

IN THE CIRCUIT COURT OF THE \_\_\_\_\_ JUDICIAL CIRCUIT  
OF FLORIDA, IN AND FOR \_\_\_\_\_ COUNTY

FEDERAL NATIONAL MORTGAGE  
ASSOCIATION,

CASE No. 05-2011-CA-XXXX

PLAINTIFF

v.

JANE DOE; JOHN DOE, et. al.

DEFENDANTS  
\_\_\_\_\_ /

**DEFENDANT JANE DOE AND JOHN DOE**  
**MOTION TO DISMISS**

Comes now, DEFENDANTS, JANE DOE and JOHN DOE, and pursuant to Rule 1.140 of the Florida Rules of Civil Procedure, hereby moves the Court to Order the case dismissed, and in support thereof states:

**I**  
**MOTION TO DISMISS**

1. Florida Rules of Civil Procedure section 1.140(b) provides in part:

How Presented. Every defense in law or fact to a claim for relief in a pleading shall be asserted in the responsive pleading, if one is required, but the following defenses may be made by motion at the option of the pleader: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a cause of action, and (7) failure to join indispensable parties.

2. The function of a motion to dismiss a complaint is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. *Connolly v. Sebco, Inc.*, 89 So. 2d 482 (Fla. 1956). For the purpose of a motion to dismiss, the Court is required to accept as true all well-pleaded allegations of the complaint. *Brown v. First Federal Savings and Loan*, 160 So.2d 556 (Fla. 1st DCA 1964). However, the Court is not required to accept as true allegations that are inconsistent with law. *Brown*, 160 So. 2d at 563. (“Semantics cannot be employed for the purpose of refuting facts clearly shown to exist or used to create a fictional relationship, one that otherwise would have no existence in the law.”) The pleading must be construed against the pleader in determining whether the necessary allegations have been stated. *Matthews v. Matthews*, 122 So. 2d 571 (Fla. 2d DCA 1960).

**A. Lack of Verification**

3. Plaintiff’s Complaint is not properly verified. Plaintiff is the Federal National Mortgage Association (“FNMA”). The action is brought by FNMA and not by a servicer of the Plaintiff and nowhere in the Complaint does Plaintiff claim otherwise. The verification is not made by the party plaintiff, but instead is by Donna Schmitt, vice president of Seterus, Inc, as “servicer” for FNMA. Seterus, Inc., is not a party to this action and even if a non-party could verify the complaint, there is no document attached to the Complaint which demonstrates that Seterus, Inc. has authority to act as an agent or representative of the Plaintiff, such as by a power of attorney.
4. In Administrative Order No. AOSC09-54, the Florida Supreme Court mandated certain rules relating to foreclosure actions. One such rule is that Complaints must be verified by the party plaintiff. The Florida Supreme Court has recently adopted a new Florida Rule of Civil Procedure for all mortgage foreclosure complaints involving residential real property some of which became effective “immediately with the publication of the opinion.” The new Rule 1.110(b) requires the utilization of verified complaints and became applicable to

Florida Courts on February 11, 2010. (See Fla. Sup. Ct. Order SC09-1460 and SC09-1579). The reasons provided by the Florida Supreme Court for instituting the amendment to Rule of Procedure 1.110(b) were as follows:

The primary purposes of this amendment are (1) to provide incentive for the plaintiff to appropriately investigate and verify its ownership of the note or right to enforce the note and ensure that the allegations in the complaint are accurate; (2) to conserve judicial resources that are currently being wasted on inappropriately pleaded “lost note” counts and inconsistent allegations; (3) to prevent the wasting of judicial resources and harm to defendants resulting from suits brought by plaintiffs not entitled to enforce the note; and (4) to give trial courts greater authority to sanction plaintiffs who make false allegations.

5. Henry Trawicks makes clear that “[V]erification means that the verifying *party* attests that the facts alleged in the complaint are true.” (emphasis added) Trawicks Florida Practice and Procedure Sec. 6:14 (Verification) (*Also see Beverette v. Graham*, 131 So. 826, 827 (Fla. 1931); *Burns v. Burns*, 174 So.2d 432, 434 (2nd DCA 1965)). Rule 1.110(b) does not specifically provide for or allow verification to be made by a non-party such as a loan officer or agent of the Plaintiff.
  
6. For the above stated reasons, Donna Schmitt’s signature on the complaint cannot act as a verification of the complaint. Her signature lacks any indicia of credibility and trustworthiness and the Plaintiff’s complaint does not meet with the Florida Supreme Court’s intent of Rule 1.110(b). This Court should strike the Complaint for its intentional misrepresentation and dismiss the case for lack of a trustworthy and valid verification.

**B. Lack of Standing**

7. The promissory note states that the lender is J.P. Morgan Chase Bank, N.A. The Plaintiff attached an alleged copy of the promissory note to the Complaint. That note carries an indorsement in blank executed by “Mary Hunnicutt Assistant Secretary”. Only corporate

officers and those specifically empowered by a power of attorney may dispose of corporate assets.<sup>1 2</sup> The State of Florida does not recognize an “assistant secretary” as a corporate officer any more than it recognizes that a janitor or a mail boy would be a corporate officer.

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<sup>1</sup> Florida Statutes 617.1201 states:

Secured transactions and other dispositions of corporate property and assets not requiring member approval.

(1) Unless the articles of incorporation or the bylaws otherwise provide, the board of directors may authorize any of the following transactions without any vote or consent of the members, even though the corporation has members entitled to vote:

(a) Any mortgage or pledge of, or creation of a security interest in, or conveyance of title to, all or any part of the property and assets of the corporation of any description, or any interest therein, for the purpose of securing the payment or performance of any contract, note, bond, or other obligation of the corporation;

(b) Any sale, lease, exchange, or other disposition of less than substantially all the property and assets of the corporation; and

(c) Any sale of all or substantially all of the property and assets of the corporation if:

1. The corporation is insolvent and a sale for cash or its equivalent is deemed advisable by the board in order to meet the liabilities of the corporation; or

2. The corporation was incorporated for the purpose of liquidating such property and assets.

(2) Any transaction made pursuant to this section without any vote or consent of the members may be upon such terms and conditions and for such consideration as the board may deem to be in the best interests of the corporation.

<sup>2</sup> An agent cannot make a gift of his principal's property to himself or others unless it is expressly authorized in the power. *James v. James*, 843 So. 2d 304, 308 (Fla. 5th DCA 2003).

<sup>3</sup> <sup>4</sup> Because the indorsement of the note on its face fails to transfer the instrument, it cannot be enforced by anyone other than the lender, JP Morgan Chase Bank, N.A.

**C. Lack of Necessary Party**

8. The plaintiff failed to include a necessary party to this action. Plaintiff has claimed that JPMorgan Chase Bank, N.A. owned and held an interest in the subject Promissory Note and Mortgage because the exhibit attached to Plaintiff's Complaint so states. Plaintiff attaches a document entitled Exhibit C to its complaint, which purports to be an assignment from JPMorgan Chase Bank, N.A. to Plaintiff. This assignment indicates that it was prepared by Jessica Fretwell of Chase Home Finance, LLC, and it is signed by Crystal Moore, Vice President of JPMorgan Chase Bank, N.A., and who the assignment states resides in Louisiana, and who personally appeared before notary Christopher Jones in Florida on July 29, 2010 who didn't actually sign his official name, but instead initialed the document. The address where the assignment was prepared by JPMorgan Chase Bank, N.A. is actually not an address for JPMorgan Chase Bank, N.A., but instead is an address

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<sup>3</sup>Florida Statutes section 607.01401(23) states: "Secretary" means the corporate officer to whom the board of directors has delegated responsibility under s. 607.08401 for custody of the minutes of the meetings of the board of directors and of the shareholders and for authenticating records of the corporation.

<sup>4</sup> Florida Statutes section 617.0840 states:

Required officers.

(1) A corporation shall have the officers described in its articles of incorporation or its bylaws who shall be elected or appointed at such time and for such terms as is provided in the articles of incorporation or the bylaws. In the absence of any such provisions, all officers shall be elected or appointed by the board of directors annually.

(2) A duly appointed officer may appoint one or more officers or assistant officers if authorized by the bylaws or the board of directors.

(3) The bylaws or the board of directors shall delegate to one of the officers responsibility for preparing minutes of the directors' and members' meetings and for authenticating records of the corporation.

(4) The same individual may simultaneously hold more than one office in a corporation.

for Nationwide Title Clearing, Inc., as indicated on the State of Florida SUNBIZ website. (Attached) Crystal Moore is also a known robo-signer. These facts strongly suggest fraud in the assignment.<sup>5</sup>

9. The original party entitled to payment of the mortgage loan is JP Morgan Chase Bank, N.A., who has not been named as a defendant in this action. Only the owner and holder of a promissory note and mortgage may foreclose. In *Kahn v. Bank of America, N.A.*, 5D10-3288 (5<sup>th</sup> DCA, April 8, 2011), the Court stated:

The proper party with standing to foreclose a note and mortgage is the holder of the note and mortgage or the holder's representative. See *Taylor v. Deutsche Bank Nat. Trust. Co.*, 44 So. 3d 618, 622 (Fla. 5th DCA 2010); *BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936, 938 (Fla. 2d DCA 2010).

10. Plaintiff failed to include JPMorgan Chase Bank, N.A. as well as any other intermediary parties who shared or individually owned this Promissory Note. See Fund Title Note 22.02.03. Therefore, the plaintiff's failure to include all necessary parties requires this court to dismiss this action.

**D. Lack of Notice of Assignment, Sale, Transfer, Default and Acceleration**

11. Certain required notices were not attached to the Complaint as required by Florida Rules of Civil Procedure section 1.130, which states:

(a) Instruments Attached.

All bonds, notes, bills of exchange, contracts accounts, or documents upon which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, shall be incorporated in or attached to the pleading. No papers shall be unnecessarily annexed as exhibits. The pleadings shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments.

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<sup>5</sup> When exhibits are inconsistent with Plaintiff's allegations of material fact as to who the real party in interest is, such allegations cancel each other out. *Fladell v. Palm Beach County Canvassing Board*, 772 So.2d 1240 (Fla. 2000); *Greenwald v. Triple D Properties, Inc.*, 424 So. 2d 185, 187 (Fla. 4th DCA 1983); *Costa Bella Development Corp. v. Costa Development Corp.*, 441 So. 2d 1114 (Fla. 3rd DCA 1983).

(b) Part for All Purposes.

Any exhibit attached to a pleading shall be considered a part thereof for all purposes. Statements in a pleading may be adopted by reference in a different part of the same pleading, in another pleading, or in any motion. Paragraph 12 of the Complaint states that all conditions have been fulfilled or occurred and Paragraph 13 of the Complaint states that Exhibit X to the Complaint is the Notice pursuant to the Fair Debt Collection Practices Act.

12. Because the Plaintiff claims that the original lender no longer owns the note and mortgage, Plaintiff is alleging there has been an assignment, sale or transfer of servicing. Plaintiff failed to provide the required notice under 24 C.F.R. 3500.21 (d), which provides:

Notices of Transfer; loan servicing. (1) Requirement for notice. (i) Except as provided in this paragraph (d)(1)(i) or paragraph (d)(1)(ii) of this section, each transferor servicer and transferee servicer of any mortgage servicing loan shall deliver to the borrower a written Notice of Transfer, containing the information described in paragraph (d)(3) of this section, of any assignment, sale, or transfer of the servicing of the loan. The following transfers are not considered an assignment, sale, or transfer of mortgage loan servicing for purposes of this requirement if there is no change in the payee, address to which payment must be delivered, account number, or amount of payment due: (A) Transfers between affiliates; (B) Transfers resulting from mergers or acquisitions of servicers or subservicers; and (C) Transfers between master servicers, where the subservicer remains the same.

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(2) Time of notice. (i) Except as provided in paragraph (d)(2)(ii) of this section: (A) The transferor servicer shall deliver the Notice of Transfer to the borrower not less than 15 days before the effective date of the transfer of the servicing of the mortgage servicing loan; (B) The transferee servicer shall deliver the Notice of Transfer to the borrower not more than 15 days after the effective date of the transfer; and (C) The transferor and transferee servicers may combine their notices into one notice, which shall be delivered to the borrower not less than 15 days before the effective date of the transfer of the servicing of the mortgage servicing loan. (ii) The Notice of Transfer shall be delivered to the borrower by the transferor servicer or the transferee servicer not more than 30 days after the effective date of the transfer of the servicing of the mortgage servicing loan in any case in which the transfer of servicing is preceded by: (A) Termination of the contract for servicing the loan for cause; (B) Commencement of proceedings for bankruptcy of the servicer; or (C) Commencement of proceedings by the Federal Deposit Insurance . . .

13. Plaintiff did not provide notice of breach (default) to the defendants. Paragraph 22 of the Mortgage provides for notice of breach that must be provided prior to the notice of acceleration and prior to judicial foreclosure. Paragraph 22 of the mortgage provides in relevant part:

Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify (a) the default, (b) the action required to cure the default, (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured, and (d) that failure to cure the default on or before the date specified in the notice *may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding* and sale of the property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. [*emphasis added*]

14. The mortgage provides a covenant and a condition that no suit may be commenced until after the notice of breach is given. Paragraph 20 of the mortgage provides in relevant part:

Neither the Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action.

15. The issue of a lack of a notice of default is a material fact sufficient to defeat summary judgment. *Morrison v. U.S. Bank, N.A.*, \_\_\_\_\_ So. "x" nd \_\_\_\_; 5D10-556 (5th DCA, July 11, 2011) Based on section 22 of the Mortgage and the definition of "lender" set forth on page I of the Mortgage, a default notice from the "lender" is a condition precedent prior to filing this complaint. *Amedas v. Brown*, 505 So.2d 1091 (Fla. 2nd DCA 1987);

*Dykes v Trustbank Savings. F.S.B.*, 567 So.2d 958 (Fla. 2<sup>nd</sup> DCA 1990); *Gomez v. American Savings and Loan Ass'n*, 515 So.2d 301 (Fla, 4<sup>th</sup> DCA 1987); *Rashid v. Newberry Federal Savings and Loan Association*, 502 So.2d 1316 (Fla. 3rd DCA 1987); *Rashid v. Newberry Federal Savings and Loan Association*, 526 So.2d 772 (Fla. 3rd DCA 1988).

16. Plaintiff did not provide notice of acceleration as required by the mortgage. Paragraph 8 of the Complaint is the only notice of acceleration provided by Plaintiff to Defendants. The required notice of acceleration must indicate that the debt will not be accelerated before the expiration of 30 days from the delivery of the notice of breach. Paragraph 18 of the mortgage provides in relevant part:

The notice [*of acceleration*] shall provide a period of not less than 30 days from the date the notice [*of breach*] is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. *emphasis added*.

17. Paragraph 20 of the mortgage provides in relevant part:

Neither the Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action.

18. A notice of acceleration which is given in a complaint is a violation of the material terms of the mortgage because it does not provide the Borrower with an opportunity to cure prior to the institution of suit. Paragraph 20 of the mortgage states:

The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of Section 20.

19. Wherefore, the failure to attach the three required notices requires dismissal of the Complaint.

**II**  
**DEMAND FOR VALIDATION OF THE DEBT**

20. Exhibit X to the Complaint carries no address, no name of the party sending or receiving it and no account number. The notice is clearly intended to be effectuated upon service of the Summons and Complaint. The notice indicates that collection efforts will be suspended (through litigation or otherwise) until the requested information is mailed to the defendant. The defendant disputes the validity of the debt and demands the name of the creditor who is the owner and holder in due course of the note and of the mortgage.

**CONCLUSION**

WHEREFORE, Defendants requests the Court dismiss this Complaint and order reasonable attorneys fees to the defendant.

Respectfully Submitted,

August 10, 2011

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XXXXX

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing is being furnished by U.S. mail on the 10th day of August, 2011, to xxxxxx.

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XXXXX