[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10147
Non-Argument Calendar

D.C. Docket No. 1:17-cv-22250-RNS,
Bkcy No. 12-bkc-27731-AJC

In re: MICHAEL D. LYNCH,
CANDENCE B. LYNCH,

Debtors,

MICHAEL D. LYNCH,
CANDENCE B. LYNCH,

Plaintiffs-Appellants,

versus

DEUTSCHE BANK NATIONAL TRUST COMPANY, OCWEN LOAN SERVICING LLC,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(November 15, 2018)

Before MARCUS, ROSENBAUM and BLACK, Circuit Judges.

PER CURIAM:

Michael D. Lynch and Candence B. Lynch, Chapter 7 debtors proceeding pro se, appeal the district court's order affirming the bankruptcy court's grant of summary judgment in favor of Deutsche Bank National Trust (Deutsche) and Ocwen Loan Servicing, LLC (Ocwen) (collectively, the Banks). By way of background, the Lynches initiated an adversary proceeding ultimately seeking to invalidate a mortgage lien on their real property, asserting the Banks could not enforce the lien under Florida law. The Lynches contended there was no evidence of an assignment from their original lender to either of the Banks. They did not, however, dispute the validity of the mortgage or the underlying debt.

After extensive litigation, the Banks moved for summary judgment, attaching affidavits from Donna Walker, Ronaldo Reyes, and Nicole Gostebski. The affidavits collectively purported to establish that: (1) Michael Lynch originally executed a note (the Note) and mortgage (the Mortgage) in favor of New Century Mortgage Company (New Century) for a loan (the Loan) made in the principal amount of $224,000.00; (2) through several assignments, the Note was transferred to Deutsche, as trustee for a securitized trust; (3) New Century, along with several affiliated companies, filed bankruptcy in Delaware after the assignment; (4) during the pendency of the adversary proceeding in this case, a liquidation trustee from New Century's bankruptcy in Delaware issued a power of attorney (POA) authorizing Deutsche to execute any

documentation necessary to effectuate transfer of the Loan; (5) Deutsche executed an allonge (the Allonge) assigning the Note to itself as trustee for the securitized trust; and (6) Ocwen, as Deutsche's servicer for the loans in the securitized trust, possessed the Note.

Based on the facts set forth in the affidavits, the Banks argued they were entitled under Florida law to enforce the Note and the Mortgage as: (1) "holders" in possession of the Note with a "blank indorsement"; (2) "holders" in possession of the Note through a "special indorsement," by way of the Allonge; or (3) "nonholders" in possession of the Note with rights of a holder. The bankruptcy court issued a ruling in the Banks' favor on all three points. The Lynches appealed to the district court, which affirmed the majority of the bankruptcy court's conclusions.

In their appeal to this Court, the Lynches challenge certain evidentiary rulings made by both the district and bankruptcy courts, along with those courts'

conclusions that Deutsche and Ocwen can enforce the Note and the Mortgage.[1] After review,[2] we affirm.

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[1] We decline to consider many of the Lynches' arguments because they were not properly raised below. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004); *In re Worldwide Web Sys., Inc.*, 328 F.3d 1291, 1298 (11th Cir. 2003). For example, we do not address: (1) whether the copies of the Note attached to the Banks' filings were invalid because a date stamp indicated they were actually "copies of copies"; (2) whether the law-of-the-case doctrine applied to arguments concerning the blank indorsement stamp; (3) the date discrepancy between the affidavit of Donna Walker and the POA; (4) whether the POA violated the terms of the Delaware Modified Confirmation Order; or (5) whether the Allonge sufficiently established the chain of succession from New Century to Deutsche. To the extent the Lynches contend these arguments may be raised at this stage of the proceedings, based on Florida state courts that have allowed litigants to raise new challenges to "sufficiency of the evidence" on appeal, their contention is without merit. This is not a Florida state-court proceeding, and the Lynches are not raising a sufficiency-of-the-evidence challenge following a trial on the merits. We similarly decline to consider evidence submitted to the district court on appeal that was not originally submitted to the bankruptcy court. *See Gen. Dev. Corp. v. Atlanta Gulf Cmtys. Corp.* 84 F.3d 1364, 1369 (11th Cir. 1996). Thus, we will not consider the effect, if any, of records not submitted to the bankruptcy court. To the extent the Lynches' arguments are not waived or otherwise addressed in this opinion, we conclude they lack merit and do not warrant further discussion.

[2] "As the second court of review of a bankruptcy court's judgment, we independently examine the factual and legal determinations of the bankruptcy court and employ the same standards of review as the district court." *In re Int'l Admin. Servs., Inc.*, 408 F.3d 689, 698 (11th Cir. 2005) (quotation omitted).

I. DISCUSSION

A. *Evidentiary Rulings*[3]

The Lynches first challenge the bankruptcy court's decision to admit Walker's affidavit into the summary-judgment record.[4] Walker stated in her affidavit that she based her testimony on her experience as a former employee of New Century and as a consultant to the trustee of the liquidation trust for the New Century entities. She further stated that she reviewed the New Century entities' business records related to the Loan in forming her testimony, that she had custody and control over those records, that the records were created in the ordinary course of business at or around the time of the events they described, and that the records were kept as part of the ordinary course of business of the New Century entities. The bankruptcy court was within its discretion to determine that Walker's affidavit provided a basis for her personal knowledge of the facts she asserted and that it demonstrated her competency to testify on the matter, based

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[3] We review a bankruptcy court's evidentiary rulings for abuse of discretion. *In re Int'l Mgmt. Assocs., LLC*, 781 F.3d 1262, 1265 (11th Cir. 2015). Under this standard, we will not reverse an evidentiary ruling unless it amounts to a clear error of judgment. *In re Rasbury*, 24 F.3d 159, 168 (11th Cir. 1994).

[4] The Lynches also object to the bankruptcy court's admitting the affidavits of Reyes and Gostebski. Those objections were not preserved for appeal, however, because they were not raised timely or specifically before the bankruptcy court. *See* Fed. R. Evid. 103(a)(1). Even if the Lynches' objections had been preserved, however, we would conclude the bankruptcy court acted within its discretion.

on her experience and a review of records that fell within the business-records exception to the rule against hearsay. *See* Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 803(6). Thus, the bankruptcy court did not abuse its discretion by determining that any statements conveyed from New Century's business records were *admissible* hearsay.[5] *See* Fed. R. Evid. 803(6).

To the extent the Lynches object on the basis that one or more of the original business records reviewed or referenced by Walker was not itself admitted into evidence, they did not preserve an objection based on the so-called "best-evidence rule." *See* Fed. R. Evid. 1002; *see also* Fed. R. Evid. 103(a)(1) (preserving an evidentiary objection requires that the objection be both timely and specific); *Wilson v. Attaway*, 757 F.2d 1227,

[5] We are not persuaded by the Lynches' citation to Florida authorities holding that, under Florida's evidentiary rules, statements based on the contents of business records are inadmissible as hearsay unless the underlying business records are separately entered into evidence. *See, e.g.*, *Heller v. Bank of Am., NA*, 209 So. 3d 641, 645 (Fla. 2d DCA 2017); *Sas v. Fed. Nat'l Mortg. Ass'n*, 112 So. 3d 778, 779–80 (Fla. 2d DCA 2013). Nothing in Federal Rule of Evidence 803(6) suggests the hearsay exception applies to statements made in business records only if the records have been separately admitted into evidence. If a proper foundation has been provided to show that a business's record-keeping practices are sufficiently reliable under Rule 803(6), statements from the business's records are not inadmissible as hearsay—regardless of whether the records are separately admitted into evidence. If, however, a witness testifies about the contents of documents that have not been separately admitted into evidence, that testimony may be excluded under Federal Rule of Evidence 1002, provided that an exception to the so-called "best-evidence rule" does not apply.

1242 (11th Cir. 1985) ("[O]bjections to the admission of evidence . . . are preserved only if they are timely and state the specific ground of objection, if the specific ground was not apparent from the context." (quotations omitted)).[6] Likewise, the Lynches did not preserve objections based on relevance or impermissible legal conclusions purportedly provided in Walker's testimony. The only objection articulated to the bankruptcy court was that Walker's statements were inadmissible hearsay. The bankruptcy court did not abuse its discretion by overruling that objection and admitting the Walker affidavit into the summary judgment record.

The Lynches also did not show that the bankruptcy court failed to consider the evidence they

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[6] Even if a best-evidence objection were preserved, the Lynches have not identified which specific statements in Walker's affidavit seek to *prove the contents* of specific documents that either were not admitted elsewhere into the summary-judgment record or that could not otherwise have been admitted into evidence. *See Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1543 (11th Cir. 1994) ("[T]here is no general rule that proof of a fact will be excluded unless its proponent furnishes the best evidence in his power. Rule 1002 requires production of an original document only when the proponent of the evidence seeks to prove the content of the writing. It does not, however, require production of a document simply because the document contains facts that are also testified to by a witness." (quotations and citations omitted)). Moreover, the Lynches have not demonstrated a legitimate basis for questioning the admissibility of duplicate records under Federal Rule of Evidence 1003. Nor have they demonstrated that records were destroyed in bad faith, such that testimony concerning the contents of those records would not be permitted under Federal Rule of Evidence 1004(a).

submitted. As an initial matter, although the bankruptcy court did not expressly exclude them, the Lynches' communications with Mark Indelicato were offered to prove the truth of a matter asserted by Indelicato in the communications—that records relied upon in Walker's affidavit were destroyed. The communications therefore constituted hearsay, and the Lynches did not provide an applicable hearsay exception. *See* Fed. R. Evid. 801(c), 802. Thus, even if the bankruptcy court did not consider Indelicato's statements, it was not an abuse of discretion.

Likewise, the bankruptcy court did not abuse its discretion in its treatment of the purported expert report provided by Kathleen G. Cully.[7] Cully opined that the Banks' evidence was legally insufficient to establish ownership of the loan under the Uniform Commercial Code. That, however, is a legal conclusion, and "questions of law are not subject to expert testimony." *Commodores Entm't Corp. v. McClary*, 879 F.3d 1114, 1128–29 (11th Cir. 2018). The Lynches point to no *facts* contained in Cully's report on which Cully demonstrated competency to testify for purposes of summary judgment. The bankruptcy court therefore did not abuse its discretion by choosing not to credit Cully's purported expert report.

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[7] Cully's report acknowledged both that she is not licensed in Florida and that her legal opinions were not based on the governing law of Florida. *See* ER 6968 ("My conclusions are based on the standard UCC. . . . As an attorney admitted to practice only in New York, I express no opinion as to Florida law.").

B. Enforceability of the Lien[8]

We now turn to the bankruptcy court's determination that the Banks can enforce both the Note and the Mortgage. The Lynches' overarching argument on this point rests on a flawed legal premise—that a claim must be disallowed (and a corresponding lien extinguished) if a particular creditor cannot prove it owned the claim on the date the bankruptcy petition was filed. Specifically, the Lynches contend that the secured proof of claim *they* filed on behalf of Deutsche must be disallowed because Deutsche cannot prove it held the Note when the Lynches filed their bankruptcy petition in 2012. From that premise, they contend the lien on their property is void under 11 U.S.C. § 506(d).

The Bankruptcy Code does not support the Lynches' position. Under the Code, the term "claim" is defined as either the "right to payment" or the "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment. . . ." 11 U.S.C. § 101(5). The term "creditor" is defined as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." *Id.* at § 101(10)(A). Under these definitions, the claim itself (the right to either payment or an equitable remedy) must exist before the debtor's voluntary petition—not a particular creditor's interest in the claim. A creditor's interest in a claim can be acquired later. Indeed, the Federal Rules of Bankruptcy Procedure specifically contemplate claims being

[8] We review a bankruptcy court's legal conclusions de novo. *In re Int'l Admin. Servs.*, Inc., 408 F.3d at 698.

transferred after a proof of claim has been filed. *See* Fed. R. Bankr. P. 3001(e). Thus, there is no merit to the Lynches' contention that the Banks cannot enforce the Note or the Mortgage if they could not enforce them in 2012.[9]

That leaves only the Lynches' arguments that the summary judgment record does not establish that the Banks are entitled to enforce the Note and the Mortgage under Florida law. We agree with the district court's conclusions and its reasoning on this issue.[10]

II. CONCLUSION

The bankruptcy court did not abuse its discretion by admitting Walker's affidavit. Nor did it err in its treatment of the evidence presented by the Lynches. Based on the summary judgment evidence, the district court correctly affirmed the judgment of the bankruptcy court.

AFFIRMED.

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[9] The Lynches concede as much in their reply brief, choosing instead to focus on their contention that, regardless of when the POA and the Allonge were executed, the Allonge is void because the Banks did not adequately prove a complete chain of effective transfers from New Century to the securitized trust. As noted above, that argument has been waived because it was not first made to the bankruptcy court.

[10] Like the district court, we do not think it is necessary to determine whether the blank stamp was a valid indorsement under Florida law.

United States District Court
for the
Southern District of Florida

Michael D. Lynch and Candence B. Lynch, Appellants v. Deutsche Bank National Trust Company and Ocwen Loan Servicing, LLC, Appellees	)))))))))	Bankruptcy Appeal Case No. 17-22250-Civ-Scola Bankruptcy Court Adv. No. 14-01786

Order Denying Appellants' Motion For Reconsideration

(Filed Jan. 5, 2018)

This matter is before the Court on the Appellants' motion for reconsideration of the Court's order affirming the Bankruptcy Court's order granting the Appellees' motion for summary judgment. (Mot. for Rehearing, ECF No. 25.) The Appellants bring their motion under Federal Rule of Civil Procedure 60(b). (Mot. 2; Reply 3-4, ECF No. 27.) Rule 60(b) permits a court to relieve a party from a final judgment or order for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial; (3) fraud, misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; or (6) any

other reason justifying relief from the operation of the judgment.

Reconsideration is appropriate only in very limited circumstances, such as where "the Court has patently misunderstood a party, where there is an intervening change in controlling law or the facts of a case, or where there is manifest injustice." *See Vila v. Padron*, No. 04-20520, 2005 WL 6104075, at *1 (S.D. Fla. Mar. 31, 2005) (Altonaga, J.). "Such problems rarely arise and the motion to reconsider should be equally rare." *See id.* (citation omitted). In order to obtain reconsideration, "the party must do more than simply restate its previous arguments, and any arguments the party failed to raise in the earlier motion will be deemed waived." *See id.*; *Z.K. Marine Inc. v. M/V Archigetis*, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992) (Hoeveler, J.) ("[A] motion for reconsideration should not be used as a vehicle to present authorities available at the time of the first decision or to reiterate arguments previously made.").

The Lynches make two arguments in support of their motion. First, the Lynches argue that the Court erroneously concluded that the allonge executed by Deutsche Bank on October 20, 2016 (the "Allonge") was valid, even though it was executed after the date of the Lynches' bankruptcy petition. (Mot. at 3-9.) In rejecting the Lynches' argument that the Allonge was invalid, the Court explained that:

> The Appellants have directed the Court to no case law or statutory requirement that

> supports this argument. To the contrary, courts have held that the question when determining whether a party is entitled to enforce a note in bankruptcy proceedings is not when the note was indorsed, but whether the party seeking to enforce the note is now the holder of the note. *In re Wilson*, 442 B.R. 10, 15 (Bankr. D. Mass. 2010) (holding that the question of the timing of an indorsement did not create a genuine issue of material fact because "[r]egardless of when the note was indorsed, it is uncontroverted that it is *now* indorsed and in the possession of Deutsche Bank"); *In re Hooper*, No. CC-11-1269-PaMkCa, 2012 WL 603766, *7 (B.A.P. 9th Cir. Feb. 14, 2012) (affirming bankruptcy court's ruling that the timing of the transfer of a note was not important because nothing in the California Commercial Code requires proof of the date of transfer as a condition to enforcing a note). In other words, the ultimate question is who the debtor actually owes. *In re Wilson*, 442 B.R. at 15 n.5.

(Order on Appeal 8-9, ECF No. 24.) The Lynches assert that they did in fact cite case law supporting their position in the briefs they submitted to the Bankruptcy Court, and that the Appellees referenced this case law in a brief submitted to this Court. (Mot. at 3.)

The Lynches are correct: the Appellees did state in a footnote in their initial brief that the Lynches had cited a case in their briefing before the Bankruptcy Court that reached a holding contrary to *In re Wilson* and *In re Hooper*, and provided a citation to the case.

(Appellees' Br. 44 n.9, ECF No. 13.) Thus, the case law was brought to the Court's attention and reconsideration is not appropriate. Moreover, the case, *In re Parker*, 445 B.R. 301, 305-06 (Bankr. D. Vt. 2011), cited to *In re Wilson* and *In re Hooper*, but reached a different conclusion in light of several Vermont state court opinions and the Vermont Rules of Civil Procedure. Thus, the case was determined on the basis of Vermont law and does not demonstrate that the Court relied on *In re Wilson* and *In re Hooper* in error.

The Lynches' motion for reconsideration also cites to case law from Florida concerning the standard for establishing standing to file a foreclosure complaint. (Mot. at 6-7.) However, this is not a foreclosure case, and the Lynches did not previously cite to this case law, which was available to them during the appeal. Thus, reconsideration on this basis is not appropriate either. The Court notes that even if it were to grant reconsideration and find that the Allonge was invalid, the Appellants would still not be entitled to judgment in their favor because the Court's Order affirmed the Bankruptcy Court's alternative holding that, irrespective of the Allonge, the Appellees are entitled to enforce the note as nonholders in possession with the rights of holders. (Order 9-11.)

Second, the Lynches challenge the Court's ruling that the affidavits presented by the Appellees to the Bankruptcy Court in support of their motion for summary judgment met the requirements of Federal Rule of Civil Procedure 56(c) and were properly considered by the Bankruptcy Court. (Mot. at 9-12.) However, the

motion for reconsideration simply restates arguments that the Lynches previously made, and does not demonstrate that reconsideration is warranted.

Accordingly, the Court **denies** the motion for reconsideration (**ECF No. 25**).

Done and ordered in chambers at Miami, Florida on January 5, 2018.

/s/ Robert N. Scola, Jr.
Robert N. Scola, Jr.
United States District Judge

United States District Court
for the
Southern District of Florida

Michael D. Lynch and Candence B. Lynch, Appellants	)	Bankruptcy Appeal Case No. 17-22250-Civ-Scola
v.	)	
Deutsche Bank National Trust Company and Ocwen Loan Servicing, LLC, Appellees	)	Bankruptcy Court Adv. No. 14-01786

Order on Appeal

(Filed Nov. 9, 2017)

This matter is before the Court on appeal of the Bankruptcy Court's order granting the Appellees' motion for summary judgment and denying the Appellants' cross-motion for summary judgment. After reviewing the parties' briefs, the record on appeal, and the relevant legal authorities, the Court **affirms** the Bankruptcy Court's entry of summary judgment in favor of the Appellees.

1. Background

On June 2, 2004, Michael Lynch executed a note in favor of New Century Mortgage Corporation ("New Century"), which was secured by a mortgage on the Lynches' home. (Appellees' Mot. for Summ. J., R. at 48,

ECF No. 6-4.)[1] New Century subsequently sold the loan to NC Capital Corporation, which sold it to New Century Mortgage Securities, Inc. ("NC Mortgage Securities"). (*Id.*) On August 4, 2004, pursuant to a Pooling and Servicing Agreement, NC Mortgage Securities transferred the loan to the New Century Home Equity Loan Trust, Series 2004-A (the "Securitized Trust") for the benefit of the certificate holders of the Securitized Trust. (*Id.*) Defendant Deutsche Bank National Trust Company ("Deutsche Bank") is the trustee and custodian for the Securitized Trust. (*Id.* at 49.)

On April 2, 2007, New Century, NC Capital Corporation, and certain of their affiliates (collectively, the "New Century Debtors") filed bankruptcy petitions. (*Id.*) On November 20, 2009, the Delaware Bankruptcy Court confirmed a modified and amended bankruptcy plan filed by the New Century Debtors. (*Id.* at 50.) The plan ratified and confirmed the New Century Liquidation Trust Agreement, formed the New Century Liquidation Trust, and appointed Alan Jacobs as the Liquidation Trustee. (*Id.*) The Delaware Bankruptcy Court's order provided that the New Century Liquidation Trust shall execute, upon written request, any powers of attorney necessary to fully effectuate the transfer of mortgage loans purchased from the New Century Debtors, including any required mortgage assignments. (*Id.* at 51.)

[1] Citations to "R." will refer to the Record on Appeal, which appears on the docket as ECF Number 6.

On July 24, 2012, Michael and Candence Lynch filed a Chapter 7 bankruptcy petition. (*Id.*) On their bankruptcy schedules, they listed GMAC, the entity that previously serviced their loan for Deutsche Bank, as a first-lien secured creditor. (*Id.* at 47, 52.) On that same date, the Lynches filed a motion seeking to strip a second lien on their home held by SunTrust Bank, asserting that GMAC's lien was senior in priority. (*Id.* at 52.) On February 11, 2013, the Bankruptcy Court granted the motion. (*Id.*) Approximately two weeks later, the Lynches filed a motion to compel, asserting for the first time that the note and mortgage, which they thought were owned by GMAC, were not properly securitized or assigned to the Securitized Trust and/or GMAC. (*Id.*)

On October 23, 2014, the Lynches, proceeding pro se, filed an adversary proceeding in the Bankruptcy Court against Deutsche Bank and Ocwen Loan Servicing, LLC ("Ocwen"), the current servicer of their loan, challenging Deutsche Bank's claim that it holds the note for the Lynches' mortgage. (Order on Mot. for Summ. J. at 2-3, ECF No. 1.) Specifically, the Lynches assert that Deutsche Bank is not the holder of the note because a blank indorsement stamp on the signature page of the note does not constitute a valid indorsement under Florida law. (*Id.* at 2.) The Complaint seeks a declaratory judgment that the Appellees are not the holder of the note, that the Appellees are not a non-holder in possession of the note with the rights of a holder, and that the Appellees' proof of claim in the Lynches' bankruptcy action is unenforceable. (Compl.,

R. at 1-14, ECF No. 6-4.) In addition, the Lynches seek compensatory damages for the Appellees' alleged violation of the discharge order in their bankruptcy case. (*Id.*)

The Bankruptcy Court granted the Appellees' motion to dismiss the Complaint, finding that the blank indorsement stamp constituted a signature under Florida law and was therefore a valid indorsement. (R. at 1-13, ECF No. 6-11.) This Court reversed the Bankruptcy Court's decision, finding that the blank indorsement stamp did not constitute a signature under Florida law without evidence as to the intent of the person that placed the stamp on the note. (R. at 20-23, ECF No. 6-4.)

On July 7, 2016, the New Century Liquidation Trust, as successor to New Century, executed a limited power of attorney appointing Deutsche Bank as attorney-in-fact for New Century with respect to the mortgage loans that were originated by New Century and transferred to the Securitized Trust. (*Id.* at 53.) On October 20, 2016, pursuant to the limited power of attorney, Deutsche Bank executed an allonge making the Lynches' note payable "to the order of Deutsche Bank National Trust Company, as Trustee for New Century Home Equity Loan Trust, Series 2004-A" (the "Allonge"). (*Id.* at 54.)

The parties subsequently conducted discovery and filed cross-motions for summary judgment. (Order on Mot. for Summ. J. at 3.) After conducting a hearing on the cross-motions for summary judgment, the

Bankruptcy Court issued an order holding that: (1) the blank indorsement stamp constitutes a signature and an indorsement under Florida law; (2) the Allonge constitutes a signature and an indorsement under Florida law; (3) since Ocwen is in possession of the original note and the Allonge, it is a holder under Florida law and is entitled to enforce the note; and (4) in the alternative, the Appellees are entitled to enforce the note as non-holders in possession of the note with the rights of holders. Accordingly, the Bankruptcy Court granted the Appellees' motion for summary judgment and denied the Appellants' motion for summary judgment. The Appellants have appealed the Bankruptcy Court's decision.

2. Legal Standard

This Court has jurisdiction over appeals of a final judgment in a bankruptcy adversary proceeding. 28 U.S.C. § 158(a)(1); *In re Donovan*, 532 F.3d 1134, 1136 (11th Cir. 2008). A district court reviews a bankruptcy court's legal conclusions de novo and its factual findings for clear error. *In re Globe Mfg. Corp.*, 567 F.3d 1291, 1296 (11th Cir. 2009); *In re Club Assocs.*, 951 F.2d 1223, 1228–29 (11th Cir. 1992).

3. Analysis

The Lynches raise seven issues on appeal. (Appellants' Br. 16, ECF No. 10.) The Court will address each in turn.

A. Whether the Bankruptcy Court Properly Considered the Walker Affidavit

The Lynches first argue that the Bankruptcy Court erred in ruling that the affidavit of Donna Walker, which was submitted by the Appellees as an exhibit in support of their motion for summary judgment, was admissible. (Appellants' Br. 25-28.) Walker was an employee of New Century prior to its bankruptcy, and is currently the sole officer and director of New Century and NC Capital Corporation. (Walker Aff. ¶ 2, R. at 65, ECF No. 6-4.) Walker's affidavit attests, among other things, to the fact that the New Century Liquidation Trust executed a limited power of attorney for the purpose of executing the documentation necessary to remedy any errors or deficiencies in the documentation related to the transfer of mortgage loans from New Century to the Securitized Trust. (*Id.* ¶ 17, R. at 69-70.) A copy of the power of attorney is attached to Walker's affidavit. (*Id.*; R. at 74-75.)

The Lynches objected to Walker's affidavit as hearsay. (Order on Mot. for Summ. J. 7.) The Bankruptcy Court overruled the objection, holding that the affidavit fell "squarely within the 'business records' exception to hearsay under Federal Rule of Evidence 803(6)," and was valid and reliable. (*Id.* at 7-8.) The Bankruptcy Court noted that in a similar proceeding filed against New Century concerning a mortgage loan that was transferred to a different securitized trust, the borrowers also argued that an affidavit from Walker was hearsay. (*Id.* at 8 n.5 (citing *White v. New Century*

TRS Holdings, Inc., et. al., 502 B.R. 416 (Bankr. D. Del. 2013)).) In that case, the Delaware Bankruptcy Court concluded that,

> Ms. Walker's experience with the Debtors and knowledge of their record-keeping procedures makes her at least a qualified witness (if not a custodian of records) whose statements in support of the Trustee's Motion to Dismiss were reliable. Moreover, her statements are consistent with the Trustee's evidence throughout this bankruptcy case about the Debtors' books and records and the transfers of mortgage loans.

White, 502 B.R. at 426 n.11.

In challenging the Bankruptcy Court's ruling that Walker's affidavit is admissible, the Lynches argue that, "[w]hile Ms. Walker might be one of several custodians for the [New Century] and NC Capital business records, her personal knowledge of and competence to testify about the records, she alleges to have reviewed, is not evidenced in the affidavit." (Appellants' Br. 26.) Affidavits used to support a motion for summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

Walker's affidavit states that she has custody and control of the records, that the records were made at or near the time of the subject events, that the records were created by a person with knowledge of the events,

and that the records were kept in the ordinary course of business. (Walker Aff. ¶ 4, R. at 65-66.) In addition, Walker's affidavit states that she is familiar with the documents discussed in the affidavit, and that the affidavit was given "on the basis of my personal knowledge and review of the records. . . ." (*Id.*) Thus, the affidavit meets the requirements of Rule 56(c)(4). *See U.S. v. Kneapler*, 733 F.Supp.2d 1308, 1319 (S.D. Fla. 2010) (Ungaro, J.) (citations omitted) (holding that the personal knowledge required of affidavits submitted in support of motions for summary judgment "can come from a review of the contents of business files and records."); *Flores v. I.C. Sys., Inc.*, No. 13-21352, 2014 WL 1379046, at *2 (S.D. Fla. April 8, 2014) (Altonaga, J.) (holding that declaration submitted in support of motion for summary judgment was not hearsay because a "corporate representative's testimony is sufficient to support the trustworthiness of the records at issue and to prove that they were prepared in the usual course of business," and the plaintiff submitted no evidence to challenge the trustworthiness of the records).

The Lynches also argue that Walker's affidavit is not admissible because it "does not identify or describe the records [reviewed by Walker] and most importantly copies of the records are not attached to the affidavit." (Appellants' Br. 26.) However, the Lynches have not identified any requirement that copies of all business records reviewed by an affiant be attached to an affidavit, and the Court is not aware of any.

Next, the Lynches argue that Walker's affidavit is unreliable because she signed the affidavit on June 24,

2016, but the power of attorney about which Walker attested is dated July 7, 2016. (Appellants' Br. 28 fn. 5.) Thus, the Lynches argue that Walker could not have reviewed the power of attorney before signing the affidavit. (Appellants' Reply 11, ECF No. 14.) However, the Lynches did not raise this argument before the Bankruptcy Court, and therefore it is waived. *In re Biscayne Park, LLC*, No. 12-20150, 2012 WL 4468346, at *7 (S.D. Fla. Sept. 26, 2012) (Marra, J.) (citing *In re DeGennaro*, 315 F. App'x. 817, 819 (11th Cir. 2009)) (an appellant cannot raise for the first time on appeal arguments that were not presented to the bankruptcy court). Moreover, the Appellees submitted an affidavit from Ronaldo Reyes, a Vice President for Deutsche Bank, in support of their motion for summary judgment that also attested to the power of attorney and attached a copy as an exhibit. (Reyes Aff. ¶¶ 7-10, R. at 78, ECF No. 6-4.) Therefore, the Appellees have sufficiently authenticated the power of attorney, and the fact that there is a date discrepancy in Walker's affidavit does not on its own render the affidavit unreliable in its entirety.

Finally, the Lynches argue that their response to the Appellees' Motion for Summary Judgment "presents affirmative evidence of the material facts that Defendants do not possess the records, and the New Century Liquidating Trustee completed the destruction of all records in possession of the Trust as of September 30, 2016." (*Id.* at 27.) The response alleges that the attorney for the Liquidating Trustee, Mark S. Indelicato, advised Michael Lynch by email that "by

order of the Bankruptcy Court all hard copy records and data had been destroyed as of September 30, 2016." (Resp. to Mot. for Summ. J., R. at 10, ECF No. 6-5.) In support of this allegation, the Appellants provided a declaration from Michael Lynch and an email from Indelicato to Lynch. (*Id.*) The Appellees argue that the description of the conversation between Michael Lynch and Indelicato in Lynch's declaration and the Indelicato email are inadmissible hearsay. (Appellees' Br. 36.)

The Court agrees with the Bankruptcy Court's finding that "[t]he Lynch Affidavit does not contradict any material fact in the Walker Affidavit. . . ." (Order on Mot. for Summ. J. 5.) Even if the evidence presented by the Lynches was admissible, the destruction of the records would not demonstrate that Walker's affidavit is unreliable because the affidavit is dated approximately three months prior to the date that destruction of the records was allegedly completed. (Walker Aff., R. at 71, ECF No. 6-4.) The Lynches have presented no evidence that the records were unavailable for Walker to review during the preparation of her affidavit.

Accordingly, the Court affirms the Bankruptcy Court's conclusion that Walker's affidavit is valid and reliable.

B. Whether the Blank Indorsement and the Allonge are Valid Indorsements Under Florida Law

The Lynches assert that the Bankruptcy Court erred in concluding that the blank indorsement stamp and the Allonge are valid indorsements under Florida law. (Appellants' Br. 28-31, 41-42.) Under Florida law, a person is entitled to enforce an instrument if they are: (1) the holder of the instrument; (2) a nonholder of the instrument with the rights of a holder; or (3) a person not in possession of the instrument who is entitled to enforce the instrument. Fla. Stat. § 673.3011. Florida law specifies that "[a] person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument." *Id.*

In order to transfer possession of a negotiable instrument, the instrument must be indorsed by the holder. *Id.* §§ 673.2011, 673.2041(1). An indorsement is "a signature . . . that alone or accompanied by other words is made on an instrument for the purpose of negotiating the instrument. . . ." *Id.* § 673.2041. The term "signed" means "bearing any symbol executed or adopted by a party with present intention to adopt or accept a writing." *Id.* § 671.201(40). If an indorsement identifies a person to whom it makes the instrument payable, it is a "special indorsement." *Id.* § 673.2051(1). If an indorsement does not identify the person to whom it makes the instrument payable, it is a "blank indorsement." *Id.* § 673.2051(2). A blank indorsement "becomes payable to bearer and may be negotiated by

transfer of possession alone until specially indorsed." *Id.*

An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving the transferee the right to enforce the instrument. *Id.* § 673.2031(1). The transfer of an instrument "vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course," unless the transferee engaged in fraud or illegality. *Id.* § 673.2031(2).

In support of their motion for summary judgment, the Appellees submitted a copy of the Lynches' note bearing the following stamp:

Pay to the order of, without recourse

New Century Mortgage Corporation

By:
Name: Magda Villanueva
Title: A.V.P. / Shipping Manager

(R. at 317, ECF No. 6-4.) The Bankruptcy Court found that the blank indorsement stamp was affixed by New Century with the intent of accepting and/or authenticating the language therein. (Order on Mot. for Summ. J. 6.) At the hearing on the cross-motions for summary judgment, the Bankruptcy Court stated that this conclusion was based on the fact that "the obtaining of the allonge apparently establishes that the intent was to

transfer this note." (Tr. at 34:23 – 35:2, R. at 162-63, ECF No. 6-7.)

The Court harbors doubts that the obtaining of the Allonge is sufficient to establish that the person who affixed the blank indorsement stamp to the note had the present intention to adopt or accept the writing therein. Moreover, although the Appellees contend that the affidavits that they submitted in support of their motion for summary judgment establish that the blank indorsement "was intentionally placed on the Note for purposes of the transfer to the Securitized Trust," none of the affidavits actually attest to this fact. However, the Court need not determine whether the Bankruptcy Court erred in concluding that the blank stamp is a valid indorsement because the Court agrees with the Bankruptcy Court that the Allonge is a valid indorsement.

The Allonge states that it is intended to be made a permanent part of the Note, it is payable to Deutsche Bank as the Liquidating Trustee, and it is signed by Deutsche Bank Vice President Ronaldo Reyes pursuant to the limited power of attorney executed by the New Century Liquidating Trust. (Allonge, R. at 710, ECF No. 6-5.) Thus, the Allonge is a special indorsement under Florida law. *See* Fla. Stat. § 673.2051(1). Under Florida law, "[a]n instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." *Id.* § 673.2031(1). At the hearing on the cross-motions for summary judgment, counsel for the Appellees

produced the original note and the original Allonge for the Court's and the Appellees' inspection. (Order on Mot. for Summ. J. 6.) Since the Allonge is a special indorsement and the Appellants are in possession of the original note and the Allonge, the Bankruptcy Court properly concluded that the Appellees are holders of the note. (*Id.*)

The Appellants argue that the power of attorney pursuant to which the Allonge was executed is defective because New Century no longer owned the loan at the time the power of attorney was executed. (Appellants' Br. 41.) The Appellants did not present this argument to the Bankruptcy Court, and therefore it is waived. Moreover, the argument fails on the merits because Florida Statute § 673.2031(3) specifically provides that:

> [I]f an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

The Delaware Bankruptcy Court authorized the New Century Liquidation Trust to execute any powers of attorney necessary to fully effectuate the transfer of mortgage loans purchased from the New Century Debtors, including any required assignments of mortgage. Therefore, the Allonge is not invalid simply because New Century no longer owned the loan at the time the power of attorney was executed.

The Appellants also assert that the New Century Liquidating Trust closed when the New Century Debtors' bankruptcy case was terminated in August of 2016, and that any acts taken pursuant to the power of attorney after August 2016 are void. (Appellants' Br. 42.) This is yet another argument that the Appellants have waived because they failed to present it to the Bankruptcy Court. Moreover, the argument fails on the merits because the order closing the New Century Debtors' bankruptcy case extended the term of the New Century Liquidating Trust until the earlier of the finalization of the Liquidating Trustee's liquidation of the assets of the trust or December 31, 2017, and specifically provided that "any Power of Attorney executed by the Debtors or the Trustee prior to the date of this Order shall remain in full force and effect." *In re New Century TRS Holdings, Inc., et. al.*, No. 07-10416, D.E. 11535 at 5-6 (Del. Bankr. Ct. Aug. 25, 2016). The power of attorney at issue here was executed on July 7, 2016, prior to the date of the order. (R. at 74-75, ECF No. 6-4.) Therefore, any acts taken pursuant to the power of attorney were valid even after the bankruptcy case closed.

Finally, the Appellants argue that the Allonge is invalid because it was executed after the date that they filed their bankruptcy petition. (Appellants' Br. 42.) The Appellants have directed the Court to no case law or statutory requirement that supports this argument. To the contrary, courts have held that the question when determining whether a party is entitled to enforce a note in bankruptcy proceedings is not when the

note was indorsed, but whether the party seeking to enforce the note is now the holder of the note. *In re Wilson*, 442 B.R. 10, 15 (Bankr. D. Mass. 2010) (holding that the question of the timing of an indorsement did not create a genuine issue of material fact because "[r]egardless of when the note was indorsed, it is uncontroverted that it is *now* indorsed and in the possession of Deutsche Bank"); *In re Hooper*, No. CC-11-1269-PaMkCa, 2012 WL 603766, *7 (B.A.P. 9th Cir. Feb. 14, 2012) (affirming bankruptcy court's ruling that the timing of the transfer of a note was not important because nothing in the California Commercial Code requires proof of the date of transfer as a condition to enforcing a note). In other words, the ultimate question is who the debtor actually owes. *In re Wilson*, 442 B.R. at 15 n.5.

Accordingly, the Court affirms the Bankruptcy Court's conclusion that the Allonge constitutes a valid indorsement. Therefore, the Court need not address the Appellants' various arguments that the Bankruptcy Court erred in concluding that the blank indorsement stamp constitutes a valid indorsement under Florida law.

C. Whether the Allonge is Void Under New York Law

The Appellants also argue that the Allonge is void under New York law because they allege that it violates the Pooling and Servicing Agreement pursuant to which the Lynches' loan was transferred to the

Securitized Trust. (Appellants' Br. 43-45.) However, district courts within the Eleventh Circuit as well as the New York Appellate Division have held that a mortgagor whose loan is owned by a trust does not have standing to challenge a bank's status as assignee of the mortgage based on noncompliance with a pooling and servicing agreement. *See, e.g., Rhodes v. JPMorgan Chase Bank, N.A.*, No. 12-80368, 2012 WL 5411062, at *4 (S.D. Fla. Nov. 6, 2012) (Marra, J.) (citing *In re Canellas*, No. 6:11-cv-1247-Orl-28DAB, 2012 WL 868772, at *3 (M.D. Fla. Mar. 14, 2012)) (additional citations omitted); *Wells Fargo Bank, N.A. v. Erobobo*, 127 A.D.3d 1176, 1178 (N.Y. App. Div. 2015) (citing *Rajamin v. Deutsche Bank Natl. Trust Co.*, 757 F.3d 79, 86-87 (2nd Cir. 2014)) (additional citations omitted). Based on this case law, the Court finds that the Appellants do not have standing to challenge the Appellees' status as holders of the note based on any alleged noncompliance with the Pooling and Servicing Agreement.

D. Whether the Defendants Are Entitled to Enforce the Note as Nonholders in Possession with the Right of the Holder

As an alternative to its conclusion that the Appellees are holders of the note, the Bankruptcy Court concluded that the Appellees are entitled to enforce the note as nonholders in possession with the rights of holders. (Order on Mot. for Summ. J. 9.) Under Florida law, a "nonholder in possession of the instrument who has the rights of a holder" is entitled to enforce an

instrument. Fla. Stat. § 673.3011(2). The Uniform Commercial Code ("UCC") Comment to this provision[2] provides that "[a] nonholder in possession of an instrument includes a person that acquired rights of a holder by subrogation or under Section 3-203(a)." Fla. Stat. Ann. § 673.3011, UCC cmt. (West). Florida has codified UCC Section 3-203(a) as Florida Statute § 673.2031(1), which provides that "[a]n instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." Florida law also provides that "[t]ransfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course. . . ." Fla. Stat. § 673.2031(2). The UCC Comments specify that "[i]f the transferee is not a holder because the transferor did not indorse, the transferee is nevertheless a person entitled to enforce the instrument . . . if the transferor was a holder at the time of transfer. Although the transferee is not a holder . . . the transferee obtained the rights of the transferor as holder." Fla. Stat. Ann. § 673.2031, UCC cmt.2 (West).

The Bankruptcy Court found that the undisputed evidence showed that New Century was the holder of the note, that the note was transferred to the

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[2] Florida courts look to UCC Comments in interpreting the corresponding provisions of Florida's Uniform Commercial Code. *See, e.g.*, *Rivera v. Wells Fargo Bank, N.A.*, 189 So.3d 323, 328 (Fla. 4th Dist. Ct. App. 2016) (looking to UCC Comment in interpreting provision of Florida's Uniform Commercial Code).

Securitized Trust, and that, accordingly, the Securitized Trust acquired the same right to enforce the note as that of New Century. (Order on Mot. for Summ. J. 9-10.) The Appellants argue that a nonholder in possession must provide evidence of the transaction(s) through which it acquired the note, and that the Appellees provided no such evidence. (Appellants' Br. 32-34.) However, Walker's affidavit attests to the fact that New Century sold the Lynches' loan to NC Capital Corporation, which sold the loan to New Century Mortgage Securities, which transferred the loan to the Securitized Trust. (Walker Aff. ¶ 7, R. at 66, ECF No. 6-4.) In addition, Reyes's affidavit and the affidavit of Nicole Gostebski, a Senior Loan Analyst for Ocwen, state that the Lynches' loan was included in the Securitized Trust. (Gostebski Aff. ¶10, R. at 342, ECF No. 6-4; Reyes Aff. ¶ 4, *id.* at 77.) Attached to Reyes's affidavit is an extraction from the mortgage loan schedule for the Pooling and Servicing Agreement that shows that the Lynch's loan was included in the Securitized Trust. (Reyes Aff. Ex. 2, *id.* at 310-313.)

The Appellants argue that the mortgage loan schedule is untrustworthy because the Appellants have found satisfactions of mortgage reflecting that New Century was the holder of other mortgages included on the mortgage loan schedule after those mortgages were purportedly transferred to the Securitized Trust. (Appellants' Br. 35-36.) The Appellees argued to the Bankruptcy Court that the mortgage satisfactions submitted by the Appellants were inadmissible for lack of foundation and proper authentication.

(Appellees' Br. 57.) In support of their appeal, the Appellants have submitted certified copies of ten of the mortgage satisfactions. (*Id.* at 59-105.) However, the Court cannot consider this evidence because it was not presented to the Bankruptcy Court.

The Appellants also rely on the report of their expert, Kathleen Cully, to establish that the Appellees cannot prove the chain of transactions from New Century to the Securitized Trust. (Appellants' Br. 32-34.) The Bankruptcy Court found that Cully's report does not attest to any issue of material fact. (Order on Mot. for Summ. J. 5.) Cully opined that due to the recency of the Allonge, "as a technical matter the Loan neither has been transferred into the Securitized Trust nor can be, as no Mortgage Loans (as defined in the [Pooling and Servicing Agreement]) could be accepted into the Securitized Trust after August 4, 2006. (Cully R., R. at 129, ECF No. 6-5.) In addition, Cully opines that there is no record of the transfer of the loan from New Century to NC Capital Corporation, and no record of a transfer from NC Capital Corporation to NC Mortgage Securities, other than the testimony in the affidavits provided by the Appellees. (*Id.* at 131-132.)

The Walker, Gostebski, and Reyes affidavits sufficiently establish the chain of transactions through which the Appellees acquired the note. The Appellants again raise arguments concerning the reliability of the affidavits submitted by the Appellees, but all three of the affidavits meet the requirements of Rule 56(c)(4). Moreover, the Appellants have provided no evidence to dispute the facts set forth in the affidavits. Therefore,

the Court affirms the Bankruptcy Court's holding that the Appellees are entitled to enforce the note as non-holders in possession with the rights of holders.

E. Whether Appellees are in Possession of the Original Note

The Appellees next argue that the Bankruptcy Court erred in finding that Ocwen is in possession of the note because they have consistently disputed that the Appellees possess the original note. (Appellants' Br. 46.) The only argument that the Appellants make to dispute this finding is that the affidavits produced by the Appellees are inadmissible hearsay. (Appellants' Br. 46-47.) As discussed above, the affidavits meet the requirements of Rule 56(c)(4), and the Bankruptcy Court properly considered the affidavits.

Reyes's affidavit specifically states that on June 14, 2004, Deutsche Bank received the original note for the Lynch's loan. (Reyes Aff. ¶ 5, R. at 77, ECF No. 6-4.) In addition, Gostebski's affidavit states that Ocwen currently has possession of the original note. (Gostebski Aff. ¶ 12, R. at 343, ECF No. 6-4.) Copies of the note are attached to both Reyes's and Gostebski's affidavits. (R. at 315-317, 703-705, ECF No. 6-4.) Moreover, the Appellees produced the original note at the hearing on the cross-motions for summary judgment. (Order on Mot. for Summ. J. 6.) Michael Lynch declined to examine the document and stated, "I concede that I cannot prove that it's not the original." (Tr. 20:9-15, R. at 148, ECF No. 6-7.) The Appellants now argue that

they dispute that the Appellees possess the original document and that whether the Appellees possess the original note remains an "unresolved material fact." (Appellants' Br. 46-47.) However, this argument relies on a fundamental misunderstanding of the summary judgment standard.

At the summary judgment stage, "once the moving party has met its burden of showing a basis for the motion, the nonmoving party is required to 'go beyond the pleadings' and present competent evidence designating 'specific facts showing that there is a genuine issue for trial.'" *United States v. $183,791.00*, 391 F. App'x 791, 794 (11th Cir. 2010) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). The nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but [instead] must set forth specific facts showing that there is a genuine issue for trial." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (citation omitted). Thus, in the face of the Reyes and Gostebski affidavits and the production of the original note at the hearing, the Appellants were required to do more than simply continue to deny that the Appellees possess the original note – they were required to present evidence to support their denial. They conceded that they could not do so. Therefore, the Bankruptcy Court did not err in finding that the Appellees are in possession of the original note.

F. Whether the Appellants' Cross-Motion for Summary Judgment Should Be Granted

Finally, the Appellants argue that their cross-motion for summary judgment "contains affirmative evidence which is uncontroverted by the Defendants with any affirmative evidence in opposition to a material fact. . . ." (Appellants' Br. at 47-54.) In support of this argument, the Appellants rely on the same arguments that the Court has already discussed and rejected. These arguments include that Walker's affidavit is hearsay and should be stricken, that the blank indorsement is not a valid indorsement under Florida law, that the Appellees are not a holder of the note under Florida law, and that the Appellees cannot prove an unbroken chain of transfers of the note from New Century to the Securitized Trust. (*Id.*) The Court has reviewed the Appellants' Cross Motion for Summary Judgment (R. at 1, ECF No. 6-7), and it sets forth no evidence that is "uncontroverted by the Defendants" or establishes that the Appellants should be granted summary judgment.

4. Conclusion

Count One of the Complaint seeks a declaration that the Appellees are not the holder of the note. As set forth above, the Court affirms the Bankruptcy Court's conclusion that the Allonge is a valid indorsement under Florida law and that the Ocwen is a holder in possession of the note. Count Two seeks a declaration that the Appellees are not a nonholder in possession with

the rights of a holder. As set forth above, the Court affirms the Bankruptcy Court's conclusion that Count Two is moot in light of its holding that the Appellees are holders in possession of the note, and that, in the alternative, the Appellees are entitled to enforce the note as non-holders in possession with the rights of a holder. Counts Three and Four of the Complaint depend on a finding that the Appellees' proof of claim is unenforceable. Since the Court has affirmed the Bankruptcy Court's conclusion that the Appellees are holders in possession of the note and are entitled to enforce it, the Court also affirms the Bankruptcy Court's grant of summary judgment to the Appellees on Counts Three and Four of the Complaint.

Accordingly, the Court **affirms** the Bankruptcy Court's Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Cross-Motion for Summary Judgment. The oral argument scheduled for November 17, 2017 is hereby cancelled. The Court directs the Clerk to **close** this case.

Done and ordered at Miami, Florida on November 9, 2017.

/s/ Robert N. Scola, Jr.
Robert N. Scola, Jr.
United States District Judge

[SEAL]

ORDERED in the Southern District of Florida on June 8, 2017.

/s/ A. Jay Cristol
A. Jay Cristol, Judge
United States Bankruptcy Court

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

In re: **Michael D. Lynch and Candence B. Lynch,** **Debtors.**	)	**Case No. 12-27731-BKC-AJC** **Chapter 7**
Michael D. Lynch and Candence B. Lynch, **Plaintiffs,** **v.** **Ocwen Loan Servicing, LLC, et al.** **Defendants.**	)	**Adv. No. 14-1786-BKC-AJC-A**

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court for hearing on April 13, 2017 upon the cross-motions for summary judgment filed by the parties herein. Defendants Ocwen Loan Servicing, LLC ("Ocwen") and Deutsche Bank National Trust Company, as Trustee for New Century Home Equity Loan Trust, Series 2004-A Asset Backed Pass-Through Certificates, Series 2004-A ("Deutsche Bank" and, together with Ocwen, the "Defendants") filed a *Motion for Summary Judgment and Incorporated Memorandum of Law* (Doc. No. 101) (the "Ocwen MSJ"); and Michael D. and Candence B. Lynch (together, the "Plaintiffs") filed a *Cross Motion for Summary Judgment and Incorporated Memorandum of Law* (Doc. No. 113) (the "Lynch MSJ"). Plaintiffs filed a *Response in Opposition to Defendants' Motion for Summary Judgment and Incorporated Memorandum of Law* (Doc. No. 107) and Defendants filed a *Response in Opposition to Plaintiffs' Motion for Summary Judgment* (Doc. No. 120). Immediately before the April 13, 2017 hearing, Plaintiffs filed their *Reply to Defendants' Response in Opposition to Plaintiffs' Cross-Motion for Summary Judgment* (Doc. No. 124). At the hearing, Defendants were represented by Glenn E. Glover, Esq. and T. Parker Griffin, Jr., Esq. Michael D. Lynch represented the Plaintiffs, *pro se*.

I. Summary of Plaintiffs' Complaint

As background, Plaintiffs' *Complaint* (Doc. No. 1) relates to a *Promissory Note* dated June 2, 2004 executed by Mr. Lynch in favor of New Century Mortgage Corporation ("New Century") in the principal amount of $224,000 (the "Note" or "Loan"), and a *Mortgage* securing the Note executed by Plaintiffs in favor of New Century and recorded in Miami-Dade County, Florida on June 21, 2004, at Book 22409, Page 3469 (the "Mortgage"). Specifically, Plaintiffs assert that a blank indorsement stamp from New Century located on the last and signature page of the Note (the "Blank Indorsement")[1] was not "signed" by New Century as required by Florida law and therefore did not constitute a valid "indorsement" under Florida law. Plaintiffs' *Complaint* thus asserts that Defendants cannot enforce the Note and Mortgage, and seeks a judgment on four (4) theories: (1) that Deutsche Bank is not the holder of the Note under Florida law (Count I); (2) that Deutsche Bank is not a non-holder in possession of the Note with the rights of a holder under Florida law (Count II); (3) that Defendants' claim in the Plaintiffs' bankruptcy case (which was filed by Plaintiffs on behalf of Defendants as Claim No. 12-1) should be disallowed under 11 U.S.C. § 502(b)(1) (Count III); and (4) that Deutsche Bank violated the discharge injunction by representing itself as a secured creditor and

[1] A copy of the Note containing the Blank Indorsement is attached as **Exhibit A-1** to the Lynch MSJ.

accepting the Plaintiffs' post-petition mortgage payments (Count IV).

II. Procedural History[2]

On March 11, 2015, this Court entered an *Order* (Doc. No. 12) granting Defendants' motion to dismiss Plaintiffs' *Complaint*, finding that the Blank Indorsement constituted a signature under Florida law and was therefore a valid indorsement under Florida law. Thus, this Court held that the Note, which is in Defendants' possession, was a bearer instrument that Defendants were entitled to enforce as a holder under Florida law. Following appeal by the Plaintiffs to the United States District Court for the Southern District of Florida (the "District Court"),[3] the District Court entered an *Order* on October 8, 2015 reversing this Court's March 11, 2015 *Order* and finding that the Blank Indorsement did not, strictly as a matter of law, constitute a "signature" under Florida law without evidence as to the intent of the signor. The matter was remanded back to this Court for further proceedings consistent with the District Court's *Order*. After some delay, the parties have now completed discovery and filed the cross-motions for summary judgment that are now before the Court.

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[2] Paragraphs 18-29 of the "Statement of Undisputed Facts" in the Ocwen MSJ, which Plaintiffs do not dispute, provides a fuller account of the procedural history.

[3] District Court Case No. 15-21143.

III. Analysis

A. Counts I, III, and IV.

1. Undisputed Facts

a. The Defendants' Affidavits.

In support of the Ocwen MSJ and attached as **Exhibit 1** thereto, Defendants submitted an affidavit from Donna Walker (the "Walker Affidavit"), a former employee of New Century serving as a consultant to the liquidation trustee of the "New Century Liquidation Trust" (the "Liquidation Trust") which was formed and judicially approved in the jointly-administered Chapter 11 bankruptcy cases of New Century and various related entities (collectively, the "New Century Bankruptcy Case").[4] The Walker Affidavit attests to two key facts. First, it states that on or about August 4, 2004, the Loan and Note were transferred to and securitized as part of a securitized trust – i.e. the New Century Home Equity Loan Trust, Series 2004-A (the "Securitized Trust") – for which Deutsche Bank now serves as "Trustee" and Ocwen as the current servicer. Second, it states that as authorized by (a) *Orders* entered by the United States Bankruptcy Court for the District of Delaware in the New Century Bankruptcy Case and (b) the governing terms of the Liquidation Trust, the Liquidation Trust executed a *Limited Power*

[4] Paragraphs 8-17 of the "Statement of Undisputed Facts" section of the Ocwen MSJ, which Plaintiffs do not dispute, provide an overview of these bankruptcy cases, the formation of the "New Century Liquidation Trust," and the appointment of the "Liquidation Trustee."

of Attorney (the "POA"), as successor to New Century, in favor of Deutsche Bank. It further states that the POA (which is attached as Exhibit A to the Walker Affidavit) authorizes Deutsche Bank to execute a corrective indorsement for the Note.

In further support of the Ocwen MSJ and attached as **Exhibit 2** thereto, Defendants submitted the affidavit of Ronaldo Reyes (the "Reyes Affidavit"), a Vice-President with Deutsche Bank. Mr. Reyes states therein that he reviewed Deutsche Bank's records, including the POA, and that on or about October 20, 2016, he, in his capacity as Vice-President of Deutsche Bank, in its capacity as attorney-in-fact for New Century pursuant to the POA, executed an *Allonge* to the Note (the "Allonge") containing a special indorsement as follows: "Pay to the order of Deutsche Bank National Trust Company, as Trustee for New Century Home Equity Loan Trust Series 2004-A, without recourse, representations or warranties." A copy of the Allonge was attached as Exhibit 6 to the Reyes Affidavit.

Finally, in further support of the Ocwen MSJ and attached as **Exhibit 3** thereto, Defendants submitted the affidavit of Nicole M. Gostebski (the "Gostebski Affidavit"), a Senior Loan Analyst for Ocwen Financial Corporation who was authorized to execute the affidavit for Ocwen. Ms. Gostebski attests to, among other things, (a) Ocwen's purchase in 2012 of the servicing rights to the loans in the Securitized Trust from the Chapter 11 bankruptcy estates of GMAC Mortgage LLC and related entities; and (b) the inclusion and ownership of the Loan in and by the Securitized Trust.

b. The Plaintiffs' Affidavit and "Report."

The Lynch MSJ attached as **Exhibit A** thereto the affidavit of Plaintiff Michael D. Lynch (the "Lynch Affidavit"). The Lynch Affidavit does not contradict any material fact in the Walker Affidavit, the Reyes Affidavit, or the Gostebski Affidavit.

The Lynch MSJ also attached as **Exhibit B** thereto the "Report" of Kathleen G. Cully (the "Cully Report"), an attorney who is in private practice in the State of New York. The Cully Report is a legal brief but it does not attest to any issue of material fact in this case.

This Court reviewed the Ocwen MSJ, the Lynch MSJ, and the related filings by Defendants and Plaintiffs, including without limitation the respective supporting affidavits and "report," and the record in this adversary proceeding as a whole. The Court heard extensive oral argument at a hearing on the Ocwen MSJ and Lynch MSJ on April 13, 2017, during which Defendants' counsel produced for the Court's and Plaintiffs' inspection the original Note and the original Allonge. Upon consideration of the above, the Court reaches the following conclusions of law based on the undisputed material facts of record.

c. The Undisputed Facts.

After a review of the foregoing in support of the summary judgment motions, the undisputed material facts are: (1) the Securitized Trust owns the Note;

(2) neither New Century nor the Liquidation Trust owns the Note; (3) the Liquidation Trust executed the POA; (4) Deutsche Bank executed the Allonge pursuant to the POA; and (5) Ocwen is in possession of both the Note and Allonge. The original Blank Indorsement was stamped by New Century and/or Magda Villanueva with the present intent of accepting and/or authenticating the language therein.

2. Conclusions of Law for Counts I, III, and IV.

Based on the undisputed material facts, the Court concludes as a matter of law that the Blank Indorsement constitutes both a "signature" under Fla. Stat. §§ 671.201; 671.2041; and 671.4011(2) and an "indorsement" under Fla. Stat. § 673.2041(1). Moreover, because the Blank Indorsement is not made payable to a specific person, it is a "blank indorsement" under Fla. Stat. § 673.2051(2). The Court further concludes that because Ocwen is in possession of the Note, it is a "holder" of the Note under Fla. Stat. § 671.201(21)(a). Finally, the Court concludes that because it is a "holder" of the Note, Ocwen can enforce the Note. Fla. Stat. § 673.301(1).

As a separate and independent ground for granting summary judgment, the Court also concludes as a matter of law, based upon the undisputed facts set forth herein, that the Allonge includes and constitutes both a "signature" under Florida law (Fla. Stat. §§ 671.201; 671.2041; 671.4011(2)) and an "indorsement" under Florida law (Fla. Stat. § 673.2041(1)). The

Court concludes that because it contains the language "Pay to the order of Deutsche Bank National Trust Company, Deutsche Bank National Trust Company, as Trustee . . . ," the Allonge includes and constitutes a "special indorsement" under Fla. Stat. § 673.2051(1). The Court further concludes that because Ocwen is in possession of the Note and Allonge, Ocwen is a "holder" of the Note under Fla. Stat. § 671.201(21)(a). Finally, the Court concludes that because it is a "holder" of the Note, Ocwen can enforce the Note under Fla. Stat. § 673.301(1).

Plaintiffs have made numerous arguments against the Ocwen MSJ, but the Court finds them hard to grasp. If the Plaintiffs are attempting to invalidate their mortgage on the facts presented, the circumstances herein do not lead to that result.

Federal Rule of Civil Procedure 56(c)(4) provides that affidavits in support of motions for summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." The duly filed Walker Affidavit persuades this Court to grant summary judgment. Ms. Walker was a consultant to the trustee for the Liquidation Trust and also the sole officer and director of New Century. (Walker Affidavit, ¶ 2). Ms. Walker states she is one of the persons who has custody and control of New Century's business records, and makes further averments as to the record keeping thereof. (Walker Affidavit, ¶¶ 4). Finally, Ms. Walker states the Walker Affidavit is based on her personal knowledge

and review of New Century's business records. (¶ 4). Despite Plaintiffs' objections to the Walker Affidavit as "hearsay," Ms. Walker's affidavit is based on her authorized review of the business records, falling squarely within the "business records" exception to hearsay under Federal Rule of Evidence 803(6). For these reasons, the Court concludes as a matter of law that the Walker Affidavit is valid and reliable.[5]

Count I seeks a judgment that Plaintiffs cannot enforce the Note as a holder in possession. Counts III and IV of the Plaintiffs' *Complaint* are based on the same inability to enforce the Note. Because the Court concludes as a matter of law that Ocwen can enforce the Note as a holder in possession, summary judgment is GRANTED in favor of Defendants and AGAINST Plaintiffs on Counts I, III, and IV of the *Complaint*. The Ocwen MSJ is GRANTED as to these three counts and

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[5] The Court notes that in a similar adversary proceeding filed in the New Century Bankruptcy Cases involving a loan that had been originated by New Century and later transferred to a different securitized trust, the borrowers argued that similar declarations submitted by Ms. Walker in that case were not based on personal knowledge and contained hearsay – just as the Plaintiffs have done in this case. *White v. New Century TRS Holdings, Inc., et al., (In re New Century TRS Holdings, Inc., et al.)*, 502 B.R. 416 (Bankr. D. Del. 2013). The Delaware Bankruptcy Court disagreed, noting that Ms. Walker had been employed with New Century from 1997 to 2007, then worked as a consultant to the Liquidation Trust, and was familiar with New Century's books and records. *Id.* at n. 11. The court concluded: "Ms. Walker's experience with the Debtors and knowledge of their record-keeping procedures makes her at least a qualified witness (if not a custodian of records) whose statements in support of the Trustee's Motion to Dismiss were reliable." *Id.*

the Lynch MSJ is DENIED as to those three counts; and Counts I, III, and IV are dismissed with prejudice, costs taxed as paid.

B. Count II.

Count II seeks a determination that Defendants are not a "non-holder" in possession of the Note and are therefore not entitled to enforce it under Florida law. However, as previously stated, Ocwen is a holder of the Note in possession pursuant to the validity of either the Blank Indorsement or the Allonge or both; and it may therefore enforce the Note as a "holder in possession" under Fla. Stat. 673.301(1). Because Defendants are entitled to summary judgment on Count I, Count II is MOOT.

Even if the Blank Indorsement and the Allonge were somehow deemed invalid, Defendants are still able to enforce the note as non-holders in possession with the rights of a holder. Section 673.301(2), Fla. Stat., provides that "[a] nonholder in possession of the instrument who has the rights of a holder" is a "person entitled to enforce" an instrument. The Uniform Commercial Code Comment to section 673.301, which is incorporated by statute, provides that a "nonholder in possession of an instrument includes a person that acquired rights of a holder . . . under Section 3-203(a)." Section 673.203(1)[6] provides that an "instrument is transferred when it is delivered by a person other than

[6] Florida's version of section 3-203(a) has numbered subsections rather than lettered subsections.

its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument. Section 673.203(2) provides that "[t]ransfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument. . . ." This specifically includes a transfer that involves a failure by the transferor to indorse the instrument.[7]

The uncontroverted evidence of record is that the Note was transferred to the Securitized Trust; that New Century has no ownership interest or claim to the Note; that the Note is owned by the Securitized Trust; and that Ocwen has possession of the original Note in its capacity as servicer for Deutsche Bank and the Securitized Trust. New Century, as the original payee of the Note, was certainly a "holder" of the Note and entitled to enforce it because the Note was originally made payable to New Century and New Century was in original possession of the Note. *See* Fla. Stat. § 673.201(21)(a). This means that upon the transfer of the Note to the Securitized Trust, the Securitized Trust acquired the same right to enforce the Note as

[7] Section 2 of the Uniform Commercial Code Comment, incorporated by statute, provides:

> If the transferee is not a holder because the transferor did not indorse, the transferee is nevertheless a person entitled to enforce the instrument under Section 3-301 if the transferor was a holder at the time of transfer. Although the transferee is not a holder, under subsection (b) the transferee obtained the rights of the transferor as holder.

Fla. Stat. § 673.203.

that of New Century. The Court therefore believes Count II is moot as it seeks a judgment that Defendants are not nonholders in possession of the Note, and the Court has ruled that Defendants are actually holders of the Note with the rights of a holder to enforce the Note. However, even if Count II is not deemed moot, then the Court concludes as a matter of law that Ocwen can enforce the Note as a nonholder in possession with the rights of a holder. Pursuant to Fla. Stat. § 673.301(2), the Securitized Trust, Deutsche Bank as Trustee, and Ocwen as servicer, are entitled to enforce the Note as "nonholder" in possession of the instrument Note who has the rights of a holder. Accordingly, it is

ORDERED AND ADJUDGED that the Ocwen MSJ is GRANTED as to all Counts in the Complaint, and the Lynch MSJ is DENIED as to all Counts.

# # #

Glenn Glover is directed to serve copies of this Order on the parties listed and file a certificate of service.

SUBMITTED BY:

Glenn E. Glover
BRADLEY ARANT BOULT CUMMINGS LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, Alabama 35203
Telephone: (205) 521-8000
Facsimile: (205) 521-8500
Email: gglover@babc.com
Counsel for Defendants

<u>With copy to:</u>

Michael Lynch and Candence B. Lynch,
Plaintiffs, pro se

[SEAL]

ORDERED in the Southern District of Florida on January 28, 2016.

/s/ A. Jay Cristol
A. Jay Cristol, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

In re

MICHAEL LYNCH
and CANDENCE LYNCH

Debtors. /

Case No.
12-27731-BKC-AJC

MICHAEL LYNCH
and CANDENCE LYNCH

Plaintiffs,

Adv. No.
14-1786-BKC-AJC-A

vs.

DEUTSCHE BANK NATIONAL TRUST COMPANY and OCWEN LOAN SERVICING, LLC.,

Defendants. /

ORDER VACATING DISMISSAL ORDER AND SETTING HEARING ON REMAND

THIS CAUSE came before the Court upon the *Order* reversing and remanding the Bankruptcy Court Order dismissing the adversary complaint in Adv. No. 14-1786-BKC-AJC-A, entered by the United States District Court on October 8, 2015 in Case No. 15-21143-CIV-Scola. The U.S. District Judge reversed and vacated the order granting the motion to dismiss the second amended complaint and remanded the action for further proceedings. The District Court directed the Bankruptcy Court to consider, on remand, any evidence that would conclusively demonstrate that the person who stamped the subject promissory note intended that alone to constitute a signature, as the District Court determined it was not clear from the record that the person had a present intent to negotiate the note.

Reconsideration was thereafter sought by the Debtors/Plaintiffs and denied by the District Court on January 5, 2016. Accordingly, it is

ORDERED that this adversary case is RE-OPENED and the *Order Granting Motion to Dismiss Second Complaint Filed in Adv. No. 14-1786-BKC-AJC-A* is VACATED; a hearing on remand will be held on **February 23, 2016 at 2:00 PM** in Courtroom 7, 301 North Miami Avenue, Miami, Florida.

###

United States District Court
for the
Southern District of Florida

Michael D. Lynch and Candence B. Lynch, Appellants	)	Bankruptcy Appeal Case No. 15-21143-Civ-Scola
v.	)	Bankruptcy Court Adv. No. 14-01786
Deutsche Bank National Trust Company and Ocwen Loan Servicing, LLC, Appellees	)	(Filed Jan. 6, 2016)

Previously, the Court determined that the Bankruptcy Court erred by granting Deutsche Bank's motion to dismiss because of an unresolved factual issue over whether a stamp constituted a signature. (*See* Opinion, ECF No. 21.) The Court noted that Deutsche Bank may ultimately be able to present evidence to establish that the person from New Century Mortgage Corporation who placed the stamp on the note did so with the present intent to indorse it. (*Id.* at 4.) In other words, the Court concluded that evidence may eventually resolve the issue at the summary-judgment phase of the case, but that at the motion-to-dismiss stage, the Court must accept the Lynchs' allegations as true, and draw all reasonable inferences in their favor.

Following that opinion, the Lynchs submitted for the Court's consideration evidence they contend wins their case for them. (*See* Mot. Reh'g 86 Exs., ECF No. 22.) But "[i]n reviewing bankruptcy court judgments, a

district court functions as an appellate court." *In re JLJ Inc.*, 988 F.2d 1112, 1116 (11th Cir. 1993). And as an appellate court, this Court may not make independent factual findings—that is for the bankruptcy court, in this situation the trial court. *Id.* The appropriate procedural action when a factual question is unresolved is to remand the case to bankruptcy court. *Id.*

The Lynchs' request for factual determinations is misdirected. As this Court has already previously determined, this case must be remanded to the Bankruptcy Court for further proceedings. During those proceedings, perhaps at the summary-judgment stage of the case, the Lynchs may present their newfound evidence. For these reasons, the Court **denies** the Lynchs' Motion for Rehearing (ECF No. 22).

Done and ordered, in chambers, at Miami, Florida on January 4, 2016.

/s/ Robert N. Scola, Jr.
Robert N. Scola, Jr.
United States District Judge

United States District Court
for the
Southern District of Florida

Michael D. Lynch and Candence B. Lynch, Appellants v. Deutsche Bank National Trust Company and Ocwen Loan Servicing, LLC, Appellees	)))))))))	Bankruptcy Appeal Case No. 15-21143-Civ-Scola Bankruptcy Court Adv. No. 14-01786 (Filed Oct. 9, 2015)

This case involves an appeal of a decision in an adversary proceeding in a bankruptcy action. For the reasons detailed in this Order, the Court reverses the decision below and remands the case back to the Bankruptcy Court for further proceedings consistent with this Order.

1. Procedural History

Michael and Candence Lynch filed an adversary proceeding in the Bankruptcy Court challenging Deutsche Bank's claim that it holds the note and mortgage related to the Lynchs' property. The Lynchs sought declaratory judgment on four issues: (1) that Deutsche Bank is not the holder of the note, (2) that Deutsche Bank is not a non-holder in possession of the note with the rights of a holder, (3) that Deutsche Bank is not allowed to proceed with its claim filed in the Lynchs' bankruptcy action, and (3) that Deutsche

Bank violated the discharge injunction by representing it is a secured creditor. The Bankruptcy Court concluded that the note contained a blank indorsement transferring the note to the person in possession—in this case Deutsche Bank. Both parties agree that this Court applies a de novo standard in reviewing the Bankruptcy Court's conclusions of law.

2. Legal Analysis

Under Florida law, to transfer possession of a negotiable instrument the instrument must be indorsed—meaning it must be signed. Fla. Stat. §§ 673.2011, 673.2041(1) (2015). A *signature* is any symbol or mark executed by a party with the present intention of accepting or authenticating a writing. Fla. Stat. §§ 671.201, 671.4011(2) (2015). Deutsche Bank claims to be a secured creditor in this bankruptcy action, and has submitted what it asserts is an indorsed note that bears this stamp:

Pay to the order of, without recourse

____
New Century Mortgage Corporation

By: __________________________
Name: Magda Villanueva
Title: A.V.P. / Shipping Manager

The question presented in this appeal is whether this stamp constitutes a signature, and thus an indorsement. Under the familiar motion-to-dismiss standard, a court must allow a case to proceed where the

allegations "possess enough heft" to suggest a plausible entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). "And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556. The Bankruptcy Court concluded that the stamp alone constituted a signature, and thus an indorsement, and that the Lynchs' claims failed as a matter of law. As explained below, this Court concludes that it cannot be determined if the stamp constitutes a signature, and thus an indorsement, without additional evidence.

Deutsche Bank argues a signature "may be handwritten, typed, printed or made in any other manner, [i]t need not be subscribed, and may appear in the body of the instrument, as in the case of 'I, John Doe, promise to pay * * *' without any other signature." (Appellee Br. 10, ECF No. 17 (quoting Fla. Stat. Ann. § 673.2041 cmt.2 (West 2015)).) While that is a correct statement of law, the essence of a signature is the expression of a present intent to accept or authenticate a writing. Fla. Stat. §§ 671.201, 671.4011(2) (2015). Stamping a document with a blank line that seems clearly intended as a space for a handwritten signature does not, on the face of it without any other evidence, express a clear present intent to accept or authenticate the document. If anything, it expresses an intent *not* to accept or authenticate the document *until* the additional step of signing on the blank line is completed. 1A David Frisch, Lawrence's Anderson on the Uniform

Commercial Code § 1–201:708 (Signed/Sufficiency of Signature) (3d ed. 2014) ("When a space is left above the typewritten name, in which it is apparently contemplated that a handwritten signature will be made, it is likely that the typewritten name will be found not to be a signature, as it is merely a preparatory, and not a final, authenticating act.").

At oral argument, Deutsche Bank argued that "regardless of the intent of the signer, a signature and its accompanying words is an indorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement." Fla. Stat. § 673.2041(1) (2015). But that rule only applies once a court concludes that the stamp, writing, or other mark constitutes a *signature*. Here, the Court cannot conclude, as a matter of law, that the stamp in this case is a signature, without any evidence as to the intent of the alleged signor. Deutsche Bank may be able to present evidence, in a summary-judgment motion, that conclusively demonstrates that the person who stamped the document intended that alone to constitute a signature. But this Court cannot reach that conclusion upon a review of just the complaint and the note because the Court must "draw all reasonable inferences in the [Lynchs'] favor." *Randall v. Scott*, 610 F.3d 701, 705 (11th Cir. 2010).

Although the parties have both cited a handful of cases, both parties have conceded that they have not discovered any cases that address this unique factual

situation (i.e., a stamp with a space for a handwritten signature but no handwritten signature). But, a few cases are helpful. In *Riggs v. Aurora Loan Services, LLC*, 36 So. 3d 932, 933 (Fla. 4th DCA 2010), the court concluded that the following image constituted a signature, and thus an indorsement:

WITHOUT RECOURSE,
PAY TO THE ORDER OF
FIRST MAGNUS
An Arizona
BY: H Alday
Humberto

This is helpful because like the image in *Riggs*, this case involves a stamp with a line for a person to sign on. In *Riggs* the person had taken the additional step of printing his name in block print on the line. Unsurprisingly, the court determined this was enough even though it was not a traditional signature in cursive. But in this case, the person did not write anything on the line, and thus is it not clear if the person had a present intent to negotiate the note. The image from the *Riggs* case was submitted by the Lynchs as a certified copy of a court document from the state court. This Court has taken judicial notice of this court filing. *See U.S. ex rel. Osheroff v. Humana Inc.*, 776 F.3d 805, 812 n.4 (11th Cir. 2015) ("Courts may take judicial notice of publicly filed documents, such as those in state court litigation, at the Rule 12(b)(6) stage.").

In another case, the Supreme Court of North Carolina was asked to determine whether the below stamp constituted a signature:

Pay to the order of:
Emax Financial Group, LLC
without recourse
By: Mortgage Lenders Network USA, Inc.

The court also examined several other stamped images on the same document. Some of those other stamps contained a line for a handwritten signature. *In re Bass*, 738 S.E.2d 173, 174 (N.C. 2013). All of the stamped images that included a line for a handwritten signature (i.e., By:________) also had some marking—either a handwritten signature or a hand printed name. *Id.* The court explained that "authenticating intent is sufficiently shown by the fact that the name of a party is written on the line which calls for the name of that party." *Id.* at 176. (quoting 1A David Frisch, Lawrence's Anderson on the Uniform Commercial Code § 1–201:695 (Signed/In General) (3d ed. 2014)). The court ultimately concluded that the above-stamped image that did not include a line for a handwritten signature, and did not have a handwritten signature, nonetheless constituted a signature. *Id.* at 177. But this case is different, because here the stamped image *does* contain a line for a handwritten signature and there is *no mark* on that line. Under these facts, the Court cannot conclude as a matter of law that the person who stamped the note but left the signature line blank possessed the present intent to indorse the note. More evidence is needed.

3. Conclusion

For the reasons explained in this order, the Court concludes that the Bankruptcy Court erred by granting Deutsche Bank's motion to dismiss. Deutsche Bank may ultimately be able to present evidence to establish that the person from New Century Mortgage Corporation who placed the stamp on the note did so with the present intent to indorse it. That evidence may eventually resolve the issue at the summary-judgment phase of the case. But at the motion-to-dismiss stage, the Court must accept the Lynchs' allegations as true, and draw all reasonable inferences in their favor. Given the facts of this case, it is a reasonable inference that the note was not signed, and thus not indorsed. Because the Bankruptcy Court's analysis of all of the Lynchs' claims was predicated on its conclusion that the note was validly indorsed, this Court must **reverse** the order granting the motion to dismiss the second amended complaint. The Court **remands** this action to the Bankruptcy Court with instructions to vacate the order granting the motion to dismiss and for further proceedings consistent with this opinion.

Done and ordered at Miami, Florida on October 8, 2015.

/s/ Robert N. Scola, Jr.
Robert N. Scola, Jr.
United States District Judge

[SEAL]

ORDERED in the Southern District of Florida on March 11, 2015.

/s/ A. Jay Cristol
A. Jay Cristol, Judge
United States Bankruptcy Court

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

IN RE: **MICHAEL D. LYNCH AND CANDENCE B. LYNCH,** **Debtors.**	**CASE NO. 12-27731-BKC-AJC** **CHAPTER 7**
MICHAEL D. LYNCH AND CANDENCE B. LYNCH, **Plaintiffs,** **V.** **OCWEN LOAN SERVICING, LLC, ET AL.,** **Defendants.**	**ADV. NO. 13-01712-BKC-AJC-A (CON-SOLIDATED WITH ADV. NO. 14-1786-BKC-AJC-A)**

ORDER GRANTING MOTION TO DISMISS SECOND COMPLAINT FILED IN ADV. NO. 14-1786-BKC-AJC-A

THIS CAUSE came before the Court for hearing on January 7, 2015 upon (1) the *Motion To Dismiss Complaint And Incorporated Memorandum Of Law* [Docket No. 99] (the "Motion to Dismiss") filed by defendants Ocwen Loan Servicing, LLC ("Ocwen") and Deutsche Bank National Trust Company, solely as trustee for New Century Home Equity Loan Trust Series 2004-A Asset Backed Pass-Through Certificates, Series 2004-A ("Deutsche Bank" and collectively with Ocwen, the "Defendants"); (2) *Plaintiffs Objection To Defendants Motion To Dismiss Complaint* [Docket No. 104] (the "Objection") filed by plaintiffs Michael D. Lynch and Candence B. Lynch (collectively, the "Plaintiffs" and collectively with the Defendants, the "Parties"); and (3) Defendants' *Response To Objection To Motion To Dismiss Complaint* [Docket No. 106] (the "Response"). The Motion to Dismiss seeks dismissal based on Federal Rule of Civil Procedure 12(b), incorporated by Federal Rule of Bankruptcy Procedure 7012(b), of each of the four counts alleged in Plaintiffs' *Complaint* [Docket No. 1] (the "Second Complaint") filed in Adversary Proceeding No. 14-01786.[1]

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[1] Pursuant to the Court's *Order* dated November 20, 2014 [Docket No. 93] (the "Consolidating Order") entered in Adv. No. 13-1712, Adv. Nos. 13-1712 and 14-1786 were to have been consolidated so as to proceed under Adv. No. 13-1712. However, the Court is informed that the Clerk's office is unable to technically and formally consolidate the two adversary proceedings on the Court's CM/ECF system. Notwithstanding, as a result of the

Having considered the Motion to Dismiss, the Objection, the Response and the case law cited therein, and the Parties' arguments at the Hearing, the Court dismisses the Second Complaint in its entirety. The subject note and mortgage, to which the Debtors object, reflect New Century Mortgage Corporation as the payee of the note and mortgagee of the mortgage. Therefore, the challenged indorsement, which indorses the note in blank, converts the note and mortgage to a bearer instrument, subject to enforcement by any holder thereof. While the Debtor(s)' obligation under the note may be discharged in bankruptcy, the lien created by the mortgage in favor of the holder of the note and mortgage remains in full force and effect. The mortgage lien is not affected by the Debtors' discharge in bankruptcy, and any effort to enforce the mortgage is not a violation of the discharge injunction.

I. Procedural Background

1. Plaintiffs filed Chapter 7 bankruptcy in this Court on July 24, 2012, Case No. 12-27731 (the "Bankruptcy Case").

2. This Court entered an *Order* dated November 21, 2012 discharging the Plaintiffs [Docket No. 63] (the "Discharge Order").

3. The Chapter 7 Trustee filed a *Notice of Deadline to File Claims* filed on March 5, 2013 [Docket No.

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ruling herein dismissing the Second Complaint, consolidation is no longer necessary.

90], which set the deadline to file proofs of claim for June 5, 2013.

4. On September 25, 2013, Debtors commenced Adv. No. 13-1712 against the Defendants.

5. On March 28, 2014, in Adv. No. 13-1712, the Court dismissed certain counts in that Complaint regarding ownership of the note and mortgage, fraud and gross negligence, but allowed the claims for breach of contract and violation of the discharge injunction to proceed.

6. Then, on October 23, 2014, Plaintiffs filed a proof of claim for Deutsche Bank [Claim No. 12-1] (the "Deutsche Bank POC"), and thereafter filed the Second Complaint commencing Adv. No. 14-1786, challenging the note and mortgage.

II. Factual Background

"In deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must accept all factual allegations in a complaint as true and take them in the light most favorable to the plaintiff." *In re Fisher Island Investments, Inc.*, 2014 WL 1343269, at *1 (Bankr. S.D. Fla. Mar. 18, 2014) (citation omitted); *see also Wint v. Palm Beach County*, 2015 WL 204869, at *3 (S.D. Fla. Jan. 15, 2015) (citations omitted). Matters referred to in a complaint may properly be considered in deciding a motion to dismiss. The Eleventh Circuit Court of Appeals recognizes this exception when (1) a plaintiff refers to documents in the

complaint, (2) the documents are central to the plaintiff's claim, (3) the contents are not disputed, and (4) "the defendant attaches the documents to its motion to dismiss." *Fin. Sec. Assurance, Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284 (11th Cir. 2007) (citation omitted).

Viewed in a light most favorable to Plaintiffs, the facts alleged in the Second Complaint are as follows.

1. On or about June 2, 2004, Michael D. Lynch obtained a loan (the "Loan") from New Century Mortgage Corporation ("New Century"), which is evidenced by that certain *Note* dated June 2, 2004 made by Mr. Lynch in favor of New Century in the original principal amount of $224,000.00 (the "Note"). (Second Complaint, ¶ 3.1).

2. In response to Plaintiffs' formal written requests, GMAC Mortgage LLC ("GMACM") provided Plaintiffs a copy of the Note with no Indorsement thereon. (*Id.*, ¶ 3.6).

3. In response to Plaintiffs' formal written requests, Ocwen provided Plaintiffs a copy of the Note identical to the copy GMACM had previously provided. (*Id.*, ¶ 3.7).

4. On or about March 21, 2013, Deutsche Bank filed in the Plaintiffs' Bankruptcy Case a *Response and Objection to Debtors' Motion to Compel* [Docket No. 95] (the "Court Filing"), attached to which as "Exhibit A" was another copy of the Note. (*Id.*, ¶ 3.11).

5. The copy of the Note attached to the Court Filing included a stamp at the bottom of page 3 (the

"Indorsement"). The Indorsement had six "lines," as follows: (a) a line stating "Pay to the order of without recourse;" (b) a blank line; (c) a line stating "New Century Mortgage Corporation;" (d) an additional blank line; (e) a line stating "Name: Magda Villanueva;" and (f) a line stating "Title: A.V.P./Shipping Manager." (*Id.*, ¶ 3.12).

6. As such, the Indorsement reads as follows:

Pay to the order of, without recourse

____

New Century Mortgage

By:___________________________
Name: Magda Villanueva
Title: A.V.P./Shipping Manager

(*Notice of Exhibit A to Motion to Dismiss Complaint and Incorporated Memorandum of Law* [Docket No. 102], "Exhibit A"); *see also* Second Complaint, ¶ 3.12).[2]

III. Discussion

A. Rule 12(b)(6) Standard.

"Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law. This procedure, operating on the assumption that the factual allegations in the complaint are true, streamlines

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[2] Plaintiffs reference the Note in the Second Complaint but did not attach it as an exhibit. Defendants filed a *Notice of Filing Exhibit A to Motion to Dismiss Complaint and Incorporated Memorandum of Law* [Docket No. 102], attaching to it as "Exhibit A" a copy of the original Note which it states is true and correct.

litigation by dispensing with needless discovery and factfinding." *Neitzke v. Williams*, 490 U.S. 319, 326-27, 109 S.Ct. 1827, 1832 (1989) (citing, *e.g.*, *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984)). "[D]ismissal is warranted if, assuming the truth of the factual allegations of plaintiff's complaint, there is a dispositive legal issue which precludes relief." *Degutis v. Financial Freedom, LLC*, 978 F. Supp. 2d 1243, 1251 (M.D. Fla. 2013) (citing *Neitzke v. Williams*, 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L. Ed.2d 338 (1989); *Brown v. Crawford County, Ga.*, 960 F.2d 1002, 1009–10 (11th Cir.1992)).

Additionally, a court may dismiss a claim under Rule 12(b)(6) for deficiency in pleading. While factual allegations are not required to be detailed, they, nonetheless, must contain more than "labels and conclusions and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555) (internal quotations omitted). Instead, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (citations omitted). "Facts that are merely consistent with the plaintiff's legal theory will not suffice when, without some further factual enhancement, [they] stop short of the line between possibility and plausibility of entitle[ment] to relief." *Weissman v Nat'l Ass'n of Sec. Dealers, Inc.*, 500 F.3d 1293, 1310 (11th Cir. 2007) (internal quotations

omitted). Should the plaintiff fail to "nudge [his] claims across the line from conceivable to plausible, [his] complaint must be dismissed." *Twombly*, 550 U.S. at 570.

Finally, although complaints drafted by *pro se* plaintiffs are to be construed liberally, "[t]his liberal construction . . . 'does not give a court license to serve as de facto counsel for a party, or to rewrite an otherwise deficient pleading in order to sustain an action.'" *Muhammad v. Bethel-Muhammad*, 574 F. App'x 922, 923 (11th Cir. 2014) (citation omitted). Neither courts nor defendants should be tasked with perusing a *pro se* plaintiff's complaint and attempting to put together a viable cause of action. *See Correa v. BAC Home Loans Servicing LP*, 2012 WL 1176701, at *14 (M.D. Fla. Apr. 9, 2012) ("Even with a *pro se* pleading, the Court will not cobble together Plaintiff's disorganized allegations to create a plausible cause of action.").

B. Summary of Four Counts in Second Complaint.

Count One alleges that the Defendants are not the holder of the Note. Count Two alleges that the Defendants are not a nonholder in possession of the Note with the rights of a holder. Count Three is an objection to the Deutsche Bank POC, seeking its disallowance based on Defendants' inability to enforce the Note and/or Mortgage. Count Four alleges that Defendants violated the discharge injunction by representing that they are a secured creditor.

The Second Complaint requests that the Court enter judgment in favor of Plaintiffs on all claims asserted in the Second Complaint, including a declaratory judgment that Defendants are not the holder of the Note nor nonholders in possession with the rights to enforce the Mortgage and Note; that the Deutsche Bank POC is disallowed as unenforceable; and that Defendants violated the Discharge Order.

C. Analysis.

After review of both the Second Complaint and the Objection, and viewing both in the light most favorable to Plaintiffs, it appears that Plaintiff's primary argument is that the Indorsement is invalid because the line on the Indorsement that reads "By: __________" does not have Ms. Villanueva's "wet ink" signature written thereon. (*See* Second Complaint, ¶ 3.12; Count I, ¶¶ 4-5; Objection, pp. 2-4). Florida law makes it clear that the Indorsement is a valid blank indorsement.

1. Count One Is Dismissed as a Matter of Law Because Defendants are "Holders" of the Note Under Florida Law and Entitled to Enforce It

As background, under Florida law, the Note is undoubtedly an "instrument." Fla. Stat. § 673.1041(1), (2). Defendants are entitled to enforce the Note if they qualify as a "holder of the instrument," and one of the ways to so qualify as a "holder" is if they are in possession of the Note and it is "payable to bearer." *Id.* §§ 673.3011(2), 671.201(21)(a). An instrument is

"payable to bearer" when it is "indorsed in blank." *Id.* § 673.2051(2). An instrument is "indorsed in blank" if it is "made by the holder of an instrument and it is not a special indorsement." *Id.* A "special indorsement" is one that "identifies a person to whom it makes the instrument payable." *Id.* § 673.2051(1)).

Several Florida courts have nicely summarized the above law. For example, in *Riggs v. Aurora Loan Services, LLC*, the Florida Fourth District Court of Appeal stated:

> Aurora's possession of the original note, indorsed in blank, was sufficient under Florida's Uniform Commercial Code to establish that it was the lawful holder of the note, entitled to enforce its terms. The note was a negotiable instrument subject to the provisions of Chapter 673, Florida Statutes (2008). An indorsement requires a "signature." § 673.2041(1), Fla. Stat. (2008). As an agent of First Magnus, Alday's hand printed signature was an effective signature under the Code. *See* §§ 673.4011(2)(b), 673.4021, Fla. Stat. (2008). The indorsement in this case was not a "special indorsement," because it did not "identif[y] a person to whom" it made the note payable. § 673.2051(1), Fla. Stat. (2008). Because it was not a special indorsement, the indorsement was a "blank indorsement," which made the note "payable to bearer" and allowed the note to be "negotiated by transfer of possession alone." § 673.2051(2), Fla. Stat. (2008). The negotiation of the note by its transfer of possession with a blank indorsement made

> Aurora Loan the "holder" of the note entitled to enforce it. §§ 673.2011(1), 673.3011(1), Fla. Stat. (2008).

36 So. 3d 932, 933 (Fla. 4th Dist. Ct. App. 2010). And in *In re Balderamma*, the Bankruptcy Court for the Middle District of Florida more succinctly stated:

> "Holder" is defined as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an *identified person* that is the person in possession." In Florida, standing to enforce a note depends on the type of negotiable instrument the note becomes upon execution. If the note is endorsed in blank, it becomes a bearer instrument and can be enforced by the party in possession, regardless of how that party obtained the note.

473 B.R. 823, 827 (Bankr. M.D. Fla. 2012).

The question at the heart of Count One is whether the Indorsement constitutes a "signature" under Florida law even though the "wet ink" signature of Ms. Villanueva is not contained on the blank line immediately above her printed name. For various reasons, the Court concludes it does constitute a signature.

First, a "signature" "may be made (a) [m]anually or by means of a device or machine; and (b) [b]y the use of any name, including a trade or assumed name, or by a word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing." Fla. Stat. § 673.4011(2). Second, Florida law provides that a "signature" "may be handwritten, *typed, printed*

or made in any other manner" or "made by mark, or even by thumb-print." *Id.*, Uniform Commercial Code Comment 2 (emphasis added). Third, the definition of "signed" under Florida law also provides that a complete signature is not necessary, and it may be "printed, stamped or written" or "by initials or by thumbprint." *Id.* § 671.201, Uniform Commercial Code Comment 39. Thus, it is clear from multiple Florida statutes that a "signature" may be made by a device, machine, mark, or symbol, and may be typed, printed, or stamped. The Indorsement clearly identifies the indorser, Ms. Magda Villanueva, and her title for New Century. The Indorsement thus constitutes a "signature" under Florida law despite the lack of a wet-ink, handwritten signature on the "By: ______________" line.

At least two other courts have squarely rejected the identical argument the Plaintiffs are making about the Indorsement. In *In re Bass*, the North Carolina Supreme Court held that the stamp, without any "wet ink" signature, constituted a signature under the Uniform Commercial Code's ("UCC") "broad definition" and was sufficient to transfer the note. 738 S.E.2d 173, 177 (N.C. 2013). That court summarized by stating that "[t]he UCC does not limit a signature to a long-form writing of an individual person's name." *Id.* at 176 *(citing* 1B *Lary Lawrence, Lawrence's Anderson on the Uniform Commercial Code* § 1–201:385 (3d ed. 2012)). Similarly, in *U.S. Bank National Association v. Dumas*, the Louisiana Court of Appeals held that stamps without a "wet ink" signature constituted blank

indorsements under Louisiana law. 144 So. 3d 29, 42 (La. Ct. App. 2014).

2. Count Two Is Dismissed as a Matter of Law Because Defendants Can Enforce the Note and Mortgage.

Count Two is titled "Defendants are not a Non-holder in Possession with the rights of the Holder." From the title of Count II, Plaintiffs appear to be challenging Defendants' right to enforce the Note because they are not "nonholder[s] in possession of the instrument who ha[ve] the rights of a holder." *See* Fla. Stat. § 673.3011(2). However, under section 673.3011, this is only one of three ways to enforce an instrument, one of the other two being, as discussed in Section C.1 above, possessing an instrument with a blank indorsement. Accordingly, Count Two is moot to the extent it requests a finding that Defendants are not able to qualify as a holder of the Note under this theory because they are able to qualify as a holder of the Note otherwise.

However, the factual allegations in Count II relate to assignments of the Mortgage, not the Note. (Second Complaint, Count II, ¶¶ 2-4). Therefore, it is possible that Plaintiffs are challenging Defendants' ability to enforce the Mortgage. Enforcing the Mortgage, though, has nothing to do with enforcing the Note under section 673.3011. Regardless, to the extent that Defendants' enforcement of the Mortgage is at issue, Florida law is clear that a party entitled to enforce a note is also entitled to enforce a mortgage securing the note,

even without a formal assignment of the mortgage. *See, e.g.*, *Wane v. Loan Corp.*, 552 F. App'x 908, 913 (11th Cir. 2014) ("A promissory note may be used to secure an interest on a home mortgage, and unless there is a plain and clear agreement to the contrary, both the mortgage and promissory note are assigned as one.") (citing *WM Specialty Mortg., LLC v. Salomon*, 874 So. 2d 680, 682 (Fla. 4th Dist. Ct. App. 2004) ("[A] mortgage is but an incident to the debt, the payment of which it secures, and its ownership follows the assignment of the debt. If the note or other debt secured by a mortgage be transferred without any formal assignment of the mortgage, or even a delivery of it, the mortgage in equity passes as an incident to the debt. . . .")).[3] Because Defendants can enforce the Note, they can enforce the Mortgage. Plaintiffs' Count Two is due to be dismissed as a matter of law.

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[3] This well-settled proposition of law has long been established in Florida. *E.g.*, *Johns v. Gillian*, 184 So. 140, 143 (Fla. 1938) ("[I]t has frequently been held that a mortgage is but an incident to the debt, the payment of which it secures, and its ownership follows the assignment of the debt. If the note or other debt secured by a mortgage be transferred without any formal assignment of the mortgage, or even a delivery of it, the mortgage in equity passes as an incident to the debt, unless there be some plain and clear agreement to the contrary, if that be the intention of the parties.") (internal quotations omitted); *see also*, *e.g.*, *Warren v. Seminole Bond & Mortg. Co.*, 172 So. 696, 697 (Fla. 1937) ("It is well settled that the security follows the note. . . ."); *Collins v. W.C. Briggs, Inc.*, 123 So. 833, 833 (Fla. 1929) (a mortgage follows the note even without assignment).

3. Count Three Is Dismissed as a Matter of Law

Count Three is an objection to the Deutsche Bank POC based on the same arguments made in Counts One and Two alleging Defendants' inability to enforce the Note and/or Mortgage. (Second Complaint, Count III, ¶¶ 2-3). For the reasons discussed in Section C.1 above, Defendants do have the ability to enforce the Note and Mortgage, and this Count fails as a matter of law.

4. Count Four Is Dismissed As A Matter Of Law Because The Acts Complained Of Do Not Constitute Violations Of The Discharge Injunction.

Count Four alleges that Defendants violated the Discharge Order (and presumably the discharge injunction under 11 U.S.C. § 524) by allegedly misrepresenting that they are secured creditors and by accepting payments from the Plaintiffs. (Second Complaint, Count IV, ¶¶ 3-6). This claim fails as a matter of law for several reasons.

First, a party's representation that it is a secured creditor is not an [sic] "an act, to collect, recover or offset" Plaintiffs' personal liability on the Note under section 524(a)(2). The Discharge Order specifically states that creditors may enforce valid liens remaining after the bankruptcy and that Plaintiffs could "voluntarily pay any debt."[4] (Discharge Order, p. 2). Accepting

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[4] This mirrors the language of 11 U.S.C. § 524(f), which provides that "[n]othing contained in subsection (c) or (d) of this

payments, which the Plaintiffs voluntarily made on the valid lien under the Mortgage, does not violate the Discharge Order. Moreover, voluntarily accepting payments from a discharged debtor is not an act to collect that violates the discharge injunction under section 524(a). *E.g.*, *In re Mayes*, 2007 WL 4292770, at *4 (Bankr. E.D.Tenn. Dec. 5, 2007) ("Voluntarily accepting payments tendered by a willing debtor clearly falls outside the scope of the discharge injunction. Doing so is not listed among the prohibitions of § 524(a)(2) and moreover, '[n]othing . . . prevents a debtor from voluntarily repaying any debt.' 11 U.S.C. § 524(f) (2004)."). Section 524(j) expressly excepts all acts by holders of secured claims from violation of the discharge injunction if (a) the creditor retains a security interest in the debtor's principal residence; (b) the act is in the ordinary course of business; and (c) the act is limited to seeking or obtaining periodic payments in lieu of foreclosure. 11 U.S.C. § 524(j). Because Defendants may enforce the Mortgage, section 524(j) necessarily protects Defendants who act in the ordinary course from a discharge injunction violation claim.

Although issues remain as to whether Defendants acted in the ordinary course of business, by force placing insurance and the like and attempting to collect for same, or whether the payments sought from the Debtors were for periodic payments in lieu of foreclosure, these issues are already raised and being addressed by

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section [the subsections concerning reaffirmation] prevents a debtor from voluntarily repaying any debt."

the Complaint pending in Adv. No. 13-1712. Such issues must necessarily be resolved in Adv. No. 13-1712 to determine whether a violation of the discharge injunction has occurred, as that Complaint alleges. For these reasons, Count Four in the Second Complaint is dismissed.

Based on the forgoing, it is

ORDERED AND ADJUDGED that the Motion to Dismiss is GRANTED as follows:

1. All four counts in the Second Complaint are DISMISSED WITH PREJUDICE and the Second Complaint is dismissed in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted, as made applicable by Federal Rule of Bankruptcy Procedure 7012.

2. Each Party shall bear its own costs, and the Clerk is directed to close this Adversary Proceeding.

3. This Court shall retain jurisdiction with respect to all matters relating to the interpretation or implementation of this Order.

# # #

Glenn Glover is directed to serve copies of the order on the parties listed and file a certificate of service.

SUBMITTED BY:

Glenn E. Glover
BRADLEY ARANT BOULT CUMMINGS LLP
One Federal Place
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Birmingham, Alabama 35203
Telephone: (205) 521-8000
Facsimile: (205) 521-8500
Email: gglover@babc.com
Counsel for Defendants

Copy to:

Jason R. Bushby, Esq., Glenn E. Glover, Esq.,
Counsel for Defendants
Michael Lynch and Candence B. Lynch,
Plaintiffs, pro se

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10147-AA

In re: MICHAEL D. LYNCH,
CANDENCE B. LYNCH,

Debtors,

MICHAEL D. LYNCH,
CANDENCE B. LYNCH,

Plaintiffs - Appellants,

versus

DEUTSCHE BANK NATIONAL TRUST COMPANY, OCWEN LOAN SERVICING LLC,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Jan. 11, 2019)

BEFORE: MARCUS, ROSENBAUM and BLACK, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

ORD-42

Federal Rules and Statutes To Be Construed

Federal Rule of Evidence 802:

Rule 802. The Rule against hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court

Federal Rule of Evidence 803(6):

Rule 803. Exceptions to the Rule Against Hearsay The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: **(6)** *Records of a Regularly Conducted Activity.* A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a

certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Federal Rules of Civil Procedure 56:

Rule 56. Summary Judgment.

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) TIME TO FILE A MOTION. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) PROCEDURES.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the

motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) FAILING TO PROPERLY SUPPORT OR ADDRESS A FACT. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) FAILING TO GRANT ALL THE REQUESTED RELIEF. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) AFFIDAVIT OR DECLARATION SUBMITTED IN BAD FAITH. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

Federal Statute Construed

28 U.S.C. § 1652

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

--x

In re Michael D. Lynch and Candence B. Lynch, *Debtors*.	Case No.: 12-BK-27731-AJC Chapter 7

--x

Michael D. Lynch and Candence B. Lynch, *Plaintiffs*, v. Deutsche Bank National Trust Company, *et al.*, *Defendants.*	 Adversary Proc. No. 14-1786

--x

REPORT OF KATHLEEN G. CULLY

My name is Kathleen G. Cully. For well over twenty years I was a structured finance lawyer with an emphasis on securitization, including interinstitutional sales of mortgage loans and the creation and sale of residential mortgage-backed securities. I have participated in or overseen hundreds of transactions, representing clients acting in many different capacities, through December 2006. As a result, I am thoroughly familiar with the structure, mechanisms and

documentation involved in such sales and securitizations.[1] My résumé is attached as Exhibit A.

I have reviewed the Defendants' Motion for Summary Judgment and Incorporated Memorandum of Law, ECF No. 101 (the "MSJ") and documents Bates-stamped 2001-4055 that the Defendants produced as their fourth response to the Plaintiff's production requests. My conclusion in this case, briefly, is that the Defendants[2] have not presented sufficient evidence that the Securitized Trust owns the Loan (including the Note and Mortgage) relating to the Plaintiffs' property that is the subject of this adversary proceeding. They have not shown a sale or chain of sales from the original lender, New Century, to the depositor under the PSA, NC Mortgage Securities. As the loans included in the Securitized Trust are only those assigned pursuant to Section 2.01 of the PSA, whereas the only means of transferring this Loan into the Securitized Trust is through the recent allonge proffered by the Defendants, as a technical matter the Loan neither has been transferred into the Securitized Trust nor can be, as no Mortgage Loans (as defined in the PSA) could be accepted into the Securitized Trust after August 4, 2006.

[1] My conclusions are based on the standard UCC as set forth at, among many other sources, the Cornell University Law School website at https://www.law.cornell.edu/ucc. As an attorney admitted to practice only in New York, I express no opinion as to Florida law.

[2] Terms used without definition in this Report have the meanings assigned to them in the MSJ.

For more than 15 years, the *exclusive* way to establish ownership of a mortgage note or mortgage loan has been Article 9 of the Uniform Commercial Code (the "UCC"; avail. at https://www_law.cornell.edu/ucc). That is because Article 9 was amended, effective July 1, 2001,[3] to include sales as well as pledges of promissory notes and payment intangibles. As explained by the Uniform Law Commission itself, "certain kinds of transactions that did not come under Article 9 before, now come under Article 9. These are some of the kinds of collateral that are included in Revised Article 9 that are not in original Article 9: sales of payment intangibles and promissory notes." Uniform Law Commission, *UCC Article 9, Secured Transactions (1998) Summary,* ¶1 (avail. at http://www.uniformlaws.org/ActSummary.aspx?title=UCC%20Article%209,%209.20Secured%20Transactions%20(1998)); *see also* UCC § 9-109(a)(3) (stating that Article 9 applies to sales of payment intangibles and promissory notes). *See generally, e.g.*, Julian B. McDonell & John Franklin Hitchcock, Jr., *The Sale of Promissory Notes Under Revised Article 9: Cooking Securitization Stew*, 117 BANKING L. J. 99 (Apr./May 2000); S. Schwarcz, *The Impact on Securitization of Revised UCC Article 9*, 74 CHICAGO-KENT L. REV. 947 (1999) (avail. at http://scholarship.law.duke.edu/faculty_scholarship/992).

[3] According to the website of the Uniform Law Commission, revised Article 9 has been adopted in Florida. *See* http://uniformlaws.org/LegislativeFactSheet.aspx?title=UCC%20Article%209,%20-Secured%20Transactions%20(1998).

Incorporating the relevant defined terms, the statute reads:

> (b) . . . [A] sale is enforceable against the seller and third parties with respect to the note or loan *only* if:
>
> (1) Value has been given;
>
> (2) The seller has rights in the note or loan or the power to transfer rights in the note or loan to a buyer; and
>
> (3) One of the following conditions is met:
>
> (A) The seller has authenticated a sale agreement that provides a description of the note or loan . . . ;
>
> . . .
>
> (C) The note or loan . . . is in the possession of the buyer . . . pursuant to the seller's sale agreement; . . . .

See UCC § 9-203(b)(2) (emphasis added).[4] Consequently, no transfer or negotiation of a promissory note (whether

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[4] The actual words are:

> (b) . . . [A] security interest is enforceable against the debtor and third parties with respect to the collateral only if:
>
> (1) Value has been given;
>
> (2) The debtor has rights in the collateral or the power to transfer rights in the collateral to a buyer; and
>
> (3) One of the following conditions is met:

or not the note is negotiable) can transfer *ownership* of a securitized note or loan unless it complies with Article 9. *See also* Report of the Permanent Editorial Board for the Uniform Commercial Code, *Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes* 2 & 8-12 (Nov. 14, 2011) (avail. at http:/www.uniformlaws.org/-Shared/Committees Materials/PEBUCC/PEB Report 111411.pdf).

The result is that the law requires a complete chain of title from the loan originator to the party claiming ownership. Assuming for purposes of this Report that the mortgage loan schedule the Defendants provide is in fact the schedule applicable to the Securitized Trust,[5] then the sale from NC Mortgage Securities to the Securitized Trust would be valid—if NC

> (A) The debtor has authenticated a security agreement that provides a description of the collateral . . . ;
>
> . . .
>
> (C) The collateral . . . is in the possession of the secured party . . . pursuant to the seller's security agreement; . . . .

"Collateral" is defined to include a payment intangible or promissory note that has been sold, UCC § 9-102(a)(12); "debtor" is defined as, inter alia, the seller of a payment intangible or promissory note, UCC § 9-102(a)(28); "secured party" is defined as, inter alia, a person to whom a payment intangible or promissory note has been sold, UCC § 9-102(a)(73); and "security agreement" means "an agreement that creates or provides for a security interest," UCC § 9-102(a)(74). And "security interest" is defined to include the interest of a buyer of a payment intangible or promissory note. UCC § 1-201(b)(35).

[5] For purposes of this Report, I do not dispute that value was given or that the PSA is an authenticated sale agreement.

Mortgage Securities owned or had the power to sell the Loan. But if New Century did not sell the Loan to NC Capital, or NC Capital did not sell the Loan to NC Mortgage Securities, then NC Mortgage Securities had no power to sell the Loan to the Securitized Trust.

Yet the Defendants provide no evidence at all that these sales occurred: neither in the original note or the corrective allonge nor in any sale agreement or agreements between these parties. They merely assert without corroboration that the originator, New Century, "sold the Loan to NC Capital who, in turn sold the Loan to New Century Mortgage Securities, Inc." Defendants' Motion for Summary Judgment, *supra*, Ex. 1, New Century Aff. ¶ 17. As a result, they have failed to show that the Securitized Trust purchased the Loan, Note or Mortgage from NC Mortgage Securities (the depositor under the PSA), as required by Section 2.01 of the PSA.

This failure is not cured by the recent endorsement of the Note directly from New Century to the Securitized Trust via the allonge dated October 20, 2016, ECF No. 10146, as the PSA does not permit the acquisition of Mortgage Loans from any entity other than NC Mortgage Securities. Furthermore, no mortgage loans can be added to the Trust Fund (as defined in the PSA)—*i.e.*, all of the Mortgage Loans and other assets of the Securitized Trust—more than two years after August 4, 2004 (the closing date for the Securitized Trust). *See* PSA § 2.01 & 2.03(b) & definitions of "Closing Date," "Mortgage Loan," "Startup Day" and "Trust Fund."

Consequently, the Defendants have not demonstrated that the Securitized Trust owns the Loan, Note or Mortgage.

I declare that the foregoing conclusions are correct to the best of my knowledge and belief based on the documents I have reviewed and my familiarity with applicable law and securitization practice. I am prepared to so testify at trial if I am called as a witness in this case.

Date: February 28, 2017
New York, New York /s/ Kathleen G. Cully
Kathleen G. Cully

STATE OF NEW YORK

COUNTY OF NEW YORK

BEFORE ME this date personally appeared Kathleen G. Cully, who upon an oath deposed and said the foregoing report was true and correct to the best of her knowledge and belief as stated above, and who is personally known to me or who produced NY Driver's License as identification.
NOTARY PUBLIC, State of New York

My Commission Expires: June 23, 2018

/s/ Rafael Gutierrez
Rafael Gutierrez

RAFAEL L GUTIERREZ
Notary Public -
State of New York
NO. 01GU6306751
Qualified in New York County
My Commission
Expires Jun 23, 2018

EXHIBIT A

KATHLEEN G. CULLY

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EMPLOYMENT

KATHLEEN G. CULLY PLLC **2007-Present**

Principal

Focus on consumer bankruptcy as well as expert services and testimony on complex financial transactions (including RMBS and credit default swaps) and financial guaranty insurance

CIFG GROUP **2003-2006**

Managing Director and General Counsel 2005-2006
Managing Director and General Counsel,
CIFG Assurance North America, Inc. 2003-2004

Responsible for all legal aspects of the business and operations of then-AAA-rated CIFG Group, comprising primary financial guarantors in the US and Europe, a French reinsurer and an associated holding company and services company

- Responsible for all transactional work, focusing on US and European structured finance and European project finance and public-private partnership transactions; transactions include synthetic and cash CDOs and CLOs as well as more traditional structures, enhanced through credit default swaps as well as traditional financial guaranties
- Served as CIFG liaison with ISDA and with ISDA's End User Group, including work on Form II pay-as-you-go template for CDS of ABS
- Participates in formulating CIFG's standard forms, policies and procedures, including its CDS and guaranty forms and related agreements and trading and conflicts policies
- Responsible for Board, regulatory, licensing and corporate matters in the US and Europe

ACA CAPITAL HOLDINGS. INC. **1998-2003**

Managing Director and General Counsel

Responsible for all legal aspects of the business and operations of the ACA Capital group, including then-A-rated ACA Financial Guaranty Corporation, an asset manager and a broker-dealer

- Responsible for all transactional work; most work performed in-house, optimizing use of outside counsel while encouraging legal and business team and controlling costs
- Developed regulatory and legal strategies for high-yield municipal, project finance and structured finance transactions
- Successfully managed workouts of structured finance and tax-exempt transactions

- Responsible for Board, regulatory and other corporate matters

FitchRatings	**1993-1998**
Deputy General Counsel	*1994-1998*
Senior Attorney	*1993-1994*

Responsible for the day-to-day running of the Legal Department, covering both transactional analysis and corporate matters

- Transactions included all novel or complex structures and international offerings rated by Fitch, such as UK, French, Italian, Dutch, and Spanish MBS, commercial MBS, and ABS; CLOs, CBOs, and bank loans; tax lien, stranded-asset, future-revenue and natural resource securitizations; securitizations of revolving assets continuing into bankruptcy of originator; Orange County issuances immediately after bankruptcy; New York TFA bonds; tobacco company ratings; special-revenue, project finance and power-supply-contract transactions; and many others
- Served as member of Credit Advisory Group coordinating criteria for Fitch as a whole. Developed and refined legal criteria and policies in response to new structures
- Trained analysts on legal aspects of securitization and securities offerings
- Corporate responsibilities included Fitch's 1997 merger with IBCA as well as generally ensuring compliance with laws and regulations affecting Fitch's business, such as securities, investment adviser, intellectual property, copyright, and employment

- Advised Board, officers, and employees as to legal matters affecting the company, and assisted in developing company policies and procedures

CITIGROUP **1985-1993**

Legal Counsel, Citicorp Securities Markets Inc., Global Finance North America *1991-1993*

Line counsel to mortgage finance, commercial and multi-family mortgage and asset securitization groups in Citicorp's investment banking activity center. Matters worked on included conduit and rental shelf MBS transactions, whole-loan and participation sales of mortgages, master servicing, asset-backed commercial paper programs, and auto loan and lease warehouse facilities, among others.

Global Securitization Coordinator, Office of Corporate Finance *1989-1991*

Developed and coordinated policies and procedures for all Citicorp asset securitization programs; reviewed and approved all securitization transactions; advised Citicorp businesses on securitization strategy, methods, and structures. New products included a master trust structure, global certificate delivery, and floating-rate money-market certificates for cards ABS; a senior/mezzanine/subordinated format for residential MBS; and the first international securitizations in many markets, such as residential MBS in Australia, Hong Kong, Italy, the Philippines, Spain, and England and auto loans in Italy and Spain.

Securities Counsel and Co-Head of Securities Unit, General Counsel's Office	*1987-1989*
Staff Attorney, Securities Unit, General Counsel's Office	*1985-1987*

Acted as issuer's counsel for all Citicorp securitizations and corporate securities. Successfully competed with outside law firms in bringing issuer's counsel role
in-house. Transactions included the first global offering of common stock ($1.1 billion), perpetual subordinated floating-rate notes, money-market and remarketed preferred stock, "blank-check" Class B common stock, and many of the first securitizations, including the first public cards, auto and tax-free municipal lease deals, franchise loan securitization, and REMIC and multiple-originator MBS transactions.

SULLIVAN & CROMWELL LLP **1982-1985**

Associate, Corporate Practice Group

General securities practice, including shelf offerings, mergers and acquisitions, preferred stock, and corporate work. Particularly active in initial public offerings and interest-rate and currency swaps; as a third-year associate, was second-in-command of the swaps group. Served on the industry committee that drafted the initial ISDA Code for interest rate swaps.

MEMBERSHIPS

American Securitization Forum
American Bar Association
National Association of Consumer Bankruptcy
Attorneys New York City Bar Association
New York State Bar Association
Structured Finance Industry Group

PUBLICATIONS

In-House Counsel's Role in the Structuring of Mortgage-Backed Securities, 2012 WIS. L. REV. 521-47 (available on the Social Science Research Network at http://ssrn.com/abstract=1970249

CLE AND SEMINARS

New York City Bar Association/LawReview CLE, "Bankruptcy 101" (July 25, 2012)
NCLC 2012
Summer Mortgage Conference, "PSA Agreements" (July 18, 2012)
Max Gardner's Securitization and Servicing Bankruptcy Boot Camps (June 10, 2012; Feb. 18-21, 2011; Sept 17-19, 2010); May 29-30, 2016; Foreclosure and Mortgage Litigation Boot Camp (Oct. 12-14, 2012); and Reboot Camp (Sept. 2-3, 2012)
Wisconsin Law Review Symposium, "Who's in the House? The Changing Role and Nature of In-House and General Counsel" (Nov. 18-19, 2011)
Federal Judicial Center Bankruptcy Judges' Workshops (Aug. 3-5, 2011 and Mar. 22-24, 2011)
New York City Bar Association, "Using Bankruptcy to Retain Real Estate Ownership" (July 27, 2011)
Empire Justice Center, Securitization of Mortgages (Oct. 13, 2010)

EDUCATION

J.D., YALE LAW SCHOOL 1979-1982
New Haven, Connecticut
Articles Editor, *Yale Law Journal*

WILLAMETTE UNIVERSITY SCHOOL OF LAW *Salem, Oregon*	1978-1979
B.A., HISTORY, REED COLLEGE *Portland, Oregon*	1967-1971

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

In re: MICHAEL D. LYNCH and CANDENCE B. LYNCH, **Debtors.**	**Case No.: 12-BK-27731-JC Chapter 7**
MICHAEL D. LYNCH and CANDENCE B. LYNCH, **Plaintiffs,** **v.** **OCWEN LOAN SERVICING, LLC and DEUTSCHE BANK NATIONAL TRUST COMPANY** **Defendants.**	**Adversary Proceeding No. 14-01786**

AFFIDAVIT OF DONNA WALKER

STATE OF CALIFORNIA)
COUNTY OF ORANGE)

Before me, the undersigned Notary Public, in and for said State and in said County, personally appeared Donna Walker, who being known to me, upon oath duly administered, deposed and said as follows:

1. My name is Donna Walker and I am over the age of twenty-one (21) years and competent to testify to the matters contained herein.

2. As discussed in further detail herein, I am a consultant to Alan M. Jacobs, ("Jacobs") the Liquidating Trustee of the New Century Liquidating Trust (the

"Liquidating Trust") and also the sole officer and director of New Century Mortgage Corporation ("NCMC"), NC Capital Corporation ("NC Capital") and other affiliated debtors. Prior to the bankruptcy filed by the NC Debtors (as hereinafter defined) I was an employee of NCMC.

3. I am authorized to execute this affidavit on behalf of the Liquidating Trust, NCMC, and NC Capital, in furtherance of the *Motion for Summary Judgment* filed in the above-styled adversary proceeding by Ocwen Loan Servicing, LLC ("Ocwen") and Deutsche Bank National Trust Company, as Trustee for New Century Home Equity Loan Trust Series 2004-A ("Deutsche Bank").

4. As discussed in further detail herein, on behalf of the Liquidating Trustee, I am one of the persons who has custody and control of the business records of NCMC and NC Capital concerning the indebtedness referred to herein. These records were made at or near the time of the events underlying the subject indebtedness, and recorded by a person with knowledge of the events and charged with the responsibility of recording such events. These records were kept in the ordinary course of business by NCMC's and NC Capital's regularly conducted business activity, which was the customary practice of NCMC and NC Capital, and later delivered to and are currently held by the Liquidating Trust. As consultant to the Liquidating Trustee and former employee of NCMC, I am familiar with the documents discussed herein. This affidavit is given on the

basis of my personal knowledge and review of the records set forth above.

5. Prior to its bankruptcy filing (as discussed below), NCMC was engaged in the business of originating and purchasing mortgage loans, and was an active participant in the secondary mortgage market as NCMC would sell its mortgage loans through loan sales and securitizations.

6. On or about June 2, 2004, NCMC made a loan to Michael D. Lynch and Candence B. Lynch (together, the "Borrowers") in the principal amount of $224,000.00 (the "Loan").

7. Following the origination of the Loan, NCMC sold the Loan to NC Capital, who, in turn, sold the Loan to New Century Mortgage Securities, Inc. On or about August 4, 2004, the Loan was transferred to, and securitized as part of, the New Century Home Equity Loan Trust, Series 2004-A (the "Securitized Trust").

8. On April 2, 2007 (the "Petition Date"), NCMC, NC Capital and other of their affiliates (collectively, the "NC Debtors") filed chapter 11 petitions with the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"), which chapter 11 cases are being jointly administered in the case of New Century TRS Holdings, Inc., Case No. 07-10416 (the "Bankruptcy Case").

9. As of the Petition Date, neither NCMC, nor NC Capital (nor any of the other NC Debtors) owned the Loan as a result of the aforementioned sales and

the securitization and transfer of the Loan to the Securitized Trust.

10. Accordingly, the Loan was not (and is not) an asset of the bankruptcy estate of NCMC, NC Capital or any of the other NC Debtors.

11. On July 15, 2008, the Bankruptcy Court entered an order (*See* Bankruptcy Case, Doc. No. 8596) (the "Original Confirmation Order") confirming the NC Debtors second amended chapter 11 plan (*See* Bankruptcy Case, Doc. No. 6412) (the "Original Plan"). The effective date of the Original Plan was August 1, 2008 (the "Original Plan Effective Date"). The Original Confirmation Order and Original Plan, which are of record, are incorporated by reference herein.

12. Pursuant to the Original Plan, as amended and confirmed by the Original Confirmation Order, (a) the New Century Liquidating Trust Agreement (*See* Bankruptcy Case, Doc. No. 6414) (the "Liquidating Trust Agreement") was approved, (b) the Liquidating Trust was formed, (c) the remaining assets of NCMC and NC Capital were transferred to the Liquidating Trust, (d) Jacobs was appointed as Liquidating Trustee of the Liquidating Trust, (e) the officers and directors of NCMC and NC Capital were terminated, and Jacobs was appointed as the sole officer and director of NCMC and NC Capital, and (f) the Liquidating Trust was directed to preserve and maintain all documents and electronic data transferred to the Liquidating Trust by NCMC and NC Capital as required under the Original Plan and Liquidating Trust Agreement.

13. On July 16, 2009, following an appeal of the Bankruptcy Court's First Confirmation Order, the United States District Court for the District of Delaware (the "District Court") reversed the First Confirmation. Order based on a finding that the Original Plan effectuated an improper substantive consolidation. *See In re New Century TRS Holdings, Inc.*, 407 B.R. 576 (D. Del. 2009).

14. On or about September 30, 2009, a modified second amended chapter 11 plan (*See* Bankruptcy Case, Doc. No. 9905) (the "Modified Plan") was filed to address the issues raised by the District Court, which plan was confirmed by order of the Bankruptcy Court on November 20, 2009 (*See* Bankruptcy Case, Doc. No. 9957) (the "Modified Confirmation Order"). The effective date of the Modified Plan was December 1, 2009. The Modified Plan and Modified Confirmation Order, which are of record, are incorporated by reference herein.

15. The Modified Plan adopted, ratified and confirmed as of the Original Plan Effective Date (a) the formation of the Liquidating Trust, (b) the approval of the Liquidating Trust Agreement, (c) the transfer of the remaining assets of NCMC and NC Capital to the Liquidating Trust, (d) Jacobs appointment as Liquidating Trustee for the Liquidating Trust, (e) Jacobs appointment as the sole officer and director of NCMC and NC Capital, and (f) the Liquidating Trust's duty to preserve and maintain all documents and electronic data transferred to the Liquidating Trust by NCMC and NC

Capital as required under the Original Plan and Liquidating Trust Agreement.

16. Similar to Paragraph 72 of the Original Confirmation Order, Paragraph 69 of the Modified Confirmation Order provides:

> Additionally, with respect to mortgage loans purchased from one or more of the Debtors prior to or subsequent to the Petition Date, the Liquidating Trust shall execute, upon written request, and at the expense of the requesting party, any powers of attorney as shall be prepared by the requesting party and reasonably satisfactory to the Liquidating Trustee, as applicable, necessary to fully effectuate the transfer of such loan or otherwise to effect the appropriate transfer of record title or interest in such loan, including, without limitation, any powers of attorney as may be necessary to allow the purchaser of such mortgage loan from such Debtor (including any trustee or servicer on behalf of the purchaser) to complete, execute and deliver, in the name of and on behalf of the applicable Debtor or the Liquidating Trust, any required assignments of mortgage or instruments of satisfaction, discharge or cancellation of mortgages, mortgage notes or other instruments related to such mortgage loan; provided, however, that the party making the requests presents evidence reasonably satisfactory to the Liquidating Trustee, as the case may be, of the validity of the transfer being effectuated and

that the loan being transferred was purchased from the applicable Debtor . . .

17. In accordance with the terms of the Modified Confirmation Order, the Liquidating Trust, as successor to NCMC, has executed a *Limited Power of Attorney* ("PoA") appointing Deutsche Bank as NCMC's attorney-in-fact with respect to the mortgage loans originated by NCMC and transferred to, and securitized as part of, the Securitized Trust (including, without limitation, the Loan) for the limited purposes of, among other things, executing such documentation as necessary to correct or otherwise remedy any errors or deficiencies contained in any documentation prepared or executed by NCMC and relating to or evidencing the transfer of such mortgage loans, including, without limitation, mortgage assignments, note endorsements and allonges. A true and correct copy of the PoA is attached hereto as **Exhibit A** and incorporated by reference herein.

18. According to the PoA, Deutsche Bank, as Trustee of the Securitized Trust, is authorized as attorney-in-fact for NCMC to execute any note endorsements, mortgage assignments, allonges or other documents to correct or otherwise remedy any errors or deficiencies contained [sic] any documents prepared or executed by NCMC and relating to the transfer of the Loan as necessary to fully effectuate the transfer of the Loan to the Securitized Trust or otherwise effect the transfer of record title or interest in the Loan to the Securitized Trust if, and to the extent, the same has not already occurred.

FURTHER AFFIANT SAITH NOT.

Dated this 24 day of June, 2016.

/s/ Donna Walker
Donna Walker
Consultant to Alan M. Jacobs as, Liquidating Trustee of the New Century Liquidating Trust and sole director and office [sic] of New Century Mortgage Corporation and NC Capital Corporation

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CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT **CIVIL CODE § 1189**

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
County of Orange)

On June, 24, 2016 before me, Lara Loper, Notary Public
Here Insert Name and Title of the Officer
personally appeared Donna Walker
Name(s) of Signer(s)
— only —

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that

he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) or the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Lara Loper
Signature of Notary Public

[SEAL] LARA A. LOPER
Commission # 2117905
Notary Public – California
Orange County
My Comm. Expires Jul 29, 2019

Place Notary Seal Above

OPTIONAL

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

Description of Attached Document

Title or Type of Document: Affidavit of Donna Walker
Document Date: 6/24/16 Number of Pages: 8
Signer(s) Other Than Named Above: None

LIMITED POWER OF ATTORNEY

This limited power of attorney (the "*Limited Power of Attorney*") is made in connection with, and relates solely to, that certain *Pooling and Servicing Agreement* dated July 1, 2004 for the New Century Home Equity Loan Trust, Series 2004-A, Asset Backed Pass-Through Certificates (the "*Agreement*"), under the terms of which Deutsche Bank National Trust Company, as Trustee of the New Century Home Equity Loan Trust, Series 2004-A ("*Deutsche Bank*"), with offices at 1761 East St. Andrew Place, Santa Ana, CA 92705, administers certain mortgage loans (collectively, the "*Mortgage Loans*") that were (a) originated by New Century Mortgage Corporation (the "*Originator*"), with offices formerly located at Irvine, CA, and (b) transferred to, and securitized as part of, the New Century Home Equity Loan Trust, Series 2004-A, with a transaction closing date of August 4, 2004.

In connection with Deutsche Bank's administration of the Mortgage Loans, the New Century Liquidating Trust (the "*Liquidating Trust*"), on behalf of and as successor-in-interest to the Originator, as authorized by and pursuant to the *Order Confirming the Modified Second Amended Joint Chapter 11 Plan of Liquidation Dated as of September 30, 2009* (the "*Confirmation Order*") entered by the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") (*See* Case No. 07-10416, Doc. No. 9957), hereby makes, constitutes and appoints Deutsche Bank the Originator's true and lawful attorney-in-fact

only with respect to the Mortgage Loans and only for the following limited purposes:

> To endorse mortgage payment checks, execute mortgage satisfactions/deeds of reconveyances or similar release instruments, partial releases, assignments, and any and all documentation required to foreclose delinquent mortgages, assign mortgages, and properly administer the Mortgage Loans, and to correct or otherwise remedy any errors or deficiencies contained in any documents prepared or executed by the Originator and relating to or evidencing the transfer of the Mortgage Loans, including, but not limited to any mortgage assignments, note endorsements or allonges; *provided, however*, that nothing herein shall permit Deutsche Bank to commence, continue, or otherwise prosecute or pursue any foreclosure proceedings in the name of the Liquidating Trust or the Originator.

All documents executed pursuant to this Limited Power of Attorney shall contain the following sentence: "This (insert document title) is made without recourse to or against the Liquidating Trust and the Originator, and without representation or warranty, express or implied, by the Liquidating Trust and the Originator."

The undersigned gives Deutsche Bank, as attorney-in-fact, full power and authority to execute and/or endorse the above described documentation as if the undersigned were personally present, hereby ratifying and confirming all that said attorney-in-fact shall lawfully do or cause to be done by authority hereof.

All actions taken by Deutsche Bank pursuant to this Limited Power of Attorney must be authorized by, and in compliance with all state and federal debt collection laws and any other applicable state and federal laws.

Nothing contained herein shall be construed to grant Deutsche Bank the power to (i) initiate or defend any suit, litigation, or proceeding in the name of the Liquidating Trust or the Originator or be construed to create a duty of the Liquidating Trust or the Originator to initiate or defend any suit, litigation, or proceeding in the name of Deutsche Bank, (ii) incur or agree to any liability or obligation in the name or on behalf of the Liquidating Trust or the Originator, or (iii) execute any document or take any action on behalf of, or in the name, place, or stead of, the Liquidating Trust or the Originator, except as provided herein.

The Liquidating Trust makes no representations, warranties or covenants to Deutsche Bank regarding the validity, legality or enforceability of this Limited Power of Attorney, any of the provisions hereof or any document executed by Deutsche Bank pursuant to this Limited Power of Attorney. If any provision of this Limited Power of Attorney or any document executed by Deutsche Bank pursuant to this Limited Power of Attorney shall be held invalid, illegal or unenforceable, (i) the validity, legality or enforceability of the other provisions hereof or thereof shall not be affected thereby and (ii) the Liquidating Trust shall not be liable to Deutsche Bank or any other person or entity as a result of or arising out of such invalidity, illegality or unenforceability. This Limited Power of Attorney is entered into and shall be governed by the laws of the

State of New York without regard to conflicts of law principles of such state. The parties agree that this Limited Power of Attorney is coupled with an interest in the Mortgage Loans such that it shall continue. in full force and effect upon and after the dissolution of the Originator and termination of the Liquidating Trust pursuant to the *Modified Second Amended Joint Chapter 11 Plan or Liquidation of the Debtors and the Official Committee of Unsecured Creditors Dated as of September 30, 2009* (*See* Case No. 07-10416, Doc. No. 9905) (the "*Modified Plan*"), which Modified Plan was confirmed by the Bankruptcy Court pursuant to the Confirmation Order.

NEW CENTURY
LIQUIDATING TRUST
Successor (as provided for in the Modified Plan) to New Century Mortgage Corporation

By: /s/ Alan M. Jacobs
Printed Name: Alan M. Jacobs
Printed Title: Liquidating Trustee

WITNESSED BY:

By: /s/ [Illegible]
Printed Name: [Illegible]

By: /s/ [Illegible]
Printed Name: [Illegible]

STATE OF NEW YORK)
COUNTY OF NEW YORK)

On July 7, 2016, before me, the undersigned, a notary public in and for said State, personally appeared Alan M. Jacobs, the Liquidating Trustee of the New Century Liquidating Trust, personally known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the entity upon behalf of which the person acted executed the instrument.

/s/ [Illegible]
Notary Public

My Commission Expires: 9/14/18

[Illegible Notary Stamp]