No. 20-1509

In the Supreme Court of the United States

PAMELA M. TIMBES,

Petitioner,

vs.

DEUTSCHE BANK NATIONAL TRUST COMPANY,
As Indenture Trustee,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

PAMELA M. TIMBES

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Petitioner Pro Se

I. QUESTIONS PRESENTED FOR REVIEW

Circumvention of a full and fair trial on the merits, and then routine, arbitrary denial of appeal without reason under the guise of discretionary appeal, [1] squarely conflicts with the United States Constitution and precedents of this Court[2] and those of the Supreme Court of Georgia. Furthermore, vastly different legal standards exist with regard to requirement of proof of a real party in interest with Article III standing of alleging Creditors, who routinely file false documents in public records for the purpose of taking property. Instead of applying the established requirements of law and procedure strictly against the same entities that have been repeatedly cited for FRAUD AND NON COMPLIANCE by government and lawsuits from investors, insurers and guarantors, the courts have applied liberal standards and circumvention to allow foreclosure and eviction to proceed. Yet, Debtors are deemed not to have standing to challenge an Assignment of their mortgage, even when fraud is documented.[3]

1. Whether the stated claims for relief of this Case arising directly under the

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[1] See **App. K:** Over 100 Orders in the Georgia Court of Appeals, just in 2020, denying discretionary appeals without reason and using the identical language used in the denial of Timbes' discretionary appeal, **App. D.** Note, specifically, that on June 19, 2020, A20D0391, another Application to appeal was denied involving Deutsche Bank, as Appellee. Because in each there is no opinion, there is no way to determine whether the "decision was reached for an impermissible reason or for no reason at all." *Dunlop*, 421 U.S. at 573, 95 S.Ct. 1851 (1975).

[2] See e.g., *Lindsey et al. v. Normet et al*, 405 U.S. 56, 77 (1972), 92 S. Ct. 862.

[3] See e.g., *Haynes* v. *McCalla Raymer, LLC*, 793 F.3d 1246, 1251 (11th Cir. 2015).

due process clause of the Fourteenth Amendment of the United States Constitution can be circumvented by unconstitutional departures from established law and procedures?

A. Whether or not the State of Georgia has abridged Timbes' privileges or immunities by making and/or enforcing the Discretionary Appeal Process under O.C.G.A. § 5-6-35, which has allowed arbitrary denial of appeal without reason?

B. Whether Timbes' having been deprived of her property without due process of law, and having been denied equal protection of the laws, is a violation the Fourteenth Amendment to the United States Constitution, Section 1?

2. Whether alleging creditors with no proven ownership in the subject property have Article III standing to have brought a dispossessory action and/or to have moved for Summary Judgment and/or to have moved to dismiss Timbes' Counterclaim, which lawsuit challenges a state-regulated, non-judicial foreclosure as void for violation of Georgia law requiring that a valid assignment be filed prior to foreclosure, and/or for mortgage fraud under the Georgia RICO Act, and/or for violation of the Trust's PSA?

II. THE PARTIES

Petitioner is Pamela M. Timbes, citizen and resident of Glynn County, Georgia.

Respondent is Deutsche Bank National Trust Company, as Indenture Trustee[4], having its principal place of business at 1761 East St. Andrew Place, Santa Ana, GA 92705. Deutsche Bank National Trust Company is owned by Deutsche Bank Trust Corporation, which is owned by Deutsche Bank Holdings, Inc, which is owned Deutsche Bank Trust Corporation, which is owned by Taunus Corporation, which is owned by Deutsche Bank AG, a banking corporation organized under the laws of the Federal Republic of Germany.

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[4] "Deutsche Bank National Trust Company as Indenture Trustee", Respondent, brought the present action to evict and was granted a writ of possession with no proof in the record that Pamela Timbes' mortgage is in the American Home Mortgage Investment Trust 2005-3, or any trust (explaining Respondent's current nomenclature as "Trustee", excluding which trust). There is absolutely no proof of ownership in the record. The sole document on which Respondent relies is a purported assignment from "MERS as nominee for the lender, its successors and assigns", which Timbes' contends is void, because the assignor, American Home Mortgage, did not exist when the document was signed by robo signers who were never agents of MERS.

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The unpublished Order of the Court of Appeals of Georgia, No. A20D0280, denying the Application for Discretionary Appeal, (February 12. 2020). [App. D]

The unpublished Order of the Superior Court of Glynn County, State of Georgia, No. CE19-00763, granting Deutsche Bank National Trust Company as Indenture Trustee's Motion for Summary Judgment, (January 14, 2020). [App. E]

The unpublished Order of the Magistrate Court of Glynn County, State of Georgia, No.1800416, granting possession of the subject property to Deutsche Bank National Trust Company, (June 3, 2019). [App. G]

VII. JURISDICTION

The Supreme Court of Georgia entered its order denying certiorari on September 8, 2020, **App. A.** Motion for Reconsideration was denied on September 28, 2020, **App. B.** The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1) and under Article III of the United States Constitution.

VIII. CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Art. III, section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

IX. STATEMENT OF THE CASE

On January 29, 2018 Deutsche Bank National Trust Company, as Indenture Trustee, Plaintiff/Respondent, filed a dispossessory action in Magistrate Court Case No. 1800416 with regard to 304 Carnoustie, St. Simons Island, Ga. 31522.

On February 5, 2018 Timbes filed her Answer and Motion to Dismiss Dispossessory Action for Lack of Standing. Also included were Counterclaims

against Plaintiff/ Respondent.

On February 15, 2018 Timbes filed Motion to Remove to Superior Court where the jury trial demanded could be had.

On May 10, 2019 a Notice of Dispossessory Hearing was mailed to Timbes advising of the Hearing scheduled for May 28, 2018.

On May 20, 2019 Timbes filed her Motion to Stay Proceedings pending a decision, and any appeals thereof, of Timbes' February 15, 2018 Motion to Remove to Superior Court where a jury trial could be had and pending a decision on Motion to Dismiss Dispossessory Action for Lack of Standing, filed February 5, 2018 along with Timbes' Answer.

On May 22, 2019 the Magistrate Court denied the pending motions, including the Motion to remove the dispossessory action to Superior Court where a jury trial could be had.

On May 28, 2019 at 8:34 A.M., prior to the Dispossessory Hearing on May 28, 2019, Timbes filed Notice of Appeal from the May 22, 2019 denial of her Motion to Remove to Superior Court, **Appendix F.**

At the May 28, 2019 Hearing, Timbes gave to the Judge the file-stamped copy of the Notice of Appeal from the May 22, 2019 Order and told Judge Harrell that she had offered a settlement higher than the previously auctioned bid of $385,000, despite the fact that there is no proof of ownership by Deutsche Bank National Trust

Company. The Judge encouraged the Bank to consider Timbes' $400,000 offer to avoid going through the appeal process.

Without Notice to Timbes, on June 3, 2018 a Writ of Possession was granted to Deutsche Bank National Trust Company, ordering Timbes and all others to vacate the premises by June 13, 2018, **Appendix G.**

On June 7, 2019 Timbes filed Notice of Appeal from the June 3, 2019 Writ of Possession in Magistrate Court Case No. 1800416.

On June 14, 2019 the Appeal from Magistrate Court Case No 1800416 was docketed in Superior Court of Glynn County. Supplement of Appeal from the Magistrate Court was docketed on June 19, 2019.

On June 25 2019 Timbes filed her Appellant's Brief and Counterclaim in the Superior Court, Case No. CE19-00763, and demanded a jury trial.

A hearing was scheduled by the Superior Court; however, Deutsche Bank National Trust Company, as Indenture Trustee asked for a continuance until there was a ruling on the summary judgment. The continuance was granted.

On September 19, 2019 Deutsche Bank filed its Motion for Summary Judgment and Brief in Support of Motion for Summary Judgment; Theory of Recovery and Statement of Material Facts; Affidavit of Gregory Wallach.

On September 30, 2019 Timbes filed her Response in Opposition to Summary Judgment and Brief in Support of her Response in Opposition; Response in

Opposition to Deutsche Bank's Theory of Recovery and Statement of Material Facts.

On October 17, 2019 Timbes filed a Supplement to her Responses in Opposition to Summary Judgment and in Opposition to Deutsche Bank's Theory of Recovery and Statement of Material Facts; and Affidavit of Pamela M. Timbes, **Appendix H.**

On January 14, 2020, without a hearing on the disputed facts, the Honorable Stephen G. Scarlett, Jr. signed the Order Granting Motion for Summary Judgment, prepared by Christopher J. Reading, attorney for Appellee, which had been sent by letter to Judge Scarlett, the Superior Court Judge. Said Order, **Appendix E,** entitled Deutsche Bank to evict Pamela Timbes and ruled that the Counterclaims are barred by the doctrines of res judicata and collateral estoppel due to previous adjudication in the federal court.

On January 21, 2020 Pamela Timbes timely filed within seven (7) days her Application for Discretionary appeal in the Court of Appeals of Georgia pursuant to OCGA § 5-6-35(a)(1), out of an abundance of caution because the dispossessory case was initiated in the Magistrate Court; despite the fact that there had not been a ruling by two courts due to the void Writ of Possession granted by the Magistrate Court, **App. G,** in violation of the supersedeas, **App. F,** as set forth below.

On February 12, 2020 the Court of Appeals of Georgia denied without opinion or reason Timbes' Application A20D0280, **Appendix D.**

On September 8, 2020 Timbes' timely filed Petition for Writ of Certiorari, was denied by the Supreme Court of Georgia, **Appendix A**. Motion for Reconsideration was denied on September 28, 2020 **Appendix B.**

Motion to Stay Writ of Possession pending the filing of a Petition for Certiorari in the U.S. Supreme Court was denied by the Georgia Supreme Court on September 28, 2020, **Appendix C.**

X. REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

1. THE STATED CLAIMS FOR RELIEF OF THIS CASE ARISING DIRECTLY UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION CANNOT BE CIRCUMVENTED BY UNCONSTITUTIONAL DEPARTURES FROM ESTABLISHED LAW AND PROCEDURES.

As early as Magna Carta, procedural norms were regarded as a valuable means of protecting the rights of litigants. In America, with the object of preventing an arbitrary government, procedural safeguards were guaranteed to all persons by the inclusion of "due process" clauses in the various federal and state constitutions. Few principles of law, applicable as well to the administrative process, are as fundamental or well established as "a party is not to suffer . . .

without an opportunity of being heard." *Painter v. Liverpool Oil Gas Light Co.*, 11 Eng. Rep. 478, 484, 3 Adm. & Eccl. 433, 448-49 (K.B. 1836). *Caritativo v. California*, 357 U.S. 549, 558 (1958) (Frankfurter, J., dissenting); *Gorman v. University of Rhode Island*, 837 F.2d 7, 12 (1st Cir. 1988).

Timbes has been denied her due process rights under the Fourteenth Amendment to the U.S. Constitution, as set forth below. It is Timbes' due process right to demand equality of application of the law. Our whole system of law is predicated on that fundamental principle. *Truax v. Corrigan,* 257 U.S. 312, 331 (1921):

> Due process tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty, and property, which the congress or the legislature may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law. (pp.312, 331).

Arbitrary Denial of Appeal is an Offense to Fourteenth Amendment Due Process.

This Court stated in *Lindsey et al. v. Normet et al,* 405 U.S. 56, 77 (1972), 92 S. Ct. 862:

> This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review, *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956); *District of Columbia* v. *Clawans*, 300 U.S. 617, 627 (1937); *Ohio* v. *Akron Park District*, 281 U.S. 74, 80 (1930); *Reetz* v. *Michigan*, 188 U.S. 505, 508 (1903); *McKane* v. *Durston*, 153 U.S. 684, 687-688 (1894), and the continuing validity of these cases is not at issue here. When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. *Griffin* v. *Illinois, supra; Smith* v. *Bennett*, 365 U.S. 708 (1961); *Lane* v. *Brown*, 372 U.S. 477 (1963); *Long* v. *District Court of Iowa*, 385 U.S. 192 (1966); *Gardner* v. *California*, 393 U.S. 367 (1969). Cf. *Coppedge* v. *United States*, 369 U.S. 438 (1962); *Ellis* v. *United States*, 356 U.S. 674 (1958).

Although an Application for Discretionary Appeal under O.C.G.A. § 5-6-35 is by definition discretionary, the Court of Appeals of Georgia abused its discretion by arbitrarily denying Pamela Timbes' Application without giving a reason for the denial. There is no way to determine whether the "decision was reached for an impermissible reason or for no reason at all." *Dunlop*, 421 U.S. at 573, 95 S.Ct. 1851 (1975). The arbitrary denial defeats the intention of the Georgia Code.

The Georgia Code has made clear in Title 5, Chapter 6, Sec. 30 (5-6-30):

> It is the intention of this article to provide a procedure for taking cases to the Supreme Court and the Court of Appeals, as authorized in Article VI, Sections V and VI of the Constitution of this state; to that end, this article shall be liberally construed so as to bring about a decision on the merits of every case appealed and to avoid dismissal of any case or refusal to consider any points raised therein, except as may be specifically referred to in this article.[Emphasis Added.].

None of the issues presented in Timbes' Application was addressed by the Court of Appeals. Reversible error appears to exist and/or the establishment of precedent would be desirable; therefore, pursuant to Rule 31(b)(1) and/or Rule 31(b)(2), the Court of Appeals should have granted Timbes' Application for Discretionary Appeal. And the Supreme Court of Georgia should have granted certiorari. Consequently, Timbes' Constitutional rights under Article VI, Sections V and VI of the Constitution of the State of Georgia and her Constitutional rights to due process under the U.S. Constitution have been violated. But it is not just Timbes' Constitutional rights which are at stake here. Because discretionary appeals are routinely, arbitrarily

denied without reason[5], the discretionary appeal process, itself, must be evaluated for its constitutionality under the Fourteenth Amendment to the U.S. Constitution. Furthermore, where a court "makes an error of law," it "by definition abuses its discretion." *Koon v. United States*, 518 U.S. 81, 100 (1996).

The Court of Appeals of Georgia erred by not granting the Application because a direct appeal was available under OCGA § 5-6-34(a).

The Court of Appeals of Georgia erred in denying the Application for Discretionary Appeal from the Superior Court's Order; said Order having granted summary judgment which is directly appealable under OCGA § 5-6-34(a)(1); there having been material fact in dispute; there having been no trial to establish proof of ownership of the subject property, standing of Appellee or a landlord-tenant relationship; Timbes' having been denied her Constitutional right to a jury trial; *and* the Counterclaim having not been barred by *res judicata* due to fraud, *inter alia.* Furthermore, the Magistrate Court lacked jurisdiction to grant the Writ of Possession due to the supersedeas. See **Appendix F** and **Appendix G**. If an appellant files an application for discretionary appeal in a case in which direct appeal is available under OCGA § 5-6-34(a), Section 5-6-35(j) provides that the appeals court "shall grant the application," and the appeal then proceeds as normal. Consequently, the

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[5] See **App. K,** Over 100 Orders in the Georgia Court of Appeals, just in 2020, denying discretionary appeals without reason and using the identical language used in the denial of Timbes' discretionary appeal, **App. D.**

Court of Appeals erred in not granting the present Application pursuant to OCGA § 5-6-34(a)(1).

Circumventing a Hearing on the Merits of the Case is an Offense to Fourteenth Amendment Due Process.

"Due process requires that there be an opportunity to present every available defense." *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932). See also *Nickey* v. *Mississippi*, 292 U.S. 393, 396 (1934).

Pamela Timbes has been denied her due process right to a trial on the issues. And she has a constitutional right to the jury trial she demanded.

In *Metro Atlanta Task Force for the Homeless, Inc. v. Premium Funding Solutions, LLC*, 321 Ga App 100 (2013) the Court stated:

> The exclusive method whereby a landlord may evict a tenant is through a properly instituted dispossessory action filed pursuant to OCGA § 44-7-50 et seq."1 The statutory procedures for dispossessing a tenant must be strictly construed and observed.2 Our review of the trial court's ruling on a legal question is "plain legal error."3
>
> In this case, the court did not adhere to the requirements of the dispossessory statute. For instance, the Task Force was entitled to a trial on the issues, which would include taking the testimony of witnesses orally in open court (unless otherwise provided),4 [Emphasis added.]
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> 1 Steed v. Fed. Nat. Mtg. Corp., 301 Ga. App. 801, 805 (1) (a) (689 SE2d 843)(2009) (citation omitted); Roberts v. Roberts, 205 Ga. App. 371, 372 (2) (422 SE2d253) (1992).
>
> 2 Skelton v. Hill Aircraft & Leasing Corp., 175 Ga. App. 144, 145 (333 SE2d14) (1985).
>
> 3 Suarez v. Halbert, 246 Ga. App. 822, 824 (1) (543 SE2d 733) (2000).
>
> 4 OCGA § 9-11-43.

O.C.G.A § 15-10-41 states in subsection (a) that "[t]here shall be no jury trials in the magistrate court", but goes on to describe the manner for an appeal from a judgment of magistrate court in the subsequent sections, stating at (b)(1) that "appeals may be had from judgments returned in the magistrate court to the state court of the county or to the superior court of the county and the same provisions now provided for by general law for appeals contained in Article 2 of Chapter 3 of Title 5 shall be applicable to appeals from the magistrate court, *the same to be a de novo appeal.* The provisions of said Article 2 of Chapter 3 of Title 5 shall also apply to appeals to state court" [emphasis added].

O.C.G.A. § 5-3-30 provides:

> a) Upon the filing of an appeal from magistrate court to superior court or state court, the appeal shall be placed upon the court's next calendar for nonjury trial. Such appeals from the magistrate court to superior court or state court shall be tried by the superior court or state court without a jury unless either party files a demand for a jury trial within 30 days of the filing of the appeal or the court orders a jury trial.

ARTICLE I. SECTION I. PARAGRAPH IX of the Georgia State Constitution provides as follows:

> (a) The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party.

"The Georgia Constitution provides for the right of trial by jury in dispossessory actions." *Hill v. Levenson,* 259 Ga. 395 (1) (383 S.E.2d 110).

Pamela Timbes has been denied her due process right to the jury trial she timely demanded. She initially asked that the case be removed from the Magistrate Court to the Superior Court where a jury trial could be had. The Magistrate Court denied Timbes' motion for removal. Timbes then filed a notice of appeal from that Order; despite which the Magistrate Court issued a Writ of Possession in violation of the supersedeas. See **Appendix F** and **Appendix G**. Under OCGA §§ 5-6-45 and 5-6-46 the filing of a notice of appeal in the trial court functions as a supersedeas, thereby suspending the trial court's jurisdiction to act with respect to the decision being appealed. "The supersedeas of a filed application or notice of appeal deprives the trial court of the power to affect the judgment appealed, so that subsequent proceedings purporting to supplement, amend, alter or modify the judgment, whether pursuant to statutory or inherent power, are without effect." *Avren v. Garten*, 289 Ga. 186, 190 (710 SE2d 130) (2011). Consequently, the Magistrate Court lacked subject-matter jurisdiction to have issued a Writ of Possession after the notice of appeal was filed.

The Supreme Court of Georgia has long held that judgments, over which the trial court had no subject-matter jurisdiction, must be reversed; and the U.S. Supreme Court has held that any such judgments should be vacated at the earliest opportunity to do so.

Quoting in *Abushmais et al. v. Erby*, No. S07G0372, October 2007:

> .... we point out that this holding is in conflict with long-standing statutory and case law requiring courts to dismiss an action "[w]henever it appears, by suggestion of the parties or otherwise, that the court lacks jurisdiction of the subject matter." OCGA § 9-11-12(h)(3). "The court's lack of subject-matter jurisdiction cannot be waived and may be raised at any time either in the trial court, in a collateral attack on a judgment, or in an appeal. [Cit.]" Ruskell, Davis and Shulman's Ga. Practice and Procedure § 9:3, p. 464 (2007 ed.). See Jackson v. Gamble, 232 Ga. 149, 152, 205 S.E.2d 256 (1974) (waiver or consent to jurisdiction cannot confer jurisdiction over the subject matter).

See also *McDaniel v. Selman*, 75 Ga. App. 119 (1947), citing *Kirkman V. Gillespie*, 113 Ga 507 (37 S.E. 714) and *Stamey v. Hill*, 114 Ga 154 (39 S.E. 949)(1901): "When a trial court, in a case over which it has, as to subject-matter, no jurisdiction, renders therein any judgment, except one of dismissal, this Court will reverse the same..."

This Court has held: *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). And even for the first time before the Supreme Court—a party may attack jurisdiction after the entry of judgment. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

The Writ of Possession issued by the Magistrate Court is void *ab initio* for lack of subject-matter jurisdiction; therefore, there had not been a ruling by two courts due to the void Writ of Possession granted by the Magistrate Court in violation of the supersedeas. The only Order by a court with jurisdiction to grant possession to Appellee was that of the Superior Court granting summary judgment, **Appendix**

E, without a trial, despite there having been fact in dispute. Consequently, there have not been two lower courts who have reviewed this case and the Application for Discretionary Appeal was unnecessary. Direct appeal from the Order granting summary judgment is available under OCGA § 5-6-34(a)(1). The Court of Appeals should have granted the Application and allowed the direct appeal to proceed as normal, OCGA Section 5-6-35(j).

As set forth above, Timbes has *never* had a hearing on the issues. A hearing was initially scheduled by the Superior Court, but was continued at the request of Deutsche Bank after filing its Motion for Summary Judgment. The trial court judge signed the Order granting summary judgment prepared by Respondent's attorney, who had sent the Order by letter to Judge Scarlett. Consequently, Timbes not only never received the jury trial to which she is entitled under the Georgia Constitution, she never even got a hearing where she could call witnesses and present evidence and where Deutsche Bank would have to present evidence of ownership; all of which is in violation of the dispossessory statute. See *Metro Atlanta Task Force for the Homeless, Inc. v. Premium Funding Solutions, LLC*, 321 Ga App 100 (2013), quoted supra. As set forth in Timbes' Affidavit, **Appendix H**, Timbes has attempted for years to find out who actually owns her mortgage but Appellee has circumvented the discovery process for obvious reasons.

Material Fact is in Dispute; Therefore, the Trial Court Erred in Granting Summary Judgment.

Summary judgment is proper only if the pleadings and evidence "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." OCGA § 9-11-56 (c). Where the party moving for summary judgment is the plaintiff, he must make a *prima facie* showing that no material issues of fact exist and that he is entitled to judgment as a matter of law before the burden shifts to the defendant to establish a possible defense. See *Sawnee Forest, LLC v. CRE Venture 2011–1, LLC,* 339 Ga. App. 339, 341 (2) (793 SE2d 542) (2016); *Smith v. Gordon*, 266 Ga. App. 814, 814 (1) (598 SE2d 92) (2004). "A party opposing a summary judgment motion need not respond and may instead rely on the movant's failure to remove any fact questions." *Sherman v. Thomas-Lane American Legion Post 597*, 330 Ga. App. 618, 621 (1) (768 SE2d 797) (2015).

Timbes' Response in Opposition to Summary Judgment, and Response in Opposition to Plaintiff's Theory of Recovery and Statement of Material Facts, gave a concise outline of the genuine issues as to material fact which necessitate a trial, as quoted below:

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS GENUINE ISSUE TO BE TRIED

1. Defendant, Pamela Timbes, contends that she currently owns the Property located in Glynn County, Georgia.
2. The subject Security Deed, Plaintiff's Exhibit A, does not reference Deutsche Bank in any capacity.

3. The Assignment of the Security Deed, Plaintiffs' Exhibit B **[App. I]**, to Deutsche Bank, is a false document[6] filed in the Glynn County Records, as set forth in Appellants' Brief, and, therefore, void *ab initio*.
4. The Deed Under Power, Plaintiff's Exhibit C **[App. J]**, is a premise document based on the false Assignment, and, therefore, also void *ab initio*.
5. Deutsche Bank has no standing to have demanded possession of the property due to lack of proof of ownership; proof of which is incumbent upon Plaintiff.
6. Deutsche Bank is required under Georgia law to prove ownership in order to obtain a Writ of Possession and has failed to provide any such proof; therefore, Plaintiff is not entitled to a Writ of Possession. There is no landlord-tenant relationship. Timbes is not a tenant at sufferance.

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[6] The "false document" nature of the Assignment, Exhibit A **[Appendix I]**, includes:

A. Michelle Halyard and Elizabeth Boulton signed as assistant secretary; however, they are not and never were authorized to execute on behalf of MERS. They were robo signers employed by LPS.

B. All MERS Assignments of Security Deeds, meaning those purportedly executed by an officer of MERS have been established as void and invalid:

1) pursuant to established case law;

2) pursuant to the MERS Federal Consent Order Including Cease and Desist Orders; and

3) pursuant to MERS Membership Rules that make it clear that MERS Members cannot execute such MERS Assignments and must clean the record of such MERS Assignments previously recorded, which rules were amended to comply with the aforementioned MERS Federal Consent Order Including Cease and Desist Orders.

C. The Assignment of Security Deed was executed years after the closing of the of American Home Mortgage Investment Trust 2005-3 in violation of the Trust's PSA and, therefore, void *ab initio* under N.Y. Law. N.Y. Est. Powers & Trusts Law §7-2.4....*Wells Fargo Bank, N.A. v. Erobobo, et al.*, 2013 WL1831799 (N.Y.Sup.Ct. April 29, 2013).

Although a borrower generally does not have standing to challenge an Assignment of Deed to Secure Debt, Defendant, Pamela M. Timbes, has standing to challenge the Assignment under Georgia law because the Assignment of Security Deed is void *ab initio*. Furthermore, "Fraud, accompanied by damage to the party defrauded, always gives a right of action to the injured party." O.C.G.A. 51-6-1 (2010).

The Trial Court Erred in Not Requiring Proof of the Landlord-Tenant Relationship before Granting a Writ of Possession to Deutsche Bank.

Without proof of ownership, or proof of agency relationship with a proven owner, Deutsche Bank lacks standing under Georgia law to demand possession of Timbes' home, 304 Carnoustie, St. Simons Island, GA. Pursuant to OCGA § 44-7-50, only the owner or its agent may demand possession of property through a dispossessory action. Georgia Courts have recognized a fundamental lack of landlord-tenant relationship as an appropriate defense against a dispossessory action.[7] Proof of the lack of landlord-tenant relationship is the presentation of fraudulent deeds or other evidence that the Plaintiff does not actually own the property.[8] In the present case, Assignment of security deed, **Appendix I**, is false and void on its face and the Deed Under Power, **Appendix J**, premised on the validity of the Assignment, is false and void as well; therefore, dispossessory cannot

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[7] *Egana v. HSBC Mortg. Corp.*, 669 S.E.2d 159, 161 (Ga. Ct. App. 2008). This case involved an allegedly fraudulent security deed. Id.The Georgia Court of Appeals distinguished between defendants challenging plaintiff's ownership of the property—and therefore the landlord-tenant relationship itself—and defendants claiming defects in the landlord's title. Id. This case cited *Thomas v. Wells Fargo Credit Corp.*, 200 Ga.App. 592, 594(3), 409 S.E.2d 71 (1991) which is particularly relevant and quoted below.

[8] E.g., *Patrick v. Cobb*, 49 S.E. 806 (Ga. 1905) (plaintiff allegedly did not present sufficient evidence to establish the existence of a tenancy); *Egana*, 669 S.E.2d at 160–61 (allegedly fraudulent security deed); *Wilbanks v. Arthur*, 570 S.E.2d 664 (Ga. Ct. App. 2002) (defendant's mother allegedly acquired title from plaintiff through adverse possession, and defendant lived on the property with mother's permission); *Sanders v. Hughes*, 359 S.E.2d 396 (Ga. Ct. App. 1987) (document between the parties was allegedly a sales contract, not a lease).

lie. There is absolutely nothing in the record which proves that Pamela Timbes' mortgage was ever in the American Home Mortgage Trust 2005-3 or that Deutsche Bank National Trust Company, as Indenture Trustee for American Home Mortgage Investment Trust 2005-3 is the owner of the subject property, or an agent of the owner, and had standing to dispossess.[9] *See* also Affidavit of Pamela M. Timbes, **Appendix H.**

American Home Mortgage Acceptance, Inc. closed in 2007 and has been defunct since that time. The sole proof on which the bank has relied — a purported assignment from "MERS as nominee for the lender, its successors and assigns" — is void, because the assignor did not exist when the document was signed and was fraudulently signed by robo signers who were never agents of MERS. The Assignment referenced is attached hereto as **Appendix I** and the Deed Under Power, premised upon the purported Assignment, is attached as **Appendix J.** There is absolutely no proof of ownership in the record. *See* Affidavit of Pamela Timbes, **Appendix H.** Quoting in part from the Affidavit:

> 8. It is my personal belief, based upon the facts set forth, that I have been unable to secure a loan modification, and now have had my offer of $400,000 declined, because Deutsche Bank does not have legal authority to enter into a contract regarding the subject property. Persisting with the wrongful foreclosure and wrongful dispossession appears to be the only

[9] Note that the present action was brought by Deutsche Bank National Trust Company as Indenture Trustee, but does not designate trustee for which trust. There is no proof in the record that Pamela Timbes' mortgage was ever in the American Home Mortgage Investment Trust 2005-3.

> option for Deutsche Bank who has failed to prove chain of title back to the original lender, American Home Mortgage Acceptance, Inc., now defunct. The sole proof on which the bank has relied — a purported assignment from "MERS as nominee for the lender, its successors and assigns" — is void, because the assignor did not exist when the document was signed and was fraudulently signed by robo signers who were never agents of MERS.

See Memorandum Order *Deutsche Bank Nat'l Trust Co. v. Burke,* 117F. Supp 3d 953 (2015).[10]

Deutsche Bank has failed its *prima facie* showing that no material issues of fact exist. Nonetheless, with no hearing on the disputed fact, the Superior Court granted summary judgment. Furthermore, "The Georgia Constitution provides for the right of trial by jury in dispossessory actions." *Hill v. Levenson,* 259 Ga. 395 (1) (383 S.E.2d 110). Pamela Timbes has answered that she is not a tenant at sufferance and timely demanded a jury trial.

In *Thomas v. Wells Fargo Credit Corp.,* 200 Ga.App. 592, 594(3), 409 S.E.2d 71 (1991) the Court stated:

> "The defense of lack of landlord-tenant relationship is a proper defense to a dispossessory action [and] if the defendant so answers, a trial of the issues raised shall be had in a civil court of record. OCGA § 44-7-53; *Lopez v. Dlearo,* 232 Ga. 339 (206 S.E.2d 454); *Lamb v. Sims,* 153 Ga.App. 556 (265 S.E.2d 879); see *Rucker v. Fuller,* 247 Ga. 423 (276 S.E.2d 600)." *Bread of Life Baptist Church v. Price,* 194 Ga.App. 693, 694 (392 S.E.2d 15). In the case sub judice, defendants answered and denied that a landlord-tenant relationship exists between the parties. Further, there is no evidence or

[10] Although this federal case involves property in Texas for which Deutsche Bank failed to provide chain of title back to the original lender, now defunct, the Texas law cited is similar to that of Georgia.

admission that plaintiff is the owner of the premises or that defendants are on the premises without the landlord's consent. Consequently, genuine issues of material fact remain as to plaintiff's allegations that it is the owner of the premises and that defendants are tenants at sufferance. The trial court erred in striking defendants' answer, granting a judgment on the pleadings and entering an immediate writ of possession. See OCGA § 9-11-12 (c) and (f). Defendants are entitled to a trial of the issues in accordance with procedure prescribed for civil actions in courts of record. See *Crymes v. Crymes,* 148 Ga.App. 299 (2) (251 S.E.2d 155).[Emphasis added.].

4. In their fifth enumeration, defendants contend they are entitled to a jury trial. We agree. "The Georgia Constitution provides for the right of trial by jury in dispossessory actions." *Hill v. Levenson,* 259 Ga. 395 (1) (383 S.E.2d 110).

Clearly Timbes has been denied her due process rights under the Fourteenth Amendment to the U.S. Consitution. **It is Timbes' due process right to demand equality of application of the law**. Our whole system of law is predicated on that fundamental principle. *Truax v. Corrigan,* 257 U.S. 312, 331 (1921).

ARTICLE I. Section I of the Georgia Constitution provides:

Paragraph I.
Life, liberty, and property. No person shall be deprived of life, liberty, or property except by due process of law.

Paragraph II.
Protection to person and property; equal protection.
Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.

The Court of Appeals February 12, 2020 Order in Case No. A20D0280 is void because Timbes' was denied her Constitutional right to due process.

While the phrase "void for any other cause" does not appear to be specifically defined under O.C.G.A. § 9-12-16, Georgia courts have recognized that the denial of a due process right may result in a void judgment. See *McBurrough v. Dept. of Human Resources*, 150 Ga. App. 130, 131 (3) (257 SE2d 35) (1979).

Where Due Process is denied, the case is void, *Johnson v. Zerbst*, 304 U.S. 458 S Ct.1019 (1938). See also *Sabariego v Maverick*, 124 US 261, 31 L Ed 430, 8 S Ct 461 (1888).

'Defendants who have been treated with unfairness, bias and the appearance of prejudice by this Court, and the opposing counsel, leaves open the question of how an uninterested, lay person, would question the partiality and neutrality of this Court."...our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchinson*, 349 U.S. 133, 136 (1955).

"This court had a duty to ensure fairness. This Court failed, or refused to ensure that fairness." *Marshall v. Jerrico*, 100 S. Ct. 1610, 446 U.S. 238.

The establishment of precedent would be desirable with regard to whether O.C.G.A. § 44-14-162 (b) "could ever provide a debtor with standing to challenge a foreclosure based on an unrecorded or facially invalid assignment."

In *Ames v. JP Morgan Chase Bank, N.A.*, 783 S.E. 2d 614 (Ga. 2016) the Georgia Supreme Court actually left open the distinct possibility of a challenge to a facially invalid Assignment under §44-14-162(b):

> [Footnote] 7 The legislature has indicated its desire to ensure that only the record holders of deeds initiate foreclosure proceedings. OCGA § 44-14-162 (b) requires that "[t]he security instrument or assignment thereof vesting the secured creditor with title to the security instrument shall be filed prior to the time of sale in the office of the clerk of the superior court of the county in which the real property is located," and the stated legislative purpose of this provision is to "require a foreclosure to be conducted by the current owner or holder of the mortgage, as reflected by public records," Ga. L. 2008, p. 624, § 1. Because Chase recorded its assignment as required and the Ameses have not brought a distinct challenge under this statute, we need not decide whether § 44-14-162 (b) could ever provide a debtor with standing to challenge a foreclosure based on an unrecorded or facially invalid assignment. [Emphasis added.]

Although affirming the dismissal of the Amended Complaint in federal District Court, 2:16-cv-00031, the Eleventh Circuit Court on September 6, 2017, in Appeal No. 17-10556, acknowledged the discrepancy between federal law and Georgia law with regard to the issue raised in the present Counterclaim: Timbes' standing to challenge the Assignment of the security deed, **Appendix I**. Quoting from the Eleventh Circuit September 6, 2017 Order:

> Turning to Timbes's challenge to the validity of the assignment, we agree the district court that she lacks standing to contest the assignment. [Order at p. 7].
> .....
> Timbes points out that Georgia courts have not gone quite so far as *Haynes*. In *Ames*, the Supreme Court of Georgia adopted the general rule that a borrower lacks standing to challenge an assignment of his or her security deed. 783 S.E.2d at 619-20. But the Court left open the possibility that a debtor could have standing to challenge the validity of an assignment indirectly, if the invalid assignment violated a statutory protection and thereby injured the debtor. *Id.* At 621. One question left unresolved by *Ames* is whether O.C.G.A. § 44-14-162 (b) "could ever provide a debtor with standing to challenge a foreclosure based on an unrecorded or facially invalid assignment." *Id.* At 622 n.7. Section§ 44-14-162 (b) "requir[es]foreclosures to be conducted by the current owner of the mortgage, as shown by public records." *Duke Galish*

> *LLC v. SouthCrest Bank*, 726 S.E.2d 54,56 (Ga. Ct. App. 2012). Thus, *Ames* left open a possibility—that a debtor could have standing to challenge an unrecorded or facially invalid assignment under § 44-14-162 (b)—that *Haynes* appears to foreclose. Compare *Ames*, 783 S.E.2d at 622 n.7 (noting *Haynes*), with *Haynes*, 793 F.3d at 1252-53. [Order at p. 9].

Lewis v. Manufacturers National Bank of Detroit, 364 U.S. 603, 81 S.Ct. 347, 5 L.Ed.2d 323 (1961), settled the question of whether state law applies in bankruptcy court to allocate priorities among creditors. As the Bankruptcy Judge stated:

> * * * Generally, a secured creditor is entitled to reclaim from the estate of a Bankrupt, or to foreclose against his security interest in, any property in possession of the Bankrupt or Trustee if the value of the security does not substantially exceed the debt to the particular creditor. To enjoy this right, the secured creditor must have, prior to the filing of the Bankruptcy, perfected his security interest in accordance with the law of the State which is to be applied by the Bankruptcy Court in its consideration of the issues. [Emphasis added.].

Respondent had no such perfected lien pre-petition; nor, to this date, has a valid assignment been filed under OCGA § 44-14-162 (b) in order to proceed to foreclosure. The establishment of precedent would be desirable with regard to whether O.C.G.A. § 44-14-162 (b) "could ever provide a debtor with standing to challenge a foreclosure based on an unrecorded or facially invalid assignment." *Ames*, 783 S.E.2d at 622 n.7. Consequently, the Court of Appeals erred in not granting Timbes' Application for Discretionary Appeal which would have allowed appeal of the Counterclaim. *Inter alia*, the Counterclaim cannot be barred under the doctrine of *Res Judicata*, due to the fraud upon the court, as set forth below.

The federal court dismissed the issues and then the Georgia Court of Appeals ignored these and other issues without opinion. The Georgia Supreme Court has denied certiorari. Consequently, the issues in the Counterclaim have also been circumvented and Pamela Timbes' right to due process has been denied.

Pro Se Litigants Have a Constitutional Right to Have Their Claims Adjudicated and to Submit Evidence in Support of Their Claims.

Pro se litigants are afforded certain rights under authority of the supremacy and equal protection clauses of the United States Constitution and the common law authorities of *Haines v Kerner*, 404 U.S. 519(1972),)*Platsky v. C.I.A.* 953 F.2d. 26 (2d Cir. 1991, and *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000) relying on *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992), "*United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996), quoting *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring).

In re *Haines*: pro se litigants are held to less stringent pleading standards than BAR registered attorneys. Regardless of the deficiencies in their pleadings, pro se litigants are entitled to the opportunity to submit evidence in support of their claims.

In re *Platsky*: court erred when court dismissed the pro se litigant without instruction of how pleadings are deficient and how to repair pleadings.

In re *Anastasoff*: litigants' constitutional rights are violated when courts depart from precedent where parties are similarly situated. All litigants have a constitutional right to have their claims adjudicated according the rule of precedent. See *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000).

Pamela Timbes, *pro se*, has stated claims upon which relief can be granted.

Even if the pleading is deficient in some way, she should be given the opportunity to correct the pleading. The pleading should be construed to include any exhibits attached to the Counterclaim. See *Gold Creek SL v. City of Dawsonville*, 290 Ga. App. 807, 809 (660S.E.2d 858) (2008). Furthermore, Pamela Timbes should be afforded her Constitutional right to a trial by jury, including her right to discovery to further prove her claims of fraud.

Claims cannot be barred where fraud was involved; and new evidence should be allowed in the advancement of truth. *Brown v. Felsen*, 442 U.S. 127, 132 (1979).

2. LACK OF ARTICLE III STANDING OF RESPONDENT TO DEMAND POSSESSION OF THE SUBJECT PROPERTY, TO MOVE FOR SUMMARY JUDGMENT AND TO MOVE TO DISMISS THE COUNTERCLAIM.

It is clearly established law that standing has both constitutional and prudential (*i.e.* self-imposed) requirements. The real party in interest question is really the prudential component of the overall standing analysis, while injury-in-fact is a constitutional requirement. Both requirements must be met before a court can grant relief. In addition, a party also has standing to seek relief if it has the authority to act on behalf of an entity that has standing. Therefore, a nominee or agent will have to prove both (1) that it is an agent with the authority to act on behalf of the principal and (2) that the principal has both constitutional standing and prudential standing. The standing requirement is "an essential and unchanging part of the case-

or controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 US 555, 560(1992). This constitutional doctrine requires that a claimant must present an actual or imminent injury that is fairly traceable to the opposing party's conduct and redressable by a favorable ruling. *Davis v. Fed. Election Comm'n*, 544 U.S. 724 (2008). The standing question is a threshold issue, required before a court may entertain a suit. *Warth v. Seldin*, 422 U.S. 490, 495 (1975). Thus, if a lender cannot establish standing, the court has no authority to hear its motion for relief and it must deny the motion. Prudential requirements also require that a party bringing a motion be the real party in interest. The purpose is to ensure the party bringing forth the action is the party who "possesses the substantive right being asserted under the applicable law." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). The real party in interest inquiry is one of the prudential considerations the judiciary self-imposes to limit the role of courts in democratic society.

An alleging creditor must prove ownership to establish a real party in interest with standing to proceed to dispossession under Georgia law.

It is well established that in a civil action the plaintiff has the burden of proof. *Anderson v. Poythress*.(246 Ga. 435)(271 SE2d 834)(1980), citing *Kimsey v. Rogers*, 166 Ga. 176 (142 SE 667) (1928).

"The exclusive method whereby a landlord may evict a tenant is through a properly instituted dispossessory action filed pursuant to OCGA§ 44-7-50 et seq."

Steed v. Fed. Nat. Mtg. Corp., 301 Ga. App. 801, 805(1)(a)(689 SE2d843) (2009); *Roberts v. Roberts*, 205 Ga. App. 371, 372 (2) (422 SE2d253) (1992).

The statutory procedures for dispossessing a tenant must be strictly construed and observed. *Skelton v. Hill Aricraft & Leasing Corp.*, 175 Ga. App. 144, 145 (333 SE2d14) (1985).

Pursuant to OCGA § 44-7-50, only the owner or its agent may demand possession of property through a dispossessory action. O.C.G.A. 44-7-50 (2010).

Only the owner of the subject property at 304 Carnoustie, St. Simons Island, GA can demand possession of said property. A landlord-tenant relationship must exist between a legal title holder and a tenant at sufferance such that the dispossessory procedures set forth in OCGA § 44-7-50 et seq. are applicable. See *Frank v. Fleet Finance Inc. of Ga.*, 227 Ga.App. 543, 547(1)(c), 489 S.E.2d 523 (1997); *Cloud v. Ga. Central Credit Union,* 214 Ga.App. 594, 598(8), 448 S.E.2d 913 (1994); *Stevens v. Way*, 167 Ga.App. 688, 690(5), 307 S.E.2d 507 (1983). A landlord-tenant relationship must exist before a dispossessory action will lie, see *Stevens*, supra.; *Crain v. Daniel*, 79 Ga.App. 647, 651-652(3), 54 S.E.2d 487(1949).

Plaintiff, Deutsche Bank National Trust Company, as Indenture Trustee, has no proven ownership of the subject property or agency relationship with the owner; proof of which is incumbent upon Deutsche Bank National Trust Company and required under Georgia law to demand possession of the subject property. *See* OCGA

§ 44-7-50; *Metro Atlanta Task Force for the Homeless, Inc. v. Premium Solutions, LLC*, 321 Ga App 100 (2013); *Steed v. Fed. Nat. Mtg. Corp.*, 301 Ga. App. 801, 805 (1) (a) (689 SE2d 843)(2009); *Roberts v. Roberts*, 205 Ga. App. 371, 372 (2) (422 SE2d253) (1992).

As set forth above, Georgia Courts have recognized a fundamental lack of landlord-tenant relationship as an appropriate defense against a dispossessory action. In *Thomas v. Wells Fargo Credit Corp.*, 200 Ga.App. 592, 594(3), 409 S.E.2d 71 (1991), supra. Proof of the lack of landlord-tenant relationship is the presentation of fraudulent deeds or other evidence that the Plaintiff does not actually own the property. In the present case, Assignment of security deed, **App. I**, is false and void on its face and the Deed Under Power, **App. J**, premised on the validity of the Assignment, is false and void as well; therefore, dispossessory cannot lie. "The exclusive method whereby a landlord may evict a tenant is through a properly instituted dispossessory action filed pursuant to OCGA § 44-7-50 et seq." In *Metro Atlanta Task Force for the Homeless, Inc. v. Premium Funding Solutions, LLC*, 321 Ga App 100 (2013), supra. Furthermore, "The Georgia Constitution provides for the right of trial by jury in dispossessory actions." *Hill v. Levenson,* 259 Ga. 395 (1) (383 S.E.2d 110).

Although a borrower generally does not have standing to challenge an Assignment of Deed to Secure Debt, Defendant, Pamela M. Timbes, has standing to

challenge the Assignment under Georgia law because the Assignment of Security Deed is void *ab initio*. See note 6 above. Furthermore, "Fraud, accompanied by damage to the party defrauded, always gives a right of action to the injured party." O.C.G.A. 51-6-1 (2010).

The Counterclaim Cannot be Barred by Res Judicata and/or Collateral Estoppel.

On January 5, 2016 Plaintiff, Deutsche Bank National Trust Company, as Indenture Trustee for American Home Mortgage Investment Trust 2005-3, wrongfully foreclosed on Pamela M. Timbes' home at 304 Carnoustie, St. Simons Island, GA 31522 in violation of O.C.G.A. § 44-14-162(b) which requires that a valid Assignment of Deed to Secure Debt had to be filed prior to the foreclosure sale. The fraudulent and void Assignment, **App. I**, was utilized to foreclose on the subject property. The Deed Under Power, **App. J**, depended upon the premise that the Assignment of Deed to Secure Debt was a true and valid document. This premise document is, therefore, a false document and cannot be used as proof of ownership.

Respondent Committed Documented Fraud upon the Court.

"Fraud, accompanied by damage to the party defrauded, always gives a right of action to the injured party." O.C.G.A. 51-6-1 (2010). The Assignment of Deed to Secure Debt was the fabrication of Lender Processing Services (LPS). LPS is a known document fabricator and the Assignment was signed by known robo

signers.[11] See also *American Home Mortgage Servicing, Inc. v. Lender Processing Services, Inc.,* 11-10440, District Court of Dallas County, TX, 2011. Petitioner's Complaint, August, 2011: American Home Mortgage sued LPS for robo signing and violation of the Trust's PSA. American Home Mortgage admitted that assignments were done illegally by unauthorized parties; that filings were not done in compliance with the PSA; and that LPS had caused American Home Mortgage Servicing Inc. potential liability.

This Court has held that if a party has used fraud to obtain a judgment, the party should be deprived of the benefit of the judgment. *Marshall v. Holmes*, 141 U.S. 589 at 599 (1891), quoting *Johnson v. Waters*, 111 U.S. 640, 667, 28 L. Ed. 547, 4 S. Ct. 619 (1884). See *Chambers v. NASCO, Inc., 501 U.S. 32,* 44(1991):

> See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944); Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580 (1946). This "historic power of equity to set aside fraudulently begotten judgments," Hazel-Atlas, 322 U. S., at 245, is necessary to the integrity of the courts, for "tampering with the administration of justice in [this] manner . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public." Id., at 246. [Emphasis added.].

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[11] The Assignment of Security Deed recorded December 2, 2010 (**App. I**) was prepared by Lender Processing Services (LPS). LPS is a known document fabricator for lenders and law firms. Michelle Halyard and Elizabeth Boulton signed as assistant secretary; they were employees of LPS with no authority. American Home Mortgage filed a lawsuit against LPS for robo signing. The FDIC also filed suit against LPS for other frauds.

Violations of the Georgia RICO Act

Respondent has violated one or more of the Georgia RICO statutes listed below.

> 135. Georgia defines Mortgage Fraud as when a person "[k]nowingly makes a deliberate misstatement, misrepresentation, or omission during the mortgage lending process with the intention that [the false information] be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process [including negotiation and servicing]."[12]
>
> 136. Further, a violation of the statute occurs when a person uses or facilitates the use of such false information with the intent that the false information be used by anyone during the mortgage lending process.[13]
>
> 137. Violation of the statute occurs when any written instrument that contains a deliberate misstatement, misrepresentation, or omission is recorded in the real estate records of any Georgia county.[14]

Attorneys and others who take part in the mortgage lending process are subject to separate prosecution for conspiracy,[15] should the party conspire with others to violate the statute.[16]

Aldridge Pite LLP, Attorney for the Respondent in the dispossessory action, is a high-volume foreclosure mill who has a history of fraudulent activity.[17]

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12 O.C.G.A.§16-8-102(1).

13 O.C.G.A.§16-8-102(2).

14 O.C.G.A.§16-8-102(5).

15 O.C.G.A.§16-4-8 (2003).

16 O.C.G.A.§16-8-102(4).

17 Aldgridge Pite LLP utilized documents prepared by the now-notorious fraudulent, robo-signing affidavit mill Lender Processing Services, "LPS" (f/k/a as Fidelity National Foreclosure Solutions and several other names) out of Mendota Heights, MN and Jacksonville, FL. The Assignment of Security Deed recorded December 2, 2010 (**App. I**) was prepared by LPS. Lender

The Related Federal Court Action Cannot Bar the Present Action.

Pamela Timbes brought a wrongful foreclosure lawsuit, "Related Action", in Superior Court, No. CE16-00001-063, which was then removed to federal court. Timbes contended that under the *Rooker Feldman* doctrine and/or *Younger* doctrine, the federal court lacked jurisdiction and the related action should have been remanded to the Superior Court of Glynn County. However, the related wrongful foreclosure complaint was dismissed for failure to state a claim. The ruling in the federal court with regard to the Related Action cannot be construed to bar the Counterclaim in the present action. Quoting the Court in *Heath v. Alabama*, 474 U.S. 82, 89 (1985):

> Thus, the Court has uniformly held that the States are separate sovereigns with respect to the Federal Government because each State's power to prosecute is derived from its own "inherent sovereignty," not from the Federal Government. Wheeler, supra, at 320, n. 14. See Abbate v. United States, 359 U.S. 187, 193 - 194 (1959) (collecting cases); Lanza, supra. .... If the States are separate sovereigns, as they must be under the definition of sovereignty which the Court consistently has employed, the circumstances of the case are irrelevant.

Consequently, the claims in the Counterclaim must be adjudicated under Georgia law without regard to the ruling of the federal District Court. Therefore, the claims in the Counterclaim cannot be barred by res judicata or collateral estoppel, even if

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Processing Services, LPS, is a known document fabricator for lenders and law firms. Michelle Halyard and Elizabeth Boulton signed as assistant secretary; they were employees of LPS with no authority. American Home Mortgage filed a lawsuit against LPS for robo signing. The FDIC also filed suit against LPS for other frauds.

related.

Although affirming the dismissal of the Amended Complaint in federal District Court, 2:16-cv-00031, the Eleventh Circuit Court on September 6, 2017, in Appeal No. 17-10556, acknowledged the discrepancy between federal law and Georgia law with regard to the issue raised in the present Counterclaim: Timbes' standing to challenge the Assignment of the security deed. See the Eleventh Circuit September 6, 2017 Order quoted above at page 22.

Lewis v. Manufacturers National Bank of Detroit, 364 U.S. 603, 81 S.Ct. 347, 5 L.Ed.2d 323 (1961), settled the question of whether state law applies in bankruptcy court to allocate priorities among creditors. As the Bankruptcy Judge stated:

> * * * Generally, a secured creditor is entitled to reclaim from the estate of a Bankrupt, or to foreclose against his security interest in, any property in possession of the Bankrupt or Trustee if the value of the security does not substantially exceed the debt to the particular creditor. To enjoy this right, the secured creditor must have, prior to the filing of the Bankruptcy, perfected his security interest in accordance with the law of the State which is to be applied by the Bankruptcy Court in its consideration of the issues. [Emphasis added.].

Respondent had no such perfected lien pre-petition; nor, to this date, has a valid assignment been filed under OCGA § 44-14-162 (b) in order to proceed to foreclosure.

Res Judicata Cannot be Applied to the Counterclaim, Because the Federal Courts Lacked Jurisdiction.

Under Georgia law for res judicata to apply there must have been a judgment of a court of competent jurisdiction. *Neely v. City of Riverdale*, 298 Ga. App. 884, 86 (2009).

Without proof of standing of the alleging creditor, the federal courts lacked subject-matter jurisdiction. There is absolutely no proof in the record in the federal court or in the state court that Deutsche Bank is a real party in interest with standing to have proceeded to foreclosure or to dispossession. There has been no trial on the disputed material fact in any court; therefore, the federal District Court had no jurisdiction to dismiss the Amended Complaint on summary judgment. The federal District Court concluded that Timbes lacked standing to challenge the Assignment of Deed to Secure Debt. However, such is not the case under Georgia Law. Nonetheless, it is Plaintiff/Respondent's burden of proof of standing to proceed to foreclosure and to dispossession.

Article III of the United States Constitution limits the jurisdiction of all federal courts to "cases and controversies". A person with no ownership interest has no constitutional standing because a non-owner cannot establish "injury in fact" traceable to the acts of the opposing party. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). When standing is absent, a district court lacks subject- matter

jurisdiction over the plaintiff's claim. *See D'Lil v. Best Western Encina Lodge & Suites*, 538 F.3d 1031, 1036 (9th Cir. 2008) (a party invoking federal jurisdiction has the burden of establishing that it has satisfied the 'case-or-controversy' requirement of Article III of the Constitution; standing is a 'core component' of that requirement.") (internal citations omitted); *Medina v. Clinton*, 86 F.3d 155,157 (9th Cir. 1996) (linking Article III standing with subject-matter jurisdiction of federal courts). And a federal court cannot hypothesize subject- matter jurisdiction for the purpose of deciding the merits. *Ruhrgas A.G. v. Marathon Oil*, 526 U.S. 574 (1999). The constitutional limitations on federal jurisdiction make federal courts "courts of limited jurisdiction," *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978) (jurisdiction lacking), as opposed to state courts, which are generally presumed to have subject-matter jurisdiction over a case.

A federal court is presumed to lack subject-matter jurisdiction and the party invoking federal jurisdiction bears the burden of persuasion on jurisdiction. "It is to be presumed that a cause lies outside [of federal courts'] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *McNutt v. Gen. Motors Acceptance Corp. of Ind., Inc.*, 298 U.S. 178, 189 (1936) ("The burden of proving all jurisdictional facts is on the party asserting jurisdiction.").

The principles of waiver, consent, and estoppel do not apply to jurisdictional issues—the actions of the litigants cannot vest a district court with jurisdiction above the limitations provided by the Constitution and Congress. In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

A federal court has the obligation to determine jurisdiction on its own even if the parties do not raise the issue. All courts have an "independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (citing *Ruhgras AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("Even if the parties remain silent, a federal court, whether trial or appellate, is obliged to notice on its own motion its lack of subject-matter jurisdiction, or the lower court's lack of subject-matter jurisdiction when a case is on appeal.").

A litigant or the court can raise a defect in jurisdiction at any time, even after a court has entered judgment and even on appeal. Federal Rule 12(h)(3) states that, "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

The objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006)

(citations omitted); *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). And even for the first time before the Supreme Court—a party may attack jurisdiction after the entry of judgment in the district court. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

It is clearly established law that a final judgment is void "if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." *Rice v. Ford Motor Co.*, 88 F.3d 914, 918 n. 7 (11th Cir. 1996). Accord, *Watts v Pinkney*, 752 F.2d 406, 409(9th Cir. 1995). When a judgment is void the court has a non-discretionary duty to grant relief. See also, *Thomas P. Gonzales Corp v Consejo Nacional de Costa Rica*, 614 F. 2d 1247, 1256(9th Cir. 1980), *Tomlin v McDaniel*, 865 F.2d 209, 210(9th Cir. 1987); *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992). All courts have a duty to vacate void orders. *Jordon v. Gilligan*, 500 F.2d 701, 704 (6th Cir.1974) ("A void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside."); *Watts v. Pinckney*, 752 F.2d 406, 409 (9th Cir.1985); *Textile Banking Company, Inc. v. Rentschler*, 657 F.2d 844, 850 (7th Cir. 1981) ("If the underlying judgment is void because the court lacked personal or subject matter jurisdiction or because the entry of the order

violated the due process rights of the respondent, the trial judge has no discretion and must grant appropriate relief.").

In *Oldfield v. Pueblo De Bahia Lora, S.A.*,558 F.3d 1210,1217-1218 (11th Cir. 2009) the Court held that a district court's failure to vacate a void judgment is per se an abuse of discretion,

"A void judgment [or order] is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one." *Bennett v. Wilson* , 122 Cal. 509, 513-514(1898).

It is well-settled law that there is a presumption against subject-matter jurisdiction in courts of limited jurisdiction, including courts of statutory jurisdiction. The bankruptcy court is a court of limited jurisdiction. Appellate Courts are also courts of limited jurisdiction; therefore, there is a presumption against subject-matter jurisdiction in Appellate Court proceedings.

In the present case with regard to the Counterclaim, the threshold condition of claim preclusion was not met: (1) because the federal courts lacked subject-matter jurisdiction over the Amended Complaint and (2) because Timbes, having objected to standing of the alleging creditor, was denied due process by the courts' placing proof of the lack of standing and subject-matter jurisdiction upon Timbes, instead of requiring the alleging creditor to prove standing.

New evidence of fraud upon the court cannot be precluded under the law of the case doctrine when different evidence is produced or when a prior decision would result in "manifest injustice". *Newman v. Ormond*, 456 F. App'x 866,867 (11th Cir. 2012).

Under Georgia law "Fraud, accompanied by damage to the party defrauded, always gives a right of action to the injured party." O.C.G.A. 51-6-1 (2010). Regardless of the dispossessory action, Timbes' Counterclaim should have proceeded to jury trial. *Long v. Greenwood Homes*, 285 Ga. 560, 562, 679 S.E.2d 712 (2009).

An Appropriate Disposition in This Case would be to Remand to the Supreme Court of Georgia for Further Consideration.

This Court has stated that its authority arises under the very broad grant of 28 U.S.C. § 2106, which allows:

> [t]he Supreme Court or any other court of appellate jurisdiction [to] affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and [to] remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.[18]

As set forth above, the federal court dismissed the standing issue of the alleging creditor and fraud upon the court, because *Timbes* lacked standing to challenge the fraudulent assignment. Then, the state court circumvented Timbes'

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[18] 28 U.S.C. § 2106 (2007).

right to a trial on the issues; and the appeals court arbitrarily denied Timbes' appeal without opinion or reason. Because Timbes has been denied a full and fair opportunity to assert claims and defenses resulting in violation of her due process rights, remand would be an appropriate disposition in this case.

XI. CONCLUSION

This Honorable Court should grant certiorari to evaluate the Discretionary Appeal Process under O.C.G.A. § 5-6-35, which has allowed routine, arbitrary denial of appeal without reason in apparent violation of the Fourteenth Amendment to the United States Constitution and the Georgia Constitution.

In the alternative, the Court should remand to the Georgia Supreme Court for further consideration; Petitioner, Timbes, having been deprived of her property without due process of law and having been denied equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution, Section 1; and there having been no proof of Article III standing of the alleging creditor, Respondent, Deutsche Bank National Trust Company, as Indenture Trustee, to have demanded possession of Timbes' home, to have moved for summary judgment, or to have moved to dismiss the Counterclaim.

Respectfully submitted this 23rd day of February, 2021.

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PRO SE PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the following parties with

Petition for Writ of Certiorari:

Dallas R. Ivey
Christopher Reading
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Fifteen Piedmont Center, Suite 500
Atlanta, Georgia 30305

By UPS with sufficient postage affixed thereon to assure delivery.

Respectfully submitted this 23rd day of February, 2021.

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Respectfully resubmitted this 26th day of April, 2021.

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