SAMPLE ONLY FOR EDUCATIONAL PURPOSE (FOR MORTGAGES ONLY!!) BELOW FOR SUMMARY JUDGMENT (Answer and/OR initial Cross-Claim Laswsuit) (File this Summary Judgment MOTION in your COURT CASE as soon as possible after the bank responds with anything.. You also need a Forensic Mortgage Audit of who is the real owner! This is an actual court case where My Client that sued the Bank Won!! Number each page with Line Numbers..

Your regular heading for your County and State.)--->

IN THE CIRCUIT COURT OF RUSSELL COUNTY, STATE

TRUST NAME as Trustee for Certificate Holders asset backed certificates, series 2006-EC2; et al **CASE #:**

PLAINTIFF,

VS.

YOUR NAME

DEFENDANT.

(Can be used for) Cross-Claim For Payment and Recoupment OR PLAINTIFF or DEFENDANT NAME'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56 OF THE YOUR STATE RULES OF CIVIL PROCEDURE AND RESPONSE TO DEFENDANTS' PLANTIFFS' MOTION FOR SUMMARY JUDGMENT

Comes now Your Name, hereafter known as Plaintiff OR Defendant whichever you are and moves this Honorable Court for an Order granting summary judgment in her/his (Substitute your title Plaintiff or Defendant wherever it says her or her/his) favor as set forth in her/ his motion and supporting brief as follows:

SUMMARY JUDGMENT IS APPROPRIATE IN THIS CASE

The plaintiff moves pursuant to Rule 56 for summary judgment in this matter on her claims of wrongful foreclosure against the Defendant Trust designated as "**Bank National Association, as Trustee for Certificate holders of Bear Stearns Asset Backed Securities I LLC, Asset-Backed Certificates, Series 2006-EC2**". The Plaintiff asserts that Summary Judgment is proper under the law and facts and prays that after consideration of her motion, her evidentiary submissions and her brief that the Court will enter a Summary Judgment in her favor finding that the Defendant trust has no interest in her promissory note and no ability to foreclose and further finding that the Trust's institution of foreclosure against her was wrongful and further enjoining the Trust from prosecuting a foreclosure against her in this case.

The Plaintiff feels it important to note that her claims and her motion do not seek to obviate the underlying promissory note but is in the nature of a claim against a stranger to her mortgage loan who seeks to foreclose upon her property under false and fraudulent pretenses. Under the Plaintiff's theory of the case it is clear that the Trust is a stranger to her mortgage loan and that success upon her claim against the Trust will not defeat the right of a single holder in due course to enforce the promissory note executed in conjunction with her home mortgage loan. In effect the Plaintiff asserts that there is a proper payee of her mortgage promissory note that has been paid in full for discharge and extinguishment of this claimed debt, but it is not the defendant Trust or its agents who are involved **in the foreclosure** upon which she sued in the present case.

STATEMENT OF FACTS

1. On or about **November 11, 2005 Sharron Hornby ("Mrs. Hornby")** executed a mortgage to facilitate the purchase of her home for her family in Any County, Georgia.

2. At the time the funds were allegedly borrowed, **the nation was in the midst of the expanding housing bubble, it was a predatory loan, fraudulent loan, etc.**

3 The Defendant **Encore Credit Corp**, a mortgage lender, offered Mrs. **Hornby** a loan using their own money. **This loan involved an initial two year teaser rate period during which Mrs. Hornby was required to make only interest payments at a low teaser rate. At the expiration of the teaser period, the loan recast to a substantially higher monthly payment based on the terms of the note and mortgage**.

4. **Mrs. Hornby and her husband (who is not a signatory and thus not bound to the mortgage) (together the "Hornby's")** enjoyed income from regular employment, which was used to make their monthly mortgage payments not knowing that the banks cannot loan their own money, credit, assets, or depositors' money and had to borrow the loan money as the only DEBTOR from an investor trust.

5. After the loan **recast at the end of the teaser period, the Hornby's income was not sufficient to cover the fully indexed payment**, a fact which was known to the Defendants at the time of originating this loan.

6. Despite the predatory and unfair origination of the **Hornby** loan, the loan's origination is not the subject of the summary judgment motion. The **Hornby's** have reserved those issues for trial. The **Hornby's** provide this information to the Court as background to explain the original claimed default which led to this litigation.

7. This motion and the crux of this case is about the validity of the transfers of mortgage security and promissory notes in the Wall Street financing process known as "securitization" and the resulting issues regarding the ability of the securitization trust in this case to foreclose. Ultimately, much of the outcome of this case hinges upon the Court's ruling regarding the validity or not of the Trust's assertions that it is the owner of the **Hornby** Promissory note and personal County recorded mortgage contract security.

8. Securitization is the practice of pooling and selling contractual debt obligations ("receivables") such as residential mortgages, commercial mortgages, auto loans, credit card debt, or installment contracts to a specially-created entity, typically a New York based Investor Trust. The Trust pays for the receivables by issuing debt securities variously referred to as bonds, pass-through securities, or Collateralized mortgage obligation (CMOs)) to investors. The trust collects payments of principal and interest on the receivables, which it then uses to make regular payments to investors on their debt securities.[1] Securitization thus links consumer and commercial borrowers with financing from securities markets.

9. There are numerous reasons why financial institutions engage in securitization, including the management of credit and interest rate risk, relief from regulatory capital tax requirements, and liquidity enhancement. Securitization began to be used as a financing technique with mortgages in 1971.

10. "For decades before that, banks were essentially portfolio lenders; they held loans until they matured or were paid off. These loans were funded principally by deposits, and sometimes by debt, which was a direct obligation of the bank (rather than a claim on specific assets). But after World War II, depository institutions simply could not keep pace with the rising demand for housing credit. Banks, as well as other financial intermediaries sensing a market opportunity, sought ways of increasing the sources of mortgage funding[1] To attract investors, investment bankers eventually developed an investment vehicle that isolated defined mortgage pools, segmented the credit risk, and structured the cash flows from the underlying loans."[2]

11. Banks use a variety of structures for securitization trusts depending on the type of asset being securitized, but all securitization structures are based on two overriding concerns First, is ensuring favorable tax treatment of the bank, the securitization trust, and the investors, ideally through the securitization trust having "pass thru" tax status, meaning that the securitization trust is not taxed on its own income

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[1] SYLVAIN RAYNES& ANN RUTLEDGE, THE ANALYSIS OF STRUCTURED SECURITIES103 (Oxford Univ. Press, 2003).

[2] *Asset Securitization: Comptroller's Handbook*, Office of the Comptroller of the Currency, November 1997, http://www.occ.treas.gov/handbook/assetsec.pdf . Last viewed 01/12/2011.

when it is paid on the receivables.[3] Second, and perhaps more critical, is ensuring that the trust's assets are "bankruptcy remote," meaning that they are insulated from the claims of the *bank's* creditors. This involves ensuring that the transfer of the receivables to the trust is a "true sale" and not a financing transaction.

12. Bankruptcy remoteness is critical for making the economics of securitization work. By insulating the receivables placed in the trust from the claims of the bank's creditors, securitization enables investors to invest based solely on the quality of the receivables and not have to worry about the bank's other business activities. To accomplish this, the bank conveys receivables to a trust for the benefit of thousands of certificate holders with no one single holder with subject matter jurisdiction to foreclose.

13. Applying these industry standards to the transaction at issue, **Hornby** points out that the Defendant is a securitization trust identified as "**Bank National Association as Trustee for Certificate holders of Stearns Asset Backed Securities I, LLC, Stearns Asset Backed Securities I LLC Asset Backed Certificates, and Series 2006-EC2**" (hereinafter the "Trust") [4]

14. The Trust was formed on **February 1, 2006** by the execution of the trust agreement, which is known in the industry as a Pooling and Servicing Agreement (hereinafter "PSA").[5] The Trust's closing date was February 28, 2006.[6]

14 The Trust is a common law trust created pursuant to the laws of the State of New York and its existence and actions are governed and controlled by New York law. Highland Capital Mgmt. LP v. Schneider, 607 F.3d 322, 327 (2d Cir. 2010).

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[3] *See id.*
[4] *See* PSA for Defendant Trust page **5 of 397**
[5] *See* PSA page **5 of 397**
[6] *See* PSA page 25 of 397

15. New York trust law is ancient and well-settled with respect to the determination of whether an asset is trust property.

16. Under New York law, the analysis of whether an asset is trust property is determined under the law of gifts.[7] In order to have a valid inter vivos gift, there must be a delivery of the gift (either by a physical delivery of the subject of the gift) or a constructive or symbolic delivery (such as by an instrument of gift) sufficient to divest the donor of dominion and control over the property[8] and "what is sufficient to constitute delivery 'must be tailored to suit the circumstances of the case '"[9] The delivery rule requires that "'[the] delivery necessary to consummate a gift must be as perfect as the nature of the property and the circumstances and surroundings of the parties will reasonably permit.'"[10]

17. New York law is also settled that (1) "Until the delivery to the trustee is performed by the settlor, or until the securities are definitely ascertained by the declaration of the settlor, when he himself is the trustee, no rights of the beneficiary in a trust created without consideration arise".[11] (2) The delivery necessary to consummate a gift must be as perfect as the nature of the property and the circumstances and surroundings of the parties will reasonably permit; there must be a change of dominion.

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[7] *See, e.g.,In re* Beck r, 2004 N.Y. Slip Op. 51773U, 4 (N.Y. Sur. Ct. 2004) ("In the case of a trust where there is a trustee other than the grantor, transfer will be governed by the existing rules as to intent and delivery (the leents of a gift).").

[8] (see, Matter of Szabo, 10 N.Y.2d 94, 98-99, supra; Speelman v. Pascal, 10 N.Y.2d 313, 318-320, supra; Beaver v Beaver, 117 NY 421, 428-429, supra; Matter of Cohn, 187 App. Div. 392, 395) as cited in Gruen v. Gruen, 68 N.Y.2d 48, 56 (N.Y. 1986).

[9] (Matter of *Szabo*, supra, at p. 98).

[10] (id ; Vincent v. Rix, 248 N.Y. 76, 83; Matter of Van Alstyne, supra, at p 309; see, Beaver v. Beaver, supra, at p 428) as cited in Gruen v. Gruen, 68 N.Y.2d 48, 56-57 (N.Y. 1986).

[11] (cf. Riegel v. Central Hanover Bank & Trust Co., 266 App. Div. 586; Matter of Gurlitz [Lynde], 105 Misc. 30, aff'd 190 App. Div. 907, supra; Marx v. Marx, 5 Misc. 2d 42) as cited in Sussman v. Sussman, 61 A.D.2d 838 (N.Y. App. Div. 2d Dep't 1978).

and ownership; intention or mere words cannot supply the place of an actual surrender of control and authority over the thing intended to be given.[12]

18. Lastly, "under New York law there are four essential elements of a valid trust of personal property: (1) A designated beneficiary; (2) a designated trustee, who must not be the beneficiary; (3) a fund or other property sufficiently designated or identified to enable title thereto to pass to the trustee; and (4) the actual delivery of the fund or other property, or of a legal assignment thereof to the trustee, with the intention of passing legal title thereto to him as trustee."[13] There is no trust under the common law until there is a valid perfected interest delivery of the asset in question to the trust [14] Since Lender lost the only perfected interest upon securitization assignment, the trust could not have acquired the mortgage. Furthermore, when the trust fails to acquire the property, then *there is no trust over that property that may be enforced.*[15]

19. When New York trust law is applied to the Trust and the facts of this case, it is apparent that there was never a valid delivery of **Mrs. Hornby's** mortgage nor note to the Trust, so the *Trust* may not enforce the mortgage or note.

20. According to the terms of the PSA, all promissory notes and securities transferred to the Trust are required to have a complete chain of endorsements from the original payee thereof to either "Blank" or to the Trustee for the specific Trust. This means that each promissory note or security must have the following complete chain of endorsements in order to

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[12] Vincent v. Putnam, 248 N.Y. 76, 82-84 (N.Y. 1928).
[13] Brown v. Spohr, 180 N.Y. 201, 209-210 (N.Y. 1904).
[14] Until the delivery to the trustee is performed by the settlor, or until the securities are definitely ascertained y the declaration of the settlor, when he himself is the trustee, no rights of the beneficiary in a trust crea ed without consideration arise (cf. Riegel v. Central Hanover Bank & Trust Co., 266 App. Div. 586; Matter of Gurlitz [Lynde], 105 Misc 30, affd 190 App Div 907, supra; Marx v Marx, 5 Misc 2d 42) as cited n Sussman v. Sussman, 61 A.D.2d 838 (N.Y. App. Div. 2d Dep't 1978).
[15] I n an action against the individual defendant as trustee, based on the theory of breach of fiduciary obligation, the complaint was properly dismissed on the ground that he had acquired no title or separate control of the goods and, hence, there was no actual trust over the property to breach. Kermani v. Liberty Mut. Ins. Co., 4 A.D.2d 603 (N.Y. App. Div. 3d Dep't 1957).

comply with the Trust's documents and thus fit within the authorization of the Trust's activities

From **ORIGINAL LENDER** to

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EMC Mortgage Corporation; who endorsed to

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Stearns Asset Backed Securities I, LLC, as the Depositor; who endorsed either in blank or specifically to

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Bank National association as trustee for Certificate holders of Stearns Asset Backed Securities I, LLC Stearns Asset Backed Securities I LLC Asset Backed Certificates, and Series 2006-EC2 (**NAME OF TRUST)**

21. The PSA requires this complete chain of endorsements to be in place by the Trust's closing date or under no circumstances later than 90 days after the Trust's closing date. Therefore the last possible day to transfer to the Trust within the terms of the Trust agreement was **May 29 2016**.

22. During the litigation of this case, the Defendants are producing a collateral file that included the wet-ink signed copy of the mortgage and note in this case. ***This note contained a single endorsement in blank by the Encore Credit Corporation and no other*. (See Mortgage allonges on last page.)** Accordingly, the endorsement chain presented by the Defendant Trust does not comply with that required by the PSA. This means that under New York trust law, there is no effective transfer of the **Hornby** mortgage or note to the Defendant Trust, so the Trust cannot enforce the note or mortgage security.

23. There is no evidence that Mrs. **Hornby**'s mortgage promissory note or mortgage has been securitized, and there is no effective conveyance of **Mrs. Hornby's** mortgage promissory note to the Defendant Trust, which has claimed ownership and sought to foreclose.[16] (through servicer NAME or who is suing you or who you are suing trust)

24. In the case before the Court there is no good faith basis for the defendant Trust to assert or otherwise claim that the **Hornby** promissory note or mortgage security is Trust property.

25. **Mrs. Hornby** requests that the Court enter a summary judgment in her favor that the Trust, Lender, or Servicer is not the owner of her promissory note or mortgage security and that the Trust or anyone else has no right to foreclose upon her real property.

26. Mrs. **Hornby** also requests that the Court enter any appropriate payment and recoupment Orders to effectuate this Judgment.

27. **Mrs. Hornby** also requests that the Court direct liability in her favor on her claims against the Trust and all parties acting on the Trust's behalf with respect to her claims regarding the **foreclosure** action instituted by these parties and that the Court seat a 12 member trial by jury for the sole purpose of determining what damages should be awarded against these parties for their wrongful conduct.

28. **UCC 8-102 sect 17 (17)** "Security entitlement" means the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 5. Security is a financial assets and you have a property interest and a possessionary right not only in the instrument itself but in the proceeds says that in 3-306 because the security is a negotiable instrument it comes under article 3 but because it is a security; its governed by article 8. Credit card, car loan, student loan etc. all are remics or PSAs and all have a B5 prospectus. Every time you go out and use credit, all have PSA with requirements and must qualify for remics. Courts are securitizing court judgments and selling them to the Federal Reserve, they have a security agreement, a deposit agreement. Its done electronically.

PLAINTIFF'S EVIDENTIARY SUBMISSIONS IN SUPPORT OF HER MOTION FOR SUMMARY JUDGMENT

The Plaintiff submits the following list of exhibits in support of her motion for summary judgment in this case:

Attached as **exhibit 1** to this motion is the PSA consisting of all exhibits including the form custody agreement and the mortgage loan purchase agreement pulled from the SEC's website and consisting of **397** pages. This exhibit does not include the mortgage loan schedule that may have been submitted by the defendant's in this case.

Attached as exhibit 2 to this motion is the affidavit of Thomas J. Adams provided to the

Defendant's in this case.

29. Attached as **exhibit 3** to this motion is the deposition of Thomas J. Adams taken by counsel for the defendants, Shaun Ramey.

30. Attached as exhibit 4 to this motion is the complete collateral file produced by the defendants in this case which consists of 62 pages as produced by the Defendants.

31. Attached as **exhibit 5** to this motion is an exhibit which shows the transfers required by the Trust instrument as a recapitulation of t he voluminous document.

32. Attached as **exhibit 6** to this motion is an exhibit which demonstrates the transfers of the mortgage promissory note revealed by the contents of the mortgage collateral file.

33. Attached as **exhibit 7** is **Hornby** 391 which is a single document from the PSA which sets forth the required documents for the collateral files of loans properly transferred to the Defendant trust

34. Additionally, other documents are attached to this motion which are referenced in this motion or in brief by their Bates Stamp number which include, at least, Bates Stamped documents numbered 2 & 29. Or acceptance of Plaintiff's Bank Instrument Draft that extinguishes and discharges the debt that Defendants must accept as Defendants are in the business "Banking Business"; therefore, "a bank draft, promissory note, or a new credit agreement payoff security is a bank instrument".

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[6] A fact noted in the opinions and testimony of Horace's securitization expert, Thomas J. Adams who opines that the promissory note is not an asset of the Defendant trust in his deposition at 140:4-8.

CONCLUSION

The plaintiff requests that the Court consider her motion, her evidentiary submissions, her Bank Instrument payoff, and her brief in support of her **motion for summary judgment or Cross-Claim** and upon consideration of the same, enter **summary judgment or Dismissal with Prejudice in my favor** as

prayed for herein against the **Defendant or Plaintiff** Trust and all its agents declaring that the original Lender, Trust, and any authorized agent of these two have no interest in her promissory note or mortgage and may not pursue foreclosure or this or any other action against her and preserving for 12 member trial by jury the issue of damages against the Defendant trust and its agents under Principal/Agent doctrine. That the defendants issue into county records the cancellation, release, and satisfaction of both mortgage Note and mortgage contract security within 15 days.

RESPECTFULLY SUBMITTED,

/s/ **Your name, address, phone, email**

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon the Defendants by providing an electronic copy on this the **13th day of January 2022**.

All counsel of Record

/s/ Your Name

IN THE CIRCUIT COURT OF RUSSELL COUNTY, STATE

TRUST NAME as Trustee for Certificate Holders asset backed certificates, series 2006-EC2; et al **CASE #:**

PLAINTIFF,

VS.

YOUR NAME

DEFENDANT.

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND **IN RESPONSE TO PLAINTIFF'S/DEFENDANTS' (Which Ever you are) MOTION FOR SUMMARY JUDGMENT**

Plaintiff **First Name Hornby,** submits this **memorandum of law** in support of her motion for summary judgment on the issue of standing as to Defendant Bank National Association ("Fannie" [the TRUST]). Plaintiff's Complaint claims that Fannie did not have possession of the mortgage note or mortgage contract security when it notified Defendant that foreclosure was forthcoming. Namely, Fannie had no — and cannot have any — authority to institute foreclosure proceedings because Fannie is not entitled to the money secured by the promissory note.

Title 15 section 1641 when they amended public law 111-203 which is **15 USC 1640** says **Hornby** has a claim and a defense of recoupment and set off amended that in 2010 and also amended **sect 1641 of the truth in lending sect 129 and 130.** If there is a proper transfer done, the new owner of loan docs has to **notify you within 30 days in writing** – they never do this because the Lender never transferred the funds in the first place – with no transfer of funds the loan is in default and **both the mortgage Note and mortgage security** loan is unsecured which means **there is no mortgage because the deed of trust is the mortgage and the note is the obligation**.

Trust then dissolves on the 91st day because there is **no corpus inside the trust** to sustain the

trust. THE trust collapses. So no one entity has any legal authority or subject matter jurisdiction to foreclose on anybody.

The unregistered Note was never transferred because it's a security and the Trust don't own it. It is an **investment contract and not a mortgage loan**. Credit cards, automobile, student loans, etc. go into remics as well, same thing. DTC is owner of both sides of the account, they sell the cash flow claims to the beneficial interest holders. For all the mortgage payments **Hornby** is entitled, because **Hornby's monthly payments are funding the PSA and the Lender or Trust must give Hornby recoupment and setoff with account closure and balance both ledger sheets to a zero balance. Hornby is the third party beneficial investor** and should get paid all investment money earned.

INTRODUCTION

On **November 11, 2005**, Plaintiff borrowed **$283,500.00** for the purchase of property at **3745 Singleton Road in Atlanta, Georgia.** The loan was secured by a mortgage to the lender, **Encore Credit Corp ("Encore")** who supposedly loaned Plaintiff their own Money, but Plaintiff found out recently that Defendant lender borrowed funds from the Investor Trust. The mortgage promissory note contract was recorded in the County official records on **August 11, 2016**.At some unknown time after the signing of the mortgage documents, Encore executed a blank endorsement.[1] No other assignments or endorsements are present in the record provided to the Plaintiff.[2]

On October 16, 2016, Trust Name sent a "Notice of Acceleration of Promissory Note and Mortgage" to Plaintiff. Plaintiff then filed the instant cause. The court enjoined the foreclosure by order entered on November 20, 2018. Plaintiff currently lives in the subject property. Plaintiff comes before the court today requesting a judgment that the foreclosure proceeding be permanently enjoined as to the defendant Trustee NAME acting for its beneficiary trust (and Bank of America as the successor-in-interest), the only entity to give notice of foreclosure and for summary judgment on her claims related to the wrongful foreclosure of this real property.

II. STANDARD OF REVIEW

Summary judgment is appropriate only when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." **YOUR STATE**. R. CIV. PROC. 56**(c)(3),** ***Young v. La Quinta Inns Inc*** 682 So.2d 402 (Ala.1996). A court considering a motion for summary judgment will view the record in the light most favorable to the nonmoving party, **(YOU if you are in foreclosure and the Defendant)** ***Hurst v. Alabama Power Co***., 675 So.2d 397 (Ala.1996), ***Fuqua v. Ingersoll-Rand Co***., 591 So.2d 486 (Ala. 1991); will accord the nonmoving party all reasonable favorable inferences from the evidence, ***Fuqua, supra, Aldridge v. Valley Steel Constr., Inc***., 603 So.2d 981 (Ala. 1992); and will resolve all reasonable doubts against the moving party. ***Ex parte Brislin***, 719 So.2d 185 (Ala.1998)

III. ARGUMENTS

A. THE PLAINTIFF or DEFENDANT TRUST OR AGENTS HAVE NO STANDING TO FORECLOSE BECAUSE THERE HAS BEEN NO VALID ENFORCEABLE ASSIGNMENT TO THE TRUSTEE OF THE TRUST

A-1.The Plaintiff Trust Is A New York Common Law Trust Governed By New York Law Based On Its Trust Agreement

The October 16, 2018 Notice sent to Plaintiff was on behalf of the legal entity, "Bank National Association, as Trustee for Certificate holders of **Stearns Asset Backed Securities I LLC, Asset-Backed Certificates, Series 2006-EC2"** hereafter the "Trust"). **Trust NAME** is not the originator of the note or mortgage, the servicer, or even a bank. Instead, this entity is a New York common law trust created by an agreement known as "Pooling and Service Agreement." Allegedly, the Plaintiff's loan, along with other loans were pooled into a trust and converted into mortgage-backed securities ("MBS") investor certificates that can be bought and sold by thousands of investors — a process known as securitization. The underlying promissory notes of each and every mortgage held by the Trust serve as generate a potential income stream for investors.

The Trust allegedly holding the Plaintiff's note and mortgage security was created on or about February 1, 2016, and is identified as "**Bank National Association, as Trustee for Certificate holders of Stearns Asset Backed Securities I LLC, Asset-Backed Certificates, Series 2006-EC2."The Trust, by its terms, as to a "closing date"** of **February 28, 2016**.The terms of the Trust are contained in the Pooling and Servicing Agreement ("PSA" or the "Trust agreement"), which is an approximately **400**-page document that creates the Trust and defines the rights, duties and obligations of the parties to the Trust Agreement.[3]

The PSA is filed under oath with the Securities and Exchange Commission and is attached to TRUST NAME's motion for **summary judgment** as **Exhibit 1**. The PSA also incorporates by reference a separate document called the Mortgage Loan Purchase Agreement ("MLPA"). These various documents, and hence the acquisition of the mortgage assets for the Trust, are governed under the law of the State of New York pursuant to **section 11.03** of the PSA (found at page **133 of 397** of the PSA).

The Trust, being sued through its trustee agent, is a New York Corporate Trust formed to act as a "REMIC" trust (defined below) pursuant to the U.S. Internal Revenue Code ("IRC"). Pursuant to the terms of the Trust and the applicable Internal Revenue Se vice ("IRS") regulations adopted and incorporated into the terms of the Trust, the "closing date" of the Trust **(February 28, 2016)** is also the "Startup Day" for the Trust under the REMIC provisions of the IRC. The Startup Day is significant because the IRC ties the limitations upon which a REMIC trust may be receive its assets to this date. The relevant portion of the IRC addressing the definition of a REMIC is:

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[3]**It is settled that the duties and powers of a trustee are defined by the terms of the trust agreement and are tempered only by the fiduciary obligation of loyalty to the beneficiaries (see, United States**

Trust Co. v First Nat'l City Bank, 57 A.D.2d 285, 295-296, aff'd 45 NY2d 869; Restatement [Second] of Trusts § 186, comments a, d). *See In re* IBJ Schroder Bank & Trust Co., 271 A.D.2d 322 (N.Y. App. Div. 1st Dep't 2000)

General rule. For purposes of this title, the terms 'real estate mortgage investment conduit' and 'REMIC' mean any entity—

> (1) to which an election to be treated as a REMIC applies for the taxable year and all prior taxable years,
> (2) all of the interests in which are regular interests or residual interests,
> (3) which has 1 (and only 1) class of residual interests (and all distributions, if any, with respect to such interests are pro rata),
>
> (4) ***as of the close of the 3rd month beginning after the startup day*** and at all times thereafter, substantially all of the assets of which consist of qualified mortgages and permitted investments.
>
> **26 U.S.C.S. § 860D** (emphasis added).

The IRC also provides definitions of prohibited transactions and prohibited contributions which are relevant to this case as well. In the context of this case, the relevant statute is the definition of *prohibited contributions* which is as follows:

26 U.S.C. 860G(d)(1) states:

> Except as provided in section 860G(d)(2), "if any amount is contributed to a REMIC after the startup day, there is hereby imposed a tax for the taxable year of the REMIC in which the contribution is received equal to 100 percent of the amount of such contribution."

26 U.S.C. 860G(d)(2) states:

> (2) Exceptions. Paragraph (1) shall not apply to any contribution which is made in cash and is described in any of the following subparagraphs:
> (A) Any contribution to facilitate a clean-up call (as defined in regulations) or a qualified liquidation.
> (B) Any payment in the nature of a guarantee.
> (C) Any contribution during the 3-month period beginning on the startup day.
> (D) Any contribution to a qualified reserve fund by any holder of a residual interest in the REMIC.
> (E) Any other contribution permitted in regulations.

The PSA (primarily in section **9.12**) addresses these sections of the IRC by obliging the parties to the Trust to avoid any action which might jeopardize the tax status of any REMIC and/or impose any tax upon the Trust for prohibited contributions or prohibited transactions. These PSA provisions are important to the court's analysis of the facts in this case because of the interplay between the New York trust law, the IRC's REMIC provisions, and the PSA's incorporation of the IRC REMIC provisions.

A-2.The Trust Instrument/PSA Sets Forth A Specific Time, Method And Manner Of Funding The Trust

The Trust seeking to foreclose on the Plaintiff has included in the terms of its Trust agreement (the PSA) a specific time, method and manner of funding the Trust with its assets.

The *most critical* time is the Trust's closing date, **February 28, 2016**.[4] According to the terms of the PSA, all of the assets of the Trust were to be transferred to the Trust on or before the closing date.[5] This requirement is to ensure that the Trust will receive REMIC status and thus be exempt from federal income taxation. Section 2.02(a) of the PSA provides for a window of 90 days after the Trust closing date in which the Trust may complete any missing paperwork or finalize any documents necessary to complete the transfers of assets from the depositor to the Trust.[6] Thus, for an asset to become an asset of the Trust it *must* have been transferred to the Trust within the time set forth in the PSA.

The additional 90 days in the timeline requirement is incorporated from the REMIC provisions of the IRC to provide a "clean-up period" for a REMIC to complete the documents associated with the transfers of assets to a REMIC after the startup day (which is also the Trust closing date). Therefore according to

[4] http://sec gov/Archives/edgar/data/1352655/000088237706000801/d431341.htm(last viewed 1/7/10) **This date is defined in**

the Trust instrument at page 25 of 397 in exhibit 1.
[5] This requirement is found at Section **2.01** on page **56 of 397**.
[6] This requirement is found at page **58 of 397**.

the plain terms of the Trust agreement in this case, the closing date/startup date was **February 28, 2006** and the last day for transfer of assets into the Trust was **May 29 2016**.

B. THE TRUST AGREEMENT PROVIDES THE ONLY MANNER IN WHICH ASSETS MAY BE PROPERLY TRANSFERRED TO THE TRUST AND ANY ACT IN CONTRAVENTION OF THE TRUST AGREEMENT IS VOID

B-1. Transfer of Assets to the Trust Pursuant to the Trust Instrument/PSA

As a generic matter, there are several methods by which the underlying assets of the Trust, specifically the individual promissory notes, might be transferred or conveyed. A trust's ability to transact is restricted to the actions authorized by its trust documents. In this case, the Trust documents permit only one specific method of transfer to the Trust. That method is set forth in Section **2.01** of the PSA:

Pursuant to the Mortgage Loan Purchase Agreement, each Seller sold, transferred, assigned, set over and otherwise conveyed to the Depositor, without recourse, all the right, title and interest of such Seller in and to the assets sold by it in the Trust Fund….

In connection with such sale, the Depositor has delivered to, and deposited with, the Trustee or the Custodian, as its agent, the following documents or instruments with respect to each Mortgage Loan so assigned: (i) the original Mortgage Note and Mortgage Security, including any riders thereto, endorsed without recourse

> (A) in blank or to the order of *"**Bank National Association**, as Trustee for thousands of Certificate holders of **Stearns Asset Backed Securities I LLC. Asset-Backed Certificates, Series 2006-EC2**,"* or (B) in the case of a loan registered on the MERS system, in blank, and in each case showing an unbroken chain of endorsements from the original payee thereof to the Person endorsing it to the Trustee.

The analysis of this transfer language requires the court to consider each part. In the second paragraph of the language in the Trust Agreement, the first statement is one of transfer, stating "***the Depositor has delivered to and deposited with the Trustee or the Custodian the following documents***".

The key document is the original mortgage note and mortgage contract security, which requires mandatory endorsements found in this language: "***the original mortgage note….endorsed without recourse***" followed by two alternatives which are phrased in the either/or format. The first labeled "A" states "***in blank or to the order of "Bank National Association, as Trustee for Certificateholders of Stearns Asset Backed Securities I LLC , Asset-Backed Certificates, Series 2006-EC2*** ". The second possibility stated in "B" provides as the "or" proposition for transfer the following statement *"**in the case of a loan registered on the MERS system, in blank…*** In each case, the affirmative language of the Trust agreement places a burden on the depositor to make a valid legal transfer in the terms required by the Trust instrument The key language in the entire paragraph is the final statement trailing the "either/or" language of A & B which reads: "***and in each case showing an unbroken chain of endorsements from the original payee thereof to the Person endorsing it to the Trustee***".

Stacked upon the top of this requirement of an unbroken chain of endorsements is the requirement of certification of the final contents of the collateral file for the benefit of the Trust. This requirement is found at **Exhibit 1** to the MLPA (Mortgage Loan Purchase Agreement) which is an attachment to and incorporated as a part of the PSA in Section 2.01. This Document is found at **Hornby** 391 and states as follows:

> With respect to each Mortgage Loan, the Mortgage File shall include e ach of the following items, which shall be available for inspection by the Purchaser or its designee, and which shall be delivered to the Purchaser or its designee pursuant to the terms of this Agreement.
>
> (a) The original Mortgage Note, including any riders thereto, endorsed without recourse to the order of *"**Bank National Association as Trustee for certificate holders of Stearns Asset Backed Securities I LLC, Asset-Backed Certificates, Series 2006-EC2**,"*and showing to the extent available to the related Mortgage Loan Seller an unbroken chain of endorsements from the original payee thereof to the Person endorsing it to the Trustee; (**EMPHASIS ADDED**)

The foregoing requirement demonstrates clearly that while the parties to the securitization made provisions whereby promissory notes and mortgages for this Trust might be delivered in blank to the

Trustee, there were two requirements that were *mandatory*. First, all notes and mortgage contract securities sold to the Trust were required to have an unbroken chain of endorsements from the original payee, Lender, to the person endorsing it to the Trustee. This requirement stems from a particular business concern in securitization, namely to evidence that there was in fact a "true sale" of the securitized assets and that they are in no way still property of the originator, sponsor, or depositor, and; thus, not subject to the claims of creditors of the originator, sponsor, depositor, or trust. A fact testified to by the Plaintiff's securitization expert, **Thomas J. Adams**, who explained under examination by Counsel for the Trust as follows:

Page **83**
Q So what then I guess with respect to notes is – Q what's the purpose then of having a chain of endorsements, if what I'm concerned about is who currently owns it?
My understanding is that it helps establish how Defendant Trust came to possess it.
Q Okay. And why does that matter? Page **84**
A From an investor perspective in a mortgage backed securities governed by a pooling and servicing agreement, you want confidence that the collateral for the file is properly conveyed to it, that -- that the -- that they will have the right to establish their ownership as investors in that collateral.

Second, there was a requirement that ultimately, within 90 days of the Trust closing date, the actual promissory note and mortgage contract security must be endorsed over to the trustee or the specific trust to effectively transfer the asset into the trust and; therefore, make the **Hornby** promissory note and contract security Trust property. Trust entitlement should be attached on the last page of the note and mortgage contract security as a Lender add on

[7] As early as 1935, in Burgoyne v. James, 282 N.Y.S. 18, 21 (1935), the New York Supreme Court recognized that business rusts, also known as ""Massachusetts trusts","are deemed to be common law trusts. *See also In re Estate of Plotkin*, 290 N.Y.S.2d 46, 49 (N.Y. Sur. 1968) (characterizing common stock trust funds as ""common law trust[s]""). Other jurisdictions are in accord. *See, e.g., Mayfield v. First 'Nat'l Bank of Chattanooga*, 137 F.2d 1013 (6th Cir. 1943) (applying common law trust principles to a pool of mortgage participation certificate holders).

[8]""In the case of a trust where there is a trustee other than the grantor, transfer will be governed by the existing rules as to intent and delivery (the elements of a gift)""***In re*** **Becker**, 2004 N.Y. Slip Op. 51773U, 4 (N.Y. Sur. Ct. 2004).

allonges addition. This requirement finds support in logic and law and is, in fact, the ancient and settled law of New York on this issue

B-2. New York Law Governs The Mandatory Requirements To Effectively Transfer An Asset To A Trust

It is not contested that securitization trusts, such as the defendant, are subject to the common law of New York.[7] New York's trust law is ancient and settled. There are a few principles of New York Trust law that are particularly important to the analysis of physical delivery of the subject of the gift) or a constructive or symbolic delivery (such as by an instrument of gift) sufficient to divest the donor of dominion and control over the property[9] and "what is sufficient to constitute delivery 'must be tailored to suit the circumstances of the case'".[10] The delivery rule requires that "'[the] delivery necessary to consummate a gift must be as perfect as the nature of the property and the circumstances and surroundings of the parties will reasonably permit.'"[11]

"Under New York law there are four essential elements of a valid trust of personal property: (1) A designated beneficiary; (2) a designated trustee, who must not be the beneficiary; (3) a fund or other property sufficiently designated or identified to enable title thereto to pass to the trustee; and (4) the actual delivery of the fund or other property, or of a legal assignment thereof to the trustee, with the intention of passing legal title thereto to him as trustee."[12] There is no trust under the common law until there is a valid delivery of the asset in question to the Trust.[13] 24 If the trust fails to acquire the

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[9] (see, Matter of Szabo, 10 N.Y.2d 94, 98-99, *supra*; Speelman v Pascal, 10 N.Y.2d 313, 318-320, supra; Beaver v. Beaver, 117 N.Y. 421, 428-429, supra; Matter of Cohn, 187 App. Div. 392, 395) as cited in Gruen v. Gruen, 68 N.Y.2d 48, 56 (N.Y. 1986).

[10](Matter of *Szabo*, supra, at p. 98).

[11] (id.; Vincen v Rix, 248 N.Y. 76, 83; Matter of Van Alstyne, supra, at p 309; see, Beaver v. Beaver, supra, at p 428) as cited in Gruen v. Gruen, 68 N.Y.2d 48, 56-57 (N.Y. 1986) .

12 Brown v. Spohr, 180 N.Y. 201, 209-210 (N.Y. 1904).

13 Until t e delivery to the trustee is performed by the settlor, or until the securities are definitely ascertained by

the d claration of the settlor, when he himself is the trustee, no rights of the beneficiary in a trust created without con ideration arise (cf. Riegel v. Central Hanover Bank & Trust Co., 266 App. Div. 586; Matter of Gurlitz [Lynde], 105 Misc 30, aff'd 190 App. Div. 907, supra; Marx v. Marx, 5 Misc 2d 42) as cited in Sussman v. Sussman, 61 A.D.2d 838 (N.Y. App. Div. 2d Dep't 1978).

property, then there is *no trust or subject matter jurisdiction* over that property which may be enforced.[14] An attempt to convey to a trust will fail if there is no designated beneficiary in the conveyance.[15]

In the context of mortgage-backed securitization, it is clear that registration of the notes and mortgages in the name of the trustee for the trust is necessary for effective transfer to the trust. Within the Statutes of New York governing Trusts, Estates Powers and Trusts Law (EPTL) section 7-2.1(c) authorizes investment trusts to acquire real or personal property "in the name of the trust as such name is designated in the instrument creating said trust." Further, the actual contracts of the parties, which include the custodial agreements, the mortgage loan purchase agreements, and the trust instrument known as the "pooling and servicing agreement," prescribe a very specific method of transfer of the notes and mortgages to the Trust. Because the method of transfer is set forth in the Trust instrument, it is not subject to any variance or exception.[16]

The Trust documents require that the promissory notes and mortgages be transferred to the Trustee, which under New York trust law requires valid delivery. The question then arises — "What constitutes valid delivery to the Trustee?"

When the requirements of transfer to the trustee are viewed in the context of the corporate or business trust indenture, more information about compliance with these requirements becomes apparent. One must first understand that

14 In an action again t the individual defendant as trustee, based on the theory of breach of fiduciary obligation, the complaint was properly dismissed on the ground that he had acquired no title or separate control of the goods and, hence, there was no actual trust over the property to breach. Kermani v. Liberty Mut. Ins. Co., 4 A.D.2d 603 (N.Y. App. Div. 3d Dep't 1957).

15 Wells Fargo B nk v. Farmer, 2008 N.Y. Misc Lexis 3248.

16 Courts may neither ignore the actual provisions of transaction documents nor create contractual remedies that were omitted from the governing contracts by the contracting parties. *See* Schmidt v. Magnetic Head Corp., 468 N.Y.S.2d 649, 654 (N.Y. App.Div. 1983) (""It is fundamental that courts enforce contracts and do not rewrite them . . . An obligation undertaken by one of the parties that is intended as a promise . . . should be expressed as such, and not left to implication."") (citations omitted)); *Morlee Sales Corp. v. Manufacturers Trust Co.*, 172 N.E.2d 280, 282 (N.Y. 1961) (""[T]he courts may not by construction add or excise terms . . . and thereby 'make a new contract for the pa ties under the guise of interpret[ation].'"" (quoting *Heller v. Pope*, 250 N.E. 881, 882 (N.Y. 1928))

"[t]he corporate trustee has very little in common with the ordinary trustee . . . . The trustee under a corporate indenture . . . has his [or her] rights and duties defined, not by the fiduciary relationship, but exclusively by the terms of the agreement. His [or her] status is more that of a stakeholder than one of a trustee."[17]

Indeed, "[a]n indenture trustee is unlike the ordinary trustee. In contrast with the latter, some cases have confined the duties of the indenture trustee to those set forth in the indenture."[18] The indenture trustee, it has been said, resembles a stakeholder whose obligations are defined by the terms of the indenture agreement.[19] Moreover, "[i]t is settled that the duties and powers of a trustee are defined by the terms of the trust agreement and are tempered only by the fiduciary obligation of loyalty to the beneficiaries".[20]

The clear import of these cases and statutes is that the delivery of an asset to a trustee under the terms of a corporate indenture requires strict compliance with the mandatory transfer terms of the trust indenture. Thus the Trustee in this case can only take delivery in strict compliance with the terms of the PSA/Trust document. Further, given that New York Estates Powers and Trusts Law section 7-2.1(c) the instrument creating said trust property," there should be little doubt that for transfer to an trustee to be effective, the property must be registered in the name of the trustee *for the particular trust*. Trust property cannot be, as the Defendant argues, held with incomplete endorsements and assignments that do not authorizes a trustee agent to acquire property "in the name of the trust as such name is designated in

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[17] AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co., 2008 N.Y. Slip Op. 5766, 7 (N.Y. 2008)

[18] Green v. Title Guarantee & Trust Co., 223 A.D. 12, 227 N.Y.S. 252 (1st Dept.), aff'd, 248 N.Y. 627 (1928); Hazzard v Chase National Bank, 159 Misc. 57, 287 N.Y.S. 541 (Sup. Ct. 1936), aff'd, 257 A.D. 950, 14 N.Y.S.2d 147 (1st Dept.), aff'd, 282 N.Y. 652, cert. denied, 311 U.S. 708 (1940).

[19] See Me kel v. Continental Resources, 758 F.2d 811, 816 (2d Cir. 1985) as cited in Ambac Indem. Corp. v. Bankers Trust Co., 151 Misc. 2d 334, 336 (N.Y. Sup. Ct. 1991).

[20] see, United States Trust Co. v First Nat'l City Bank, 57 A.D.2d 285, 295-296, aff'd 45 NY2d 869; Restatement [Second] of Trusts § 186, comments a, d) as cited in *In re* IBJ Schroder Bank & Trust Co., 271 A.D.2d 322 (N.Y. App. Div. 1st Dep't 2000).

to indicate that the property is held in trust by a trustee for a specific beneficiary trust to be the owner. In fact, it is clear in the law of New York that an attempt to transfer to a trust which fails to specify both a

trustee and a beneficiary is ineffective as a conveyance to the Trust. "***The failure to name a beneficiary for the Trustee renders the assignment without merit "***[21]

This position is further supported logically in the common law of New York by the following propositions:

(1) **"Until the delivery to the trustee is performed by the settlor, or until the securities are definitely ascertained by the declaration of the settlor, when he himself is the trustee, no rights of the beneficiary in a trust created without consideration arise".**[22]

(2) **The delivery necessary to consummate a gift must be as perfect as the nature of the property and the circumstances and surroundings of the parties will reasonably permit; there must be a change of dominion and ownership; intention or mere words cannot supply the place of an actual surrender of control and authority over the thing intended to be given.**[23]

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[21] **Wells Fargo Bank, N.A. v. Farmer, 2008 NY Slip Op 51133U, 6 (N.Y. Sup. Ct. 2008)**

[22] **cf. Ri gel v. Central Hanover Bank & Trust Co., 266 App. Div. 586; Matter of Gurlitz [Lynde], 105 Misc. 30, aff d 190 App. Div. 907, supra; Marx v. Marx, 5 Misc 2d 42) as cited in Sussman v. Sussman, 61 A.D.2d 838 (N.Y. App. Div. 2d Dep't 1978).**

[23] **Vincent v. Putnam, 248 N.Y. 76, 82-84 (N.Y. 1928).**

It is the consummation of the donor's intent to give that completes the transaction. Intention alone, no matter how fully established, is of no avail without the consummated act of delivery.[24] How could one logically argue that delivering a promissory note and mortgage contract security endorsed in blank (making it bearer paper) into a trustee's vault is "delivery beyond the authority and control of the donor" when the vault is managed by the agent of the donor? If the donor were to claim that the promissory note and the mortgage contract security were its property, not the trustee's, there would be no evidentiary basis for the trustee to claim ownership. Accordingly, New York law expressly requires that for property to be validly delivered to a trust, the property must pass completely out of the control of the donor (and its assigns and agents):

"If the donor delivers the property to the third person simply for the purpose of his delivering it to the donee as the agent of the donor, the gift is not complete until the property has actually been delivered to the donee. Such a delivery is not absolute, for the ordinary principle of agency applies, by which the donor can revoke the authority of the agent, and resume possession of the property, at any time before the authority is executed.""[25]

Another case addressing this issue holds that "In order that delivery to a third person shall be effective, he must be the agent of the donee. Delivery to an agent of the donor is ineffective, as the agency could be terminated before delivery to the intended donee."[26]

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[24] Phillippsen v. Emigrant Indus.Sav. Bank, 86 N.Y.S.2d 133, 137-138 (N.Y. Sup. Ct. 1948). (*Beaver v. Beaver, supra,* 117 N.Y. 421, 428, 22 N.E. 940, 941, 6 L.R.A. 403, 15 Am.St.Rep. 531).

[25] (See, al o, Grant Trust & Savings Co. v. Tucker, 49 Ind. App. 345; Furenes v. Eide, 109 Ia. 511; Dickeschied v. Exchange Bank, 28 W. Va. 340; Love v. Francis, 63 Mich. 181; [**428] Merchant v. Building Co. [***15] , 17 Ohio Circuit Ct. 190.)

[26] In re Nat'l Commer. Bank & Trust Co., 257 A.D. 868, 869-870 (N.Y. App. Div. 3d Dep't 1939) citing Vincent v. R x, supra v. Rix, supra; Bump v. Pratt, 84 Hun, 201.

Trustees for securitizations often occupy many roles simultaneously and conflictingly both as

document custodians and trustees for myriad thousands of securitizations as well as for various parties who are active in the securitization process including originators, servicers, sponsors, agents, and depositors. Accordingly, it is inconceivable that anything other than registration into "the name of the trust as such name is designated in the instrument creating said trust property"[27] could ever qualify as delivery to any particular securitization trust. Absent such registration, there would be nothing that would indicate which of thousands of trusts in the care of a trustee a particular promissory note might belong to or if it were the personal property of the trustee itself. Absent such registration, a promissory note would simply be bearer paper, and thus the property of anyone who obtained possession of it. Further, if anything less constituted delivery, why are our courts overwhelmed with robo-signed note and mortgage assignments and false affidavits expressing legally-impossible transfers into the specific trusts long *after* the trusts have closed for funding?

This point was slammed home to the public consciousness in a watershed decision out of the State of Massachusetts On January 7, 2011, the Supreme Judicial Court of Massachusetts—the highest court in that state—rendered a unanimous verdict in a case captioned *U.S. Natl. Bank Assn. Trustee, v. Ibanez, For ABFC 2005- 0PT 1 Trust, ABFC Asset Backed Certificate, Series 2005-0PT 1*, No. SJC-10694, (Mass. Jan. 7, 2011). While that ruling is of course not binding upon this court, it is very much contrary to the mortgage securitization industry's position in cases involving the foreclosure of mortgage loans which have allegedly been securitized. The facts of the case in Massachusetts and the facts of this instant case are similar. Both the Massachusetts and the **Hornby** cases concern an entity seeking to foreclose on the mortgagor when the foreclosing entities did not possess the underlying promissory note nor mortgage contract security at the time of the foreclosure (or attempted foreclosure in

[27] EPTL 7-2.1(c)

the **Hornby** situation). The case was a ruling on two consolidated cases – both cases were filed by banks (as trustees for two separate trusts) to quiet title on properties they had foreclosed and purchased at the

foreclosure sale to satisfy the mortgagor's debt.

The Massachusetts Supreme Judicial Court held that neither bank proved that its trust owned the notes or mortgages when they foreclosed on the homes; therefore, neither had title to the foreclosed properties and that their foreclosures were void. Effectively, this put the borrowers back into the place they were before the foreclosure.

The Massachusetts Supreme Judicial Court did not tell the homeowners they are allowed to shirk their obligation to pay their mortgages which are still outstanding, valid obligations. The Massachusetts Supreme Judicial Court did, however, sharply instruct the banks that they must have the proper documentation which demonstrates a valid right to foreclose before a foreclosure can be carried out. It is well worth noting the conclusion of the Massachusetts *Ibanez* opinion.

The Massachusetts Supreme Judicial Court noted that "The legal principles and requirements we set forth are well established in our case law and our statutes. All that has changed is the [banks'] apparent failure to abide by those principles and requirements in the rush to sell mortgage-backed securities." Just as the principles and requirements of Massachusetts law are well-founded, so too are those of New York law, and they should be upheld even if adherence to the law is inconvenient for banks rushing to sell mortgage-backed securities.

Defendant did not shirk my obligation to pay my note and mortgage debt for recoupment under GAAP and FASB. The obligation was accepted and paid to the Trust owner authorized agent on DATE of Bank acceptance by hand or Registered Mail, with a binding Bank Draft bank instrument which is the representative of money and equal to money by U.S. law and banking business law as is the Federal Reserve Note Dollar. (**Evidence N**)

B-3 THE INTENT TO TRANSFER AN ASSET TO THE TRUST *IS NOT A TRANSFER TO THE TRUST*

The contents of these statutes, cases and contracts lead to one inescapable conclusion: the intent

of the parties and the requirements of the contracts were that the assets be conveyed to the Trusts by the Trust closing dates. For a transfer to any particular trust to be effective, there should have been a registration of the assets into "the name of the trust as such name is designated in the instrument creating said trust property"—this is the only method by which these assets could have been "divested from the possession, perfected interest, and title" of the donor/lenders.

In response to the lucidity of the controlling law on this issue, the mortgage foreclosure industry has chosen to argue that it is clear that it was the parties '"intent" to transfer these assets and therefore "no court" would ever declare that these assets were not transferred to these trusts. The controlling law is overwhelmingly against the industry in this position. The failure to deliver the notes and mortgages to these trusts as required by the trust instruments is a default under the terms of every agreement that these parties executed, including their agreements for payment guarantees with the monoline bond insurers. The securitization industry chose to create its securitization trusts under New York law precisely because the law was ancient and settled. Now that the actions of the foreclosure industry contradicts that law, parties such as the Plaintiff trust are left to argue hope against precedent. The well-settled New York trust law provides that "A mere intention to make a gift which has not been carried into effect, confers no right upon the intended beneficiary. There must also be delivery beyond the power of further control and dominion."[28] Equity will not help out an incomplete delivery.

[28](Vincent v. Rix, 248 N.Y. 76, 85 v. Rix, 248 N.Y. 76, 85; Matter of Green, 247 App. Div. 540; McCarthy v. Pieret, 281 N.Y. 407, 409.) as cited by In re FIRST TRUST & DEPOSIT CO., 264 A.D. 940, 941 (N.Y. App. Div. 4th D p't 1942)

If the agent of the donor has failed to make the delivery expected equity will not declare him a trustee for the donee.[29]

"Thus, Thornton on Gifts and Advancements (§140) notes:

> "In determining whether there has been a valid delivery, the situation of the subject of the gift must be considered. Thus if it is actually present, and capable of delivery without serious effort, it is not too much to say that there must be an actual delivery, although the donor need not in person or by agent hand the article to the donee, if the latter assumes the possession."

There was absolutely nothing in the physical nature of the papers to be delivered in this case, or in the physical condition or the surroundings of the donor, that made a symbolical delivery necessary."[30] It is true that the old rule requiring an actual delivery of the thing given has been very largely relaxed, but a symbolical delivery is sufficient only when the conditions are so adverse to actual delivery as to make a symbolical delivery as nearly perfect and complete as the circumstances will allow.[31]

Further, the failure to convey to a trust per the controlling trust document is not a matter that may be cured by the breaching party. New York law is unflinchingly clear that a trustee has only the authority granted by the instrument under which he holds, either deed or will. This fundamental rule has existed from the beginning and is still law.[32] An indenture trustee is unlike the ordinary trustee. In contrast with the latter, some cases have confined the duties of the indenture trustee to those set forth in the indenture.[33] From this context springs the seminal rule of law that effectively causes the parties to the Trust agreement and the Trust to be "gored by their own bull". New York's law is so well-settled regarding the limitations of a trustee's power to act that New York's Estates Powers and Trust Law Section 7-2.4 states:§ 7-2.4

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[29]Vincent . Putnam, 248 N.Y. 76, 82-84 (N.Y. 1928)
[30] n re Van Alstyne, 207 N.Y. 298, 309-310 (N.Y. 1913).
[31] In re Van Alstyne, 207 N.Y. 298, 309-310 (N.Y. 1913).
[32]Allison & Ver Valen Co. v. McNee, 170 Misc. 144, 146 (N.Y. Sup. Ct. 1939).
[33]Ambac Indem. Corp. v. Bankers Trust Co., 151 Misc. 2d 334, 336 (N.Y. Sup. Ct. 1991).

Act of trustee in contravention of trust

If the trust is expressed in the instrument creating the estate of the trust every sale, conveyance or other

act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void.

Therefore, the trustees for these trusts may only acquire assets in the manner set forth in the trust instrument and may not acquire assets in violation of the trust instrument. To the extent that any assets were not conveyed to these trusts as required and when r equired by the trust instrument, they are not assets of the trusts and the trustee cannot correct this deficiency now since the funding period provided in the Trust instruments passed many years ago.

The attempt to acquire assets by these trusts which violate the terms of the Trust instrument are void. Therefore, late assignments, improper chains of title, late endorsements, improper chains of title in the endorsements and the attempt to transfer to the trusts by foreclosure deed are just a number of the many examples of actions which are *void* if taken by a party to the indenture who is attempting to transfer property to the Trustee for the Trust in violation of the trust instrument.

C. THE TRUST NEVER PROPERLY ACQUIRED THE MORTGAGE NOTE AND MORTGAGE CONTRACT SECURITY AND THE TRUST CANNOT CURE ITS FATAL STANDING DEFECT

Under New York law there is no trust over property that has not been properly transferred to a trust. The Plaintiff Trust stated to the U.S. Securities and Exchange Commission in filings under oath that it has assets in excess of $400 million.[34]

To acquire assets, the Trust must be funded in accordance with the requirements of the PSA/Trust documents.

[34] http://sec.gov/Archives/edgar/data/1352655/000088237706000801/d431341.htm(last viewed 1/7/10)

The pertinent terms of the agreement are found at §2.01 (Conveyance of Trust Fund) of the PSA.[35] This section data ls how the mortgage notes in the instant case were transferred from **Encore Credit**

Corp. (as Originator) to EMC Mortgage Corp. (as the Sponsor and Master Servicer) to Stearns Asset Backed Securities I LLC (the Depositor) to Bank National Association (The Trustee) Stearns as the Depositor was required to deliver to **Trust** the original mortgage note and mortgage contract security showing an unbroken chain of endorsements from the original payee to the person endorsing it to the Trustee. The person endorsing to the Trustee was the **Stearns** entity.[36]

In the discovery provided to the Plaintiff, the only endorsement to the **Hornby** mortgage note is a blank endorsement "pay to the order of _____ without recourse Encore Credit Corp, A California Corporation," signed by an unreadable name with an unreadable title.[37]

The last assignment of the mortgage was a blank endorsement with a stamp by **LENDER**— nothing has been submitted by the Trust to the Court indicating that **LENDER** ever assigned the mortgage to any other entity. Thus, based on the documents in this case, **LENDER**, not **NAME (the TRUST),** may be the mortgage holder. **NAME Trust** does not have the authority or subject matter jurisdiction to foreclose the mortgage.

No later than May 29, 2006 there should have been — at a minimum — endorsements from Encore Credit Corp. to EMC Mortgage Corp., then EMC Mortgage Corp. to Stearns, then Stearns to Trust.[38] And yet, there is no "showing" of an unbroken chain of endorsements in the documents provided to the Plaintiff. The affidavit of **Thomas J. Adams**, expert for the Plaintiff, physically testified to this:

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35 Bates #: Lasalle/Horace 0067.

[36]*See* Bates #: LaSalle/Horace 0067-0068: ""(A) in blank or to the order of ""LaSalle Bank National Association, as Trustee fo Certificateholders of Bear Stearns Asset Backed Securities I LLC, Asset-Backed Certificates, Series 2006 EC2,"" or (B) in the case of a loan registered on the MERS system, in blank, and in each case showing an unbroken chain of endorsements from the original payee thereof to the Person endorsing it to the Trustee, . . ."

[37]Bates #: Horace v. LaSalle 29.

[38] Plaintiff states ""at a minimum"" because there may have been more transfers.

"According to the requirements set forth in the Trust Agreement I would expect to see a series of endorsements of the promissory note reflective of each party who had an interest in the promissory note reflective of each party who had an ownership interest in the promissory note culminating with a blank endorsement from the depositor at the very minimum."[39]

The Trust never possessed the mortgage note nor the mortgage contract security per the terms of the PSA (Pooling and Service Agreement). Further, in the PSA's exhibits, Exhibit One sets forth the contents of the collateral file for each mortgage loan that is trust property and further includes a final specific endorsement to the Trustee for the specific trust in this case to effect a final transfer to the Trust and to make the Horace promissory note trust property.

Any attempt by LaSalle (Trust), or Bank of America (Servicer), to transfer the promissory note to the Trust at this late date would fail for numerous reasons, not the least of which is that the closing date of **February 28, 2006** passed nearly **5** years ago. By the terms of the Trust and the applicable provision of the Internal Revenue Code incorporated into and a part of the Trust agreement, the Mortgage Contract Security or the Promissory Note cannot be transferred to the Trust.[40]

Because the contradicted evidence in the case is that the **Hornby** loan has never been conveyed to the Trust and a conveyance to the Trust at this time would be void as violating the terms of the PSA. The Court is left with one clear and inescapable proposition: ***The Trust has never owned the Hornby promissory note or Mortgage contract security and the Trust can never own the Hornby promissory note or Mortgage contract security.***

D. THE TRUST IS NOT ENTITLED TO THE MONEY SECURED BY THE HORNBY MORTGAGE AND CANNOT FORECLOSE

Per **Ala. Code §35-10-12**, the power to sell lands is held by the person who " . . . by assignment or otherwise, becomes entitled to the money thus secured." The **2022 Florida Statutes; Chapter 714**,

[39] Affidavit and Testimony of Thomas J. Adams, ¶ 12.
[40] Affidavit and Testimony of Thomas J. Adams, ¶17.

UNIFORM COMMERCIAL REAL ESTATE RECEIVERSHIP ACT ; **Chapter 715**, PROPERTY: GENERAL PROVISIONS ; **Chapter 716**. As outlined above, the Trust has not provided documentation to show that it was or is entitled to the money secured by the mortgage of **Hornby's** property. "The **Defendant or Plaintiff** Trust [**LaSalle]** has offered no proof of ownership and the collateral file offered by the Plaintiff Trust clearly demonstrates that this loan was not securitized nor was it transferred to this Trust."[41]

CONCLUSION

Based on the law, the terms of the Pooling and Service Agreement, the failure to show the proper chain of endorsements, the arguments contained herein, and the bank instrument payoff of this mortgage debt, **Defendant or Plaintiff** moves this Court to permanently enjoin Bank National Association (and Bank of America as its successor- in-interest) and all agents from foreclosing on the property at 3745 Null Road, Atlanta, Georgia 65764 because they have failed to make the required showing that they are or ever were or ever could be the holder or owner of the mortgage promissory note security or the mortgage contract recorded security.

RESPECTFULLY SUBMITTED,

/s/ Signture
Your Name and address
Tel. (334) 887-4527
Fax (334) 821-4529

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon the Defendants by providing an electronic copy on this the 13th day of January 2017

All counsel of Record

_/s/ Your Name

41 Affidavit and Testimony of Thomas J. Adams, ¶14 and deposition testimony page 140, lines 4-8.