Case No. 11-11019

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RICKEY FOSTER and wife MICHELLE FOSTER,

Plaintiffs – Appellants

v.

OCWEN LOAN SERVICING, L.L.C. and U.S. BANK NATIONAL ASSOCIATION, as Indenture Trustee for the Registered Holders of Aegis Asset Backed Securities Trust 2005-1, Mortgage Backed Notes,

Defendants – Appellees

Appeal from the U.S. District Court
Northern District of Texas, Dallas Division
USDC No. 3:10-CV-1058

BRIEF OF APPELLANTS RICKEY FOSTER and MICHELLE FOSTER

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CERTIFICATE OF INTERESTED PERSONS

In the appeal *Rickey Foster and wife Michelle Foster*, Plaintiffs-Appellants v. *Ocwen Loan Servicing, LLC and U.S. Bank National Association, as Indenture Trustee for the Registered Holders of Aegis Asset Backed Securities Trust 2005-1, Mortgage Backed Notes*, Defendants-Appellees, Case No. 11-11019, the undersigned counsel of record certifies that the following listed persons and entities with an interest in the outcome of this case. These representations are made pursuant to Fed. R. App. P. 26.1 and 5th Cir. R. 28.2.1 to enable the Judges of this Court to evaluate possible disqualification or recusal.

Rickey Foster (Plaintiff/Appellant)
Michelle Foster (Plaintiff/Appellant)
J.B. Peacock, Jr. (Attorney for Plaintiffs-Appellants)
Cynthia K. Shanklin (Attorney for Plaintiffs-Appellants)
David M. Vereeke (Attorney for Plaintiffs-Appellants)
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Ocwen Loan Servicing, LLC (Defendant-Appellee)
U.S. Bank National Association, as Indenture Trustee for the Registered Holders of Aegis Asset Backed Securities Trust 2005-1, Mortgage Backed Notes (Defendant-Appellee)
Mark D. Cronenwett (Attorney for Defendants-Appellees)
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Date: March 26, 2012

/s/ *J.B. Peacock, Jr.*
J.B. Peacock, Jr.
Attorney of Record for Plaintiffs-Appellants

STATEMENT CONCERNING ORAL ARGUMENT

The issues that Appellants have raised in their Brief are particularly complex and novel. For this reason, Appellants believe that that oral argument would materially aid the Court in reaching a decision in this case. Plaintiffs-Appellants request that 30 minutes of oral argument be allocated to each side.

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STATEMENT OF JURISDICTION

The Property that is the subject of this appeal is located at 3103 County Road 2606, Caddo Mills, Texas 75135 (hereinafter "Property"). (ROA 40). Hunt County is in the territory of the United States District Court for the Northern District of Texas, Dallas Division. 28 U.S.C.A. § 1391(a)(2) and (b)(2). All of the parties are purportedly domiciled in different states (Appellants are from Texas; Defendant Ocwen Loan Servicing, LLC ("Ocwen") claims to be a nonresident limited liability company with its sole member, Ocwen Financial Corporation, a citizen of Florida, and Defendant U.S. Bank National Association ("U.S. Bank") is a nationally chartered banking association with its principal place of business in Cincinnati, Ohio. Appellees argued that the federal courts thus had diversity jurisdiction under 28 U.S. C. §1332(a)(1), and the amount in controversy exceeded $75,000.00. (ROA 10-12).

The causes of action raised by Appellants were disposed of via summary judgment, and on July 26, 2011, the United States District Court for the Northern District of Texas, United States District Judge Royal Furgeson entered an order granting summary judgment and a Final Judgment dismissing in their entirety all of Appellants' claims against Appellees. (ROA 732-761).

On August 25, 2011, Appellants filed their Motion to Vacate Judgment, within 28 days of the Judgment, which the Court denied September 19, 2011 (ROA

767-780, 878-885). Appellants filed their Notice of Appeal on October 19, 2011, within 28 days of the denial of their motion for new trial. (ROA 886-887).

STATEMENT OF ISSUES

1. U.S. Bank accelerated the Note before it obtained a written assignment of the Note. Thus the acceleration was without lawful authority, and was ineffective.

2. The Trial Court Erred in Granting Summary Judgment for Appellees and Dismissing Appellants' claim of Waiver because Appellees Never Moved for Summary Judgment on Waiver and the District Court Did Not Address it *Sua Sponte.*

3. The District Court erred in overruling Appellants' objection to Appellees' summary judgment evidence.

4. The District Court erred in dismissing Appellants' claims for breach of contract.

   a. The District Court erred in finding that Appellants do not have standing to contest the assignment from MERS to U.S. Bank.

   b. The District Court erred in finding no merit to Appellants argument that the assignment from MERS to U.S. Bank is unenforceable and Ocwen lacked standing to foreclose on the Note.

c. The District Court erred in its application of the law concerning the Statute of Frauds.

d. The District Court erred in finding that the mortgage servicer was allowed to appoint a substitute trustee.

5. The District Court erred in granting summary judgment for Appellees on Appellants anticipatory breach of contract claim.

6. The District Court erred in granting summary judgment in favor of Appellees on Appellants' claim for unreasonable collection efforts.

a. The District Court erred in granting summary judgment on Appellants' claims for unreasonable collection efforts because the court applied the most stringent standard under Texas law.

b. The District Court erred in its application of the evidence to the law with regard to unreasonable collection efforts.

7. The District Court erred in granting summary judgment for Appellees and dismissing Appellants' claim for violations of the Texas Finance Code.

a. The District Court erred in granting summary judgment as to Appellants claim under §392.304(a)(19) of the Texas Finance Code.

8. The District Court erred in granting summary judgment in favor Appellees on Appellants claim for suit to quiet title and trespass to try title.

9. The District Court erred in granting summary judgment and dismissing Appellants claim for negligent misrepresentation.

10. The District Court erred in granting summary judgment for Appellees on Appellants equitable request for an accounting.

11. The District Court erred in granting summary judgment for Appellees on Appellants request for declaratory judgment.

STATEMENT OF THE CASE

Appellants (the "Fosters") purchased the property located at 3103 County Road 2606, Caddo Mills, Texas 75135 (the "Property") on or about December 10, 2004. Appellants executed a Note payable to Success Investments, Inc. ("Success"), in furtherance of a loan for $118,750, and a Deed of Trust to secure the payment of the Note naming Mortgage Electronic Registration System ("MERS") as nominee and beneficiary for Success. (ROA 602-606, 607-622). On the same day, Appellants also executed another Note in the amount of $29,688 payable to Success, and a Deed of Trust securing payment of the second Note was executed by Appellants naming MERS as beneficiary and nominee for Success. (ROA 623-626, 628-635).

On or about April 7, 2008, Ocwen and the Fosters entered into a loan modification agreement pertaining to the second Note. (ROA 549) and entered into a loan modification on September 11, 2009 for the first Note. (ROA 549).

On or about February 22, 2010, MERS assigned its rights under the Deed of Trust and the first Note to U.S. Bank with an effective date of August 25, 2007 and was not executed until January 27, 2010, which obviously made the assignment suspect on its face. (ROA 549). Appellees argued that the assignment occurred on February 1, 2005 and was filed on February 22, 2010 and that a corrected assignment would be filed. (ROA 238). There is no evidence before the Court that a corrected assignment was ever filed. AEGIS Mortgage Corporation was servicing at least one of the loans until August 17, 2007, when AEGIS assigned the servicing rights to Ocwen. (ROA 311-314). At all relevant times herein, Ocwen was the loan servicer for U.S. Bank.

In December 2009, Appellants contacted U.S. Bank to inquire about a loan modification for their first Note. Before receiving the loan modification packet, Appellees began refusing and returning Appellants' payments. (ROA 550). Upon receipt of the loan modification packet, Appellants submitted the application and documentation to Appellees. (ROA 550). Appellants were continuously told their loan was in the process of being modified. (ROA 550). On or about January 22, 2010, Appellees sent Appellants a notice of acceleration and notice of foreclosure sale for March 2, 2010. Appellees foreclosed upon Appellants property on March 2, 2010 despite their representations to the contrary. (ROA 660).

The Fosters filed suit against U.S. Bank and Ocwen in state court in April 2010, raising numerous causes of action and seeking a temporary restraining order to enjoin Appellees from evicting Appellants from the Property. (ROA 25-37). The State Court granted a temporary restraining order in April 2010. Appellees removed the case to federal court on May 26, 2010. (ROA 9-79). Appellants filed their First Amended Complaint on February 11, 2011, asserting causes of action for breach of contract, anticipatory breach of contract, common law tort of unreasonable collection efforts, violations of the Texas Finance Code, negligent misrepresentation, gross negligence, and suit to quiet title and trespass to try title. Appellants also sought an accounting and declaratory relief. (ROA 138-169).

On May 31, 2011, Appellees filed their Motion for Summary Judgment, Brief, and Appendix ("Motion"), seeking judgment on all claims brought against them by Appellants. (ROA 188-191, 192-231, 232-531). On June 21, 2011, Appellants filed an Unopposed Motion to Extend Time to Respond, which was granted giving Appellants until June 24, 2011 to respond to the Motion. Appellants filed their Response, Brief, and Appendix on June 24, 2011. (ROA 536-537, 538-585, 586-690). On July 5, 2011, Appellees filed a Reply in support of their Motion. (ROA 691-701). Appellants then filed a Motion for Leave to file a Sur-Reply, which the Court granted on July 16, 2011 and Appellants filed on July 18, 2011. (ROA 717-728). The Court held a hearing on the Motion on July 18, 2011. (ROA

891-932). On July 26, 2011, the Court entered its Order Granting Summary Judgment in its entirety and dismissing all of Appellants' claims. (ROA 732-760). On the same date, the Court entered its Final Judgment. (ROA 761).

Appellants filed their Motion to Vacate Judgment on August 23, 2011. (ROA 767-780). On September 19, 2011, the Court denied the motion to vacate. (ROA 878-885). Appellants filed their Notice of Appeal on October 19, 2011. (ROA 886-887).

STATEMENT OF FACTS

Appellants were and are the rightful owners of the Property located at 3103 County Road 2606, Caddo Mills, Texas 75135 ("Property"). On December 10, 2004, Appellants purchased the Property and executed a promissory Note in the amount of $118,750 payable to Success Investments, Inc. ("Success"). (ROA 602-606). On or about the same day, a Deed of Trust to secure the payment of the Note was executed by Appellants naming Mortgage Electronic Registration System ("MERS") as beneficiary and nominee for Success. (ROA 607-622). On the same date, Appellants also executed another Note in the amount of $29,688.00 payable to Success, and a Deed of Trust securing payment of the second Note was executed by Appellants naming MERS as beneficiary and nominee for Success. (ROA 623-626, 628-635). MERS purportedly assigned its rights under the Deed of Trust and the first Note to U.S. Bank. The assignment was not filed until February 22, 2010,

although the document reflects that that assignment was effective several years previously, as of August 25, 2007, but was not executed until January 27, 2010, which was five days **after** U.S. bank had accelerated the Note. (ROA 549). AEGIS Mortgage Corporation was servicing at least one of the loans, until August 17, 2007, when AEGIS assigned the servicing rights to Ocwen. (ROA 311-314).

At all relevant times herein, Ocwen was the loan servicer for U.S. Bank. The deeds of trust named MERS solely as Success' nominee. (ROA 607-622, 628-635). Neither Note made any reference to MERS. (ROA 602-606, 623-626). MERS never held either of the Notes.

On or about April 7, 2008, Ocwen and the Fosters entered into a Loan Modification Agreement pertaining to the second Note. (ROA 641-643). On or about September 11, 2009, Ocwen and the Fosters entered into a Loan Modification Agreement pertaining to the first Note. (ROA 644-646).

Due to some financial constraints caused by health issues in the Fosters' family, Rickey Foster contacted the Appellants in December 2009, to inquire about a loan modification plan for the first Note. The Appellees told Rickey Foster that they would send him a loan modification package. On December 4, 2009, Ocwen sent a letter to Appellants listing alternatives to foreclosure. (ROA 647-648, 788). In the interim, Appellees began refusing and returning Appellants' payments. (ROA 749).

Upon receipt of the loan modification application, Rickey Foster immediately filled it out and returned it to Appellees. (ROA 649-653). Appellants then contacted Appellees several times through out the following weeks to inquire on the status of their loan modification application and were told that their loan was in the process of being modified. (ROA 808). Despite their representations, on or about January 22, 2010, Appellees sent Appellants a notice of acceleration and indicated that Appellants' Property would be sold at a foreclosure sale on March 2, 2010. (ROA 654-659). Appellants deny even receiving or seeing the letter. (ROA 791). Rickey Foster testified that he only saw it at the courthouse after someone contacted him for him about a cash for keys program and he contacted an attorney in Royse City because Ocwen was refusing to talk to him. (ROA 791).

On or about March 5, 2010, Appellants received the "cash for keys" offer via phone from a realtor. (ROA 792). This was first time that Appellants discovered that their property was foreclosed upon and sold on March 2, 2010. On or about March 13, 2010, US Bank's attorneys sent a notice to vacate the Property, giving Appellants until March 16, 2010, to vacate the Property. (ROA 660).

As a result of the errors and omissions (or intentional acts) of the Appellees, Appellants' home was foreclosed upon on March 2, 2010. (ROA 347-349). The demands made in connection therewith, and the actions taken to accelerate and

post the property for foreclosure were made unlawfully and in violation of applicable state statutes.

SUMMARY OF THE ARGUMENT

The District Court erred in granting Appellees' Motion dismissing all of Appellants' claims against Appellees. Specifically,

- At the time that U.S. bank accelerated the Note and posted the Notice of Foreclosure, it had no written authority, as required by law.
- In addition, MERS was never a payee of the Note, and thus had no authority to transfer the Note. A transfer of the Deed of Trust does not carry the Note with it. *Kirby Lumber Corp. v. Williams*, 230 F.2d 330, 333 (5th Cir. 1956).
- Regarding the 2009-2010 modification agreement, the statute of frauds does not apply, because the exceptions of partial performance and promissory estoppel apply. *In re Bank of America*, No. 10-md-02193, 2011 WL 2637222, at *4-5 (Mass. July 6, 2011).
- Appellees misrepresented that Appellants loan would be modified and provided false or untrue information to Appellants.
- Appellees have not posted a bond with the Texas Secretary of State, as required by Tex. Fin. Code § 392.101, and therefore are not otherwise authorized to collect on this debt. *CA Partners v. Spears*, 274 S.W.3d 51, 79 (Tex. App. – Houston [14th Dist.] 2008, pet. ref'd).

- Appellants have superior title to the Property.

Accordingly, the District Court erred in dismissing Appellants claims and entering judgment for Appellees.

STANDARD OF REVIEW

This Court reviews the grant of summary judgment de novo. *LeMaire v. La Dep't of Transp. & Dev.*, 480 F.3d 383 (5th Cir. 2007). Summary Judgment is appropriate when, after considering the pleadings, discovery, and disclosures on file, along with any affidavits, "there is no genuine issue as to any material fact and … the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material facts exists if the summary judgment evidence is such that a reasonable jury could return a verdict for the non-movant. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). "[A]ll facts and evidence must be taken in the light most favorable to the non-movant." *LeMaire*, 480 F.3d at 387. In reviewing the evidence at summary judgment, the court must "refrain from making credibility determinations or weighing the evidence." *Turner v. Baylor Richardson Med. Ctr*., 476 F.3d 337, 343(5th Cir. 2007).

ARGUMENT AND AUTHORITIES

ISSUE 1: U.S. Bank accelerated the Note before it obtained a written assignment of the Note. Thus the acceleration was without lawful authority, and was ineffective.

Appellants pled that MERS purportedly assigned it rights under the Deed of Trust and Note to U.S. Bank effective August 25, 2007. However, the document was executed on January 27, 2010. It was executed five days after U.S. Bank accelerated the note and posted the property for foreclosure sale. (ROA 549).

An assignment of a Deed of Trust and Note is not effective until made in writing. TEX. BUS. & COM. CODE § 26.01 & 26.02; Tex. Prop Code § 5.021. So the acceleration was ineffective because there was no written assignment until **after** the Note was accelerated. Hence, U.S. Bank, the purported owner and holder, had no authority to accelerate. The assignment was made on January 27, 2010, but the acceleration was made on January 22, 2010. (ROA 334-335, 549).

ISSUE 2: The Trial Court Erred in Granting Summary Judgment for Appellees and Dismissing Appellants' claim of Waiver because Appellees Never Moved for Summary Judgment on Waiver and the District Court Did Not Address it *Sua Sponte.*

A summary judgment cannot be upheld on any ground not presented in the summary judgment motion. *John Deere Co. v. American Nat. Bank, Stafford*, 809 F.2d 1190, 1192 (5th Cir 1987). Decisions addressing FED. R. CIV. P. 56 have stressed the importance of providing the nonmoving party an opportunity to respond and to develop the record in opposition to a requested summary judgment. *John Deere Co.,* 809 F.2d at 1192; *Conley v. Board of Trustees of Grenada County Hospital,* 707 F.2d 175, 179 n. 2 (5th Cir.1983); *Kistner v. Califano,* 579 F.2d 1004, 1006 (6th Cir.1978). When a District Court relies on grounds not advanced

by the moving party as a basis for granting summary judgment, the non-movant is not given proper notice before the granting of judgment on such grounds, and the Court's judgment cannot be upheld on appeal. *John Deere Co*., 809 F.2d at 1192.

The Fifth Circuit has strictly applied the procedural safeguards of Rule 56 and "has therefore held that a district court may not grant summary judgment *sua sponte* on grounds not requested by the moving party." *John Deere Co*., 809 F.2d at 1192 (citing *Capital Films Corp. v. Charles Fries Productions,* 628 F.2d 387, 390-91 (5th Cir.1980); *Sharlitt v. Gorinstein,* 535 F.2d 282, 283 (5th Cir.1976)).

Likewise, the Fifth Circuit does not condone new summary judgment grounds being raised in a reply brief. See *John Deere Co.,* 809 F.2d 1192. From a procedural standpoint, the movant would be seeking summary judgment on a ground not raised in its motion, presented instead for the first time in the reply brief, neither of which is permissible. *See John Deere Co.,* 809 F.2d at 1192; *Senior Unsecured Creditors' Comm. of First Republic Bank Corp. v. FDIC,* 749 F.Supp. 758, 772 (N.D. Tex.1990). The Court will not grant summary judgment on a ground raised for the first time in a reply brief. *Jacobs v. Tapscott,* 2006 WL 2728827, at *7 (N.D. Tex. Sep.25, 2006); *Wesley v. Yellow Transp., Inc.,* 2008 WL 294526 at * 18 (N.D. Tex. Feb. 4, 2008).

A District Court may, in some circumstances, enter summary judgment *sua sponte*, provided the nonmovant has been given adequate notice and an opportunity

to respond. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) ("[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte,* so long as the losing party was on notice that he/she had to come forward with all of the evidence."); *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Aries Marine Corp.*, 932 F.2d 442, 444-45 (5th Cir. 1991); s*ee, e.g., McCarty v. United States,* 929 F.2d 1085 (5th Cir.1991); *Matter of Caravan Refrigerated Cargo, Inc.,* 864 F.2d 388, 393 (5th Cir.1989); *Page v. DeLaune,* 837 F.2d 233, 238 (5th Cir.1988); *British Caledonian Airways v. First State Bank,* 819 F.2d 593, 595 (5th Cir.1987); 10 A.C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2720 (2d ed. 1983).

Appellees moved for summary judgment on all of Appellants' claims except waiver of the right to foreclose. (ROA 768-769). Nowhere in their brief or motion did they address waiver. (ROA 192-231). In Appellants' Motion to Vacate they argued that waiver was not addressed in Appellees Motion. (ROA 768-769). In Appellees Response to Appellants Motion to Vacate they argue for the first time that waiver is a defense and not a cause of action. (ROA 871-872).

The District Court did not give Appellants notice that it was considering entering summary judgment *sua sponte* on their waiver argument, thus Appellants were without notice and opportunity to respond and present evidence. The Appellees and the District Court in the Courts Order granting Summary Judgment,

wholly failed to address the claim of waiver, and there was no attempt to dismiss the claim *sua sponte*, even if the court could have done so with notice. (ROA 732-760). Because the District Court's grant of summary judgment on all of Appellants claims, including waiver, was not based on grounds raised or advanced by Appellees in their motion, and no opportunity was given to Appellants to respond (either by Appellees or by the Court *sua sponte*), summary judgment on that unaddressed claim must be reversed and remanded.

ISSUE 3: The District Court erred in overruling Appellants' objection to Appellees' summary judgment evidence.

The District Court erred in overruling Appellants' objections to the Declaration of Nichelle Jones based on 1) lack of a showing of basis for purported personal knowledge of affiant and 2) conclusory statements that are not supported by evidence, rendering them hearsay.

An affidavit "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." FED. R. CIV. P. 56(e)(1). "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." FED. R. CIV. P. 56(c)(4). Simply stating that the matters are within the affiant's personal knowledge is not sufficient; rather, the witness must introduce sufficient evidence supporting a finding that the

witness possesses actual personal knowledge of a matter. *See* FED. R EVID. 602; *Amie v. El Paso Indep. Sch. Dist.,* 253 Fed. App'x 447, 451-452 (5th Cir. 2007); *Cooper-Schut v. Visteon Auto. Sys.*, 361 F.3d 421, 429 (7th Cir. 2004). Testimony setting forth purported imputed knowledge is not sufficient to show or exhibit personal knowledge and should be stricken. *See Perez v. Volvo Car Corp.,* 247 F.3d 303, 316 (7th Cir. 2001) (rejecting affidavit's statement of what a party knew when affidavit lacked specificity demonstrating personal knowledge); s*ee also Spencer v. City of Hollywood, Fla.,* No. 08-60028-CIV, 2009 WL 980274, at *3 n.4 (S.D. Fla. Apr. 10, 2009) (noting that "broad assertions in affidavits, made without specific supporting facts, are insufficient to prevent summary judgment" and "The inclusion of a blanket statement that the affidavit is made upon personal knowledge will not save statements made upon belief, no matter how strong the belief.") (citing *Pace v. Capobianco,* 283 F.3d 1275, 1279 (11th Cir. 2002)). Conclusory, unsupported assertions are insufficient to defeat a motion for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

An affidavit which does not positively and unqualifiedly represent the facts as disclosed in the affidavit to be true and within the affiant's personal knowledge is legally insufficient. *Id;* Fed. R. Evid. 602; and *Amie* at 451-452. *See also Humphreys v. Caldwell*, 888 S.W.2d 469, 470 (Tex. 1994) (citing to *Brownlee v.*

Brownlee, 665 S.W.2d 111, 112 (Tex.1984); *Burke v. Satterfield,* 525 S.W.2d 950, 955 (Tex.1975)). Affidavits in which "the affiant's statements are based on his 'own personal knowledge and/or knowledge which he has been able to acquire upon inquiry'" fail to unequivocally show that they are based on personal knowledge; accordingly, the affidavits are legally invalid and cannot serve as evidence in the summary judgment context. *Lear Inc. v. Adkins*, 395 U.S. 653 (1969). See also *Humphreys*, 888 S.W.2d at 470. Affidavits containing unsubstantiated factual or legal conclusions that are not supported by evidence are not competent summary judgment proof because they are not credible or susceptible to being readily controverted. *Ryland Group, Inc. v. Hood,* 924 S.W.2d 120, 122 (Tex.1996).

To avoid being conclusory, an affidavit must contain specific factual bases, admissible in evidence and upon which conclusions are drawn. *TIG Ins. Co. v. Sedgwick James*, 276 F.3d 754, 759 (5th Cir. 2002); *Southtex 66 Pipeline Co., Ltd. v. Spoor,* 238 S.W.3d 538, 542 (Tex.App.-Houston [14th Dist.] 2007, pet. denied), *citing Nichols v. Lightle,* 153 S.W.3d 563, 570 (Tex.App.-Amarillo 2004, pet. denied).

Appellants specifically objected to the declaration of Nichelle Jones ("Jones") submitted with the Motion on the ground that it lacked a basis for

personal knowledge, and contained conclusory statements and statements constituting hearsay. (ROA 547-548).

A mere recitation in a declaration that the statements are within the affiant's personal knowledge without more, does nothing to positively show that the affiant does, in fact, have personal knowledge of any facts to which they attest. Litigants and courts have become increasingly careless and permissive in straying from well-established evidentiary principles requiring a positive showing of the actual basis for personal knowledge beyond a blanket, unsupported assertion of "personal knowledge."

Appellants objected to the declaration of Jones on the basis that it failed to establish the factual basis for her personal knowledge of any of the matters asserted in the declaration, and that in fact, the declaration is not based upon any personal knowledge possessed by Jones because Jones was a stranger to the transactions at issue, never interacted in any manner with the Fosters, knew nothing about the Fosters until after the underlying lawsuit was filed, and failed to establish the basis for her attested personal knowledge regarding the transactions, activities, facts asserted, people involved, or the claimed loan modification regarding the Fosters' loan file.

In the declaration, Jones did attest that she is a Loan Analyst for Ocwen since 2006. This does not establish any basis for personal knowledge of the facts and

transactions pertinent to the Fosters, as there is no positive showing of the basis for her knowledge. The declaration wholly fails to disclose the basis on which Jones claims personal knowledge of the facts she asserts. The affidavit "must show that the affiant is competent to testify on the matters stated." FRCP 56(c)(4).

Quite simply, Jones' declaration, lacks underlying information to show a basis for her assertion of personal knowledge of the facts stated in her declaration, and her statements, therefore, are insufficient to support summary judgment, other than the instances where she acts as records custodian. FRCP 56(c)(4). See also *Valenzuela v. State & Cnty. Mut. Fire Ins. Co.,* 317 S.W.3d 550, 553 (Tex.App.-Houston [14th Dist.] 2010, no pet.) (mere recitation that affidavit is based on personal knowledge is inadequate if affidavit does not positively show basis for the knowledge).

For all of these reasons, Jones' declaration submitted as an exhibit to the Motion is incompetent summary judgment evidence because it does not positively show the basis for her purported personal knowledge of any of the facts about which she attempts to testify. Because of the lack of a basis for personal knowledge, all of the statements therein are conclusory and consist of hearsay, which also renders the declaration incompetent summary judgment evidence. The District Court erred in overruling Appellants' objection to the declaration, and erred in using the declaration as summary judgment evidence and admitting and

relying on the testimony contained therein in granting summary judgment for Appellees. This Court should reverse the rulings on the Appellants' objection to Appellees' summary judgment evidence, sustain the objection, and remand to the trial court for further proceedings.

ISSUE 4: The District Court erred in dismissing Appellants' claims for breach of contract.

SubIssue 4a: The District Court erred in finding that Appellants do not have standing to contest the assignment from MERS to U.S. Bank.

The District Court erred by finding that Appellants did not have standing to contest the assignments between MERS and U.S. Bank. (ROA 738). At the summary judgment hearing, Appellants counsel argued that Appellants had standing and was given the opportunity to provide additional briefing to the Court regarding *Wells Fargo Bank, N.A. v. Ballestas,* 2011 WL 1835265 (Tex.App.-Hous. [1st Dist.] May 12, 2011). (ROA 738). However, after Appellants' briefing, the Court misinterpreted the holding in *Ballestas* and stated that it had no bearing on this issue because it deals with a bank's standing to foreclose, not a borrowers standing to foreclose. The *Ballestas* Court stated as follows, to-wit:

> "In the prior proceeding, there was a real controversy between the Ballestas and Wells Fargo as to whether or not Wells Fargo could collect on the promissory note by foreclosing on the Ballestas' homestead. Because Wells Fargo's ownership of the promissory note was an essential element of its right to collect, whether by foreclosure or otherwise, this controversy would be determined by a judgment that Wells Fargo did not own the promissory note. *See Cadle*, 21 S.W.3d at 674; *Clark* 658 S.W.2d

> at 295. **The Ballestas thus have standing** to seek declaratory judgment that Wells Fargo did not own the promissory note and did not have a right to foreclose. *See Lovato*, 171 S.W.3d at 849. Because the Ballestas had standing, the 280th District Court had subject matter jurisdiction to determine that Wells Fargo did not own the promissory note and did not have a right to foreclose. *See Joachim*, 315 S.W.3d at 863, 865." (emphasis added).

Further, Appellants have standing to complain because US Bank foreclosed on their property based on contracts to which Appellants are a party, and on relationships in which they are an active participant. (ROA 602-606, 623-626). There is no evidence in the record that US Bank was the owner or the holder of the Note **because MERS had no authority to assign the note** to US Bank, or any other party. (emphasis ours)(ROA 602-606, 623-626). *See Livonia Prop. Holdings, LLC v. 12840-12976 Farmington Road Holdings, LLC,* 717 F. Supp.2d 724, 733-736 (E.D. Mich. 2010).

A debtor may assert certain defenses that render an assignment absolutely invalid such as nonassignability of the right assigned, even if she wasn't a party to the purported assignment. *Id.* Appellants alleged in no uncertain terms that MERS did not have the right to assign the Note, because it had no interests under the Note, and thus Appellants had standing to challenge the existence of an assignment of the Notes from MERS to US Bank because such an assignment never occurred, and yet it is just that non-existent assignment through which US Bank foreclosed.

(ROA 559-561). *See Wells Fargo Bank, N.A. v. Ballestas,* 2011 WL 1835265 (Tex.App.-Hous. [1st Dist.] May 12, 2011).

SubIssue 4b: The District Court erred in finding no merit to Appellants argument that the assignment from MERS to U.S. Bank is unenforceable and Ocwen lacked standing to foreclose on the Note.

The Fifth Circuit, in *Kirby Lumber Corp. v. Williams*, 230 F.2d 330, 333 (5th Cir. 1956), long ago recognized the legal difference between notes and deeds of trust, and addressed both transfer of a note and transfer of a deed of trust, and how a transfer of one affects the other in Texas, well before MERS was even in existence:

> 'The rule is fully recognized in this state that a mortgage to secure a negotiable promissory note is merely an incident to the debt, and passes by assignment or transfer of the note. * * * The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.' (emphasis added).

Kirby, 230 F.2d at 333 (quoting *Van Burkleo v. Southwestern, Tex.Civ.App.* 39 S.W. 1085, 1087; *Gough v. Home Owners Loan Corporation, Tex.Civ.App.,* 135 S.W.2d 771). The Fifth Circuit has long held that a transfer of a Deed of Trust alone is a nullity and does nothing to transfer the Note. See *Kirby*, 230 F.2d at 33.

Federal and state courts across the nation are recognizing that the MERS system set up in 1993 by several large participants in the mortgage industry to streamline the mortgage process by using electronic commerce to eliminate paper and sidestep the various state recording requirements, does not change underlying,

longstanding law regarding transfers of interests in notes and deeds of trust. This recognition is happening in Texas as well. See *McCarthy v. Bank of America, NA*, No. 4:11-CV-356-A, 2011 WL 6754064, *3-4 (N.D. Tex. Dec. 22, 2011).[1]

Also, in recent opinions, numerous other federal and state courts across the nation are recognizing the validity of the argument that an assignment of interests under a deed of trust does not carry with it a simultaneous transfer of the note, because MERS never holds an interest in the note. "Thus, it is clear that MERS's relationship with its member lenders is that of agent with principal. This is a fiduciary relationship, resulting from the manifestation of consent by one person to another, allowing the other to act on his behalf, subject to his control and consent." *Onewest Bank v. Dayton*, 2010 NY Slip Op. 20429, 910 N.Y.S. 2d 1021. The agency relationship limits MERS's authority to act, and thus the authority to act of its assignees. *In re Doble*, No. 10-11296-MM13 (Bankr. S.D.C.A. Feb 13, 2011). "The key issue before the Court is . . . 'whether MERS has statutory authority to assign the Deed of Trust under its terms, particularly when MERS held no rights under the Note.'" *Id.* "MERS had no authority to assign the Deed of Trust, under its terms and as a matter of law, without the authority to assign the Note." *Id.*

[1] In turn citing and referring to *Carpenter v. Longan,* 16 Wall. 271, 83 U.S. 271, 274, 21 L.Ed. 313 (1872) (footnote omitted); *Baldwin v. State of Mo.,* 281 U.S. 586, 596, 50 S.Ct. 436, 74 L.Ed. 1056 (1930) (Stone, J., concurring); *Nat'l Live Stock Bank v. First Nat'l Bank,* 203 U.S. 296, 306, 27 S.Ct. 79, 51 L.Ed. 192 (1906); *Kirby Lumber Co. v. Williams,* 230 F.2d 330, 336 (5th Cir.1956); *In re Veal,* 450 B.R. 897, 916–17 (B.A.P. 9th Cir.2011); *In re Vargas,* 396 B.R.

"Even if MERS had assigned the mortgage acting on behalf of the entity which held the Note at the time of the assignment, this Court finds that MERS did not have authority, as "nominee" or agent to assign the Mortgage absent a showing that it was given specific written directions by its principal." *In re Agard*, No. 10-77338-21 reg. 2011 Bankr. LEXIS 488, at 58 (Bankr. E.D.N.Y. Feb. 10, 2011).

> MERS argues that its agent status can be found in the Mortgage which states that MERS is a 'nominee' and a 'mortgagee of record.' However, the fact that MERS is named "nominee" in the Mortgage is not dispositive of the existence of an agency relationship and does not, in and of itself, give MERS any "authority to act."
>
> According to MERS, the principal/agent relationship among itself and its members is created by the MERS rules of membership and terms and conditions, as well as the Mortgage itself.
>
> However, the rules lack any specific mention of any agency relationship, and do not bestow upon MERS any authority to act. Rather, the rules are ambiguous as to MERS's authority to take affirmative actions with respect to mortgages registered on its systems.
>
> Ultimately the Court concludes and this Court finds, that MERS's theory that it can act as a "common agent" for undisclosed principals is not supported by the law.

Id. The relationship between MERS and its lenders and distortion of its alleged "nominee" status was appropriately described by the Supreme Court of Kansas: "The parties appear to have defined the word [nominee] in much the same way that the blind men of Indian legend described an elephant – their description depended

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511, 516 (Bankr.C.D.Cal.2008); *In re Leisure Time Sports, Inc.,* 194 B.R. 859, 861 (B.A.P. 9th

on which part they were touching at any given time." *Id*. (quoting *Landmark Nat'l Bank v. Kesler*, 216 P.3d 158, 166-67 (Kan. 2010)). The *Agard* Court was mindful about the wide-ranging impact of its decision:

> The Court recognizes that an adverse ruling regarding MERS's authority to assign mortgages or act on behalf of its members/lenders could have a significant impact on MERS and upon the lenders which do business with MERS throughout the United States. However, the Court must resolve the instant matter by applying the laws as they exist today. It is up to the legislative branch, if it chooses, to amend the current statutes to confer upon MERS the requisite authority to assign mortgages under its current business practices. MERS and its partners made the decision to create and operate under a business model that was designed in large part to avoid the requirements of traditional mortgage recording process. This Court does not accept the argument that because MERS may be involved with 50% of all residential mortgages in the country, that is reason enough for this Court to turn a blind eye to the fact that this process does not comply with law.

Id.(emphasis added).

Further, other courts are increasingly finding, upon a more thorough analysis of MERS, its formation, and its purpose, similarly: MERS (and its assignees) cannot foreclose if it doesn't also hold the underlying note. *Bank of N.Y. v. Siverberg*, 926 N.Y.S. 2d 532 (App. Div. 2011). The ubiquitous MERS, nominal holder of millions of deeds of trust, does not have the right to foreclose on a mortgage in default or assign that right to anyone else if it does not also hold the underlying promissory note. *Id.*

Cir.1996); *Bellistri v. Ocwen Loan Servicing, LLC,* 284 S.W.3d 619, 623 (Mo.Ct.App.E.D.2009).

> This Court is mindful of the impact that this decision may have on the mortgage industry in New York, and perhaps the nation. Nonetheless, the law must not yield to expediency and the convenience of lending institutions. Proper procedures must be followed to ensure the reliability of the chain of ownership, to secure the dependable transfer of property, and to assure the enforcement of the rules that govern real property.

Id. Further, the New York court recognized that if a deed of trust is transferred without the note, it is a nullity – no interest is acquired by transfer of the deed of trust standing alone; the "mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation." *Id.* (quoting *FGB Realty Advisors, Inc. v. Parisi*, 265 A.D. 2d 297, 298 (N.Y. App. Div. 1999)). Because MERS was never the lawful holder or assignee of the notes, the court determined that MERS was without authority to assign the power to foreclose to the bank, and thus the bank lacked standing to foreclose. *Id.*

A formal assignment of the Deed of Trust is the process by which US Bank claimed in this matter to have somehow become the holder or owner of the Note. US Bank claims to have been assigned the Deed of Trust by MERS, but an assignment of a deed of trust, even if validly accomplished, does not accomplish a simultaneous transfer of the note. The only assignment in the record is for instrument number 20215. (ROA 316). Instrument number 20215 is the Deed of Trust for the First Note. (ROA 607-622). Appellees bore the burden of proving, as a matter of law, the Note under which they foreclosed was legally transferred by

Success to US Bank, which they have failed to prove through any admissible evidence. On the record, US Bank was not the holder of the Note, and was not entitled to enforce it.

Sub-Issue 4c: The District Court erred in its application of the law concerning the Statute of Frauds.

Texas law applies here because this case was removed from the state court to federal court on the basis of diversity of citizenship. *Brooks, Tarlton, Gilbert, Douglas & Kressler v. United States Fire Ins. Co.,* 832 F.2d 1358, 1364-1376 (5th Cir.1987). Loss of the right to accelerate and foreclose may result from inconsistent or inequitable conduct on the part of the holder of a promissory note. *McGowan v. Pasol*, 605 S.W.2d 728, 732 (Tex.App.-Corpus Christi 1980) (citing *Crow v. Heath*, 516 S.W.2d 225 (Tex.Civ.App.-Corpus Christi 1974, writ ref'd n.r.e.)). When one contracting party commits a material breach, the other party must elect between continuing performance under the contract or ceasing performance and terminating the contract. *See Gupta v. Eastern Idaho Tumor Inst., Inc*., 140 S.W.3d 747, 756 (Tex. App.--Houston [14th Dist.] 2004, pet. denied); *World Access Telecomms. Group, Inc. v. Statewide Calling, Inc*., No. 03-05-00173-CV, 2006 Tex. App. LEXIS 9061, at *18 (Tex. App.--Austin Oct. 17, 2006, no pet.) (mem. op.). If the non-breaching party elects to treat the contract as continuing and takes actions showing that it wants the party in default to continue performance, the previous breach constitutes no excuse for nonperformance on the

part of the party not in default, and the contract continues in force for the benefit of both parties. *Hanks v. GAB Bus. Servs., Inc*., 644 S.W.2d 707, 708 (Tex. 1982); *Gupta*, 140 S.W.3d at 756.

Statute of Frauds: The Court erred in its refusal to acknowledge that the exceptions to the statute of frauds apply, which do not require a writing to enforce a change in terms of the contracts and the enforcement of unilateral contracts.

The statute of frauds in Texas provides that contracts for the sale of real estate (among others), are not enforceable unless the agreement, or a memorandum of it, is in writing and signed by the person to be charged or his authorized representative. TEX. BUS. & COM. CODE ANN. § 26.01(a); *Bank of Tex. v Gaubert,* 286 S.W.3d 546, 554-55 (Tex.App.-Dallas 2009, pet. dism'd). Section 26.02 contains a statute of frauds for loan agreements involving loans exceeding $50,000. TEX. BUS. & COM. CODE ANN. §26.02. A loan agreement is *generally* not enforceable unless the agreement is in writing and signed by the party to be bound or by that party's authorized representative. *Id.;* §26.02(b)(emphasis added).

"However, equity will act to avoid the statute of frauds in circumstances where enforcing the statute would itself amount to a fraud." *Gaubert*, 286 S.W.3d at 553 (finding exceptions to enforcement of traditional statute of frauds also apply to 26.02)(referring to *Nagle v. Nagle,* 633 S.W.2d 796, 799-800 (Tex.1982); *Birenbaum v. Option Care, Inc.,* 971 S.W.2d 497, 503 (Tex.App.-Dallas 1997, pet.

denied)("Before using equity to circumvent the statute of frauds, the Texas Supreme Court has consistently required a showing that fraud would result in not doing so.")).

> Promissory estoppel and partial performance have been recognized as equity-based exceptions to the traditional statute of frauds. Promissory estoppel allows enforcement of an otherwise unenforceable oral agreement when (1) the promisor makes a promise that he should have expected would lead the promissee to some definite and substantial injury; (2) such an injury occurred; and (3) the court must enforce the promise to avoid the injury.

Id. at 553 (citing *Nagle*, 633 S.W.2d at 800; *Moore Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 936 (Tex.1972)).

Promissory estoppel avoids the statute of frauds when the alleged oral promise is to sign an existing document that satisfies the statute of frauds. *Id*. at 553 (see *Nagle*, 633 S.W.2d at 800; *Exxon Corp. v. Breezevale Ltd.*, 82 S.W.3d 429, 438 (Tex.App.-Dallas 2002, pet. denied); *see also Birenbaum*, 971 S.W.2d at 504 (promissory estoppel avoids statute of frauds only if the oral promise "was to execute a document in existence that itself complied with the statute;" discussing statute of frauds formerly applicable to purchase of securities)).

Under the partial performance equitable exception, an oral agreement that does not satisfy the traditional statute of frauds but that has been partially performed may be enforced if denying enforcement would itself amount to a fraud. *Id*. at 554 (citing *Breezevale*, 82 S.W.3d at 439; *Carmack v. Beltway Dev. Co*., 701

S.W.2d 37, 40 (Tex.App.-Dallas 1985, no writ) (discussing statute of frauds for agreements to pay a commission on sale or lease of real estate)).

Appellees are barred, by both promissory estoppel and partial performance, from escaping responsibility for their actions and inactions in breaching the contracts at issue in this matter. The evidence shows:

- Appellees told Appellants that no foreclosure will occur "during the time period provided that your application has been submitted and complete". (ROA 556-557, 683).

- Appellees would contact Appellants if additional information was needed. (ROA 556-557, 683).

- Appellees orally told Appellants in early December 2009 to apply for a loan modification, and what information, forms, documentation, etc., Ocwen needed in order to process the application. (ROA 788-789). Plaintiffs provided the requested information numerous times. (ROA 679, 789-790).

- A corporate representative for both Ocwen and U.S. Bank, stated that it is Ocwen's standard practice and policy that borrowers are told that the loan modification process will take some time, and to be patient. (ROA 679).

- A corporate representative for both Ocwen and U.S. Bank testified that if the loan modification was in process, Ocwen would not move forward with foreclosure, and that Ocwen normally puts the foreclosure on a hold status until a decision was made about the modification. (ROA 680).

- A corporate representative for both Ocwen and U.S. Bank testified that Appellees tell borrowers that if there's an active foreclosure sale date, it does get put on hold, or postponed, or cancelled while the loan modification is reviewed. (ROA 680, 687-688).

- A corporate representative for both Ocwen and U.S. Bank testified that Appellants requested a loan modification in December 2009, that they downloaded the materials for the loan modification in December 2009. (ROA 679-680).

- Appellees records show that Appellants talked to Ocwen in January 2010, and told them that he had already submitted the materials for the application requested by Appellees, but that they would resubmit them as it appeared from Ocwen's records that they never received the package from Mr. Foster. (ROA 680-683).

- A corporate representative for both Ocwen and U.S. Bank testified that Mr. Foster provided his financial information over the phone on January 28, 2010 to Ocwen, and that he was resending the application packet, which he informed them had sent at least 10 days earlier. (App. ROA 683-684).

These instances show promissory estoppel barring Appellants from relying on the statute of frauds and from proceeding to foreclosure under the contracts as well as promissory estoppel for partial performance. *In re Bank of America*, No. 10-md-02193, 2011 WL 2637222, (Mass. July 6, 2011).

It would be equitable to enforce the oral promise of not foreclosing during the loan modification process to avoid the injuries that Appellants are now suffering and continue to suffer, including the foreclosure upon their Property.

Sub-Issue 4d: The District Court erred in finding that the mortgage servicer was allowed to appoint a substitute trustee.

The District Court erred by finding that Ocwen had the right to appoint a substitute trustee. The evidence shows that neither US Bank nor Ocwen were the

holders or owners of the Notes, as explained above. Therefore, Ocwen lacked standing to foreclose upon Appellants' Property.

ISSUE 5: The District Court erred in granting summary judgment for Appellees on Appellants anticipatory breach of contract claim.

In Texas, to prevail on a claim for anticipatory breach of contract, Appellants must establish (1) an absolute repudiation of the obligation; (2) a lack of a just excuse for the repudiation; and (3) damage to the non-repudiating party. *Gonzalez v. Denning*, 394 F.3d 388, 394 (5th Cir. 2004) (citing *Taylor Publ'g Co. v. Systems Mktg. Co.*, 686 S.W.2d 213, 217 (Tex. App.- Dallas 1984, writ ref'd n.r.e.)). The evidence showed that Appellees not only repudiated their obligations under the Deeds of Trust and Notes, they repudiated their obligations under the unilateral contract that was formed by their oral representation that no foreclosure sale would occur while they were in the loan modification process.

As shown above, Appellees have no rights under the Note because the Notes was never validly assigned to them. The evidence shows that Success is still the holder and owner of the Notes. (ROA 602-606, 623-626). Appellees' foreclosure upon the Property was a repudiation of their obligations under the Deeds of Trust. Appellees had no just excuse for the repudiation, as neither party had any authority under the Notes to accelerate and foreclose on the Property. Appellants were damaged by Appellees' repudiation of their obligations, in that they lost title to their property. (ROA 151-152, 347-348).

As shown above, a unilateral contract was formed between the parties in January 2010 when Ocwen informed the Appellants that no foreclosure sale would occur while they were in the loan modification process. (ROA 683). Appellants partially performed by submitting all requested documentation, on numerous occasions. (ROA 789-790). Again, Appellees repudiated their obligations under the agreement without just excuse (there is no evidence of any excuse in the record), and Appellants were damaged. (ROA 151-152).

ISSUE 6: The District Court erred in granting summary judgment in favor of Appellees on Appellants' claim for unreasonable collection efforts.

Sub-Issue 6a: The District Court erred in granting summary judgment in favor of Appellees on Appellants' claim for unreasonable collection efforts.

The District Court its Order, while admitting that the conduct amounting to unreasonable collection efforts varies from case to case, nonetheless elected to use the most stringent standard under Texas law for determining whether collection efforts were reasonable or unreasonable in this context. (ROA 747-749).

The Court relied on the definition in *EMC Mortg. Corp. v. Jones*, 252 S.W.3d 857 (Tex. App. – Dallas 2008). However, when the Dallas Court issued its opinion in *EMC* on unreasonable collection efforts it referred to *Montgomery Ward & Co. v. Brewer,* 416 S.W.2d 837, 844 (Tex.Civ.App.-Waco 1967, writ ref'd n.r.e.) and *Connell v. Rosales,* 419 S.W.2d 673, 676 (Tex.Civ.App.-Texarkana 1967, no writ) which is weak precedent.

In *Montgomery Ward*, the Waco Court of Appeals opined that "the Court, in its instructions to the jury, among other things said: 'By the term 'unreasonable collection efforts' is meant a course of harassment on the part of a creditor which is willful, wanton and malicious and is intended to inflict mental anguish and resulting bodily harm.' (**There was no objection to this instruction**.)".(emphasis ours), *Montgomery Ward* at 838. This was also the case in *Rosales*. **There was no objection to the standard used** for unreasonable collection efforts. (emphasis ours), *Rosales* at 676. Since there was not an objection, the Appellate Courts could not overrule the definition. Therefore the Dallas Court did not adopt that definition, but simply made reference to it.

The proper standard, not the one applied by the Court, varies from case to case, and should have been "efforts which an ordinary person of ordinary prudence in the exercise of ordinary care on his per her part would have exercised under the same or similar circumstances." *Employee Finance Co. v. Lathram*, 363 S.W.2d 899 (Tex.App.-Fort Worth 1962), aff'd in part, rev'd in part on other grounds, 369 S.W.2d 927 (Tex. 1963). Is there any compelling reason why the definition of "unreasonable" should be anything other than Webster's definition of "unreasonable"?

Moreover, a Texas federal district court recently found that Defendants exceeded the bounds of reason by failing to respond to Plaintiff's requests for

clarification of reinstatement amounts, misrepresentations that foreclosure would not occur, failure to give Plaintiff notice of this right to cure, and increasing Plaintiff's mortgage payment without explanation, sufficient to support a claim for unreasonable collection efforts. *Verdin v. Federal National Mortgage Assoc*., No. 4:10-CV-590, 2011 WL 4347050, *7 (E.D. Tex. August 24, 2011). Similarly, another Court found that Plaintiff's unreasonable collections efforts claim was supported by Defendant's refusal to accept payments, misrepresentations that the foreclosure sale would not occur, and failure to give Plaintiff's proper notice of the right to cure, and notices of acceleration and foreclosure sale. *Overholt v. Wells Fargo Bank, N.A.*, No. 4:10-CV-618, 2011 WL 4862525, *12 (E.D. Tex. Sept. 9, 2011). Accordingly, the District Court erred in applying a different, heightened standard to Appellants' claim for unreasonable collection efforts, and thus erred in granting summary judgment to Appellees on Appellants' claim.

Sub-Issue 6b: The District Court erred in its application of the evidence to the law with regard to unreasonable collection efforts.

In its Order, the District Court improperly applied the evidence to the law (ROA 748-749). Debt-collection efforts are tortious when lenders attempt to collect debts that are not actually owed. *See Narvarez v. Wilshire Credit Corp.,* 757 F.Supp.2d 621, 635 (N.D. Tex. 2010); *EMC Mortg. Corp. v. Jones,* 252 S.W.3d 857, 868–69 (Tex.App. – Dallas 2008); *Pullins v. Credit Exch. of Dall., Inc.,* 538 S.W.2d 681, 682–83 (Tex.Civ.App.-Waco 1976, no writ).

The evidence shows that by improperly applying force-placed insurance and late fees to the account, Appellees attempted to collect a debt they were not owed. (ROA 307). This claim is supported by Texas law that states debt-collection efforts are tortious when lenders attempt to collect debts not actually owed. *Narvarez*, 757 F.Supp.2d at 635; *EMC Mortg.,* 252 S.W.3d at 868–69; *Pullins,* 538 S.W.2d at 682–83. Moreover, Appellants presented evidence that:

- Appellees made representations to Appellants that they were involved in the loan modification application process, and that their home would not be foreclosed while they were under consideration for a loan modification. (ROA 564-566, 683).

- Plaintiffs provided the information requested by Ocwen, however Ocwen claims it never received that information, despite the fact that Plaintiffs sent it in at least twice and gave their financial information orally over the phone. (ROA 564-566, 683, 790).

- Mr. Foster testified that he was told by Defendants that so long as the modification was under review and consideration, the Property would not be foreclosed on. (ROA 564-566).

- A corporate representative for both Ocwen and U.S. Bank, stated during a deposition that it is Ocwen's standard practice and policy that borrowers are told that the loan modification process will take some time, and to be patient. (ROA 679).

- A corporate representative for both Ocwen and U.S. Bank testified that if the loan modification was in process, Ocwen would not move forward with foreclosure, and that Ocwen normally puts the foreclosure on a hold status until a decision was made about the modification. (ROA 680).

- The corporate representative for both Ocwen and U.S. Bank further testified that Appellees tell borrowers that if there's an active foreclosure sale date, it does get put on hold, or postponed, or cancelled while the loan modification is reviewed. (ROA 680, 687-688).

- As for the Appellants loan modification application, the corporate representative for both Ocwen and U.S. Bank testified that Appellants requested a loan modification in December 2009, that Appellants downloaded the materials for the loan modification in December 2009, and that Appellees records show that Mr. Foster talked to Ocwen in January 2010, and told them that he had already submitted the materials for the application requested by Appellees, but that he would resubmit them as it appeared from Ocwen's records that they never received the package from Appellants. (ROA 680-683).

- Further, the corporate representative testified that Mr. Foster provided his financial information over the phone on January 28, 2010 to Ocwen, and that he was re-sending the application packet, which he informed them had sent at least 10 days earlier. (ROA 683-684).

This Court should reverse the rulings on Appellants' claim for unreasonable collection efforts and remand to the trial court for further proceedings.

ISSUE 7: The District Court erred in granting summary judgment for Appellees and dismissing Appellants' claim for violations of the Texas Finance Code.

The United States District Court for the Northern District of Texas found that "foreclosure actions inevitably involve a debt collection aspect." *Biggers v. BAC Home Loans Servicing, LP*, 2011 WL 588059 at *5 (N.D. Tex. February 10, 2011)(Fitzwater, J.). More specifically, that Court held that "because under Texas law a notice of default and opportunity to cure must precede a foreclosure sale and notice of a foreclosure sale, *see* TEX.PROP.CODE ANN. §51.002(d)(West Supp. 2010), foreclosure actions inevitably involve a debt collection aspect. Therefore it appears that the TDCPA applies to foreclosure actions." *Id.*

Sub-Issue 7a: The District Court erred in granting summary judgment as to Appellants claim under §392.304(a)(19) of the Texas Finance Code.

TEX. FIN. CODE §392.304(a)(19) prohibits a debt collector, in debt collection or obtaining information concerning a consumer, from using a fraudulent, deceptive, or misleading representation or deceptive means to collect a debt or obtain information concerning a consumer. The District Court erred by failing to acknowledge the evidence in the record. (ROA 750).

The evidence shows that the loan modification process was initiated in December 2009. (ROA 680). Appellees represented that they would not foreclose while the application was under review, and represented that they would postpone, put on hold, or otherwise cancel any foreclosure sale until after the modification review process was completed. (ROA 680, 683). Specifically, Mr. Foster testified that he provided the information requested by Defendants for a loan modification. (ROA). Appellees own records show that Mr. Foster talked to Ocwen in January 2010, and told them that he had already submitted the materials for the application requested by Appellees, but that he would resubmit them as it appeared from Ocwen's records that they never received the package. (ROA 680-683). Further, the evidence shows that Mr. Foster provided his financial information over the phone on January 28, 2010 to Ocwen, and that he was resending the application

packet, which he informed Appellees that he had sent it at least 10 days earlier. (ROA 683-684).

Instead of postponing the foreclosure sale as represented, Appellees moved forward and foreclosed upon Appellants Property. Appellants were never informed whether their application for a loan modification was approved or denied. Therefore, the representations that the foreclosure sale would be postponed if Appellants were in the loan modification process were false and misleading representations in the collection of a debt.

ISSUE 8: The District Court erred in granting summary judgment in favor Appellees on Appellants claim for suit to quiet title and trespass to try title.

To prevail in a trespass to try title action, a plaintiff must usually (1) prove a regular chain of conveyances from the sovereign, (2) establish superior title out of a common source, (3) prove title by limitations, **or** (4) prove title by prior possession coupled with proof that possession was not abandoned. *Martin v. Amerman*, 133 S.W.3d 262, 265 9Tex.2004).

In a suit to quiet title, a plaintiff must establish superior title, proving and recovering on the strength of his own title, not the weakness of the defendant's title. *See Fricks v. Hancock*, 45 S.W.3d 322, 327 (Tex. App.--Corpus Christi 2001, no pet.).

Appellants have presented evidence that they have superior title to the Property. As explained above, (1) Appellees accelerated the loan before it was

assigned to them, and (2) Appellees were not the owners or holders of the Note and therefore not authorized to foreclose upon the Property. Further, Appellees right to foreclose never matured because they had told Appellants not to worry about the foreclosure and that no foreclosure will occur "during the time period provided that your application has been submitted and complete". (ROA 556-557, 683). Appellants submitted the application on numerous occasions, however, Appellees foreclosed on the property on March 2, 2010. (ROA 347-349, 564-566, 683, 790). Thus, the foreclosure sale is void. Because the sale is void, Appellants have superior title and the U.S. Bank's claimed title is improper.

Appellants title and U.S. Bank's trustee's deed are both derivative of the same Seller's Warranty Deed. (ROA 347-349, 574-575). The sellers are the common source, but since the trustee's sale is void, U.S. Bank obtained no title. *See Slaughter v. Qualls,* 162 S.W.2d 671 (Tex. 1942); *First Southern Properties v. Henke*, 586 S.W.2d 617, 620 (Tex. App.—Waco 1979, writ ref'd. n.r.e.).

Therefore, the District Court erred by finding Appellants did not have superior title. (ROA 754). This Court should reverse the rulings on Appellants' claim for suit to quiet title and trespass to try title and remand to the trial court for further proceedings.

ISSUE 9: The District Court erred in granting summary judgment and dismissing Appellants claim for negligent misrepresentation.

In all negligent misrepresentation claims in Texas, the false information complained of "must be a misstatement of an existing fact rather than a promise of future conduct." *Scherer v. Angell*, 253 S.W.3d 777, 781 (Tex. App. – Amarillo 2007, no pet.)(citing *Miller v. Raytheon Aircraft Co.*, 229 S.W.3d 358, 379 (Tex.App. – Houston [1st Dist] 2007, no pet.). No one contests that requirement. The District Court erred in dismissing Appellants claim for negligent misrepresentation on the basis that Appellants failed to provide any evidence that Appellees supplied false information or that Appellees did not "exercise reasonable care or competence in communicating that information." (ROA 756).

Appellants presented evidence that Appellees supplied false information and failed to exercise reasonable care or competence in communicating that information to them. Appellees continually misrepresented and misstated the status of Appellants' loan modification. As stated previously:

- Appellees made representations to Appellants that they were involved in the loan modification application process, and that their home would not be foreclosed while they were under consideration for a loan modification. (ROA 564-566, 683).

- Plaintiffs provided the information requested by Ocwen, however Ocwen claims it never received that information, despite the fact that Plaintiffs sent it in at least twice and gave their financial information orally over the phone. (ROA 564-566, 683, 790).

- Mr. Foster testified that he was told by Defendants that so long as the modification was under review and consideration, the Property would not be foreclosed on. (ROA 564-566).

- A corporate representative for both Ocwen and U.S. Bank, stated during a deposition that it is Ocwen's standard practice and policy that borrowers are told that the loan modification process will take some time, and to be patient. (ROA 679).

- A corporate representative for both Ocwen and U.S. Bank testified that if the loan modification was in process, Ocwen would not move forward with foreclosure, and that Ocwen normally puts the foreclosure on a hold status until a decision was made about the modification. (ROA 680).

- The corporate representative for both Ocwen and U.S. Bank further testified that Appellees tell borrowers that if there's an active foreclosure sale date, it does get put on hold, or postponed, or cancelled while the loan modification is reviewed. (ROA 680, 687-688).

In *Federal Land Bank Association of Tyler v. Sloane,* 825 S.W.2d 439, 442 (Tex.1991) the Texas Supreme Court found that a lender/bank owes their customers or potential customers a duty of reasonable care whenever they provide information to their customers or potential customers, and that the bank breached that duty when the bank negligently represented to the Sloanes that they would receive a loan for their business. *Sloane*, 825 S.W.2d at 442. Additionally, even a Defendant's accidental false representation can be actionable. *Milestone Props. Inc. v. Federated Metals Corp*., 867 S.W.2d 113, 119 (Tex. App.—Austin 1993, no writ); *Susser Pet. Co. v. Latina Oil Corp.*, 574 S.W.2d 830, 832 (Tex. App.—Texarkana 1978, no writ).

A bank can be liable to its customers for negligent misrepresentations about the status of a loan. *Sloane,* 825 S.W.2d at 442. Even accidental misrepresentations

(such as representing they will not foreclose during the loan modification process) are actionable. *Milestone Props. Inc.*, 867 S.W.2d at 119.

Appellants justifiably relied on Appellees' representations, which was reasonable at the time. All of these facts and evidence show that there were genuine issues of material fact concerning Appellants' claim against Appellees for negligent misrepresentation.

ISSUE 10: The District Court erred in granting summary judgment for Appellees on Appellants equitable request for an accounting.

The District Court erred in addressing and dismissing Appellees request for the remedy of an accounting. Not all of Appellants' causes of action should have been dismissed; therefore the remedy of an accounting should still be available as an equitable remedy for Appellants. This Court should reverse the rulings on the Appellants' equitable request for an accounting as damages and remand to the trial court for further proceedings.

ISSUE 11: The District Court erred in granting summary judgment for Appellees on Appellants request for declaratory judgment.

The District Court erred in dismissing Appellants' request for declaratory judgment because not all of Appellants' causes of action were properly dismissed; therefore there still existed an underlying claim or more for the Court to adjudicate, as shown above. This Court should reverse the rulings on the Appellants'

objections to Appellees' summary judgment evidence and remand to the trial court for further proceedings.

CONCLUSION

This Court should reverse the rulings made by the District Court in dismissing all of Appellants' claims and causes of action because the District Court made errors in the law and facts. This Court should reverse the rulings and remand to the District Court for further proceedings consistent with this Court's rulings.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellants Rickey Foster and Michelle Foster request that the Appellate Court reverse the Order Granting Summary Judgments and Final Judgment and remand this matter for further proceedings, and for such other and further relief to which they may be justly entitled.

Respectfully submitted,

/s/ *J.B. Peacock, Jr.*

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CERTIFICATE OF SERVICE

I certify that on the 26th day of March, 2012, a true and correct copy of the foregoing document was served by certified mail, return receipt requested on the following parties:

a. the attorney for Appellees-Defendants Ocwen Loan Servicing, LLC and U.S. Bank National Association, Mark D. Cronenwett and Lindsay Stansberry, at 5057 Keller Springs Road, Suite 600, Addison, Texas 75001.

/s/ *J.B. Peacock, Jr.*

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because it contains 10,668 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (Times New Roman, 14-point) using Microsoft Word 2003.

Dated: March 26, 2012

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