

IN THE DISTRICT COURT OF APPEAL
FOR THE FIFTH DISTRICT
STATE OF FLORIDA

GREGORY TAYLOR,

Appellant,

Case No.: 5D09-4035

L.T. No.: 05-2008-CA-065811

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY
AS TRUSTEE FOR FFMLT 2006FF4,
MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2006-FF4,

Appellee.

REPLY TO MOTION FOR REHEARING EN BANC

The Appellee, DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR FFMLT 2006FF4, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-FF4, pursuant to Rule 9.331(d)(1), Florida Rules of Appellate Procedure, submits this reply to the Appellant's motion for rehearing en banc and states:

1. The Appellant's motion for rehearing en banc ("motion") should be denied because there is no matter of exceptional importance in this case as the Court's opinion does not create a new theory of transferring notes. The Court applied principals of transferring debts that are clearly contemplated within the Uniform Commercial Code. ("UCC").

The Appellant simply refuses to acknowledge that intent of the parties is the key to a valid transfer and the UCC allows the parties to reach a mutual agreement regarding the transfer of an instrument. While it is unfortunately true there are many foreclosure cases in this state, it cannot be said that this Court's holding created a new theory of transferring notes when that theory is clearly contemplated in statute and supported by existing case law.

**THERE IS NO AMBIGUITY IN THE DOCUMENTS
REVIEWED BY THE COURT IN THIS CASE**

2. There is no ambiguity in the documents reviewed by the Court and the Appellant's attempt to impugn this Court's reasoning with case law decided on clearly distinguishable facts and law is flawed and does not warrant an opposite result.

3. The Court in the instant case held that a valid assignment occurred from MERS to the Appellee and the clear language in the mortgage and note in this case illustrated it was the parties intent to allow that transaction to occur. Opinion at pp.7-8. The Court reasoned this case was similar to the facts in *U.S. Bank, N.A.*

v. Flynn, 879 N.Y.S.2d 855 (Sup.Ct. Suffolk County, March 12, 2010.). *Id.* In *Flynn* the court held that the agreement of the parties contained in the mortgage indenture gave the nominee (MERS) the authority to make an assignment because MERS was lawfully acting in the place of the owner at the time the assignment was made. *Flynn* at p.859. Clearly, this is not a novel concept.

4. The Appellant ignores the *Flynn* case in his motion and advances the argument that this Court should review the panel's decision en banc because the language the Court considered within the note and mortgage is ambiguous and the Supreme Court of Maine reached a different result based upon similar language in *Mortgage Electronic Registration Systems, Inc. v. Saunders*, 2010 WL 3168374 (Me.). Appellant's argument is flawed in two ways. First, the facts and law analyzed by the *Saunders* court were different from those in the instant case. Second, the language reviewed by this Court was not ambiguous.

5. The Appellant's motion omits the critical distinctions in both fact and law between the *Saunders* case and the case at bar. These distinctions are fatal to the motion and it should be denied. Further, this Court gave no indication of ambiguity in the note, mortgage, and assignment in this case and reasoned its opinion based upon the clear and plain meaning of the words used in the documents and the application of appropriate Florida law.

6. The *Saunders* court reviewed whether MERS as nominee had standing to initiate a foreclosure proceeding which the court reviewed under Maine law applicable to a party's right to sue. *Saunders* at *2. The court in *Saunders* held that MERS did not have standing to initiate a foreclosure proceeding because they were not the real party in interest, and not a mortgagee as defined by 14 M.R.S. § 6321. *Id.* at *4. The distinction is obvious between the two cases as the critical issue in the instant case was whether Deutsche Bank was a nonholder in possession - not whether MERS had a right to sue.¹

7. This obvious distinction aside, the Appellant posits that the *Saunders* court "Reviewed the Same Relevant Language and Reached a Different Interpretation Thereby Creating an Issue of Fact Precluding Summary Judgment." Motion at p.1. The Appellant is mistaken. The holding in *Saunders* turned on the language contained in the mortgage. Specifically, paragraph (C) which limited the MERS role as mortgagee to recording the mortgage only. The court then logically concluded that the only right conveyed to MERS was the right to record the mortgage. *Saunders* at *3. ("The only rights conveyed to MERS in either the Saunderses' mortgage or the corresponding promissory note are bare legal title to

¹ The Appellant posits that the Appellee did not argue or brief the issues which the Court decided in this case at the trial court or appellate levels. Motion at p.1 fn.1. Of course, there is no record of the hearing. Opinion at 5. However, §673.3011 was raised in the answer brief, although the emphasis was on subsection (1). Answer brief at p.11.

the property for the sole purpose of recording the mortgage and the corresponding right to record the mortgage with the Registry of Deeds.”). In the instant case the similar paragraph (C) of the mortgage contains no such limitation. R. p.11. Therefore, this Court’s opinion is based upon different issues and underlying facts and the motion should be denied. The *Saunders* court seized upon the language in paragraph (C) of the mortgage in that case and then applied Maine law regarding a party’s right to initiate a law suit which also differs from Florida law.

8. Maine law regarding real party in interest materially differs from Florida law. In Maine a party must demonstrate a personal stake in the matter by evidence of “a particularized injury to the party’s property, pecuniary, or personal rights.” *Id.* at *2. The court’s holding in *Saunders* states that “MERS, as the complaining party, must show that it has suffered an injury fairly traceable to an act of the mortgagor and that the injury is likely to be redressed by the judicial relief sought.” *Id.* at *5. As this Court correctly held, in Florida, a party is not required to have a beneficial interest in the note to in order to have standing in foreclosure proceedings. Opinion at p.8. This is true because “[t]he Florida real party in interest rule, Fla. R. Civ. P. 1.210(a), permits an action to be prosecuted in the name of someone other than, but acting for, the real party in interest.” Opinion at p.8 (*quoting Mortgage Electronic Registration Systems, Inc. v. Azize*, 965 So. 2d 151 (Fla. 2d DCA 2007)). *Saunders* was decided on facts and law that are

dissimilar from the case currently before this Court and cannot be used to illustrate ambiguity in the instant case. This case does not present a question of exceptional importance.

THE COURT READ THE LANGUAGE OF THE NOTE AND MORTGAGE TOGETHER AS REQUIRED UNDER FLORIDA LAW.

9. The Appellant suggests this Court reviewed the language of the mortgage in an isolated manner and if the language of the note and mortgage are viewed collectively the language is ambiguous. Motion at p.2. First, the Appellant is merely asking this court to reconsider matters already decided in its opinion without identifying the language in the documents that was overlooked. The Court gave no indication that it viewed pertinent language in this matter in such an isolated fashion. In fact, “[t]he doctrine of mutual construction, by which two documents executed by the same parties as part of a single transaction regarding the same subject matter must be read and construed together, applies to mortgages and the notes they secure.” See 37 Fla.Jur.2d Mortgages, Etc., §94 and *Slaughter v. Parsons*, 148 Fla. 240, 4 So. 2d 328 (1941). Specifically, the Court must read the documents collectively in order to determine the parties’ intent. See, *In re Alford*, 381 B.R. 336 (Bankr. M.D. Fla. 2007). This is exactly what the Court did. The Court held that “MERS was lawfully acting in the place of the holder and was given **explicit and agreed upon authority to make such an assignment.**” Opinion at p.8. (Emphasis added). There are no ambiguities in the relevant

documents. The Court was capable of determining the intent of the parties and correctly did so. The motion for rehearing en banc should be denied.

10. The authority cited by the Appellant on page 3 of the motion appears to argue for this result. The Appellant attempts to advance *Mortgage Electronic Registration Systems, Inc. v. Nebraska Department of Banking and Finance*, 270 Neb. 529, 704 N.W.2d 784 (2005), to support the argument that MERS did not have the authority to make the assignment on this case. Motion at p.3. However, the following quote by the *Nebraska* court, provided by the Appellant, reveals that the authority granted to MERS is specified in the documents themselves:

MERS agrees not to assert any rights **(other than rights specified in the Governing Documents)** with respect to such mortgage and loans mortgaged properties; ...
Motion at p.3. quoting *Nebraska* at 532. (Emphasis added)

This provides further support for the fact that the intent and agreement of the parties is the key to MERS authority in these matters.

11. Next, the Appellant appears to argue that the Court's opinion gives MERS the authority to act as a rogue entity, assigning mortgages at will, to the detriment of lenders it works with, such as the Appellee. Motion at pp.4-5. As this Court pointed out in its opinion, other states have held that MERS has the authority to act consistent with the authority granted it within the documents (see paragraph 2 above), and there has been no cases cited by the Appellant wherein a lender has complained of MERS exceeding its authority either under the documents in a given

transaction or under the agreement between MERS and the lender. This argument is nothing more than a straw man and cannot support a motion for rehearing en banc.

**THERE IS NO CONFLICT BETWEEN THE OPINION
IN THIS CASE AND THE SECOND DISTRICT'S OPINION
IN *VERIZZO V. BANK OF NEW YORK*.**

12. The Appellant's attempts to manufacture conflict between the case at bar and *Verizzo v. Bank of New York*, 28 So.3d 976 (Fla. 2d DCA 2010), are equally misguided as the facts of that case did not present the same issue to the *Verizzo* court as were reviewed by this court in the instant case. In *Verizzo* the court found that the note in that case bore "an endorsement, without recourse, signed by Novastar ("the original lender") stating: Pay to the Order of: JP Morgan Chase Bank, as Trustee." *Id.* The assignment in that case indicated that MERS assigned the mortgage and note to the Bank of New York. *Id.* The *Verizzo* court perceived these two facts as conflicting evidence regarding who was in fact the holder of the note and determined that this conflict was a genuine issue of material fact and reversed summary judgment. *Id.* at 978.

13. The court in *Verizzo* did not need to reach the issue of whether the assignment by MERS in that case was valid because of the conflict that was apparent on the face of the documents. The case at bar presents no such conflict. The note in the instant case does not bear an indorsement that would conflict with

MERS authority to assign the note and mortgage. Therefore, it was necessary for this Court to review whether the assignment from MERS to the Appellee was valid in order to reach its holding. Because the *Verizzo* court did not reach these issues its holding cannot provide the basis of conflict with the opinion in the instant case.

**AMPLE EVIDENCE SUPPORTED THE APPELLEE'S
POSSESSION OF THE NOTE AND MORTGAGE.**

14. On page 9 of the motion the Appellant states “[t]his Court did not delineate whether the legislature intended that “possession” of the note merely be a legal fiction as in constructive possession, or in fact, whether the note must have actually been possessed in order to foreclose.” This is because the Appellee was obviously in possession of the note and mortgage in this case. It is clear under the UCC that “[a]n instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.” §673.2031(1), Fla. Stat. (2009). The plain reading of the statute demonstrates that indorsement is not always required. However, delivery with the intent to deliver the right to enforce it is. The comments to 673.2031 clearly state that “[a]n instrument is a reified right to payment. The right is represented by the instrument itself.” *Id.* at Comment 1. When the instrument is not indorsed “[t]he instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it. Proof of a transfer to the

transferee by a holder is proof that the transferee has acquired the rights of a holder." *Id.* at Comment 2. Appellant's belief that indorsement is always required is incorrect and the motion should be denied.

15. The Court's holding is not based upon constructive possession of the note and mortgage as suggested by the Appellant. Further, Appellant's argument that there was no proof that MERS was in possession of the documents at the time of the assignment is without merit. The Court held that MERS was a nonholder in possession with the rights of a holder under sec. 673.3011(2), (opinion at p.7). The Court's belief that MERS had possession of the note and mortgage is supported by several facts. First, the Court found there was a valid assignment of the **note and mortgage** from MERS to the Appellee. Opinion at p.8. (Emphasis added). Second, the Appellee produced the original note and mortgage regarding the subject property. And third, as the Court noted, the mortgage expressly provided that "MERS (solely as nominee for Lender and Lender's successor and assigns) *has the right to exercise any and all of those interests, including, but not limited to, ...releasing and canceling the security instrument.*" Opinion at pp.3-4. As MERS is named in the mortgage itself with the identified right to release and cancel the security instrument itself this implies they possess it. This fact then becomes clear when one observes the Appellee through the assignment from MERS took delivery of the note and mortgage which it produced in the proceedings below. There is

ample evidence demonstrating MERS had possession of the documents that were assigned.

**THE COURT'S OPINION DOES NOT
CONTRADICT EXISTING FLORIDA LAW**

16. The Appellant's argument that the Court's opinion upset the law of Florida regarding the mortgage following the note is also without merit. The note and the mortgage must be read and construed together. The Court has done that (see opinion pp.3-4) and determined that a valid assignment of the note and mortgage were made at the same time. Opinion p.7.

17. The Court's opinion does not conflict with section 673.5011, Florida Statutes (2009). The Appellant's reading of this statutory section is in error. As stated more particularly above, it is well settled under the UCC that an instrument may be transferred by indorsement or proper assignment. The Court's opinion holds the assignment in this case was proper; therefore, the Court did not address the indorsement issue because it was unnecessary. The Appellant's misinterpretation of section 673.5011 does not warrant an opposite result.

18. The Appellant quotes section 673.5011(1)(a) which defines presentment. The Appellant then proceeds to advance what is offered as subparagraphs (b) and (c) of paragraph (1) to support their position that indorsement on the physical note itself is required before payment is due. Motion at p.11. This is the sole basis for the Appellant's contention that the Court's opinion conflicts

with section 673.5011. In fact, the above referenced sub-paragraphs (a) and (b) follow section 673.5011(2), which reads as follows:


The following rules are subject to chapter 674, **agreement of the parties**, and clearinghouse rules and the like[.]

(Emphasis added)

19. First, the physical indorsement of the actual note is not required. Second, the Court held that MERS was acting by agreement of the parties when it transferred the note and mortgage to the Appellee. Therefore, the Court is not in conflict with section 673.5011. Lastly, the Appellant asserts virtually every mortgage in Florida is a standard Fannie Mae/Freddie Mac uniform instrument. See Motion at p.9 fn.4. In the accompanying standard note, as in this note, the parties waive the presentment requirement. R. p.8. Therefore, this issue cannot be used to establish a matter of exceptional importance.

For all of the foregoing reasons, the Appellee respectfully requests the Appellant's motion for rehearing en banc be denied.

Respectfully Submitted,



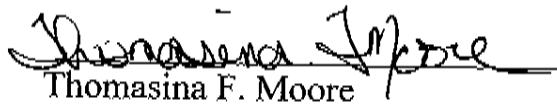
Thomasina F. Moore

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CERTIFICATE OF SERVICE

I certify that a copy of this Reply to Motion for Rehearing En Banc has been served by U.S. Mail this 5th day of September 2010 to:

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Appellee.

**REPLY TO APPELLANT'S
MOTION FOR CERTIFICATION**

The Appellee, DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR FFMLT 2006FF4, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-FF4, pursuant to Rule 9.330(a), Florida Rules of Appellate Procedure, submits this reply to the Appellant's motion for certification and states:

1. There is no conflict between *Verizzo v. Bank of New York*, 28 So.3d 976 (Fla. 2d DCA 2010) and the Court's opinion in this case. The facts in *Verizzo* did not present the same issues as were addressed by this court in the instant case.

In *Verizzo* the court found that the note in that case bore “an endorsement, without recourse, signed by Novastar (“the original lender”) stating: Pay to the Order of: JP Morgan Chase Bank, as Trustee.” *Id.* The panel in that case also found that assignment in that case indicated that MERS assigned the mortgage and note to the Bank of New York. *Id.* The *Verizzo* court perceived these two facts as conflicting evidence regarding who was in fact the holder of the note and determined that this conflict was a genuine issue of material fact and reversed summary judgment. *Id.* at 978.

2. The court in *Verizzo* did not need to reach the issue of whether the assignment by MERS in that case was valid because of the conflict that was apparent on the face of the documents. The case at bar presents no such conflict. The note in the instant case does not bear an indorsement that would conflict with MERS authority to assign the note and mortgage. Therefore, it was necessary for this Court to review whether the assignment from MERS to the Appellee was valid in order to reach its holding. Because the *Verizzo* court did not reach these issues its holding cannot provide the basis of conflict with the opinion in the instant case.

3. This case should not be certified as presenting a question of great public importance. The Appellant’s have asked the Court to certify two questions to the Supreme Court. The first question reads as follows:

“Whether a negotiable instrument promissory note made payable to a specifically identifiable person is

enforceable by another person in the absence of an indorsement from the payee?”

This is not a question of great public importance.

4. It is clear from a plain reading of the Uniform Commercial Code (“UCC”) that indorsement is not required to transfer an instrument. What is required is the delivery of the instrument with the intent to deliver the right to enforce it is. The comments to 673.2031 clearly state that “[a]n instrument is a reified right to payment. The right is represented by the instrument itself.” *Id.* at Comment 1. When the instrument is not indorsed “[t]he instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it. Proof of a transfer to the transferee by a holder is proof that the transferee has acquired the rights of a holder.” *Id.* at Comment 2. Appellant’s belief that indorsement is always required is incorrect and the motion should be denied. While indorsement might normally be the quickest and safest way for lenders to transfer an instrument, it is clearly not the exclusive means to accomplish that purpose.

5. The Appellant’s also submitted the following for certification:

“Is an assignment of mortgage from Mortgage Electronic Registration System, Inc. (MERS), without proof that MERS ever had possession of the underlying promissory note or that it was authorized by the original lender to

make such an assignment, sufficient proof to foreclose upon a mortgage in summary judgment proceeding?"

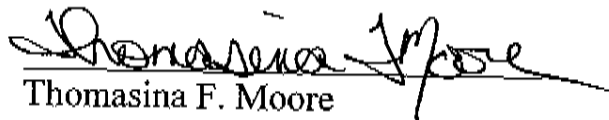
Likewise, this is not a question of great public importance because the Court's holding was not based upon the factual scenario described by the Appellant.

6. In this case there was ample evidence MERS was in possession of the requisite documents. The Court held that MERS was a nonholder in possession with the rights of a holder under sec. 673.3011(2). Opinion at p.7. The Court's belief that MERS had possession of the note and mortgage is supported by several facts. First, the Court found there was a valid assignment of the **note and mortgage** from MERS to the Appellee. Opinion at p.8. (Emphasis added) Second, the Appellee produced the original note and mortgage regarding the subject property. And third, as the Court noted, the mortgage expressly provided that "MERS (solely as nominee for Lender and Lender's successor and assigns) *has the right to exercise any and all of those interests, including, but not limited to, ...releasing and canceling the security instrument.*" Opinion at pp.3-4. As MERS is named in the mortgage itself with the indentified right to release and cancel the security instrument itself this implies they possess it. This fact then becomes clear when one observes the Appellee through the assignment from MERS took delivery of the note and mortgage which it produced in the proceedings below. There is ample evidence demonstrating MERS had possession of the documents that were assigned. Certification of this matter is not warranted as the issue presented in the

Appellant's proffered question and the rational for the holding in the instant case are dissimilar.

WHEREFORE, the Appellee respectfully requests the Appellant's motion for certification be denied.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Thomasina F. Moore", with a long horizontal flourish extending to the right.

Thomasina F. Moore

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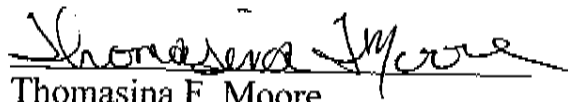
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CERTIFICATE OF SERVICE

I certify that a copy of this Reply to Appellant's Motion for Certification has been served by U.S. Mail this 3rd day of September 2010 to:

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Michael J. Wrubel,
Gregory Clark,
Matthew Weidner,
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