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Case Number 306,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

J.M. SHREWSBURY, a/k/a J. MICHAEL SHREWSBURY, and KATHY SHREWSBURY, Defendants Below, Appellants. v. THE BANK OF NEW YORK MELLON, f/k/a THE BANK OF NEW YORK, as Trustee for the Certificateholders of CWMBS, Inc., CHL Mortgage Pass-Through Trust 2007-9, Mortgage Pass-Through Certificates, Series 2007-9, Plaintiff Below, Appellee	Case NO. 306,2016 On appeal from the Superior Court of the State of Delaware in and for New Castle County, C.A. No. N15L-03-108-CLS

APPELLANTS' CORRECTED REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Rules

INTRODUCTION

The Defendants Below, the Appellants Michael Shrewsbury and Kathy Shrewsbury ("the Shrewsburys"), submit this Reply Brief in support of its Appeal of the Summary Judgment Order and the Reargument Order entered in favor of the Plaintiff below, Appellee The Bank of New York Mellon, f/k/a, The Bank of New York, as Trustee for the Certificateholders of CWMBS, Inc., CHL Mortgage Pass-Through Trust 2007-9, Mortgage Pass-Through Certificates, Series 2007-9 ("the Appellee") DI#1, A006.[1]

The Appellee has failed to sustain its evidentiary burden on the critical element of its case in chief: whether it has standing to foreclose on the Appellants' home, and whether it is real party at interest. The Appellee has argued that it is not necessary for a mortgagee in a *scire facias* action to also have the right to enforce the underlying promissory note. Yet, shockingly, the Appellee attached an alleged copy of an indorsed note to its Answering Brief on Appeal, that was never presented at any prior time during the Superior Court proceedings. The Appellants respectfully request the Court to strike this impermissible submission.

In addition, the Appellee fails to demonstrate how it is entitled to the rights of payment from foreclosing on the mortgage without also having the right to

[1] All further references to the record below are made as "DI" followed by the appropriate docket item and page number. References to Appellants' Corrected Appendix are made as "A" followed by the appropriate page number.

enforce the note. The Superior Court erred in granting Summary Judgment to the Appellees, because the mortgage and note are both necessary to establish standing to foreclose – the mortgage, alone, does not grant the mortgagee the beneficial rights to payment of the mortgage money, rights which are found only in the note. The Appellants believe that the Superior Court should have conducted the proper analysis regarding the right to enforce the note under the Uniform Commercial Code (UCC). The Superior Court has, in many cases, conducted analysis under the UCC when the mortgagee has presented an indorsed note, but in this case, where the mortgagee did not have a note with indorsements, this analysis was not done.

The Superior Court also erred by granting the Appellee's Summary Judgment Motion based on assignments which are not what they purported to be. For example, the Appellees have stated, in its Answering Brief on Appeal, that Mortgage Electronic Registration Systems, Inc. ("MERS") did not transfer the note. Yet, the assignment attached to the Appellee's Complaint state that MERS assigned the "Mortgage described below together with the note(s) and obligations therein described". Based on this assignment, which was clearly not what it purported to be, the Superior Court ruled that the assignment "was valid because it operated to convey all the rights and interest of the assignor", and [a]s a valid assignee Plaintiff is the proper party to enforce the Note". A194-A195.

The Superior Court erred in allowing a commercial mortgagor to challenge a mortgagee's standing, but denying homeowners the opportunity to challenge standing. In certain circumstances, such as this one, a mortgagor has standing to challenge the mortgagee's standing, such as where an injury in fact is alleged; where the evidence demonstrates that foreclosing mortgagee does not have the right to enforce a promissory note under the UCC; and in cases where the assignments are invalid, ineffective or void.

For these reasons, the Defendants/Appellants the appeal should be granted, the Summary Judgement Order and Reargument Order should be reversed, and this matter remanded to the trial court.

ARGUMENT

I. **THE SUPPERIOR COURT ERRED BY RULING THAT STANDING TO FORECLOSE ON THE MORTGAGE IS DEPENDENT ON THE MORTGAGE ONLY AND NOT THE NOTE, BECAUSE THE MORTGAGE WITHOUT THE NOTE IS A NULLITY, AND IT IS THE NOTE AND NOT THE MORTGAGE THAT ENTITLES THE "LENDER" TO RECEIVE THE PROCEEDS FROM THE MORTGAGED PREMISES.**

A. Without the note, the Appellee has no beneficial interest in the proceeds received through "enforcing the condition of nonpayment of the mortgage money".

The Appellee lacks standing to foreclose without the note in a *scire facias* foreclosure action, as codified by 10 Del. C. § 5061, as well as under the underlying loan documents, without also having the right to enforce the promissory note under 6 Del. C. Sections 3-203 and 3-301.

It has been held that a *scire facias* foreclosure " is only a more speedy mode of enforcing payment of the sum secured; and it only contemplates a sale for so much as will pay the debt, interest and costs" (emphasis added). Reybold v. Herdman, 2 Del. Ch. 34, 38 (Del. Ch. 1837). 10 Del. C. Section 5061, provides as follows:

> "upon breach of the condition of a mortgage of real estate by nonpayment of the mortgage money or nonperformance of the condition stipulated in such mortgage at the time and in the manner therein provided the mortgagee, the mortgagee's heirs, executors, administrators, successors or assigns may, at any time after the last day whereon the mortgage money ought to have been paid or other conditions performed, sue out of the Superior Court of the county wherein the mortgage premises are situated a writ of scire

> facias upon such mortgage directed to the sheriff of the county commanding the sheriff to make known to the mortgagor, and those persons described in subsection (b) of this section and such mortgagor's heirs, executors, administrators or successors that the mortgagor or they appear before the Court to show cause, if there is any, why the mortgaged premises ought not to be seized and taken in execution for payment of the mortgage money with interest or to satisfy the damages which the plaintiff in such scire facias shall, upon the record, suggest for the nonperformance of the conditions" (emphasis added). 10 Del. C. § 5061.

The beneficial interest in the mortgage money only inures to the party with the right to enforce the note, and not solely the mortgagee. Clearly, the mortgagee must also have the right to enforce the note, in order to have a right to payment of the mortgage proceeds. For this reason, it has been held that a mortgagee, without the assignment also of the note, "has a worthless piece of paper." In re Veal, 450 B.R. 897, 11 Cal. Daily Op. Serv. 7989, 2011 Daily Journal D.A.R. 9592 (B.A.P. 9th Cir., 2011)

In the case *sub judice*, Paragraphs 1 of the Note and the mortgage, as well as Paragraphs (D) and (E) of the mortgage, provide that payments on the debt are to be given to the Lender, which the mortgage defines as Countrywide. The Note also provides that payments are to be made to the Note Holder. *See* A37, A40, A141; 6 Del. C. Section 1-201(21). The Appellee argues that Superior Court case law has consistently held that a mortgagee does not need to have a right to enforce the note in order to foreclose on the mortgage in a *scire facias sur mortgage* action. However, the Appellee's reliance on these cases for this proposition is misplaced.

For example, in Ryan v. Ryan, 1989 Del. Super. LEXIS 434 (Del. Super. Sept. 7, 1989), the Plaintiff's instituted a *scire facias sur mortgage* action with an unsealed mortgage, clearly contrary to Delaware law. *See* Monroe Metropolitan Life Ins. Co. v. Monroe Park, 442 A.2d 503, 509 (Del. Super. Ct. 1982), *rev'd on other grounds by* Monroe Park v Metropolitan Life Ins Co., 457 A.2d 734, 1983 Del. LEXIS 389 (Del. 1983). Due to this defect, the Defendants in that case rightly challenged the mortgagee's standing. The mortgagee in Ryan tried to revive its defective mortgage using a note "under seal". Ryan, *2. Judge Babiarz declined to accept that argument, explaining that the *in rem* action on the mortgage exists independently of an *in personnam* action on the note. *Id.*, *2-3; Berg v. Liberty Federal Sav. & Loan Asso, 428 A.2d 347 (Del. 1981)(cited in Ryan)(where, in a suit on the note, the Court found that, absent a release or novation, mortgagors who sold their home and assigned the mortgage to a 3rd party, remained liable to the mortgagee on both the note and mortgage).

Although the issue was not raised, in Ryan and Berg, the mortgagee apparently also had the right to enforce the promissory note, more particularly the condition of default under the note, a fact which distinguishes those cases from the case *sub judice*. Also, in the instant case, the underlying mortgage and note requires that the mortgagee must also be the note holder. For example, Paragraph 20 of the alleged mortgage specifies that Note must be sold "together with the

security instrument". *See* A50. In Delaware, negotiable instruments are negotiated in accordance with the UCC.

Most of the cases cited in the Appellee's Response brief are distinguishable from the instant case, because the mortgagee in those cases also had a right to enforce the promissory note. *See* Branch Banking & Trust Co. v. Eid, -- A.3d --, 2013 Del. Super. LEXIS 264 (Del. Super. Ct. June 13, 2013)(note was indorsed in blank); Nationstar Mortgage, LLC v. Sears, 2015 Del. Super. LEXIS 393 (Del. Super. Ct. 2015)(promissory note indorsed in blank).

Davis v. 913 North Mkt. St. Pshp., 1996 Del. Super. LEXIS 579 (Del. Super. Ct. Dec. 12, 1996), cited by Appellee, also fails to support the Appellee's thesis. In Davis, there were two separate promissory notes in two separate transactions at issue in Davis. The first note was an unsecured note on which the Plaintiff Davis was indebted to the Defendant 913 North Mkt. St. Psp. ("913"). The second note, in which 913 was indebted to Davis, was secured by real property. Davis, the mortgagee who also had the right to enforce the second note, filed a *scire facias* foreclosure action. The main issue in that case was whether 913 could use the debt represented by the first note, to offset the mortgage debt owed to Davis pursuant to the foreclosure action. The Davis Court held that set-off was not one of the allowed defenses in a *scire facias* action. *Id.* At *4.

The Appellee states that the Appellants' reliance on the cases cited in its Opening Brief are flawed, because of the focus placed on the reasoning in each case without citing the holding. This leads to the Appellants' point – the lack of indorsed note at the summary judgment stage in the instant case distinguishes it from those cases cited. Yet, in many of the cases that the Appellants cited, the Superior Court observed that the foreclosing mortgagee also had the right to enforce the note. The Appellants used the Chestnut Run, a commercial foreclosure case, as their example because, as in this case, the foreclosing mortgagee presented a note with no indorsements. It was through discovery and through analysis under the UCC that the Chestnut Run court found that the mortgagee had standing. Yet, no such analysis was conducted by the Superior Court under the UCC in this case.

The Supreme Court decisions in Moss and Bendfeldt were previously discussed in the Appellants' Corrected Opening Brief, at Pages 9, 11, 13-14. The instant case is distinguishable in that the Appellee in the instant case failed to present a note with any indorsements whatsoever during the Trial Court proceedings, whereas the Plaintiff in Benfeldt had a note indorsed in blank---this was one reason this Court did not reach the issue of the mortgagors' standing to challenge an assignment in Benfeldt. The second Moss Superior Court decision (2016 Del. Super. LEXIS 32)(Del. Super. Jan. 26, 2016) is currently on appeal, and thus was not discussed.

M&T Bank v. Watkins, 2016 Del. Super. Lexis 377 (Del. Super., 2016), also cited by the Appellee, is distinguishable from the instant case. First, contrary to the Watkins case, where Court opined that the "monthly installments" were due "under the mortgage", the monthly installments in the case *sub judice* are due under the promissory note, and the mortgage references the payment obligations under the note. Also the terms of payment default are defined in the note. *See* Paragraphs 3(B) and 6(B), A141-A142. The Appellants contend that the tendency to conflate the rights under the mortgage and the note illustrates yet another reason why the mortgagee must also be the party entitled to enforce the promissory note.

The second distinguishing factor between the instant case and the Watkins case is the procedural posture. Watkins involved a defense motion to dismiss the complaint where the defendant homeowner had the burden of proof, and the evaluation is conducted on the pleadings, where a note is not required at the pleading stage. *See* Elmwood Federal, and Appellants Corrected Opening Brief at Page 16. The instant case involved the Appellee's motion for summary judgment, where the Appellee had the burden of proof on all issues, including standing, yet the Appellee failed to sustain its burden of overcoming the Appellants' evidence with a valid, properly authenticated indorsed note at the trial court stage.

B. The Appellants have standing to challenge assignments in which injury is alleged, which are invalid, ineffective or void, or where the mortgagee "fails to satisfy the indorsement element of negotiation of the note under the UCC."

Recent Delaware cases have held that, unless the mortgagors allege they were parties to an assignment, third-party beneficiaries, "or somehow injured by the assignment", the mortgagors would not have standing to challenge assignments. Bishops v. Argent Mortgage Company, LLC, Adv. Pro. No. 11-53412 (BLS) (Bankr. Dist. Delaware September 7, 2012), * 3; Citimortgage, Inc. v. Bishop, 2013 Del. Super. LEXIS 95 (Del. Super. Ct. Mar. 4, 2013), *13.

However, this Court has also recognized other circumstances in which a mortgagor has standing to challenge assignments of the note and mortgage. For example, it has been held that a mortgagor may also challenge an assignment which is rendered "'absolutely invalid, ineffective, or void'". *See* Deutsche Bank Nat'l Trust Co. v. Moss, 2014 Del. LEXIS 294, *11, n.14, *quoting* Livonia Property Holdings, LLC v. 12840-12976 Farmington Road Holdings, LLC, 399 Fed. Appx. 97, 102-03 (Oct. 28, 2010). Also, it has been held that mortgagors also have standing to challenge a mortgagee's promissory note failures under the UCC. *See* Wash v. Saxon Mortg. Servs. (In re Washington), 469 B.R. 587, 592 (Bankr. W.D. Pa., 2012)(recognizing that courts within the Third Circuit have not

questioned the standing of homeowners to challenge a mortgage company's failure to "satisfy the indorsement element for negotiation of the note under the Uniform Commercial Code").

The Appellants herein have standing to challenge the alleged assignments of the note and mortgage, because they have alleged an injury in fact resulting from the assignments. *See* Appellants' Corrected Opening Brief at 24-26. *See* also A132 and A134. If the Appellee, who has not demonstrated the right to enforce the note under the UCC, forecloses on the mortgage, a foreclosure sale would not discharge the Appellants' obligation under the note. *See* 6 Del. C. Section 3-602(a). This exposes the Appellants to the risk of being sued on the note by some unrelated 3rd party later claiming the right to payment on the promissory note after their home has been foreclosed on by the Appellee, and the loan were no longer secured. This is the same judicially-recognized harm articulated by the Delaware, Pennsylvania, Bankruptcy Court, and 3rd Circuit caselaw that the Appellants have cited on pages 24-25 of their Corrected Opening Brief. The Appellants have offered cases interpreting Pennsylvania Law on these issues as persuasive authority, since Delaware modeled it's *scire facias* foreclosure statute after Pennsylvania's statute. *See* In re Skelly, 38 B.R. 1000, 1001, N. 5 (D. Del. 1984).

The Appellants also have standing to challenge assignments which are invalid, ineffective or void. *See* Deutsche Bank Nat'l Trust Co. v. Moss, 2014 Del. LEXIS 294, *11, n.14. The assignments in this case are invalid, ineffective and void, because they attempt to transfer, not only the mortgage, but also improperly attempt to transfer the promissory note. *See* A60-A70.

The Appellee, on Page 14 of its Answering Brief on Appeal, states that MERS "would not have transferred the note". However, the purported assignments that the Appellee itself presented, which the Superior Court relied on, betrays this statement. *See* Appellants' Corrected Opening Brief at 6; A60-A70.

The Appellee also argues that MERS' inability to transfer the note is irrelevant. *See* Appellee's Answering Brief on Appeal at 14. However, the Appellants posit that this point is relevant because the Superior Court in the case *sub judice* held that the assignment operated to transfer the note as well as the mortgage. *See* Appellants' Corrected Opening Brief, Rule 14(b) (vii) Attachment 1, the Superior Court's February 17, 2016 Order at Pages 4-5. The Appellants respectfully submit that this holding was in error.

The Appellee also argues that MERS' inability to transfer a note is a moot point, because of the alleged copy of a note indorsed in blank that was attached to its Answering Brief on Appeal. Appendix to Appellee's Answering Brief on Appeal, B-28 to B-30. For the reasons stated later in this Reply Brief (*supra*, at

Page 14), the Appellants respectfully requests that the Court strike this document and not consider it. Clark v. Clark, 2012 Del. LEXIS 651, *4.

The assignments in this case are also rendered ineffective, invalid and void due to the chain of title problems that the Appellants identified in their Opening Brief and in the Superior Court. *See* Appellants' Corrected Opening Brief at Page 5, 11, 13, 25; and A69-A85. The purported MERS assignment of mortgage directly to the Appellee omits Bank of America altogether. This Court has opined that such chain of ownership problems would be fatal. *See* Deutsche Bank Nat'l Trust Co. v. Moss, 2014 Del. LEXIS 294, *3-4.

The Appellants steadfastly maintain their challenges to the assignments, contrary to the Appellee's assertion on Page 14 of its Answering Brief. The Appellants have specifically denied the validity of the assignments in their Answer, their Amended Response to the Motion for Summary Judgment, as well as on this appeal. *See* A73-A76, A130, A132-134; and Appellants' Corrected Opening Brief at 3-6, 11, 19-25. The Appellants are in no way are abandoning these unequivocal challenges to the assignments. However, in their Motion for Reargument, the Appellants were simply trying call the Superior Court's attention to and narrow the Court's focus on their argument of whether or not the note was validly assigned under the UCC.

II. THE APPELLEE CANNOT CURE ITS EVIDENTIARY FAILURE BY IMPERMISSIBLY ATTACHING AN ALLEGED INDORSED NOTE TO ITS ANSWERING BRIEF ON APPEAL THAT WAS NOT PART OF THE TRIAL COURT RECORD, AND ITS SUBMISSION VIOLATED SUPREME COURTRULE 9(a), DELAWARE'S UNIFORM RULES OF EVIDENCE, AND RULES OF PROFESSIONAL CONDUCT.

A. This Submission by the Apellee Violated Supreme Court Rule 9(a), and Delaware's Rules of Professional Conduct.

The Appellee presented in this Appeal, for the first time, an alleged copy a note indorsed in blank, by attaching it to its Answering Brief. *See* Appendix to Appellee's Answering Brief on Appeal, B-28 to B-30. This document was never previously presented to the Superior Court, and was not part of the trial court's record. For this reason, the Appellants object to this document, move to strike it, and respectfully request this Court to disregard this document. *See* Supreme Court Rule 9(a); Clark v. Clark, 2012 Del. LEXIS 651, *4; Delaware Elec. Coop. v. Duphily, 703 A.2d 1202, 1206 (Del. 1997).

For this reason, the Appellants submit that Counsel for the Appellee violated Delaware Rules of Professional Conduct Rule 3.5(a), seeking to influence this Court by a means prohibited by law, in submitting the alleged note for the first time on Appeal and not at any prior time during the Superior Court proceedings, in contravention of Supreme Court Rule 9(a). Moreover, the Appellants contend that Counsel for the Appellee violated Delaware Rules of Professional Conduct, Rule

3.7 by improperly acting as a witness in attaching the alleged indorsed note to the Appellee's Answering Brief On Appeal, without a sworn Affidavit by a witness with the appropriate personal knowledge of the record.

B. The "Surprise" Submission of an Alleged Indorsed Note is Objectionable On Foundational Grounds

Simply attaching a copy of an alleged original indorsed to an appellate brief does not necessarily entitle the Appellee to enforce it. The Appellants specifically denied the authenticity of any surprised alleged indorsed note and signatures in their pleadings. *See* 6 Del. C. Section 3-308(a); A76 and A129. Thus, absent proper authentication, through a witness with the requisite personal knowledge, there is no evidence that the Appellee is the party in possession of a note indorsed in blank with the right to enforce it. *See* D.R.E, Rules 901(a) and 602; Deutsche Bank National Trust Company v. Thomas P. Wuensch, Wisconsin Court of Appeals, District IV, Case No. L.C. #2009CV752 (August 23, 2016). Also, the alleged "suddenly appearing indorsed note" raises significant factual questions about the validity of the entire process.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Appellant's Correct Opening Brief and Corrected Appendix, the Appellant/Defendants the Shrewsburys, respectfully request that the Superior Court's Order Granting Summary Judgment to the Plaintiff/Appellee Reversed, and any further relief for the Defendants the Court deems proper under the circumstances.

Respectfully submitted

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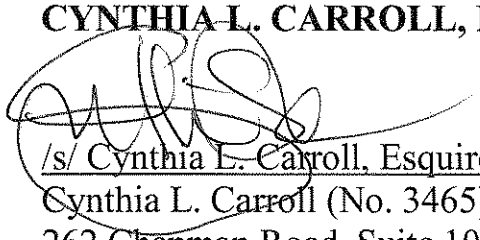

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