

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,  
IN AND FOR PINELLAS COUNTY, FLORIDA  
CIVIL DIVISION**

**WELLS FARGO BANK, N.A., AS TRUSTEE  
FOR OPTION ONE MORTGAGE LOAN  
TRUST 2007-CP1 ASSET-BACKED  
CERTIFICATE SERIES 2007-CP1,**

**CASE NO. 08-018162-CI-11**

**PLAINTIFF,**

**v.**

**DANIEL DYMINSKI,**

**DEFENDANT.**

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**DEFENDANT'S MOTION TO DISMISS ACTION**

COMES NOW, the Defendant DANIEL DYMINSKI (hereinafter "Defendant") by and through the undersigned counsel MATTHEW D. WEIDNER and respectfully moves this Court to DISMISS WITH PREJUDICE the above entitled civil action, pursuant to Rules 1.210(a) and 1.140(b)(6) Fla. R. Civ. P., and precedent case law, and in support thereof states:

**FACTS**

1. This is an action for foreclosure of real property owned by the Defendant.
2. The named Plaintiff in this case is WELLS FARGO, N.A., AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN TRUST 2007-CP1 ASSET BACKED CERTIFICATES, SERIES 2007-CP1 (hereinafter "Plaintiff").
3. In its Complaint, the Plaintiff alleges that "[o]n August 25, 2006, [the Defendant], executed and delivered a promissory note and a mortgage securing payment of same to SAND CANYON CORPORATION F/K/A OPTION ONE MORTGAGE CORPORATION."<sup>1</sup>

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<sup>1</sup> See Complaint, ¶2.

4. SAND CANYON CORPORATION (hereinafter “Sand Canyon”) is not the named lender on the Mortgage and Promissory Note attached to the Plaintiff’s Complaint and, as further described below, Defendant has no idea how Sand Canyon is a party to this case. The named lender is OPTION ONE MORTGAGE CORPORATION, a California Corporation (hereinafter “Option One”).

5. Records obtained from the California Division of Corporations reflect that Option One, has had its status as a California corporation suspended since 1990. (California Division of Corporations Records attached hereto as “Exhibit A.”) The California Division of Corporations lists Sand Canyon as an active corporation, but the only name appearing on the documents shows that Option One Mortgage Corporation is the real party in interest in this litigation. There is no record or mention of any connection between the two entities and the contradictory information contained both within the pleadings and the attached exhibits introduce a real question of fact regarding who the real parties in interest are.

6. When the complaint was initially filed, attached to the complaint was a copy of the note at issue in this case along with a blank allonge which, if authentic, may have made the note in question payable to bearer.

7. On or about July 24, 2009, the original note, including the alleged allonge, was filed with the court, but the allonge now appearing in the court file was changed to provide a special endorsement in favor of, “Wells Fargo Bank, N.A. As Trustee for Option One Mortgage Loan Trust 2007-CP1 Asset Backed Certificates, Series 2007-CP1”

8. The allonge is not dated, or notarized and it is unclear when the alleged allonge was changed to specially endorse the note in question to the lender but the fact that the special endorsement appears on the original note after the instant litigation was initiated raises questions

as to the veracity of the alleged special endorsement via allonge. Specifically, how can a corporation which the public records reveal has been suspended since 1990 endorse or pledge any security and what person had the authority to create the special endorsement that appears now on the original document after the instant litigation was initiated?

9. Next and most importantly, the Defendant asserts that the purported allonge is ineffective to transfer ownership of the note at issue given the facts of this particular case and the existing case law and statutes. Quite simply, while an allonge may be authorized by statute and case law in cases where there is not ample space on the promissory note to affix an original endorsement, an allonge is not authorized when, as in this case, the document sought to be transferred and entered into evidence includes abundant space upon which to record a proper endorsement.

#### **STANDARD OF REVIEW**

10. In ruling on a defendant's motion to dismiss, a trial court is limited to the four corners of the Complaint, and it must accept all the allegations in the Complaint as true. *See Lutz Lake Fern Rd. Neighborhood Groups, Inc. v. Hillsborough County*, 779 So.2d 380, 383 (Fla. 2d DCA 2000). However, when a question has not been previously decided by a Florida court, the decisions of a court of another state may be considered. *Old Plantation Corp. v. Maule Industries, Inc.*, 68 So. 2d 180 (Fla. 1953). Such a decision, when on point, is regarded as persuasive. *Tonkovich v. South Florida Citrus Industries, Inc.*, 185 So. 2d 710 (Fla. 2d DCA 1966).

#### **INTRODUCTION**

11. There is surprisingly small universe of case law in the entire body of American jurisprudence to which this Court could look to for guidance when deciding matters dealing with allonges. A search on Westlaw reveals that the entire universe of Florida cases, both in State and

Federal courts, is limited to two cases: Booker v. Sarasota, Inc., 707 So. 2d 886 (Fla 1st DCA 1998) and In re Canellas, 2010 WL 571808 (Bankr. M.D. Fla. Feb. 9, 2010). {note especially the late date on the Canellas case} Moreover, a search of the word “allonge” on Westlaw for the entire American judicial system, both State and Federal, reveals only 274 documents. It should be noted, however, that the vast majority of these cases only mention allonges in passing, most often reciting the Black’s Law Dictionary definition of an allonge in the footnote of the decision or simply making reference to an allonge when reciting the facts of the case. According to the only Florida appellate case which deals with these ancient documents, “[a]n allonge is a piece of paper annexed to a negotiable instrument or promissory note, on which to write endorsements for which there is no room on the instrument itself. Such must be so firmly affixed thereto as to become a part thereof.” Booker, 707 So. 2d at 886 (Fla 1st DCA 1998). *See also* U.S. Bank National Association v. Weigand, 2009 WL 1623764 (Conn. Super. 2009); P&B Properties I, LLC v. Owens, 1996 WL 111128 (Del. Super. 1996). Furthermore, while “Florida’s Uniform Commercial Code does not specifically mention an allonge, [the Code] notes that ‘for purposes of determining whether a signature is made on an instrument, a paper affixed to the instrument is made part of the instrument.’ Fla. Stat. §673.2041(1) (1995).” Booker, 707 So. 2d at 886 (Fla. 1st DCA 1998). Amazingly, very few opinions in the entire country delve into actual substantive matters regarding allonges and there is scant direction in these opinions on the technical and legal requirements particular to allonges. As exhibited by the facts of this case, and as would be shown by a review of the hundreds of thousands of foreclosure cases filed across the state and country, allonges are being used to show evidence of ownership of debts when this “evidence” may not be authorized by any law.

## LEGAL MEMORANDUM IN SUPPORT OF DEFENDANT'S ARGUMENT

### I. Plaintiff's Complaint Should Be Dismissed for Failure to be Prosecuted in the Name of the Real Party in Interest

#### a. Legal Standards

12. Fla. R. Civ. P. 1.210(a) provides, in pertinent part, that “[e]very action may be prosecuted in the name of the real party in interest, but a personal representative, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought.”

13. Recently, the Second District held that Plaintiffs in foreclosure actions are required to establish, through admissible evidence, that it held the note and mortgage in question and so had standing to foreclose the mortgage before it would be entitled to summary judgment in its favor. BAC Funding v. Jean-Jacques, 2010 WL 476641 (Fla. 2d DCA 2010). Furthermore, the Second District held that whether such a Plaintiff does so through valid assignment, proof of purchase of the debt, or evidence of an effective transfer, they are nevertheless required to prove that it validly held the note and mortgage which it sought to foreclose. Id. In BAC Funding, the Second District ultimately ruled that an incomplete, unsigned and unauthenticated assignment of mortgage attached as an exhibit to the Plaintiff's response to the Defendant's motion to dismiss did not constitute admissible evidence establishing the Plaintiff's standing to foreclose on the note and mortgage in question.

14. Additionally, the Bankruptcy Court of the Middle District of Florida recently denied a movant's motion for relief from stay so the movant could foreclose on real property owned by a debtor, in part, because the movant did not establish that it was the real party in interest

through a valid allonge. In re Canellas, 2010 WL 571808 (Bankr. M.D. Fla. Feb. 9, 2010). There, the movant accompanied its motion with a mortgage and note which were endorsed to someone other than itself. Some three months later, the movant filed an allonge with the Court which purportedly endorsed to it the mortgage and the note. However, the allonge was not notarized nor was it dated. The Court ultimately denied the movant's motion and questioned the veracity of the allonge because, amongst other reasons, the allonge was not: (1) dated; or (2) notarized.

**b. Argument**

15. In this case before the court, the Plaintiff filed its case and attached documents that showed affirmatively that another party, namely, Option One Mortgage was entitled to proceed on the mortgage foreclosure count. The named lender according to the Plaintiff's own Complaint is SAND CANYON CORPORATION F/K/A OPTION ONE MORTGAGE CORPORATION; however, Option One, the actual named lender on the Mortgage and Note, has had its corporate status suspended since 1990 and the Record is completely devoid of how Sand Canyon has come into existence or how it can legally hold a mortgage or note. Furthermore, the purported allonge which the Plaintiff alleges gives it the power to enforce the Mortgage and Note in question is not dated nor is it notarized. Option One's suspended corporate status, the unclear and undefined existence of Sand Canyon, and the lack of a date or notarization on the purported allonge itself are firm grounds for the Court to doubt the veracity of this document and, as an extension, the Plaintiff's status as the real party in interest.

**WHEREFORE**, because the Plaintiff failed to prosecute this cause in the name of the real party in interest, the instant case must be dismissed.

## **II. Plaintiff's Complaint Should be Dismissed for Failure to State a Cause of Action Because the Purported Allonge was not Firmly Affixed to the Promissory Note**

### **a. Legal Standards**

16. Fla. R. Civ. P. 1.140(b)(6) provides, in pertinent part, that “the following defenses may be made by motion at the option of the pleader...failure to state a cause of action.” In ruling on a motion to dismiss for failure to state a cause of action, the trial court must assume that all allegations in the complaint are true and decide whether the Plaintiff would be entitled to relief. Carmona v. McKinley, Ittersagen, Gunderson & Berntsson, P.A., 952 So.2d 1273 (Fla. 2d DCA 2007). Nevertheless, as indicated in the Standard of Review discussion, *supra*, exhibits attached to the Plaintiff's complaint are part of the complaint, and where the allegations made in the complaint do not agree with the exhibits attached, the exhibits control.

17. There is no Florida case on point which provides guidance as to how an allonge must be physically attached to an instrument in order for it to become “firmly affixed” to same, but the court can rely on the plain meaning of the words, “firmly affixed” and the Court may look to decisions of courts in other states for persuasive authority. To begin, two reasons have been cited for the “firmly affixed” rule: (1) to prevent fraud; and (2) to preserve a traceable chain of title. *See Adams v. Madison Realty & Development, Inc.*, 853 F. 2d 163, 167 (3d Cir. 1988). A draft of the 1951 version of the UCC Article 3 included the comment that “[t]he indorsement must be written on the instrument itself or an allonge, which, as defined in Section \_\_\_\_\_, is a strip of paper so firmly pasted, stapled or otherwise affixed to the instrument as to become part of it.” ALI, Comments & Notes to Tentative Draft No. 1 – Article III 114 (1946), reprinted in 2 Elizabeth Slusser Kelly, Uniform Commercial Code Drafts 311, 424 (1984). More recently, however, courts have held that “stapling is the

modern equivalent of gluing or pasting.” Lamson v. Commercial Cred. Corp., 187 Colo. 382 (Colo. 1975). *See also* Southwestern Resolution Corp. v. Watson, 964 S.W. 2d 262 (Texas 1997) (holding that an allonge stapled to the back of a promissory note is valid so long as there is no room on the note for endorsement, but affixed does not include paperclips.). Regardless of the exact method of affixation, numerous cases have rejected endorsements made on separate sheets of paper loosely inserted in a folder with the instrument and not physically attached in any way. *See* Town of Freeport v. Ring, 1999 Me. 48 (Maine 1999); Adams v. Madison Realty & Development, Inc., 853 F. 2d 163 (3d Cir. 1988); Big Builders, Inc. v. Israel, 709 A. 2d 74 (D.C. 1988).

**b. Argument**

18. Here, the Plaintiff’s purported allonge, as found in the Court File, is in no way so firmly affixed to the Promissory Note as to give the Plaintiff the ability to raise a cause of action for foreclosure of a mortgage and note which is made out to someone other than itself. Specifically, when undersigned counsel examined the Court File, this purported allonge was not affixed to the Promissory Note at all, but is unattached and “floating” in the court file. Because the purported allonge is not affixed to the Note, the twin aims of affixation, namely to prevent fraud and to preserve a traceable chain of title, have expressly not been met.

**WHEREFORE**, because the Plaintiff failed to state a cause of action upon which relief can be granted within the four corners of the Complaint or in any other Pleading or Filing, the instant case must be dismissed.

**III. Plaintiff’s Complaint Should be Dismissed for Failure to State a Cause of Action Because the Promissory Note Contained Room for Endorsement**

**a. Legal Standards**

19. There is also no Florida case law which provides guidance on how to decide “No-Space

Tests”, or how to proceed when there is room on the instrument for an endorsement but an allonge is nevertheless attached instead. However, numerous jurisdictions permit allonges only where, because of multiple endorsements, no additional space for signatures remains on the negotiable instrument. See Shepherd Mall St. Bank v. Johnson, 603 P. 2d 1115, 1118 (Okla. 1979); Tallahassee Bank & Trust Company v. Raines, 187 S.E. 2d 320, 321 (Ga. App. 1972); James Talcott, Inc. v. Fred Ratowsky Assoc., Inc., 38 Pa. D. & C.2d 624 (Pa. Ct. of Common Pleas 1965). But see Crosby v. Roub, 16 Wis. 616, 626-27 (Wis. 1863) (allonge permitted even where space remains on note). Perhaps the seminal case which deals with the issue is Pribus v. Bush, 118 Cal. App. 3d 1003 (Cal. App. 1981), which reasoned that

the law merchant rule [which permits the use of allonges only when there is no room on the instrument itself]...was developed as a refinement of the basic rule that an indorsement must be on the instrument itself. This basic rule must have become impractical when strictly applied in certain multiple indorsement situations, due to the finite amount of space on any given instrument. The allonge, then, was apparently created to remedy the inconveniences of the basic rule, not as an alternative method of indorsement. Id at 1008. *Emphasis added.*

The Pribus court ultimately decided that the majority view is to follow the law merchant rule and only permit allonges when there is no physical space left on the instrument itself. Id.

#### **b. Argument**

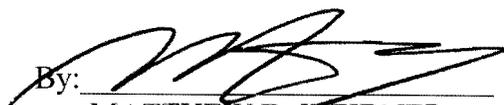
20. Here, the allonge was improper because there is ample blank space on the Promissory Note filed with the Plaintiff’s Complaint to stamp an endorsement. This includes abundant space both below the Plaintiff’s alleged signature and on the back of the Note. Florida courts, in the absence of a Florida case directly on point, should follow the majority rule which only allows the use of an allonge when there is no room on the instrument itself for endorsement. Doing so preserves the law merchant rule, an ancient principal of commercial law. Because the allonge

was improper, the Mortgage and the Note are endorsed to someone other than the Plaintiff, and therefore the Plaintiff does not have the ability to raise the cause of action for foreclosure.

**WHEREFORE**, because the Plaintiff failed to state a cause of action upon which relief can be granted within the four corners of the Complaint or in any other Pleading or Filing, the instant case must be dismissed.

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 23<sup>rd</sup> day of March, 2010 to PASCALE ACHILLE, Ben-Ezra & Katz, P.A., 2901 Stirling Road, Suite 300, Fort Lauderdale, FL 33312.

By: 

MATTHEW D. WEIDNER  
Attorney for Defendant  
1229 Central Avenue  
St. Petersburg, FL 33705  
(727) 894-3159  
FBN: 0185957

# California Business Portal

Secretary of State DEBRA BOWEN

**DISCLAIMER:** The information displayed here is current as of DEC 26, 2008 and is updated weekly. It is not a complete or certified record of the Corporation.

Corporation		
OPTION ONE MORTGAGE CORP.		
<b>Number:</b> C1562192	<b>Date Filed:</b> 7/19/1989	<b>Status:</b> suspended
<b>Jurisdiction:</b> California		
Address		
**3109 LOS FLORES A		
LYNWOOD, CA 90262		
Agent for Service of Process		
** RESIGNED ON 10/03/1990		

Blank fields indicate the information is not contained in the computer file.

If the status of the corporation is "Surrender", the agent for service of process is automatically revoked. Please refer to California Corporations Code Section 2114 for information relating to service upon corporations that have surrendered.

# California Business Portal

Secretary of State DEBRA BOWEN

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Corporation		
SAND CANYON CORPORATION		
Number: C1846488	Date Filed: 11/3/1992	Status: active
Jurisdiction: California		
Address		
6501 IRVINE CENTER DRIVE		
IRVINE, CA 92618		
Agent for Service of Process		
C T CORPORATION SYSTEM		
818 WEST SEVENTH ST		
LOS ANGELES, CA 90017		

Blank fields indicate the information is not contained in the computer file.

If the status of the corporation is "Surrender", the agent for service of process is automatically revoked. Please refer to California Corporations Code Section 2114 for information relating to service upon corporations that have surrendered.