

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

DANIEL M. HERRIGAN  
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SUMMIT COUNTY  
CLERK OF COURTS

Deutsche Bank National Trust Company, ) Case No. 2011 08 4500  
as Trustee for Soundview Home Loan )  
Trust 2005-4, Asset-Backed Certificates, ) JUDGE COSGROVE  
Series 2005-4 c/o Chase Manhattan )  
Mortgage Company )  
)  
Plaintiff, )  
)  
v. )  
)  
Glenn E. Holden, et al., ) DEFENDANTS GLENN AND ANN  
) HOLDEN'S 12(B)(1) MOTION TO  
Defendants. ) DISMISS THE COMPLAINT

NOW COMES Defendants Glenn and Ann Holden, by and through counsel, and moves this Court to dismiss the complaint for lack of subject matter jurisdiction since this case was brought c/o Chase Manhattan Mortgage Company, a company that has been merged out of existence. Nonexistent parties cannot sue in a court of law.

In addition, the promissory note attached to the complaint is payable to NovaStar Mortgage, Inc. *See Plaintiff's Exhibit A.* Defendants have a meritorious defense to foreclosure because there is no indorsement on the promissory note. "If an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder." R.C. 1303.21(B). Since the promissory note is payable to NovaStar Mortgage, Inc. and there is no indorsement on the note then there has been no valid negotiation to the Plaintiff.

The cut off date of the trust was November 1, 2005.

[http://www.sec.gov/Archives/edgar/data/1347120/000088237706000078/d395885\\_ex4-1.htm](http://www.sec.gov/Archives/edgar/data/1347120/000088237706000078/d395885_ex4-1.htm)

The assignment of mortgage attached to the complaint as Exhibit C was executed on September 17, 2010, nearly five years past the cut off date!

On November 16, 2010 the United States Congress published a report that analyzed the legal consequences of failing to comply with the Pooling and Servicing Agreements of the trusts.

“In order to convey good title into the trust and provide the trust with both good title to the collateral and the income from the mortgages, each transfer in this process required particular steps. Most PSAs are governed by New York law and create trusts governed by New York law. New York trust law requires strict compliance with the trust documents; any transaction by the trust that is in contravention of the trust documents is void, meaning the transaction cannot actually take place as a matter of law. Therefore, if the transfer for the notes and mortgages did not comply with the PSA, the transfer would be void, and the assets would not have been transferred to the trust. Moreover, in many cases the assets could not now be transferred to the trust. PSAs generally require that loans transferred to the trust not be in default, which would prevent the transfer of any non-performing loans to the trust now. Furthermore, PSAs frequently have timeliness requirements regarding the transfer in order to ensure that the trusts qualify for favored tax treatment.” Congressional Oversight Panel, *Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation*, November 16, 2010 page 19.

Section 11.04 of the Pooling and Servicing Agreement states that the governing law for the trust is the substantive laws of the State of New York.

Under New York Trust Law "every sale, conveyance or other act of the trustee in contravention of the trust...is void." New York Estates, Powers and Trusts § 7-2.4. The Pooling and Servicing Agreement is the governing document for the trust and is has a particular cut off date. Any assignment in contravention of the cut-off date is void.

In addition, Defendant Glenn Holden’s note does not have an indorsement. Not only

was the assignment of mortgage executed nearly five years after the cut-off date, but Defendant's note does not have any indorsement to the trust. Plaintiff Deutsche Bank does not own Defendants' note and mortgage.

Defendants move this Court to dismiss the complaint for lack of subject matter jurisdiction. "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction on the subject matter, the court shall dismiss the action." Civ.R 12 (H)(3).

A 12(B)(1) motion to dismiss can consider matters outside the pleadings.

The Ohio Constitution in Article 4 only grants the Common Pleas Courts of Ohio jurisdiction over justiciable matters. See Section 4(B), Article 4, Ohio Constitution. A justiciable matter involves an actual controversy. When the foreclosing Plaintiff does not own the note and mortgage at the time the complaint is filed there is no justiciable controversy between the plaintiff and the defendant homeowner, and thus no subject matter jurisdiction. Plaintiff did not attach to the complaint any evidence that it owned the note so no justiciable controversy exist between Plaintiff and the Holdens. Thus, this Court lacks subject matter jurisdiction and the compliant should be dismissed.

Respectfully submitted,

**DANN, DOBERDRUK & WELLEN LLC**



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## MEMORANDUM IN SUPPORT ON THE MERS ISSUES

Defendant's note was severed from the mortgage at origination, which had the effect of rendering the mortgage unenforceable.

The American Law Institute in The Third Restatement of Property (Mortgages) states:

(a) A transfer of an obligation secured by a mortgage also transfers the mortgage **unless the parties to the transfer agree otherwise. (emphasis added)**

Restatement of the Law 3d, Property (1997) Mortgages, Section 5.4.

When MERS is involved the parties to the transfer have agreed otherwise - they agree that the note will be held by the original lender and the mortgage will remain in MERS name. Thus, when the note is transferred the mortgage does not follow. Here, Defendant Glenn Holden's note was payable to NovaStar Mortgage, Inc. *See Plaintiff's Exhibit A*. However, at origination the parties (really, the lender since these were contracts of adhesion) decided to keep the mortgage separate by having MERS be the mortgagee. *See Plaintiff's Exhibit B*. Since the note and mortgage were severed at origination of the loan, the mortgage does NOT follow the note when the note is transferred. This is very problematic for the Plaintiff because the mortgage is the security for the debt. Without ownership of the mortgage, a Plaintiff cannot foreclose.

Plaintiff does not own the Defendants' note and mortgage. The assignment of mortgage attached to the complaint is incapable of transferring the note because MERS has no interest in the note. *See Plaintiff's Exhibit C*. An assignment of the mortgage without the note is a nullity. *Carpenter v. Longan*, 83 U.S. 271, 274 (1872) ("The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity"). Since Plaintiff's Exhibit C is an assignment of the mortgage without the note, the assignment is invalid to transfer an interest to

Plaintiff. Since MERS is not named on the promissory note, MERS has no interest in the note and can never transfer it.

While it is generally true that a mortgage follows the Note, the MERS process has by its very terms altered this practice since mortgages are held by MERS as “mortgagee of record.” MERS has become a third party in what used to be a two party system between the lender and the borrower. By MERS’s own account, the Notes are transferred among *its* members, while the Mortgage remains in MERS’s name.

“MERS admits that the very foundation of its business model as described herein requires that the Note and Mortgage travel on divergent paths. Because the Note and Mortgage did not travel together, Movant must prove not only that it is acting on behalf of a valid assignee of the Note, but also that it is acting on behalf of the valid assignee of the Mortgage.” *In re Agard*, 2011 Bankr. LEXIS 488 \*37 (MERS does not have standing).

At loan origination the parties intended to keep the note and mortgage separate. Thus, the mortgage has been severed from the Note. *See Carpenter v. Longan*, 83 U.S. at 274 (finding that an assignment of the mortgage without the note is a nullity); *Landmark Nat’l Bank v. Kesler*, 216 P.3d 158, 166-67 (Kan. 2009) (“[I]n the event that a mortgage loan somehow separates interests of the note and the deed of trust, with the deed of trust lying with some independent entity, the mortgage may become unenforceable”).

In *Bellistri v Ocwen Loan Servicing, LLC* the Missouri Court of Appeals held that since MERS was not named on the promissory note MERS’s assignment together with the promissory note failed to transfer an enforceable interest. *Bellistri v Ocwen Loan Servicing, LLC* 284 S.W.3d 619; 2009 Mo. App. LEXIS 219 \*\*9, transfer denied by *Bellistri v. Ocwen Loan Servicing, L.L.C.*, 2009 Mo. LEXIS 138 (Mo., June 30, 2009).

This same logic was followed in Cuyahoga County, Ohio in the dismissal of the case *Provident Bank v. Turner*, Case No. CV-09-706959. Since MERS was not named on the

promissory note, MERS had no legal right to transfer the promissory note. The journal entry of November 9, 2010 which dismissed the case stated:

MOTION OF THE DEFENDANTS PHILLIP TURNER AND TAMARA TURNER TO DISMISS FOR PLAINTIFF'S LACK OF STANDING TO FILE THE FORECLOSURE IS GRANTED. PLAINTIFF DID NOT PRESENT EVIDENCE TO THE COURT THAT IT OWNED THE SUBJECT PROMISSORY NOTE AS OF THE DATE OF THE FILING OF ITS COMPLAINT IN THIS CASE AND COULD NOT, THEREFORE, PROVE THAT IT HAD STANDING TO FILE THIS CASE. SEE *WELLS FARGO BANK V. JORDAN*, 2009 OHIO 1092 (8TH DIST. CT. APP., MAR. 12, 2009). MERS COULD NOT ASSIGN THE NOTE AS IT NEVER HELD THE PROMISSORY NOTE. THERE IS NO EVIDENCE THAT THE ALLONGE WAS EVER AFFIXED TO THE NOTE. VIRTUAL BANK PURPORTS TO INDORSE THE NOTE TO THE PLAINTIFF, BUT THERE IS NO EVIDENCE THAT VIRTUAL BANK HELD THE NOTE AT THE TIME OF THE INDORSEMENT. VIRTUAL BANK IS ALSO NOT THE PAYEE ON THE NOTE. COMPLAINT DISMISSED WITHOUT PREJUDICE.

The MERS process splits the note and the mortgage. "In the event that the note and the deed of trust are split, the note, as a practical matter becomes unsecured. Restatement (Third) of Property (Mortgages) §5.4. Comment.

When the same entity owns both the note and mortgage then that entity can sell the note and the mortgage will follow the note so that the new entity can enforce both. However, when MERS is involved the note and mortgage are severed. The same entity does not hold both the note and mortgage. Mortgages processed through the MERS system are not properly perfected and valid liens. Defendant Glenn Holden's note was likely sold into securitization and transferred multiple times while the mortgage remained in MERS name. However, because MERS is not a payee of the note, MERS has NO right to transfer the note. Thus, a MERS assignment cannot transfer the note and according to United States Supreme Court precedent the assignment to Plaintiff is a nullity. *Carpenter v. Longan*, 83 U.S. 271, 274 (1872).

A syllogism is a logical argument where a conclusion is inferred from two or more premises. Below is a logical syllogism for Defendants Glenn and Ann Holdens' mortgage:

Premise 1 - An assignment of the mortgage without the note is a nullity.

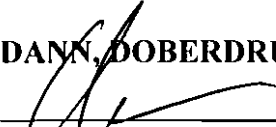
Premise 2 - MERS does not own the note so MERS cannot transfer the note.

Conclusion = All MERS assignments are nullities.

In the case of Defendants Glenn and Ann Holdens' mortgage, the debt and the security have been severed at origination and are incapable of being enforced through foreclosure. The note and mortgage were further severed by the assignment of mortgage. When the assignment of mortgage transferred the mortgage to Deutsche Bank as Trustee, the note still remained payable to NovaStar Mortgage, Inc. Defendants have a meritorious defense to foreclosure because the security agreement is now unenforceable.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 8, 2011 a copy of the foregoing document as served by ordinary U.S. mail upon the following:

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