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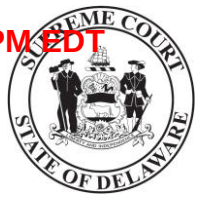

IN THE SUPREME COURT OF THE STATE OF DELAWARE

Deutsche Bank National Trust Company, as trustee for the registered holders of Morgan Stanley ABE Capital I Inc., trust 2007-NC# mortgage pass-through certificates, series 2007-NC3, assignee of Deutsche Bank Trust Company Americas, f/k/a Bankers Trust Company, as trustee and custodian for Morgan Stanley MSAC 2007-NC3, assignee of Mortgage Electronic Registration Systems, Inc., as nominee for New Century Mortgage Corporation,	:	No. 26, 2014
	:	Court Below:
	:	Superior Court of the State of Delaware, in and for New Castle County (C.A. No. N11L-03-097-ALR)
Plaintiff-Below, Appellant,	:	
v.	:	
Eugene Moss,	:	
Defendant-Below, Appellee.	:	

APPELLANT'S REPLY BRIEF

Dated: April 24, 2014

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INTRODUCTION

Plaintiff below, Appellant Deutsche Bank submits this Reply Brief in support of its appeal of the Summary Judgment Order and the Reargument Order entered in favor of Defendant below, Appellee Moss.[1]

Appellee's Corrected Answering Brief ("Answering Brief"), fails to address the fundamental question at issue in the appeal: whether the Superior Court erred in holding that Deutsche Bank failed to submit sufficient evidence to establish that the Mortgage had been properly assigned. Instead, Moss reargues the Summary Judgment Order and the Reargument Order without touching on the particular grounds for such orders. Moss's arguments, including (i) Deutsche Bank's alleged failure to satisfy its evidentiary burden to show it is the real party-in-interest; (ii) Moss's standing to challenge the assignments of the Mortgage and a certain pooling and servicing agreement dated May 1, 2007 ("PSA") despite his status as a non-party thereto; and (iii) that the endorsement on the Note does not comply with the terms of the PSA, were not relied upon by the Superior Court, and are each without merit. Moreover, in responding to Deutsche Bank's arguments that the Mortgage was properly assigned notwithstanding the bankruptcy of the original lender, New Century, Moss relies upon certain evidentiary submissions presented

[1] Capitalized terms not otherwise defined herein shall have the meaning set forth in the [Second Corrected] Appellant's Opening Brief ("Opening Brief").

to, but not reviewed by or relied upon by, the Superior Court in rendering its decisions.

Deutsche Bank has demonstrated that it is the real party-in-interest, and has presented sufficient evidence to create a material issue of fact as to its standing to enforce the Mortgage. Deutsche Bank's standing is supported facially in its pleadings and substantively in various exhibits presented to the Superior Court, including the Mortgage, the First and Second Assignments and the Modification Agreement, as was admitted by Moss himself. However, the Superior Court erred by allowing Moss standing to challenge the assignments of the Mortgage. Moss is not a party to either the First Assignment, the Second Assignment, or the PSA and therefore lacks standing to raise challenges under any of these agreements under applicable law. Finally, the endorsement of the Note complies with the terms of the PSA and was properly endorsed, in blank, by New Century. The Note was presented to the Superior Court by Deutsche Bank, as holder thereof.

Because Moss has failed to respond to Deutsche Bank's arguments, the appeal should be granted, the Summary Judgment Order and the Reargument Order should be reversed and this matter remanded to the trial court.

ARGUMENT

I. DEUTSCHE BANK PROPERLY ARGUED THAT MOSS'S JUDICIAL ADMISSIONS BAR HIM FROM CHALLENGING DEUTSCHE BANK'S STANDING TO ENFORCE THE MORTGAGE.

In Moss's Answer, amended Answer, second amended Answer, and First Summary Judgment Motion, Moss admitted to the validity of the First Assignment and Deutsche Bank's standing to enforce the Mortgage. A051; A061; A071; A085. In the First Summary Judgment Motion, Moss stated that "[o]n April 14, 2009 loan was modified ... *which was accepted and agreed upon by Defendant and Plaintiff*". *See, e.g.,* A085 (emphasis added). In that same Motion, Moss *asked the Superior Court to enforce the Modification Agreement* against Deutsche Bank. A061; A071.

In his Answering Brief, Moss discounts these admissions by arguing that he denied all allegations pertaining to the validity of the assignments. App. Ans. Br. at 16. However, the effect of Moss's repeated specific judicial admissions cannot be diminished by these vague general denials.

A. Moss Admitted to the Validity of the Assignments in Pleadings.

Statements made in court documents are judicial admissions. App. Op. Br. at 19; *Merritt v. United Parcel Serv.*, 956 A.2d 1196, 1201 (Del. 2008).

Moss argues that his admissions as to the validity of the assignments should have less effect because he specifically denied that Deutsche Bank owned his Mortgage. *See* App. Ans. Br. at 16. Moss states that "[e]quivocal statements do

not constitute judicial admissions, and are not binding." App. Ans. Br. at 15. Moss contends that his admissions should be considered "evidentiary admissions", which may be "rejected or accepted by the trier of fact." *Id.*

However, Moss's statements were not equivocal. Moss did not "specifically deny" the allegations included in the Complaint concerning the assignment of the Mortgage.[2] Rather, Moss generally denied the allegations, averring "Defendant [Moss] has no information or knowledge of said information." *See* A051; A061; A071. Contradicting this assertion, in the First Summary Judgment Motion, Moss stated that "[o]n April 14, 2009 loan was modified of said mortgage with New Century Mortgage *which was accepted and agreed upon by Defendant and Plaintiff.*" A085 (emphasis added). Moss makes the same assertion in his Memorandum of Law in Support of the First Summary Judgment Motion ("Summary Judgment Memorandum") and states "[s]ubsequent to the acceptance of the mortgage modification, Defendant [Moss] complied with all terms and agreements of said modification and the mortgage was brought up to date and the new monthly payment is $1,908.57." A121.

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[2] Paragraph 2 of the Complaint avers as follows:

> Mortgage Electronic Registration Systems, Inc. as nominee for New Century Mortgage Corporation, for valuable consideration, duly assigned its entire interest in and to said Mortgage unto [Deutsche Bank], a copy is attached hereto as Exhibit A and incorporated herein by reference.

A011.

In his Summary Judgment Memorandum, Moss asserts "[s]ubsequent to the loan modification Plaintiff's [sic] breached the terms and agreements to the loan modification", thus again admitting that Deutsche Bank was a party to the Modification Agreement. A121-A122; *see also*, A051 at ¶ 6 ("Plaintiff refused to honor the April 14, 2009 loan modification."). If Deutsche Bank were not a party to the Modification Agreement, then it could not breach the Modification Agreement. Because Appellee admitted that Deutsche Bank is a party to the Modification Agreement, Appellee has admitted that Deutsche Bank has standing to enforce it. Moreover, Moss attached "a true and correct copy of Defendant's [Moss's] loan modification agreement" as Exhibit B to the First Summary Judgment Motion, affirmatively identifying the document in the body of the motion. A085; A112-A116. Thus, the evidence was in the record before the Superior Court.

Moss's statements concerning the Modification Agreement and implicit affirmation of Deutsche Bank's standing to enforce the Mortgage are judicial admissions because they are "[v]oluntary and knowing concessions of fact made by a party during judicial proceedings". *See Merritt*, 956 A.2d 1192. Even if Moss's general denials of knowledge somehow could mitigate the binding effect of such contemporaneous admissions, which it cannot, an issue of fact would

consequently arise precluding the Superior Court from entering summary judgment in Moss's favor. *See* Del. Supr. Ct. R. 56(c).

B. Moss's Admissions Concerning the Validity of the Assignments Are Properly Before the Court.

Deutsche Bank properly raised the fact of Moss's judicial admissions in its Opening Brief. *See* App. Op. Br. at 18-20. The issue of the validity of the parties' Modification Agreement was raised, in the first instance, by Moss himself in the New Matter pled in his original Answer. A051 at ¶ 7 ("Defendant requests plaintiff to honor the April 14, 2009 loan modification."). This New Matter/affirmative defense was reiterated in both of Moss's amended Answers, and asserted by way of a counterclaim added to the second amended Answer.[3] A061; A071-A072. Accordingly, Moss's affirmative defense and counterclaim, and supporting premises (*i.e.*, Moss's admission concerning the Modification Agreement with Deutsche Bank, and his repeated submission of the Modification Agreement), persisted before the Superior Court throughout the record below.

Given Moss's repeated reliance on the Modification Agreement, this issue was "fairly presented" to the trial court so as to be adequately preserved on appeal. *Bryant v. Bayhealth Med. Ctr.*, 937 A.2d 118 (Del. 2007). However, should the Court determine that the issue of Moss's judicial admission was not fairly

[3] Deutsche Bank answered Moss's counterclaim on July 7, 2011, denying the counterclaim allegations and asserting that it "had honored the April 2009 loan modification." DI 9 at ¶ 3.

presented to the Superior Court, this argument may still be considered because the "interests of justice" are served by such consideration. *See Burrell v. State*, 953 A.2d 957, 963 (Del. 2008) ("Generally, questions not fairly presented to the trial court are not considered on appeal unless 'the interests of justice' mandate such consideration."). This exception allows issues not specifically presented below to be considered by this Court "where the argument is merely an additional reason in support of a proposition that was urged below". *Robino-Bay Court Plaza, LLC v. West Willow-Bay Court LLC*, 985 A.2d 391 (Del. 2009); *see also, Wit Capital Group, Inc. v. Benning*, 897 A.2d 172, 184 n.48 (Del. 2006) (allowing "new" theory and arguments that were "sufficiently related" to those raised by party below); *Mundy v. Holden*, 204 A.2d 83, 87-88 (Del. 1964) (finding that a defendant's argument that was not argued below was "simply ... an additional reason in support of the theory [that was] argued before the trial court").

Moss claims that he challenged Deutsche Bank's standing and ability to enforce the Mortgage throughout the case below. At the same time, Moss admitted, in numerous pleadings and documents filed in the Superior Court, that Deutsche Bank was the counter-party to the Mortgage. Given the fact that both parties conceded the validity of the Modification Agreement, and that Deutsche Bank was a proper party to the Mortgage, the Superior Court should never have considered whether Deutsche Bank was a proper party to enforce the Mortgage.

C. There Was No "Fraud Upon the Court" in the Superior Court.

In order to establish that a party has committed a "fraud upon the court," a heavy burden must be met: there must be "a showing of the most egregious conduct involving a corruption of the judicial process itself." *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 543 (Del. 2006) (internal citations and quotations omitted).

Moss baselessly suggests that the issue of his admissions should not be considered, even in the "interests of justice," because Deutsche Bank "clearly attempted fraud on the court".[4] App. Ans. Br. at 16. Moss offers no authority as to the type of conduct that might amount to a "fraud upon the court" or in support of his contention that such conduct should otherwise bar consideration of properly presented argument and evidence. *Id.* There is no authority that supports such contentions. Because "[r]easonable minds may differ as to how a court is likely to rule on a given issue, [ ] advocating a tenuous position does not amount to a fraud on the court." *Epstein v. Matsushita Elec. Indust. (In re MCA, Inc.),* 785 A.2d 625, 640 (Del. 2001).

Here, Deutsche Bank's original counsel relied upon the July 14 Order as *part* of her argument seeking to establish New Century's authority to transfer the

[4] Moss proposes that Deutsche Bank "attempted fraud" upon the Superior Court through prior counsel's inadvertently erroneous submission of and reliance upon a July 14, 2008 Bankruptcy Court order that concerned the termination of the automatic stay in relation to the transfer of New Century's security interests in real property ("July 14 Order"). A552.

Mortgage; this argument was later clarified (if not disclaimed) by substituting counsel in Deutsche Bank's supplemental response to the Second Summary Judgment Motion ("Supplement Response") and in the Reargument Motion. *See* A628-A269 ("While prior Plaintiff's counsel did make that argument, current counsel was careful *not* to incorporate that portion of prior counsel's response in current counsel's supplemental response. In fact, current counsel did not and does not assert that the relief order allowed for the signing of the assignment."). Regardless of whether counsel's reference to the July 14 Order supported Deutsche Bank's arguments in favor of its ability to enforce the Mortgage, counsel's reliance thereon in no way involved the corruption of the judicial process itself and was not a fraud on the Superior Court. There is simply no support, legal or otherwise, for the contention that Deutsche Bank's prior counsel's conduct amounted to fraud on the Court.

In addition, Moss's assertion that such conduct bars the Court's consideration of Deutsche Bank's arguments regarding Moss's judicial admissions is also without any foundation whatsoever and should be disregarded by the Court.

II. MOSS'S ARGUMENTS ON THE ASSIGNMENTS AND POOLING AND SERVICING AGREEMENT ARE WITHOUT MERIT.

A. Moss's Ownership Interest in the Property Does Not Provide Him with Standing to Challenge the Assignments' Validity or Deutsche Bank's Compliance with the Pooling and Servicing Agreement.

The Superior Court erred in permitting Moss to challenge assignments under agreements to which he was not a party. Without any legal authority, and for the first time on appeal, Moss asserts that he has standing to challenge the First Assignment and the Second Assignment (together, "Assignments") and the PSA because his claim to possession and ownership of the Property puts him within the zone of protected interests. App. Ans. Br. at 25. As set forth in the Opening Brief, the courts of Delaware and most other states have determined that a mortgagor does not have standing to challenge the assignment of a mortgage. App. Op. Br. at 15-16. Therefore, Moss's claimed ownership of and possessory interests in the subject Property are irrelevant.

Moss's attempts to distinguish the cases cited in the Opening Brief are ineffective. *See* App. Ans. Br. at 25-27. These cases are not distinguishable from this case. For example, in *BAC Home Loans Servicing, LP v. Albertson*, 2014 Del. Super. LEXIS 34 (Del. Super. Ct. Feb. 10, 2014) and *CitiMortgage, Inc. v. Bishop*, 2013 Del. Super. LEXIS 95 (Del. Super. Ct. Mar. 4, 2013), the Superior Court held that mortgagors do not have standing to challenge the validity of an assignment or a pooling and services agreement because a mortgagor is not a party to, or a third

party beneficiary of, the contract. Here, it is undisputed that Moss is challenging agreements to which he is not a party. *See* App. Op. Br. at 16-18.

Even if Moss had standing to challenge the PSA and the Assignments, his arguments are not supported by the express language of the agreements or Delaware law. In his Answering Brief, Moss argues that Deutsche Bank cannot enforce the underlying Mortgage because the First Assignment was signed on January 17, 2008, a date after the closing of the relevant trust. App. Ans. Br. at 7, 21-22. Consequently, Moss concludes that because all transfers pursuant to the PSA had to occur prior to the closing date, the First Assignment must be void. App. Ans. Br. at 22. However, this argument is contrary to the express language of the PSA, which states that an Assignment of Mortgage (as that term is used therein) is defined as "notice of transfer or equivalent instrument in recordable form, reflecting the sale of the mortgage to the Trustee." A339; App. Ans. Br. at 32; PSA at 34.[5] Thus, an assignment of mortgage acts only as *notice* of the sale, not of the date the loan was actually sold to the trust.

Here, the First Assignment in January 2008, was notice to the world that title and interest in the validly recorded first mortgage lien had been assigned, not a reflection of the actual date the loan was sold to the loan trust.

[5] Moss provides a link to the publicly available PSA agreement in his Answering Brief. App. Ans. Br. at 32.

In addition, the PSA includes a provision for an assignment of mortgage where the mortgage has been recorded in the name of MERS, as is the case here, as follows:

> If any Mortgage has been recorded in the name of Mortgage Electronic Registration System, Inc. ("MERS") or its designee, no Assignment of Mortgage in favor of the Trustee will be required to be prepared or delivered and instead, the applicable Servicer shall take all reasonable actions as are necessary at the expense of the Depositor to cause the Trust to be shown as the owner of the related Mortgage Loan on the records of MERS for the purpose of the system of recording transfers of beneficial ownership of mortgages maintained by MERS.

App. Ans. Br. at 32; PSA at 70. Thus, contrary to Moss's arguments, mortgage loans pooled into the trust remained in the name of MERS, or the original owner.

Moreover, Moss's arguments are facially defective. Instead of relying on the PSA for his argument, Moss cites an affidavit provided in response to a New Jersey Administrative Order entered in 2011, in regard to MERS's general practices. A402. However, Moss takes paragraphs of the affidavit out of context to argue about MERS's assignment of the Mortgage. The affidavit actually supports Deutsche Bank's arguments. Specifically, paragraph 15 of the affidavit states if "a MERSCORP member is no longer involved with the note after it is sold, an assignment from MERS to the non-MERSCORP member is provided by MERS, that assignment is recorded in the county where the real estate is located, and the mortgage is 'deactivated' from the MERS System." A402. Thus, even if

Deutsche Bank were not a MERSCORP member, it still could properly receive an assignment from MERS.

Moss also supports his arguments by selecting portions of a search report on the MERS website. A420. What Moss fails to mention is that the search report states that MERS assigned the Mortgage to Deutsche Bank. A420. Thus, there was a genuine issue of material fact and the Second Summary Judgment Motion should have been denied.

B. Moss is Not Threatened by the Possibility of Double Liability.

Because Deutsche Bank is the holder of the Note and Mortgage, Moss is not threatened by the possibility of double liability. Deutsche Bank attached a true and correct copy of the Note to its Supplemental Response because it is the holder of the Note. A622-626. Thus, Deutsche Bank asserts that it is the holder in possession of the Note, despite Moss's misstatements in the Answering Brief. App. Op. Br. at 18-19. Even if the First Assignment to Deutsche Bank was defective, the original assignor retains ownership rights in the Note and any payments Moss makes to Deutsche Bank will discharge his liability under the Note. 6 Del. C. § 3–602. Thus, even if Deutsche Bank lacks the right to retain the economic benefit of the Note as a result of a failure to comply with all the transfer requirements of the PSA, Deutsche Bank is the holder and Moss cannot be harmed by paying the holder. *In re Walker*, 466 B.R. 271,281 (Bankr. E.D. Pa. 2012).

Moss's arguments about the danger of being subject to double liability are simply without merit.

In addition, the Note was properly endorsed in blank by New Century. A622-626. Moss's misstatements about the endorsements on the Note, made for the first time on appeal are incorrect on their face. App. Ans. Br. at 31. 6 Del. C. § 3–104(a) defines the Note as a negotiable instrument. A negotiable instrument is transferred by delivery to a person other than its issuer for the purpose of giving to that person the right to enforce the instrument. 6 Del. C. § 3–203. If an endorsement is made by the holder of an instrument and it is not a special endorsement, it is a "blank endorsement." 6 Del. C. § 3–205(b). When endorsed in blank, an instrument becomes payable to the bearer and may be negotiated by transfer of possession alone until specially endorsed. *Id.*

Moreover, it is well settled that "[i]n an action with respect to a negotiable instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings." *See* 6 Del. C. § 3–308(a). Nevertheless, even when the signature is denied in the pleadings, "the signature is presumed to be authentic and authorized." *Id.* Here, Moss did not submit any evidence to contradict the Note endorsement's authenticity.

Since Moss did not dispute the endorsement's authenticity and because he admitted to executing the Note and subsequent Modification Agreement, the Superior Court erred in ruling Deutsche Bank was not the proper party-in-interest.

C. Moss's Expert Report Created a Genuine Issue of Material Fact.

Moss is not a party to the PSA; therefore, he does not have standing to challenge any of its terms. Nonetheless, if the Court should consider Moss's claim, he argues the First Assignment was void because the transfer violated the terms of the PSA. App. Ans. Br. at 32-33. Moss supports his contentions by referencing an expert report – a report not discussed by or relied upon in any way by the Superior Court. The report was neither dispositive nor probative of the issues before the Superior Court and should be disregarded by this Court. Consequently, the expert report is irrelevant to this appeal. In addition, the report includes an extensive list of nineteen items which require further investigation before any conclusions could be drawn that Moss's loan was or was not conveyed to the trust. A255. That investigation was never conducted, making the report's probative value negligible.

D. The Assignments Cannot Be Challenged by Moss Even Under New York Law.

If (i) Moss had standing to challenge the assignments, which he does not; (ii) New York law applied to the assignments, which it does not; and (iii) the trust was

not a securitized trust, which it is, the assignments could not be challenged by Moss.

Moss makes the unsupported argument that New York law is applicable in this case. App. Ans. Br. at 31. However, even if that were true, which it is not, under New York law, a mortgagor only has standing to challenge the validity of an assignment of a mortgage if the alleged defect in the assignment would render it void. *See e.g., Russian Entm't Wholesale, Inc. v. Close-Up Int'l, Inc.*, 767 F. Supp. 2d 392, 401-02 (E.D.N.Y. 2011). Moss's argument fails, however, because under New York law the assignments would be merely voidable, not void. New York Est. Powers & Trusts Law ("E.P.T.L.") § 7-2.4 provides in relevant part that:

> If the trust is expressed in the instrument creating the state of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void.

E.P.T.L. § 7-2.4. By its plain language, § 7-2.4 is inapplicable because the First Assignment was not an "act of the trustee"; rather the assignment at issue was signed by MERS. A040-042. Moreover, even if the First Assignment involved an act of the trustee, § 7-2.4 is inapplicable because the securitized trust into which Moss's loan was deposited is a business trust, which is not governed by the statute:

> [a] trust [does] not include . . . business trusts where certificates of beneficial interest are issued to the beneficiary, investment trusts, . . . [or] security instruments such as deeds of trust and mortgages . . . .

E.P.T.L. §11-1.1.

Even if § 7-2.4 were applicable to the First Assignment, and the First Assignment had been an act of the trustee (a matter of pure speculation), courts interpreting that section have treated trustees' *ultra vires* actions as voidable, not void, because a beneficiary can ratify a trustee's *ultra vires* acts. *Bank of Am. Nat'l Ass'n v. Bassman FBT, L.L.C.*, 981 N.E.2d 1, 9 (Ill. App. Ct. 2012), appeal denied, 985 N.E.2d 304 (Ill. 2013) (holding that E.P.T.L. § 7-2.4 renders noncompliant transactions voidable). In *Bassman*, the court considered whether, under E.P.T.L. § 7-2.4, assignments of mortgages that were not made in the manner specified by a pooling and servicing agreement were void and subject to challenge by the mortgagor. The court found that they were not void or subject to challenge. Undertaking a detailed analysis of New York law, the court reasoned:

> [S]everal New York courts have applied the rule that a beneficiary can ratify a trustee's *ultra vires* act. Where an act can be ratified it is voidable rather than void. Accordingly, these cases indicate that *ultra vires* transactions are voidable rather than void.[6]

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[6] The reasoning in *Bassman* has been adopted by numerous courts. For example, in *Koufos v. U.S. Bank, N.A.*, the district court found "persuasive the detailed analysis of this issue in [*Bassman*]" and concluded that under New York law, *ultra vires* trust transactions are voidable rather than void and, as a result, the plaintiff lacked standing to raise challenges to an assignment of mortgage based on alleged non-compliance with a pooling and services agreement. 939 F. Supp. 2d 40, 57 n.2 (D. Mass. 2013). Several other courts are in agreement. *See e.g.*, *Deutsche Bank Nat'l Trust Co. v. Stafiej,* 2013 U.S. Dist. LEXIS 36312, at *7 (N.D. Ill. Mar. 15, 2013) (adopting *Bassman* and holding that "§ 7-2.4 only makes an act by the trustee in contravention of the trust instrument voidable, not void"); *Green v. Bank of America, N.A.*, 2013 U.S. Dist. LEXIS 78124, at *2 (S.D. Tex. June 4, 2013) (rejecting mortgagor's argument that an assignment made in violation of the terms of a pooling and services agreement would be void under § 7-2.4 because "[c]ourts applying New York law have treated actions by trustees as voidable" and holding that mortgagor lacked standing to challenge the validity the assignment); *Omrazeti v. Aurora Bank, FSB*, 2013 U.S. Dist. LEXIS 88644, at *7 (W.D. Tex. June 25, 2013) ("even if it is

Id. at 9.

To support his proposition that the assignment was void, Moss relies upon *Wells Fargo Bank, N.A. v. Erobobo*, 39 Misc. 3d 1220(A) (N.Y. Sup. Ct. 2013). App. Ans. Br. at 32-33. In *Erobobo*, the court concluded that the transfer of a note and mortgage to a securitized trust in violation of the relevant pooling and services agreement was void. *Id.* at 8-9. However, aside from a reference to § 7-2.4, this decision was without citation to supporting authority, was devoid of any analysis and was conclusory. Moreover, its reasoning and holding have been called into doubt. *See Koufos,* 939 F.Supp.2d at 40; *Orellana v. Deutsche Bank Nat. Trust Co.,* 2013 U.S. Dist. LEXIS 135698 (D. Mass. Aug. 30, 2013). It should not, therefore, be given any weight by this Court.

Additionally, § 7-2.4 inures to the trust's beneficiaries and "attempts to protect trust beneficiaries from unauthorized actions by the trustee." E.P.T.L § 7-2.4 (Practice Commentaries). It is undisputed that Moss is not a trust beneficiary.[7]

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true that the Notes were transferred to the trust in violation of the trust's terms, that transaction could be ratified by the beneficiaries of the trust and is therefore merely voidable"); *Keyes v. Deutsche Bank Nat'l Trust Co.,* 921 F. Supp. 2d 749 (E.D. Mich. 2013) (holding § 7-2.4 "does not affect the validity of the assignment").

[7] The United States District Court for the Northern District of Illinois recognized that an argument similar to the one raised by Moss would harm the Trust's beneficiaries. *See Deutsche Bank Nat'l Trust Co. v. Adolfo*, 2013 U.S. Dist. LEXIS 122805 at *3 (N.D. Ill. Aug. 28, 2013). In *Adolfo*, the court rejected the defendant's argument that the transfer of the note was void because it was not endorsed in the manner required by the relevant pooling and servicing agreement, and concluded that an interpretation rendering an otherwise valid assignment void would "injure the parties that [§ 7-2.4] is intended to protect." *Id.*

In the instant case, a declaration that the First Assignment of Mortgage is void would use § 7-2.4 to harm the trust beneficiaries, which is neither the design nor the purpose of the statute. Even assuming that the transfer of the Mortgage to the trust violated the terms of the PSA, and assuming New York law applies, the after-the-deadline transactions would merely be voidable at the election of one or more of the parties to the PSA, not Moss, and the First Assignment was most assuredly not void.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in its Opening Brief, Deutsche Bank respectfully requests that the Superior Court's Summary Judgment Order and Reargument Order be reversed.

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