

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

HSBC BANK USA, NATIONAL ASSOCIATION,  
AS TRUSTEE FOR DBALT 2006-AF1

Case No.: 2011-CA-xxxxxx

Plaintiff,

v.

JOHN DOE AND JANE DOE

Defendants.

\_\_\_\_\_ /

**DEFENDANTS JOHN DOE AND JANE DOE  
ANSWER AND AFFIRMATIVE DEFENSES TO AMENDED COMPLAINT**

1. Paragraph 1 is admitted.
2. Paragraph 2 is denied.
3. Paragraph 3 is admitted in that a note and mortgage were executed, but denied as to delivery of same to the payee named thereon.
4. Paragraph 4 is:
  - i. denied as to the recording of the original mortgage;
  - ii. admitted that the defendants own the subject property;
  - iii.denied that plaintiff acquired the mortgage or note;
  - iv.denied in all other respects.
5. Paragraph 5 is denied, plaintiff does not own and hold the note and mortgage.
6. Paragraph 6 is admitted, defendants own the subject property.
7. Paragraph 7 is denied as the Plaintiff failed to plead ultimate facts to establish its authority to accelerate the note and mortgage as well as its authority to declare the note and mortgage are in default. The Defendants demand strict proof thereof.
8. Paragraph 8 is denied.

9. Paragraph 9 is denied as the Plaintiff failed to plead ultimate facts to establish its authority to accelerate the note and mortgage as well as its authority to declare the note and mortgage are in default. The Defendants demand strict proof thereof.
10. Paragraph 10 is denied.
11. Paragraph 11 is denied.
12. Paragraph 12 is denied.
13. Paragraph 13 is denied.
14. Paragraph 14 is denied.
15. Paragraph 15 is denied.

## **AFFIRMATIVE DEFENSES**

### **FACTS COMMON TO ALL AFFIRMATIVE DEFENSES**

1. The subject mortgage loan is a federally related mortgage loan subject to federal laws, rules and regulations relating to the providing of notices, enforcement, servicing, and pre-suit default prevention procedures including the requirement for a face-to-face meeting with the defendants at the site of the subject property, presentation to defendants of options to foreclosure, including federally mandated loan modifications options.
2. At the closing on the defendants mortgage loan, the defendants were given an exact copy of the note and mortgage as the originals, which was printed off the same printer as the originals and which came from the same ream of paper as the originals. At the closing, the closing officer provided defendants Jane Doe and John Doe with pens to sign the documents and she told the defendants that they could keep those pens as memorabilia to commemorate the closing event.
3. While at the closing, when the defendants executed the note and mortgage, they also immediately signed their copies with the same pens that they used to sign the

original documents. After the closing, they took their now signed copy of the note and mortgage and their two pens and hermetically sealed them in a glassine envelope and deposited them into their banks temperature and humidity controlled safe deposit box for safe keeping.

4. During a hearing in U.S. Bankruptcy Court regarding defendants chapter 7 bankruptcy action, plaintiff's counsel brought to court the alleged original note. Defendants examined the note and their alleged signatures thereon and immediately noticed that the paper on the allegedly original note appeared brand new, in stark contrast to their copies which had been sealed and which had now yellowed. They also noted that the ink on the allegedly original note had a brilliant, almost wet look, whereas the ink on their copies was faded. Defendants and their counsel advised plaintiff's counsel of the observed disparity, but plaintiff's counsel failed to comment, investigate into the matter or take corrective action to remove the false documents from the court records.

5. The allegedly original note is fraudulent and was made with a pen writing machine from a scanned signature of the defendants. The defendants have filed a motion for an ink test to determine if the ink on the allegedly original note is a forgery.

6. The plaintiff is HSBC Bank USA. The lender on the note is Pinnacle Financial Corporation, d/b/a/ Tri-Star Lending Group. There is no indorsement on the note. Plaintiff claims that it owns and holds the note and mortgage. (Complaint, para. 5) The mortgage provides that the mortgagee is Mortgage Electronic Registration Systems, Inc. (hereafter, "MERS") The mortgage provides that MERS is merely a nominee under the mortgage. MERS never held a beneficial interest in the promissory note, nor did it hold a beneficial interest in the mortgage. MERS never had possession of the promissory note.

7. Plaintiff claims that it obtained its interest in the note and mortgage from an assignment of the mortgage and note from MERS. MERS cannot assign that which it

does not have an interest in, and it did not have an interest in the note. Defendants expert witness in the detection of fraudulent documents, Lynn Szymoniak, has examined the assignment of mortgage and has opined that the assignment of mortgage is fraudulent. (Exhibit A to this Answer)

8. The plaintiff is not in possession of the original promissory note. On information and belief, the note was intentionally destroyed in order to eliminate paper and to rely upon digital documents. The note was destroyed prior to any transfer to the plaintiff. The plaintiff knew that the original note was destroyed at the time that it allegedly took ownership of the note. The allegedly original note is fraudulent and was made with a pen writing machine from a scanned signature of the defendants.

9. Plaintiff, its agents and attorneys are fully aware of the fraudulent note, the unauthorized assignment of mortgage and the plaintiff's claims of ownership of the note and mortgage which were made in both the federal action (bankruptcy case) and in this action. Plaintiff, its agents and attorneys have failed to take any corrective action to remove the false documents from the record or to correct their amended complaint.

**FIRST AFFIRMATIVE DEFENSE**  
Lack of Verification

10. The complaint was filed prior to the Supreme Court ruling that mandated that residential foreclosure complaints be verified. The amended complaint was filed after the mandate requiring verification. Plaintiff has failed to verify the amended complaint as required by Florida Supreme Court Rule.

11. At a motion to dismiss in this matter that occurred on December 8, 2011 which was held before Judge XXXX, plaintiff's counsel and the court stated that the courts of Orange County, Florida, have a special rule where complaints that were amended after

the mandate need not be verified if the amendment was filed prior to June, 2010. This local rule is inconsistent with the Supreme Court rule and the amended complaint fails for lack of verification.

## **SECOND AFFIRMATIVE DEFENSE**

### Failure to Post Cost Bond

[F.S. 57.011]

12. Plaintiff HSBC Bank, USA, is a foreign entity that withdrew its registration in Florida in 2004. (Exhibit B to this Answer) Plaintiff has failed to comply with Florida Statutes section 57.011 and has not posted a cost bond. “When a nonresident plaintiff begins an action [ ] he or she shall file a bond with surety to be approved by the clerk of \$100, conditioned to pay all costs which may be adjudged against him or her in said action in the court in which the action is brought. On failure to file such bond within 30 days after such commencement or such removal, the defendant may, after 20 days’ notice to plaintiff (during which the plaintiff may file such bond), move to dismiss the action or may hold the attorney bringing or prosecuting the action liable for said costs and if they are adjudged against plaintiff, an execution shall issue against said attorney.” 57.011 Fla. Stat.

## **THIRD AFFIRMATIVE DEFENSE**

### Failure to comply with trust registration law

13. Plaintiff is a trustee of a securitized trust to whom the subject note and mortgage have allegedly been transferred. Plaintiff failed to comply with Florida Statute § 660.27, which provides, in pertinent part:

(1) Before transacting any trust business in this state, every trust company and every state or national bank or state or federal association having trust powers shall give satisfactory security by the deposit or pledge of security of the kind or type provided in this section having at all times a market value in an amount equal to 25 percent of the issued and outstanding capital stock of such trust company, bank, or state or federal stock association or, in the case of a federal mutual association, an equivalent amount determined by the office, or the sum of \$ 25,000, whichever is

greater. However, the value of the security deposited or pledged pursuant to the provisions of this section shall not be required to exceed \$ 500,000. Any notes, mortgages, bonds, or other securities, other than shares of stock, eligible for investment by a state bank, state association, or state trust company, or eligible for investment by fiduciaries, shall be accepted as satisfactory security for the purposes of this section.

14. Additionally, Florida Statute § 660.27(2)(a) requires the plaintiff to provide to Florida's Chief Financial Officer the full legal name of the trust, its federal employer identification number; principal place of business; amount of capital stock; and amount of collateral required to be deposited by the trust.<sup>1</sup>

15. Plaintiff is transacting trust business in the State of Florida which includes, but is not limited to the following: the acquiring, holding and transferring mortgages on property in Florida; receiving assignments of promissory notes; receiving payments from Florida consumers on mortgage notes; enforcing notes by filing and prosecuting this and other foreclosure actions; foreclosing on mortgages; purchasing foreclosed properties at judicial sales; and owning and selling properties acquired at judicial sales.

16. A cursory search of the State of Florida Office of Financial Regulation suggests that the Plaintiff has failed to provide the full legal name of the trust to the State of Florida, and consequently, has failed to pay the required statutory fee.

#### **FOURTH AFFIRMATIVE DEFENSE**

##### **Failure to Include Necessary Party**

17. The plaintiff is HSBC Bank USA. The lender on the note is Pinnacle Financial Corporation, d/b/a/ Tri-Star Lending Group. There is no indorsement on the note. Plaintiff claims that it owns and holds the note and mortgage. (Complaint, para. 5) The mortgage provides that the mortgagee is Mortgage Electronic Registration Systems, Inc. (hereafter, "MERS") The mortgage provides that MERS is merely a nominee under the

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<sup>1</sup> See Florida Statute 658.12(8), 658.12(20), 660.34(1), 660.34(2) and 660.34(3).

mortgage. MERS never held a beneficial interest in the promissory note, nor did it hold a beneficial interest in the mortgage. MERS never had possession of the promissory note. Plaintiff claims that it obtained its interest in the note and mortgage from an assignment from MERS. MERS cannot assign that which it does not have an interest in, and it did not have an interest in the note.

18. Pinnacle Financial Corporation is a necessary party as it's interest in the note is at issue. Plaintiff failed to include this necessary party. Because Florida law allows foreclosure on a note and mortgage, the Defendants could be subject to a double recovery if they lose in this case and then are foreclosed upon later. Plaintiff failed to include any other intermediary parties who shared or individually owned this Promissory Note. See Fund Title Note 22.02.03.

#### **FIFTH AFFIRMATIVE DEFENSE**

##### **Lack of Notice of Assignment, Sale or Transfer of Servicing**

[24 C.F.R. 3500.21]

19. The plaintiff is HSBC Bank USA. The lender on the note is Pinnacle Financial Corporation, d/b/a/ Tri-Star Lending Group. There is no indorsement on the note. Plaintiff claims that it owns and holds the note and mortgage. (Complaint, para. 5) The plaintiff claims that the note and mortgage were transferred to it. The defendants, as borrowers, were not provided with any notice of a sale, assignment or transfer in servicing as required pursuant to 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.

....

(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 . . .

## **SIXTH AFFIRMATIVE DEFENSE**

### **Lack of Notice of Breach (Default)**

20. The plaintiff claims in its amended complaint that all conditions precedent have occurred. (Complaint, para. 8) Paragraph 7(C) of the note and paragraphs 15, 18, 19, 20 and 22 of the mortgage provides that as a condition precedent to instituting a lawsuit for foreclosure, the plaintiff must provide the defendant with a very specific notice of “breach” (default). 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.

21. The plaintiff failed to provide the defendants with either notice of breach or adequate notice of breach. The notice of breach was required to be sent to defendants at least 30 days prior to acceleration. Lack of such notice prior to commencement of litigation is in clear violation of paragraph 20 of the mortgage.

22. 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. 2d \_\_\_\_; 5D10-556 (5th DCA, July 11, 2011) A default notice from the "lender" is a condition precedent prior to filing a 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).

## **SEVENTH AFFIRMATIVE DEFENSE**

### Lack of Notice of Acceleration

23. The only notice of acceleration that plaintiff provided to the defendants was in the amended complaint at paragraphs 9 and 10. Plaintiff failed to provide the required notice of acceleration pursuant to paragraph 7(C) of the note and paragraphs 15, 18, 19, 20 and 22 of the mortgage. The 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 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.

24. 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.

25. 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.

#### **EIGHTH AFFIRMATIVE DEFENSE**

##### Lack of Default

26. Plaintiff has not and cannot show default as required pursuant to the notes.

#### **NINTH AFFIRMATIVE DEFENSE**

##### Unauthentic Indorsements F.S. 673.3081

27. Defendants deny the authenticity of each and every indorsement on the Note and Mortgage, including their own alleged indorsements, and demands strict proof thereof, by clear and convincing evidence, pursuant to § 673.3081, Fla. Stat. (2008).

#### **TENTH AFFIRMATIVE DEFENSE**

##### Failure to Produce Original Promissory Note

28. A person seeking enforcement of a lost, destroyed or stolen instrument must first

prove entitlement to enforce the instrument when the loss of possession occurred, or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred. Further, he must prove the loss of possession was not the result of a transfer by the person or a lawful seizure; and the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process. 673.3091 Fla. Stat. (2009).

**ELEVENTH AFFIRMATIVE DEFENSE**

**Plaintiff's Lack of Standing and failure to plead a cause of action**  
[Fla. R. of Civ. P. 1.110(b)]

29. Plaintiff does not own and hold the note and the note that it claims is an original is a fraudulent document. Wherefore, plaintiff is not a real party in interest.

**TWELFTH AFFIRMATIVE DEFENSE**

**No Payment Supporting Equitable Lien/Subrogation**

30. Plaintiff claims an ownership interest in the note by way of an assignment. The plaintiff can not show that it paid any money or value for the assignment, for the note or for the mortgage. Wherefore, plaintiff is not entitled to an equitable lien if one is requested.

**THIRTEENTH AFFIRMATIVE DEFENSE**

**Estoppel and F.S. 673.3051**

31. The defendants assert the defense of Estoppel and Florida Statutes section 673.3051. The subject promissory note is non-negotiable paper. The Plaintiff is not a holder in due course and on information and belief, the original promissory note is lost or stolen. Florida law provides "An obligor is not obliged to pay the instrument if the

person seeking enforcement of the instrument does not have rights of a holder in due course and the obligor proves that the instrument is a lost or stolen instrument.” § 673.3051(3), Fla. Stat. (2009)

32. “The assignee of defaulted negotiable paper occupies the status of the holder of a nonnegotiable instrument. As to those occupying this status, the rule appears to be: There cannot be a holder in due course of a nonnegotiable instrument, and the doctrine of protecting a bona fide holder for value without notice and before maturity does not apply, no matter how widely or how narrowly the instrument may miss being negotiable or how the parties themselves may have regarded the instrument.” *Guaranty Mortg. & Ins. Co., v. Harris*, 182 So. 2d 450, 453 (1st DCA 1966) (emphasis added). This concept is codified in § 673.3021(1)(b)(3) which defines a Holder in Due Course as one who takes an instrument “Without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series;”.

#### **FOURTEENTH AFFIRMATIVE DEFENSE**

##### Unclean Hands

33. The Plaintiff is pursuing this foreclosure under a guise of authority it does not have. “A foreclosure action is an equitable proceeding which may be denied if the holder of the note comes to the court with unclean hands or the foreclosure would be unconscionable.” *Knight Energy Services, Inc. v. Amoco Oil Co.*, 660 So.2d 786, 789 (Fla. 4th DCA 1995).

34. The Florida Supreme Court held that while “[m]ere notions or concepts of natural justice of a trial judge which are not in accord with established equitable rules and maxims may not be applied in rendering a judgment,” relief from a foreclosure action may be provided “where the mortgagee failed to perform some duty upon which the exercise of his right to accelerate was conditioned.” *David v. Sun Federal Sav. & Loan Ass’n*, 461 So.2d 93, 95-6 (Fla., 1984).

## **FIFTEENTH AFFIRMATIVE DEFENSE**

### Fraud

35. The plaintiff intentionally represented to the Court and defendants that it holds an original promissory note and an authorized assignment of mortgage and note. At the time the plaintiff file the foreclosure action, it and its agents and attorneys knew that the note was fraudulent and the assignment of mortgage was without lawful authority. They made this misrepresentation with the intent that the Court and defendants would rely thereon, and the Court and defendant's have relied thereon. The integrity of the Court is damaged by the filing of the fraudulent note and the unauthorized assignment and the defendants were likewise harmed in that this action has resulted in their loss of money by way of making a defense, their loss of credit in that plaintiff harmed their credit, and mental and emotional distress.

36. Where "a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." *Cox v. Burke*, 706 So.2d 43, 46 (Fla. 5th DCA 1998).

37. Trial courts have "the right and obligation to deter fraudulent claims from proceeding in court." *Savino v. Fla. Drive In Theatre Mgmt., Inc.*, 697 So.2d 1011, 1012 (Fla. 4th DCA 1997). This is because "[o]ur courts have often recognized and enforced the principle that a party who has been guilty of fraud or misconduct in the prosecution or defense of a civil proceeding should not be permitted to continue to employ the very institution it has subverted to achieve [its] ends." *Hanono v. Murphy*, 723 So.2d 892, 895 (Fla. 3d DCA 1998). Where a party perpetrates a fraud on the court which permeates the entire proceedings, dismissal of the entire case is proper. *Desimone v. Old Dominion Ins. Co.*, 740 So.2d 1233, 1234 (Fla. 4th DCA 1999).

## **SIXTEENTH AFFIRMATIVE DEFENSE**

### Illegal Charges Added to Balance

38. Plaintiff has added illegal charges to the alleged debt owed by the Defendant. Plaintiff's lack of standing, lack of capacity to sue and *ultra vires* action in foreclosure has added illegal charges and fees to the alleged debt owed by the Defendant including but not limited to a title search expense, advanced Ad Valorem taxes, premiums on insurance, attorney's fees and other unnecessary costs.

### **SEVENTEENTH AFFIRMATIVE DEFENSE**

#### **Collateral Source Payments**

39. Defendant demands credit for and application of any and all collateral source payments Plaintiff, its predecessors in interest, co-owners, trust beneficiaries, certificate holders, or any others associated with this Note and Mortgage have received or will be entitled to receive from any source whatsoever as a result of the default claimed, including credit default insurance, credit default swaps, whether funded directly by insurance and/or indemnity agreement or indirectly paid or furnished by means of federal (i.e. TARP funds) assistance on an apportioned basis for loans or groups of loans to which the subject mortgage loan of the action is claimed.

### **EIGHTEENTH AFFIRMATIVE DEFENSE**

#### **Failure to Comply with Federal Loan Servicing Requirements**

40. The subject mortgage loan is a federally related mortgage loan subject to federal regulations and laws. Plaintiff intentionally failed to act in good faith or to deal fairly with Defendant by failing to follow the applicable standards of residential single family mortgage lending and servicing as described in these Affirmative Defenses thereby denying these Defendant access to the residential mortgage servicing protocols applicable to the subject note and mortgage pursuant to The National Housing Act, 12 U.S.C. 1710. (See U.S. v. Trimble, 86 F.R.D. 435 (S.D. Fla. 1980) where the court found that compliance with applicable federal laws can be upheld as equitable defense to deny a creditor the judicial remedy of foreclosure.)

41. There are certain required steps a servicer of a loan must do before foreclosing, which are set forth in 24 CFR 203.604 and 24 CFR 203.605 for FHA loans and other provisions for other types of federally backed loans.

### **NINETEENTH AFFIRMATIVE DEFENSE**

#### Violation of 15 U.S.C. § 1692 Et. seq.

42. Defendants are consumers within the meaning of the FDCPA, 15 U.S.C. §1692a (3). Plaintiff and its agents and attorneys are debt collectors within the meaning of the FDCPA, 15 U.S.C. §1692a(6).

43. The plaintiff, its agents and attorneys violated 15 U.S.C. §1692d by engaging in conduct the natural consequence of which is to harass, oppress, or abuse any person, and which did harass, oppress and abuse the defendants by falsely representing the character, amount, or legal status of the debt (15 U.S.C. §1692e(2)); by sale or transfer of an interest in the debt that caused the consumer to lose any claim or defense to payment of the debt, and in particular, by obfuscation of the true creditor (15 U.S.C. §1692e(6)); by communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed (15 U.S.C. §1692e(8)); by the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer (15 U.S.C. §1692e(10)); by the collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law (15 U.S.C. §1692f(1)); by taking or threatening to unlawfully repossess or disable the consumer's property (15 U.S.C. §1692f(6)); by, within five days after the initial communication with counter-plaintiff in connection with the collection of any debt, failing to send counter-plaintiff a written notice containing a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt,

or any portion thereof, the debt will be assumed to be valid by the debt collector; a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor (15 U.S.C. §1692g).

44. Plaintiff violated provisions of the Federal Fair Debt Collection Practices Act at 15 USC 1692, et. seq. because it did not have any right to enforce collection of this Mortgage and Note because it did not have standing, it did not comply with all conditions precedent, it has no legally enforceable claim against the Defendant, it did not comply with the contract requirements for acceleration, it had unclean hands, it harmed the credit of defendants and it sent dunning letters to the defendants.

**TWENTIETH AFFIRMATIVE DEFENSE**

Violation of Florida Consumer Collection Practices Act F.S. 559.72, et. seq.

45. F.S. 559.72(9) provides (in pertinent part):

Prohibited practices generally. In collecting consumer debts, no person shall:  
(9) Claim, attempt, or threaten to enforce a debt when such person...assert(s) the existence of some other legal right when such person knows that the right does not exist.

46. The federal government has deemed that pre-suit default prevention procedures are a condition precedent to filing a foreclosure action and must be utilized before foreclosure may be instituted. F.S. 559.72(9) provides that it is illegal to enforce collection when knowing that other legal rights exist. The face of the mortgage provides

prima facie evidence that this is a federally backed mortgage. The Plaintiff failed to comply with all federal regulations on pre-suit default prevention procedures.

47. The Florida Consumer Practices Act (FCCPA, F.S. 559.552) provides protection for consumers in foreclosure. The FCCPA prohibits the Plaintiff from collecting the underlying consumer mortgage debt involved in this action by asserting its right to foreclose when the Plaintiff knows that such right does not exist because the Plaintiff did not comply with the applicable federal default servicing obligations and guidelines prior to filing this foreclosure action. "In collecting consumer debts, no person shall ... claim, attempt, or threaten to enforce a debt when such person asserts the existence of some other legal right when such person knows that the right does not exist. 559.72(9) Fla. Stat. (2009)

48. The FCCPA applies to anyone attempting to collect a consumer debt unlawfully and F.S. 559.72 "includes all allegedly unlawful attempts at collection of consumer claims." *Seaton Jackson v. Wells Fargo Homemortgage, Inc.*, 12 Fla. L. Weekly Supp. 188 (Fla. 6th Circuit 2004) citing *Williams v. Streeps Music Co., Inc.*, 333 So. 2d 65 (Fla. 4th DCA 1976) See also, *Hart v. GMAC Mortgage Corporation*, 246 B.R. 709 (D. Mass. 2000)(Debtor stated a cause of action under the FDCPA where continuation of foreclosure proceedings amounted to conduct "the natural consequence of which was to harass, oppress, or abuse") Plaintiff, its agents and attorneys had actual knowledge that the written statements as to alleged ownership of the defendants mortgage loan by plaintiff, the written statements as to the assignment of mortgage, the legal entitlement to demand monies from defendants and institute foreclosure proceedings were false statements of material fact which were false when made and known by said counter-defendants to be false when made.

49. The plaintiff, its agents and attorneys have claimed, attempted to enforce a debt, or threatened to enforce a debt when such persons knew the debt was not legitimate and

did not exist. They asserted the existence of the right to enforce the debt in the name of plaintiff when they knew that the right did not exist.

50. As a direct and proximate result of the actions of the plaintiff, its agents and attorneys, the defendants have suffered significant damages.

**TWENTY-FIRST AFFIRMATIVE DEFENSE**  
Violation of Federal Truth in Lending Act (TILA),  
15 U.S.C. §1641

51. 15 U.S.C. §1641(g) requires:

(1) In general

In addition to other disclosures required by this subchapter, not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer, including—

(A) the identity, address, telephone number of the new creditor;

(B) the date of transfer;

(C) how to reach an agent or party having authority to act on behalf of the new creditor;

(D) the location of the place where transfer of ownership of the debt is recorded; and

(E) any other relevant information regarding the new creditor.

52. Plaintiff, its agents and attorneys failed to provide defendants with notice of an assignment of the mortgage loan in violation of 15 U.S.C. §1641(g).

**TWENTY-SECOND AFFIRMATIVE DEFENSE**  
Abuse of Process

53. Plaintiff, its agents and attorneys made an illegal, improper, or perverted use of process and had an ulterior motive or purpose in exercising the illegal, improper or perverted process. Plaintiff, its agents and attorneys had no legal justification to bring an action to try to foreclose upon defendants property and defendants were injured as a result of the actions of plaintiff, its agents and attorneys.

## **TWENTY-THIRD AFFIRMATIVE DEFENSE**

### Lack of Capacity

54. A negative averment as to capacity is the normal rule for pleading such issues pursuant to Florida Rules of Civil Procedure, § 1.120(a) and § 1.110(b), except when capacity affects the jurisdiction of the court. “Capacity to sue” is an absence or a legal disability which would deprive a party of the right to come into court. 59 Am.Jur.2d Parties, § 31, (1971). This is in contrast to “standing” which requires that a party have a sufficient interest in the outcome of litigation to warrant the court's consideration of its position. *Keehn v. Joseph C. Mackey and Co.*, 420 So.2d 398 (Fla. App. 4 Dist., 1982).

55. In *Altamonte Hitch & Trailer v. U-Haul*, 498 So.2d 1346 (Fla. 5th DCA 1986), the Court stated:

The general rule is that the body of the complaint, and not the caption, determines who is a party to the action. *Weavil v. Myers*, 243 N.C. 386, 90 S.E.2d 733 (1956); *Motor Credit Corp. v. Ray Guy's Trailer Court, Inc.*, 6 N.J. Super. 563, 70 A.2d 102 (1949); and *Morisse v. Billau*, 70 Ohio App. 215, 45 N.E.2d 798 (1941). The naming of an individual or entity in the caption is not a sufficient basis to warrant inclusion in the action if the party is not mentioned in the body of the complaint.

56. Plaintiff's exhibits to the amended complaint demonstrates that a different entity from the named Plaintiff is the possible real party in interest. Plaintiff claims it is a trust, but it has failed to attach to the amended complaint documents to support its claim that it is a trustee of a named trust, and it has not pled ultimate facts to identify what it (the Plaintiff) is, whether it is authorized to do business in the State of Florida or on who's behalf it is acting, if indeed it is acting on another's behalf.

57. Plaintiff has failed to properly plead, describe or identify its legal identity, authority and capacity to sue and therefore show the jurisdiction of this court under Fla. R. Civ. P. 1.120. Plaintiff does not describe itself in the Complaint, other than to state its name as “U.S. Bank National Association as Trustee”. It fails to identify the trust, where

the Plaintiff entity was created or whether it was authorized to do business in Florida, or exempt from registration under Florida law.

#### **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

##### **Wrongful Conversion of the Mortgage**

58. The defendants did not authorize the securitization of their mortgage. The securitization of the Mortgage constitutes a conversion of the Note rendering it null, void and unenforceable. The Note when executed could be sold or otherwise transferred, in whole or in part. The consent given by the mortgagor and the legal authority as holder to enable the holder to sell or otherwise transfer the Note does not entail the right to convert the Note into a security. The failure to adhere to this distinction has resulted in conversion of an enforceable note and mortgage into unenforceable securitized note and mortgage. When the mortgage was securitized, the Note was converted and could no longer be sold or transferred, in whole or in part.

59. The securitization divides those who are at a financial risk of loss from a default upon the Note (the investors or certificate holders) from those who control and have decision-making authority over the Trust. When the managers decide to foreclose, it is the certificate holders who bear the loss. However, the certificate holders have nothing to say about if, when and how the managers decide to foreclose.

60. The certificate holders, guarantors and mortgage insurers bear the losses. By separating the incidence of loss from the authority to foreclose, the original Note has been altered resulting in a change to the Mortgage without the consent of the mortgagor. The conversion of the Mortgage to Trust backed securities renders the Note unenforceable.

61. The parties who manage and control the Note and mortgage in this case do not represent and are not the appointees of or successors in interest to the note holder. The third parties who manage and control the mortgage are interlopers and intermeddlers

which have wrongfully and without legal authority inserted themselves into the relationship between mortgagor and mortgagee established by the note and mortgage.

62. The interests of the Defendants as mortgagor are adversely and materially affected by these changes.

**TWENTY-FIFTH AFFIRMATIVE DEFENSE**  
Discharge in Bankruptcy and Loss of Security

63. The securitization of the mortgage makes the trustee an unsecured creditor. The unsecured creditor can sue on the debt evidenced by the note but cannot foreclose. The trustee is the holder of the note under the U.C.C. and is entitled to receive the installment payments. The trustee, however, is not the note holder for purposes of enforcing the mortgage because the trustee cannot enforce the mortgage on behalf of a secured creditor that no longer exists. Securitization disconnects the mortgage from the note. The certificate holders hold no interest in the mortgages. A mortgage is executed as a collateral agreement to allow foreclosure for a specific, identified creditor or such creditor's successor in interest. Securitization creates a state of facts where there is no specific, identified creditor remaining with an interest in the mortgage.

64. The following actions disconnected the mortgage from the note:

- a. Segmentation of cash flows into tranches;
- b. The mortgage backed securities trust's payment obligation to pay certificate holders is unrelated to the payments received from any specific mortgage or the entire mortgage portfolio;
- c. Sale, redemption or repayment of a mortgage in the trust's portfolio does not alter or modify a certificate holders amount of payment or right to receive payment.
- d. The disconnection of moral hazard (financial loss) from control and management of the note;

- e. The insertion of service providing, fee collecting, third party managers between the debtor and the creditor and creditor's successors in interest; and
- f. The subordination of the terms and conditions of the note and mortgage to the provisions of the master pooling and servicing agreement converting the bilateral structure of the note into a multilateral contractual arrangement.

65. The debt has been discharged in bankruptcy. Wherefore, the plaintiff has no security.

**TWENTY-SIXTH AFFIRMATIVE DEFENSE**  
Plaintiff has Clogged the Defendant's Equity of Redemption

66. The equity of redemption creates a right in every mortgagor to redeem the property, i.e., to pay off the debt and remove the lien encumbrance from the property.

67. By restricting the ability to modify the mortgage, securitization interferes with Defendant's rights to redeem the subject property. For example, if the debtor could only afford to pay off 99% of the amount owed, the creditor is barred from accepting the one percent reduction in the payoff. This is a clog on the equity of redemption.

**TWENTY-SEVENTH AFFIRMATIVE DEFENSE**  
Violation of Federal Fair Credit Reporting Act

68. Plaintiffs violated the Federal Fair Credit Reporting Act, 15 U.S. C., §1681 et seq. (the "Act") Defendants are "consumers" as defined by 15 U.S.C. §1681(c) of the Act and a "debtor" under Florida's Consumer Collection Practices Act, F.S. 559.55, et. seq. Defendants applied for and was either denied or delayed credit or caused to pay more for credit from credit grantors, based in whole or in part, on inaccurate, misleading, adverse information contained in the credit reports of TransUnion, Equifax and Experian, placed there and published there by plaintiffs collection efforts on the subject mortgage loan.

69. These negative credit references in the credit reports indicated the defendants failed to make payments on the subject mortgage loan and they constituted violations of the Federal Fair Credit Reporting Act as plaintiff knew at the time it made the negative reports, that its published statements were false and that it had no factual basis or authority to publish the statements. The statements plaintiff made were malicious, willful, wanton and showed a complete disregard for the Plaintiff's statutory federal rights. The written publications by constitute libel per se. The verbal publications constitute slander per se.

70. Defendants have suffered extreme mental anguish, a loss of credit reputation, a loss of ability to obtain credit and pecuniary damages. The losses are either permanent or continuing and Plaintiff will suffer the losses in the future.

#### **CLAIM FOR ATTORNEY'S FEES**

71. Defendants hereby request they be awarded attorney's fees pursuant to the terms of the promissory note and mortgage Plaintiff is seeking to enforce and section 57.105(7), Florida Statutes (2011).

#### **WHEREFORE CLAUSE**

72. Wherefore, Defendants demand judgment against Plaintiff and requests the court deny Plaintiff's requested relief of foreclosure, and award reasonable attorney's fees and costs to Defendants; order discharge, release or cancellation of the alleged mortgage and send Plaintiff forthwith without day.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail, this \_\_\_\_th day of December, 2011, to xxxx xxxx.

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