffy G. Scheider;

Exhibit "17" – Response in Opposition to Motion for Summary Judgment on Plaintiffs' Claims. Response filed by James P. Scheider, Jr., & Taffy G. Scheider;

Exhibit "18" – Reply to Response to Motion for Summary Judgment on Plaintiffs' Claims. Response filed by Deutsche Bank National Trust Company, IndyMac Mortgage Services, MERS, Inc., Mortgage Electronic Registration Systems, Inc., OneWest Bank;

Exhibit "19" – Reply to Response to Motion for Partial Summary Judgment on Foreclosure Counterclaim. Response filed by Deutsche Bank National Trust Company;

Exhibit "20" – Motion to Dismiss Foreclosure Counterclaim and Third-Party Claim Without Prejudice to Re-File in State Court by Deutsche Bank National Trust Company, IndyMac Bank Federal Bank, IndyMac MBS, Inc., IndyMac Mortgage Services, Internal Revenue Service, MERS, Inc., Mortgage Electronic Registration Systems, Inc., OneWest Bank;

Exhibit "21" - Motion for Reconsideration of Order on Motion for Summary Judgment and Order on Motion for Partial Summary Judgment filed by James P. Scheider, Jr. & Taffy G. Scheider.

LEGAL ARGUMENTS

POINT I

THE EVILS OF SECURITIZATION UNDERLIE THE CASE AT BAR

The legal questions at issue have their genesis in the securitization process.

The typical residential mortgage finance transaction results in two legally operative documents: (1) a promissory note, a negotiable instrument which represents the borrower's repayment obligation over the term of the loan; and (2) a mortgage, representing the security interest in certain property as collateral for repayment of the note.

Mortgage Electronic Registrations Systems, Inc. (hereinafter referred to as "MERS") enters a mortgage finance transaction when the lender and the borrower name MERS in the mortgage instrument as the mortgagee and as nominee for the lender and its successors and assigns.

The attendant promissory note is sold on the secondary mortgage market and may, over its term, have many owners. This is often achieved by a complex process called securitization. The note is transferred, along with many other notes, through several different entities into a special purpose vehicle (hereinafter referred to as "SPV"), typically a trust; the trust then issues securities backed by the trust corpus, i.e., the notes, to investors. Regardless of the secondary market route which the note takes, MERS remains the named mortgagee as "nominee" for the

subsequent owners of the note as long as the note is held by a MERS member. *In re. MERS*, 659 F. Supp. 2d 1368, 1370 n.6. So, instead of effecting formal assignments of a mortgage when MERS members transfer the accompanying note between one another, the MERS members simply register the change in beneficial ownership in the MERS electronic database.

Aside from the severance of the note and mortgage, securitization causes several other problems.

Subject to satisfying certain requirements of the Internal Revenue Code, an SPV may qualify as a "real estate mortgage investment conduit" (hereinafter referred to as "REMIC"). An SPV which qualifies as a REMIC offers investors two potential benefits that boost the SPV's value relative to other investment options: bankruptcy-remoteness and favorable tax treatment. Bankruptcy remoteness means both that the SPV that issues the mortgage-backed securities cannot file for bankruptcy and that the SPV's assets cannot be brought into the bankruptcy estate of other entities in the mortgage loans' chain of title. These features isolate the SPV's mortgage payment cash flow from claimants other than their investors. Additionally, REMIC status ensures that only the investors, and not the SPV, are taxed on the SPV's cash flow.

In order for an SPV to qualify for REMIC status, the SPV must be formed in a particular way, and its assets must be transferred to it in a particular manner. There are two documents in particular that need to be properly transferred to the SPV - the promissory note and the mortgage. Possession of a note without a mortgage amounts to possession of unsecured debt and will ordinarily disqualify the SPV from enjoying REMIC status.

SPV's are usually formed pursuant to, and governed by, contracts called Pooling and Servicing Agreements (hereinafter referred to as "PSA"), which are crafted to ensure that the benefits of mortgage securitization flow to the SPV. In order for an SPV to qualify for the

bankruptcy-remoteness benefits of a REMIC, there must be a "true sale" of the mortgage loans, which means that all rights to the mortgage loan are transferred to the SPV so that no other entity in the chain of title could claim control of the assets in the event of bankruptcy.

Pursuant to the PSAs, the trust remains open for a relatively short period of time, approximately 30 days, in which to transfer all notes. As shown in the excerpts from the controlling PSA attached as Exhibit "22", the trust is dated August 1, 2006 and the closing date is August 30, 2006 – 30 days to transfer the notes. The PSA further sets forth the manner in which the notes are to be transferred:

> The original Mortgage Note, endorsed by manual or facsimile signature in blank in the following form: "Pay to the order of _____ without recourse," with all intervening endorsements showing a complete chain of endorsement from the originator to the Person endorsing the Mortgage Note (each endorsement being sufficient to transfer all interest of the party so endorsing, as noteholder or assignee thereof, in that Mortgage Note) or a lost affidavit for any Lost Mortgage Note from the Seller stating that the original Mortgage Note was lost or destroyed, together with a copy of the Mortgage Note. (Exhibit "22", Section 2.01(c)(i)).

This specific chain of title is mandated so as to ensure that the SPV's assets cannot be brought into the bankruptcy estate of other entities and to protect the trust's REMIC status.

Furthermore, the PSA is governed by New York law. (Exhibit "22", Section 10.03). New York's Estates, Powers & Trusts Law ("EPTL") Section 7-2.4 states:

> If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust…is void.

New York's Estates, Powers & Trust Law Section 1-1.5 further provides that "the provisions of this chapter apply to the estates…of persons." Person is described in Section 1-2.12 as follows:

> The term "person" includes a natural person, an association, board, any corporation, whether municipal, stock or non-stock, court, governmental agency, authority or subdivision, partnership or other firm and the state."

The provisions of EPTL Section 7-2.4 are therefore applicable to the PSA governing the note at

issue. Any transfer to that trust in contravention of the governing PSA would be void under New York law - the law that was chosen to govern by Appellees.

In the case at bar, none of the notes (Exhibit "4") evidence the required intervening assignments. Appellee, Deutsche Bank, came to this litigation simply as the holder of the note.

In addition, after the closing date of the PSA, the trustee has a clean up period of three months in which to transfer all mortgages – as mandated by U.S. Treasury Regulations governing REMICs (26.U.S.C. Section 860D). Since the terms of the PSA require that the trustee not take any action or omit to take any action that would jeopardize REMIC status (Exhibit "22", Section 8.11(g)), these regulations must be followed. Contrary to this regulation, the Appellants' mortgage, however, was not transferred to the trust until after the commencement of this action – well after the expiration of the mandated three month clean up period.

POINT II

NEW YORK LAW GOVERNS THE TRANSFERS OF THE APPELLANTS' NOTE AND MORTGAGE

While it is true that the Appellants' mortgage states that it is subject to South Carolina law, the law to be used to assess the validity of the transfer of the Appellants' note and mortgage into the trust is that chosen by the Appellees in the pooling and servicing agreement. By participating in transactions under the governing PSA, it is Appellees' own actions that make New York law applicable to determine the validity of the transfers to the trust. (*Bank of America, N.A. v. Bassman FBT, LLC*, 981 N.E.2d 1 (III. App. Ct. 2012)).

In determining choice of law issues in a diversity case involving breach of contract, the analysis would

begin with the Supreme Court's decision in *Klaxon Co. v. Stentor Elec. Mfg., Co.*

> 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). In *Klaxon*, the Court stated, "The conflict of laws rules to be applied by [a] federal court...must conform to those prevailing in [the] state courts. Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side." *Id.* at 496, 61, S.Ct. 1020 (*citing Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74-77, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)). Thus, for an action filed in South Carolina, South Carolina law would be consulted for its choice of law rules, and under those rules, South Carolina law would give effect to the parties' choice of law as specified in the contract. See S.C. Code Ann. § 36-1-105(1) (providing, as applicable here, "When a transaction bears a reasonable relation to this State and also to another state or nation the parties may agree that the law either of this State or of another state or nation shall govern their rights and duties").

(See *Albemarle Corporation v. Astrazenca UK LTD,* 628 F.3d 643 (4th Cir. 2010)

As already stated, the Appellees have, by their own choice of law and by their participation in transactions under the governing PSA, chosen New York law as the controlling law.

POINT III

APPELLANTS' HAVE STANDING TO CHALLENGE APPELLEES' NON-COMPLIANCE WITH THE PSA

Appellees argue that only parties or third-party beneficiaries to the PSA can challenge the validity of an assignment to the trust. However, exceptions to this principle have been widely recognized.

A debtor's right to attack the validity of an assignment of a note has long been recognized. Corpus Juris Secundum states:

> A debtor may, generally, assert against an assignee all equities or defenses existing against the assignor prior to notice of the assignment, **any matters rendering the assignment absolutely invalid or ineffective**, and the lack of plaintiffs title or right to sue; but if the assignment is effective to pass legal title, the debtor cannot interpose defects or objections which merely render the assignment voidable at the election of the assignor or those standing in his or her shoes. (emphasis supplied; 6A C.J.S. Assignments §132)

Similarly, American Jurisprudence states:

> **The obligor of an assigned claim may defend a suit brought by the assignee on any ground that renders the assignment void or invalid,** but may not defend on any ground that renders the assignment voidable only, because the only interest or right that an obligor of a claim has in the assignment is to ensure that he or she will not have to pay the same claim twice. (emphasis supplied; 6 Am.Jur.2d Assignments §119)

It is well settled that a borrower can raise a defense to an assignment that would render it absolutely void. (See *Bank of America, N.A. v. Bassman FBT, LLC, supra.*; *Lavonia Property Holdings, LLC. v. 12840-12976 Farmington Road Holdings, L.L.C.,* 717 F. Supp.2d 724 (E.D. Mich. 2010); *Tri-Cities Construction, Inc. v. American National Insurance Co.,* 523 S.W.2d 426 (Tex. Civ. App. 1975); *Greene v. Reid*, 486 P.2d 222 (Ariz. Ct. App. 1971); *Young v. Chicago Federal Savings & Loan Association*, 180 Ill. App. 3d 280 (1989); *O'Neill v. DeLaney,* 92 Ill. App. 3d 292 (1980)).

Therefore, the issue at bar turns on whether non-compliance with the applicable PSA renders the assignments of the note and any further assignment of the mortgage void as mandated by EPTL Section 7-2-4. A recent New York case has affirmatively answered this question.

COURT ORDER OF APRIL 11, 2013 AND SUBSEQUENT CASELAW TO THE CONTRARY

On April 11, 2013, the District Court dismissed the Appellants' Complaint and their argument with regard to standing. While the Court recognized the case of *Bank of America, N.A. v. Bassman FBT, LLC, supra.,* which for the most part advanced Appellants' arguments, the District Court adopted the *Bassman* Court's finding that a transfer in contravention of a trust's terms is voidable rather than void. A New York court has subsequently spoken with regard to this issue. New York law controls the governing PSA (Exhibit "22", Section 10.03).

In the case of *Wells Fargo Bank, N.A. v Erobobo, supra.,* (a copy of said decision is attached hereto and marked as Exhibit "23"), Judge Wayne P. Saitta of the New York Supreme County for Kings County reasoned as follows:

The Plaintiff in this case is Trustee of an asset backed certificate trust. The trust

acquires mortgages, pools them and then issues securities secured or backed by the mortgages it holds. The investors receive interest or principle, or both, from the mortgages assigned to those specific securities or obligations.

The manner in which the trust acquires the mortgages issues the securities and pays the income from the mortgages to investors, is governed by the trust's pooling and servicing agreement (PSA).

The Plaintiff trust is organized as a Real Estate Mortgage Investment Conduit (REMIC). As a REMIC, the trust's investors receive significant tax benefits, but to receive those benefits, the trust must comply with the US Treasury regulations governing REMICS. [*8]26 USCA §860-D-1. The terms of the PSA require that the trust does not operate or take any action that would jeopardize its REMIC status. Section 9.01(f) of the PSA.

Article 9 of the PSA, Section 9.01(b) provides that the closing date is designated as the "start up day" of each REMIC, and lists the closing date as November 14, 2006. Pursuant to 26 USCA §860-G-(b)(9), the "start up day" of a REMIC is the day upon which the REMIC issues all of its regular and residential interests.

The PSA specifically requires the Depositor to have transferred all of the interest in the mortgage notes to the Trustee on behalf of the trust as of the closing date, PSA Article II, Section 2.05(iii).

Plaintiff asserts that the transfer of the note herein is void because the note was acquired after the closing date in violation of the terms of the PSA.

Mere recital of assignment, holding or receipt of an asset is insufficient to transfer an asset to a trust. The grantor must actually transfer the asset. EPTL §7-1.18.

The Assignment of the note and the mortgage which affected the transfer was dated July 16, 2008, however, pursuant to the terms of the PSA the trust closed on November 14, 2006.

Section 9.02 of the PSA specifically prohibits the acquisition of any asset for a REMIC part of the fund after the closing date unless the party permitting the acquisition and the NIMS (net interest margin securities) Insurer have received an Opinion letter from counsel, at the party's expense, that the acceptance of the asset will not affect the REMIC's status. No such letter has been provided to show compliance with the requirements of the PSA. Plaintiff has provided no evidence that the trustee had authority to acquire the note and mortgage herein after the trust had closed.

Since the trustee acquired the subject note and mortgage after the closing date, the trustee's act in acquiring them exceeded its authority and violated the terms of the trust. The acquisition of a mortgage after 90 days is not a mere technicality but a

material violation of the trust's terms, which jeopardizes the trust's REMIC status.

Section 9.01(f) of the PSA provides that neither the Trustee, the Servicer, nor Holder of the Certificates shall cause any REMIC formed under the PSA, by action or omission, to endanger the status of the REMIC or cause any imposition of tax upon the REMIC.

Since the trust was organized as a REMIC, the investors received certain tax benefits on the income that passed through the trust to them. Section 26 U.S.C.A. §860D(a)(4) defines a REMIC as an entity that

> as of the close of the 3rd month beginning after the startup and all that times thereafter substantially all of the assets of which consist of qualified mortgages and permitted investments.

Section 26 U.S.C.A. §860G(a)(3)(i,ii) defines a qualified mortgage as [*9}

(A) any obligation (including any participation or certificate of beneficial ownership therein) which is principally secured by an interest in real property and which (i) is transferred to the REMIC on the startup day in exchange for regular or residual interests in the REMIC, (ii) is purchased by the REMIC within the 3-month period beginning on the startup day if, except as provided in regulations, such purchase is pursuant to a fixed-price contract in effect on the startup day.

Thus to qualify for the REMIC tax benefits, the mortgages upon which the securities are based must be acquired by the Trust within three months of its start up date.

While Section 26 U.S.C.A. §860D(a)(4) permits a REMIC to contain some portion of non qualified mortgages, it is unclear how many unqualified mortgages are permitted without losing tax status. It is clear, however, that the late acquisition violates the terms of the PSA.

Under New York Trust Law, every sale, conveyance or other act of the trustee in contravention of the trust is void. EPTL §7-2.4. Therefore, the acceptance of the note and mortgage by the trustee after the date the trust closed, would be void.

Even though the *Erobobo* case is relatively recent, having been decided on April 29, 2013, it has already been cited with approval and its reasoning is being followed.

In the case of *Saldivar v. JPMorgan Chase Bank, N.A., et al.*, United States Bankruptcy Court, Case No. 11-10689 (S.D. Texas June 5, 2013) (a copy of which is attached hereto and

marked as Exhibit "24"), the Defendants moved to dismiss the Plaintiffs' complaint on the basis that the Plaintiffs lacked standing to challenge the validity of the assignment of their mortgage to a securitized trust. The Plaintiffs alleged that the note was not timely transferred into the trust in accordance with the governing PSA. The court reasoned as follows:

> The Trust was formed as a REMIC trust. Under the REMIC provisions of the Internal Revenue Code ("IRC") the closing date of the Trust is also the startup day for the Trust. The closing date/startup day is significant because all assets of the Trust were to be transferred to the Trust on or before the closing date to ensure that the Trust received its REMIC status. The IRC provides in pertinent part that:
>
> > "Except as provided in section 860G(d)(2), 'if any amount is contributed to a REMIC after the startup day, there is hereby imposed a tax for the taxable year of the REMIC in which the contribution is received equal to 100 percent of the amount of such contribution."
>
> 26 U.S.C. §860G(d)(1).
>
> A trust's ability to transact is restricted to the actions authorized by its trust documents. The Saldivars allege that here, the Trust documents permit only one specific method of transfer to the Trust, set forth in Section 2.01 of the PSA. Section 2.01 requires the Depositor to provide the Trustee with the original Mortgage Note, endorsed in blank or endorsed with the following: "Pay to the order of Deutsche Bank, as Trustee under the applicable agreement, without recourse." All prior and intervening endorsements must show a complete chain of endorsement from the originator to the Trustee.
>
> Under New York Estates Powers and Trusts Law §7-2.1(c), property must be registered in the name of the trustee for a particular trust in order for transfer to the trustee to be effective. Trust property cannot be held with incomplete endorsements and assignments that do not indicate that the property is held in trust by a trustee for a specific beneficiary trust.
>
> The Saldivars allege that the Note was not transferred to the Trust until 2011, resulting in an invalid assignment of the Note to the Trust. The Saldivars allege that this defect means that Deutsche Bank and Chase are not valid Note Holders.
>
> In its Motion to Dismiss, Chase and Deutsche Bank argue that the Saldivars lack standing to challenge the validity of the assignment to the trust. At the hearing on January 28, 2013, the Court stated that the law is well settled that the Saldivars do not have standing to complain about the Trust's failure to follow its own internal procedures. However, if the assignment was void, *ab initio*, because it occurred after the closing date, the Saldivars do have a valid argument that Chase and

Deutsche Bank are not valid Note Holders…

A third party generally lacks standing to challenge the validity of an assignment. *Bank of America Nat'l Assoc. v. Bassman FBT, L.L.C., et al.* 1981 N.E.2d 1.7 (Ill. App. Ct. 2012). A borrower may however raise a defense to an assignment, if that defense renders the assignment void. *Id.*

> The parties agree that under New York Trust Law the relevant statute provides the following: "If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void."

N.Y. Est. Powers & Trust Law §7-2.4. The *Bassman* court holds that despite the plain language of §7-2.4, under various circumstances a trustee's *ultra vires* acts are voidable and not void. *Bassman*, 981 N.E.2d. at 9. The *Bassman* court cites New York cases that hold that beneficiaries of a trust can ratify a trustee's *ultra vires* acts. See *Gregan v. Buchanan, et al.* 37 N.Y.S. 83, 85 (N.Y. Sup. Ct. 1896); see also *Hine v. Huntington, et al* 103 N.Y.S. 535, 540 (N.Y. App. Div. 1907); *Bimbaum v. Bimbaum, et al.*, 503 N.Y.S.2d 451 (N.Y. App. Div. 1986). The *Bassman* court holds that the ability to ratify a trustee's *ultra vires* act is equivalent to finding that a trustee's *ultra vires* act is merely voidable and not void.

Under 28 U.S.C. §1652, this Court has the duty to apply New York law in accordance with the controlling decision of the highest state court. *Royal Bank of Canada v. Trentham Corp.*, 665 F.2d 515, 516 (5th Cir. 1981). While the Court finds no applicable New York Court of Appeals decision, a recent New York Supreme Court decision is factually similar to the case before the Court. See *Wells Fargo Bank, N.A. v. Erobobo, et al.*, 2013 WL 1831799 (N.Y. Sup. Ct. April 29, 2013). In *Erobobo*, defendants argued that plaintiff (a REMIC trust) was not the owner of the note because plaintiff obtained the note and mortgage after the trust had closed in violation of the terms of the PSA governing the trust, rendering plaintiff's acquisition of the note void. *Id.* at *2. The *Erobobo* court held that under §7-2.4, any conveyance in contravention of the PSA is void; this meant that acceptance of the note and mortgage by the trustee after the date the trust closed rendered the transfer void. *Id.* at 8.

Based on the *Erobobo* decision and the plain language of N.Y. Est. Powers & Trusts Law §7-2.4, the Court finds that under New York law, assignment of the *Saldivars'* Note after the start up day is void *ab initio*. As such, none of the *Saldivars'* claims will be dismissed for lack of standing.

Again in *Hendricks v. US Bank National Association, as Successor Trustee to Bank of America, et al.*, State of Michigan Washtenaw County Trial Court, Case No. 10-849-CH. (a copy of which is annexed hereto and marked as Exhibit "25"), the Court held that because the Defendants failed to strictly comply with the terms of the governing PSA, the loan at issue in that case was not properly transferred to the trust. Consequently, New York Trust Law rendered the conveyance of the note and mortgage a nullity. Then, on June 20, 2013, the United States District Court for the Southern District of Texas in the case of *Ortiz v. CitiMortgage, Inc.*, 2013 U.S. Dist. LEXIS 86484, (a copy of which is annexed hereto as Exhibit "26"), decided that a debtor has standing to challenge the validity of a note based on a gap in the chain of title - much like the Appellee, Deutsche Bank's failure, in the case of bar, to adhere to the chain of endorsements of the note required by the governing PSA.

Most recently, on July 31, 2013, the California Court of Appeals recently decided the case of *Glaski v Bank of America, National Association*, 218 Cal. App. 4th 1079, Cal. Rptr. 3d (Cal. Ct. App. July 31, 2013). The Appellants in that case argued that the foreclosing bank was not the true owner of the land because its chain of ownership had been broken by a defective transfer of the loan to the securitized trust established for the mortgage backed securities. This specific defect alleged that the attempted transfers were made after the closing date of the securitized trust and therefore the transfers were ineffective and void. Citing with approval both the *Erobobo* and *Saldivar* cases, the Court held:

> ...that a borrower may challenge the securitized trust's chain of ownership by alleging the attempts to transfer the deed of trust to the securitized trust (which was formed under New York law) occurred after the trust's closing date. Transfers that violate the terms of the trust instrument are void under New York trust law, and borrowers have standing to challenge void assignments of their loans even though they are not a party to, or a third party beneficiary of, the assignment agreement.

GROUNDS FOR CERTIFICATION

Article VI Section 3(b)(9) of the New York State Constitution provides:

> The court of appeals shall adopt and from time to time may amend a rule to permit the court to answer questions of New York law certified to it by the Supreme Court of the United States, a court of appeals of the United States or an appellate court of last resort of another state, which may be determinative of the cause then pending in the certifying court and which in the opinion of the certifying court are not controlled by precedent in the decisions of the courts of New York.

In the appeal at bar, a central and potentially determinative issue is whether Appellants have standing to challenge the transfers of their note and mortgage, and the Appellees' non-compliance with the applicable pooling and servicing agreement. There is uncontroverted evidence that the Appellees did not comply with the terms of the PSA in transferring the Appellants' note and mortgage.

Neither the New York State Appellate Division nor the New York State Court of Appeals have considered these issues. Accordingly, this Court may certify the following questions to the New York State of Appeals:

1. Do Appellants have standing to challenge Appellee, Deutsche National Bank Trust Company's (hereinafter referred to as "Deutsche Bank") failure to honor the specific delivery, time sensitive, and transfer requirements for notes and mortgages under the applicable Pooling and Servicing Agreement (hereinafter referred to as "PSA"), the governing document for the trust supposedly holding Appellants' note and mortgage?

2. Does New York law control the enforceability of Appellants' note and mortgage?

3. Did the delivery and transfer of the Appellants' note to Appellee, Deutsche Bank, as trustee, after the trust's closing date render this transfer "void" as opposed to "voidable"?

4. Did the assignment of the Appellants' mortgage after the commencement of this action and contrary to the mandates of 26 U.S.C. Section 860D, render this assignment "void" as opposed to "voidable"?

5. Do Appellants have standing to challenge their loan with Mortgage Electronic Registrations Systems, Inc. (hereinafter referred to as "MERS")?

6. Do Appellants have standing to challenge the securitization of their mortgage?

This procedure would appear appropriate in light of the novelty of the issues and the recent caselaw which support the Appellants' position. Only a decision of the New York State Court of Appeals would be binding on this Court. *Johnson v. Frankell,* 520 U.S. 911, 916 (1997); 28 U.S.C. Section 1652.

Absent certification, this Court would have to make a determination without the input of the controlling jurisdiction. The United States Supreme Court, in the case of *Lehman Brothers v. Schein*, 416 U.S. 386, 391, 94 S.Ct. 1741 (1974), which involved Florida law attempting to interpret New York law, noted:

> ...When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as "outsiders" lacking the common exposure to local law which comes from sitting in the jurisdiction.

It is imperative that the New York State Court of Appeals determine whether Appellants have standing to challenge the Appellees' non-compliance with the applicable pooling and servicing agreement. There is obviously a difference of opinion on this issue which has far reaching consequences for the homeowners of this state. The decisions of the District Court in this case were based on a then existing line of cases. Since those decisions, the legal landscape has changed dramatically.

It is therefore respectfully requested that this Court certify the following questions to the New York State Court of Appeals:

1. Do Appellants have standing to challenge Appellee, Deutsche National Bank Trust Company's (hereinafter referred to as "Deutsche Bank") failure to honor the specific delivery, time sensitive, and transfer requirements for notes and mortgages under the applicable Pooling and Servicing Agreement (hereinafter referred to as "PSA"), the governing document for the trust supposedly holding Appellants' note and mortgage?

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3. Did the delivery and transfer of the Appellants' note to Appellee, Deutsche Bank, as trustee, after the trust's closing date render this transfer "void" as opposed to "voidable"?

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5. Do Appellants have standing to challenge their loan with Mortgage Electronic Registrations Systems, Inc. (hereinafter referred to as "MERS")?

6. Do Appellants have standing to challenge the securitization of their mortgage?

Pursuant to Federal Rules of Appellate Procedure, Local Rule 27(a), undersigned counsel hereby affirms that they conferred with opposing counsel in a good faith attempt to resolve this matter but were unable to reach a resolution prior to the filing of this Motion.

Respectfully submitted,

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