NO. 19-7612

IN THE SUPREME COURT OF THE UNITED STATES

SHA'RON A. SIMS,

APPILICANT

ORIGINAL

V.

WELLS FARGO BANK, N.A, WELLS FARGO AND COMPANY, INC.
AND THE UNNAMED PASS THROUGH TRUST

ON PETITION FOR WRIT OF CERTIORARI

TO THE

ELEVENTH CIRCUIT COURT OF APPEALS

SHA'RON A. SIMS
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904-802-9521

QUESTIONS PRESENTED

*"Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment..... "The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." Joint Anti-Fascist Comm. v. McGrath, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U. S. 545, 552 (1965). See Grannis v. Ordean, 234 U. S. 385, 394 (1914)." **(MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE v. ELDRIDGE, 424 U.S. 319 (1976)))***

The application of third-party beneficiary standing has resulted in thousands of cases between homeowners and their lenders being dismissed before the merits of the cases are heard. As applied, the home owner cannot sustain their cases past the motion to dismiss stage because of a PSA (Pooling and Service Agreement) between the original lender and a trust (collectively "lenders"). This Agreement between the two, directly impacts the property rights of the home owner. The home owner never has waived any rights to defend their interest, yet the court have consistently held that homeowners do not have standing in court to defend their constitutional property interest before the bench.

However, lenders, servicers and Trusts (those who actually own the mortgages within the process of securitization) have been allowed standing, throughout this country, to foreclose on homeowners when these institutions cannot prove that they have a property interest within the mortgage to assert. In fact, its long been settled that a person in wrongful possession of a note may foreclose on that, never having to prove that the note holder actually has a property interest therein with which to invoke the Court's jurisdiction.

Question 1: Are the laws of standing applied in a manner which violate the homeowner's 14th Amendment's right, under the Federal Constitution, to be equally protected by the laws and to have the laws equally applied?

When the laws of standing are applied in the manner noted in questions#1, the cases between homeowners and the lenders are kicked out of court long before any homeowner may argue the merits of his or her case. Under these circumstances, the homeowner's rights are limited to filing

paper work and showing up in court. After that, the homeowner has little hope of arguing the merits of their cases, because the lenders file a motion to dismiss and the case is dismissed.

Question 2: Do homeowners in America have a constitutional right, under the due process clauses of the 5th and 14th Amendment's to the Federal Constitution, to be meaningfully heard in cases between them and lenders and does the application of third-party beneficiary standing doctrine prevent the homeowners' due process rights ?

The history of Securitization stretches back nearly a century. ***compare United States v. Dilliard, 101 F. 2d 829 - Circuit Court of Appeals, 2nd Circuit 1938*** *("The company was organized in the year 1927 for the purpose of selling guaranteed mortgages: sometimes it sold these outright; sometimes it sold "participation certificates" in a single mortgage, which it held in trust for certificate holders; sometimes it set up as security a pool of mortgages, which it either assigned to a trustee, or itself held in trust")* **to *BlackRock Financial Management Inc. v. Segregated Account of Ambac Assurance Corp., 673 F.3d 169, 173 (2d Cir.2012)*** *("Residential mortgage loans, rather than being retained by the original mortgagee, may be pooled and borrowers. The right to receive trust income is parceled into certificates and sold to investors, sold "into trusts" created to receive the stream of interest and principal payments from the mortgage called certificate holders. The trustee hires a mortgage servicer to administer the mortgages by enforcing the mortgage terms and administering the payments. The terms of the securitization trusts as well as the rights, duties, and obligations of the trustee, seller, and servicer are set forth in a Pooling and Servicing Agreement...."). **See also Hamburg v. Guaranty Mortgage Co. N.Y., 38 N.Y.S, 2nd 165 [1945]*** (Guaranty Mortgage Co. Is *"in the business of selling to the public guaranteed mortgages and guaranteed mortgage participation certificates, I.E., the whole of or part interest in mortgages on real estate, the payment of the principle and interest of which is guaranteed"*; **New York Guardian Mortgagee Corp. v. Cleland, 473 F. Supp. 409 - Dist. Court, SD New York, 1979)**

Securitization is based on a guaranty of mortgages. In ***Hamburg v. Guaranty Mortgage Co. N.Y., 38 N.Y.S, 2nd 165 [1945]***, the court found as a fact that the issuance of a guaranty is an *"inducement to procure sales of the certificates or Mortgages"* to the public. The Guaranty is recognized in modern courts as well. See **New York Guardian Mortgagee Corp. v. Cleland, 473 F. Supp. 409 - Dist. Court, SD New York, 1979)**

Question 3: Since a guaranty is a triparte relationship, even if the guarantor is a volunteer, can the homeowner rightly rest on the duties, rights and defenses stemming from that relations when litigating with a lender, servicer or trust within securitization?

This court has held that the right to a jury trial is a broad reservation of power within our constitutional structure. (***Walker v. New Mexico & Southern Pacific Railroad, 165 US 593 [1897])*** Under this Court's ruling in ***Bell Atlantic Corp. v. Twombly, 550 US 544 [2007],*** Courts are not supposed to make factual findings on a motion to dismiss, esp in a jury demanded trial. Such will deprive the American citizen of his/her rights to have jury, not a judge, determine the truth of disputed facts. While the plausibility standard has a logical aim, the standard, as applied in this instant case, has deprived Sims of her ability to due process under the 5th and 14th amendments and a jury trial under the 7th amendment.

Question 4: Has the lower Court's deprived Sims of her Constitutional right to a Jury trial, and therefore, indirectly, denied Sims her 5th, and 14 Amendments rights to due process and her 14th Amendments right to equal protection of the law?

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b. WELLS FARGO KNEW THAT THERE ARE TWO PAYMENT HISTORIES. ONE BELONGING TO THE SECURED CREDITOR (THE PTT) AND THE OTHER TO WELLS FARGO AS AN UNSECURED CREDITOR, UNDER FLORIDA LAW). WELLS FARGO ORDERS THE ATTORNY TO MERGE, ON WELLS FARGO'S PORTAL, THE TWO DISTINCT DEBTS, AND FILE A LIS PENDIS OR PROOF OF CLAIM IN A BANKRUPTCY SETTING. tHIS COURT UNDER REYNOLDS V. DOUGLAS HELD THAT A GUARANTOR'S PAYMENT KEPT THE NOTE FREE FROM DEFAULT. APP 257

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1. pg s-27 (APP 507) , "Generally each servicer is required to advance delinquent payments of principal and interest on any mortgage in the trust" ;

2. pg S-42 AND pg s-43 (APP 522 & 523), "Wells Fargo... make periodic advances";

3. pg, S-42 (522), para 3 ""Among other things, the servicers are obligated under certain circumstances to advance delinquent payments of principal and interest with respect to the mortgage loans";

4. Pg 5 (APP [Master Servicer], "The master servicer will generally be required to make advances with respect to the Mortgage Loans";

5. pg 6 (APP 561)[***last para***.], list "limited guarantee" as a credit enhancement.;

6. page 7 (APP 562) , para 1, ..."the Servicer of the mortgage loans will be obligated....to make cash advances";

7. page 46 (APP 603) , para 2(C), "Servicers will make advances of delinquent payments of principal and interest on the mortgage loans";

8. Pg 47 (604), para 1, "The duties to be performed by the Servicer include.... the advance of funds to the extent certain payments are not made by the mortgagor...";

9. pg 49 (APP 606), last para, "Generally each servicer will be required to make advances to cover the delinquent payments of principal and interest on such mortgage loan..."; and,

10. pg 50 (APP 607), para 1, "The failure of Servicer to make any required periodic advances or other advances under an underlying Services Agreement constitutes a default under such agreement for which the Servicer will be terminated..."

AND

B: WELLS FARGO'S 2017 ANNUAL REPORT: NOTE 8- SECURITIZATION:

1. Statements made in WELLS FARGO 2017 annual report, Note 8 attached hereto: Wells Fargo provide Guarantees to the SPEs and VIEs (termed Trusts by Sims). See Note 8, pages 187 (app 684)

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

Sims isn't aware if the Bankruptcy Court's or the District Court's Orders are published, However, each are attached at App B and C. The 11th Cir. Appeals Court's Order is unpublished, and is located at APP A (Affirmation on the merits) and denial of the Petition for rehearing.

JURISDICTIONAL STATEMENT

While the decision of the three-judge panel should be vacated for sanctioning the departure of the lower court, and itself departing, from this Court's governing law, this Court has jurisdiction over this petition for Writ of Certiorari **28 U.S.C. Section 1331** and **28 U.S.C. § 1254(1).** The Bankr. Court entered its opinion on April 28, 2717. The District Court entered its opinion on July 7, 2018. The 11th Cir. Court Panel entered its decision on July 28, 2019 and its order denying the petition for rehearing on Oct. 28, 2019. Additionally, this court has jurisdiction over this matter because Sims's Claim, in part, rest on a deprivation of her Constitutional rights. "A claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a post deprivation hearing. See ***Regional Rail Reorganization Act Cases, 419 U. S. 102, 156 (1974). In***

light of the Court's prior decisions, see, e. g., Goldberg v. Kelly, 397 U. S. 254 (1970); Fuentes v. Shevin, 407 U. S. 67 (1972), (MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE v. ELDRIDGE, 424 U.S. 319 (1976))

STATUTORY AND CONSITUTIONAL PROVISONS INVOLVED

18 U.S. Code CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS, SECTION 1962, ET SEQUENCE; FLORIDA STATUTES CHAPTER 895 OFFENSES CONCERNING RACKETEERING AND ILLEGAL DEBTS; FEDERAL CONSTITUTION, AMENDMENTS 5 (one shall not be "deprived of life, liberty or property without **due process** of law."), 7 AND 14 (one shall not be "deprived of life, liberty or property without **due process** of law" **And** "nor shall any State [...] deny to any person within its jurisdiction the **equal protection** of the laws".)

STATEMENT OF THE CASE/BACKGROUND OF ISSUES PRESENT

Sims brought this matter on a guaranty of mortgages. SECURITIZATION, is not a new or mystical invention. Securitization has been around since 1888. This Court's first look at the issue was in 1924 (***THE HISTORY OF SECUTIRZATION WITH CITATIONS TO: DAVIS, WESLY, "THE STATUS OF LEGISLATION RELATIVE TO GUARANTEED MORTGAGES": ST JOHN'S LAW REVIEW (VOL. 9, ISS. 1. ARTICLE 42 [ORGINALLY PUBLISHED IN DEC. 1934); HANBURG V. GUARANTEED MORTGAGE CO. OF NY., 38 N.Y.S. 2D 165***

(1942); EMPIRE TITLE GUARANTY CO. v. UNITED STATES, (2ND CIR. 1939); pRASHER v. N.J. TITLE GUARANTY CO. (dEC. 1941); JACOBY V. BOND MORTGAGE CP., 72 F.2D 420(1934); PRUDENCE-BOND CORP., 92 N.Y.L.J. 1455 (E.D. N.Y., INCH, J., OCTOBER 25, 1934); ANATOMY OF A RESIDENTIAL MORTGAGE CRISIS: A LOOK BACK AT THE 1930'S: BY JENNETH A. SNOWDEN; BRYAN SCHOOL OF BUSINESS AND ECONOMICS; JUNE , 2009); NEW YORK GUARDIAN MORTAGE CORP. v. CLELEND, 473 F.SUPP. 422 (S.D.N.Y. 1979);

There are two types of securitization, government sponsored, or public, securitization by Fannie Mae and Freddie Mac **(GSE).** And Private Lable Securitization **(PLS)**, engaged in by banks. In the Public Securitization, the government guaranty payments to the certificate holders. The Government do not guaranty the mortgage payments. In PLS, Banks guaranty the Mortgage Payments to the Pass-Through Trust **(PTT)**, not the Certificate holders.

In 1931, this Court held that agreeing to cover a mortgage, principle and interest, was a guaranty. (**Bowers *v. Lawyers Mortgage Co. 285 US 182 [US S.CT. 1932]***) The issue in Bowers was if the company, who claimed that it provided insurance, and not a guaranty, should be taxed as an insurance company. This Court held that because of the elements of a guaranty being present, the company could not be taxed as an insurance company. The Court in Bowers, entered a split decision, so to speak. While it held, in essence, that the company could call its actions insurance, it was nonetheless a guaranty. Bowers was in line with ***Reynolds v. Douglas, 37 US***

497 (1938), which held that if the parties treat the document as a guaranty-it is a guaranty.

Thirty years later, This Court held that a suretyship is never insurance, because it will upend the commercial use of the suretyship relation. **(Pearlman v. Reliance Insurance Co., 371 U.S. 132, 83 S.Ct. 232, 9 L.Ed.2d 190 (1962) at 140 n.** Held that "*that suretyship is not insurance.*".). On a certified question form the 11th Circuit Court of Appeals, the Florida Supreme Court agreed with this Court. (***(DADELAND DEPOT. v. St. Paul Fire and Marine, 945 So. 2d 1216 - Fla: Supreme Court 2006)*** **(answering a certified Question from the 11th Cir. Ct. Of Appeals)** "*"the usual view, grounded in commercial practice, [is] that suretyship is not insurance.*" (Citing ***Pearlman v. Reliance Insurance Co., 371 U.S. 132, 83 S.Ct. 232, 9 L.Ed.2d 190 (1962) at 140 n.*** (*"Among the problems which would be raised by a contrary result would be the unsettling of the usual view, grounded in commercial practice, that suretyship is not insurance. This distinction is discussed in Cushman, Surety Bonds on Public and Private Construction Projects, 46 A. B. A. J. 649, 652-653 (1960).*"; *see also* ***W. World Ins. Co. v. Travelers Indem. Co., 358 So.2d 602, 604 (Fla. 1st DCA 1978) (noting the distinctions between a general liability insurance policy and a statutory penal bond for purposes of considering indemnification).***)

Therefore, without regard to what the parties call the document (PSA, Guaranty or insurance), if the parties treat the contract as a guaranty, it is a guaranty. (***Reynolds v. Douglas, 37 US 497 (1938)***)

GUARANTY WITHIN THE SECURITIZATION PROCESS, is well known. In 1943, the 2nd Circuit held that the guaranty was to precure sales of the certificates.

(***HAMBURG V. GUARANTEED MORTGAGE CO. OF NY., 38 N.Y.S. 2D 165 (1942)***) Courts have found that securitization works when the guaranty has been issues. (**NEW YORK GUARDIAN MORTAGE CORP. v. CLELEND, 473 F.SUPP. 422 (S.D.N.Y. 1979)**;)

In this instant case, Wells Fargo, in spite of its late denial at the 11th circuit Court of Appeals, admitted in public Documents to the Security and Exchange Commission, and the public, that not only do it provide guaranties, are required to do so. (See WELLS FARGO'S 2005-AR11 TRUST PROSPECTUS PAGE :**1.) pg s-27 (APP 507)** , "***Generally each servicer is required to advance delinquent payments of principal and interest on any mortgage in the trust***" ; **2.) pg S-42 AND pg s-43 (APP 522 & 523),** "***Wells Fargo... make periodic advances***"; **3.)** ***pg, S-42 (522)***, para 3 ""***Among other things, the servicers are obligated under certain circumstances to advance delinquent payments of principal and interest with respect to the mortgage loans***"; **4.) Pg 5 (APP [Master Servicer],** "***The master servicer will generally be required to make advances with respect to the Mortgage Loans***"; **5.)** ***pg 6 (APP 561)[last para.]***, list ***"limited guarantee" as a credit enhancement.;*** **6.) page 7 (APP 562) , para 1,** ..."***the Servicer of the mortgage loans will be obligated....to make cash advances***"; **7.) page 46 (APP 603) , para 2(C),** "***Servicers will make advances of delinquent payments of principal and interest on the mortgage loans***"; **8.) Pg 47 (604), para 1,** "***The duties to be performed by the Servicer include.... the advance of funds to the extent certain payments are not made by the***

mortgagor..."; **9.) pg 49 (APP 606), last para,** ***"Generally each servicer will be required to make advances to cover the delinquent payments of principal and interest on such mortgage loan...***"; and, **10.) pg 50 (APP 607), para 1,** "***The failure of Servicer to make any required periodic advances or other advances under an underlying Services Agreement constitutes a default under such agreement for which the Servicer will be terminated...***" **and a). APP 187, PARA 2,** WELLS FARGO SAYS THAT *AS A PART OF ITS ONGOING INVOLVEMENT WITH SPE'S, IT PROVIDE GUARANTEES*.; b). **APP 188, PARA 1,** WELLS FARGO STATES THAT SPE'S INCLUDE "***SECURITIZATIONS OF RESIDENTIAL MORTGAGES***". ; **c) APP 188, PARA 2,** *WELLS FARGO STATES THAT ITS FINANCIAL INVOLEMENT WITH SPE'S IS SIGNIFCANT, FINANCIALLY, IF THEY ARE THE SERVICERS OF THE ASSETS*.; **d) APP 189, PARA 1,** WELLS FARGO OPENLY STATES THAT *PROVIDING GUARANTEES TO SPE'S INDICATE ITS "**SIGNIFICANT INVOLEMENT**"*. mORE IMPORTANTLY, *WELLS FARGO ADMITS THAT IT PROVIDE GUARANTEES TO SPE'S,* AS SIMS CLAIM.; **e) APP 190, PARA 2 (RESIDENTIAL *MORTGAGE LOANS)***, WELLS FARGOS STATES THAT MORTGAGES THEY TRANSFER TO SPE'S (VIE'S) IT RETAIN THE RIGHT TO SERVICE. AND **(CONTINUING TO APP 191)** ***WELLS FARGO FACES LIABILITY BECAUSE OF GUARANTEES (AMONG OTHER AGREEMENTS) WITH THE RESIDENTIAL MORTGAGE SPE'S.)*** Therefore, there is a reasonable

plausibility that Sims' claim that Wells Fargo acted as a guarantor is true, and provable with discovery.

PRIOR COURT PROCEEDINGS

SIMS filed here Amended Complaint on Feb. 14, 2017 in the Middle District of Florida, Bankruptcy Division. (See App 19-96) On March20, 2017, Wells Fargo Filed Its motion to dismiss. Wells Fargo's listed several Reasons to dismiss, including failure to state a claim, failure of Sims to properly plead under Rule 8(a) and 9(b) and Failure to serve. The sole Argument for the Failure to state a claim was that Wells Fargo didn't sale Sims' Note. The remainder of Wells Fargo's motion was Arguendo, which meant it wasn't relying on those arguments. Essentially, this is what Wells Fargo would say – if it wanted say-, but really isn't saying for purposes of this Motion.

Sims Filed a written Opposition to the Motion to dismiss, arguing that Sims' complaint is in compliance with this Court's holding on rule 8(a), Rule 9(b), RICO Pleadings and Service requirement. (APP F)

At the April 12, 2017 Hearing, Wells Fargo didn't make any arguments, however, Sims spoke for about 45 minutes. At this Hearing, Sims produced a Copy of Sims' Note which had multiple Stamps on it. Sims Argued that the stamps indicated multiple sales of her note.

Also, Sims pointed out a fraudulent endorsement on that Note. This would indicate that Wells Fargo repurchased Sims' Note within the same month that Sims defaulted. However, this endorsement was on Sims' Note two years earlier. There was a fourth endorsement, but no date stamp next to it. Therefore, Sims argued that there was no evidence that proved that Sims' note was owned by Wells Fargo at the time of the alleged RICO injuries to Sims.

On April 28, 2017, The Bankruptcy Court entered it's order granting Wells Fargo's Motion to dismiss. However, though this Court has consistently held that a judge's

belief, or disbelief, cannot be the foundation of a court's dismissal of a complaint, the bankruptcy Court held that Sims' Complaint could not be believed, even "IF" it happened as she claimed. (APP C)

Sims filed her Appeals brief, within the District Court on Sept. 5, 2017 and Wells Fargo filed its reply brief in Nov. 2017, after filing a motion to strike. (Wells Fargo has filed a Motion to Strike at every Court, as a regular course of litigating this matter)

On December 19, 2017, Sims filed her Reply brief, along with a motion to exceed page limits. Wells Fargo's response Brief included brand new Arguments and arguments it had waived below. Wells Fargo filed an opposition to Sims Motion to Exceed page limits. The District Court granted Sims' motion. See APP G

In June, 2018, the District Court entered a one paragraph ruling that Affirmed the Bankruptcy Court's Belief based order. See App C

Sims filed her initial 11TH CIR. Brief on Sep 11, 2018. The Panel delivered its opinion on July 17, 2019. This Opinion was silent on the Bankruptcy Court's **belief based order**, acknowledge that the District Court Order was inadequately reasoned (as Sims briefed the panel it was), held that though the District Court order was inadequate, Sims' wasn't harmed because the Panel knew why the district Court affirmed the Order, and, finally, the Panel after recognizing the centrality of the Guaranty claim and after being briefed that, by Sims, that no other Court has determined the factual allegation of guaranty, simply stated that it didn't find a guaranty present. (App A)

Sims Filed a Petition for rehearing and rehearing en banc, arguing that the Panel made a factual determination on a de novo review, the panel defined a fact allegation as conclusory, contrary to this Court's governing law as to what a factual allegation was, that the panel ignored the evidence, including Wells fargo's public statements, on a guaranty and that Sims' due process rights under the 5th and 14th Amendments had been violated by the Courts decisions.

Further, Sims argued that Sims' 14th amendments right to equal protection of the law was violated, because Sims has a right to have this Court's governing law on Rule 12(b)(6) Motion to be applied equally to Sims, as another litigant.

Lastly, Sims argued that Sims' right to a Jury Trial has been violated, in that the Panel took for itself the right to make a determination of fact that rightly belong to the Jury Sims' demanded.

On OCT. 28, 2019, The 11th Circuit Court denied Sims' Request for a rehearing--- without a vote thereon.

Sims Filed a Motion to Stay Mandate arguing, arguing that this Court has held that a Mandamus should issue for the denial of a jury trial.

In their Opposition to Sims' Motion to Stay Mandate, Wells Fargo Acknowledge that The Courts' actions so far have denied Sims her right to a Jury Trial.

The 11th Cir. Court of Appeals denied Sims' request for a Stay of Mandate.

Finally, Sims filed a motion to stay the proceedings within the Main bankruptcy Case, Wells fargo did not object to that filing or argued against that motion at the hearing. The Bankruptcy Court denied that motion, without prejudice, to give the 11th Cir. The opportunity to rule on that motion. Sims filed that motion in the 11th Cir. Ct., Wells Fargo did object to this filing, after having abandoned its right to object, by not objecting below. Sims had a death in her family around the time that Wells Fargo filed its objection at the 11th cir. Sims' Grandchild passed away, after her daughter was became ill. Sims' Daughter was pregnant.

If not for the Illness of Sims' child, and the death of Sims' Grandchild, Sims would have been able to reply to the 11th's filing by Wells Fargo.

PLAUSIBILITY OF CLAIM

In a pivotal case concerning the Plausibility Standard, this Court held that "*Once a claim has been stated adequately it may be supported by the showing any set of facts*

consistent with the allegation. See ***Sanjuan, 40 F.3d, at 251*** *(once a claim for relief has been stated, a plaintiff "receives the benefit of imagination, so long as the hypotheses are consistent with the complaint;* ***accord, Sweirkiewicz, 534 US., at 514, 122 S.Ct. 992; National Organization for Women Inc., v. Scheidler, 510 US 249, 256, 114S.Ct 798, L.Ed 2d0 99 (1994); H.J. Inc. v. Northwestern Bell Tele. Co., 492 US 229, 249-250, 109 S.Ct. 2893, 106 L.Ed 2d, 195 (1989)*** *" (****Bell Atlantic Corp. v. Twombly, 550 US 544 [2007])***

Sims argued in her complaint that the Pooling and Service Agreement (PSA), covering her loan has the verbiage of a guaranty. **See APP 27, Para 36.** Sims also argued that this was to Guaranty rev. to the Trust that Owns Sims's Mortgage. **See APP 25, Para25-26**. Attached to Sims' Opposition to Wells' Motion to Dismiss, Sims filed Wells' Note to Wells' Financial Statement Wherein Wells Admit to providing Guaranties within Securitization. **See APP 182-197** Sims also argued in the District Court and the 11th Cir. that Securitization, historically and today, is centered on a guaranty of mortgages. **See APP 391-395**. While at the 11th Cir., Sims filed two Documents that Wells Filed with the Security and Exchange Commission (SEC) wherein Wells' openly admits, multiple times, that Wells provide Guaranties and are required to do so. **See APP 478-753.**

Yet, the Bankruptcy Ct. held that it couldn't "believe" Sims' Complaint. Both the Dist. Ct. and the 11th Cir. affirmed the Bankr. Ct.'s Belief Based order, though this Court has consistently held that a judge's disbelief cannot form the foundation of a dismissal on a Rule 12(b)(6) Motion. **(Bell Atlantic Corp. v. Twombly, 550 US 544 - Supreme Court 2007)** *"****Neitzke v. Williams, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989)*** *("Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations")"*

The District Court simply affirmed the Bankruptcy Court's belief-based ruling; And, the Panel at the 11th Cir. found that the District Ct.'s Order was inadequate and that the Panel itself didn't "find" a guaranty present. In addition to the Bankr. Ct.'s belief-based order dismissing Sims Complaint, the 11th Cir. Panel appears to

have, itself, worked against this Court's ability to set governing law within this Nation's Courts.

This Court has held that a plaintiff's pleading, to be plausible, need not show that its allegations are more likely than not true or that they rule out the possibility of independent action, as would be required at later litigation stages such as defense motion for summary judgement. (**See *Matsushita Electric Industrial Co v Zenith Radio Corp., 475 US 574, 597-98, 106 S.Ct. 1348, 89 L.Ed. 2d 538 (1986)***, or a trial, ***see Monsanto, 465 US at 556, 127 S.Ct. 1464***; ***Theater Enterprises, 346 US at 540-41, 74 S.Ct. 257.***

Therefore, this Court has held that a given set of actions may well be subject to diverging interpretations, each of which is plausible. (***Anderson v. Bessener City, 470 US 564, 575, 105 S.Ct. 1504, 84 L.Ed. 2d 518 (1985)*** *" Two or more witnesses" may tell mutually inconsistent but "coherent and facially plausible stories"*); *The choice between or among possible inferences or scenarios is one for the fact finder*, **see *id; Monsanto, 465 US at 766 & n. 11, 104 S.Ct. 1464*** *(the meaning of documents that are "subject to" divergent "reasonable interpretations"" either as referring to an agreement or understanding that distributors and retailers would maintain prices " or instead as referring to unilateral and independent actions, is properly left to the jury"*; ***id at 767 n. 12, 104 S.Ct. 1464*** *(the choices between two reasonable interpretations of testimony properly is left for the jury"*); *("The eye of the judiciary must not in the first instance rove about searching for evidence to support other conflicting inferences and conclusions which the judges or the litigants may consider more reasonable or desirable. It must be cast directly and primarily upon the evidence"* ***Justice Frank Murphy; Commissioner of Internal Reve. V. Scottish American Investment Co., 323 US 119, 124 (1944))***. In ***Todd v. Exxon Corp., 275 F.3d 191, 203 (2001)***, the 2nd Cir. held, in line with this Court's reasoning, that the choice between two plausible inferences that may be drawn from factual allegations is not the choice to be made by a Court on a Rule 12(b)(6) Motion.

However, the 11th Cir. Panel made such choices in this instant case, in direct conflict with settle law. Sims alleged the language of a guaranty in her complaint. Suretyship is a contractual relationship resulting from an agreement whereby one person, the surety, engages to answer for the debt, default or miscarriage of another, the principal, (***Westchester Fire Ins. Com. v. City of Brooksville (US Dist. MD of Florida 2010)*** see ***US. v. United States Fidelity Guaranty Co., 236 US 512, 35 S.Ct. 298, 59.L.Ed. 696 (1915)***) and alleged that such was to guaranty the stream of revenue to the trust that owns Sims' mortgage. ((***"As borrowers (i.e., homeowners) make payments on the mortgages, the trust uses the payments to pay the investors, the holders of the mortgage-backed securities. "Thus, the [trust's] ability to continue making payments to the ... investor depends on the entity's continuing receipt of mortgage payments from the homeowners. If the mortgages are not paid, the [trust's] income stream decreases, undermining the entity's ability to pay the ... investors." In re Citigroup Inc. Sec. Litig., 753 F.Supp.2d 206, 214*** (S.D.N.Y.2010)." ***In re Lehman Bros. Holdings Inc., 513 BR 624 - Bankr. Court, SD New York 2014))***. In an older case dealing with securitization, and in lines with Sims' claim of a guaranty of the mortgage, is ***Hamburg v. Guaranty Mortgage Co. N.Y., 38 N.Y.S, 2nd 165 [1945]***, in ***Hamburg v. Guaranty Mortgage Co. N.Y.,*** the court found as a fact that the issuance of a guaranty is an "*inducement to procure sales of the certificates or Mortgages*" to the public.

The Panel did not consider the historical fact that securitization is centered on a guaranty of mortgages. (*See* ***Kenneth A. Snowden, Mortgage Companies and Mortgage Securitization in the Late Nineteenth Century 31–32 (Aug. 2007) (unpublished manuscript) [hereinafter Snowden, Mortgage]***, available at ***http://www.uncg.edu/bae/people/snowden/Wat_jmcb_aug07.pdf.); (Econ. Research, Working Paper No. 15650, 2010), available at http://www.nber.org/papers/w15650; Kenneth A. Snowden, The Anatomy of a Residential Mortgage Crisis: A Look Back to the 1930s 11–12*** (Nat'l Bureau of

Econ. Research, Working Paper No. 16244, 2010) [hereinafter Snowden, Anatomy], available at **http://www.nber.org/papers/w16244.) and** ***compare United States v. Dilliard, 101 F. 2d 829 - Circuit Court of Appeals, 2nd Circuit 1938*** *("The company was organized in the year 1927 for the purpose of selling guaranteed mortgages: sometimes it sold these outright; sometimes it sold "participation certificates" in a single mortgage, which it held in trust for certificate holders; sometimes it set up as security a pool of mortgages, which it either assigned to a trustee, or itself held in trust")* **to** ***BlackRock Financial Management Inc. v. Segregated Account of Ambac Assurance Corp., 673 F.3d 169, 173 (2d Cir.2012)*** *("Residential mortgage loans, rather than being retained by the original mortgagee, may be pooled and borrowers. The right to receive trust income is parceled into certificates and sold to investors, sold "into trusts" created to receive the stream of interest and principal payments from the mortgage called certificate holders. The trustee hires a mortgage servicer to administer the mortgages by enforcing the mortgage terms and administering the payments. The terms of the securitization trusts as well as the rights, duties, and obligations of the trustee, seller, and servicer are set forth in a Pooling and Servicing Agreement...."). **See also** **Hamburg v. Guaranty Mortgage Co. N.Y., 38 N.Y.S, 2nd 165 [1945]*** (Guaranty Mortgage Co. Is *"in the business of selling to the public guaranteed mortgages and guaranteed mortgage participation certificates, I.E., the whole of or part interest in mortgages on real estate, the payment of the principle and interest of which is guaranteed"*; **New York Guardian Mortgagee Corp. v. Cleland, 473 F. Supp. 409 - Dist. Court, SD New York, 1979)**

The history of securitization is very compelling, relevant, evidence that Sims' complaint is plausible, as to a guaranty being present herein. (*"The word "relevant" means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other."* (***Stanford Encyclopedia of Philosophy: The Legal Concept of Evidence: [Nov 13, 2015])*** : *"A page of history is worth a volume of logic"*

(Oliver Wendell Holmes, New York Trust Co. V. Eisner, 256 US 345, 349 (1921)) See also APP 148-150

Nor did the 11th Cir. Panel consider Wells Fargo's Own Statements, in public documents filed with the SEC (Security and Exchange Commission), that Wells engage in Guaranties and are required to do so, within its securitization operation. (Statements made in ***WELLS FARGO 205-AR11 PROSPECTUS SUPPLEMENT:*** (A) pg s-27, *"Generally each servicer is* ***required*** *to advance delinquent payments of principal and interest on any mortgage in the trust";(*B) pg S-42 *"Wells Fargo... make periodic advances"*; (C) pg, S-42, para 3 *"Among other things, the servicers are* ***obligated*** *under certain circumstances to advance delinquent payments of principal and interest with respect to the mortgage loans";* (D) Pg 5 [Master Servicer], *"The master servicer will generally be* ***required*** *to make advances with respect to the Mortgage Loans"*; (E) pg 6, [last para.], list ***"limited guarantee"*** as a credit enhancement.; (F) page 7, para 1, ..."*the Servicer of the mortgage loans will be* ***obligated****....to make cash advances"*; (G) page 46, para 2(C), *"Servicers will make advances of delinquent payments of principal and interest on the mortgage loans"*; (H) Pg 47, para 1, *"The duties to be performed by the Servicer include.... the advance of funds to the extent certain payments are not made by the mortgagor..."*; (I) pg 49, last para, *"Generally each servicer will be required to make advances to cover the delinquent payments of principal and interest on such mortgage loan..."*; and, (J) pg 50, para 1, *"The failure of Servicer to make any required periodic advances or other advances under an underlying Services Agreement* ***constitutes a default under such agreement for which the Servicer will be terminated****..."*);(Statements made in ***WELLS FARGO 2017 annual report, Note 8***: *Wells Fargo provide Guarantees to the SPEs and VIEs* (termed Trusts by Sims). See Note 8, pages 187, 189 [para 1], 191 [para4] and 192 [para 5].)

Sims Offered these items through a motion for judicial notice, after Wells, for the first time at the 11th Cir., disclaimed that it was a guarantor. (If the documents are

not physically attached to the complaint, they may be considered if the documents' "*authenticity ... is not contested*" and "*the plaintiff's complaint necessarily relies*" on them. ***Parrino v. FHP, Inc., 146 F.3d 699, 705-06 (9th Cir.1998)***. Second, under **Fed.R.Evid. 201**, a court may take judicial notice of "matters of public record." ***Mack v. South Bay Beer Distrib., 798 F.2d 1279, 1282 (9th Cir.1986)***. ("*whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiffs] pleading*." ***Branch v. Tunnell, 14 F.3d 449, 454 (9th 706*706 Cir.1994)***) However, the Panel simply denied the Motion, without comment.

The language in the PSA Guaranty clause clearly states that the guarantor, wells, intended to pay the Mortgage, principle and interest, when, but only when, the borrower fails to pay. (**APP 27, Para 36**: *"P&I Advance" Defined as: As to any mortgage loan or REO property, any advance made by the applicable Servicer in respect to any remittance date representing the aggregate of all payments of principle and interest, net of the Servicing fee, that were due during the related period on the mortgage loans and that were delinquent on the related due period on the mortgage loan*"). *"The [surety] relation arises where two persons are bound to a third who is entitled to but one performance, and whereas between the two, one rather than the other should perform.... Once a suretyship relation has been demonstrated the rule*" of Suretyship "*applies*". (***Cole v. Exchange Nat. Bank of Chicago, Fla S.Ct. 1969.***) See also ***The Restatement of Security***: "*Suretyship is the relation which exists where one person has undertaken an obligation and another person is also under an obligation or other duty to the obligee, who is entitled to but one performance, and as between the two who are bound, one rather than the other person should perform*".; *and* ***The Restatement of Suretyship*** defines this relationship as follows: *"Transactions Giving Rise to Suretyship Status (1) A "secondary obligor" has suretyship status whenever: (a) one person (the "principal obligor") owes performance of a duty (the "underlying obligation") to another person (the "obligee"); and (b) pursuant to contract, a third person (the "secondary obligor")*

is subject to a "secondary obligation," whereby either: (1) the secondary obligor also owes performance, in whole or in part, of the duty of the principal obligor to the obligee".

*"There is a difference between an undertaking which guarantees a loan and one which guarantees the payment of a negotiable instrument. The former covers the debt; the latter the evidence thereof. * * * The language of the guaranty expressly covers the obligation and not the evidence thereof."* **(Fewox v. Tallahassee Bank & Trust Co., 249 So. 2d 55 - Fla: Dist. Court of Appeals, 1st Dist. 1971). The PSA language states that the Mortgage payments are covered.**

This Court has held in a case concerning the same type of transaction, that when a person promises to pay another's mortgage, principle and interest, that such an act is a Guaranty. In **Bowers *v. Lawyers Mortgage Co. 285 US 182 [US S.CT. 1932]*** This Court that the act was a guaranty, the Court termed the guaranty insurance (as the defendant in that case termed it), but ruled that, because the company's business was providing guaranties, the company couldn't be taxed as an insurance company. However, thirty (30) years later, The US S.Ct. revisited the position that the surety relationship give way to an insurance. In 1962, the S.Ct. sitting in ***Pearlman v. Reliance Insurance Co., 371 U.S. 132, 83 S.Ct. 232, 9 L.Ed.2d 190 (1962) at 140 n.*** Held that *"that suretyship is not insurance."*. Therefore, reading ***Bowers v. Lawyers*** and ***Pearlman v. Reliance*** together give the clear view that the act alleged within this instant case, Wells paying the Mortgages within Securitization, principle and interest, can reasonably be seen by a reasonable jury as a guaranty. As such, this Court's controlling law, and the 7th Amendment Guaranty of a Jury trial, seem to require that this Case goes to a jury, for determination.

In Florida, the Supreme Court held that "*"the usual view, grounded in commercial practice, [is] that suretyship is not insurance."* (Citing ***Pearlman v. Reliance Insurance Co., 371 U.S. 132, 83 S.Ct. 232, 9 L.Ed.2d 190 (1962) at 140 n.***

("*Among the problems which would be raised by a contrary result would be the unsettling of the usual view, grounded in commercial practice, that suretyship is not insurance. This distinction is discussed in Cushman, Surety Bonds on Public and Private Construction Projects, 46 A. B. A. J. 649, 652-653 (1960).*"; *see also* ***W. World Ins. Co. v. Travelers Indem. Co., 358 So.2d 602, 604 (Fla. 1st DCA 1978)*** ***(noting the distinctions between a general liability insurance policy and a statutory penal bond for purposes of considering indemnification)*** ***(DADELAND DEPOT. v. St. Paul Fire and Marine, 945 So. 2d 1216 - Fla: Supreme Court 2006)*** **(answering a certified Question from the 11th Cir. Ct. Of Appeals).** Other States also hold the same positions: "*Despite some superficial similarities, contracts of the guaranty are distinguishable from contracts of insurance. The distinction between the two lies in the nature of the performance promised by the obligor. If the performance is collateral to another's obligation to perform, the resulting contract is a guaranty.*" (***Lum v. Lee Way Motor Freight, Inc., 1987 OK 112, 757 P.2d 810; Empire Bank v. Dumond, 28 F.Supp.3d 1179;***)

The 11th Cir. Panel then decided, in the face of this Court's rulings, the Fla. Supreme Court's rulings, Sims' complaint and Wells' own words that it "***found***" no guaranty. Neither the Panel, the lower courts or Wells ever stated that Sims did not properly "***plead***" a guaranty, which would be grounds for dismissal, the Panel expressly held that it didn't "***find***" a guaranty. Even if the panel could determine that the language gave rise to another circumstance, the Panel wasn't allowed, under Sims' 7th Amendment Right to a jury trial, nor this Court's express governing law on Rule 12(b)(6) Motions to make a choice between the two, or more, reasonable inferences. A jury must decide the disputed facts of the case.

The Panel, after recognizing that a surety relation was central to Sims' claim, made a factual determination of Sims' allegation of a guaranty, was contrary to the 11th Cir.'s own precedent. (***Garcia v. St. Paul Fire & Marine ins, Co., 3rd Party Defendant, No. 95-3006 [11th Cir. 1997]***(Holding a court cannot make a factual

determination of a matter that is central to the plaintiff's claim on a Rule 12(b)(6) motion or on Summary Judgement).

This fact finding is also against this Court's governing law. (*"appellate courts must constantly have in mind that their function is not to decide factual issues de novo".* ***(Zenith Radio Corp. v. Hazeltine Research, Inc., 395 US 100, 123 (1969); Anderson v. Bessemer City, 470 US 564 {S.Ct. 1985))*** and that "*The parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their accounts of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As this Court has stated in a different context, the trial on the merits should be " the 'main event'.....rather than a tryout on the road"'* (***Anderson v. Bessemer City, 470 US 564 {S.Ct. 1985)***) citing ***Wainwright v. Sykes, 433 US 42, 90 (1977)***

The Panel, in support of its inconsistent ruling with this court, the Fla. Supreme Court, the history of securitization being centered on a guaranty, Well's own words that it provide guarantees within securitizations and Sims' complaint that alleged the language of a guaranty and the reasons for the guaranty, stated that Sims' allegation of a guaranty was a conclusion of law. "*But the argument conflates facts and opinions. A fact is a 'thing done or existing' or '[a]n actual happening'. Webster's New International Dictionary 782 (1927)".* (***Omnicare v. Laborers Dis. Council Const., 135 S. Ct. 1318, 575 US __, 191 L. Ed. 2d 253 (2015))*** On **App 462,** Sims argued before the panel the exact same definition of fact that this Court used in Omnicare v. Laborers, et al. ("*Fact (factum, fait) stands in lawbooks for :1 an act: 2. For a completed and operative transaction brought about by sealing and executing a certain sort of writing, and so for the instrument itself, a deed (factum): 3. As designation what exists, in contradiction to what should exist (defacto as contrasted with de jure); 4 As indicating things, events, actions, conditions, as happening, existing, really taking place*". ***Thayer, Evd. 190(Blacks Law Dictionary, 4th ed, 1968))***

A guaranty is indeed an instrument, sealed and executed, and therefore a factum. A guaranty is an act of one party covering the obligations of a third party, when they were not under any obligations, beforehand, to do so. (*"the [surety] relation arises where two persons are bound to a third who is entitled to but one performance, and whereas between the two, one rather than the other should perform.... Once a suretyship relation has been demonstrated the rule*" of Suretyship applies. (***Cole v. Exchange Nat. Bank of Chicago, Fla S.Ct. 1969.***)) And, Sims has alleged the true, or what she sees as the true, actions, events and condition of the parties that are really happening. Therefore, Sims seems to have correctly countered the argument that her allegation of a guaranty was a conclusion of law by arguing that a guaranty was an act, factual in nature.

The word guaranty may well be little more than a term of art. This Court has held, that it's not the term of art that is important, but the elements plead. (Term of Art "*adverse effect*", is used to only identify potential elements. ***(Doe v. Chao, 540 US 614, 624, 124 S.Ct. 1204, 1211, 157 L.Ed. 2d 1122[2004]*** Sims used word "Guaranty" to identify the surety relation and to frame the complaint (, but Sims plead and argued the elements required for that relation.

Even if the Panel wish to view the "*term*" guaranty as a conclusion, this Court has held that such conclusions may be used to *"frame the Complaint"*, as long as there is supporting factual allegations. ("*Legal conclusions can provide the framework of a complaint, [but] they must be supported by factual allegations". **Ashcroft v. Iqbal, 556 US 662 (2009))*** Sims' complaint is supported by factual allegations and those allegations are supported by nearly two centuries of case law, common law, the history of securitization and Wells' own words in public documents to the SEC..

Sims would like the Court to consider a sticking point with respect to the lower courts' ruling. In part, the lower courts states that the reimbursement language within the PSA prevents Sims' claims from being plausible. As Sims explained to the 11th Cir. Panel, every portion of the courts' ruling is rebutted with ample case law and consistent history of guaranties."

Sims Argued that the Reimbursement language is a forbearance to sue the Debtor, Sims, within this Triparty contractual arrangement. When a guarantor is a volunteer guarantor of a debt, which is the status of any guarantor who becomes a guarantor after the underling obligation has been entered into, cannot pursue the primary obligor because the primary obligor didn't as for the guaranty and such wasn't a condition required by the lender at the time of the creation of the obligation. APP402 & 433

Additionally, the reimbursement language operates as a forbearance even if Wells wasn't a volunteer, because Wells contracted to seek reimbursement only from lender, not the debtor. "It is fundamental in the law of contracts that forbearance to sue on a debt, when the forbearance is bargained for, is good consideration for the promise of a third person, even though the claim is not asserted against the third person and the forbearance was of no advantage to him. ***1 Corbin On Contracts, § 139***; ***Marks Brothers Paving Co. v. Mt. Vernon Homes, Inc., 156 So.2d 787 (Fla. 3rd DCA 1963)***... In the case at bar, Jones contends that she intended only to collateralize the debt and that she was misled. However, it is clear that any misrepresentations were attributable to O'Dell and not to the Baras. Jones also takes the position that she was simply an employee rather than a director or stockholder of Carpet King, Inc., and thus no benefit flowed to her from the Baras' forbearance in this case. However, as indicated above, the benefit of the forbearance moved to O'Dell and Carpet King, Inc.; thus, Jones's purported failure to receive any benefit from the forbearance does not affect the sufficiency of that forbearance as consideration for Jones's promise." (***Bara v. Jones, 400 So. 2d 88 - Fla: Dist. Court of Appeals, 4th Dist. 1981)***

Courts have ruled, and Wells have argued in the District Court, that Wells is able to seek subrogation of the lenders claims. This is not possible if a surety relationship wasn't at hand. Suppose, though it hasn't been argued by any, that this is a letter of credit. Subrogation wouldn't be allowed because it destroys the independence required for a letter credit-which is a two-party obligation. Moreover, the language

clearly indicates that the Trigger for Wells' requirement to pay is based on if the borrower fails to pay. Again, there isn't any independence here. The unavailability of the right of subrogation to issuers of letters of credit is justified on the ground that such a right is fundamentally inconsistent with the independence principle of letter-of credit law.

Substance rather than form determines whether suretyship status rights attach. (*The Restatement preserves distinctions between three-party and two-party relationships, between consensual and nonconsensual sureties, between compensated and uncompensated sureties, between commercial and noncommercial, and between consumer and nonconsumer.* (***RESTATEMENT (THIRD) OF SURETYSHIP § 13 at xv.***) See also ***Reynold's v. Douglas, 37 US497 [1938]***

Additionally, Sims has argued that subrogation is denied to a guarantor who has interfered with the contractual rights of the parties of the underlying obligation. **(APP 397-400)** The PSA contains and agreement between Wells, as guarantor, the lender to not provide any modification to the mortgages. However, Sims, and other debtors, expressly bargained for at least an honest review of a modification of their 30-year commitment, from time to time. This is a material interference with Sims' contractual rights, a right to seek protection, through modification, of years of payments on a mortgage secured by her home and the ownership interest within the home itself. **(APP 152-154 & 397-400)**

Finally, *"It often appears that the world of suretyship consists of two wholly distinct worlds. On one hand is the world of credit enhancement [securitization], where decisions to extend credit are induced by the agreement of a solvent party to assume the risk of non-payment associated with the extension of credit to the debtor. In this world, the underlying obligation is the payment of money and the instrument effectuating the suretyship is, in substance, a payment guarantee."* (***by Dennis B. Arnold, Adviser to the Restatement of Suretyship, in a letter dated July 20, 1989: Donald J. Rapson; History and Background of the Restatement of Suretyship, 34 Wm. & Mary L. Rev 989 (1993)***, https://scholarship.law.wm.edu/wmlr/vol34/iss4/3)

Therefore, **under the laws of suretyship, and security, the historical context of mortgage securitization, case law, Wells' own words and all of the language of the PSA reasonably supports sims' claims that a guaranty is present.**

CONTRACT INTERPRETATION

The 11th Cir. Panel seems to suggests that Contract interpretations are always a function of the court. However, this Court's holdings states that Juries are should undertake this task in circumstances such as those which are present in this instant case. (**see also** ***Monsanto, 465 US at 767 n. 12; Monsanto, 465 US at 766 & n. 11, 104 S.Ct. 1464*** (the meaning of documents that are *"subject to"* divergent *"reasonable interpretation"* either as referring to an agreement or understanding that distributors and retailers would maintain prices "or instead as referring to unilateral and independent actions, is properly left to the jury); (("***But sometimes, say when a written instrument uses "technical words or phrases not commonly understood," ... those words may give rise to a factual dispute. If so, extrinsic evidence may help to "establish a usage of trade or locality.***" And, in that circumstance, "***determination of the matter of fact" will "preced[e]" the "function of construction.***" (***Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285, 291, 42 S.Ct. 477, 66 L.Ed. 943 (1922); see also 12 R. Lord, Williston on Contracts §§ 34:1, p. 2, 34:19, p. 174 (4th ed. 2012)*** (In contract interpretation, the existence of a ***"usage"*** — a ***"practice or method"*** in the relevant industry — ***"is a question of fact"*** (internal quotation marks omitted))(***Teva Pharmaceuticals USA v. Sandoz, Inc., 135 S. Ct. 831 - Supreme Court 2015)***. **See also APP 468-472**

Even Florida Law, which the 11th Cir. Panel recognized was the law both parties rely on, hold that contract interpretations are often issues of fact, for a jury to resolve. (***DEC Elec. Inc., v. Rapael Const. Corp., 558 So 2d 427 (Fla S.Ct 1990)*** (holding that when the contract is ambiguous, the intentions of the parties becomes a matter of fact to be resolved by the jury) ;(***Weldon v. All Am. Ins. Co., 605 So.2d***

911, 914-15[Fla. 2d DCA 1992] (holding that if the language is susceptible to more than one interpretation.... the contract is considered ambiguous); and, ***Swindal, 6222d at 470)***; ***Friedman v. Virginia Metal Products Corp. 56 So 2d 515 (Fla. S.Ct. 1952)*** (holding that language is ambiguous where it is susceptible of interpretation in opposite ways) .Additionally, the Fla. S.Ct. held that its not what the court would like the contract to say that matters. (***Siegle v. Progressive Consumer Ins. Co., 819 So 2d 732 (Fla S.Ct. 2002)*** (holding that *"In Contractual Interpretations, the issue isn't what the Court would prefer"* the language to be or mean").

Under Fla. Law, a guaranty is based on an act and reflect the factual relation between the parties. Further, it's been long settled that *"the [surety] relation arises where two persons are bound to a third who is entitled to but one performance, and whereas between the two, one rather than the other should perform.... Once a suretyship relation has been demonstrated the rule*" of Suretyship applies. (***Cole v. Exchange Nat. Bank of Chicago, Fla S.Ct. 1969***.) As noted above, the language requires wells to cover the principle and interest payments of the mortgages when, but only when, borrowers haven't paid such amounts.

Further, this Court has held that held that disputed issues, relative to guaranty contracts, are for a jury to determine. (***Davis v. Wells Fargo, 104 US 159 S.Ct. (1881); Reynold's v. Douglas, 37 US497 [1938])***.

Yet, the 11th Cir. Panel made factual determinations, on issues that are required, by the 7th Amendment and this Court's governing law, to be decided by a jury.

Finally, the Panel held that it could not, under Florida law, review a particular portion of a contract for ambiguity. However, both Fla. and the US S.Ct. recognize the ability of the courts to make such a limited review. (***Seifert v. US Home Corp., 750 So. 2d 633 (1999)*** (interpreting contractual language contained within a single portion of the contract) (citing ***Weldon v. All Am. Ins. Co., 605 So.2d 911, 914-15[Fla. 2d DCA 1992]*** (holding that if the language is susceptible to more than one

interpretation....the contract is considered ambiguous; ***Friedman v. Virginia Metal Products Corp. 56 So 2d 515 (Fla. S.Ct. 1952)*** holding that language is ambiguous where it is susceptible of interpretation in opposite ways); In ***Bugware Inc. v. Williams LLC (No. 1D15-2694 [2017]***), the court focusing solely on the particular allegation a section within the contract, determined that the word "by" relieved the litigant from obligation) Courts in Florida often deal with so-called "drag net Clauses". In one case, the Court held that a tenant of contract law, in Florida, is to construe the ambiguous langued against the drafter of the contract. If the Panel had followed the Fla Law, the ambiguous terms would have been drafted against WF's interpretation and in favor of Sims's(***St. Lucie County Bank & Trust Co. v. Aylin, 94 Fla. 528, 114 So. 438 (1927)*** See also ***Davis v. Wells Fargo, 104 US 159 [S.Ct. 1903]*** (holding *"On disputes of a guaranty, the particular provision* (clause) *is what the courts should focus on*). The Panel's decision appears contrary to these holdings.

LEGAL EFFECTS OF A GUARANTY PAYMENT

This Court has held that a payment, made by a guarantor, keeps an installment loan current. (***Reynolds v. Douglas, 37 US 497 [1838]***) While the Secured lender (original lender as the case maybe) is satisfied, the debtor owes the guarantor for the payments made by the guarantor to the lender. (***Putnam v. Commissioner, 352 US 82 [1956]***) *"The familiar rule is that, instanter upon the payment by the guarantor of the debt, the debt's obligation to the creditor becomes an obligation to the guarantor*"; **see also** ***United States v. Munsey Trust Co., 332 US 234, 242***; ***Aetne Life Ins. Co. Middleport, 124 US 534, 548***; ***Brandt, suretyship and Guaranty (3rd Ed) Sect. 324***; ***38 C.J.S., Guaranty, ,Sect. 111; and 24 Am. Jur., Guaranty, Sect. 125)*** **See APP- 154-159**

This Court has held that that State law controls the secured nature of a claim. (***Butner v. United States, 440 U.S. 48, 54-55, 99 S. Ct. 914, 917-18, 59 L. Ed. 2d 136 (1979)***). Under Florida Law a Guarantor of a mortgage do not have a secured interest within the property secured by the mortgage. ("*A person who guarantees a*

promissory note does not acquire any interest in the mortgaged property. In Florida, a mortgage creates a special lien against the collateral property, see ***§ 697.02, Fla. Stat. (2001)***; ***Hemphill v. Nelson, 116 So. 498 (Fla. 1928)****...Conversely, a guaranty of a mortgage note is simply a promise to answer for the debt should the mortgagor fail to pay.* ***See West Flagler Assocs., Ltd. v. Dep't of Revenue, 633 So. 2d 555 (Fla. 3d DCA 1994)*** *(holding that note guaranty was not subject to intangible personal property tax in light of secondary nature of liability which arises only upon default by note maker);* ***New Holland, Inc. v. Trunk, 579 So. 2d 215, 216-17 (Fla. 5th DCA 1991)*** *("A guaranty is a promise to pay some debt (or to perform some obligation) of another on the default of the person primarily liable for payment or performance."); see generally Black's Law Dictionary at 634 (defining guaranty as a "promise to answer for the payment of some debt, or the performance of some duty, in case of the failure to another who is liable in the first instance")"* ***Cukierman v. Bankatlantic, 89 So. 3d 250 (Fla. Dist. Ct. App. 2012)).***

Therefore, it appears that if it's true that a guarantor's payment keep the installment note free from default (***Reynolds v. Douglas, 37 US 497 [1838]***) and that once the guarantor make the payment required by the guaranty, that obligation belong to the guarantor and not the original lender (***Putnam v. Commissioner, 352 US 82 [1956])*** Then Neither the lender, nor its agents, have a claim on the Sims's Property (***American Waterworks, ETC. Co. v. Home Water Co., 115 FED 171 [App Dis. 194 US 639, 24 S.Ct., 48 L.Ed 1162***].

The language in the PSA Guaranty clause clearly states that the guarantor, wells, intended to pay the Mortgage, principle and interest, when, but only when, the borrower fails to pay. (**APP 27, Para 36:** *"P&I Advance" Defined as: As to any mortgage loan or REO property, any advance made by the applicable Servicer in respect to any remittance date representing the aggregate of all payments of principle and interest, net of the Servicing fee, that were due during the related period on the mortgage loans and that were delinquent on the related due period on the mortgage loan"*)

State law controls the secured nature of the obligation (***Butner v. United States, 440 U.S. 48, 54-55, 99 S. Ct. 914, 917-18, 59 L. Ed. 2d 136 (1979)***) and under Florida law a guarantor of a mortgage do not have a secured interest within the property secured by the mortgage (***Cukierman v. Bankatlantic, 89 So. 3d 250 (Fla. Dist. Ct. App. 2012)***, than it also appears to be true that no default has occurred with respect to the original lender which would allow it to foreclose on Sims Property.

An assignment by the Lender, to anyone, cannot re-attach rights it did not have at the time of the Assignment, because a lender cannot assign greater rights than it possesses at the time of the transfer. (***Parrie State Bank v. United States, 164 US 227 (1896)***). Allowing the secured creditor to receive payment from the guarantor, while maintaining the secured interest within the property, stemming from those payments made by the guarantor, violently confronts the one satisfaction rule. (***Restatement (second) of Torts, Section 885 (3)(1979); In Re National Mortgage Equity Corp Mortgage Pool Certificates, 636 F. Supp 1138 (C.D. Cal. 1986); Zenith Radio v. Halzetine Research, Inc., 401 US 321, 348, 91 S.Ct. 795, 811, 28 L.Ed. 2d 91971); Mac Kethan v. Burrus, Cootes & Burrus, 545 F.2d 1388, 13390-91(4th Cir 1976), Cert Denied, 434 US 826, 98 S.Ct. 103, 54 L.ED 2d 1977)***

Additionally, this Court has held that a secured debt cannot go through the bankruptcy process and become unsecured. "Moreover, we have specifically recognized that "*[t]he justifications for application of state law are not limited to ownership interests," but "**apply with equal force to security interests, including the interest of a mortgagee.**"* ***Butner, supra,*** at 55. (***Nobleman v. American Savings Bank, 508 US 324 - Supreme Court 1993***) **In Florida, a guarantor of a mortgage do not have a security interest in the property subject to the mortgage.** (("*A person who guarantees a promissory note does not acquire any interest in the mortgaged property. In Florida, a mortgage creates a special lien against the collateral property,* ***see § 697.02, Fla. Stat. (2001);***

Hemphill v. Nelson, 116 So. 498 (Fla. 1928) *.....Conversely, a guaranty of a mortgage note is simply a promise to answer for the debt should the mortgagor fail to pay. See* ***West Flagler Assocs., Ltd. v. Dep't of Revenue, 633 So. 2d 555 (Fla. 3d DCA 1994)***

However, under the conditions set up under the lower Courts' ruling, a wholly unsecured debt, under fla law, may go through the bankr. Process and become a wholly secured debt. Debtors appear to not have equal protection of the law, under these circumstances. Creditors, merely because of their status as creditors, are given greater protection under the laws, or the applications of the the laws, than debtors. This appears to in violation of the 14th Amendment's equal protection clause.

This is so, it appears, because This Court has held that a Valid payment should be determined in accordance with common law understanding of a payment (***Seminole Nation v. United States, 316 US 286)*** and when Payment is deposited into the accounts of one who was to receive payment, payment has been effectively made. (***United States v. Dann, 470 US 39***)

A valid Payment is also determined by if the payments made benefits the lender. This Court's holding on Guarantors' payments clearly show that lenders are satisfied by such payments. (***Reynolds v. Douglas, 37 US 497 [1838]***); ("***The familiar rule is that, instanter upon the payment by the guarantor of the debt, the debtor's obligation to the creditor becomes an obligation to the guarantor***" (***Putnam v. Commissioner, 352 US 82 - Supreme Court 1956***) see (***United States v. Munsey Trust Co., 332 U. S. 234, 242; Aetna Life Ins. Co. v. Middleport, 124 U. S. 534, 548; Howell v. Commissioner, 69 F. 2d 447, 450; Scott v. Norton Hardware Co., 54 F. 2d 1047; Brandt, Suretyship and Guaranty (3d ed.), § 324; 38 C. J. S., Guaranty, § 111; 24 Am. Jur., Guaranty, § 125.)***). Not recognizing the validity of the payment made by the guarantor in this instant case "*ignores* ***Restatement Section 885(3)*** *which provides that a payment made in compensation of a harm diminishes the claim against other tortfeasors*

"whether or not it is agreed to at the time of payment". ***(In Re National Mortg. Corp. Mortg. Pool Certificates, 636 F.Supp. 1138 (C.D. Cal. 1986)*** **(Citing** ***Screen Gems, 453 F.2d at 554*****))** ***(Prigal v. Kearn, 557 So. 2d 647 (Fla. Dist. Ct. App. 1990). at 649.*** *"[u]nder the facts sub judice, it would be manifestly unjust to allow the original lender to reacquire fee simple title to the land and also recover the full amount of the purchase money mortgage note given to him upon the occasion of the initial sale."*) When this occurs, the one satisfaction rule applies in all cases. However, in this instant case, and cases like this across the country, where debtors assert this rule of law against a creditor, The Courts rule that no such satisfaction has occurred. The sole reason appears to be, is because it's an action against a creditor.

Therefore, by operation of law, Wells, as guarantor, holds a separate and distinct obligation, wholly unsecured under Florida law, and cannot be co-mingled with a secured claim, under the bankruptcy code. Creditors cannot work both sides of the issue at once. Creditors cannot have the Courts protect their secured claim from becoming unsecured claims AND Rely on Courts to elevate their unsecured claim, no matter how they become unsecured, to secured status. Such circumstances treat the debtor as second-class citizens before the Courts: Unequal in protection and application of the laws

CONSITUTIONAL QUESTIONS

STANDING

14TH AMENDMENT VIOLATION

"(a) *A plaintiff invoking federal jurisdiction bears the burden of establishing the "irreducible constitutional minimum" of standing by demonstrating (1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, and (3) likely to be redressed by a favorable judicial decision.* ***Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 119 L.Ed.2d 351. Pp. 1546-1547.****; (b) As relevant here, the injury-in-fact requirement requires a plaintiff to show that he or*

she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." ***Lujan, supra, at 560, 112 S.Ct. 2130. Pp. 1547-1550.(Spokeo, Inc. v. Robins, 136 S. Ct. 1540 - Supreme Court 2016)***

"*Our cases have established that the "irreducible constitutional minimum" of standing consists of three elements.* ***Lujan, 504 U.S., at 560, 112 S.Ct. 2130.*** *The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.* ***Id., at 560-561,*** *112 S.Ct. 2130;* ***Friends of the Earth, Inc., 528 U.S., at 180-181, 120 S.Ct. 693.*** *The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements.* ***FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990).*** *Where, as here, a case is at the pleading stage, the plaintiff must "clearly ... allege facts demonstrating" each element.* ***Warth, supra, at 518, 95 S.Ct. 2197."(Spokeo, Inc. v. Robins, 136 S. Ct. 1540 - Supreme Court 2016)***

In this instant case, Sims is complaining of an injury to her Constitutionally recognized property interest, Sims' home. This injury isn't hypothetical nor conjectural: Its concrete and particularized to Sims' Interest. Sims has an unchallenged, and proven, property interest within her home.

Yet, the lower Courts held that Sims do not have standing to sue Wells in defense of that interest. However, Sims has proven in the lower Courts that Wells, counter to its claim of never sold the note, has in fact sold the note. Wells has refused to provide any information as to who owns the note, or provide a correct copy of the PSA, which identify that it's the agent for the owner.

Wells is allowed standing to assert a claim against Sims' constitutional property, without establishing, outside of merely claiming, conjecture or hypothesis, that it has an irreducible constitutional standing. It's well settled that a creditor may enforce a note, even if that creditor has wrongful possession of that note.

The reason given by the lower courts is that PSA is signed by Wells and the Trust, and therefore Sims is not a beneficiary of the provisions therein. However, this line of reasoning is suspect. First, no litigant comes to court to prevent a benefit; All litigants come to court to prevent an invasion of right. This is the proper role of the Courts, to seek a fair, unbiased, review of the issues which are to impact the property interest of each litigant, without recognition of a party's wealth, power or social status.

Second, it allows two parties to do to a third party what the government cannot do: Prevent the exercise of the third parties constitutional right to protect his/her property interest. The third party never agreed to not hold harmless the two parties for any acts which invade the third's property interest, but courts appear to do just that.

Finally, there can be no due process if a litigant is kicked from the court system, before a trial on the merits of the claim. There is in fact no process: A litigant in this instance only have the right to walk into the court, file papers and then go home. Nothing more.

This represents an unequal application and protection of the laws of standing. It appears that Courts have determined standing, in contests between creditor's and debtors, based solely on the characteristic of the litigant "as creditor". This is especially true when the contest is between a mortgage borrower and the mortgage lender and its' agents. (*"There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose on the majority must be imposed generally."* (***J. Jackson. Conurr.: Railway express Agency, Inc. V. New York, 336 US 106, 112-113 (1949))***

The 7th Amendment was passed, in part, to settle contest between the debtor and the Creditor. The founding fathers (***anti-Federalist***) fought for the inclusion of this Amendment, and others. They were concerned that Courts would automatically default to the interest of the Creditors over a fair review of the actual issues at play within the legal contest. (***Charles W. Wolf, The Constitutional History of the 7th***

Amendment, 57 Minn. L.Rev. 639, 673-74 [1973]) *If* we take an unbiased view of the legal proceedings within this country today, the founders were correct in holding that fear.

IMPROPER DENIAL OF JURY TRIAL

"Judicial independence is often is often discussed in terms of independence from external threats, the framers understood the concept to also include independence from the "internal threat" of "human will"" .....In dependent judgment required judges to decide cases in accordance with the law of the land, not in accordance with pressure placed on them through either internal or external sources. Internal sources include personal biases, while external sources might include pressure from political branches, the public or other interested parties..... The Framers 'contemplated [the Constitution], *as a rule for the government of the courts, as well as of the legislature'* (citing ***Marbury v. Madison, 1 cranch 137, 179-180, 2.L.Ed. 60 (1803)*** *) Thus, in a case of a conflict between a law and the Constitution, judges would have a duty 'to adhere to the latter and disregard the Former". (**J. Thomas, C., US S.Ct.; Concurring Opinion, Perez v. Mortgage Bankers Assn. 135 S.Ct. 119**)*

I

*"A judge who makes a decision without reasonable grounds or adequate consideration of the circumstances is said to be arbitrary and capricious. These decisions can be overturned on review" (**Natural Resource Defense Council, Inc. v. EPA, 966 F.2d 1292, 1297 [9th Cir. 1992***];

It is without question that the Bankr. Court entered a decision based on that Court's belief. The Panel acknowledged the District Court's in adequate reasoning in its affirmation of the Bankr. Ct.'s belief-based order. Each of these orders are premised on legally inadequate, or insufficient grounds.

Sims has not been afforded adequate notice of any true grounds for which the Court's below has entered the decisions they have. Without such, Sims has been subject to a process which violates the 5Th and 14Th Amendments' Due Process

Clauses. Sims cannot be meaningfully heard if she is Denied the Actual grounds for the Decisions. This has hampered the Due Process on Appeal, because it impacts Sims' ability to meaningfully argue, to the appellate court, any deficiency in the lower Court's decisions.

II

The equal protection clause (14th Amendment) maintains that "*deviations, by a government body, should be 'free from taint of arbitrariness or discrimination' in order not to offend the 14th Amend.'s equal protection clause*" (***Roman v. Simcock, 377 US 695, 84 S.Ct. 1449 [1964]*** "*The right to a jury trial generally tend to prevent arbitrariness and repression*"(***DeStefano v. Woods, 392 US 631, {U.S. S.Ct. 1968];***

In Twombly and Iqbal, the US S. Ct. held that a court's belief cannot form the foundation of a decisions on a Rule 12(b)(6) Motion. However, the Bankr. Ct.'s decisions Explicitly state that court's disbelief.

The District Court's decisions, containing a single paragraph, affirmed that belief-based decisions with any reasoning as to upon what legal grounds or conclusions it rested on. Sims briefed the Panel on the hardship this caused Sims in executing any appeal. This Panel rejected the negative Due Process impact the District Ct.'s decision had on Sims' ability to effectively argue her claim on appeal.

The Panel, against S.Ct. mandates, and Sims' briefed arguments-based on S.Ct.'s mandates, engaged in a factual determination on its review of a Rule 12(b)(6) Motion. This de novo review wasn't to include factual determinations.

The Panel sanctioned the departure from normal Rule 12(b)(6) motions procedure and deviated from the proper appellate review of a Rule 12(b)(6) Motion itself.

There isn't a compelling reason to do so, and, even if there was a compelling reason to deviate so far from normal, the Panel hasn't articulated such. ("*It May be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and*

*unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedures". (**Justice Bradley, Boyd v. United States, 116 US 616, 635 (1886))***

III

*"We should not tolerate arbitrariness and unfairness of a legal system" **US v. Kozminski, 487 US 931, 108 S.Ct. 2751, 101 L.Ed2d 788 {US S.Ct. 1988]***

The Panel sanctioned, by confirming, arbitrary decisions of the Lower Court. Neither the Bankr. Ct.'s nor the District. Ct.'s decisions are predicated on sufficient facts or law and deviated from the normal procedure in such a manner that little more than arbitrary reasons could be the foundation for both.

The Panel's decisions fair no better. The Panel openly states that the District's Court's decision to Affirm the Bankr. Ct.'s belief-based decisions was inadequately reasoned, but held that It, the Panel, wasn't harmed-because the Panel knew what wasn't written in that decision. The Problem here is twofold: (1) The panel could not possibly know what the reasoning was. The District Ct.'s decision was bluntly silent on the reasoning. The Panel could "assume", but little more. Therefore, neither Sims nor the Panel actually knew upon what grounds the decisions was based.; (2) Sims' was substantially disadvantaged by the lack of reasoning and the Panel's assumption of reasoning. The Panel compounding the effects of the Dist. Ct.'s lack of reasoning, with its own lack of notice. If the Panel assumed that Contract law was the basis of the Dist. Ct.'s decisions, and after being informed by Sims that she was given no guidance, the Panel, in the intertest of preventing an injustice to Sims, should have asked the Parties to brief it on the matter (if the Panel wanted to keep the appeal here) or remand for clarification. The Panel did neither.

The Panel repeated the lower Ct.'s practice of ignoring the record. Neither the Panel, nor the lower courts reviewed, or considered, evidence that clearly shows that Appellees engage in guaranties within Securitization. The Panel did not

consider the elements of the guaranty relation argued within the complaint, as law requires.

The Panel's decision stands as a decision that is arbitrary in its character. It disregarded the complaint, misapplied law, ignored the US S. Ct. mandates and the Due Process violations of the lower courts. All of which unfairly disadvantaged Sims.

Therefore, Sims asserts that Manner in which the Panel reviewed this case and the manner in which the Panel rendered its decisions violated Sims Due Process Rights and Equal protection rights.

The effect of the panel's decisions is to deny Sims of her Right to a Jury trial as required by the 7Th Amendment to the Federal Constitution.

The power to regulate the Court's affairs cannot extend to the power to prohibit Constitutional rights of the people of this Country within the Courts. The constitution *"is a restraint on the legislative as well as the executive and judicial powers of government, and cannot be so construed as to leave ... free to make any process "due process of law", by its mere will."* (***J. Curtis: Den ex dem Murray v. Hoboken Land & Improv. Co., 59 US 272, 276-277 (1856)***)

Conclusions

For the Forgoing reasons, Sims respectfully request that This Honorable Court grant both the mandamus and Cert in order to answer the broad implications of constitutionality that impacts every single mortgage borrower and the rights they may assert within the judicial process,

There can be no compelling governmental reason for treating litigants differently based upon their characteristics of being a creditor or not. Standing to sue, to protect the property interest of one's constitutionally recognized property interest should not be unevenly applied, or applied in such manner as to reduce one litigant to the servitude of another's will. (*"To deprive a whole class of the community of this*

right, to refuse their evidence and their sworn complaints, is to brand them with a badge of slavery; is to expose them to wanton insults and fiendish assaults; is to leave their lives, their families, and their property unprotected by law". (J. ***Bradley, dis.: Blyew v. United States, 80 US 581, 599 (1971))***

Sims' understands that she is asking the Court to review its own practices to determine if and how the court's actions may have inadvertently arrived at a place where a whole class of Citizen's are frozen out of their constitutional rights. (*"The Courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, if they are found to be contrary to the constitution, may declare then to be of no legal validity. Surely the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power".* (***Martin v. Hunter's Lessee, 14 US 304, 344 (1916)***); *"The Constitution of the United States is a law for the rulers and people, equal in war and in peace, and covers with a shield of its protection all classes of men, at all times and under all circumstances."* (***Justice Davis, Ex Parte Milligan, 71 US 2, 120-121 (1866))***

How can there be due process, if the litigants are blocked from engaging the process. Merely filing papers within a Court and walking in, is not the same as being meaningfully heard. Under the current conditions dealing with creditors, debtors are not heard at all, let alone meaningfully. Their cases are kicked into the dismissal pile upon the invocation of third-party beneficiary standing. A doctrine, as applied, offends the debtors' 5th and 14th rights to due process and their14th amendments right to rights to equal protection and application of the laws. (*"In Framing an instrument, which was intended to be perpetual, the presumption is strong, that every important principle introduced into it is intended to be perpetual also; that a principle expressed in terms to operate in all future time, is intended to so operate".* (***Justice Marshal, concurring: Ogden v. Saunders, 25 US 213, 355 (1827)***

Courts are required to uphold these constitutional Safeguards: (1) ***Article III, Section 2, para (1)***: *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States*; (2) ***Article VI, section 2***: *This Constitution, and the Laws of the United States which shall be*

made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby",

In each section of the constitution, mentioned above, courts are directed to observe the constitution before anything else. If that order of wording wasn't sufficient, the Founders made this plain within ***Article VI, section 2***: "*and the Judges in every State shall be bound thereby*". No court can be bound by that which it avoids. How could it? In so much as avoiding it, it is ignored.

This Court Agrees: "*The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it is brought before us. We have no more right to decline the exercise of our jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.*" (***C.J. Marshall: Cohens v. Virginia, 19 US 264, 404 (1821)***)"

Sims is not alone with this concern that banks/creditors have an unequal, superior, right in the eyes of the courts. When the UCC was first considered, many complained about this re-writing of law for the self-interest of creditors. (***See Frederick K. Beutel, The Proposed Uniform [?] Commercial Code Should Not Be Adopted, 61 YALE L.J. 334, 362 (1952)*** ("*In fact, this Article [Article 4) is so one-sidedly drawn in favor of the banking interests that any banker who insisted on exercising the rights given him by this 'Code' would probably be under suspicion by the better business bureau.*"); ***Grant Gilmore, The Uniform Commercial Code: A Reply to Professor Beutel, 61 YALE L.J. 364, 376-77 (1952)*** ("*[An] efficient collection system is in the private interest of banks as much as it is in the public interest of customers of banks .. . . Section 4-103 goes far beyond what is wise or permissible in allowing banks to rewrite the law their way whenever things get tough ....* "); ***see also Edward Rubin, Efficiency, Equity and the Proposed Revision of Articles 3 and 4, 42 ALA. L. REv. 551 (1991)*** (describing how pressure from financial institutions during the drafting process skewed the balance

among the rights of parties to negotiable instruments transactions within the scope of revised Articles 3 and 4 of the Uniform Commercial Code). This Court, applying the constitutional rights of the American Citizen, can, and should, correct this issue. The laws passed by any legislature cannot amend, distort or eliminate the Valid Provisions of Amendment 5th, 7th, and 14th to the federal constitution. Only

The application of this Doctrine kills, literally kills, the 7th amendment guaranty of jury trial. No matter how much merit a debtor's case may have, third party beneficiary standing blocks them from getting past the pretrial phase-never reaching the jury guaranty at all.

The apparent superiority of the third-party beneficiary standing doctrine, over the Article III and statutory standing of debtor's nationwide, seem expressly prohibited by the 14th Amendment's requirement for the equal application of the law. This court has held that once a government body vest rights within the people, that body may not do anything that will be "*arbitrary*" and create *"disparate treatment"*, which will "*value one person*".. "*over that of another*". (***Bush v. Gore, 531 US 98 - Supreme Court 2000: citting Reynolds v. Sims, 377 U. S. 533, 555 (1964))*** While these cases are speaking about voting, these cases stand for the proposition that government action, including that of the judiciary, which is itself the third branch of government, cannot treat persons in a manner that create a "*disparate treatment*" between the citizens of this nation. Throughout the nation's courts, the courts, through the application of third party beneficiary standing, within contests between home mortgage borrowers and lenders (including servicers), appears to value the constitutional interests of the lenders over that of the home mortgage borrower: Even when the lenders cannot prove any constitutional property interest in the contract.

Courts cannot enter a balancing test of the interest between the parties. Borrowers 5th, 7th and 14th Amendments' rights are guaranteed. Whatever policy issues that may attain in a case between creditors and home mortgage borrowers, the home mortgage borrowers enumerated rights require observance and compliance. ("*We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth*

insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." **District of Columbia v. Heller, 554 US 570)**

More disturbing, if it can be so, is that the 7th amendment was to ensure that debtors can invoke a jury to determine the issues between them and creditors. (***Charles W. Wolf, The Constitutional History of the 7th Amendment, 57 Minn. L.Rev. 639, 673-74 [1973]***). The manner in which courts apply third party beneficiary standing, even when the plaintiff, like Sims, rely on RICO statutory standing and their Article III, irreducible, standing, directly frustrates the founding father's reasoning for the 7th amendment.

This Court has held that no court should directly or indirectly take the jury function. (***Walker v. New Mexico & Southern Pacific Railroad, 165 US 593 [1897]*** The 7th Amendment "is *not to preserve mere matter of form and procedure but substance of right. This requires that questions of fact in common law actions shall be settled by a jury, and Courts shall not assume directly or indirectly to take from the jury or for itself such prerogative*"; ***Blakely v. Washington, 526 US 296 [2004]*** *"the right of a jury trial...is no mere procedural formality, but a fundamental reservation of power in our constitutional structure"*)) To that end this Court has consistently held that belief, of the judge should not play a role in any decision and neither should a court make factual determinations on a motion for pleading sufficiency.

When a court has denied the litigant their right to a jury trial, this Court has rightly maintained that a Mandamus should issue to ensure that trial. (***In re Simons, 247 US 231 [1918]***; ***Beacon Theaters Inc. V. Westover, 359 US 500, 511 [1959]*** *"whatever differences of opinion there may be in other types of cases.... the right to grant mandamus to require a jury trial where it [has] been improperly denied is settled."*; ***Dairy Queen Inc. V. Wood, 369 US 469, 472 [1962]*** Appeals Courts have ""*responsibility .... to grant mandamus where necessary to protect the constitutional right to trial by jury.*") Sims, on no uncertain terms, has demanded a Jury Trial. The 7th Amendment, the rules of the Federal Courts and Federal Statute

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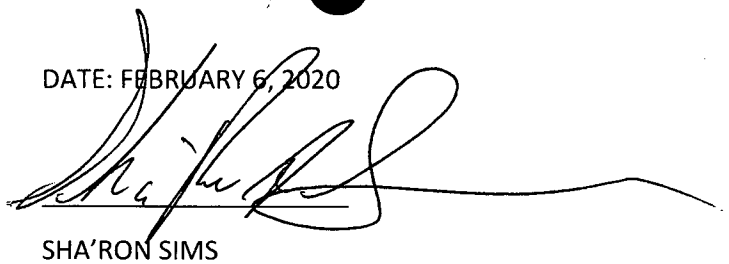

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so guarantees Sims this trial. However, through the uneven application of the laws of Standing and the massive departure from this Court's governing law, the 11th Cir. Panel allowed the lower courts to enter a belief-based order, inadequately reasoned order and itself made factual determinations on a Rule 12(b)(6) motion in a case in which an American Citizen has demanded the exercise of her 7th amendment right.

Sims Pray this Court grant the Certiorari requested, in an exercise of this Court's supervisory rule, in order to address the issues of: (1) If the Laws of Standing have been unevenly applied to such a degree, between creditors and home mortgage borrowers, that such application has violated the 14th Amendment equal protection clause, which includes the equal application of laws.:(2) Has the manner in which Courts have applied this Court's governing law on Rule 12 (b)(6) Motions violate the litigants 5th, and 14th Amendments Due process rights; (3) Has the manner in which the lower courts proceeded, in this instant case, result in an improper denial of Sims' 7th amendment right to the Jury Trial Sims demanded?