No. _____

In the

Supreme Court of the United States

ALBERTO C. TIMOSAN, SIMPLICIA C. TIMOSAN, ARIEL TIMOSAN, ARCHANGEL TIMOSAN and AILYN T. OUNYOUNG,

Petitioners,

vs.

THE BANK OF NEW YORK MELLON TRUST COMPANY, NATIONAL ASSOCIATION, FKA THE BANK OF NEW YORK TRUST COMPANY, N.A. AS SUCCESSOR TO JPMORGAN CHASE N.A. AS TRUSTEE FOR RAMP 2005RS9,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Hawaii

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is it a violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution for a federal or state court through state action to deprive property owners of title to and possession and enjoyment of real property by enforcing a nonjudicial or judicial foreclosure against their economic interests based solely on recorded mortgages and recorded mortgage assignments without first also requiring proof by a foreclosing mortgagee of the location, ownership and validity of their underlying promissory note?

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I. JURISDICTIONAL STATEMENT

This Court has jurisdiction to review this *Petition for a Writ of Certiorari*, timely filed by U.S. Mail on August 12, 2014, within ninety calendar days of the Supreme Court of the State of Hawaii's rejection of Petitioners' application for writ of certiorari, pursuant to Section 1257(a) of Title 28 of the United States Code and Supreme Court Rules 10(b) and 13(1).

II. AUTHORITATIVE PROVISIONS

This Petition presents a question of first impression in this Court, whether the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution are violated when a federal or state court deprives property owners of title to and possession and enjoyment of real property by enforcing a nonjudicial or judicial foreclosure against their economic interests based solely on recorded mortgages and recorded mortgage assignments without first requiring proof by a foreclosing mortgagee of the location, ownership and validity of their underlying promissory note.

The two controlling constitutional provisions therefore are:

1. *The Fifth Amendment*: No person shall . . . be deprived of . . . property, without due process of law, and

2. *The Fourteenth Amendment, Section 1*: [N]or shall any state deprive any person of . . . property, without due process of law.

III. CONCISE STATEMENT OF THE CASE

On or about August 25, 2005, the Timosans, husband and wife, borrowed $475,000 from Finance America, LLC, secured by a first mortgage on their property in favor of Mortgage Electronic Registration Systems, Inc. ("MERS") as their mortgagee.

Almost immediately thereafter, on or about October 1, 2005, Finance America, LLC was acquired by and merged into BNC Mortgage, Inc. ("BNC"), with BNC as the surviving entity.

Still holding the Timosan promissory note and mortgage according to opposing parties' filed records and recordations, BNC filed bankruptcy on or about January 9, 2009, making the subject promissory note and mortgage assets of the bankruptcy estate, with Finance America, LLC also in bankruptcy with it, documented from court proceedings in a related federal case, not disputed below, of which the lower court was asked to take judicial notice.

On or about April 15, 2010, MERS proceeded to assign the subject mortgage and purportedly the subject promissory note "solely as nominee for Finance America, LLC" to "The Bank of New York Mellon Trust Company, National Association fka The Bank of New York Trust Company, N.A. as Successor to JPMorgan Chase Bank, N.A., as Trustee, a Delaware Corporation" ("BNY Mellon"), even though MERS never owned the promissory note in the first place and therefore had no ability to assign the promissory note to anyone, and even though Finance America, LLC was in bankruptcy with BNC, and hence MERS lost its contractual nominee status as to the mortgage by operation of federal bankruptcy law, where transfers of bankruptcy estate assets would require bankruptcy court approval, never placed in evidence below.

On or about June 15, 2010, BNY Mellon

nevertheless confidently announced itself as "mortgagee" and proceeded to invoke the power of sale under the subject mortgage, anonymously as Trustee for a yet undisclosed trust.

Waiting almost a year later, on or about April 25, 2011 BNY Mellon recorded a "Mortgagee's Affidavit of Foreclosure Sale Under Power of Sale, claiming suddenly to be "Trustee for RAMP 2005RS9," apparently a securitized trust never previously disclosed and not for whom it invoked the power of sale in the first place.

BNY Mellon then proceeded on or about August 1, 2011, to execute a Grant Deed to sell the subject property, whose promissory note it never had, and certainly whose mortgage it never had as "Trustee for RAMP 2005RS9," to itself as "Trustee for RAMP 2005RS9."

Meanwhile, on or about January 11, 2012, Petitioner Ailyn T. Ounyoung, who had acquired an ownership interest in the property, filed a Chapter 13 bankruptcy petition, and suddenly GMAC Mortgage, LLC filed a motion for relief in bankruptcy court seeking successfully to lift her automatic stay, representing to the bankruptcy court that it, GMAC, was suddenly her "mortgagee."

On April 27, 2012, the State District Court in Kona on the Big Island of Hawaii proceeded to grant summary judgment and a writ of possession, denying the Timosans' motion to dismiss, entering a Judgment for Possession, and Writ of Possession, oblivious to the breaks in the chain of title of the promissory note and mortgage in this case, while the Timosans were proceeding *pro se*.

Below, BNY Mellon had filed a Verified Complaint on or about September 22, 2010, containing an attorneys' affirmation in the form of a Declaration of Counsel under penalty of perjury that

the chain of title of the note and mortgage were accurate, despite the obvious irregularities.

Nevertheless, the Timosans and Ounyoung, appearing pro se, did their best to object, raising standing and title as a defense, first on or about December 13, 2011 in answering the complaint, second on or about January 10, 2012 in moving to dismiss, third on or about March 21, 2012 in objecting to the order denying their motion to dismiss, and fourth on or about June 7, 2012 in seeking judicial notice that GMAC Mortgage had meanwhile itself filed bankruptcy on or about May 14, 2012.

On or about August 16, 2012, newly retained counsel for the Timosans and Ounyoung objected on jurisdiction grounds to BNY Mellon, and filed a Rule 60(b)(3) and (4) jurisdictional motion alleging fraud on the Court and seeking to set aside all prior orders and judgments, for leave to conduct discovery, and to require a new Attorneys' Affirmation.

That motion was denied on September 18, 2012 in its entirety, as a result of which the Timosans and Ounyoung timely appealed, only to have the Hawaii Intermediate Court of Appeals affirm the decision of the lower court on January 6, 2014 (A-1 to A-11) and entered a judgment on appeal on February 3, 2014 (A-11 to A-12).

Petitioners then sought review by way of a petition for writ of certiorari to the Hawaii Supreme Court, which was rejected by that Court on May 14, 2014 without comment (A-12).

Despite the obvious breaks in the chain of ownership of their note and mortgage, the Hawaii Intermediate Court of Appeals refused to force the foreclosing mortgagee to provide evidence that it owned Petitioners' note, relying instead on copies of assignments of their mortgage alone (A-7 to A-8):

> This contention posits that RAMP did not suffer an actual injury because RAMP did not hold good title to the Property. This contention is without merit because Hawai'i's former non-judicial foreclosure act does not require a mortgagee to affirmatively prove that it holds the note. See Pascual v. Aurora Loan Services, LLC, CIV. No. 10-00759 JMS-KS, 2012 WL 3583530 at *3 (D. Haw. Aug. 20, 2012) ("According to its plain language, HRS § 667-5 contains no requirement that a mortgagee affirmatively prove that it holds the note."). * * * *
>
> Additionally, where a mortgage instrument assigns transfer rights to the nominee before the principal filed for bankruptcy, as here, the principal's subsequent bankruptcy filing does not automatically invalidate the nominee's assignment. See Camat v. Fed. Nat'l Mortg. Ass'n, CIV. No. 12-00149 SOM/BMK, 2012 WL 2370201 at *7 (D. Haw. June 22, 2012) (holding homeowner's contention, that the assignment of a mortgage by a nominee for lender was invalid because the assignment occurred while lender was in bankruptcy, was without a factual basis because the lender's "bankruptcy did not on its own affect the validity of the assignment because [the lender] transferred its beneficial interest in the mortgage to [the nominee] before instituting the bankruptcy proceedings.").

No mention was made whatsoever concerning who owned Petitioners' promissory note, which was

merely inferred based upon whoever said that they were assigned Petitioners' mortgage, as if ownership of the mortgage constituted ownership of their note, placing the burden of proof on Petitioners moreover to prove otherwise. Consequently, Petitioners lost their property and their home.

IV. LEGAL ARGUMENT SUPPORTING WRIT

This Court as earlier as a century and one-half ago in Carpenter v. Longan, 83 U.S. 271, 274-276 (1982) rejected using ownership of a mortgage as evidence of ownership of a note for purposes of authorizing foreclosures, as an upside down, *Alice-in-Wonderland* view of real property rights:

> 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.
>
> The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter. If not assignable at law, it is clearly so in equity. When the amount due on the note is ascertained in the foreclosure proceeding, equity recognizes it as conclusive, and decrees accordingly. Whether the title of the assignee is legal or equitable is immaterial. The result follows irrespective of that question. The process is only a mode of enforcing a lien.

The Ninth Circuit United States Bankruptcy Appellate Panel in Veal v. American Home Mortgage

Servicing, Inc., 450 B.R. 897, 916-918 (2011), explained the importance of Longan as follows:

> [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. *916 e (1997) ("in general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation").[31] 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)).

Similarly, as the Supreme Court of Vermont explained in U.S. Bank National Association v. Kimball, 27 A.3d 1087, 1092 (Vt. 2011):

> 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.

> 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).
>
> 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.

New York Courts have come to the same conclusion; *see, e.g.*, Bank of New York v. Silverberg, 86 A.D. 3d 274, 28-282 (Sup. Ct. NY 2011):

The principal issue ripe for determination by this Court, and which was left unaddressed by the majority in *Matter of MERSCORP* (*id.*), is whether MERS, as nominee and mortgagee for purposes of recording, can assign the right to foreclose upon a mortgage to a plaintiff in a foreclosure action absent MERS' right to, or possession of, the actual underlying promissory note.

Standing requires an inquiry into whether a litigant has "an interest ... in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request" (*Caprer v. Nussbaum,* 36 A.D.3d 176, 182, 825 N.Y.S.2d 55; *see New York State Assn. of Nurse Anesthetists v. Novello,* 2 N.Y.3d 207, 211, 778 N.Y.S.2d 123, 810 N.E.2d 405; *Wells Fargo Bank Minn., N.A. v. Mastropaolo,* 42 A.D.3d 239, 242, 837 N.Y.S.2d 247). Where, as here, the issue of standing is raised by a defendant, a plaintiff must prove its standing in order to be entitled to relief (*see* **537 *U.S. Bank, N.A. v. Collymore,* 68 A.D.3d 752, 753, 890 N.Y.S.2d 578; *Wells Fargo Bank Minn., N.A. v. Mastropaolo,* 42 A.D.3d at 242, 837 N.Y.S.2d 247). In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced (*see U.S. Bank, N.A. v. Collymore,* 68 A.D.3d at 753, 890 N.Y.S.2d 578; *Countrywide Home Loans, Inc. v. Gress,* 68 A.D.3d 709,

709, 888 N.Y.S.2d 914; *Wells Fargo Bank, N.A. v. *280 Marchione,* 69 A.D.3d 204, 207–208, 887 N.Y.S.2d 615; *Mortgage Elec. Registration Sys., Inc. v. Coakley,* 41 A.D.3d 674, 674, 838 N.Y.S.2d 622; *Federal Natl. Mtge. Assn. v. Youkelsone,* 303 A.D.2d 546, 546–547, 755 N.Y.S.2d 730; *First Trust Natl. Assn. v. Meisels,* 234 A.D.2d 414, 651 N.Y.S.2d 121).

As a general matter, once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note (*see Mortgage Elec. Registration Sys., Inc. v. Coakley,* 41 A.D.3d 674, 838 N.Y.S.2d 622; *Smith v. Wagner,* 106 Misc. 170, 178, 174 N.Y.S. 205 ["assignment of the debt carries with it the security therefor, even though such security be not formally transferred in writing"]; *see also Weaver Hardware Co. v. Solomovitz,* 235 N.Y. 321, 331–332, 139 N.E. 353 ["a mortgage given to secure notes is an incident to the latter and stands or falls with them"]; *Matter of Falls,* 31 Misc. 658, 660, 66 N.Y.S. 47, *affd.* 66 App.Div. 616, 73 N.Y.S. 1134 ["The deed being given as collateral for the payment of the note [,] the transfer of the note carried the security"]).

By contrast, "a transfer of the mortgage without the debt is a nullity, and no interest is acquired by it" (*Merritt v. Bartholick,* 36 N.Y. 44, 45; *see Carpenter v. Longan,* 16 Wall. 271, 83 U.S. 271, 274, 21 L.Ed. 313 [an assignment of the mortgage without the note is a nullity]; *US Bank N.A. v.*

> *Madero,* 80 A.D.3d 751, 752, 915 N.Y.S.2d 612; *U.S. Bank, N.A. v. Collymore,* 68 A.D.3d at 754, 890 N.Y.S.2d 578; *Kluge v. Fugazy,* 145 A.D.2d 537, 538, 536 N.Y.S.2d 92 [plaintiff, the assignee of a mortgage without the underlying note, could not bring a foreclosure action]; *Flyer v. Sullivan,* 284 App.Div. 697, 698, 134 N.Y.S.2d 521 [mortgagee's assignment of the mortgage lien, without assignment of the debt, is a nullity]; *Beak v. Walts,* 266 App.Div. 900, 42 N.Y.S.2d 652). A "mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation" (*FGB Realty Advisors v. Parisi,* 265 A.D.2d 297, 298, 696 N.Y.S.2d 207). Consequently, the foreclosure of a mortgage cannot be pursued by one who has no demonstrated right to the debt (*id.; see* Bergman on New York Mortgage Foreclosures § 12.05[1][a][1991]).

Nevertheless, the judicial application of this one simple concept, that ownership of the mortgage must follow the note, has caused serious disagreements not only between state and federal jurisdictions, but within state and within federal jurisdictions as well, due to the emergence of the Mortgage Electronic Registration Systems, Inc. ("MERS") in the past fifteen years that split control of the note from its mortgage in order to trade ownership rights in the secondary mortgage market.

Not being able to securitize notes since they are not recorded, MERS decided to sell share certificates in bundled mortgages to investors, and in the process lost account of who owns most notes in

America, raising serious questions regarding clouded titles where foreclosed properties are being sold based upon prior mortgage ownership and not retired notes.

The United States experienced its greatest recession starting in 2008 which many have attributed directly to the manner in which MERS separated the note from the mortgage, leading to grossly sloppy if not outright fraudulent handling of mortgage interests beyond the oversight and record keeping of traditional state recording offices, Krieger, *Clouded Titles* (2014); Nelson, G.S., *Confronting the Mortgage Meltdown*, 37 Pepperdine L. Rev. 583 (2010).

Indeed, the vast majority of federal and state laws and federal and state courts have failed to insist upon proof of ownership of notes and instead are basing their foreclosure and quiet title decisions on proof of ownership of mortgages alone if even that, and therefore in many ways are unwittingly transforming our courts into collection agencies for crooks.

The resulting confusion and retreat taking place in our courts from basic centuries old evidentiary principles otherwise requiring proof of ownership of the note illustrates the need for this Court to once again reassert its the reasoning in its decision in Longan, *supra*; *E.g.*:

Pascual v. Aurora Loan Servicing, LLC, 2012 WL 3583530, at *3 (D. Haw.) (no proof of ownership of the note is required to foreclose).

Cervantes v. Countrywide Home Loans, 656 F.3d 1034 (9th Cir. 2011) (MERS' self-professed authority to assign mortgages is proof enough of ownership of a loan and authority to foreclose).

Teaupa v. U.S. National Bank, N.A., 836 F. Supp 2d 1083, 1104 (D. Haw. 2011) (MERS has standing to foreclosure by itself as "nominee").

Brink v. Alternative Loan Trust 2006-39CB, 2014 WL 1839103, at *3 (E.D. Calif.) (borrowers cannot challenge validity of note ownership in securitized trusts as lack standing).

Gomes v. Countrywide Home Loans. Inc., 192 Cal. App. 4th 1149, 1155, 121 Cal. Rptr. 3d 819 (2011) (California nonjudicial statutes do not allow homeowners to challenge standing and whether a foreclosing mortgagee is authorized by a note holder to foreclose, because that would delay valid foreclosures and make the process slower and more expensive for mortgagees).

A good example of the manner in which fundamental rules of evidence are being ignored by trial courts in foreclosure cases in jurisdictions throughout this Nation in otherwise low visibility courtrooms can be seen in one recent Washington State Court hearing posted on YouTube at https://www.youtube.com/watch?v=_yxvv_axfa4. And reports from battle weary foreclosure defense attorneys can be heard on www.foreclosurehour.com.

V. CONCLUSION

Neglected in all of this are the millions of beleaguered homeowners who have already lost their homes and the equity therein, and the millions now awaiting a similar fate, without most courts caring to require proof of ownership of their promissory notes as a precondition to eviction, resulting in zombie notes surfacing later to surprise new buyers.

Neglected in all of this also have been the Due Process Clauses of the Fifth and Fourteen Amendments, otherwise guaranteeing the protection of property rights against arbitrary forfeitures akin to the evils which this Court removed with your decisions, for instance, in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), Fuentes v. Shevin, 407 U.S. 67 (1972), and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

Neglected in all of this is the special importance to the welfare of this Nation of protecting a family's "single most important asset," its residence, not only from an economic point of view, but also for its inherent social values -- as its location often determines where children go to school, where families worship, where family and friends reside, and where the elderly spend their remaining years, in the absence of which borrowers may become dependent on public housing and welfare, if available, and parental control may be lost and marriages may break up as a result; *see* Sawada v. Endo, 57 Haw. 608, 616, 561 P.2d 1291 (1977).

There is no institution in America presently equal to this challenge and to this task except this Court. What is urgently needed is to apply the Due Process Clauses of the Fifth and Fourteenth Amendments to your Carpenter v. Longan decision.

Respectfully submitted,

/s/ Gary Victor Dubin

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Honolulu, Hawaii
August 12, 2014

INDEX TO APPENDIX

A. INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII, SUMMARY DISPOSITION ORDER, DATED JANUARY 6, 2014

CAAP-12-0000865

(By: Foley, Presiding J., Reifurth and Ginoza, JJ.)

Defendants-Appellants Alberto C Timosan, Simplicia C. Timosan, Ariel Timosan, Archangel Timosan[i] and Ailyn Timosan Ounyoung (collectively, Appellants) appeal from:

(1) the "Order 1) Denying Defendant's Motion to Dismiss Filed January 10, 2012[;] 2) Granting Plaintiff's Motion for Summary Judgment and Writ of Possession Filed November 14, 2011," the "Judgment for Possession," and the "Writ of Possession," all entered April 27, 2012 (collectively, Summary Judgment Order); and

(2) the "Order Denying Defendants' [District Court Rules of Civil Procedure (DCRCP)] Rule 60(b)(3) and (4) Motion to Set Aside This Court's (1) April 27, 2012 Order Granting Summary Judgment And Writ of Possession, (2) April 27, 2012 Judgment For Possession, And (3) April 27, 2012 Writ of Possession, For Sanctions, And For Discovery[,]" entered September 18, 2012 (DCRCP Rule 60(b) Motion). All judgments and orders were entered in the District Court of the Third Circuit[ii] (district court).

Because Appellants filed their notice of appeal on October 18, 2012, only the appeal from the DCRCP Rule 60(b) Motion is timely. See Hawai'i Rules of Appellate Procedure Rule 4(a)(1).

On appeal, Appellants contend the district court lacked subject matter jurisdiction, rendering its prior orders and judgments void, because: (1) title

was at issue, depriving the district court of jurisdiction, (2) Plaintiff-Appellee Bank of New York Mellon Trust Company, National Association, FKA the Bank of New York Trust Company, N.A. as Successor to JPMorgan Chase N.A. as Trustee for RAMP 2005RS9 (RAMP) lacked standing to pursue ejectment as a matter of law, (3) RAMP committed fraud, (4) RAMP's attorneys' affirmation was false, and (5) discovery was required on all standing issues.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, as well as the relevant statutory and case law, we conclude Appellants' appeal is without merit.

(1) The district court's denial of Appellants' DCRCP Rule 60(b) Motion was proper because the Summary Judgment Order was not void.

The district court's denial of Appellants' DCRCP Rule 60(b) Motion is reviewed for abuse of discretion. See Beneficial Hawaii, Inc. v. Casey, 98 Hawai'i 159, 164, 45 P.3d 359, 364 (2002). An abuse of discretion occurs if the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant. See id.

DCRCP Rule 60(b)(4) provides a party relief from a "final judgment, order, or proceeding ... [if]...the judgment is void[.]" A judgment is void "if the court that rendered it lacked jurisdiction of ...the subject matter...." Application of Hana Ranch Co., 3 Haw. App. 141, 146, 642 P.2d 938, 941 (1982).

Appellants contend the Summary Judgment Order is void for lack of subject matter jurisdiction because (1) Appellants presented a question of title

to the district court, and (2) RAMP lacked standing to bring the summary possession and ejectment action. We conclude the denial was not erroneous, in that the district court had subject matter jurisdiction and RAMP had standing.

(a) The district court had subject matter jurisdiction.

Hawaii Revised Statutes (HRS) § 604-5 (Supp. 2012) precludes district courts from exercising jurisdiction "in which the title to real estate comes in question[.]" If a defendant in an ejectment action seeks to raise a defense to the court's jurisdiction on the ground that title to real estate is in dispute, the defendant must comply with DCRCP rule 12.1.[iii] See Deutsche Bank Nat'l Trust Co. v. Peelua, 126 Hawai'i 32, 33, 265 P.3d 1128, 1129 (2011). DCRCP Rule 21.1 aims to prevent abuse of HRS § 604-5(d) by requiring an affidavit describing the claim to title with specificity. Peelua, 126 Hawai'i at 36, 265 P.3d at 1132. Bare assertions that title is at issue are insufficient to divest the district court of jurisdiction. Id. at 38, 265 P.3d at 1134. Appellants contend they satisfied the requirements of DCRCP Rule 12.1 by "pointing out that there were deficiencies in how [RAMP] acquired title to their note and mortgage."

In opposition to the summary possession and ejectment action, Alberta and Simplicia asserted three main claims:

(1) the "Mortgagee's Grant Deed Pursuant to Power of Sale" raises a question of fact about whether the note was assigned or delivered to RAMP, and cites Carpenter v. Longan, 83 U.S. 271, 274 (1972) for the proposition that 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[;]"

(2) based on the record, a genuine issue of material fact exists regarding whether RAMP is the "lawful owner and holder of the note and/or mortgage[;]" and

(3) RAMP did not prove it has any rights as holder to enforce the note or mortgage per HRS § 490:3-301 (2008 Repl.) or UCC Article 3 §§ 3-301, 3-302.

In opposition to the action for summary possession and ejectment, Ounyoung asserted three main claims:

(1) a genuine issue of material fact exists regarding whether RAMP holds good title to the Property because RAMP did not "have proper Chain of Title;

(2) a question exists "as to whom has the right proper quitclaim deed, [Ounyoung or RAMP;]" and

(3) the district court lacked subject matter jurisdiction.

In opposition to RAMP's proposed order denying Ounyoung's motion to dismiss and granting RAMP's motion for summary judgment, Ounyoung asserted:

(1) RAMP lacked "standing to foreclose and is not the holder in due course evidence by the promissory note[;]" and

(2) the district court lacked "subject matter jurisdiction under [DCRCP] Rule 12.1 based upon [Ounyoung] having special interest on title."

Ounyoung submitted what appears to be a title report to the district court. Significantly, however, no affidavit appears of record regarding the source, nature, and extent of the title to the Property claimed by any Appellant. Because Appellants failed to submit an affidavit per DCRCP Rule 12.1, they could not raise a title dispute as a defense. See

State ex rel. Dep't of Hawaiian Home Lands v. Pedro, No. CAAP-12-0000444 (App. June 28, 2013) (SDO) (holding defendants failed to submit, at any time, an affidavit providing the particulars about the source, nature or extent of their claim to title and thus could not raise a title dispute as a defense). Furthermore, Appellant's failed to sufficiently identify the source, nature, and extent of the title claimed.

To satisfy DCRCP Rule 12.1, a defendant's affidavit must identify a claimed interest in the subject property existing "at the time a defense under DCRCP Rule 12.1 is raised." Peelua, 126 Hawai'i at 28 n.14, 265 P.3d at 1134 n.14. So while a title report may identify the source, nature, and extent of title once held, it does not identify an existing interest where the subject property has been conveyed through a non-judicial foreclosure sale. To meet the requirements of DCRCP Rule 12.1 in such a situation as here, defendants must specifically identify a claim to title that survives the non-judicial foreclosure. See id. at *11 ("Permitting the type of vague, speculative hypotheticals of a defect in the chain of title that the [defendants] assert would contravene the purpose of [DCRCP Rule 12.1], which is to apprise the court fully of the nature of the defendant's claim[.]" (citation and internal quotation marks omitted)). The bare assertion that RAMP lacked standing to foreclose is too speculative to sufficiently apprise the district court of the claimed interest in the Property. See Fed. Nat'l Mortg. Ass'n v. Medeiros, No. CAAP-12-0000024 at *3 (App. May 7, 2013) (mem.) ("The declaration simply asserts that there was an 'apparent violation of Federal law.' But as in Peelua, without further detail it cannot be ascertained how or whether the allegation has any bearing on title to the property.")

(b) RAMP had standing to pursue ejectment.

Appellants' DCRCP Rule 60(b) Motion contended the Summary Judgment Order was void and should be set aside under DCRCP Rule 60(b)(4) because RAMP was not a holder of the note and therefore lacked standing to pursue ejectment as a matter of law. A plaintiff has the right to bring suit, and thus standing, when "(1) the plaintiff has suffered an actual or threatened injury as a result of the defendant's wrongful conduct, (2) the injury is fairly traceable to the defendant's actions, and (3) a favorable decision would likely provide relief for a plaintiff's injury." See IndyMac Bank v. Miguel, 117 Hawai'i 506, 512, 184 P.3d 821, 827 (App. 2008) (citation, internal quotation marks, and brackets omitted). If a party lacks standing, the court is without subject matter jurisdiction to decide the action. See id.

Appellants contend:

> Under the common law, a "mortgagee" or person entitled to enforce a mortgage must also be the holder of the secured promissory note. Generally, possession of an indorsed promissory note, in compliance with the requirements of Article III of the Uniform Commercial Code (adopted in Hawaii as Chapter 490:3) is essential before an entity may conduct a foreclosure. However, the Timosans and Ounyoung maintained that [RAMP] was not the holder of their promissory note at the time of the nonjudicial foreclosure. The disputed Assignment of Mortgage

> is wholly insufficient to establish this elemental fact.

This contention posits that RAMP did not suffer an actual injury because RAMP did not hold good title to the Property. This contention is without merit because Hawai'i's former non-judicial foreclosure act does not require a mortgagee to affirmatively prove that it holds the note. See Pascual v. Aurora Loan Services, LLC, CIV. No. 10-00759 JMS-KS, 2012 WL 3583530 at *3 (D. Haw. Aug. 20, 2012) ("According to its plain language, HRS § 667-5 contains no requirement that a mortgagee affirmatively prove that it holds the note.").

Appellants also contend the original lender's bankruptcy invalidated the assignment of the mortgage on the Property from Mortgage electronic Registration Systems, Inc., nominee for the original lender, to the Bank of New York, RAMP's predecessor in interest. This contention is also without merit. Appellants produced no evidence that the assignment violated the bankruptcy stay, alleging only that the assignment occurred sometime after the original lender filed for bankruptcy. A nominee's assignment of a mortgage while the principal is in bankruptcy does not automatically violate 11 U.S.C. § 362. See Pascual v. Aurora Loan Services, LLC, CIV. No. 10-00759 JMS-KSC, 2012 WL 2355531 (D. Haw. June 19, 2012) reconsideration denied, CIV. No. 10-00759 JMS-KSC, 2012 WL 2583530 (D. Haw. Aug. 20, 2012) ("Assuming that Plaintiffs' mortgage loan was part of [the lender's] bankruptcy estate, [] [the lender's] filing of Chapter 11 bankruptcy permitted it to continue to operate its business in the ordinary course.") (citing 11 U.S.C. §§ 1107(a), 1108).

Additionally, where a mortgage instrument assigns transfer rights to the nominee before the

principal filed for bankruptcy, as here, the principal's subsequent bankruptcy filing does not automatically invalidate the nominee's assignment. See Camat v. Fed. Nat'l Mortg. Ass'n, CIV. No. 12-00149 SOM/BMK, 2012 WL 2370201 at *7 (D. Haw. June 22, 2012) (holding homeowner's contention, that the assignment of a mortgage by a nominee for lender was invalid because the assignment occurred while lender was in bankruptcy, was without a factual basis because the lender's "bankruptcy did not on its own affect the validity of the assignment because [the lender] transferred its beneficial interest in the mortgage to [the nominee] before instituting the bankruptcy proceedings.").

In support of its "Motion for Summary Judgment And Writ Of Possession" RAMP attached its "Mortgagee's Affidavit Of Foreclosure Under Power Of Sale," "Mortgagee's Grant Deed Pursuant To Power Of Sale," the Mortgage, and two recorded mortgage assignments. Based on this record, we conclude RAMP held good title to the Property and therefore suffered actual, redressable injury when Appellants refused to vacate. See generally Wells Fargo Bank, N.A. v. Himalaya-Fidele, No. 29905 (App. April 30, 2013) (SDO).

(2) The district court did not abuse its discretion when it denied Appellants' DCRCP Rule 60(b) Motion because Appellants failed to present competent evidence of fraud.

DCRCP Rule 60(b)(3) provides relief from a judgment if the judgment was procured through intrinsic or extrinsic fraud, misrepresentation, or other misconduct of an adverse party. See DCRCP Rule 60(b)(3); see also Kawamata Farms, Inc. v. United Agri Products, 86 Hawai'i 214, 251, 948 P.2d 1055, 1092 (1997).[iv] Kawamata Farms explained the burden a Hawai'i Rules of Civil Procedure (HRCP)

Rule 60(b)(3) movant must satisfy for the judgment to be set aside:

> HRCP Rule 60(b)(3) is essentially identical to Federal Rule of Civil Procedure (FRCP) Rule 60(b)(3). Where we have patterned a rule of procedure after an equivalent rule within the FRCP, interpretations of the rule "by the federal courts are deemed to be highly persuasive in the reasoning of this court." *Harada v. Burns,* 50 Haw. 528, 532, 445 P.2d 376, 380 (1968) (footnote omitted). According to the United States Court of Appeals for the Ninth Circuit, "[u]nder [FRCP] Rule 60(b)(3), the movant must, (1) prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct [, and] (2) establish that the conduct complained of prevented the losing party from fully and fairly presenting his case or defense." *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878-79 (9th Cir. 1990) (citation and internal quotation marks omitted) [.]

Kawamata Farms, 86 Hawai'i at 251-52, 948 P.2d at 1092-93. (Emphasis added.) The district court found Appellants failed to satisfy both requirements.

Appellants alleged RAMP knew its title to the Property was not good and therefore, RAMP's

"knowingly contrary affirmations constitute fraud not only upon Movants, but upon [the district court.]" As previously discussed, Appellants' attack of RAMP's title to the Property is without merit; so too are Appellants' related claims of fraud.

(3) RAMP's attorneys' affirmation.

Appellants contend RAMP's attorneys submitted an "affirmation at the beginning of the case that was clearly false." Appellants' contention that the affirmation was false appears to be based on Appellants' claim that RAMP did not hold good title, which as previously discussed, is without merit.

(4) Discovery was not required on all standing issues.

Appellants contend discovery "was obviously warranted . . . to determine the real standing/jurisdictional facts of this case [.]" This claim again appears to be based on Appellants' claim that RAMP did not hold good title, which is without merit.

Therefore,

IT IS HEREBY ORDERED that "Order Denying Defendants' Rule 60(b)(3) and (4) Motion to Set Aside This Court's (1) April 27, 2012 Order Granting Summary Judgment And Writ of Possession, (2) April 27, 2012 Judgment for Possession, And (3) April 27, 2012 Writ of Possession, For Sanctions, And For Discovery" entered September 18, 2012 in the District Court of the Third Circuit is affirmed.

DATED: Honolulu, Hawai'i, January 6, 2014.

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[i] Ariel Timosan and Archangel Timosan were dismissed as Defendants.

[ii] The Honorable Joseph P. Florendo, Jr. presided.

[iii] DCRCP Rule 12.1 provides:

> Rule 12.1 DEFENSE OF TITLE IN DISTRICT COURTS.
>
> Pleadings. Whenever, in the district court, in defense of an action in the nature of an action of trespass or for the summary possession of land, or any other action, the defendant shall seek to interpose a defense to the jurisdiction to the effort that the action is a real action, or one in which the title to real estate is involved, such defense shall be asserted by a written answer or written motion, which shall not be received by the court unless accompanies by an affidavit of the defendant, setting forth the source, nature and extent of the title claimed by defendant to the land in question, and such further particulars as shall fully apprise the court of the nature of defendant's claim.

[iv] We note that the text of HRCP Rule 60(b) and DCRCP Rule 60(b) are materially alike. See Bank of Hawaii v. Shaw, 83 Hawai'i 50, 55, 924 P.2d 544, 549 (App. 1996).

B. INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII, JUDGMENT ON APPEAL, DATED FEBRUARY 3, 2014

CAAP-12-0000865

(By: Foley, Presiding J., for the court)

Pursuant to the Summary Disposition Order of the Intermediate Court of Appeals of the State of Hawai'i entered on January 6, 2014, the "Order Denying Defendants' Rule 60(b)(3) and (4) Motion to Set Aside This Court's (1) April 27, 2012 Order Granting Summary Judgment And Writ of Possession, (2) April 27, 2012 Judgment For

Possession, And (3) April 27, 2012 Writ of Possession, For Sanctions, And For Discovery" entered September 18, 2012 in the District Court of the Third Circuit is affirmed.

DATED: Honolulu, Hawai'i, February 3, 2014.

C. SUPREME COURT OF THE STATE OF HAWAII, ORDER REJECTING APPLICATION FOR WRIT OF CERTIORARI, DATED: MAY 14, 2014

CAAP-12-0000865

(By: Recktenwald, C.J., Nakayama, McKenna, Pollack, and Wilson, JJ.)

Petitioner/Defendant-Appellant's Application for Writ of Certiorari, filed on April 4, 2014, is hereby rejected.

DATED: Honolulu, Hawai'i, May 14, 2014.