CASE NO. 11-11019

IN THE UNITED STATES COURT OF APPEALS
THE FIFTH CIRCUIT
NEW ORLEANS, LOUISIANA

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 United States District Court
Northern District of Texas, Dallas Division
USDC No. 3:10-cv-1058

BRIEF OF APPELLEES 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

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ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the 5th Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

District Judge:
Hon. Royal Furgeson

Plaintiffs/Appellants:
Rickey Foster
and wife Michelle Foster

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Defendants/Appellees:
Ocwen Loan Servicing, L.L.C.
U.S. Bank National Association, as Indenture Trustee for the Registered Holders of Aegis Asset Backed Securities Trust 2005-1, Mortgage Backed Notes

Ocwen Loan Servicing, LLC is wholly owned by Ocwen Financial Corporation, which is publicly traded on the New York Stock Exchange (OCN) and owns 10% or more of Ocwen Loan Servicing LLC's stock.

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STATEMENT REGARDING ORAL ARGUMENT

Appellees Ocwen Loan Servicing, L.L.C. ("Ocwen") and U.S. Bank National Association, as Indenture Trustee for the Registered Holders of Aegis Asset Backed Securities Trust 2005-1, Mortgage Backed Notes ("U.S. Bank") do not request oral argument as they believe this matter may be determined on the briefs. Should this Court determine the issues in this case warrant oral argument, or permit Appellants to present oral argument, Appellees request to present oral argument.

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STATEMENT OF THE CASE

On or about December 10, 2004, the Fosters executed an Adjustable Rate Note for $118,750.00 payable to U.S. Bank's predecessor, as lender on an acquisition loan secured by certain property in Hunt County, Texas pursuant to a Deed of Trust executed by the Fosters in favor of the lender thereunder. (USCA5 243-283). The Fosters defaulted under the Loan and failed to make all required payments due thereunder. (USCA5 240, ¶17). Appellees exercised their rights to accelerate the Loan and foreclose on the Property. (USCA5 240, ¶16).

The Fosters filed the underlying action against the Appellees on or about April 19, 2010, in Hunt County, Texas. (USCA5 5). The case was removed to the U.S. District Court in May 2010. (USCA5 9). The Fosters filed their First Amended Original Complaint ("Complaint") on February 11, 2011. (USCA5 138). The Fosters claim, among other things, that Appellees breached the loan agreements by foreclosing after allegedly agreeing to a modification of the Fosters' loan in early 2009 and purportedly telling the Fosters that Appellees would not foreclose; the Fosters further claim that Appellees violated provisions of the Texas Finance Code, committed the tort of unreasonable collection practices, and made negligent misrepresentations to the Fosters about their loan. (USCA5 138-169). The Fosters also claim that Appellees had no right to foreclose because Mortgage Electronic Systems, Inc. ("MERS"), the nominee under the Deed of Trust securing

the Fosters' loan, had no authority to assign the loan and therefore the assignment of lien was ineffective, and that Ocwen improperly appointed the substitute trustee. (USCA5 138-169). Finally, the Fosters brought claims for suit to quiet title and trespass to try title, for an accounting and for declaratory judgment. (USCA5 138-169).

However, as will be shown herein, Rickey Foster admitted that he was not told by Appellees that the 2009 loan modification was approved, the Fosters failed to submit a complete loan modification application, and the Fosters have provided no evidence that Appellees told the Fosters that they would not foreclose on the loan, or provided any false or incorrect information to the Fosters about their loan. MERS had full authority to assign the loan to U.S. Bank and the assignment of lien was effective as it predated the acceleration and foreclosure. Additionally, the recorded assignment of lien was for recording and notice purposes; the actual assignment of the loan was completed pursuant to the Transfer and Servicing Agreement which also predated the acceleration and foreclosure. (*See* discussion *infra* pp. 15-16). Furthermore, Ocwen properly appointed the substitute trustee as attorney in fact for U.S. Bank.

On May 31, 2011, Appellees filed their Motion for Summary Judgment and Brief in Support seeking summary judgment on all of the Fosters' claims. (USCA5 188-531). The Fosters filed their objections to Appellees' summary judgment

evidence and a response brief on June 24, 2011. (USCA5 538-690). Appellees filed a reply on July 5, 2011. (USCA5 691-701). On July 18, 2011, the Fosters filed a sur-reply. (USCA5 717-728). A hearing was held on July 18, 2011. (USCA5 891). Appellees filed a letter brief in support of its summary judgment motion on July 22, 2011. (USCA5 729). The District Court entered its Order Granting Summary Judgment in favor of Appellees on all of the Fosters' claims (USCA5 732-760), and its Final Judgment, on July 26, 2011. (USCA5 761). The Fosters filed a Motion to Vacate Judgment on August 23, 2011 (USCA5 762), which was denied. (USCA5 878-885). The Fosters filed their Notice of Appeal on October 19, 2011. (USCA5 886).

The District Court's judgment on the Fosters' claims against Appellees was the correct ruling. The bottom line is this: the Fosters were in default of the Loan since September 2009 and failed and refused to bring the Loan current. Appellees lawfully exercised their rights to accelerate the Loan and foreclose. There is no fact issue on any of the Fosters' claims and Appellees are entitled to judgment as a matter of law. The Fosters raise a myriad of issues on appeal, all of which have been properly addressed by the District Court in its ruling for Appellees on all of the Fosters' claims. The District Court properly granted summary judgment in favor of Appellees, and the Fosters' have failed to demonstrate in this appeal that the District Court erred in any rulings in this matter.

STATEMENT OF FACTS

The Fosters' Statement of Facts omits facts which are relevant to the issues in this appeal. Therefore, the Appellees offer the following statement of facts.

The Fosters execute First Lien Loan Documents. On or about December 10, 2004, the Fosters executed an Adjustable Rate Note (the "Note") for $118,750.00 payable to Success Investments, Inc. ("Success"), as lender on an acquisition loan (the "Loan") secured by certain property in Hunt County, Texas located at 3103 County Road 2606, Caddo Mills, Texas 75135 (the "Property") pursuant to a Deed of Trust executed by the Fosters in favor of the lender thereunder. (USCA5 238, ¶4; USCA5 243, ¶22).

The Loan was Assigned. The Loan was assigned to U.S. Bank, National Association, as Indenture Trustee for the Registered Holders of Aegis Asset Backed Securities Trust 2005-1 on February 1, 2005. (USCA5 316). U.S. Bank, National Association, as Indenture Trustee for the Registered Holders of Aegis Asset Backed Securities Trust 2005-1 is the owner and holder of the Note, and has been since February 1, 2005. (USCA5 238, ¶5). *See* discussion *infra* pp. 15-16.

The Fosters Execute Second Lien Loan Documents. The Fosters also executed a Note (the "Second Lien Note") on even date with the First Lien Note for $29,688.00 payable to Success, as lender on a second lien acquisition loan also secured by the Property pursuant to a Purchase Money Deed of Trust executed by

the Fosters in favor of the lender thereunder. (USCA5 238, ¶6).

The Fosters Agree to Loan Terms. Under the terms of the Note and Deed of Trust executed by the Fosters, the Fosters were required to pay when due the principal and interest on the debt evidenced by the Note, as well as any applicable late charges due under the Notes. (USCA5 239, ¶7; USCA5 243, ¶2; USCA5 260, ¶1).

The Deed of Trust further provides that should the Fosters fail to make payments in the Note as they became due and payable, or fail to comply with any or all of the covenants and conditions of the Deed of Trust, then the lender may enforce the Deed of Trust by selling the real Property according to law and in accordance with the provisions set out in the agreement. (USCA5 239, ¶8; USCA5 269, ¶22).

On or about even date with the Note, the Fosters also executed Truth-in-Lending Disclosure Statements and a Variable Rate Mortgage Program Disclosure. (USCA5 239, ¶9, USCA5 303, 72, 73).

No Oral Agreements. The Fosters also executed a Loan Agreement Addendum, agreeing that the Loan documents executed at closing were the final agreement between the parties as follows:

> "THIS WRITTEN LOAN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONSTRADICTED BY EVIDENCE OF PRIOR,

> CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES. THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES."

(USCA5 310; USCA5 239, ¶10).

RESPA Servicing Disclosure Statement. On even date with the Note, the Fosters also executed a RESPA Servicing Disclosure Statement ("Disclosure Statement") acknowledging certain disclosures made by the lender. (USCA5 239, ¶9). The Disclosure Statement states, in part, that the Loan falls under the Real Estate Settlement Procedures Act ("RESPA"), and provides a procedure for the Fosters to obtain information about the Loan from the lender by sending the lender a "qualified written request."

> "Section 6 of RESPA (12 U.S.C. 2605) gives you certain consumer rights, *whether or not your loan servicing is transferred.* If you send a "qualified written request" to your servicer, your servicer must provide you with a written acknowledgment within 20 business days of receipt of your request. A "qualified written request" is a written correspondence, other than notice on a payment coupon or other payment medium supplied by the Servicer, which includes your name and account number, and the information regarding your request. Not later than 60 business days after receiving your request, your servicer must make any appropriate corrections to your account, or must provide you with a written clarification regarding any dispute. During this 60-business-day period, your servicer may not provide information to a consumer reporting agency concerning any overdue payment related to such period or qualified written request."

(USCA5 308, ¶6).

The Fosters Default -- First Modification. In 2008, the Fosters fell behind on their loans, and the parties agreed to a loan modification agreement of the Second Lien Loan on or about April 7, 2008, and a loan modification agreement on the First Lien Loan or about September 11, 2008. (USCA5 239, ¶11). Prior to the First Lien modification, the principal balance of the First Lien Loan was $114,660.81. (USCA5 239, ¶11). Pursuant to the First Lien loan modification, the parties agreed that the new principal balance under the modified note was adjusted to $134,244.66. (USCA5 239, ¶11; USCA5 320, ¶1). The adjustment was to cover an escrow deficiency for tax and insurance advances required to be made by lender on behalf of the Fosters. (USCA5 239-40, ¶11).

Notice of Default Sent to the Fosters. On or about November 14, 2009, as the Fosters were in default of their loan modification, a notice of default was sent by Ocwen to the Fosters via certified mail and regular mail to the Fosters at the Property. (USCA5 240, ¶12). The notice stated that if the default was not cured that the Loan would be accelerated and that the Property could be foreclosed upon. The Fosters failed to pay the amount due. (USCA5 240, ¶12).

Letter Sent to Fosters Explaining Alternatives to Foreclosure. On December 4, 2009, Ocwen sent the Fosters a letter explaining alternatives to foreclosure and informing the Fosters what needed to be submitted for a new loan

modification application. (USCA5 240, ¶13; USCA5 508). The Fosters never submitted a complete loan modification application. (USCA5 509-512, 650-653). Ocwen never approved the second loan modification to the Fosters. (USCA5 240, ¶13).

Notice of Acceleration Sent to the Fosters. On or about January 22, 2010, a notice of acceleration of loan maturity, and a notice of foreclosure sale, was sent by U.S. Bank's counsel via certified mail to the Fosters at the Property. (USCA5 240, ¶14).

Appointment of Substitute Trustee Executed. On February 2, 2010, Johnna Miller of Ocwen, as attorney-in-fact for U.S. Bank, executed an Appointment of Substitute Trustee. On that date, Ocwen held a power of attorney from U.S. Bank to make and execute appointments of substitute trustee on the Fosters' loan. (USCA5 240, ¶15).

Property Foreclosed Upon. On March 2, 2010, the Property was foreclosed upon. (USCA5 240, ¶16).

The Fosters Remain in Default. At the time of foreclosure, the Fosters were in breach of the Note and Deed of Trust, and the Loan was in default. (USCA5 240, ¶17). The last regular loan payment made by the Fosters on the loan was the

payment due May 27, 2009.[1] The Fosters failed and refused to bring the Loan current after demand to do so. (USCA5 240, ¶17).

The Fosters have admitted that that they executed the Note and Deed of Trust. (USCA5 449, ¶¶1-4). The Fosters have admitted that they were not current on the Loan and that the last current payment they believed that they had made was in August 2009. (USCA5 490, ¶¶1, 2).

The Fosters File Lawsuit. On April 19, 2010, the Fosters filed their Plaintiff's Original Petition and Application for Temporary Restraining Order ("Petition"), alleging, among other claims, breach of contract and anticipatory breach of contract, violations of the Texas Debt Collection Practices Act ("TDCPA"), negligent misrepresentation/gross negligence, unreasonable collection efforts, suit to quiet title/trespass to try title, and claims for declaratory judgment and an accounting.

The Fosters alleged in the Petition that their default was due to Appellees' conduct--they claimed that Appellees wrongfully foreclosed, failed to give the Fosters' a notice of default and a warning that their loan would be accelerated, and told the Fosters that they could ignore the notice of acceleration sent to them and that Appellees had agreed to a modification of their loan in early 2009. (Petition,

[1] Fosters did make three forbearance payments after May 27, 2009, the last of which was made on November 2, 2009 and was applied to the payment which was due on August 1, 2009, but the payment made on May 27, 2009, was the last timely payment. (USCA5 240, ¶17.)

¶¶10-12, 14, 18). The Fosters also claim that Appellees had no right to foreclose because MERS, the nominee under the deed of trust securing the Fosters' loan, had no right to assign the loan, and that Ocwen appointed the substitute trustee (in fact, U.S. Bank appointed the substitute trustee). (Petition, ¶18).

The case was removed to the U.S. District Court in May 2010. (USCA5 9). The Fosters filed their First Amended Original Complaint ("Complaint") on February 11, 2011. (USCA5 138).

The Fosters admit loan was not modified in 2009. Rickey Foster admitted in his deposition that he was not told by Ocwen that the Fosters' 2009 loan modification application was approved (USCA5 527, page 49, lines 22-24), and that he was not sent a loan modification agreement to execute relative to the 2009 modification application, even though he acknowledged that for the previous modifications he had to execute a loan modification agreement. (USCA5 527, page 49, line 25; page 50, lines 1-2). In his deposition, Rickey Foster stated,

> Q. Okay. So you submitted all the information in. And did Ocwen or U.S. Bank send you a letter notifying you that your modification had been approved?
> A. For the first one or---
> Q. This is the --no, this is the most recent, the 2009 loan modification request.
> A. No, I never received a letter.
> Q. Okay. And this loan modification was to modify the first lien note?
> A. Yes, ma'am.
> Q. Okay. The big one. So did they indicate to you at all that it was approved?

A. The--the people that I talked to on the phone told me that--that it was in the system and it just took time.

Q. Okay.

A. And I knew that to be true from--from what happened the first time.

Q. Okay.

A. It took a long time.

Q. Did they tell you that everything was approved?

A. They never told me that, no.

Q. Okay. Did they send you a loan modification agreement to sign for 2009 or 2010?

A. No.

Q. Okay.

A. I don't believe so.

Q. Okay. But typically, in the past, they would send you the new loan modification terms? You had to sign it and send it back in? That's how it worked the first time?

A. The first time, that's how it worked.

(USCA5 527, page 49, lines 1-25, page 50, lines 1-9).

When questioned about the correspondence that the Fosters received from Ocwen explaining alternatives to foreclosure, and what that correspondence meant to him, Rickey Foster replied, "That if I sent all this stuff in, that *they would possibly* do a loan modification." (USCA5 524, page 40, line 8-12) (Emphasis added).

Furthermore, when asked what errors Ocwen made in servicing the Fosters' loan, Rickey Foster replied, "Communication." When asked to elaborate, he replied,

They gave me--a--the gentlemen that I talked to gave me a false sense that --and based on what happened before with the loan modification, I thought everything was okay. I thought it was

> just taking a long time to get it done like before and it was going to end up working out.

(USCA5 524, page 59, line 18-23). Clearly Mr. Foster knew that a loan modification had not been approved by Appellees in 2009, but he was just assuming, incorrectly, that the 2009 loan modification application would be approved as it had previously.

Appellees win Summary Judgment. The Appellees filed a motion for summary judgment on all of the Fosters' claims on May 31, 2011 (USCA5 188-531). The District Court expressly rejected the Fosters' arguments when it awarded the Appellees summary judgment on all of the Fosters' claims. USCA5 732-759; 877-885. The District Court's ruling was correct.

SUMMARY OF THE ARGUMENT

The District Court's judgment in favor of Appellees on the Fosters' claims was the correct ruling. The bottom line is that the Fosters defaulted on the Note and Deed of Trust, and the Appellees properly accelerated the loan and foreclosed on the Property. The Fosters raise numerous issues on appeal, all of which have been properly addressed by the District Court in its ruling in favor of Appellees on all of the Fosters' claims. In summary:

a) The Fosters have no standing to challenge the assignments of the loan documents as they are not parties to the assignments, MERS had authority to transfer the loan, Appellees had authority to accelerate and foreclose the loan as

the assignment of lien is in writing and predates the acceleration and foreclosure, and the recorded assignment of lien was for recording and notice purposes-the actual assignment was completed pursuant to the Transfer and Servicing Agreement (described in n. 3, p. 15 *infra*).

b) Any modification of a loan over the amount of $50,000 is subject to the statute of frauds and no exceptions to the statute of frauds are applicable in this case. Additionally, the Fosters signed a Loan Addendum agreeing that the loan documents executed at the closing were the final agreement between the parties.

c) Appellees did not agree to a loan modification in 2009 (the Fosters never completed a loan modification application and were aware a loan modification had not been completed), nor did Appellees agree not to foreclose on the Fosters' loan.

d) Appellees are not required to post a bond pursuant to the Texas Finance Code as they are not "third party debt collectors" as defined in the Texas Finance Code, nor is there any evidence that Appellees made false representations to the Fosters in violation of Section 392.304(a)(19) of the Texas Finance Code.

e) Appellees did not make misrepresentations to the Fosters about their loan or about any loan modification or foreclosure, nor did Appellees harass the Fosters in collecting a debt.

f) The Fosters do not have superior title to the Property; Appellees rightfully and lawfully accelerated the loan and foreclosed in accordance with the loan

documents.

g) The Fosters are not entitled to an accounting and have been provided a loan transaction history in discovery.

h) The Fosters are not entitled to a declaratory judgment action as declaratory relief does not create any substantive rights or causes of action, and the Fosters are not entitled to relief on any of their claims.

i) The Declaration of Nichelle Jones establishes a basis for her personal knowledge and is not conclusory.

ARGUMENT AND AUTHORITIES

The evidence and undisputed facts demonstrate that the Fosters are in default under the Loan and have breached the terms of the Note and Deed of Trust, and the Appellees are entitled to summary judgment on the Fosters' claims. The Fosters have presented no evidence on at least one element of each of Fosters' claims that Appellees breached the Note or Deed of Trust, made negligent misrepresentations, committed the tort of unreasonable collection efforts, violated the Texas Finance Code, or that the Fosters are entitled to claims for declaratory judgment or an accounting, or on the Fosters' other claims. No fact issue exists relative to the Fosters' claims, the Fosters are not entitled to any relief against Appellees, and the District Court properly awarded summary judgment to Appellees on Fosters' claims.

ISSUE 1: The District Court did not err in finding that the assignment of the Note and Deed of Trust to U.S. Bank was effective because i) the Fosters have no standing to challenge the assignment and ii) the assignment occurred prior to the acceleration and foreclosure.

The Fosters lack standing to challenge the assignment of lien. In order to establish standing, a plaintiff must assert his or her own legal rights and interest, and cannot rely on the legal rights and interests of a third party. *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (citing, *e.g.*, *Tileston v. Ullman*, 318 U.S. 44 (1943); *United States v. Raines*, 362 U.S. 17 (1960)); *see also Apache Bend Apartments, Ltd. v. United States*, 987 F.2d 1174, 1176 (5th Cir. 1993) (en banc) (internal quotation omitted). The Fosters contest the assignment of the Note and Deed of Trust to U.S. Bank because they claim that the assignment was not effective when the acceleration of the Fosters' loan occurred. *Appellants' Brief,* p. 12.

The Fosters lack standing to assert a claim based on the assignment of their mortgage loan because they cannot prove their privity to the assignment. *See Pagosa Oil and Gas, L.L.C. v. Marrs and Smith Partnership*, 323 S.W.3d 203, 210 (Tex. App.-El Paso 2010, pet. denied) (citing *OAIC Commercial Assets, L.L.C. v. Stonegate Village, L.P.*, 234 S.W.3d 727, 738 (Tex. App.-Dallas 2007, pet. denied)). The Fosters do not claim to be parties to the assignment of the note and deed of trust, nor do they claim to be third-party beneficiaries of the assignment of the note and deed of trust, and in fact, the Fosters are not parties or third-party

beneficiaries of the assignment. A plaintiff has no standing to contest various assignments if he or she was not a party to the assignment. *Eskridge v. Fed. Home Loan Mortgage Corp.*, No. 6:10–CV–285, 2011 WL 2163989, at *5 (W.D. Tex. Feb. 24, 2011). Further, no provision of the assignment of the Fosters' note or deed of trust "manifest[s] a clear intent to benefit the borrowers" and under Texas law, "a presumption exists that parties contracted for themselves unless it 'clearly appears' that they intended a third-party to benefit from the contract." *See Trevino v. Evanston Insurance Co., et al.*, No. M-11-8, 2011 WL 2709063, at *3 (S.D. Tex. July 12, 2011).

The assignment occurred prior to the acceleration and foreclosure. The Transfer of Lien transferring the Note and Deed of Trust liens to U.S. Bank was dated effective August 25, 2007, but was executed January 27, 2010. (USCA5 316). In fact, Ocwen's representative, Nichelle Jones, testified that the assignment of Note and Deed of Trust was actually completed in February 1, 2005 (pursuant to the Transfer and Servicing Agreement, *see* discussion *infra* at pp. 15-16), and a correction Transfer of Lien was being prepared.[2] (USCA5 238, ¶5). Therefore U.S. Bank has been the owner and holder of the Note since February 1, 2005.

[2] A Transfer of Lien was filed on February 22, 2010, in the Real Property Records of Hunt County, Texas. (USCA5 316). The filed Transfer of Lien states that the date of the transfer agreement was August 25, 2007; however, that is not correct, and a correction transfer of lien will be filed with the correct date of February 1, 2005. Under Texas law, there is no requirement that a deed of trust assignment be recorded, and the ability to foreclose on a deed of trust is transferred when the note is transferred, not when an assignment of deed of trust is either prepared or recorded. *Bittinger v. Wells Fargo Bank, N.A.*, 744 F. Supp.2d 619, 625 (S.D. Tex. 2010).

(USCA5 238, ¶5).

The Fosters contend that as the acceleration of the loan was made on January 22, 2010, after the execution date of the Transfer of Lien, the assignment is not effective. *Appellants' Brief*, p. 12. However, under Texas law, there is no requirement that a deed of trust assignment be recorded, and the "ability to foreclose on a deed of trust is transferred when the note is transferred, not when an assignment of deed of trust is either prepared or recorded." *Bittinger*, 744 F.Supp.2d at 625 (*citing JWD, Inc. v. Fed. Ins. Co*., 806 S.W.2d 327, 329-30 (Tex. App.-Austin 1991, no writ)); *see also Allen v. Chase Home Finance, LLC*, No. 4:11-cv-223, 2011 WL 2683192, at *4 (E.D. Tex. June 10, 2011); *McAllister v. BAC Home Loans Servicing, LP*, No. 4:10–CV–504, 2011 WL 2200672, at *5-6 (E.D. Tex. Apr. 28, 2011). The written copy of the assignment in the record bears an effective date of August 25, 2007 (USCA5 316), but Nichelle Jones has testified that the assignment was actually in February 1, 2005 (USCA5 238, ¶5)--and both dates are prior to the acceleration date and notice of foreclosure (USCA5 331-346).

The Fosters assert that Sections 26.01 and 26.02 of the Texas Business and Commerce Code, and Section 5.021 of the Texas Property Code hold that an assignment is not effective until they are made in writing. *Appellants' Brief*, p. 12. First, as set forth above, the Fosters were not parties to the assignment so they have no grounds to complain about the assignment agreement. Second, the assignment

was in writing. Third, Chapter 5 of the Texas Property Code governs transfers of real property, and is inapposite. Section 5.021 of the Texas Property Code states, "A conveyance of an estate of inheritance, a freehold, or an estate for more than one year, *in land and tenements*, must be in writing and must be subscribed and delivered by the conveyor or by the conveyor's agent authorized in writing." TEX. PROP. CODE §5.021.

Furthermore, the recorded Transfer of Lien was filed for notice purposes; the actual assignment was completed pursuant to the Transfer and Servicing Agreement dated February 1, 2005.[3]

The Fosters did not have standing to contest the assignments because they were not parties to the assignments. Furthermore, the assignment of the loan occurred prior to acceleration and foreclosure regardless of the dates that may have been contained in the contested Transfer of Lien. The trial court did not err in finding that the Transfer of Lien was effective.

ISSUE 2: The Trial Court Properly Granted Summary Judgment for Appellees on the Fosters' claim of waiver because i) waiver is a defense and ii) Appellees addressed all of the Fosters' arguments.

The Fosters contend that they sued under a theory of waiver that was

[3] The Transfer and Servicing Agreement dated February 1, 2005, was by and between Aegis Asset Backed Securities Trust 2005-1, Issuer, Aegis Asset Backed Securities Corporation, Depositor, Aegis REIT Corporation, Seller, Wells Fargo Bank, N.A., Master Servicer, Administrator and Custodian, Ocwen Federal Bank FSB, Servicer, The Murrayhill Company, Credit Risk Manager, and Wachovia Bank, National Association, Indenture Trustee (predecessor of U.S. Bank), and can be located in the public records at http://www.sec.gov/archives/edgar/data/1319303/000116231805000191/exhibit9991.htm.

unaddressed in Appellees' Motion for Summary Judgment. *Appellants' Brief,* p. 12.

First, waiver is a defense, not a cause of action. *Hruska v. First State Bank of Deanville*, 747 S.W.2d 783, 785 (Tex. 1988); *see also Thomas v. Compass Bank*, No. 01-01-00467-CV, 2002 WL 1340333, at *3 (Tex. App.-Houston [1 Dist.], June 20, 2002, no pet.).

Second, the "waiver" argument allegedly raised by the Fosters was addressed. The first cause of action listed in Section V. of the Fosters' First Amended Original Complaint is entitled "Breach of Contract and Anticipatory Breach of Contract." (USCA5 142, Section V.). Within Paragraph 21 of that section of the Fosters' Complaint, the Fosters argue that Appellees i) approved a loan modification for the Fosters and then failed to accept payments, ii) misrepresented to the Fosters that Appellees were not accelerating the note, and iii) failed to give the Fosters an opportunity to pay the past due installments before accelerating the loan. (USCA5 142-145). The Fosters went on to state in their Complaint that such action constitutes a "waiver of the right to accelerate and foreclose." (USCA5 142, ¶21).

While Appellees may not have specifically used the word "waiver" in their summary judgment argument, all issues raised in the Fosters' Complaint were addressed. The Fosters' allegations that they were promised a loan modification

and that no foreclosure would occur was addressed in Appellees' summary judgment arguments under Section V.B.i) of the Appellees' Brief in Support of the Motion for Summary Judgment ("Motion") relative to breach of contract (USCA5 208-210, ¶¶ 32-39), and Section V.B.ii) of the Motion relative to the statute of frauds (USCA5 211-213, paras 40-48), as well as in Pages 2-6 of their reply to the Fosters' response to Appellees' Motion. (USCA5 692-696). The Appellees properly addressed all of the Fosters' claims raised in their First Original Amended Complaint, and were properly granted summary judgment by the District Court.

ISSUE 3: The District Court properly overruled the Fosters' objections to Appellees' summary judgment evidence as i) Nichelle Jones basis for personal knowledge was established, and ii) the Fosters failed to identify any alleged conclusory statements.

The Fosters contend that the District Court erred in overruling their objections to the Declaration of Nichelle Jones based on i) lack of a showing of a basis for purported personal knowledge of Ms. Jones, and ii) conclusory statements that are not supported by evidence rendering them heresay. *Appellants' Brief,* p. 15.

Ms. Jones' declaration establishes basis for personal knowledge. The Fosters claim that Ms. Jones does not show that she has personal knowledge of the matters contained in her Declaration. *Appellants' Brief*, p. 15. However, Ms. Jones stated in her Declaration that she had worked at Ocwen for 12 years. (USCA5 237, ¶2). She states that she "held the position of Loan Analyst at Ocwen since January

2006. (USCA5 237, ¶2). According to her Declaration, in that position, "[her] job duties include: researching the loan histories of parties who are in litigation with Ocwen; determining whether or not these parties made timely principal, interest, escrow and other payments on their mortgages that Ocwen services; reviewing the loan files that Ocwen has for these parties to determine whether the loans were properly originated and serviced; and serving as Ocwen's corporate representative in trials, court hearings, depositions and mediations as necessary." (USCA5 237-238, ¶2).

Ms. Jones states in her Declaration that "All statements of fact made herein are true, correct, and within my personal knowledge." (USCA5 237, ¶1). She further states that "I researched and reviewed the documents in Ocwen's possession regarding the loan of Michelle Foster and Rickey Foster that has been serviced by Ocwen, and the statements in this Declaration are based upon my research and review of these documents." (USCA5 238, ¶3). Furthermore, Ms. Jones stated that,

> I am a custodian of records for Ocwen. Attached hereto are business records of Ocwen. These records are kept by Ocwen in the regular course of business, and it was the regular course of practice of Ocwen for an employee or representative of Ocwen with knowledge of the act, event, condition, or opinion recorded to make the record or to transmit information thereof to be included in such records; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the originals or exact duplicates of the originals.

(USCA5 240, ¶18).

In *Dalton v. FDIC*, 987 F.2d 1216, 1223 (5th Cir. 1993), the court used personal experience as an example of a way a corporate office may gain personal knowledge. *Id.* at 1223. The Court further held that "an affidavit of an FDIC account officer is not defective solely because the officer did not have personal knowledge of the loan transaction when it occurred, and only learned about the transaction after the bank went into receivership." *Id. (citing RTC v. Camp, 965* F.2d 25, 29 (5th Cir. 1992)).

The Fifth Circuit has held that a bank employee may gain personal knowledge by reviewing the organization's records, which may include records from a predecessor company. *Dalton*, 987 F.2d at 1223. Furthermore, an affiant may gain personal knowledge about activities in which she did not personally participate, and an affiant's personal knowledge and competence to testify may be inferred from her position. *Madison One Holdings, LLC v. Punch International, NV*, Civil Case No. 4:06-cv-3560, 2009 WL 911984, at *11 (S.D. Tex. Mar. 31, 2009)(internal citations omitted). Ms. Jones's testimony is based on review of the documentation concerning the loans guaranteed by Defendant. (USCA5 237-238, ¶3). Furthermore, Ms. Jones states that the records attached to her Declaration are "business records of the Ocwen" and "kept in the normal course of business." (USCA5 240, ¶18). The exhibits are properly-authenticated business records, *see*

FED. R. EVID. 803(6), and the Declaration establishes the personal knowledge of Ms. Jones relative to her statements regarding the Fosters' loan.

The Fosters further complain that in her Declaration Nichelle Jones provides inadmissible conclusory statements. *Appellants' Brief*, p. 15. The Fosters do not say which statements are supposedly legal conclusions. *See Appellants' Brief*, p. 15-20. Without providing any specific basis for their objections, the Fosters failed to make a proper objection to the Declaration on this argument. *Tucker v. SAS Institute, Inc*., 462 F.Supp.2d 715, 722 (N.D. Tex. 2006) (objections to summary-judgment evidence must be specific).

The Fosters' objections to the Appellees' summary judgment evidence were properly overruled by the District Court.

ISSUE 4: The District Court properly found for Appellees on the Fosters' claims for breach of contract.

MERS, as nominee for Success Investments, Inc., the original lender, executed the Transfer of Lien to U.S. Bank. (USCA5 316). The Transfer of Lien states that it transfers the assignor's interest in the Deed of Trust, but also "any and all notes and obligations therein described or referred to . . ." (USCA5 316, second paragraph).

The Fosters contend that that MERS lacked authority to transfer the applicable loan documents, and therefore Appellees lacked authority to foreclose on the Fosters' loan. *Appellants' Brief*, pp. 21-27. The Fosters also argue that the

District Court erred in its interpretation of certain exceptions to the statute of frauds, as the Fosters claim that promissory estoppel and partial performance should bar the Appellees from relying on the statute of frauds and from foreclosing under the Deed of Trust, and they assert that the Appellees made misrepresentations to the Fosters about their loan modification. *Appellants' Brief*, pp. 27-31. The Fosters also claim that the District Court erred in finding that Ocwen was allowed to appoint a substitute trustee. *Appellants' Brief*, p. 31.

However, as will be shown in below, i) the Fosters have no standing to challenge the assignment, ii) MERS may execute such assignments, iii) the Fosters' arguments relative to the statute of fraud exceptions are inapplicable to the facts of this case, and iv) there is no evidence to show that the Appellees made misrepresentations to the Fosters about the loan modification, and v) Ocwen did not appoint the substitute trustee in Ocwen's name, but as attorney in fact for U.S. Bank, the holder of the Note and Deed of Trust.

Sub-Issue 4a: The District Court properly found that the Fosters do not have standing to contest the assignment from MERS to U.S. Bank.

The Fosters lack standing to assert a breach of contract claim based on the assignment of their mortgage loan because they cannot prove their privity to the assignment. *See Pagosa Oil*, 323 S.W.3d at 210. The Fosters do not claim to be parties to the assignment of the Note and Deed of Trust, nor do they claim to be

third-party beneficiaries of the assignment of the note and deed of trust, and in fact, the Fosters are not parties or third-party beneficiaries of the assignment. Recent case law has confirmed that a plaintiff has no standing to contest various assignments as he or she was not a party to the assignment. *Eskridge*, No. 6:10–CV–285, 2011 WL 2163989, at *5; *see also Allen*, 2011 WL 2683192, at *4; *McAllister*, 2011 WL 2200672, at *5-6. Further, no provision of the assignment of Fosters' note or deed of trust "manifest[s] a clear intent to benefit the borrowers" and under Texas law, "a presumption exists that parties contracted for themselves unless it 'clearly appears' that they intended a third-party to benefit from the contract." *See Trevino*, No. M-11-8, 2011 WL 2709063, at *3.

The Fosters rely on *Wells Fargo Bank, N.A. v. Ballestas*, No. 01-10-00020-CV, 2011 WL 1835265 (Tex. App.-Houston [1st Dist.] May 12, 2011, no pet.) in support of their position, and claim that the District Court erred in its interpretation of the case. *Appellants' Brief*, p. 20. The court in *Ballestas*, relying on its earlier opinion in *Yasuda Fire and Marine Ins. Co. of America v. Criaco*, 225 S.W.3d 894 (Tex. App.-Houston [14th Dist.] 2007, no pet.), merely held that the court had previously determined an issue regarding whether the lender in that case could enforce a note—there was no discussion about whether the borrowers, as strangers to the assignments, had standing to contest them. The *Ballestas* court said so itself:

> In response, Wells Fargo contends that the 280th District Court's reference to standing indicates that the court

> lacked subject-matter jurisdiction to render a final judgment. We reject this contention. "[T]he question of whether a party is entitled to sue on a contract is sometimes informally referred to as an issue of standing." [Citations omitted]. Because ownership of the promissory note was an essential element of Wells Fargo's right to collect on it, [citations omitted] the 280th District Court's determination that Wells Fargo did not own the promissory note is a determination on the merits, not one of jurisdiction. [Citations omitted]. Thus, the prior final judgment is not void.

Id. at *5.

The issue in that case was the authority of a lender to foreclose, as is reflected in the above. The *Ballestas* case did not adjudicate a question of the borrower's standing.

The District Court properly found that the Fosters' contest of the assignments of the loan documents should therefore be dismissed for lack of standing.

Even assuming that a plaintiff does have standing to contest an assignment of a note, allegations that MERS lacks authority to assign a note are without merit because "the note and deed of trust are construed together as a single document." *Eskridge*, 2011 WL 2163989, at *5. Furthermore, under Texas law, the "ability to foreclose on a deed of trust is transferred when the note is transferred, not when as assignment of deed of trust is either prepared or recorded." *Bittinger*, 744 F.Supp.2d at 625. MERS is identified in the Deed of Trust as the nominee for the

original noteholder and all successors and assigns. (USCA5 258¶(E)). *See Allen*, 2011 WL 2683192, at *4; *McAllister*, 2011 WL 2200672, at *5. Accordingly, MERS is able to convey the interest in the subject deed of trust to U.S. Bank as the successor noteholder. *See Allen*, 2011 WL 2683192, at *4; *McAllister*, 2011 WL 2200672, at *5.

Furthermore, at no time did the Fosters contest the ownership of the note until they were in default and initiated this lawsuit. The Fosters and Ocwen executed a loan modification agreement in 2008 wherein the Fosters agreed to "forever irrevocably waive and relinquish any claims, actions or causes of action, statute of limitations or other defenses…which exist as of the date of this modification, whether known or unknown...in connection with the making, closing, administration, collection or the enforcement by Ocwen of the loan documents…" (USCA 323, ¶7).

The Fifth Circuit recently examined the effect of such agreements on subsequent claims in *Lozano v. Ocwen Federal Bank, FSB*, 489 F.3d 636 (5th Cir. 2007), a case bearing almost identical facts to this case. The Fifth Circuit held that the borrowers were estopped from taking a position inconsistent with the terms of a forbearance agreement wherein the borrowers agreed that "they have no defense, setoff or counterclaim with respect to the default or their obligation under the Note and Mortgage" because they had received the benefit of Ocwen's forbearance from

pursuing its default remedies under the loan documents. *Lozano*, 489 F.3d at 639. The Fosters may not now take a position inconsistent with the loan modification agreement by disputing U.S. Bank's ownership of the note.

It is not for plaintiff to interject arguments between assignor and assignee, when they have no disputes between them, in an effort to walk the note. That is the essence of why the Fosters have no standing to contest the assignments, and the District Court properly ruled on this issue.

Sub-Issue 4b: The District Court properly found no merit to the Fosters' argument that the assignment from MERS to U.S. Bank is unenforceable and that Appellees lacked authority to foreclose on the Fosters' loan.

The Fosters claim that the assignment by MERS, as nominee, in the Transfer of Lien was unenforceable because the note was not transferred. *Appellants' Brief*, p.23. The Fosters offer no authority to contradict the several recent cases that have held that MERS may execute such documents. *See, e.g.*, *Defranceschi v. Wells Fargo Bank, N.A.*, No. 4:10–CV–455–Y, 2011 WL 3875338, at *4 (N.D. Tex. Aug. 31, 2011)*; Wigginton v. Bank of N.Y. Mellon*, No. 3:10–CV–2128–G, 2011 WL 2669071, at *2 n. 2 (N.D. Tex. July 7, 2011); *Allen*, 2011 WL 2683192, at *3–4; *Eskridge*, 2011 WL 2163989, at *5.

The Fosters argue the note and deed of trust were split because, according to the Fosters, MERS cannot serve as a nominee for the noteholder. *Appellants' Brief*, pp. 22-27. The Fosters make this argument despite the express approval of "book

entry systems" like MERS in Texas law. TEX. PROP. CODE §51.0001(1). Further, recent case law has determined that MERS may properly act as the beneficial holder of a deed of trust and when a note gets transferred from one mortgagee to another, the interest in the subject deed of trust goes along with it. As one Court recently held:

> Plaintiff has no standing to contest the various assignments as she was not a party to the assignments. Even if she has standing, her allegations are without merit because MERS was given the authority to transfer the documents in the Deed of Trust. The Restatement (3d) of Property offers no support for Plaintiff's claims. As MERS is a beneficiary and nominee for both the originating lender and its successors and assigns by the express language in the Deed of Trust, the situation falls within an exception to the general rule that a party holding only the deed of trust cannot enforce the mortgage. *See Comment e to the Restatement (3d) of Property (Mortgages)* § 5.4. Section 5.4 additionally notes that a "transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise." Plaintiff makes no allegations that the parties in this case agreed otherwise. Finally, while the Note may not specifically mention MERS, the Note and Deed of Trust must be read together in evaluating the terms ... thus, the Note and Deed of Trust are construed together as a single instrument.

Eskridge, 2011 WL 2163989, at *5. In a similar a case brought by the same plaintiffs attorneys in the present matter, the Court relied upon *Eskridge* in concluding that there was no basis for the plaintiffs' "splitting of note and deed of trust" argument. *McAllister*, 2011 WL 2200672, at *5-6. The subject deed of trust

in this lawsuit expressly provided that MERS held the deed of trust interest for the benefit of the original noteholder and its successor and assigns. (USCA5 257). MERS, thus, was able to convey the interest in the subject deed of trust to U.S. Bank as the successor noteholder. *See McAllister*, 2011 WL 2200672, at *5-6.

The District Court properly held that MERS could transfer the entire loan, and that Appellees were authorized to foreclose.

Sub-Issue 4c: The District Court did not err in its application of the law concerning the Statute of Frauds and finding that no oral agreement exists that Appellees would modify the loan or when Appellees would foreclosure.

Section 26.02 of the Texas Business and Commerce Code requires that loan agreements exceeding fifty thousand dollars to be in writing. The loan modification at issue in the present case must be in writing as it involves a loan over fifty thousand dollars. In the absence of any writing, these loan agreements are not enforceable. TEX. BUS. & COMM. CODE §26.02(b). Here, the Fosters executed the Note on or about December 10, 2004, in the amount of $118,750.00, which was secured by a Deed of Trust. (USCA5 243-250). Because the Note constituted a loan agreement in excess of fifty thousand dollars, the agreement was required to be in writing, and in fact, was written. TEX. BUS. & COMM. CODE §26.02. (USCA5 243-250).[4]

[4] The Fosters also executed the Loan Agreement Addendum stating that there were no oral agreements to the loan. (USCA5 310).

Any modification to an existing agreement must be in writing if the "modification encompasses or relates to a matter that must be in writing." *Deuley v. Chase Home Finance, LLC*, Civil Action No. H-05-04253, 2006 WL 1155230, at *2 (S.D. Tex. Apr. 26, 2006). When a purported oral modification relates to an original loan agreement that exceeds fifty thousand dollars, that oral modification must also be reduced to writing. *Id.*; *Burnette v. Wells Fargo Bank, N.A.*, No. 4:09-cv-370, 2010 WL 1026968, at *4 (E.D. Tex. Feb. 16, 2010). The only exception to this rule is if the time for performance alone is extended prior to the time for performance. *Deuley*, 2006 WL 1155230, at *2; *Triton Commercial Properties, Ltd. v. Norwest Bank Texas, N.A.*, 1 S.W.3d 814, 818 (Tex. App.-Corpus Christi 1999, pet. denied). However, such modification cannot materially alter any terms of the underlying written contract. *Deuley*, 2006 WL 1155230, at *2; *Triton*, 1. S.W.3d at 818.

The Fosters claim that promissory estoppel and part performance are exceptions to the statute of frauds that are applicable in the present case such that the Fosters should be able to avoid the requirements of the statute of frauds. *Appellants' Brief*, p. 29. The Fosters base their promissory estoppel and part performance arguments on alleged oral representations or agreements made by Appellees to the Fosters that Appellees would provide a loan modification and that no foreclosure would occur for a period of time. *Appellants' Brief*, pp. 30-31.

The Fosters do not state in their Appellants' Brief how the facts in this case fit the elements of promissory estoppel or part performance, they just list a number of statements or actions purportedly made by Appellees and make the blanket statement that "[t]hese instances show promissory estoppel barring Appell[ees] from relying on the statute of frauds and from proceeding to foreclosure under the contracts as well as promissory estoppel for partial performance." *Appellants' Brief*, pp. 30-31. The Fosters do not explain how these "instances" meet the requirements of either promissory estoppel or part performance, and in fact they do not. The Fosters' list of "evidence" merely shows that there was discussion between the parties about a loan modification, however, the Fosters never submitted a complete loan modification application, knew the loan agreement was not modified (*see* discussion *infra*, pp. 31-34), and they admitted that Appellees did not agree to modify the loan or promise not to foreclose. (*See* discussion *infra*, pp. 35-36).

Promissory Estoppel. To establish the defense of promissory estoppel, the plaintiff must establish i) a promise, ii) reliance thereon that was foreseeable to promissor, and iii) substantial reliance by promissee to his or her detriment. *Lozada v. Farrall & Blackwell Agency, Inc*., 323 S.W.3d 278, 291 (Tex. App.-El Paso 2010, no pet.). There is an additional requirement that the promisor promised to sign a written document complying with the statute of frauds when promissory

estoppel is raised. *Ford v. City Bank of Palacios*, 44 S.W.3d 121, 139 (Tex. App.-Corpus Christi 2001, no pet.). The Fosters have not argued, nor is there any evidence in the record, that Appellees promised to execute a written document incorporating any alleged oral agreement.

Partial Performance. If a contract has been partially performed, but does not meet the requirements of the statute of frauds, the contract may be enforced in equity if denial of enforcement would amount to virtual fraud. C*armack v. Beltway Dev. Co*., 701 S.W.2d 37, 40 (Tex. App.-Dallas 1985, no writ). The fraud arises when there is strong evidence the existence of an agreement and its terms, and the party acting in reliance on the contract has suffered substantial detriment for which he has no adequate remedy, and the other party, if permitted to plead statute of frauds, would reap unearned benefit. *Id*. The acts of performance relied upon to take a parol contract out of the statute of frauds must be such as could have been done with no other design than to fulfill the particular agreement sought to be enforced. *Exxon Corp. v. Breezevale Ltd*., 82 S.W.3d 429, 438 (Tex. App.-Dallas 2002, no pet.). The Fosters never sent in a complete loan modification application. (USCA5 509-512, 650-653). Ocwen's representative, Diane Comstock, stated in her deposition that the Fosters' application for a loan modification had to be complete for any action to be taken on it. (USCA5 772, ¶9). Submitting an incomplete loan modification does not amount to partial performance.

The Fosters admit loan was not modified in 2009 and failed to submit complete loan modification application. Rickey Foster admitted in his deposition that he was not told by Ocwen that the Fosters' 2009 loan modification application was approved (USCA5 527, page 49, lines 22-24), and that he was not sent a loan modification agreement to execute relative to the 2009 modification application, even though he acknowledged that for the previous modifications he had to execute a loan modification agreement. (USCA5 527, page 49, line 25; page 50, lines 1-2). In his deposition, Rickey Foster stated,

> Q. Okay. So you submitted all the information in. And did Ocwen or U.S. Bank send you a letter notifying you that your modification had been approved?
>
> A. For the first one or---
>
> Q. This is the --no, this is the most recent, the 2009 loan modification request.
>
> A. No, I never received a letter.
>
> Q. Okay. And this loan modification was to modify the first lien note?
>
> A. Yes, ma'am.
>
> Q. Okay. The big one. So did they indicate to you at all that it was approved?
>
> A. The--the people that I talked to on the phone told me that--that it was in the system and it just took time.
>
> Q. Okay.
>
> A. And I knew that to be true from--from what happened the first time.
>
> Q. Okay.
>
> A. It took a long time.
>
> Q. Did they tell you that everything was approved?
>
> A. They never told me that, no.
>
> Q. Okay. Did they send you a loan modification agreement to sign for 2009 or 2010?
>
> A. No.

> Q. Okay.
> A. I don't believe so.
> Q. Okay. But typically, in the past, they would send you the new loan modification terms? You had to sign it and send it back in? That's how it worked the first time?
> A. The first time, that's how it worked.

(USCA5 527, page 49, lines 1-25, page 50, lines 1-9).

When questioned about the correspondence that the Fosters received from Ocwen explaining alternatives to foreclosure, and what that correspondence meant to him, Rickey Foster replied, "That if I sent all this stuff in, that *they would possibly* do a loan modification." (USCA5 524, page 40, line 8-12) (Emphasis added).

Furthermore, when asked what errors Ocwen made in servicing the Fosters' loan, Rickey Foster replied, "Communication." When asked to elaborate, he replied,

> They gave me--a--the gentlemen that I talked to gave me a false sense that --and based on what happened before with the loan modification, I thought everything was okay. I thought it was just taking a long time to get it done like before and it was going to end up working out.

(USCA 529, page 59, line 18-23). Clearly Mr. Foster knew that a loan modification had not been approved by Appellees in 2009, but he was just assuming, incorrectly, that the 2009 loan modification application would be approved as it had been previously.

The Fosters have admitted that they never received a loan modification agreement in 2009, whether oral or in writing. (USCA5 527, page 49, lines 22-24, page 50, lines 1-2). Moreover, in response to Appellees' discovery requests, the Fosters were unable to produce a copy of the purported complete loan modification application. (USCA5 498-512). Indeed, the Fosters present no evidence that they ever actually applied for a loan modification in the days leading up to the March 2, 2010 foreclosure sale.

In fact, the evidence clearly shows that the Fosters did not submit a complete application. (USCA5 509). The documents which the Fosters produced in discovery which purportedly show their effort to apply for a loan application are missing three of the four items expressly requested; namely:

- Two of the Fosters' most-recent pay stubs;
- A W-2 Statement of Federal Income Tax Form; and
- Two of the Fosters' most recent bank statements.

(USCA5 509-512; see also the Fosters' appendix to their summary judgment response at USCA5 650-653). In the application itself, the Fosters confirm, by checking only one of the four boxes, that they have not fully completed the application. (USCA5 509, 650)

There is only one reference in Ocwen's records about an effort by the Fosters to apply for a loan modification prior to the March 2, 2010 foreclosure sale

occurs. (USCA5 382-383, 408-409). Those records reflect a conversation on January 28, 2011 where Rickey Foster is asked when he is going to send in the application. (USCA5 382-383, 408-409). The records show that the application form was sent to Mr. Foster that same day. (USCA5 382-383, 408-409). Those records, however, reveal no effort thereafter on the part of the Fosters to send in an application, whether complete or incomplete, even though Mr. Foster said he would submit it by February 7, 2011. (USCA5 382-383, 408-409).

However the Fosters may characterize the communications with Appellees before foreclosure, the fact remains that they have not produced a complete loan modification application, and the reason they have not is that they cannot. *See Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 386 (5th Cir. 2000) (sham affidavits will not create a fact issue).

Appellees did not promise the Fosters that no foreclosure would occur. In an effort to avoid the application of the statute of frauds, the Fosters claim that they were promised that no foreclosure would occur. *Appellants' Brief,* pp. 30, 31. That is not what the evidence indicates. While Ocwen may have allowed for the passing of foreclosure-sale dates upon the submission of a complete loan-modification package, but not for an incomplete package. The Fosters made this point themselves in their summary judgment response brief by referencing a supposed quote from an Ocwen representative, "*if everything is submitted*

correctly, you probably [will] not hear from your account representative until you are approved or denied based upon the government's requirements. The approval process may take up to 30 days to complete, but please know the foreclosure will not occur during the time period *provided that your application has been submitted and is complete*." (USCA5 556, p. 9, ¶2) *(emphasis added).*

The Fosters' allegations that they expected the foreclosure proceedings to simply stop is contrary to the application itself, as well as their experience with prior loan modifications. (USCA5 527). In those prior occurrences, Mr. Foster knew that foreclosure proceedings would only stop if an agreement were reached. (USCA5 527). Mr. Foster acknowledged, with regard to the March 2, 2010 foreclosure sale, that no agreement had been reached. (USCA5 527).

Neither did the Fosters perform anything in connection with the alleged promised loan modification. And neither have the Fosters produced any evidence of an actual loan modification agreement that Appellees supposedly agreed to sign. Accordingly, the Fosters' arguments relative to promissory estoppel and part performance in connection with the statute of frauds is unfounded.

Even assuming the Fosters did submit a complete application, the Fosters can identify no written offer or agreement from Appellees that a foreclosure would not occur. There is no evidence anywhere of any written offer that Appellees would not foreclose which would be required to comply with the statute of frauds.

The Fosters were never promised, either orally or in writing, that a loan modification would be given to them or that foreclosure would not occur, nor have the Fosters established that promissory estoppel or part performance would be applicable on the facts of this case to avoid the statute of frauds. The District Court properly applied the law relative to the statute of frauds in failing to find merit in the Fosters' arguments that promissory estoppel or part performance was applicable in the present case.

Sub-Issue 4d: The District Court properly found that Ocwen, as attorney in fact, was allowed to appoint a substitute trustee.

The Fosters argue that the Ocwen did not have the right to appoint a substitute trustee. *Appellants' Brief*, p. 31. The Note and related Loan Documents were assigned to the Bank on February 1, 2005. (USCA5 238, ¶5, USCA5 316). *See* discussion *supra* at pp. 15-16. Pursuant to the Deed of Trust, the Bank had the right to appoint a substitute trustee. (USCA5 294, ¶20). The proper party executed the Appointment of Substitute Trustee, which was the lender, U.S. Bank. (USCA5 326). The Appointment of Substitute Trustee is executed by U.S. Bank, through Ocwen Loan Servicing, LLC, its attorney-in-fact. (USCA 326). Ocwen did not sign the Appointment of Substitute Trustee on its own behalf, but as attorney-in-fact for U.S. Bank. (USCA5 326). The District Court did not err in ruling that U.S. Bank had the authority to appoint the substitute trustee.

The District Court properly granted summary judgment for Appellees on the Fosters' claims for breach of contract.

ISSUE 5: The District Court properly granted summary judgment for Appellees on the Fosters' anticipatory breach of contract claim.

In Texas, in order to prevail on a claim for anticipatory breach, a plaintiff must establish each of the following elements: (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. *Taylor Pub. Co. v. Sys. Mktg. Co.,* 686 S.W.2d 213, 217 (Tex. App.-Dallas 1984, writ ref'd n.r.e.); *see Universal Life & Accident Ins. Co. v. Sanders,* 129 Tex. 344, 102 S.W.2d 405 (Tex Comm'n App.1937, judgm't adopted).

The Fosters contend on pages 32-33 of their Appellants' Brief that Appellees:

i) repudiated their obligations under the Deeds of Trust and Notes,

ii) repudiated their obligations under the unilateral contract formed between the parties in January 2010, when Ocwen allegedly informed the Fosters that no foreclosure sale would occur while the parties were in the loan modification process, and that the Fosters partially performed by "submitting all requested documentation, on numerous occasions,"

iii) that Appellees have no rights under the Notes because the Notes were

never validly assigned to them,

iv) that Appellees' foreclosure was a repudiation of the Deed of Trust, and that 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' Brief,* p. 32-33.

First of all, the Fosters' anticipatory breach claim in its summary judgment response brief was that Appellees failed to give proper notice of foreclosure. (USCA5 561, ¶45-46). However, the record has shown that the proper notices were provided, and the Fosters no longer appear to be making that argument on appeal. *Appellants' Brief,* pp. 32- 33. The Fosters may not make arguments here for the first time regarding the alleged repudiation of the loan agreement. *See Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 344 n.3 (5th Cir. 2007) ("It is well settled that we do not consider issues raised for the first time on appeal."). Alternatively, the Fosters' arguments on their anticipatory breach claims will be addressed one by one below.

a) The Appellees did not repudiate their obligations under the Note and Deed of Trust. The lender under the Note (or its successor and the holder of the Note, U.S. Bank) has not repudiated its obligation under the Note, but in fact made the Loan to the Fosters for the acquisition of the Property. (USCA5 243-283). As shown hereinabove, the Fosters defaulted on the Loan and Appellees rightfully

accelerated the Note and foreclosed on the Property.

b) There was no "Unilateral Contract." The Fosters contend that a unilateral contract was formed between the parties in January 2010 when Ocwen allegedly informed the Fosters that no foreclosure sale would occur while they were in the loan modification process. *Appellants' Brief*, p. 33. The Fosters' claim that they partially performed by submitting "all requested documentation." *Appellants' Brief*, p. 33.

First, the statute of frauds required that such an agreement be in writing to be enforceable. *See Fankhauser v. Fannie Mae*, No. 4:10–cv–274, 2011 WL 1630193, at *4 (E.D. Tex. Mar. 30, 2011); *Burnette*, 2010 WL 1026968, at *4.

Second, a unilateral contract is created when a promisor promises a benefit if a promisee performs. *City of Houston v. Williams*, 353 S.W.3d 128, 136 (Tex. 2011). A unilateral contract becomes enforceable when the promisee performs. *Id.* at 137. The Fosters did not perform--they failed to submit the complete modification application. (USCA5 509-512, 650-653). Ocwen's records show no such "complete" application as being received. The Fosters have not offered evidence of a complete application. (*See* discussion *supra*, pp. 30-34).

Even assuming the Fosters did submit a complete application, they can identify no written offer or agreement from Appellees that they would be approved or that a foreclosure would not occur. The fact remains that they have not

produced a complete application, and the reason they have not is that they cannot. *See Doe*, 220 F.3d at 386. The Fosters were never promised, either orally or in writing, that a loan modification would be given to them or that foreclosure would not occur.

c) The Note was validly assigned to U.S. Bank. The Note was validly assigned to U.S. Bank by the Transfer of Lien and Transfer and Servicing Agreement. *See* discussion *supra* under Issue 1 and pp. 15-16. Additionally, the Fosters have provided no authority to support its position that MERS lacks authority to transfer loan documents and in fact MERS has such authority pursuant to the Deed of Trust. *See* discussion *supra* under Issue 4.

d) Appellees had authority under the loan documents to accelerate and foreclose on the Property. The Fosters were in default of the Loan (USCA5 239-240, ¶11-17), and all proper notices were given by Appellees to the Fosters. (USCA5 239-240, ¶12-16, USCA5 326-380). Appellees had full authority to accelerate the loan and foreclose.

The District Court properly granted summary judgment in favor of Appellees on the Fosters' claims for anticipatory breach.

ISSUE 6: The District Court properly granted summary judgment in favor of Appellees on the Fosters' claim for unreasonable collection efforts.

In their Appellants' Brief, the Fosters claim that Appellees have committed

the tort of unreasonable collection efforts by improperly applying force-placed insurance and late fees to the Fosters' account as Appellees were trying to collect a debt the Fosters did not owe. *Appellants' Brief,* p. 36. However, the allegations that Appellees have improperly applied force placed insurance and late fees have not been raised by the Fosters previously. Claims raised for the first time on appeal will not be considered by the Court. *Turner*, 476 F.3d at 344 n.3.

The Foster also claim that the District Court relied on cases with "weak precedent," although the Fosters fail to explain why. *Appellants' Brief,* p. 34. The Fosters admit that the proper standard varies from case to case, *Appellants' Brief,* p. 34, but then they complain that they do not like the standard the District Court used. *Id.* The case law the District Court relied upon is appropriate.

The tort of unreasonable collection efforts is an intentional tort that requires a finding of conduct on the part of the creditor that amounts to "a course of harassment that was willful, wanton, malicious, and intended to inflict mental anguish and bodily harm." *EMC Mortgage Corporation v. Jones*, 252 S.W.3d 857, 869 (Tex. App.-Dallas 2008, no pet.). *See also Ware v. Paxton*, 359 S.W.2d 897, 899-902 (Tex. 1962) (No unreasonable collection efforts found where over a two-year period, Ware, the creditor, made numerous calls, letters, and made a visit to the Paxtons relative to the debt, told Paxton that he might have to send the sheriff out to pick up everything the Paxtons owned, and Paxton was unable to work due

to illness and bad health following the calls from Ware; Paxton's wife testified that she suffered similar treatment).

But see Household Credit Servs., Inc. v. Driscol, 989 S.W.2d 72, 81(Tex. App.-El Paso 1998, writ denied) (liability found where the lender and its collection agency made bomb and death threats to Driscol, harassed Driscol by conduct including name-calling, foul language, multiple calls to Driscol's home and work and threatening to make Driscol's life miserable, constituted an integrated barrage of harrassment that was actionable). The Fosters have presented no evidence of any conduct of Appellees that even begins to approach the facts in either the *Ware* or *Driscol* cases.

The Fosters claim that the District Court used the most stringent standard (*Appellants' Brief*, p. 33), but under any standard, the Fosters have offered no evidence that Appellees harassed or intimidated them in any way that would give rise to unreasonable collection efforts. There is no fact issue on the Fosters' claims for unreasonable collection efforts and the District Court properly granted summary judgment to Appellees on such claims.

ISSUE 7: The District Court properly granted summary judgment as to the Fosters' claims under the Texas Finance Code, including §392.304(a)(19) of the Texas Finance Code.

The Fosters claim that the Appellees violated §392.304(a)(19) of the Texas Finance Code by representing that Appellees would not foreclose while the

modification application was under review, and would put on hold any foreclosure sale until after the modification review process was completed. *Appellants' Brief,* p. 38.

The Texas Finance Code provides remedies for wrongful debt collection practices arising out of a debtor-creditor relationship. *Ford,* 44 S.W.3d at 13; *see* TEX. FIN. CODE §392.001 *et seq*. Section 392.304(a)(19) of the Texas Finance Code states that it is a violation to use any other false representation or deceptive means to collect a debt or obtain information concerning a consumer.

As shown above, the Fosters have provided no evidence whatsoever that Appellees provided false or untrue information about the Loan or the amounts due thereunder, that Appellees represented that they would not foreclose while the modification application was under review, that Appellees would put a hold on any foreclosure sale until after the modification review process was completed, or that the loan would be modified. The District Court correctly granted summary judgment for Appellees.

No Bond Requirement for Debt Collections Claims. In the Fosters' summary judgment response brief, they raised for the first time the argument that Appellees had violated Section 392.101 of the Texas Finance Code by failing to obtain a bond. (USCA5 571, ¶61). That claim was not made in the Fosters' First Amended Original Complaint (USCA5 138), and the District Court properly

refused to address the claim. (USCA5 758, Section 9). While the Fosters' have not set forth an issue on appeal or made any specific argument relative to this claim, in their Summary of the Argument on page 10 of their Appellants' Brief, the Fosters reference their bond argument. *Appellants' Brief*, p. 10. While it does not appear that this argument is properly before the Court since it was not pled in the Fosters' First Amended Original Complaint, nor has it properly been argued in this appeal, in an abundance of caution, Appellees will address this argument.

The Fosters assert that Defendants have not posted a bond allegedly required by Texas Finance Code Section 392.101. *Appellants' Brief,* p.10. Under that statute, "third party debt collectors" are to post a bond. "Third party debt collectors" are defined in that statute in accordance with the definition of "debt collector" in 15 U.S.C. Section 1692a(6), which states, in relevant part:

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. … The term does not include—

…

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity

…

(iii) concerns a debt which was not in default at the time it was obtained by such person[.]

Under this definition, U.S. Bank is not a third-party debt collector because any efforts at debt collection by it would be for its own debt. *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232 (5th Cir. 1997) (noting that the term "debt collector" does not include creditors who collect their own debts, unless the creditor uses a name other than his own which would indicate that a third-party is collecting or attempting to collect such debts); *Cavil v. Trendmaker Homes, Inc.*, Civil Action No. G-10-304, 2010 WL 5464238, at *5 (S.D. Tex. Dec. 29, 2010).

Neither would Ocwen be considered a "third-party debt collector" because, at the time it began servicing the subject loan, on or about August 17, 2007, the loan was not in default. *Id.; see* 15 U.S.C. Section 1692a(6)(F)(3). (USCA5 311, 381, 442). Further, the Fosters offer no evidence to indicate that either of the Appellees meets the definition of "third party debt collector." Therefore, no bond is required.

The District Court properly granted summary judgment for Appellees on the Fosters' Texas Finance Code claims.

ISSUE 8: The District Court properly granted summary judgment in favor of Appellees on the Fosters' claim for suit to quiet title and trespass to try title.

The Fosters allege a claim for suit to quiet title and trespass to try title. Trespass to try title and suit to quiet title are two different causes of action. Trespass to try title is statutory, and has specific pleading requirements. TEX. PROP. CODE §22.001; TEX. R. CIV. P. 783. A suit to quiet title is an equitable action. *Fricks v. Hancock*, 45 S.W.3d 322, 327 (Tex. App.-Corpus Christi 2001, no pet.). A plaintiff in a suit to quiet title must prove and recover on the strength of his own title, not the weakness of his adversary's title. *Id.* A plaintiff in a trespass to try title suit also must rely upon the strength of his own title, not upon the weakness of the defendant's. *Id.* A trespass to try title action is the method of determining title to lands, tenements, or other real property, and evidence of legal right to located and surveyed land is necessary to maintain a trespass to try title action. TEX. PROP. CODE §22.001. A plaintiff must show he is entitled to possession and that the defendant dispossessed plaintiff of rightful possession. TEX. R. CIV. P. 783.

The Fosters defaulted on the Note, and Appellees rightfully accelerated the Note and foreclosed; therefore Appellees are rightfully in title to the Property. Appellees in no way have trespassed the title of the Fosters, and the Fosters have not asserted any facts to support that claim, and have offered no evidence to support such assertion. The Fosters have presented no evidence on the primary element of their claim for quiet title/trespass to try title, i.e., that the Fosters are

entitled to possession. The District Court properly granted summary judgment to Appellees on the Fosters' claims for suit to quiet title and trespass to try title.

ISSUE 9: The District Court properly granted summary judgment on the Fosters' claim for negligent misrepresentation.

The Fosters argue that the District Court erred by failing to find that Appellees committed the tort of negligent misrepresentation for supplying false information or for failing to "exercise reasonable care or competence in communicating that information." *Appellants' Brief*, p. 41.

The elements of negligent misrepresentation are i) the defendant made a representation in the course of his business, or in a transaction in which he has a pecuniary interest, ii) the defendant supplies false information for the guidance of others in their business transactions, iii) the defendant did not exercise reasonable care or competence in obtaining or communicating the information, and iv) the plaintiff suffers pecuniary loss by justifiably relying on the representation. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999).

As indicated above, the Fosters have provided no evidence whatsoever that Appellees supplied false information, or that Appellees did not exercise reasonable care or competence in communicating that information. As shown above, Appellees had the authority to collect on the loan, they did not misrepresented the amounts due on the loan. Appellees did not tell the Fosters that Appellees had

approved the 2009 modification (the Fosters never completed the modification application), and the Fosters have presented no evidence that that Appellees told the Fosters that the Property would not be foreclosed upon or that the foreclosure would be postponed. In support of their argument at summary judgment, the Fosters cited Ocwens' representative, Diane Comstock, as testifying that the records showed that on January 28, 2010, an Ocwen employee told Mr. Foster,

> . . . the processing time is approximately 30 days. During that time you will be assigned an account representative who will handle your file throughout the process. If additional information is required, your account representative will contact you directly. Because of the high demand for this program, *if everything is submitted correctly*, you probably will not hear from your account representative until you are approved or denied based on the government's requirements. The approval process may take up to 30 days to complete, but please know that foreclosure will not occur during the time period *provided that your application has been submitted and is complete."*

(USCA5 565, ¶51) (Emphasis added).

The Fosters have produced no completed modification application, nor produced evidence that they submitted a complete application. No fact issue exists on Fosters' claims for negligent misrepresentation, and Appellees were entitled to summary judgment on such claim. The District Court properly granted summary judgment in favor of Appellees.

Economic Loss Rule Bars the Fosters' Claims for Negligent Misrepresentation. Additionally, the Fosters cannot bring a tort claim for contract damages. Texas case law makes clear that "when the only loss or damage

is to the subject matter of the contract, the plaintiff's action is ordinarily on the contract." *Southwestern Bell Tel. Co. v. Delanney*, 809 S.W.2d 493, 494 (Tex. 1991). The *Delanney* court clarified that tort obligations "are in general obligations that are imposed by law—apart from and independent of promises made and therefore apart from the manifested intention of the parties—to avoid injury to others." *Id.* Only if the defendant's conduct would give rise to liability "independent of the fact that a contract exists between the parties" may a claim sound in tort. *Id.*

The Note, Deed of Trust, and related loan documents constitute the contract between the parties and provide the basis for liability of either party to the other. All of the parties' dealings relate to the Note, Deed of Trust and related loan documents, and there is no action independent of the loan contract which is actionable. "If the defendant's conduct…would give rise to liability only because it breaches the parties' agreement, the plaintiff's claim ordinarily sounds only in contract." *Id.* The obligations that the Fosters seek to enforce are contractual obligations. This is an action on a contract and the Fosters have not presented any evidence showing any negligent misrepresentation on the part of Appellees that would give rise to liability outside the contract damages. Therefore, the Fosters' claim for negligent misrepresentation fails as a matter of law.

The District Court properly granted summary judgment in favor of

Appellees on the Fosters' negligent misrepresentation claim.

ISSUE 10: The District Court properly granted summary judgment for Appellees on the Fosters' equitable request for an accounting.

. In the absence of a fiduciary or other special duty, there is no obligation under Texas law for an accounting to be provided. *See T.F.W. Management, Inc. v. Westwood Shores Property Owners Ass'n*, 79 S.W.3d 712 (Tex. App.-Houston [14th Dist.] 2002, pet. denied). This is particularly true when the information that an accounting would provide is available in discovery. The Fosters in this case have alleged nothing to suggest anything more than a borrower-lender/servicer relationship, which does not form a fiduciary relationship and, therefore, Appellees have no obligation to provide the Fosters with an accounting. *See also Steele v. Green Tree Servicing, LLC*, No. 3:09-CV-0603-D, 2010 WL 3565415 at *5 (N.D. Tex. Sept. 7, 2010). However, as in the *Steele* case, Appellees in the present matter produced a loan transaction history to the Fosters during discovery showing the transaction history of the subject loan. (USCA5 381-443). Since the Fosters have not established any viable claims, they are not entitled to a remedy of an accounting. *See Narvaez v. Wilshire Credit Corp*., No. 3:10-CV-179, 2010 WL 5368702, at *12 (N.D. Tex. Dec. 29, 2010). Accordingly, the Fosters' claim for an accounting is unfounded as a matter of law and the District Court properly granted summary judgment in favor of Appellees.

ISSUE 11: The District Court properly granted summary judgment for Appellees on the Fosters' request for declaratory judgment.

The Fosters claimed in their Plaintiff's First Amended Original Complaint that they are entitled to declaratory judgment that they have not materially breached the Deed of Trust, and that Appellees had no authority to foreclose and wrongfully foreclosed. (USCA5 151, ¶48). In their Appellate Brief, the Fosters generally argue that not all of their causes of action were properly dismissed by the District Court and therefore there were still issues to adjudicate. *Appellants' Brief,* p. 43.

A declaratory judgment is a procedural device for granting a remedy. *Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Ltd.,* 99 F.3d 746, 752 n.3 (5th Cir. 1996). It does not create any substantive rights or causes of action. *Id.* Second, the Fosters are in default of the Loan (USCA5 240, ¶16). Pursuant to the Deed of Trust and Note, once the Loan is in default, the holder is entitled to accelerate the Loan and foreclose upon the Property (USCA5 246, ¶7(c); (USCA5 264, ¶22).

The Fosters are not entitled to prevail on their substantive claims as set forth above, so they are not entitled to a declaratory judgment on the same claims framed as a declaratory judgment. The District Court properly granted summary judgment in favor of Appellees on the Fosters' request for declaratory judgment.

CONCLUSION AND PRAYER

The District Court properly entered final judgment in favor of the Appellees on the Fosters' claims. The evidence and undisputed facts demonstrate that the Fosters are in default under the Loan and have breached the terms of the Note and Deed of Trust, Appellees exercised their lawful rights to accelerate and foreclose upon the loan, and that Appellees are entitled to summary judgment on the Fosters' claims. The Fosters have failed to raise a fact issue on at least one element of each of the Fosters' claims that Appellees breached the Note or Deed of Trust, made negligent misrepresentations, committed the tort of unreasonable collection efforts, that Appellees violated any provisions of the Texas Finance Code, or that the Fosters are entitled claims for declaratory judgment or an accounting, or on Fosters' other claims. No fact issue exists in the Fosters' claims, the Fosters are not entitled to any relief against Appellees, and Appellees are entitled to summary judgment on the Fosters' claims against Appellees.

Accordingly, Appellees respectfully pray that the Court uphold the District Court's judgment denying the Fosters any relief from Appellees in this case, and finding in favor of Appellees' on the Fosters' claims.

WHEREFORE, PREMISES CONSIDERED, Appellees 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 respectfully requests that the Court affirm the orders and judgment of the District Court appealed by Appellants Rickey Foster and Michelle Foster; and such further and additional relief as the Court deems appropriate.

Respectfully submitted,

By: */s/ Mark D. Cronenwett*

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 14th day of May, 2012, a true and correct copy of the foregoing document was served via ECF to the following counsel of record:

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/s/ Mark D. Cronenwett
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Dated: May 14, 2012