

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In Re:

CASE NO.: 6:11-cv-1247-Orl-28DAB

JORGE CANELLAS,

CIVIL DOCKET

Debtor,

**CARLA MUSSELMAN, as Trustee for the
Bankruptcy Estate of Jorge Canellas,**

Plaintiff/Appellant,

v.

**U.S. BANK NATIONAL ASSOCIATION,
as Trustee of the Lehman Brother Small
Balance Commercial Mortgage Pass-
Through Certificates, 2006-3,**

Defendant/Appellee.

On Appeal from Order of the
United States Bankruptcy Court for the
Middle District of Florida
Orlando Division

BRIEF FOR APPELLANT, CARLA MUSSELMAN

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STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

This is an appeal from a final order and judgment of the United States Bankruptcy Court for the Middle District of Florida entered on June 3, 2011, which granted the motion for summary judgment filed by U.S. Bank National Association, as Trustee of the Lehman Brothers Small Balance Commercial Mortgage Pass-Through Certificates 2006-3 (“US Bank” or “Indenture Trustee”), and denied the cross-motion for summary judgment filed by Carla Musselman as Trustee for the Bankruptcy Estate of Jorge Canellas (the “Trustee”). This Court has jurisdiction over this appeal of a final judgment and order of a bankruptcy court under 28 U.S.C. § 158(a)(1).

STANDARD OF APPELLATE REVIEW

The Bankruptcy Court’s order granting U.S. Bank’s motion for summary judgment and denying the Trustee’s opposing motion for summary judgment is reviewed *de novo* on appeal. *See, e.g., In re Kingsley*, 518 F.3d 874, 876 (11th Cir. 2008) (quoting *In re Optical Technologies, Inc.*, 246 F.3d 1332, 1334 (11th Cir. 2001)); *In re Fleck*, 242 B.R. 188, 190 (M.D. Fla. 1999) (“When sitting in its appellate capacity, this Court reviews the grant of summary judgment in bankruptcy proceedings *de novo*.”). A court may grant a motion for summary judgment only where the moving party has demonstrated the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

STATEMENT OF THE ISSUES PRESENTED FOR APPELATE REVIEW

(1) Did the Bankruptcy Court err by entering summary judgment against the Trustee when a genuine issue of material fact existed as to whether the persons alleged to have executed the transfer of the subject loan had requisite authority at the time of the transfer?

(2) Did the Bankruptcy Court err by failing to consider the Trustee's argument that the alleged conveyance of the loan into the securitized trust in 2010 was prohibited by the trust's provisions and therefore void under New York trust law?

STATEMENT OF THE CASE

This case concerns a securitized mortgage on non-homestead real property that is allegedly held within a so-called securitized trust comprised of a number of such mortgages (the "Securitized Trust"). The Trustee argues that any secured interest of the Appellee in the real property is void or voidable. The parties do not dispute the following relevant facts:

- The Securitized Trust was formed on or about November 30, 2006.
- Until late September of 2009:
 - the mortgage securing the loan at issue in this case had never been assigned to the Securitized Trust;
 - the promissory note creating the loan at issue in this case had never been endorsed over to the Securitized Trust; and
 - the original promissory note had never been physically delivered to the Securitized Trust.
- Between these two events occurred the bankruptcy filing of the obligor on the loan.

- In late September of 2009, employees in the special assets office of Aurora Bank, FSB executed documents attempting to convey the mortgage loan into the Securitized Trust.
- The assignment of the mortgage loan attempts to backdate the assignment to the date of the formation of the Securitized Trust, and the allonge to the note is undated.
- The terms of the Securitized Trust's formation documents (the Pooling and Servicing Agreement) appear to forbid transfers of loans into the Securitized Trust any later than 90 days following November 30, 2006.

The Trustee first challenged the Securitized Trust's interest in the real property when on November 10, 2009, she filed an objection to the Securitized Trust's motion for relief from stay in the main bankruptcy case. On February 9, 2010, after litigation in the bankruptcy case, the Bankruptcy Court entered its Order denying Securitized Trust's motion for relief from stay. The Bankruptcy Court found *inter alia* that the documents provided by the Securitized Trust in support of the motion for relief lacked veracity,¹ and held that the Securitized Trust lacked standing for relief from stay.

The Trustee then filed an adversary proceeding in the bankruptcy case to avoid the Securitized Trust's lien on the real property (arising by virtue of the assignment of mortgage it executed and recorded in September 2009). After litigation and discovery in the adversary proceeding, the Securitized Trust filed its motion for summary judgment, and the Trustee filed her opposition and cross-motion thereto. (AP Doc. 33, R. 348-359). On June 3, 2011, the Bankruptcy Court entered its Order granting the Securitized Trust's motion for summary

¹ Specifically, the Bankruptcy Court found that the Allonge lacked veracity, which was one of the reasons that Court denied the motion for relief from stay. Later, the Bankruptcy Court granted the Appellee's motion for summary judgment relying on the same Allonge. The Bankruptcy Court has never reconciled the two findings or explained why a factual issue does not lie in the veracity of the Allonge.

judgment (AP Doc. 46, R. 29-36) (the “Order”) and entered Judgment in favor of the Securitized Trust (AP Doc. 47, R. 37-38).

Notably, the Bankruptcy Court’s Order does not refer in any way to the Trustee’s Opposition to U.S. Bank’s Motion for Summary Judgment (AP Doc. 33, R. 348-359). In fact, the Order states in its first paragraph that the Bankruptcy Court considered the Trustee’s Motion for Partial Summary Judgment (AP Doc. 16) which was filed before the Trustee filed her Amended Complaint (AP Doc. 20, R. 53-59) and therefore was moot.² It is possible that the Bankruptcy Court confused the earlier, mooted Motion for Partial Summary Judgment and failed to consider the Trustee’s Opposition to U.S. Bank’s Motion for Summary Judgment.

STATEMENT OF THE RELEVANT FACTS

On August 1, 2006, Jorge Canellas signed a note and mortgage (the “Note” and “Mortgage”) in favor of Lehman Brothers Bank, FSB, in the amount of \$274,500.00, and secured by non-homestead real property located at 830 Hoffner Avenue, Orlando, Florida, 32809 (the “Property”). (R. 544-558).

On November 30, 2006, the “2006-3 Trust” was created as a pool of securitized mortgages (the “Securitized Trust”).³ (R. 588). The Appellee alleges that the 2006-3 Trust owns the Note and Mortgage.⁴ (R. 73). The Trust is a so-called REMIC trust (R. 685-687). “REMIC”

² The Bankruptcy Court mentions this problem in its Order, notes that the Trustee never withdrew the mooted motion, and then proceeds to analyze it as if it remained effective (not moot), even though it was based on the original, non-amended complaint and filed prior to the Trustee’s amended complaint.

³ The date on the cover of the operative document, the Pooling and Servicing Agreement, is October 31, 2006, a month earlier than what the Agreement defines the starting date, or November 30, 2006.

⁴ Although, confusingly, the Appellee stated in its Motion for Summary Judgment that “U.S. Bank is the owner and holder of the Note and Mortgage.” Of course, U.S. Bank is the indenture

stands for “Real Estate Mortgage Investment Conduit,” referring to a special IRS tax status making the trust a pass-through entity for income tax purposes.

On April 24, 2009, Lehman Brothers Bank FSB, a subsidiary of Lehman Brothers Bancorp, Inc., changed its name to Aurora Bank, FSB, as part of the Lehman Brothers bankruptcy reorganization. (R. 72, 325).

On August 21, 2009, Jorge Canellas filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code. (R. 4). At the time of filing, Mr. Canellas (the “Debtor”) owned and was in possession of the Property, ostensibly subject to the secured lien of the Mortgage. (R. 1006).

On September 28, 2009, Jack Jacob for Aurora Bank FSB executed an assignment of the Mortgage (the “Assignment”). (R. 341). On September 30, 2009, Mr. Jacob’s execution of the Mortgage was notarized. (R. 332-333). The Assignment, from Aurora FSB to the Trust, was an attempt to make the transfer retroactively effective as of November 30, 2006:

THE COURT: So your records reflect an assignment in '06

but that it wasn't papered until '09?

MS. VILMOS: Correct.

THE COURT: And your papers tried to retroactive to '06.

MS. VILMOS: Correct.

THE COURT: And there's an intervening bankruptcy.

MS. VILMOS: Correct.

Transcript of Hearing 1/4/ 2010. (R. 1132). Also on September 28, 2009, Jennifer Henninger allegedly executed the Allonge to Note (the “Allonge”). (R. 338).

On October 6, 2009, Aurora recorded the Assignment in Orange County public records at Book 9944, Page 1038. (R. 332).

trustee, and presumably the Appellant meant to say that U.S. Bank *as trustee* owns and holds the note and mortgage for the benefit of the Securitized Trust.

On December 10, 2009, the Note was physically delivered by Aurora Bank, FSB for the first time to the Appellee by way of Appellee’s counsel. (R. 342). The Appellee has otherwise never taken physical delivery of the Note, except via its counsel. (Id.). Thus, on December 10, 2009, the Appellee became (in the words of the corporate officer who executed the transfer) the “new owner” of the Note and Mortgage. (Id.).

On April 14, 2010, a secretary’s certificate was allegedly executed by Aurora Bank, FSB, providing authority to Jack Jacob to execute assignments of mortgage. (R. 910). On April 21, 2011, at the deposition of Jack Jacob, the Appellee produced a new Aurora Bank FSB secretary’s certificate dated May 7, 2008, also purporting to authorize Mr. Jacob to execute assignments.⁵ (R. 918).

SUMMARY OF ARGUMENT

First, the documents that the Appellee filed below do not confirm that the individuals who executed the Assignment of Mortgage and the Allonge to the Note had the required corporate authority to do so in September of 2009. To the contrary, the documents conflict with the affidavits and raise genuine issues of fact as to whether such authority ever existed. The Bankruptcy Court should not have granted summary judgment while this material issue of fact was unresolved, and that court should be reversed and the matter remanded for appropriate proceedings below.

Second, the Appellee admits that the Note and Mortgage were never transferred into the Securitized Trust until December of 2009 – almost three years after the Securitized Trust was formed, and long after the trust’s 90-day required transfer period had expired. The Trustee argues

⁵ The problem with this new, earlier certificate is that it apparently was executed by Aurora Bank a year before Aurora Bank ever existed. The document is obviously fraudulent.

that such a transfer was void because it contravened the express terms of the Securitized Trust. Therefore, the Securitized Trust lacks any secured interest in the Property and its secured claim must be valued at \$0.00. This Court should reverse the Bankruptcy Court and grant the Trustee's cross motion for summary judgment instead.

ARGUMENT

- 1) **A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER JACOBS AND HENNINGER HAD REQUISITE AUTHORITY TO TRANSFER THE LOAN IN SEPTEMBER 2009, AND THE BANKRUPTCY COURT SHOULD NOT HAVE ENTERED SUMMARY JUDGMENT IN FAVOR OF THE APPELLEE.**

Federal Rules of Civil Procedure Rule 56 provides that:

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

Fed. R. Civ. P. 56(a).

The Bankruptcy Court found in its Order that the Appellant's arguments about the authority of the employees of Aurora Bank, FSB to transfer the loan was irrelevant (and therefore not material). (R. 34). The Bankruptcy Court is wrong.

Florida Statute § 692.01 provides that an assignment of an interest in real property is effective only when such transfer is executed by a person with authority to do so, such as a corporate officer. The Trustee has alleged that the individual who executed the Assignment, Jack Jacob, and the individual who executed the Allonge, Jennifer Henninger, lacked authority to do so at the time of the transfer. (R. 55-56). In response, the Defendant attempted to show authority by filing affidavits, a Secretary's Certificate, and a Circumvention of Delegation of

Authority (the “Circumvention”) – all seeking to demonstrate that authority did exist at the time of the transfer in this case. (R. 326-329).

The Circumvention, which has never been authenticated, does not prove that Ms. Henninger had authority to transfer the Note to the Securitized Trust. To the contrary, it explicitly reserves “Transfer/Sell/Assign Notes and Other Securities” to “Lehman Brothers.” (R. 328). Ms. Henninger’s name is found only under “Standard Loan Document Signing in Accordance with Company Policy” and “Recordable Loan Document Signing in Accordance with Company Policy.” (R. 327).

The Appellee’s documents and affidavits do not prove that Ms. Henninger had authority to execute the Allonge. Rather, they either prove the contrary – that she did not have authority – or at best, raise the additional factual question of exactly what authority she did have. Ms. Henninger stated in her deposition that she is a “Special Assets Administrative Assistant” – essentially a secretary – in the special assets office for Aurora Bank, FSB, (R. 930), which contradicts the notion that she would be given the authority to transfer millions of dollars of assets with only her signature:

Q And what does the special assets administrative assistant do?

A I have a varying -- I have a lot of different duties. My main duty is to prepare the assignments of mortgage for the loans that are in or near foreclosure.

Q Anything else?

A Support to the department in general. Just as projects are needed.

Q For example?

A You know, preparing copies for meetings, scanning documents, faxing documents, opening and sorting mail.

Transcript of Deposition of Jennifer Henninger, page 10, lines 3-14. (R. 930).

Ms. Henninger in fact demonstrated only the most superficial understanding of what she was doing when she executed the Allonge:

Q What is an assignment?

MS. VILMOS: Objection to the extent it calls for a legal conclusion.

BY MR. CHILDERS:

Q Go ahead.

A What I was told in my training is that it's transferring the mortgage from one entity to the other.

Transcript of Deposition of Jennifer Henninger, page 13, lines 2-8. (R. 930).

The Appellant argues that the individual who executed the Assignment, Jack Jacob, lacked authority to do so at the time of execution. (R. 55-56). The Affidavit of Jack Jacob filed by Appellee includes an unauthenticated Secretary's Certificate authorizing Mr. Jacob to execute loan assignment documents. (R. 910). The Secretary's Certificate is dated April 14, 2010 – but Mr. Jacob executed the Assignment in September of 2009. Therefore, the Secretary's Certificate provided by Appellee could not possibly have granted Mr. Jacob the requisite authority at the time the Assignment was executed.

In an attempt to cure this defect, Appellee provided another Secretary's Certificate, this time as evidence at Mr. Jacob's deposition on April 21, 2011. (R. 918). However, this second certificate is even more problematic than was the first one, because it is dated almost one year before Aurora ever came into existence. The document is almost certainly fraudulent. Mr. Jacob was unable to explain the discrepancy at his deposition:

Q ... And the question that I have for you is: If this was executed on May 7th, 2008, a little over a year before the name change, how is that possible?

A How is that possible? You're referring to what, the name?

Q Yeah. If -- if Aurora -- if Lehman Brothers Bank FSB changed its name to Aurora Bank in September of 2009, how could a secretary of Aurora Bank execute a certification in May of 2008?

MS. VILMOS: Objection. Calls for a legal conclusion.

BY MR. CHILDERS:

Q You can answer.

A I don't know.

Transcript of Deposition of Jack Jacob, page 55, line 313 – page 56 line 2. (R. 882-883).

The Appellant properly and timely argued that Jacobs and Henninger lacked authority to transfer the loan in late 2009. The Appellee submitted self-serving affidavits based on unauthenticated documents that do *not* demonstrate the alleged authority – rather, instead, they conflict with the affidavits and raise additional questions of fact about the issue of authority. The Bankruptcy Court did not make any findings but rather stated conclusively in its Order that there were no issues of material fact and that the Trustee’s arguments about authority were “irrelevant.” (R. 34). This was error. This Court should reverse the Bankruptcy Court’s Order granting summary judgment in favor of the Appellee, should reimpose the automatic stay, and remand this case for further appropriate proceedings below.

2) **THE TRANSFER OF THE LOAN INTO THE TRUST IN SEPTEMBER 2009 WAS IN DIRECT CONTRAVENTION OF THE TERMS OF THE TRUST, WAS THEREFORE VOID, AND THE BANKRUPTCY COURT SHOULD HAVE ENTERED SUMMARY JUDGMENT IN FAVOR OF THE APPELLANT.**

i. Only One Party is Permitted to Convey Loans into the Securitized Trust – and That Party is not Aurora Bank, FSB

The loan at issue in this case is allegedly held within a securitized trust of similar

mortgage loans (the “Securitized Trust”). The documents creating the Securitized Trust reveal that it is a New York common-law trust, as established by a Pooling and Servicing Agreement (the “PSA”), which is governed by the laws of the state of New York. (R. 622).

New York trust law provides that “every sale, conveyance or other act of the trustee in contravention of the trust is void.” NY CLS EPTL § 7-2.4, *Application of Muratori*, 183 Misc. 967, 970 (N.Y. Sup. Ct. 1944). *See also Dye v Lewis*, 67 Misc 2d 426, 324 NYS2d 172 (1971), *mod on other grounds*, 39 App Div 2d 828, 332 NYS2d 968 (1972, 4th Dept) (finding the authority of a trustee to whom a mortgage had been delivered under a trust indenture was subject to any limitations imposed by the trust instrument, and every act in contravention of the trust was void).

The Appellee attached a copy of the operative document providing all the Trust’s authority to its Motion for Summary Judgment: the Pooling and Servicing Agreement. (R. 562-789). The PSA is the document providing all authority to U.S. Bank as Indenture Trustee (the “Indenture Trustee”) for the Securitized Trust of mortgage loans. The PSA creates and describes the rights, duties and responsibilities of the Indenture Trustee. Any action taken by the Indenture Trustee not authorized by the PSA or in contravention of the PSA is *ultra vires* and therefore void.

The terms of the PSA conflict with the documents and affidavits filed in this case below by the Appellee. The first issue created by the PSA is that the actual attempted conveyance of the underlying loan in this case by Aurora Bank, FSB is inconsistent with the requirements of the PSA. The PSA is very specific about (i) *from whom* each loan must be conveyed, (ii) *when* the loans must be conveyed, and (iii) *with what documentation* the loans must be conveyed. The

actual conveyance as described by the Appellee's affidavits and by the transferring documents themselves is in direct conflict with all three modes of conveyance required by the PSA.

Section 2.01(a) of the PSA provides that the Indenture Trustee may purchase mortgage loans from a single entity only. (R. 613). The Depositor (and only the Depositor) shall convey the mortgages to the Securitized Trust. (R. 613). The Depositor is identified by the PSA as Structured Assets Securities Corporation, a Delaware corporation. (R. 589). The PSA allows for no other form, method, or chain of conveyance of mortgage loans to the Trust than via the named Depositor.⁶

No evidence offered by the Appellee indicates that the mortgage loan was ever conveyed to the named Depositor in the first place, much less from the named Depositor to the Appellee. To the contrary, the Assignment indicates that Aurora Bank was the attempted conveyer. By the express terms of the PSA, the Appellee as Indenture Trustee had no authority to accept conveyance of the mortgage loan from Aurora Bank.

Next, the PSA requires that the mortgage be delivered to the Trust along with any assignments at the time of delivery. (R. 615). Specifically, section 2.01(b)(v) states that upon the original conveyance of the Mortgage to the trust, "an original Assignment of Mortgage [must be provided], in form and substance acceptable for recording." (R. 615, 582). Furthermore, Section 2.01(b)(vi) of the PSA states that upon the original conveyance of the Mortgage to the trust, "if applicable, such original intervening assignments of the Mortgage [must be provided], as may be necessary to show a complete chain of assignment from the originator[.]" (R. 615) (emphasis

⁶ This is no mere technicality. Securitized trusts structure the acquisition of assets in this way to obtain favorable ratings from Moody's, Fitch's, etc., which require such a structure in order to make the assets "bankruptcy remote" from the loan originators.

added).

The Appellee's evidence indicates that it would have been impossible for the original assignment of mortgage to have been provided on November 30, 2006, the alleged date of purchase of the mortgage loan, since the Assignment was executed in September of 2009. (R. 341). Furthermore, no chain of assignments from the originator to the named Depositor exists, because Aurora Bank FSB short-circuited the described process thereby omitting all intervening assignments. The 2009 Assignment upon which the Defendant relies in support of its Motion for Summary Judgment is in direct contravention of Section 2.01 of the PSA.

Next, section 2.01(b)(i) states that upon original conveyance, the mortgage Note must be "endorsed without recourse in proper form to the order of the Trustee, or in blank (in each case, with all necessary intervening endorsements, as applicable)[.]" (R. 614).

But the Note is not endorsed in any way as required by the PSA – not in blank and not payable to the order of the Trustee.⁷ (R. 557). Rather, on September 28, 2009, Jennifer Henninger, a "Special Assets Administrative Assistant" of Aurora Bank FSB, allegedly executed an un-dated Allonge to the Note. (R. 338). The PSA does not provide for the use of allonges, nor does it permit the transfer to occur three years after the required date. Even if Ms. Henninger had authority to execute the Allonge (questionable as discussed *supra*), the Appellee lacked authority to accept transfer of the Note in this manner.

Section 2.02(b) provides that the Trustee shall within 45 days of receipt of the mortgage loan inspect each file to ensure that all the documents required by Section 2.01 have been

⁷ As a cursory examination will reveal, there is ample room on the face of the note for any number of endorsements. The allonge was used because the transferring documents were prepared without the original loan documents.

provided. (R. 617). Furthermore, within 90 days, any non-compliance must be cured or else the loan must be repurchased by the Depositor. (Id.). There is no evidence that the loan was ever repurchased by the Depositor here. But there is evidence that the mortgage loan did not comply with Section 2.01 of the PSA. Therefore, there is a factual issue as to how this loan was ever conveyed to the Trust in derogation of Section 2.02(b)'s requirement that the non-compliant loan should have been repurchased by the Depositor.

The Appellee, as Indenture Trustee for the benefit of the bond holders of the Trust, had no authority conferred upon it by the operative and governing documents (the PSA) to accept any conveyance of a mortgage loan in September, 2009 (whether on the 28th or the 30th), from Aurora Bank, FSB, or in the manner in which the Assignment of Mortgage purports to have conveyed the mortgage loan (i.e. from Aurora directly to the Trustee, bypassing the named Depositor). The attempted conveyance of the mortgage loan in September of 2009 was *ultra vires* and is void – even if the assignment and allonge were found to be facially legally sufficient.

ii. The Securitized Trust Forbids Late Transfers Into the Trust's Res, as was Attempted Here

In the previous section, the Appellant argued that the transactions as described by the documents filed by the Appellee, and described in the Defendant's affidavits, were not authorized by the PSA and were therefore *ultra vires* and void. There is a second reason why the Appellee expressly lacked authority to carry out the non-compliant transfers: because the Trust expressly forbade those transactions and denied the Indenture Trustee requisite authority.

The Securitized Trust is organized as a REMIC ("Real Estate Mortgage Investment Conduit") trust. (R. 685). REMIC trusts are governed by provisions and regulations promulgated

by the Internal Revenue Code (“I.R.C.”) found at 26 U.S.C. §§ 860A-F; I.R.C. section 860. A real estate mortgage investment conduit is an entity that timely acquires, possesses, and holds a fixed pool of mortgages (the *res* of the trust) and issues multiple classes of interests to investors. 26 U.S.C. § 860D; I.R.C. § 860D. Election by the Trust to be treated as one or more REMICs imposes strict and absolute requirements regarding transfers of assets (i.e. mortgage loans or notes) to the Securitized Trust and I.R.C. Section 860 outlines and governs these strict requirements.

The REMIC designation provides the benefit that income from the stream of mortgage payments into the Securitized Trust is not taxed when received by the Trust; rather, income is taxed to the bond holders when they receive distributions. 26 U.S.C. § 860A. Without REMIC status, income taxes would be paid twice: first at the trust level when mortgage payments are received, and second, taxes would be due again when the funds are distributed to the bond holders.

Understandably therefore, the PSA prohibits the Indenture Trustee from taking any action that would endanger the REMIC tax-protected status of the Securitized Trust. The PSA states this prohibition plainly in its opening text: “Any inconsistencies or ambiguities in this [PSA] Agreement or in the administration of this [PSA] Agreement shall be resolved in a manner that preserves the validity of [the Trust’s] REMIC elections.” (R. 567) (emphasis added).

The Securitized Trust’s “Startup Date” is defined by the PSA to be the same as the “Closing Date,” (R. 685), and its Closing Date was November 30, 2006. (R. 588).

I.R.C. Section 860G provides that all of a REMIC’s loans must be acquired on the startup day of the REMIC or within three months thereafter. 26 U.S.C. § 860D (a REMIC is an entity

where “as of the close of the 3rd month beginning after the startup day and at all times thereafter, substantially all of the assets of which consist of qualified mortgages and permitted investments”) and 26 U.S.C. § 860G(B)(3) (“The term ‘qualified mortgage’ means . . . [a]ny obligation . . . which is principally secured by an interest in real property and which – (i) is transferred to the REMIC on the startup day [or] is purchased by the REMIC within the 3-month period beginning on the startup day if . . . such purchase is pursuant to a fixed-price contract in effect on the startup day”).

Any asset other than cash, such as the mortgage here, that is contributed to the REMIC after the Startup Day (or after the allowable 90-day window) is deemed an unqualified or prohibited contribution and is subject to a 100% tax, effectively wiping out the asset. 28 U.S.C. § 860G(d)(1) (except for cash contributions, “if any amount is contributed to a REMIC after the startup day, there is hereby imposed a tax for the taxable year of the REMIC in which the contribution is received equal to 100 percent of the amount of such contribution”).

The assignment into the trust of a non-qualified mortgage could even cause the entire REMIC trust to lose its tax-free status, because the statute expressly defines such trusts as being composed only of “qualified” mortgages. 26 U.S.C. § 860D (a REMIC is an entity where “as of the close of the 3rd month beginning after the startup day and at all times thereafter, substantially all of the assets of which consist of qualified mortgages and permitted investments”). Needless to say, this would be catastrophic to the Securitized Trust (and its beneficiaries, shareholders or bond holders) because the Securitized Trust’s cash flow would be subject to double taxation.

For this reason, the Indenture Trustee is required to strictly adhere to the guidelines and conveyance requirements of Section 2.01 of the PSA, so that the Trust will not be subject to

100% taxation and cannot lose its special REMIC tax status. The Indenture Trustee lacks authority to take any action that would impair or endanger the REMIC status of the Trust or cause an Adverse REMIC Event:

Neither the Trustee, the Servicer, nor the Holder of any Residual Certificate shall knowingly take any action within their respective control, cause any REMIC to take any action or fail to take (or fail to cause to be taken) any action within its control and in the scope of its duties that, under the REMIC provisions, if taken or not taken, as the case may be, could result in an Adverse REMIC Event unless the Trustee and the Servicer have received an Opinion of Counsel addressed to the Trustee (at the expense of the party seeking to take such action) to the effect that the contemplated action will not result in an Adverse REMIC Event.

PSA Section 2.01(f). (R. 686). The PSA defines an “Adverse REMIC Event” as follows (in relevant part):

Adverse REMIC Event. Either (i) the loss of status as a REMIC, within the meaning of 860D of the Code . . . or (ii) the imposition of any tax, including the tax imposed under . . . Section 860G(d) on certain contributions to a REMIC . . . to the extent such tax would be payable from the assets held as part of the Trust Fund.

PSA Article 1 (“Definitions”). (R. 581).

Here, the acquisition transactions reflected by the Appellee’s documents and affidavits are clearly in contravention of the IRS REMIC requirements, and if valid, would impair the Securitized Trust’s REMIC status or would cause taxation of the assets of the Securitized Trust. In particular (but not exclusively), the attempted 2009 transfer of the loan into the Securitized Trust and the assertion in the Jacob Affidavit that the loan was “new” in December 2009 would appear to threaten to impair or endanger the REMIC status of the Trust or cause an Adverse REMIC Event. (R. 342). Both the Indenture Trustee and the Servicer are expressly forbidden to effect such a transaction as occurred here, have utterly no authority to do so, and the attempted assignment of the mortgage and note in December 2009 to the Securitized Trust must therefore

be void.⁸

While a finding that the loan here was not in fact effectively conveyed to the Securitized Trust would harm the Servicer (Aurora Bank, FSB, as indemnitor) to the extent of the deficiency on the loan, finding that the loan was conveyed into the Securitized Trust in September 2009 could cause 100% taxation, harming the Servicer (as indemnitor) to the full extent of the loan, or could cause the entire REMIC to fail, imposing a liability on the Servicer (as indemnitor) of millions of dollars. The least harmful finding is that the Appellee has no secured interest in the Property and no secured claim in the bankruptcy case. This Court can and should find that the Appellee did not meet its burden and that the Appellant's cross motion for summary judgment should be granted, and therefore find in favor of the Appellant.

CONCLUSION

The Bankruptcy Court's essential holding was that, because the Appellee allegedly holds the original Note, it is entitled to enforce the secured claim against the real property by way of the Mortgage.⁹ Because the Trustee did not contest whether Appellee held the original instrument, the Bankruptcy Court concluded there were no relevant issues of material fact. But the Appellee cannot enforce the Note unless it has been properly transferred to the Appellee. The Trustee timely and properly raised argument and identified fact supporting her argument that the transfer of the Note was either not proper (because the Aurora Bank employees who executed

⁸ The PSA defines the "Servicer" to be Lehman Brothers Bank, FSB or its successor (i.e. Aurora Bank, FSB). PSA Article 1 ("Definitions"). (R. 605). The Indenture Trustee is, of course, the Appellee.

⁹ The original Note was never provided to the Bankruptcy Court for inspection, as evidence, or otherwise.

the transfer lacked necessary corporate authority to do so), or because the transfer failed (was void as a matter of trust law).

The Appellee has never argued (nor could it) that a Note is enforceable even if improperly transferred to the current holder.

If this Court finds, as it should, that the Bankruptcy Court erred in granting Appellee's motion for summary judgment when there were genuine issues of material fact to be resolved, then this Court should reverse the Bankruptcy Court's Order and Judgment granting summary judgment in favor of the Appellee, should reimpose the automatic stay, and remand this case for further appropriate proceedings below.

But, if this Court finds that the Appellee failed to meet its burden of showing that a genuine issue of fact exists as to whether the attempted transfer of the Note into the Securitized Trust in September of 2009 was void, then the Court should reverse the Bankruptcy Court's Order and Judgment granting summary judgment in favor of the Appellee, should grant the Appellant's cross motion for summary judgment, and remand the case for entry of appropriate orders below.

Dated this 27th day of September, 2011.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the above-referenced date, a copy of the foregoing Brief for Appellant, Carla Musselman, was filed electronically using the CM/ECF system, which will send a Notice of Electronic Filing to all participants who are registered CM/ECF users.

/s/ Seldon J. Childers, Esq.
Seldon J. Childers

APPENDIX

The following pleadings and documents have been appended to this brief for the convenience of the reviewing Court. Motions with voluminous attachments are included here without such attachments (which may be found in the record immediately following the cited pleading).

- A. Amended Complaint (R. 53-59)
- B. US Bank's Amended Motion for Summary Judgment (R. 538-543)
- C. Trustee's Opposition and Cross Motion for Summary Judgment (R. 348-359)
- D. Order Granting US Bank's Motion for Summary Judgment (R. 29-36)
- E. Judgment (R. 37-38)
- F. Affidavit of Jennifer Henninger (R. 336-338)
- G. Affidavit of Jack Jacob (R. 340-342)
- H. Secretary's Certificate dated April 14, 2010 (R. 910)
- I. Secretary's Certificate dated April 24, 2009 (R. 802)
- J. Secretary's Certificate dated May 7, 2008 (R. 918)
- K. Circumvention of Delegation of Authority (R. 797-800)