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

LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR MERRILL LYNCH FIRST FRANKLIN MORTGAGE LOAN TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES SERIES 2007-I,

CASE NO. 09-003080-CI-13

PLAINTIFF,

v.

JEFFREY S. PERRY,

DEFENDANT.
_____/

AFFIDAVIT OF JEFFREY S. PERRY

COMES NOW the undersigned Affiant who, after taking an oath, states as follows:

1. That I am at least twenty-one (21) years of age and am in all ways capable of making this Affidavit.
2. That I make this Affidavit based upon my own personal knowledge.
3. That I do not now have, or at any time had, a relationship with the named Plaintiff in this case.
4. That I do not now have, or at any time had, a relationship with the named Affiant of the Plaintiff's Affidavit of Indebtedness.
5. That I object to summary judgment because I have viable claims and defenses that I would like to present to this Court, including whether the named Plaintiff even has a right to proceed with the instant litigation.

FURTHER AFFIANT SAYETH NAUGHT.

JEFFREY S. PERRY

STATE OF FLORIDA

COUNTY OF PINELLAS

MATTHEW WEIDNER
Comm# DD0588987
Expires 9/11/2010
Florida Notary Assn., Inc

The foregoing was signed before me on this the 20th day of May 2010 by Jeffrey S. Perry.

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
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LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR MERRILL LYNCH FIRST FRANKLIN MORTGAGE LOAN TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES SERIES 2007-I,

PLAINTIFF,

v.

JEFFREY S. PERRY,

DEFENDANT.
_____/

CASE NO. 09-003080-CI-13

DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S COMPLAINT

COMES NOW, the Defendant JEFFREY S. PERRY (hereinafter "Defendant") by and through undersigned counsel MATTHEW D. WEIDNER and respectfully files with this Court their ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S COMPLAINT, and as grounds thereof states:

1. Admit.
2. Denied that a promissory note was executed and delivered in favor of the Plaintiff or the Plaintiff's assignor.
3. Denied.
4. Admit.
5. Denied that the Defendant owes any duty to the named Plaintiff.
6. Denied that the Defendant owes any duty to the named Plaintiff.
7. Without knowledge and therefore denied.

8. Without knowledge and therefore denied.

9. Without knowledge and therefore denied.

10. Without knowledge and therefore denied.

11. Without knowledge and therefore denied.

12. Without knowledge and therefore denied.

13. Without knowledge and therefore denied.

14. Admit.

15. Without knowledge and therefore denied.

16. Without knowledge and therefore denied.

17. Without knowledge and therefore denied.

18. Without knowledge and therefore denied.

AFFIRMATIVE DEFENSE I

With regard to all counts in the complaint, the Plaintiff's claims are barred in whole or in part because of the Plaintiff's failure to comply with the forbearance, mortgage modification, and other foreclosure prevention loan servicing requirements imposed on it by the Federal Housing Administration, and regulations imposed by the Housing and Urban Development agency, pursuant to the Federal Housing Act, 12, U.S.C. § 1710(a) and 12 U.S.C. §1701. As a result, the Plaintiff failed to establish compliance with a statutory and contractual condition precedent to this foreclosure because of the Plaintiff's failure to comply with federal regulations more particularly described below:

a) Defendant defaulted on this residential mortgage which is the subject of this cause of action due to reasons beyond the borrower's control.
b) The Plaintiff is required under federal law to adapt its collection and loan servicing practices to this Defendant's individual circumstances and failed to do so.

c) The Plaintiff did not make a reasonable effort as required by federal law to arrange a face to face meeting with the Defendant before three monthly installments were unpaid as required by 24 C.F.R. § 203.604.
d) The Plaintiff is required under federal law to evaluate all available loss mitigation techniques and to re-evaluate these techniques each month after default and failed to do so. 24 C.F.R.§ 203.605.
e) The Department of Housing and Urban Development has determined that the requirements of 24 C.F.R. Part 203(c) are to be followed before any mortgagee foreclosure.
f) Plaintiff has no valid cause of action for foreclosure unless and until Plaintiff can demonstrate compliance with regulations 24 C.F.R. Part 203(c).
g) This Defendant made significant efforts to access foreclosure prevention services from Plaintiff and to make payments but Plaintiff denied this Defendant the required opportunity to access and obtain mortgage servicing options designed to avoid foreclosure of this mortgage.

AFFIRMATIVE DEFENSE II

With regard to all counts in the complaint, the Plaintiff's claims are barred in whole or in part because the Plaintiff comes to the Court with unclean hands as a result of its failures and omissions as set forth in the statement of facts asserted in Affirmative Defense I and incorporated herein. The Plaintiff is prohibited by reason thereof from obtaining the equitable relief of foreclosure from this Court. The Plaintiff's unclean hands result generally from the Plaintiff's intentional and reckless failure to properly service this mortgage pursuant to the federal regulations and specifically by filing this foreclosure before offering Defendant any of the federally required foreclosure avoidance options. As a matter of equity this Court should refuse to foreclosure this mortgage because acceleration of the note would be inequitable, unjust, and the circumstances of this case render acceleration unconscionable.

AFFIRMATIVE DEFENSE III

With regard to all counts in the complaint, the Plaintiff's claims are barred in whole or in part because of its failure to plead its capacity. While the name of the Plaintiff of the instant lawsuit is asserted in the caption of its complaint, nowhere in the body of Plaintiff's complaint

does the Plaintiff set off or describe in any way the structure of the entity so described nor does the Plaintiff assert in what capacity does the Plaintiff contends it may avail itself to the jurisdiction of this court. Nowhere in the body of Plaintiff's complaint does it assert the basis for its entity-existence or explain in any way the form of the entity that presents itself before the court.

AFFIRMATIVE DEFENSE IV

With regard to all counts in the complaint, the Plaintiff's claims are barred in whole or in part because of its failure to comply with Fla. Stat. §§660.27(1) and (2)(a), which requires the Plaintiff to provide to Florida's Chief Financial Officer the full legal name of the trust, its federal employer identification number, principal place of business, amount of capital stock, and amount of collateral required to be deposited by the trust. The Plaintiff, which is apparently claiming trustee status for "Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-1" has not provided any information in its complaint that it is in compliance with this statutorily-mandated requirement.

AFFIRMATIVE DEFENSE V

With regard to all counts of the complaint, the Plaintiff's claims are barred in whole or in part because the Defendant affirmatively question the veracity and authenticity of the endorsements made on the purported promissory note attached to the Plaintiff's notice of filing original note and mortgage pursuant to Fla. Stat. §673.3081 (2006). The complaint is completely devoid of any mention of the purported endorser, including who she is, what her relationship is to the Plaintiff, when she executed the purported endorsement, or under what authority she purported to endorse the note.

AFFIRMATIVE DEFENSE VI

With regard to all counts of the complaint, the Plaintiff's claims are barred in whole or in part because the purported assignment of mortgage attached to the Plaintiff's complaint is not in compliance with Fla. Stat. §§689.01, 692.01 or 692.02. Specifically: (1) the assignment lacks the assignor's corporate seal as required by §§692.01 and 692.02 for any assignments executed by someone other than the president or chief executive officer of the assignor; and (2) the purported signor has not been identified anywhere in the complaint as an authorized agent of the assignor who may effectuate assignments without the assignor's corporate seal attached to the document.

AFFIRMATIVE DEFENSE VII

With regard to all counts in the complaint, the Plaintiff's claims are barred in whole or in part because the Plaintiff lacks standing. Specifically, the Plaintiff lacks standing based upon the statements of facts Affirmative Defenses V and VI and incorporated herein. Without a proper endorsement on the note and assignment of mortgage, the true owner and holder of the note and mortgage in question remains the named lender on said documents.

AFFIRMATIVE DEFENSE VIII

With regard to all counts in the complaint, the Plaintiff's claims are barred in whole or in part because the Plaintiff is not authorized to bring this action by the owner and holder of the note and mortgage in question, or any person who has an interest in the mortgage and note in question. Specifically, the Plaintiff is not authorized to bring this action by the owner and holder of the note and mortgage in question, or any person who has an interest in the mortgage and note in question, based upon the statements of facts Affirmative Defenses V and VI and incorporated herein. Without a proper endorsement on the note and assignment of mortgage, the true owner

and holder of the note and mortgage in question, and the only person who has an interest in same remains the named lender on said documents.

AFFIRMATIVE DEFENSE IX

With regard to all counts in the complaint, the Plaintiff's claims are barred in whole or in part because the Plaintiff has failed to satisfy a pre-suit condition precedent to litigation. Specifically, paragraph 22 of the mortgage attached to the Complaint, the Lender

> shall give notice to [Defendant] prior to acceleration following [Defendant's] [alleged] breach of any covenant or agreement...The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to [Defendant], by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this [Mortgage], foreclosure by judicial proceeding and sale of Property. *Emphasis added.*

Notwithstanding the language of this paragraph, no notice was ever given to the Defendants prior to the acceleration of the note and foreclosure of the mortgage.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 20th day of May, 2010 to EMILY JANE HANSEN, Butler & Hosch, P.A., 3185 South Conway Road, Ste. E, Orlando, FL 32812.

By:_____

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

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
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LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR MERRILL LYNCH FIRST FRANKLIN MORTGAGE LOAN TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES SERIES 2007-I,

CASE NO. 09-003080-CI-13

PLAINTIFF,

v.

JEFFREY S. PERRY,

DEFENDANT.

_____/

DEFENDANT'S OBJECTION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant JEFFREY S. PERRY (hereinafter "Defendant") by and through undersigned counsel MATTHEW D. WEIDNER and respectfully files this OBJECTION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, pursuant to Rule 1.510 Fla. R. Civ. Pro. and precedent case law, and as grounds thereof states:

FACTS

1. This is an action for foreclosure of residential real property owned by the Defendant.

2. The named Plaintiff in this case is LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR MERRILL LYNCH FIRST FRANKLIN MORTGAGE LOAN TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-1 (hereinafter "Plaintiff"). The Plaintiff initiated the instant litigation when it filed its complaint on or about February 19, 2009.

3. The Plaintiff's complaint alleged two causes of action: (1) a complaint to foreclose on a mortgage allegedly executed between the Defendant and FIRST FRANKLIN FINANCIAL CORPORATION (hereinafter "First Franklin"); and (2) the reestablishment of a lost note allegedly executed between the Defendant and First Franklin.

4. The Plaintiff **failed** to attach a copy of the alleged note to its complaint and also failed to reference this alleged note anywhere in the body of its complaint. As such, there is no mention or attachment of the very contract upon which the Plaintiff is suing on.

5. On or about March 5, 2009 the Defendant, by and through undersigned counsel, timely motioned this court to dismiss the Plaintiff's complaint based upon the Plaintiff's failure to attach the alleged note which it is purportedly suing upon. This motion is still pending before this Court.

6. Notwithstanding the fact that the Plaintiff failed to attach a copy of the alleged note to its complaint, on or about May 14, 2009 the Plaintiff filed with this Court the original copy of this alleged note. However, the Plaintiff never amended its complaint to incorporate this purported original note into its pleading. As such, the Plaintiff's complaint is still devoid of any mention or copy of the very contract which it is suing upon.

7. Further, on or about July 16, 2009 the Plaintiff elected to voluntarily dismiss the second count of its complaint for reestablishment of the alleged note. However, the Plaintiff **did not** file an amendment complaint to this effect in accordance with the established rules of Florida civil procedure.

8. As a result of the Plaintiff's failure to file an amendment complaint, its dismissal of the second count of its complaint is a nullity and its initial complaint is still the only pleading pending before this Court.

9. The Plaintiff's motion for summary judgment is thus both procedurally and substantively improper because: (1) its second count for reestablishment of the lost note is still pending before this Court; (2) the Defendant's motion to dismiss is still pending; and (3) the only pleading offered by the Plaintiff is devoid of a copy of the very contract upon which it is suing.

10. Finally, the Plaintiff has submitted an amended affidavit of amounts due and owing on May 7, 2010. While this affidavit has not yet been received by the Defendant's counsel, based upon information and belief, this affidavit will be used as evidence in support of the Plaintiff's motion for summary judgment. However, this affidavit was not filed twenty (20) days before the summary judgment hearing as required by the Florida Rules of Civil Procedure.

STANDARD OF REVIEW

11. Under Florida law, summary judgment is proper if, and only if, based on an examination of evidence, no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. *See* The Florida Bar v. Green, 926 So. 2d 1195, 1200 (Fla. 2006); Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000).

12. Furthermore, pursuant to Rule 1.510 of the Florida Rules of Civil Procedure, a Court may grant summary judgment if, and only if, "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c).

13. Finally, the Court must take all the facts that the non-movant states as true and must draw all reasonable inferences in favor of the non-moving party. *See* Bradford v. Bernstein, 510 So.2d 1204 (Fla. 2d DCA 1987); Petruska v. Smartparks-Silver Springs, Inc., 914 So.2d 502 (Fla. 5th DCA 2005).

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S OBJECTION

I. The Plaintiff's Motion Should Be Denied because of its Failure to Amend its Complaint

a. Legal Standards

14. Fla. R. Civ. Pro. 1.190(a) provides, in pertinent part, that "[a] party may amend a pleading once as a matter of course at any time before a responsive pleading is served...[o]therwise, a party may amend a pleading only by leave of court or by written consent of the adverse party."

15. Moreover, "[t]he proper method of deleting less than all counts from a pleading is amendment of the pleading pursuant to Fla.R.Civ.P. 1.190." Deseret Ranches of Florida, Inc. v. Bowman, 340 So.2d 1232, 1233 (Fla. 4th DCA 1976) *cert. denied*, 349 So.2d 155 (Fla. 1977).

16. This is because "it is well-settled that only an entire action may be voluntarily dismissed under Fla.R.Civ.P. 1.420(a)(1); there can be no partial dismissal, no dismissal of less than all causes of action." Marine Contractors, Inc. v. Armco, Inc., 452 So.2d 77, 80 (Fla. 2d DCA 1984).

17. Finally, any attempt to voluntarily dismiss less than an entire action is a nullity. *See* Murillo v. Tri-State Employment Services, Inc., 925 So.2d 376 (Fla. 1st DCA 2006); Perez v. Winn-Dixie, 639 So.2d 109 (Fla. 1s t DCA 1994). *See also generally* Marine Contractors, Inc. v. Armco, Inc., 452 So.2d 77, 80 (Fla. 2d DCA 1984); Deseret Ranches of Florida, Inc. v. Bowman, 340 So.2d 1232, 1233 (Fla. 4th DCA 1976) *cert. denied*, 349 So.2d 155 (Fla. 1977).

b. Argument

18. Here, the Plaintiff attempted to do the impossible when it filed its notice of voluntarily dismissal of count two of its complaint on or about July 16, 2009.

19. An amended complaint pursuant to Fla. R. Civ. Pro. 1.190 omitting all but the desired count was the proper procedural method the Plaintiff should have utilized when it desired to drop the second count of its initial complaint.

20. Therefore, the Plaintiff's attempt to voluntarily dismiss only one part of its complaint was a nullity making its motion for summary judgment procedurally improper.

21. Moreover, because the Plaintiff's attempt was a nullity, the only pleading pending before this Court is the Plaintiff's original complaint. The ability of the Plaintiff to proceed on this pleading has been affirmatively questioned by the Defendant in its motion to dismiss.

22. Thus, genuine issues of material fact exist which would preclude summary judgment.

WHEREFORE, because the Plaintiff failed to amend its complaint in accordance with the Florida Rules of Civil Procedure and precedent case law, summary judgment at this stage is procedurally improper and the Defendant therefore respectfully requests that this Court deny the Plaintiff's motion for summary judgment and any other relief the Court deems just and proper.

II. The Plaintiff's Motion Should Be Denied because of its Failure to Attach the Alleged Note to its Complaint or any Amended Pleading

a. Legal Standards

23. Fla. R. Civ. Pro. 1.130(a) provides, in pertinent part, that "[a]ll...contracts... upon which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, shall be incorporated in or attached to the pleading."

24. "When a party brings an action based upon a contract and fails to attach a necessary exhibit under Rule 1.130(a), the opposing party may attack the failure to attach a necessary exhibit through a motion to dismiss. Where a complaint is based on a written instrument, the complaint does not state a cause of action until the instrument or an adequate portion thereof is

attached to or incorporated in the complaint." Samuels v. King Motor Co. of Fort Lauderdale, 782 So.2d 489, 500 (Fla. 4th DCA 2001).

25. Every mortgage loan is composed of two documents – the note instrument and the mortgage instrument. No matter how much the mortgage instrument is acclaimed as the basis of the agreement, the note instrument is the essence of the debt. Sobel v. Mutual Dev. Inc., 313 So. 2d 77 (Fla. 1 DCA, 1975); Pepe v. Shepherd, 422 So. 2d 910 (Fla. 3 DCA 1982); Margiewicz v. Terco Prop., 441 So. 2d 1124 (Fla. 3 DCA 1983); RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 5.4 (1997).

26. The promissory note is evidence of the primary mortgage obligation. The mortgage is only a mere incident to the note. Brown v. Snell, 6 Fla. 741 (1856); Tayton v. American Nat'l Bank, 57 So. 678 (Fla. 1912); Scott v. Taylor, 58 So. 30 (Fla. 1912); Young v. Victory, 150 So. 624 (Fla. 1933); Thomas v. Hartman, 553 So. 2d 1256 (Fla. 5 DCA 1989); RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 1.01 (1997).

27. The mortgage instrument is only the security for the indebtedness. Grier v. M.H.C. Realty Co., 274 So. 2d 21 (Fla. 4 DCA 1973); Mellor v. Goldberg, 658 So. 2d 1162 (Fla. 2 DCA 1995); Century Group Inc. v. Premier Fin. Services East L. P., 724 So. 2d 661 (Fla. 2 DCA 1999).

b. Argument

28. As previously stated, because the Plaintiff's voluntarily dismissal of the second count of its complaint was a nullity, the only legal pleading pending before this Court is the Plaintiff's initial complaint.

29. The Plaintiff failed to attach a copy of the alleged note executed by the Defendant to this pleading. Moreover, the complaint is devoid of any mention of the alleged note. By failing to

attach the alleged note and by not alluding to it in the body of the complaint, the Plaintiff has therefore failed to reference in any way the underlying contract which it is suing upon.

30. The Plaintiff's failure to do so makes it impossible for the Defendant in any way to litigate this case.

31. Further, while the Plaintiff filed the purported original of this alleged note on or about May 14, 2009 its failure to amend its complaint to incorporate this purported original document into its pleadings and reference the note in the body of such an amended complaint continues to distort the Defendant's ability to litigate this case because it still unclear as to what contractual basis the Plaintiff is suing upon.

32. Without a clear contractual basis which ties the allegations in the Plaintiff's complaint to some tangible piece of evidence, the Plaintiff has failed to prove that there is no genuine issue of material fact which would preclude summary judgment.

WHEREFORE, because the Plaintiff has failed to attach a copy of the purported note to its initial complaint or any amended pleadings, it has failed to prove that there is no genuine issue of material fact which would preclude summary judge and the Defendant therefore respectfully requests that this Court deny the Plaintiff's motion for summary judgment and any other relief the Court deems just and proper.

III. The Plaintiff's Motion Should Be Denied because of its Failure to Submit All Summary Judgment Evidence within 20 Days of the Hearing

a. Legal Standards

33. Fla. R. Civ. Pro. 1.510(c) provides, in pertinent part, that "[t]he movant [of a summary judgment motion] shall serve the motion at least 20 days before the time fixed for the hearing, **and shall also serve at that time copies of any summary judgment evidence on which the movant relies that has not already been filed with the court**." *Bold emphasis added.*

34. In Verizzo v. Bank of New York, 28 So.3d 976 (Fla. 2d DCA March 3, 2010), the Second District held that a mortgagee's filing of the original promissory note less than twenty (20) days before its hearing on summary judgment was a violation of Rule 1.510(c) and grounds for reversal of summary judgment.

35. There, the Second District reasoned that "cases have interpreted the rule to require that the movant also file the motion and documents with the court at least twenty days before the hearing on the motion." Id at 978.

b. Argument

36. Although not currently in possession of the Defendant's undersigned counsel, when undersigned counsel reviewed the court file he noticed that an amended affidavit of amounts due and owing has been filed by the Plaintiff.

37. The date of the filing of this amended affidavit was May 7, 2010.

38. Moreover, upon information and belief, this affidavit has been submitted by the Plaintiff as summary judgment evidence.

39. Nevertheless, the affidavit was not submitted at least twenty (20) days before the hearing as required by Rule 1.510(c) and the Second District in Verizzo. Basing summary judgment off of this evidence, then, would be grounds for reversal of this Court's decision.

WHEREFORE, because the Plaintiff has failed to submit all summary judgment evidence within twenty (20) days of the hearing on its motion, the Defendant respectfully requests that this Court deny the Plaintiff's motion for summary judgment and any other relief the Court deems just and proper.

IV. The Plaintiff's Motion Should Be Denied because the Defendant's Motion to Dismiss is Still Pending

a. Legal Standards

40. Douglas v. Deutsche Bank Trust Co., 995 So.2d 1144 (Fla. 5th DCA 2008) stands for the proposition that where a defendant's motion to dismiss is pending, and the motion cites viable defenses to the plaintiff's complaint, summary judgment is not proper as there exist genuine issues of material fact.

41. Moreover, in Verizzo v. Bank of New York, 28 So.3d 976 (Fla. 2d DCA March 3, 2010), *supra*, the Second District held that "[i]f a plaintiff files a motion for summary judgment before the defendant answers the complaint, the plaintiff must conclusively show that the defendant cannot plead a genuine issue of material fact." Id at 977.

42. Additionally, in Burch v. Kibler, 643 So.2d 1120 (Fla. 4th DCA 1994), the defendant had filed a motion to dismiss but had not filed an answer because the motion to dismiss had not been heard by the trial court. Despite this, the plaintiff filed its motion for partial summary judgment, which the trial court granted. The Fourth District reversed the entry of partial summary judgment because the Court was unable to state with certainty that the answer the Defendant might have properly served would not present any genuine issue of material fact. Id at 1121.

43. In the Burch court's own words:

> [a]lthough a court is not procedurally barred from entertaining a motion for summary judgment before an answer is filed, **the burden on the movant is not limited to demonstrating the absence of a material issue of fact. The burden on the movant increases:**
>
> **It is well settled that if a plaintiff moves for summary judgment prior to defendant's filing an answer, the movant must demonstrate conclusively and to a certainty from the record that the defendant cannot plead or otherwise raise a genuine issue of material fact.** Hodkin v. Ledbetter, 487 So.2d 1214, 1217 (Fla. 4th DCA 1986), *appeal dismissed*, 509 So.2d 1118 (Fla.1987); *see also* J & L Enterprises v. Jones, 614 So.2d 1151, 1153 (Fla. 4th DCA 1993). **The moving party's burden is, thus, an unusually heavy one.** See Rodriguez v. Tri-Square Constr., Inc., 635 So.2d 125 (Fla. 3d DCA 1994) and cases cited therein. Burch, 643 So.2d at 1121-22. *Bold emphasis added.*

b. Argument

44. Still pending before this Court is the Defendant's motion to dismiss which was timely filed on or about March 5, 2009.

45. The Defendant's motion brings before the Court the viable issue of whether the Plaintiff's complaint states a cause of action upon which relief can be granted for its failure to attach to the complaint a copy of the alleged note purportedly executed by the Defendant.

46. Because this motion is still pending before this Court, the Defendant has not elected to answer the Plaintiff's complaint. Nevertheless, acting in an abundance of caution and notwithstanding its motion to dismiss, the Defendant has elected to file an answer along with this objection to the Plaintiff's motion for summary judgment.

47. In any event, because the Defendant's motion to dismiss has been properly filed and is still pending before this Court, and because the Defendant's motion raises viable questions as to whether the Plaintiff may even proceed with the instant litigation, genuine issues of material fact exist which would preclude summary judgment.

WHEREFORE, because the Defendant's motion to dismiss is still pending before this Court, the Defendant respectfully requests that this Court deny the Plaintiff's motion for summary judgment and any other relief the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 20th day of May, 2010 to EMILY JANE HANSEN, Butler & Hosch, P.A., 3185 South Conway Road, Ste. E, Orlando, FL 32812.

By: _____

MATTHEW D. WEIDNER
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1229 Central Avenue
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