

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

**IN RE:**

**CASE NO.: 6:09-bk-12240-ABB  
CHAPTER 7**

**JORGE, CANELLAS,**

**Debtor.**

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**CARLA P. MUSSELMAN, Trustee of the  
Bankruptcy Estate of Jorge Canellas,**

**Adv Proc. No. 6:10-ap-00229-ABB**

**Plaintiff,**

**vs.**

**U.S. BANK NATIONAL ASSOCIATION, AS  
TRUSTEE OF THE LEHMAN BROTHER SMALL  
BALANCE COMMERCIAL MORTGAGE  
PASS-THROUGH CERTIFICATES, 2006-3, and  
AURORA BANK, FSB,**

**Defendants.**

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**U.S. BANK'S AMENDED MOTION FOR SUMMARY  
JUDGMENT/JUDGMENT ON THE PLEADINGS**

Secured creditors, Aurora Bank, FSB and U.S. Bank National Association, as Trustee of the Lehman Brother Small Balance Commercial Mortgage Pass-Through Certificates, 2006-3<sup>1</sup> (“**U.S. Bank**”), hereby file this Amended Motion for Summary Judgment / Judgment on The Pleadings and in support thereof states:

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<sup>1</sup> The Trustee names Aurora Bank as a Defendant, however does not make any allegations against Aurora and thus Aurora should be dropped as a party outright.

## **I. Chronology of Relevant Events**

1. On August 1, 2006 Jorge V. Canellas executed a mortgage agreement with Lehman Brothers Bank, FSB. A copy of which is attached hereto as **Exhibit “A”**<sup>2</sup>.
2. On August 1, 2006, Jorge V. Canellas executed a Promissory Note in favor of Lehman Brothers Bank, FSB. A copy of which is attached hereto as **Exhibit “B”**.
3. On October 31, 2006, a Trust Agreement was created between Lehman Brothers Bank, FSB as Servicer and U.S. Bank National Association, as Trustee. (“Series 2006-3”). A copy of which is attached hereto as **Exhibit “C”**.
4. On October 31, 2006, a Servicing Agreement was creating between Lehman Brothers Holdings, Inc., as Seller and U.S. Bank National Association as Trustee. (“Series 2006-3”). A copy of which is attached hereto as **Exhibit “D”**.
5. On December 10, 2007 U.S. Bank National Association, a national banking association, in its capacity as trustee under the Trust Agreement gave Lehman Brother Bank, FSB a limited power of attorney for various purposes, including, but not limited to “to execute, acknowledge, seal and deliver deed of trust/mortgage note endorsements, assignments of deed of trust/mortgage and other recorded documents.” A copy of which is attached hereto as **Exhibit “E”**.
6. On April 24, 2009 Aurora Bank FSB issues a Secretary’s Certificate certifying the name of the bank changed from Lehman Brothers Bank, FSB to Aurora Bank FSB. A copy of which is attached hereto as **Exhibit “F”**.

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<sup>2</sup> Broad and Cassel is currently holding the originals of the Mortgage, Promissory Note, Assignment and Allonge in the firm safe. The originals of these documents have been inspected by the Trustee and her Counsel.

7. On August 7, 2009 Ronald Warwick, the Chief Financial Officer of Aurora Bank delegated and authorized Jack Jacob, Vice President of Aurora Bank, to assign loan documents. A copy of the delegation of authority is attached hereto as **Exhibit “G”**<sup>3</sup>.

8. On September 28, 2009, Jack Jacob, Vice President of Aurora Bank, executed an *Assignment of Mortgage and Loan Documents*<sup>4</sup> to U.S. Bank National Association, as Trustee of the Lehman Brothers Small Balance Commercial Mortgage Pass- Through Certificates, 2006-3. **Exhibit “H”**.

9. On September 28, 2009, Jennifer Henninger, Aurora Bank’s Special Assets Administrative Assistant signed the *Allonge to Promissory Note*. A copy of the Allonge is attached to the Promissory Note (Exhibit “2”)<sup>5</sup> A copy of the Affidavit of Jennifer Henninger, is attached hereto as **Exhibit “I”** and a copy of the Affidavit of Jack Jacob is attached hereto as **Exhibit “J”**<sup>6</sup>.

10. On September 29, 2009, Jennifer Henninger personally requested to obtain a the original Note. *See Deposition of Jennifer Henninger (P. 26)*. Ms. Henninger received the Original Note on October 5, 2009. *See Deposition of Jennifer Henninger (P. 27)*. Ms.

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<sup>3</sup> *See Deposition of Jack Jacobs, P. 38-40,( provides explanation of delegations of authority and his authority to execute Assignments.)*

<sup>4</sup> *See Deposition of Jennifer Henninger (P. 24-26) (Ms. Henninger testifies that the Assignment is not back dated. The November 30, 2006 date refers to the date of the U.S. Bank pool, 2006-3. See Deposition of Jennifer Henninger (P. 25-26) (Ms. Henninger testifies that the notarization was proper under California notary requirements).*

<sup>5</sup> The Allonge reads “Allonge to Promissory Note Dated August 1, 2006.” The date of August 1, 2006 refers to the August 1, 2006 Promissory Note date. It is not the date that the Allonge was executed. *See Deposition of Jennifer Henninger P. 23* Moreover, Ms. Henninger had the authority to sign the Allonge. *See Deposition of Jennifer Henninger P. 21 and Deposition of Jack Jacobs, P. 38-40,( provides explanation of delegations of authority and Ms. Henninger’s authority to execute an allonge.)*

<sup>6</sup> In order to avoid duplication, Counsel did not attach the exhibits referenced in the affidavits of Ms. Henniger and Mr. Jacob as part of their affidavits because the exhibits are already attached as part of the above chronology.

Henninger then hand delivered the original note and allonge to Louis Zaffino. *See Deposition of Jennifer Henninger (P. 27-28); see also Deposition of Louis Zaffino (P. 24).*

11. Mr. Zaffino personally stapled the note and the allonge together and put the original documents in his file cabinet where they remained until requested by Broad and Cassel. *See Deposition of Louis Zaffino (P. 24).*

12. Broad and Cassel has physical possession of the original, Mortgage, Note, Allonge and Assignment.

## **II. Argument**

The Trustee raises a number of alleged defects as it relates to the Assignment and Allonge. However, the Trustee does not cite to any law that would support these allegations. The simple reason is that the Trustee's allegations are baseless.<sup>7</sup> Furthermore, the Trustee is not entitled to the relief she is requesting because it is already law of the case that (i) the property is encumbered by the mortgage; (ii) the mortgage was properly perfected; (iii) the mortgage has not been satisfied; and (iv) the assignment of the note and mortgage does not affect prior perfection. *See Main Case D.E.48*

The above chain of title clearly demonstrates that US Bank is the owner and holder of the Mortgage and Note and the Trustee does not have any legal authority or basis to show otherwise. Section 673.3011, Florida Statutes (2010) defines the persons entitled to enforce a negotiable instrument, reads as follows:

The term "person entitled to enforce" an instrument means:

- (1) The holder of the instrument;

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<sup>7</sup> Moreover, it appears that the Trustee is making the same baseless claims in an unrelated adversary action pending in front of Judge Jennemann, AP. 6:10-ap-00245-KSJ.

- (2) A nonholder in possession of the instrument who has the rights of a holder; or
- (3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to s. 673.3091 or s. 673.4181(4).

Moreover, in Adversary Proceeding. 6:10-ap-00245-KSJ, brought by Carla Musselman making similar allegations as in the instant adversary, Judge Jennemann, found the following: “under applicable Florida law, a mortgage, even without a written assignment, may travel equitably to the holder of the underlying debt, i.e., to the entity holding the original, properly executed and endorsed promissory note.” A copy of the order is attached hereto as **Exhibit “K”**. *See Order, p. 4.* Judge Jennemann relies upon the 1938 Florida Supreme Court case *Johns v. Gillian*, 184 So. 140, 143 (Fla. S. Ct. 1938) and *Riggs v. Aurora Loan Services, LLC.*, 36 So.3d 932 (Fla. 4<sup>th</sup> DCA 2010). *Johns* held “if there had been no written assignment, Gillian would be entitled to foreclose in equity upon proof of his purchase of debt.” *See id.* The *Riggs Court* held that although Aurora did not have a written assignment of the mortgage and Aurora was not the original mortgagee, Aurora could foreclose on the mortgage because it had possession of the original note. *See Riggs* at 933-34.

A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument. As identified in the above chronology, US Bank is the holder of the Mortgage and Note and is entitled and has standing to enforce them. Because a promissory note is a negotiable instrument, and because a mortgage provides the security for the repayment of the note, this statute leads to the conclusion that the person having standing to foreclose a note secured by a mortgage may be either the holder of the note or a nonholder in possession of the note who has the rights of a holder. *BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936, 938 (Fla. 2d DCA 2010).

