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# COTA – "CHAIN OF TITLE ANALYSIS"
# MORTGAGE FRAUD INVESTIGATION


**Prepared For:**
**[BORROWER/TRUSTOR]**
**John J. Smith**

**Real Property Located at:**
**9651 Mack Lane**
**San Diego, CA 92021**

**Prepared By:**
**Lazarus A. Wolfgang**
**(530) 694-4343**

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# SECTION 1: CONVEYANCE OF A SECURITIZED MORTGAGE LOAN

**Elements of a Mortgage Loan Instrument and how they are governed:**

A. **Promissory Note (Tangible)** = A "writing" in tangible form, signed, unconditional, and identifying an indebtedness or unsecured promise by one party (the Maker or Promisor) to another [drawer] (the Payee or Promisee or Tangible Obligee) that commits the maker (Debtor or Tangible Obligor) to pay a specified sum on demand, or on a fixed or a determinable date. If the Paper Promissory Note is to be a "secured" indebtedness, the Security Instrument is also identified within the Paper Promissory Note. The Paper Promissory Note is governed by the California Uniform Commercial Code (UCC) Article 3. *A signature on the Paper Promissory Note is NOT governed by E-SIGN Act – 15 USC § 7003 – which clearly excludes items governed by Uniform Commercial Code (UCC) Article 3, and as such the indebtedness can only be in paper tangible form.*

**B. Promissory Note (Intangible "e-Note" / Intangible Payment Obligation) =** An electronic transferable record (created during securitization) and signed in accordance with E-SIGN Act that commits the maker (Account Debtor or Intangible Obligor) to pay a specified sum on demand in accordance with a contract NOT governed by UCC Article 3 to an Intangible Obligee. Transferable records are governed by UCC Article 8 and the Security interests securing transferable records are governed by UCC Article 9.

**C. Security Interest (Pledging of Tangible Alternate Real Property Rights for Payment)** = An interest constituting a lien or claim created by a security agreement (Deed of Trust), or by the operation of law, that if valid and enforceable provides the alternate means to fulfill value of an intangible financial obligation between the Tangible Obligee and Tangible Obligor. Thus, if such Security Interest (Deed of Trust) is no longer valid or enforceable in accordance to local laws and jurisdiction then the Tangible UCC-3 Note is no longer secured by such Security Interest.

**D. Security Interest (Intangible to UCC Article 8 "e-Note")** = Intangible Obligations (created during securitization by an Account Debtor) are routinely swapped for another Intangible Obligation (Certificates), and as being a Transferable Record such transaction would fall under governance of (UCC-8). For this Certificate Intangible to be secured by an Intangible Account Debtor's Personal Property, the negotiation of the Intangible Obligation must be in compliance with (UCC-8) as it applies to Transferable Records. As to the Personal Property securing the Transferable Record, (UCC-9) would provide governing law.

**E. Security Instrument (Tangible)** = A "writing" in tangible form to memorialize Obligor's or Debtor's Pledging of an asset or property as an alternate method to secure payment to a Tangible Obligation if in accordance with all applicable laws of local jurisdiction.

## SECTION 1: CONVEYANCE OF A SECURITIZED MORTGAGE LOAN (con't)

**Mortgage Loan Instrument or Personal Property – What really got securitized?!?**

We begin with the mortgage loan originator. Immediately after closing, the mortgage loan originator has taken possession of many documents of which only two (2) are required to be followed through to the securitization process. These two (2) documents are the *Paper Tangible Promissory Note* and the *Paper Tangible Security Instrument* (Deed of Trust). The Promissory Note and the Deed of Trust together can be considered one tangible instrument. With a perfected Tangible lien of record securing a Tangible Promissory Note, this would then be in compliance to all applicable laws. As such, intangible and tangible laws apply granting the mortgage loan originator legal and equitable rights to the Note (tangible and intangible) as Holder-in-Due-Course that would have legal and equitable rights to the security securing if the Note and security (tangible and intangible) are in compliance to all applicable law.

Assuming originating lender has complied with all applicable laws and origination of the mortgage loan; the originating lender (First Magnus) offered up the mortgage loan to securitization by [purportedly] selling the payment stream interest to an Account Debtor (Sponsor/Seller) who then in accordance to an intangible contract swaps intangible payment stream for certificates which are sold to investors. Such swap in legal parlance is considered to be a "True Sale."

The "unknown fact" is that the monetary value contained within the Tangible Obligation, and the Security Instrument securing it, were offered for sale on the secondary market as a (UCC-8) Note (e-Note/Transferable Record usually backed on a national database [book entry system]), the book entry system tracks who is the (UCC-8) Intangible Obligee with rights to the (UCC-9) security interest. Although, the electronic book entry system does not track who has a vested legal interest in the tangible security instrument that is reserved by statutory law governed by local laws of jurisdiction.

The instrument is an Intangible Obligation. Thus, a second (non-UCC Article 3) instrument was created. The existence of the (non-UCC Article 3) Intangible instrument is dependent upon the existence of the (UCC Article 3) Tangible Instrument. To provide a security interest to allow for an alternate method to collect value for the (UCC Article 8) intangible instrument, the maker of the (UCC Article 8) Intangible instrument pledged as collateral the *Electronic Mortgage Loan Package, evidenced by the* (UCC Article 3) Tangible instrument and its underlying security interest (instrument).

**What should have happened?**

For the (UCC Article 8) Intangible Obligee (Trust) to have a perfected and continuous alternate method to collect the alternate tangible such as a true sale of real property (Alternate method of value for the Tangible Payment Stream; the (UCC Article 8) transferable record Intangible Obligee (Trust) would need to have been assigned rights to the Tangible Security Instrument in accordance to the laws of local jurisdiction securing the (UCC Article 3) obligation in order to be in compliance with state and federal law.

A Tangible Paper Promissory Note denotes to distinguishing values, one of legal rights contained within which is routinely stripped out as the intangible obligation thus leaving the second value to be only the value of paper and ink being that of tangible property without legal rights but limited to that of being of personal property of the party that stripped the rights value (legal and monetary).

Thus, a Tangible Obligee may or may not be a holder in due course of a secured (UCC-3) Instrument, whereas when distinct and separate laws applying to the tangible security instrument have not been followed, even if Tangible Obligee was entitled to enforce the (UCC-3) Instrument does not mean that the Tangible Obligee is a party entitled to enforce security instrument [party to enforce the tangible note and the tangible security instrument].

When an Intangible claim (Payment Stream) or lien created by an Intangible security agreement extends to the Tangible Note and the Tangible Security Instrument, such actions must be in compliance with all applicable law. Signatures on Intangible Security Interest, Tangible Note and the Tangible Security Interest (Security Instrument) are not governed by (UCC Article 9) or State equivalent. The collection rights are governed under (UCC-9) but the transfer of an intangible is governed under (UCC-8); therefore negotiation of the Article 8 Instrument cannot be negotiated with an electronic signature attempting to effect transfer and thus the Security Interest falling under (UCC-9) is also not transferred.

Legal guidance for signatures under **E-SIGN Act – 15 USC § 7003** – clearly excludes instruments governed by the Uniform Commercial Code Article 3, 8 and 9 so the Intangible Claim cannot be negotiated electronically. The Tangible Personal Property Security Interest (Tangible Note and continuously assigned perfection of the Tangible Security securing the Tangible Note) can only be pledged as an intangible interest in the payment stream as a (UCC-8) Instrument. As such the Intangible Payment Obligation can only be negotiated in paper form. The Intangible Security Interest cannot be sold as an electronic transferable record.

**What Did Happen: Outside Applicable Law**

To provide a security interest to allow for an alternate method to collect value (Payment Stream) for the (UCC Article 8) Intangible instrument, the maker of the (UCC Article 8) Intangible instrument pledged as collateral the "Electronic Mortgage Loan Package," evidenced by the (UCC Article 3) Tangible instrument and its underlying security interest (instrument). This "Electronic Mortgage Loan Package" is simply an intangible interest in personal property (Intangible Payment Obligation). The paper documents were either placed in storage (Custodial and Non-Custodial Custody) or deliberately destroyed.

It's important to understand Standard Operating Procedures in regards to the conveyance of the securitized mortgage loan; specifically the conversion of a Tangible Mortgage Loan Instrument into an Intangible, electronic "e-Note" Form, which is typical in this new world of Electronic Securitization. Illusion of legality is the key to this scheme.

Upon the loan closing, the paper Promissory Note and the Security Instrument are [dis-assembled] and scanned into an electronic digitized graphics package. The data from both sets of documents is converted to an electronic data file and paired with the [electronic version] of the Promissory Note and Security Instrument, along with all other closing documents which is called a "Mortgage Loan Package". Where this "Electronic Mortgage Loan Package" is routinely addressed as the "Mortgage Loan Package", it is nothing more than an interest in the [monetary] Intangible Payment Obligation, whose source of funding is captured by the payments made regarding the Tangible Promissory Note Obligation. The "Electronic Digitized Mortgage Loan Package" is now falsely represented as the legal "Mortgage Loan Package".

**Conveyance of an "e-Note":**

If Mortgage Electronic Registration Systems (hereinafter MERS) is involved, registration on the MERS system is required, and when this registration occurs, an 18 digit (MIN) Mortgage Identification Number is created. The first seven (7) digits identify the registering lender and the last digit is a checksum number. The remaining ten (10) digits is identical to the original loan number. If the "Electronic Mortgage Loan Package" is registered in the MERS Registry, there is no physical transfer of the "Electronic Mortgage Loan Package". The MERS Registry is updated as to who has control and ownership rights of electronic digitized file identified as a non-lawful and intangible form of electronic Promissory Note "e-Note".

The First Electronic Sale/ Assignment was made to (Seller/Sponsor to the Freddie Mac Trust), alleged to be [Countrywide] and occurred when the "Loan Originator" (Assignor, Tangible Obligee) offered the "Electronic Mortgage Loan Package" to the buyer (Intangible Obligor) to offset a prearranged line-of-credit by Intangible Obligee (Lender). In this scenario, Recipient (Assignee, Seller/Securitizer) of the Investment Vehicle, (Intangible Obligee) of the "Electronic Mortgage Loan Package" has already conditionally agreed to accept the (conveyance) as a tender of funds has already occurred leaving only taking control of the "Electronic Mortgage Loan Package" as a transferable record unbeknownst that it is a transaction not supported by law.

The First Transfer of Personal Property (Payment Intangible) differs from the first Electronic Sale as the Intangible Obligation (Payment Stream, rights to future payments, or beneficial interest) has been bifurcated from the Tangible Obligation (Paper Promissory Note), and in accordance to (UCC Article 3 – 3203(d)), rights to enforce the Tangible Obligation have not been negotiated to the Intangible Obligor (Seller/Securitizer), the only rights conveyed are rights to simply hold and possess the Tangible Paper Obligation.

The Second Electronic Sale/Assignment happened when the "Seller/Securitizer of the Investment Vehicle" (Assignor, Intangible Obligor) sells/assigns the "Electronic Mortgage Loan Package" to the Buyer (Freddie Mac as Depositor of the Investment Vehicle / Subsequent Intangible Obligor). The recipient (Assignee, Depositor of the Investment Vehicle / Subsequent Intangible Obligor) of the "Electronic Mortgage Loan Package" under the terms of the trust accepts the transfer and takes control of the "Electronic Mortgage Loan Package.

The Third Electronic Sale/Assignment happens when the "Depositor of the Investment Vehicle" (Assignor) sells/assigns the electronic loan package to the Trustee of the Investment Vehicle. The recipient (Assignee, Depositor of the Investment Vehicle) then takes control of the electronic mortgage loan package. The "Depositor of the Investment Vehicle", in compliance with the Investment Trust's documents, takes control of the Investment Trust's Electronic Certificate in exchange for selling/assigning the "Electronic Mortgage Loan Package".

It is not uncommon to find in Public Records an "Assignment of Deed of Trust" filed reflecting a transfer of lien rights from the Original Assignor (Tangible Obligee) to a 3rd subsequent Intangible Assignee (Subsequent Intangible Obligor) of the Intangible Obligation, usually the Trustee or Mortgage Servicer. In this scenario the perfection of lien rights (Perfected Chain of Title) does not match the "Chain of Negotiation" of the Paper Promissory Note shown by endorsements, and, as such, proves the Paper

Promissory Note is no longer secured by the Security Instrument as the Security Instrument has become a “Nullity” by operation of law. These filings in public records are fraud upon public records.

As an illusion, to allegedly provide a security interest to allow for an alternate method to collect value for the (UCC Article 8) Intangible instrument, the maker of the (UCC Article 8) Intangible instrument pledged as collateral the “Electronic Mortgage Loan Package”, evidenced by a digitized copy of the (UCC Article 3) Tangible instrument and its underlying security interest (instrument), *not perfected of record* in the intangible purchaser’s name. To further the account debtor’s deception, claims are made that Account Debtor was executing a true sale of the tangible note and it security to the purchaser of the intangible obligation. This is a legal impossibility. Intangible purchaser never obtained legal rights to alternate tangible method of payment.

Security Interest to an alleged Account Debtor (rights to collect Future Payments pledged by the Account Debtor), which was to have been secured by the Payment Stream from the Tangible Obligation; where an alternate method to receive value was done via a properly attached and perfected real property security interest, could not have taken place legally under the current governing laws without having been in written tangible paper form. Real property Security Interests are governed by local laws of jurisdiction. UCC Article 9 governance for attachment and perfection of security rights to the intangible obligation is limited to personal property security interests such as goods and services.

A Tangible Obligor or Account Debtor may or may not be a holder in due course of the (UCC-3) Instrument, where distinct and separate laws apply to the tangible security instrument have not been followed, even if Tangible Obligor/Account Debtor was entitled to enforce the (UCC-3) Instrument does not mean that the Tangible Obligor is a party entitled to enforce security instrument (party to enforce the tangible note and the tangible security instrument). The trust has been conveyed a transferable record, leaving a tangible paper (UCC Article 3) Note **LESS** the rights securing it, as would have existed if the Security Instrument securing the (UCC Article 3) Tangible Note had been assigned in accordance to the laws of local jurisdiction.

Furthermore, by NOT assigning the Security Instrument securing the (UCC Article 3) Tangible Note in accordance to local laws of jurisdiction, the (UCC-8) Intangible Obligee has taken possession of an “Electronic Mortgage Loan Package” lacking legal rights to the tangible security instrument. Pursuant to local laws of jurisdiction, without the (UCC Article 8) transferable record and the Intangible Obligee perfecting of record, (the tangible rights are found in the Tangible Security Instrument include the power of sale) the (UCC-8) transferable record Intangible Obligee is NOT a Perfected Intangible Obligee.

It is important to understand the (UCC Article 9) does not distinguish a difference between negotiable UCC Article 3 (Tangible Negotiable Instruments) and non-negotiable (Intangible non-Article 3 instrument such as an e-Note or Transferable Record), as transferable record instruments are governed by (UCC Article 8); which is also an exclusion of the E-SIGN Act and UETA. (UCC Article 9) governance is limited to personal property security interests, such as goods and services. Personal property Security Interests are governed by (UCC Article 9). Within the current process of securitizing real property mortgage instruments, it is not uncommon to notice an improper use of applying (UCC Article 9) laws to real property security interests in Note transactions where such (UCC-8) Transferable record Intangible Promissory Note transactions are in fact non-negotiable transactions.

This system of securitization has a serious legal flaw as it provides the Account Debtor (Intangible Obligor) and the Debtor (Tangible Obligor) has to be one in the same which is a logistical and legal impossibility. As the Intangible Obligee is not perfected of-record to the Tangible Mortgage (Tangible Security securing the Tangible Article 3 Note) and not having the Tangible Article 3 instrument negotiated from Tangible Obligee to Intangible Obligee as provided under (UCC-3), the Intangible Obligee has no real property securing an Obligation created by the Account Debtor. Whereas (UCC-3) allows proving up an Article 3 Tangible Instrument, such law does not extend to the Tangible Security. The one securing the Tangible Article 3 Note made payable to the Originating Tangible Obligee.

**NON-Holder-in-due-course Alleges Default:** (*Trustee/Mortgage Servicer)*

- **The Mortgage Servicer or the Trustee of the INTANGIBLE Investment Vehicle** declares default.
- Numerous actions of fraud are readily identifiable.
- As noted in the three (3) electronic negotiations of the electronic loan package to securitization, there is a lack of supporting law to allow electronic negotiation. Only the holder of the paper promissory note entitled in the indebtedness has a right to collect payments.
- Lost Note Affidavits based on Electronic Records are Hearsay.
- Introduction of fraud into the Securities Market.
- Fraudulent creation of assignments in attempt to transfer lien rights from Originator to 3$^{rd}$ or 4$^{th}$ subsequent purchaser bypassing 1$^{st}$ and 2$^{nd}$ purchasers resulting in fraudulent filing in public records.

## SECTION 2: INFOGRAPHICS, CHAIN-OF-TITLE & MORTGAGE ANALYSIS

**Introduction to "Unsafe and Unsound" Loan-Securitization-Attempt by Freddie Mac [Defendant]:**

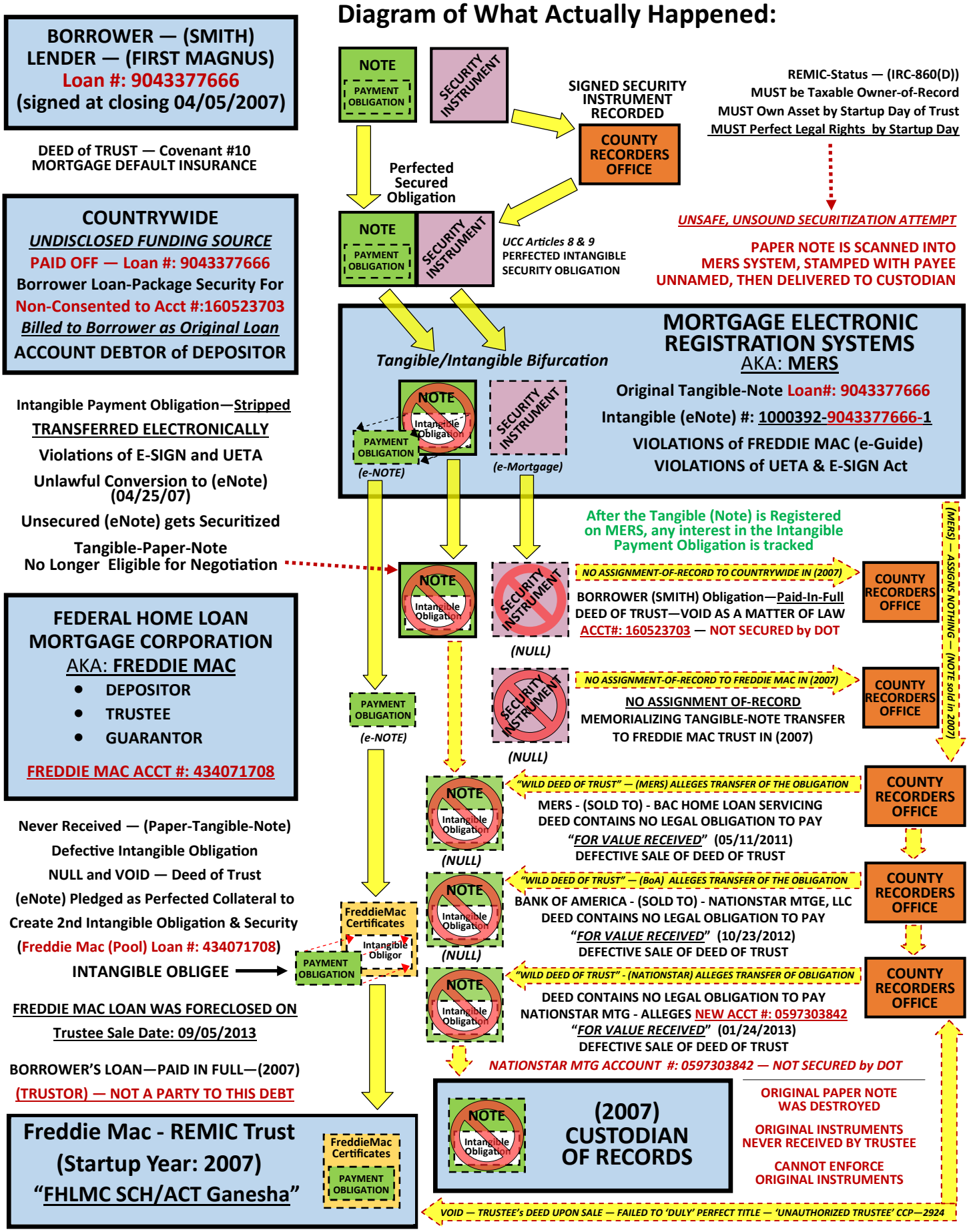
1. The chain of custody refers to the chronological documentation or paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence both physical and electronic. I have included research regarding documents that were not found to be recorded in the chain of custody. To allow for the Power-of-Sale to be available for a party to have standing, the chain of endorsements appearing on the face of the Note Instrument must be in tandem match with the recordation of the chain of Assignments of [Security Instrument] in the Public Records. Failure to properly record Assignments of the [Security Instrument] (lien) which would memorialize a Note's negotiation, where without endorsements as it pertains to the transfer of beneficial and security interest in real property, can render the [Security Instrument] a nullity by operation of law as the note is unenforceable under UCC 3-201, 3-204 and 3-302(d). "A security interest cannot exist independent of the obligation is secures." Negus-Sons, Inc., 460 B.R. at 758, quoting In re Advanced Aviation, Inc. 101 B.R. 310, 313 Bankr. M.D. Fla. 1989

2. Banking practice does not overcome Uniform Commercial Code USCA (1988). The United States Court of Appeals Fifth Circuit determined that banking practice cannot overcome or substitute for enacted Uniform Commercial Code Statute: "Hibernia's reliance on commercial custom is misplaced. Commercial custom does not apply where the UCC provides otherwise. See (UCC § 1-103); also (UCC § 3-104), Official Comment 2 ("writing cannot be made a negotiable instrument within this Article by contract or by conduct"). Moreover, it would be inequitable to apply the banking industries unilateral "custom" to maker, such as the Army, that is unaware of or may not recognize such a custom." 841 F. 2d 592 United States of America v. Hibernia National Bank 96 A.L.R.Fed. 895, 5 UCC Rep.Serv. 2d 1932 United States Court of Appeals, Fifth Circuit 1988.

3. It is a cornerstone and long-held concept within United States law, that when the rights to the Tangible Paper Note the rights to the Security Instrument are separated, the Security Instrument, because it can have no separate existence, cannot survive and becomes a nullity. In re Carpenter v. Longan 16 Wall 271, 83 U.S. 271, 274, 21 L.Ed. 313 (1872), *the U.S. Supreme Court stated "The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while assignment of the latter alone is a nullity... The mortgage can have no separate existence. When the note is paid the mortgage expires. They cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration...."*

# FREDDIE MAC REMIC-RMBS TRUST — [Ineffective] Securitization (using MERS)

## Diagram of What Actually Happened:



4. The Following Info-Graphic Diagram is Based on Public Records & Informal Discovery & Shows:

- Borrower [SMITH] Loan #: 9043377666 signed at closing on (04/05/2007)
- Lender [First Magnus] records the Deed of Trust becoming the "Beneficiary-of-Record"
- Borrower [SMITH] Note's "Intangible Obligation" stripped and transferred electronically
- Freddie Mac (received) only the "scanned image" of the Note & DOT electronically in 2007
- No "Assignment of Record" to Countrywide in 2007. Never became the "Beneficiary-of-Record"
- Borrower [SMITH] Loan #: 9043377666 PAID-OFF by Countrywide on (04/25/2007)
- MERS [e-Note#] Mortgage Electronic Registration Systems #: 1000392-9043377666
- Countrywide (replaced) [SMITH] Loan#: 9043377666 with CW-Account #: 160523703 (**Novation**)
- Countrywide (as Servicer) bills [SMITH] for Countrywide Account #: 160523703 (Fraud…)
- Countrywide's Account #: 160523703,…is NOT secured by the [SMITH] Deed of Trust
- No "Assignment of Record" to Freddie Mac in 2007. Never became the "Beneficiary-of-Record"
- Freddie Mac uses [SMITH e-Note] creating 2nd Debt-Obligation to pay Trust - "Guarantor"
- Freddie Mac Account #: 434071708 not perfected,…(not secured) by [SMITH] Deed of Trust
- MERS [acts] as "Agent" without authority granted by lender [First Magnus] to transfer Note/DOT
- MERS (sold) Deed of Trust (05/11/2011) to BAC Home Loan Servicing – creating a "Wild Deed"
- Only the "Note" can be (sold FOR VALUE) - "Deed of Trust" is NOT A LEGAL OBLIGATION TO PAY
- BoA (alleges) merger with BAC Home Loan Servicing (without) written Assignments of Record
- BoA (sold) Deed of Trust (1/23/2012) to Nationstar Mortgage – creating another "Wild Deed"
- Only the "Note" can be (sold FOR VALUE) - "Deed of Trust" is NOT A LEGAL OBLIGATION TO PAY
- Nationstar Mortgage [replaces] CW-Acct#: 160523703 with new Acct#: 0597303842 (**Novation**)
- Nationstar Mortgage (as Servicer) bills [SMITH] for Nationstar's Account #: 160523703 (Fraud)
- Nationstar Mortgage Account #: 0597303842,…is NOT secured by [SMITH] Deed of Trust
- Nationstar Mortgage (sold) Deed of Trust (01/24/2013) to Freddie Mac – another "Wild Deed"
- Only the "Note" can be (sold FOR VALUE) - "Deed of Trust" is NOT A LEGAL OBLIGATION TO PAY
- Freddie Mac (cannot accept) this Assignment (6 years after the REMIC-Trust closed in 2007)
- Freddie Mac Account #: 434071708…. gets [Foreclosed] on (09/05/2013)
- "Trustee's Deed Upon Sale" – VOID – violation of CCP § 2924 – "Unauthorized Trustee"
- Homeowner/Trustor is the legal-owner-of-record and [no debt] is secured by the real property

(The Next Page is the Corresponding Info-Graphic That Match the Above Description)

**CHAIN OF TITLE ANALYSIS:**

The following Chain of Title details are a listing of the documents related to the property in chronological order. This chain of custody is necessary to maintain an "unbroken" chain at all times pursuant to CA State law. We have investigated the documents that were recorded within the San Diego County Recorder's Office where the real property resides as well as the documents that were NOT recorded within the County Recorder's Office but were made available through "Informal Discovery."

## An Examination of the [SMITH] Mortgage Loan Package

## The [SMITH] Intangible Obligation was sold to Multiple Classes of the Freddie Mac REMIC Trust (FHLMC SCH/ACT Ganesha) in 2007

1. On December 10, 2013 I researched the [SMITH] property address of 9651 MacK Ln., San Diego, CA 92021. [SMITH] had allegedly signed a Note in favor of [First Magnus Financial Inc.] on April 5, 2007. This loan was identified on the Freddie Mac loan Lookup website. Responses to informal discovery requests, alleged this loan is contained within multiple classes of (FHLMC SCH/ACT Ganesha) Trust since 2007.

2. The rights to the [SMITH] Intangible Obligation have been conveyed as a Transferable Record to multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007). For the rights to the [SMITH] Intangible Obligation not to have been stripped away from the rights to the [SMITH] Note by that conveyance, rights to the [SMITH] Note must have also been transferred to multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007).

3. Even though the [SMITH] Intangible Obligation is owned by multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007), it can only be determined if the original [SMITH] Note had been physically delivered to multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) by checking with the Custodian of Documents. Until then, there is no evidence multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) possessed in any manner the [SMITH] Note before rights to the [SMITH] Intangible Obligation was stripped away.

4. The rights to the [SMITH] Intangible Obligation have been conveyed as a Transferable Record to multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007). For the conditions of the [SMITH] Deed of Trust over the [SMITH] Intangible Obligation not to have been stripped away by that conveyance, rights to the [SMITH] Deed of Trust must have also been acquired by multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007).

5. The beneficial interest (ownership) of the [SMITH] Deed of Trust has been recorded in the Official Records of San Diego County as being in the name of [First Magnus Financial, Inc.] for the loan on April 5, 2007. However, it is clear that [First Magnus] as recorded as the original lender on the [SMITH] Deed of Trust sold all ownership interest, in the [SMITH] Intangible Obligation to multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) shortly after signing. Interest in the [SMITH]

Intangible Obligation is held in multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) and the payments under the [SMITH] Intangible Obligation are dispersed to the investors of multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) who hold certificates to the investment classes into which payments under the [SMITH] Intangible Obligation are scheduled to flow. Therefore the transfer of beneficial interest in the [SMITH] Deed of Trust by [First Magnus] might be accomplished, but that beneficial interest is no longer attached to rights to the [SMITH] Intangible Obligation.

## As Multiple Classes of the (FHLMC SCH/ACT Ganesha Trust-2007) have an Interest in the [SMITH] Intangible Obligation Multiple Classes of the (FHLMC SCH/ACT Ganesha Trust-2007) are Required to have Interest in the [SMITH] Note and Interest in the [SMITH] Deed of Trust

6. Freddie Mac is in business to buy interests in Deed of Trust Loans and deliver that interest in those loans into Mortgage-Backed Securities (MBS) pools. Freddie Mac states in its document custodian procedures handbook:

   "*Document Custodians are responsible for verifying certain information contained in the Notes and related documents for the Mortgages sold to Freddie Mac and for certifying that you have performed those verifications and that the original documents are in your possession."*

7. By multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) purchasing the [SMITH] Intangible Obligation, multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) was exercising rights of ownership over the mortgage loan and the payment stream. By exercising rights of ownership over the mortgage loan multiple classes of the trust made a claim of rights to all three parts of the [SMITH] Mortgage Loan.

8. The [SMITH] Mortgage Loan only exists through the Tangible Instruments creating it, being the [SMITH] Note and the [SMITH] Deed of Trust. The sale of the [SMITH] Intangible Obligation to multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) without stripping away the rights to the [SMITH] Intangible Obligation from the rights to the [SMITH] Note, could only be accomplished with the accompanying negotiation of the [SMITH] Note and an accompanying assignment of the [SMITH] Deed of Trust.

9. Multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) own the [SMITH] Intangible Obligation, and exercises that claim. To exercise the claim of rights to the [SMITH] Tangible Obligation, an assignment of the [SMITH] Deed of Trust should have to have been accomplished. Multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) are acting as if assignments of the [SMITH] Deed of Trust have been accomplished,…when in fact they have not.

10. The negotiation of the [SMITH] Note to Freddie Mac is required both by Freddie Mac's own requirements and California State Law. Freddie Mac's own document requirements for document custodians:

*"Upon receipt of a delivery of Notes from Seller, you must verify the data. The information on each Note must match the corresponding information in the Selling System.*
*Verify the Note. The Note must be original and complete.*
*The Note must also be originated on a Fannie Mae Uniform Instrument.*
*Verify the chain of endorsements (Note).*
*Verify the chain of assignments (Security Instrument).*

## Multiple Classes of the (FHLMC SCH/ACT Ganesha 2007 Trust) Cannot Claim an Interest in Either the [SMITH] Note or Deed of Trust

11. The multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) owned the [SMITH] Intangible Obligation. However, the transfer of rights to either of the two tangible parts of the security instrument that evidence the [SMITH] Intangible Obligation from [First Magnus] to multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) is not memorialized in the San Diego County Record.

12. Under the Consumer Credit Protection Act Title 15 USC Chapter 41 § 1641(g) any transfers of the [SMITH] Mortgage Loan to multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) would be in violation of Federal Statute, if those transfers had not been recorded in the San Diego County Recorders within [30 days] along with notification to [SMITH] that the transfers had occurred. As there are no recorded assignments of the [SMITH] Deed of Trust in the multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) within [30 days] of April 5, 2007, either there has been a violation of Federal Law or multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007), who are the owners of the [SMITH] Intangible Obligation, are not the owners of either the [SMITH] Note or the [SMITH] Deed of Trust.

> ***Title 15 USC Chapter 41 § 1641(g)***
>
> *(g)* ***Notice of new Creditor***
>
> *(1)* ***In General***
>
> *in addition to other disclosures required by this subchapter, not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer, including –*
>
> *(A) the identity, address, telephone number of the new creditor;*
>
> *(B) the date of transfer;*
>
> *(C) how to reach an agent or party having authority to act on behalf of the new creditor;*
>
> *(D) the location of the place where transfer of interest in the debt is recorded; and*
>
> *(E) any other relevant information regarding the new creditor.*

13. There have been no assignments of the [SMITH] Deed of Trust to multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) recorded in the San Diego County Records, although both multiple

classes of the Trust's own requirements and California State Law require assignments memorializing the sale and negotiations of the [SMITH] Note.

> ***Title 15 USC Chapter 96 § 1-7003***
>
> *(a) Excepted requirements*
> *The provisions of section 7001 of this title shall not apply to a contract or other record to the extent it is governed by –*
> *(3) the Uniform Commercial Code, as in effect in any State, other than sections 1-107 and 1-206 and Articles 2 and 2A.*

14. Multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) are the owners of the [SMITH] Intangible Obligation, however, according to California State Law, multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) can only be entitled to enforce the [SMITH] Deed of Trust if they took the [SMITH] Deed of Trust by way of assignments pursuant to:

    **Cal. Civ. Stat. § 1213 provides:** No assignment of the mortgage on real property or any interest therein, is good or effectual in law or equity, against creditors or subsequent purchasers, for a valuable consideration, and without notice, unless the assignment is contained in a document which, in its title, indicates an assignment of mortgage **and is recorded according to law**.

    **Cal. Civ. Stat § 2932.5 provides:** Where a power to sell real property is given to a mortgagee, or other encumbrancer, in an instrument intended to secure the payment of money, the power is part of the security and vests in a person who by assignment becomes entitled to payment of the money secured by the instrument. *The power of sale may be exercised by the assignee if the assignment is duly acknowledged **and recorded***. (emphasis added…)

    **Cal. Civ. Stat. § 2934 provides:** Any assignment of the mortgage and any assignment of the beneficial interest under deed of trust may be recorded, and from the time the same is filed for record operates as constructive notice of the contents thereof to all persons; and any instrument by which any mortgage or deed of trust of, lien upon or interest in real property, or by which any mortgage of, lien upon or interest in personal property a document evidencing or creating which is required or permitted by law to be recorded, is subordinated or waived as to priority may be recorded, and from the time the same is filed for record operates as constructive notice of the contents thereof, to all persons.

15. A duly recorded assignment of the [SMITH] Deed of Trust constitutes constructive notice while an unrecorded assignment of the [SMITH] Deed of Trust is notice only to immediate parties. With constructive notice, all persons attempting to acquire rights in the [SMITH] property are deemed to have notice of the recorded instrument. In this way, the Recording Statute is intended to expose the chain of title of the [SMITH] Deed of Trust to inspection by examination of real property records, protecting innocent junior purchasers and lenders from secret titles and the subsequent fraud attendant to such titles.

16. As explained previously, assignments of the [SMITH] Deed of Trust must be accompanied by parallel endorsements of the [SMITH] Note for the [SMITH] Mortgage Loan to remain secured by the [SMITH] Property. No evidence is available to evidence negotiations of the [SMITH] Note to multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) this would have required endorsements and proper negotiations of the [SMITH] Note from [First Magnus] to multiple classes of the (FHLMC

SCH/ACT Ganesha Trust-2007), including any intervening claims of ownership. Of course for the [SMITH] Mortgage Loan to remain a secured loan, there would have been assignments and transfers of the beneficial interest of the [SMITH] Deed of Trust, concurrent to negotiations of the [SMITH] Note and those transfers of the [SMITH] Deed of Trust would have to be entered into Public Record at the San Diego County Recorder's Office.

17. Importantly, mere presentment of the [SMITH] Note (even if shown to be the original), is not in itself proof of an equitable transfer of the [SMITH] Loan along with its Security Instrument. This demonstration of possession may be sufficient to enforce the [SMITH] Note, but carries no indicia of ownership or intent to transfer the [SMITH] Mortgage Loan. The Uniform Commercial Code (UCC) consecrates a preference in commercial transactions for simple possession of endorsed instruments over proof of actual ownership, an exception in the law that was intended to foster free trade of commercial paper.

18. The concept that a note holder, even one who is not legitimate, may nevertheless bring an action on the [SMITH] Note, is entrenched in commercial law and commonly summarized by the axiom "even a thief may enforce a note." However, the taking of the [SMITH] Home by foreclosure is an equitable remedy, and equity does not allow a "thief" to use a stolen [SMITH] Note to foreclose on the [SMITH] Mortgage Lien.

19. The claim that the "mortgage magically follows the note" is incorrect as under California Law the Lien follows the Secured Party of record. That equitable right must be proven with evidence of a delivery. Intention does not override the requirements of law.

20. Multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007), who owned the [SMITH] Intangible Obligation, cannot show that accompanied negotiations of the rights to the [SMITH] Note and accompanied transfers of the rights to the [SMITH] Deed of Trust has occurred. The rights to the [SMITH] Intangible Obligation have been stripped from the rights to the [SMITH] Note and the rights to the [SMITH] Deed of Trust

## The Document Purporting to be an ASSIGNMENT OF DEED OF TRUST dated May 11, 2011 is <u>Invalid</u> as an "Assignment of Deed of Trust"

*Black's Law Dictionary defines the term <u>valid</u> as "having legal strength or force, executed with proper formalities, incapable of being rightfully overthrown or set aside... founded on trust of fact; capable of being justified; supported, or defended; not weak or defective... of binding force; legally sufficient or efficacious; authorized by law... as distinguished from that which exists or took place in fact or appearance, but has not the requisites to enable it to be recognized and enforced by law." (See Black's Law Dictionary, Sixth Edition, 1990, page 1550)*

21. There is a document purporting to be an "Assignment of Deed of Trust" dated May 3, 2011 recorded May 10, 2011 in the Official Records of San Diego County, California, as Instrument #: 2011-0242231 signed by Diana DeAvila as Assistant Secretary of Mortgage Electronic Registration Systems (MERS), [that] alleges to be the <u>[holder] of the Deed of Trust</u> and does hereby grant, <u>[sell]</u>, assign, transfer

and convey unto BAC HOME LOAN SERVICING, LP all beneficial interest under that certain Deed of Trust dated April 5, 2007 as Instrument #: 2007-0248968.

22. First and most importantly the original lender, [First Magnus Financial, Inc.] gave up all rights to the [SMITH] Intangible Obligation to multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007), shortly after signing. Once [First Magnus Financial, Inc.] had given up the rights to the [SMITH] Intangible Obligation, the rights to the [SMITH] Intangible Obligation was stripped away from the rights to the [SMITH] Note and the rights to the [SMITH] Deed of Trust. [First Magnus Financial, Inc.] could transfer beneficial rights to the [SMITH] Note or Deed of Trust; however, that beneficial interest would not include rights to the [SMITH] Intangible Obligation.

23. The consequences of the rights to the [SMITH] Intangible Obligation being stripped away from the beneficial interests of [SMITH] Note and Deed of Trust means the [SMITH] Note is without an Intangible Obligation to evidence and the [SMITH] Deed of Trust is without an Intangible Obligation to enforce conditions against.

24. Lender [First Magnus Financial, Inc.] or their nominee MERS can assign beneficial interest in the [SMITH] Deed of Trust to whomever they please. However, the assignment of beneficial interest in the [SMITH] Deed of Trust does not create a right to the [SMITH] Intangible Obligation. In order for this document purporting to be an "Assignment of Deed of Trust" to be valid as an Assignment of Deed of Trust however, it would have to be determined if the transfer could be made to the assignee. I will explain how transfer to the assignee named could not have been accomplished by this document purporting to be an "Assignment of Deed of Trust."

25. BAC HOME LOAN SERVICING LP, (BAC) the assignee, is the servicer of the [SMITH] Intangible Obligation for multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007). Under the Consumer Credit Protection Act Title 15 USC Chapter 41 § 1641(f) any treatment of the servicer of the [SMITH] Intangible Obligation as an Owner of the [SMITH] Intangible Obligation would be in violation of Federal Statute. As this assignment to (BAC) would be in violation of Federal Statute, if (BAC) was not the Owner of the [SMITH] Intangible Obligation (BAC's) claim of rights to the [SMITH] Intangible Obligation is either a fraudulent claim or the actions of (BAC) under the claim of ownership are in violation of Federal Law.

    **15 USC Chapter 41 § 1641(f)** ***Treatment of Servicer:***

    *(1)* ***In general***
    *A servicer of a consumer obligation arising from a consumer credit transaction [shall not] be treated as an assignee of such obligation for purposes of this section unless the servicer is or was the owner of the obligation.*

    *(2)* ***Servicer not treated as owner on basis of assignment for administrative convenience***
    *A servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as the owner of the obligation for purposes of this section on the basis of an assignment of the obligation from the creditor or another assignee to the servicer solely for the administrative convenience of the servicer in servicing the obligation. Upon written request by the obligor, the servicer shall provide the obligor, to the best knowledge of the servicer, with the*

*name, address, and telephone number of the owner of the obligation or the Master servicer of the obligation*.

26. Examination of this recorded assignment-document reveals an [attempt] to provide the illusion of legality beginning in the first sentence where it states … *FOR VALUE RECEIVED the undersigned "[holder] of a Deed of Trust (herein "Assignor") … [sells] … all beneficial interest under that certain Deed of Trust described below* … for $320,000.00.

27. A Deed of Trust [never] contains a "legal obligation to pay money" and has no separate value apart from the Note it secures, so it cannot be [sold for value] apart from the Intangible Obligation and Tangible Note, which have already been sold and/or destroyed (as described in ¶22 above).

28. The term [Holder] is only used when describing the (PETE) or 'person entitled to enforce' the [Note] who is also the "Assignor" of the Deed of Trust as the (Grantor/Grantee) in the Assessor Recorder's Index but neither [First Magnus] nor MERS can be the (Grantor/Grantee) because neither entity is the (PETE). Additionally, [selling] the Deed of Trust separate from the Note is a [nullity] and creates a "Wild-Deed," and un-securing the debt, (if any), it was meant to secure.

29. MERS is the entity granting, assigning, and transferring all beneficial interest in the [SMITH] Deed of Trust to BAC HOME LOAN SERVICING, LP.

30. As explained earlier the beneficial interest of [First Magnus] did not include rights to the [SMITH] Intangible Obligation shortly after May 5th, 2007. Certainly MERS as a nominee for [First Magnus] can only assign the beneficial interest it legitimately holds and no more.

31. MERS cannot act on its own behalf as a party with rights to the [SMITH] Note or Deed of Trust.

32. MERS is not the owner of the [SMITH] Note secured by the [SMITH] Deed of Trust and has no rights to the payments made on the [SMITH] Note. MERS is not the owner of the servicing rights relating to the [SMITH] Tangible Obligation and MERS does not, nor have they ever serviced any loans. The beneficial interest in the mortgage or the person or entity whose interest is secured by the mortgage runs to the owner and holder of the [SMITH] Note which must evidence the [SMITH] Intangible Obligation. In essence, MERS merely and only immobilizes the mortgage lien while transfers of the promissory notes and servicing rights continue to occur.

33. As explained previously, any electronic transfers of the [SMITH] Deed of Trust using MERS, that may have been executed without Recording within the Official Records of the San Diego County Recorder Office are void under the Uniform Electronic Transactions Act (UETA) USC § 15-96-1-7003.

***USC § 15-96-1-7003***
*(a) Excepted requirements*
*The provisions of section 7001 of this title shall not apply to a contract or other record to the extent it is governed by –*
*(3) the Uniform Commercial Code, as in effect in any State, other than sections 1–107 and 1–206 and Articles 2 and 2A.*

Additionally, United States Code considers that anyone certifying that a real estate instrument has been signed when in fact it has not, is guilty of a felonious criminal act.

***Title 18 U.S.C. Chapter 47 § 1021***
*Whoever, being an officer or other person authorized by any law of the United States to record a conveyance of real property or any other instrument which by such law may be recorded, knowingly certifies falsely that such conveyance or instrument has or has not been recorded, shall be fined under this title or imprisoned not more than five years, or both.*

34. MERS has emphatically stated under an agreement with the mortgage lender members, that MERS cannot exercise, and is contractually prohibited from excising, any of the rights or interests in the mortgages or other security documents and that MERS has no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgage property securing such mortgage loans. *Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Bnkng and Fin,.* 704 N.W.2d 748 (Neb. 2005), Brief of Appellant at 11-12.

## The Document Purporting to be an ASSIGNMENT OF DEED OF TRUST Recorded October 23, 2012 is <u>Invalid</u> as an Assignment of Deed of Trust

35. There is a document purporting to be an "Assignment of Deed of Trust" dated October 12, 2012 recorded October 23, 2012 in the Official Records of San Diego County, California, as Instrument #: 2012-0649335 signed by Susan Douglas as Assistant Vice President of ***BANK OF AMERICA N.A., SUCCESSOR BY MERGER TO BAC HOME LOAN SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP***,… and alleges to grant, (sell), assign, transfer and convey unto NATIONSTAR MORTGAGE, LLC all beneficial interest under a Deed of Trust dated April 5, 2007 as Instrument #: 2007-0248968.

36. As described in (¶22 above). The [SMITH] Intangible Obligation had already been stripped from the [SMITH] Note and transferred electronically to Freddie Mac as Trustee for the (FHLMC SCH/ACT Ganesha Trust-2007). Therefore, this assignment and any other subsequent assignments are [VOID]

37. Further, the assignment states it was [FOR VALUE RECEIVED…] so the [alleged servicer] has [sold] the Deed of Trust (security instrument) separately from the obligation for which it exists but this is a nullity according to the U.S. Supreme Court In re *Carpenter v. Longan.* This "Wild Deed of Trust" contains no legal obligation to pay money and is therefore a worthless piece of paper and defective.

38. Regardless of these facts,…this [void] assignment [attempts] to give [Notice] that Bank of America N.A. has received all of the [alleged] assets of BAC HOME LOAN SERVICING LP, by merger,… ***without any recorded assignments*** for same. This naked assertion creates another "Wild Deed of Trust."

39. Further, the same [void] assignment [attempts] to give [Notice] that BAC HOME LOAN SERVICING LP FKA (formerly known as) COUNTRYWIDE HOME LOANS SERVICING, LP received the assets of

COUNTRYWIDE HOME LOAN SERVICING, LP by corporate-name-change,… ***without any recorded assignments*** for same. This naked assertion merely creates an additional "Wild Deed of Trust."

40. Informal Discovery using (Request Letters) revealed the [SMITH] Note was PAID-OFF by Countrywide on May 25, 2007. Countrywide then REPLACED the [SMITH] Note [Loan #: 9043377666] with [Countrywide's Account #: 160523703] owed as the "Account Debtor" to the Trustee, Freddie Mac. **This was an attempt of NOVATION**. The [Countrywide Account #: 160523703] is NOT secured by the [SMITH] Deed of Trust.

    ***NOVATION:***
    ***In contract law and business law, [novation] is the act of either:***
    *1. replacing an obligation to perform with a new obligation; or*
    *2. adding an obligation to perform; or*
    *3. replacing a party to an agreement with a new party.*

41. In contrast to an assignment which is valid so long as the obligee is given notice,... a [novation] is valid only with the [consent] of all parties to the original agreement: the obligee and obligor must consent to the replacement of the original obligor,... and/or the replacement of the original obligation of obligor [SMITH] or the act is VOID.

42. Consent was never granted by [SMITH] to replace the [SMITH] Note with a different Debt-Obligation and different account number, unique to Countrywide, after the [SMITH] obligation was settled.

43. Borrower [SMITH] is under no contract or legal-obligation to perform or to make payment on behalf of Countrywide's Account #: 160523703 and this [account#] is NOT secured by the [SMITH] Deed of Trust.

## The Document Purporting to be an ASSIGNMENT OF A DEED OF TRUST Recorded January 24, 2013 is Invalid as an Assignment of Deed of Trust

44. There is a document purporting to be an "Assignment of Deed of Trust" dated November 28, 2012 recorded January 24,2013 in the Official Records of San Diego County, California, as Instrument #: 2013-0050410 signed by Sean McKenzie as Assistant Secretary for NATIONSTAR MORTGAGE, LLC ,… and alleges to grant, (sell), assign, transfer and convey [**FOR VALUE RECEIVED**] unto NATIONSTAR MORTGAGE, LLC all beneficial interest under a Deed of Trust dated April 5, 2007 as Instrument #: 2007-0248968.

45. First and foremost,…NATIONSTAR MORTGAGE, LLC created, issued and recorded this assignment [**from**] NATIONSTAR MORTGAGE, LLC as attorney-in-fact,… [**to itself**] as NATIONSTAR MORTGAGE, LLC.

46. An “Assignment of Land” [cannot] be made from the subsequent assignee [to itself] as its own subsequent assignee. This assignment is blatantly fraudulent on its face due to the fact that [FULL VALUE] must be paid for assignments if the assignee is to be the (HIDC) Holder-in-due-course with the power of sale. An assignee cannot assign land to themselves, a fiction or a dead person.

47. As described in (¶22 above). The [SMITH] Intangible Obligation had already been stripped from the [SMITH] Note and transferred electronically to [Freddie Mac] as Trustee for the (FHLMC SCH/ACT Ganesha Trust-2007). Therefore, the Paper Tangible Note was no longer eligible for negotiation after the Intangible Payment Obligation was stripped and transferred electronically.

48. This “Wild Deed of Trust” contains no legal obligation to pay money and is therefore a worthless piece of paper and a void assignment.

49. Regardless,…this assignment states it was made [FOR VALUE RECEIVED…] so the [alleged servicer] has [sold] the Deed of Trust (security instrument) separately from the obligation for which it exists but this is a nullity according to the U.S. Supreme Court In re *Carpenter v. Longan.*

50. Just above the signature-line of this [defective] assignment is a [block of names] listed as successive owners through merger and/or corporate-name-changes and signed by Nationstar Mortgage LLC as attorney-in-fact with Sean McKenzie as Assistant Secretary.

51. The “Signature Block” of this assignment [attempts] to give [Notice] that Bank of America N.A. has received all of the [alleged] assets of BAC HOME LOAN SERVICING LP,…***without any recorded assignment***s for same. The assertion is unauthenticated and fails to establish any legal rights.

52. Further, the same “Signature Block” of this assignment [attempts] to give [Notice] that BAC HOME LOAN SERVICING LP FKA (formerly known as) COUNTRYWIDE HOME LOANS SERVICING, LP received the assets of COUNTRYWIDE HOME LOAN SERVICING, LP…. ***without any recorded assignments***,…for same. Nothing is filed in the Record providing evidence of these “Corporate Assignments” and this document cannot supply such evidence on its face. Those alleged facts must be [proven] separately.

## The Document Purporting to be a SUBSTITUTION OF TRUSTEE dated April 4, 2013 is <u>Invalid</u> as a Substitution of Trustee

53. There is a document purporting to be a “Substitution of Trustee” dated April 4, 2013 recorded in the Official Records of San Diego County, California as Instrument #: 2013-0288687 signed by Jeremy Seal as Assistant Secretary to NATIONSTAR MORTGAGE LLC, as present Beneficiary under the deed of trust substitutes CLEAR RECON CORP, as Trustee of a Deed of Trust recorded April 12, 2007 as Instrument #: 2007-0248968.

54. As described in (¶22 above), the document purporting to be an “Assignment of Deed of Trust” dated November 28, 2012 is invalid as an Assignment of Deed of Trust and did nothing to transfer any right or interest in the [SMITH] Deed of Trust to NationStar Mortgage, LLC (hereafter, NATIONSTAR). As

no rights or interests in the [SMITH] Deed of Trust have been transferred to (NATIONSTAR),… not (NATIONSTAR) nor any of its agents have any right to substitute CLEAR RECON CORP or T.D. SERVICE COMPANY as Trustee to the [SMITH] Deed of Trust and the document purporting to be a Substitution of Trustee dated April 29, 2013 is [invalid] as a Substitution of Trustee.

55. Further,…the (NOTICE) states that (MERS) MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. was the Original Lender, as a Nominee, when the Original-Named-Lender was [FIRST MAGNUS FINANCIAL, INC]. MERS was not mentioned in the original Note signed by [Borrower] at all.

56. The only loan number listed on the Substitution of Trustee is the loan number that is [owed by] the Depositor/ Guarantor being [Freddie Mac]. The original loan number of [Borrower/ Trustor] was NOT listed on the Substitution of Trustee.

## The Document Purporting to be a "NOTICE OF DEFAULT AND ELECTION TO SELL UNDER DEED OF TRUST" dated May 7, 2013 is <u>INVALID</u> as a NOTICE OF DEFAULT AND ELECTION TO SELL UNDER DEED OF TRUST

57. There is a document purporting to be a NOTICE OF DEFAULT AND ELECTION TO SELL UNDER DEED OF TRUST (NOD) dated May 7, 2013 recorded in the Official Records of San Diego County, CA as Instrument #: 2013-0288878 signed by Frances DePalma as Vice President Operations, where CLEAR RECON CORP claims to be trustee of a Deed of Trust dated April 12, 2007 as Instrument #: 2007-0248968.

58. As described in (¶54 above), the prior recorded "Assignments of Deed of Trust" are [invalid] as Assignment[s] of Deed of Trust and did nothing to transfer any right or interest in the [SMITH] Deed of Trust. NATIONSTAR did not have authority to substitute the original trustee nor the authority to record this NOTICE OF DEFAULT.

    **<u>Cal. Civ. Stat. § 1091 provides</u>**: An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his <u>agent thereunto authorized by writing</u>.

59. The recorded NOTICE OF DEFAULT AND ELECTION TO SELL UNDER DEED OF TRUST (NOD) dated May 7, 2013 is [invalid] as it [defectively] claims CLEAR RECON CORP by T. D. SERVICE COMPANY, as the duly appointed or substituted trustee and agent for the trustee, to be the agent of the beneficiary of the [SMITH] Deed of Trust. However, the Original Trustee named in the Deed of Trust is OLD REPUBLIC TITLE COMPANY and the original trustee was not substituted by the beneficiary of record or the original lender [First Magnus].

    **<u>Cal. Civ. Stat. § 2909 provides</u>**: A [lien] is to be deemed accessory to the act for the performance of which it is a security, whether any person is bound for such performance or not and is extinguished

both in like manner with any other accessory obligation. (The security interest serves as an incident to the debt).

**Cal. Civ. Stat. § 2923.5 provides**: A mortgagee, trustee, beneficiary, or authorized agent **[may not]** file a NOTICE OF DEFAULT pursuant to Section 2924 [**until satisfying**] (Cal. Civ. Stat. § 2924(a) & (b)).

**Cal Civ. Stat. § 2923.55(c) provides**: An authorized agent or employee of the mortgage servicer [**shall certify**] the declaration is accurate, complete and supported by competent and reliable evidence which the mortgage servicer has reviewed to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information.

**Cal. Civ. Stat. § 2924(a)(1)(c) provides**: A "NOTICE OF DEFAULT" (NOD) [**shall include**] a statement setting forth the nature of the breach actually known to the beneficiary. The power of sale is reserved exclusively for the beneficiary.

**Cal. Civ. Stat. § 2924(b) provides**: A (NOD) filed pursuant to Section 2924 [**shall include**] a Declaration of Mortgage Servicer Pursuant to Section 2923.55(c).

60. The **DECLARATION OF MORTGAGE SERVICER** signed by Kelly McKnight as Assistant Secretary of Nationstar Mortgage LLC, [**failed to include**] any loan number whatsoever. It was [**left blank**] and never completed. Therefore, the recorded Declaration itself is [**defective by statute**] and void.

61. Further, this [invalid] NOD lists only the [Freddie Mac Account #: 434071706], which is owed by the (Depositor/Guarantor),… and this [account #] is NOT SECURED BY [SMITH] DEED OF TRUST.

## The Document Purporting to be a NOTICE OF TRUSTEE'S SALE dated August 05, 2013 is INVALID as a NOTICE OF TRUSTEE'S SALE

62. A document purporting to be a "NOTICE OF TRUSTEE'S SALE" (NOTS) dated August 05, 2013 is recorded in the Official Records of San Diego County, CA as Instrument #: 2013-0489360 signed by Marlene Cleghorn as Assistant Secretary of T.D. SERVICE COMPANY.

63. As described in (¶54 above), the prior recorded "Assignments of Deed of Trust" are [invalid] as Assignment[s] of Deed of Trust and did nothing to transfer any right or interest in the [SMITH] Deed of Trust. NATIONSTAR did not have authority to substitute the original trustee nor record a Notice of Default. The NOTICE OF TRUSTEE'S SALE is defective and void ab initio.

**Cal. Civ. Stat. § 1213 provides:** No assignment of the mortgage on real property or any interest therein, is good or effectual in law or equity, against creditors or subsequent purchasers, for a valuable consideration, and without notice, unless the assignment is contained in a document which, in its title, indicates an assignment of mortgage **and is recorded according to law**.

**Cal. Civ. Stat. § 2932.5 provides**: Where a power to sell real property is given to a mortgagee or other encumbrancer in an instrument intended to secure the payment of money, the power is part of the security and vests in any person who by assignment becomes entitled to payment of the

money secured by the instrument. The power of sale may be exercised by the assignee,… **If the assignment is duly acknowledged and recorded.**

**Title 18 U.S.C. Chapter 47 § 1021 provides**: Whoever, being an officer or other person authorized by any law of the United States to record a conveyance of real property or any other instrument which by such law may be recorded, knowingly **certifies falsely that such conveyance or instrument has or has not been recorded**, shall be fined under this title or imprisoned not more than five years, or both.

64. COUNTRYWIDE and FREDDIE MAC [**never**] became the "Beneficiary-of-Record," therefore, [**never**] became the party entitled to the payment of money secured by the power of sale. Non-Compliance of (Cal Civ. P. §§ 2932.5 & 2924) voids any alleged CA non-judicial foreclosure sale.

The NOTICE OF TRUSTEE'S SALE,… [contains and further reveals] FRAUD IN THE FACTUM:
The last paragraph of page-1 clearly states, … "***SAID SALE OF PROPERTY****…. is made without covenant or warranty, express or implied, regarding title possession…. to pay the remaining principle sum of the note**[s]** secured by said Deed of Trust*…. ***and of the trusts [created by] said Deed of Trust..**"*

65. This ADMISSION is clearly written into the NOTICE OF TRUSTEE'S SALE, and admits that the foreclosure sale was conducted to satisfy a debt-obligation [**other**] than the bargain struck between Borrower [SMITH] and lender [First Magnus].

66. This ADMISSION further [admits] that the terms of the Deed of Trust were altered or amended after the bargain was struck, completely outside the view of the "closing-table-transaction" and was not the intent manifested and expressed by Trustor at the closing-table.

67. Further, page-2, paragraph-2 of the (NOTS) states that the unpaid balance of the obligation secured by said Deed of Trust,… (and the "Servicer Advances") paid to the Securitized-Trust by the servicer on behalf of Borrower [SMITH],… is $409,639.35,… which is nearly ($100,000 more) than the amount of the original Note. [SMITH] not liable for recoupment to servicer. No default exists.

68. Further,… this (NOTS) ADMITS and foretells that the opening bid may be less than the total indebtedness due. (Why?) Because the only "legal obligation to pay money" for which Borrower [SMITH] has promised to perform is the amount contained in the original evidence of debt signed by borrower [SMITH] and no bargain was struck for borrower [SMITH] to re-pay advances of servicers.

69. The (NOTS) ADMITS there is NO DEFAULT [possible] due to Servicer Advances being volunteered,… and ADMITS to the destruction of the Trustor's Deed of Trust through Conversion and Novation.

## Interest in the [SMITH] Intangible Obligation Cannot be Rejoined to Interest in the [SMITH] Note or the [SMITH] Deed of Trust

70. Multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) have rights to the [SMITH] Intangible Obligation. Multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) have yet to all and each be named as payee on the [SMITH] Note and do not now have rights to the [SMITH] Note. For multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) to gain rights to the [SMITH] Note, multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) would have to all and each be named payee.

71. There is no possible way for the [SMITH] Note to be transferred to all and each of multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) for the partial rights to the [SMITH] Intangible Obligation that each owns. Interest in the [SMITH] Intangible Obligation and rights to the [SMITH] Note will remain separate.

72. Because rights to the [SMITH] Deed of Trust was separated from the rights to the [SMITH] Intangible Obligation, and will remain separate, the [SMITH] Deed of Trust, is left with no way to enforce its conditions over the obligation which should be evidenced by the [SMITH] Note, making the [SMITH] Deed of Trust an unenforceable contract.

## With Interest in the [SMITH] Intangible Obligation Stripped Away and no way to Enforce the Conditions Under the [SMITH] Deed of Trust, the [SMITH] Deed of Trust Contract is a Nullity

73. The ownership of the [SMITH] Intangible Obligation was separated from the rights to the [SMITH] Note and the rights to the [SMITH] Deed of Trust, leaving the [SMITH] Note no Intangible Obligation to evidence and the [SMITH] Deed of Trust no Intangible Obligation to enforce conditions over.

74. Lender [First Magnus Financial, Inc.] retained no beneficial interest in the [SMITH] Intangible Obligation after selling the [SMITH] Intangible Obligation to multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) shortly after signing. No acceptable assignments of the [SMITH] Deed of Trust to all and each multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007) have been recorded into the San Diego County Recorder's Office. There is no evidence of negotiations of the [SMITH] Note to all and each multiple classes of the (FHLMC SCH/ACT Ganesha Trust-2007). With no properly recorded owner of the [SMITH] Deed of Trust there is no one to enforce the conditions over the [SMITH] Intangible Obligation which is no longer evidenced by the [SMITH] Note. The [SMITH] Tangible Obligation is to longer secured by the property.

75. With no specific properly-secured owner of the limited beneficial interest of the [SMITH] Note, there is no way to enforce the stripped-away [SMITH] Intangible Obligation through the [SMITH] Note.

## The Document Purporting to be a TRUSTEE'S DEED UPON SALE dated September 05, 2013 is <u>INVALID</u> as a TRUSTEE'S DEED UPON SALE

76. A document purporting to be a "TRUSTEE'S DEED UPON SALE" (TDUS) dated September 05, 2013 is recorded in the Official Records of San Diego County, CA as Instrument #: 2013-0572847 signed by BA V. MA as Trustee's Sale Technician III for T.D. SERVICE COMPANY and signed again the following day (09/06/2013) by Cindy Gasparovic and Kimberly Coonradt- D'ambrosio, Assistant Secretaries for CLEAR RECON CORP by T.D. Service Company, As Agent for the Trustee.

77. The (TDUS) states that CLEAR RECON CORP (herein called trustee) does hereby GRANT AND CONVEY, …. to FEDERAL HOME LOAN MORTGAGE CORPORATION (herein called Grantee) …. and Trustee sold [its] interest in the property to Grantee, FREDDIE MAC..

78. The (TDUS) wrongly states the authorized or duly appointed Trustee as being CLEAR RECON CORP by T.D. Service Company, As Agent for the Trustee when the [only authorized Trustee] is the originally named Trustee in the Deed of Trust, OLD REPUBLIC TITLE COMPANY. Freddie Mac was [never] the Beneficiary-of-Record and, therefore, was [never] the Grantee. No substitution of trustee was authorized by the named lender or current beneficiary, if any, and the (TDUS) is void ab initio.

***Nemo Dat Quod Non Habet:*** The common law principle literally means one cannot [sell] what one does not own.

**Cal. Civ. Stat. § 2924 provides:** The foreclosing party must necessarily prove the sale was conducted by the Trustee.

**Cal. Civ. Stat. § 2932.5 provides**: Where a power to sell real property is given to a mortgagee or other encumbrancer in an instrument intended to secure the payment of money, the power is part of the security and vests in any person who by assignment becomes entitled to payment of the money secured by the instrument. The power of sale may be exercised by the assignee,… **If the assignment is duly acknowledged and recorded.**

**Cal. Penal. Stat. § 115(a) provides**: Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, registered, or recorded under any law of this state or of the United States, is guilty of a felony. (b) each instrument which is procured or offered to be filed, registered, or recorded in violation of subdivision (a) shall constitute a separate violation of this section. (d) for purposes of prosecution under this section, each act of procurement or of offering a false or forged instrument to be filed, registered, or recorded shall be considered a separately punishable offense.

**Title 18 U.S.C. Chapter 47 § 1021 TITLE RECORDS provides**: Whoever, being an officer or other person authorized by any law of the United States to record a conveyance of real property or any other instrument which by such law may be recorded, knowingly **certifies falsely that such conveyance or instrument has or has not been recorded**, shall be fined under this title or imprisoned not more than five years, or both.

79. If the Trustee's Deed Upon Sale identifies one Trustee but the Deed of Trust identifies a different Trustee the trial court cannot accept the recorded Trustee's Deed Upon Sale as conclusive evidence of compliance with CCP § 2924.

80. See in re (***Seidell v. Anglo-California Trust Co***. (1942) 55 Cal. App. 2d 913,920). "[T]itle is duly perfected when all steps have been taken to make it perfect, i.e., To convey to the purchaser that which he has purchased, valid and good beyond all reasonable doubt, which includes good record title, but is not limited to good record title, as between the parties to the transaction. The term duly implies that all of those elements necessary to a valid sale exist, else there would not be a sale at all. (***Kessler v. Bridge*** (1958) 161 Cal. App. 2d Supp. 837, 841 [internal citations omitted]). Under a Deed of Trust, power of sale upon the trustor's default vests in the trustee, (***Calvo v. HSBC Bank USA, N.A***. (2011) 199 Cal. App. 4th 118,122.) Therefore, in order to prove compliance with section 2924, the foreclosing-party must necessarily prove the sale was conducted by the trustee.

81. The (TDUS) wrongly states that the Grantee herein was the Beneficiary of Record, as being FREDDIE MAC, when NATIONSTAR MORTGAGE LLC was the Beneficiary of Record on September 05, 2013 and NOT [defendant] FREDDIE MAC. No credit-bid was available to Freddie Mac and the sale is void.

    **California's Mortgage Fraud Statute:**
    **Cal. Penal Code § 532(f)(a) provides:** a person commits mortgage fraud if the person does any of the following …. (4) files or causes to be filed with the Recorder of any County in connection with a mortgage loan transaction any document the person knows to contain a deliberate misstatement, misrepresentation, or omission. (alteration added…)

82. The (TDUS) wrongly states that the Grantee herein was the Beneficiary of Record, as being FREDDIE MAC, when NATIONSTAR MORTGAGE LLC was the [defective] Beneficiary of Record on September 05, 2013 and NOT [defendant] FREDDIE MAC.

83. The TRUSTEE'S DEED UPON SALE,…was [ALTERED] after being granted and conveyed by the [unauthorized] Trustee to FREDDIE MAC, as Grantee. An [unknown entity] named [SERVICELINK] [stamped and altered] the (TDUS) with a disclaimer, wherein [SERVICELINK's] states: "*THIS INSTRUMENT IS RECORDED AT THE REQUEST OF SERVICELINK AS AN ACCOMODATION ONLY. IT HAS NOT BEEN EXAMINED TO ITS EXECUTION OR AS TO ITS EFFECTS UPON TITLE*."

84. The TRUSTEE'S DEED UPON SALE is void and should be set aside or rescinded.

## FURTHER AND IN ADDITION
## Affixing or Submitting False Signatures on a Mortgage Document is a Violation of Federal and State Law

85. Those signatures on [all prior] Assignments, Declarations, Notices and Trustee's Deed Upon Sale are without authority to complete the transaction. According to a Mortgage Fraud Notice prepared

jointly by the Federal Bureau of Investigation (FBI) and the Mortgage Bankers Association, **submitting false mortgage assignments and forging signatures violates potentially eight federal criminal statutes. Specifically:**

(1) 18 U.S.C. § 1001 - Statements or entries generally; (2) 18 U.S.C. § 1010 - HUD and Federal Housing Administration transactions; (3) 18 U.S.C. § 1014 - Loan and credit applications generally; (4) 18 U.S.C. § 1028 - Fraud and related activity in connection with identification documents; (5) 18 U.S.C. § 1341 - Frauds and swindles by mail; (6) 18 U.S.C. § 1342 - Fictitious name or address; (7) 18 U.S.C. § 1343 - Fraud by wire; (8) 18 U.S.C. § 1344 - Bank Fraud; add 18 U.S.C. § 1021 - Title Records. *See* FBI Mortgage Fraud Notice at (http://www.mbaa.org/FBIMortgageFraudWarning.htm); *see also,* Truth in Lending Act, Title I of the Consumer Credit Protection Act, as amended, 15 U.S.C. § 1601 *et seq.*; California's Mortgage Fraud Statute Cal. Penal Code § 532(f)(a) provides (penalty is a felony of the third degree).

**FRAUD IN THE FACTUM – FROM "CRADLE TO GRAVE"**
**ORIGINAL NOTE, DEED OF TRUST & SUBSEQUENT ASSIGNMENTS ARE [SHAM] TRANSACTIONS**

The Deed of Trust executed by the [Borrower/Trustor] did not create an irrevocable trust by surrendering his property rights to intentionally hidden beneficiaries in an undisclosed securitization process. The Deed of Trust in this instant action was in fact a [sham] transaction which included such dishonest acts as Identity Theft of the Borrower and Breach of Trust by the purported Trustee who aided and abetted the destruction of the mortgage. The fraud in the factum was woven into the Note and Deed of Trust at the closing table on (04/05/2007) wherein [fractionalized-securitization] is inferred … *[**covenant 20**] of the Security Instrument "Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note [**or a partial interest in**] the Note (**together with this Security Instrument**) can be sold one or more times without prior notice to the Borrower."* (emphasis added). … but wasn't fully disclosed or [discovered] until the Notice of Trustee Sale (**NOTS**) - recorded (09/05/2013) which clearly states that … "***SAID SALE OF PROPERTY****…. is made without covenant or warranty, express or implied, regarding title possession…. to pay the remaining principle sum of the note**[s]** secured by said Deed of Trust*…. ***and of the trusts [created by] said Deed of Trust..***" The [Borrower/Trustor] signed one Note and one Deed

of Trust, and both seminal documents contain fraud in the factum and are therefore defective instruments. The amount of misconduct of the actors between the borrower and the ultimate investors supports the elements necessary for the court to properly declare a "constructive trust." The constructive trust is a strong vehicle of compulsion the court can apply to cause the other constructive trustees to disgorge all their records and files. **In the alternative,** and since many potential parties may no longer exist, the process for [Discovery] under (CCP §§ 2023.010 – 2033 et seq.) will suffice, (which is included within this instant action for possession). Also, due to all the misconduct, which included the title insurance company, the [Trustor's] Plaintiff's title is unmarketable due to the [Borrower's] participation knowingly or unknowingly in this fraud [which may be a covered loss under the title insurance policy].

## I. WHAT IS A DEED OF TRUST?

**A Deed of Trust is defined as:**

"A conveyance creating a trust in real estate; a conveyance given as security for the performance of an obligation which is generally regarded as containing the elements of a valid mortgage…. The difference between a deed of trust and a mortgage is essentially one of form, the formed being executed in favor of a disinterested third person as trustee,…" Ballentines's Law Dictionary, 3rd ed. At 319. (emphasis added)

### WHAT ARE THE ELEMENTS THAT MAKE UP A DEED OF TRUST?

The DEED OF TRUST at issue identified the following parties and their role at the closing table to execute the loan documents to finance the home thus creating the debt and security instruments:

a. "Security Instrument" means this document, which is dated April 05, 2007;
b. "Borrower" is [SMITH]. Borrower is the [T]rustor under the Security Instrument;
c. "Lender" is [First Magnus] Financial Corporation, an Arizona Corporation;
d. "Trustee" is [Old Republic Title Company];
e. "MERS" is Mortgage Electronic Registration Systems, Inc., a separate corporation that is [acting] as a nominee for Lender and Lender's successors and assigns;
f. "Note" means the promissory note [signed by] Borrower [Settlor, Trustor];
g. "Loan" means the debt evidenced by the [Note signed by Borrower]…;

Borrower/Trustor/Settlor owned the subject property free and clear of all encumbrances in fee simple. The paragraph Rights in the Property states, in relevant part:

"The beneficiary of this Security Instrument is MERS (solely as nominee for lender and lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender;…. Borrower [Settlor, Trustor] irrevocably grants and convey to Trustee, in trust, with power of sale, the following described property…." DEED OF TRUST (DOT), p.3 ¶ 2. (alteration added)

"TOGETHER WITH all improvements…. All of the foregoing is referred to in this Security Instrument as the 'Property.' Borrower [Settlor, Trustor] understands and agrees that MERS holds only legal title to the interest granted by Borrower [Settlor, Trustor] in this Security Instrument,…MERS (as nominee for Lender and Lender's successors and assigns) has the right;…." Id. ¶ 3. (alteration added) (emphasis added)

"BORROWER [SETTLOR, TRUSTOR] COVENANTS that Borrower is lawfully seized of the estate hereby conveyed…" Id. ¶ 4. (alteration added)

"Seized is defined as: "Having seisen. Having been subjected to seizure." – Ballentine's Law Dictionary, 3rd ed. at 1156.

"Seisin is defined in part as: The possession of a freehold estate by the owner. 42 AmJ 1st Prop §45. The possession of land coupled with the right to possess it and a freehold estate therein, practically the same thing as ownership. Holt v. Ruleau, 83 Vt 151, 74 A 1005." Id. at 1156.

## II. DID THE DEED OF TRUST CREATE A REAL TRUST AT CLOSING?

Under Arizona law, all the elements to create a trust must be complied with. Arizona Revised Statutes (ARS) ARS §14-10402(A)(2), which states in relevant part: "… a trust is created only if all the following are true: 2. The Settlor indicates an intention to create the trust."

THE ANSWER IS "NO,"… Since the title insurance agents/representatives present at the closing table did not explain the ramifications of what the (Borrower/Trustor/Settlor) was actually doing by executing the Deed of Trust and the Promissory Note, a Constructive Trust arose by operation of law. The intention to create the trust by the (Borrower/Trustor/Settlor) is an essential element of a lawful trust. Since the representatives from the Title Insurance Company of the Originating-Lender [First Magnus] did not explain that [SMITH] intended to impose enforceable duties on the Trustee, then the trust fails. It is a [sham], false, a non-entity. The [sham] Deed of Trust merely cloaked the undisclosed securitization process of the borrower's mortgage. (Ie., to be used as their-own-collateral for additional obligations).

The highly respected legal encyclopedia American Jurisprudence addressed the issue of good and bad faith.

"Good faith" as a requisite of holder-in-due-course status entails the absence of bad faith and of guilty knowledge or notice. The requirement of good faith imposed by the Negotiable Instruments Law (NIL) generally means that the transaction was honestly conceived and consummated without collusion, fraud, knowledge of fraud, or intent to assist in the perpetration of fraudulent or otherwise unlawful design. To be purchased in good faith means that at the time one takes an instrument he acts honestly and fairly under the facts and circumstances within his knowledge with respect to the rights of all prior parties, particularly those with whom he knows his transferor occupied a relationship of trust, in a manner free from the taint of any illegality. According to the 'white heart' or 'subjective' test of good faith a thing is done in 'good faith' when it is in fact done honestly, whether it is done negligently or not." 11 AmJur2nd (1963-1964), Bills and Notes, § 425.

Further, "Bad faith is a lack of fair dealing by which the taker of the instrument obtains an unfair advantage, and is akin to the equitable doctrine of clean hands. 'Bad faith' is generally regarded as meaning actual bad faith, that is bad faith tested by subjective rather than an objective standard…. To constitute evidence of bad faith, the facts known to the taker must be such as to reasonably form the basis for an inference that in acquiring the instrument with knowledge of such facts, he acted in dishonest disregard to the rights of the [Borrower]…. Willful ignorance is the equivalent of actual knowledge and bad faith. Bad faith is not mere carelessness. It is nothing less than guilty knowledge or willful ignorance. To show knowledge of such facts of the taking would amount to bad faith it is not necessary to show knowledge of the exact fraud that was practiced upon the maker. It is sufficient if the facts within knowledge tend to show that there was something wrong with the transaction." Id (alteration added)

## III. CONTROLLING TRUST LAW

**A**s authorized in ARS § 14–7510, supra, well-settled, black letter trust law will cause the DEED OF TRUST at bar to fail as no statutory or Common Law trust ever existed and draws the bright line for the Acts of Disloyalty by the trustee, NATL. Specifically:

**a.** The definition of trust. "A trust…. is a fiduciary relationship with respect to property, subjecting the person by who the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of intention to create it." RESTATEMENT OF THE LAW, 2nd, TRUSTS § 2.

b. § 3, states:
(1) The person who creates a trust is the settlor.
(2) The property held in trust is the trust property.
(3) The person holding property in trust is the trustee.

(4) The person for whose benefit property is held in trust is the beneficiary. Id.

c. § 4 states:
The phrase "terms of the trust" means the manifestation of intention of the SETTLOR with respect to the trust expressed in a manner which admits of its proof in judicial proceedings. Id. (emphasis added)

"Thus, before payment of the debt a mortgagee may properly transfer to a third person [his] interest in the debt and in the security; it is a breach of the trust for the trustee to transfer the trust property to a third person, unless he is authorized to do so by the terms of the trust…." Id, § 9 at 27.

The Deed of Trust in this instant action is truly a [sham] since well-settled trust law defines what constitutes the clear manifestation of the Settlor to create the trust. Specifically,

"No trust is created unless the Settlor manifests an intention to impose enforceable duties."
RESTATEMENT OF THE LAW, 2nd, TRUSTS §25.

These enforceable duties are laid out in detail in the [Trust Indenture] which is kept and controlled by [Defendant] Freddie Mac. "Informal Discovery," was commenced on [August 29, 2013] and repeated with each successive [inadequate] response from [Defendant]. Plaintiff's [Trustor's] informal discovery requested the Trust Indenture relied upon by [Defendant] for the securitization attempt of [SMITH's] mortgage loan-package, in order to be effective and perfected by the REMIC-styled trust's "Start-Up Date," being in the [year] 2007. [Defendant] never produced the Trust Indenture relied upon at the closing of escrow and the response received from [Trustor] Plaintiff's informal discovery attempts stated that "[Defendant] would not cooperate and produce the Trust Indenture,… except under an order of subpoena. That document was not in escrow nor made available to [SMITH] for examination since [SMITH] would have [never], and did not approve, such a document. Since [SMITH] is not identified in the Trust Indenture document, it was NOT [his] manifestation of intent to create this Trust Indenture. It is at this point in the transaction that the criminal act of [Identity Theft] occurred since the actors "securitized" [SMITH"s] loan-signature, without consent, by creating an 'electronic-debt-instrument' and

selling [both] the [defective original] and the [newly created e-Note] many times over and keeping all the profits.

## IV. FRAUD IN THE FACTUM

The Deed of Trust contract, that [Defendant] asserts having the legal right to enforce, was drafted with fraud in the factum and is therefore defective and unenforceable as the expressed intent of [SMITH] to create an irrevocable trust at the closing of escrow. “Fraud vitiates even the most solemn promise to pay,” see U.S. vs. Throckmorton, 98 U.S. 61, 65.

In [**examining**] the verbiage pertaining to [**covenant 20**] of the Security Instrument “Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note [**or a partial interest in**] the Note (**together with this Security Instrument**) can be sold one or more times without prior notice to the Borrower.” (emphasis added).

This is a gross misrepresentation of the Security contract [Trust Deed] stating that a **multiple-choice** could be made between the Note, [**or a partial interest in**] the Note, with the result being the same. This is a legal impossibility as the Security Instrument contract [Trust Deed] can only follow a properly secured Tangible Note and can only be transferred with a written assignment that [names] the subsequent assignee. It is at this point that the [undisclosed] unsafe and unsound [**fractional-securitization-attempt**] of the loan-signature, and therefore identity theft, of the [SMITH] began. A properly secured Note would have both parts attached to the Note. Both the Tangible and the Intangible. The Intangible being the promise to pay, [or the partial interest]. The partial interest is nothing but a transferable record; whereas the California Commercial Code Article-9 applies, the local laws of jurisdiction do not apply to Transferable Records. This fraudulent misrepresentation caused [SMITH] to enter a transaction without accurately realizing the risks, duties, or obligations incurred. [SMITH] as the maker or drawer of the debt instrument, was induced to sign the instrument without a reasonable opportunity to learn of its fraudulent character or essential terms.

Fraud in the Factum voids the instrument under state law. If the contract Is Void ab initio, there was never a contract to begin with. An example is a contract to commit a crime. The only distinction which can be made amongst penalties is regarding crimes and contracts. No one can contract to commit a crime; it would be void; State v. Baltimore & O.R. Co.

After examining the implied actions that were to take place within this security instrument contract [Trust Deed] it appears that an illusion on the part of the lender who is using fancy word-crafting is taking place. That very-same word-crafting [permeates] this defective-loan-event from [cradle-to-grave], and is further evidenced in subsequent documents recorded by [Defendant] and its prior (Seller/Sponsor/Servicer). **Fractionalized-Securitization** is inferred repeatedly but never actually disclosed in the bargain contained within the seminal contract[s]. Further, the defective Notice of Trustee Sale (**NOTS)** recorded (09/05/2013) states that the,… "**SAID SALE OF PROPERTY**…. is being made without covenant or warranty, expressed or implied, regarding title possession…. to pay the remaining principle sum of the note**(s)** secured by said Deed of Trust…. ***and of the trusts [created by] said Deed of Trust..*"** (emphasis added). This disclosure in the (NOTS) created, issued and recorded by the [unauthorized] substitute Trustee, is clear evidence of FRAUD IN THE FACTUM, perpetrated at the closing of escrow.

Plaintiff [Trustor] never intended for his Deed of Trust to be used to create additional trust(s) for which [Borrower/Trustor] may then be an INVOLUNTARY SETTLOR/TRUSTOR for multiple insider transactions.

[Borrower/Trustor/Settlor] never consented to or signed the Trust Indenture of [Defendant] and the Tangible Security Instrument [Trust Deed] cannot follow a partial interest of the Tangible Note. The U.S. Supreme Court in *Carpenter v. Longan* established this fact long ago,…and it applies today in exactly the same manner regardless of recent developments in financing using unsafe and unsound modern securitization-of-debt-schemes..

[Defendant] Freddie Mac is expected to counter with and apply the well-worn-argument of misdirection through a convenient [mis]interpretation of what is plainly written by the U.S. Supreme Court in a way that defies both physics and logic due to a literal-reading without addressing the actual-intended results being ruled upon by the U.S. Supreme Court in Carpenter v. Longan.

The claim that the "the mortgage magically follows the note" is [incorrect] as under California law the lien follows the Secured Party of record (CCP §§2932.5 & 2936). That equitable right must be proven with evidence of a delivery. Intention does not override the requirements of law.

It is a cornerstone and long-held concept within California law, that when the rights to the Tangible Paper Note and the rights to the Security Instrument are separated, the Security Instrument, because it can have no separate existence, cannot survive and becomes a nullity. See: *California Civil Code Sec. "2936"; US Supreme Court Case "Carpenter v. Longan" at 83 U.S. 271 (1872); California Supreme Court Case "Lewis v. Booth" at 3 Cal 2nd 345 (1935); and California Appellant Court Case "Domarad v. Fisher & Burke Inc." at 270 Cal App 2nd 543 (1969).*

**In Carpenter v. Longan, 16 Wall. 271, 83 U.S. 271, 274, 21 L.Ed. 313 (1872),** *the U.S. Supreme Court stated "The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity…. The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration...."*

The Supreme Court ruling in Carpenter v. Longan **correctly** stated the [essential] as being the obligation and the [incident] as being the security. Also correctly stated, and absolutely applicable for today's financing-schemes, was [their] stating that the two are [inseparable],...with the interpretation being that to [**actually**] separate ownership of the two is [**not prudent**], because it renders the latter as a

nullity,...[not only] when the Deed of Trust is assigned, but instantly and forever,...like severing the tail from a dog. They can exist separately and even be [owned] by two different people,...but only the one has life. The obligation [dog] is essential and continues on, but the security [tail] was severed and lost. Lifeless and of no further effect, and [that] is why they are inseparable. [Not] because the Deed of Trust is [magical] as to fly through the air like a [flying-carpet], to re-unite with the [paper] note, wherever that Note [may] be.

[Defendant's] expected position is [too often] repeated as factual throughout different courts when the event itself, as described, is [**actually**] impossible. The Supreme Court did not connote 'magical-powers' onto a security instrument (a piece of paper), of which can ONLY transfer by a writing, to enable the resurrection of the lifeless appendage. A security lost is just that; Lost.

The California Commercial Statutes (UCC in each state) are clearly the [essential] statutes concerning mortgage-loans because they govern the "Person Entitled to Enforce" the Note (PETE), whether it's negotiable or otherwise, whereas the non-judicial-foreclosure-statutes are mere incidental[s] to the California Commercial Statutes. Non-Judicial foreclosure statutes are NOT necessary to foreclose in California. Secured creditors can always [elect] to foreclose by [judicial] means and sue the [Borrower] based on the obligation. A judicial [alternative] is available for the alleged creditor therefore making the non-judicial foreclosure statutes [incidental], to the [essential] Commercial Statutes which govern the enforcement rights of the obligation.

Therefore, assignments of Deed of Trust are [first] controlled by the California Commercial Statutes (UCC), and then the State's recording and non-judicial foreclosure statutes thereafter. The [operative language] in every "Assignment of Deed of Trust" is the following; [**FOR VALUE RECEIVED**],... this assignment is made conveying, granting or gifting.... Therefore, the obligation controls, and,… "Holder-in-due-Course" status strictly relies upon [full value] being paid even for bearer paper as well as the

Note [not] being in default. Regardless whether the note [could've] been enforced by a thief,...equity will not allow a thief to foreclose non-judicially. Therefore, the [owner] of the Note (original evidence of debt) must actually be the “Owner-In-Due-Course” and can prove both the transaction was an [intended] action from a prior (OIDC) and that the present (OIDC) paid full-value for the instrument and that the instrument was not in prior dishonor or default when acquired (UCC § 3-309).

The "Of-Record-Title" is [supposed] to give constructive-notice reflecting the taxable-owner of the debt (Recording Statute - Cal. Gov. Code § 27288.1) whether it’s a public or private REMIC-Trust (IRC-860(D)) or a flesh-and-blood person (CCP § 2932.5). Under the strict Internal Revenue Code (IRC), the [Defendant] Freddie Mac as a REMIC-Trust, [shall] perfect its Title and authority to foreclose by becoming the taxable-owner-of-record within [90 days] of the startup date of the REMIC-Trust (IRC 860 (D)) which was in 2007. Freddiie Mac [Defendant] failed to become a “Beneficiary of Record.”

Further, under the Consumer Credit Protection Act Title 15 USC Chapter 41 § 1641(g) the new creditor must notify the obligor of the sale and transfer and disclose the location where the assignment is duly recorded within [30 days] of the transfer or it is a Federal Violation. [Defendant] Freddie Mac has [never] been a beneficiary-of-record prior to the defective Trustee Sale date of (09/05/2013).

The inclusion of MERS as a 4th party in a [traditionally] 3-party Deed of Trust contract [admittedly] bifurcated the Trust Deed from the Note (tail from the dog) and there is no such thing as an (equitable-tail) "Equitable Mortgage." A Deed of Trust can ONLY exist in its original "Tangible-Paper" form, secured to the obligation it protects, or the intangible-power-of-sale contained within the Trust Deed is forever out of reach. (severed and lifeless)

A Deed of Trust without a corresponding Note is not enforceable and is ineffective to allow foreclosure. In re Leisure Time, 194 B.B. 859 (9th Cir. BAP 1996). The court acknowledged that a “Security Instrument

cannot exist, much less transfer independent from the obligation which it secures." 194 B.R. at 861, citing DiSanto & Moore Associates, 41 B.R. 935 (Bankr. C.D. Cal 1984).

**MORTGAGE ELECTRONIC REGISTRATION SYSTEM (MERS) – "PROCESSING LOANS NOT PAPERWORK"**

On **April 13, 2011** MERS and MERSCORP [consented] to the issuance of a "*CEASE AND DESIST ORDER*" with the OFFICE OF THE COMPTROLLER OF THE CURRENCY (OCC No. AA-EC-11-20) and the BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (Docket Nos. 11-051-B-SC-1, 11-051-B-SC-2) where the (Agencies) identified certain deficiencies and 'unsafe and unsound' practices by MERS and MERSCORP that present compliance and legal risks to [Defendant] Freddie Mac as recipient of those services. MERS and MERSCORP had [FAILED] to ensure proper administration and delivery of original paper mortgage-loan-packages to [Defendant] Freddie Mac. MERS can ONLY e-Register [e-Notes and e-Mortgages] and cannot e-Register [paper] Notes and [paper] Mortgages/Deeds of Trust. (15 USC 7003 et seq.)

(**UETA**) – UNIFORM ELECTRONIC TRANSACTION ACT is a uniform law approved July 1999 by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and **(E-SIGN)** - ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE…. do NOT allow for paper-tangible Notes and Deeds of Trust to be [e-Registered] on the MERS e-Registry without becoming defective or destroyed. Where **E-SIGN (15 USC 7003)** is specific in stating "No written negotiable contracts can be converted into electronic instruments nor can anyone then exercise use of UCC laws in acts of foreclosing." MERS cannot act as a recorder of documents of land, as they are merely a book-entry system similar to Wall Street's electronic registry. No laws exist as yet, that supports MERS involvement in paper-mortgage-loans, therefore any MERS involvement, as in this instant action, whereas the original Note and Deed of Trust were e-Registered means that the power of sale is [dead]. The [lien] is unenforceable.

MERS furthers the [fraud in the factum] when they [act] as a [nominee] lender or [placeholder] in the public land records without owning the obligation…. (1) Under established and binding California law a

[Nominee] can't assign the Note. ***Born v. Koop*** 1962 200 C. A. 2d 519[200 CalApp2d Page 527, 528…. (2) The term [Nominee] is not included on the Note and MERS never takes ownership, making it unenforceable and unassignable by MERS. ***Ott v. Home Savings & Loan Association***, 265 F. 2d 643 [647, 648]…. (3) Ca Civil Code §2924, et seq. is exhaustive and a [Nominee] is never included as an acceptable form of "authorized agent" in a judicial or non-judicial foreclosure…. (4) MERS is not the named Trustee nor the named Lender secured by the Deed of Trust…. a) The first thing the Deed of Trust does is (i) take away MERS right to payments and (ii) take away the right to enforce the Note, and; b) Regardless of what [Borrower] agrees to, the [Borrower] cannot legally grant MERS the right to assign the Note or any of the rights of the Note owner.

MERS lacks legal authority over the Note and the Deed of Trust, and therefore lacks authority to Substitute the Trustee or to conduct non-judicial foreclosure.

Judge Margaret Mann, of the [San Diego] Federal Bankruptcy Court ruled in Salazar v. US Bank N.A. that;

"*under the Deed of Trust, the lender's rights regarding the loan are pervasive. The lender is entitled to receive all payments under the Note and to enforce the Deed of Trust, including the exclusive right to conduct a non-judicial foreclosure. MERS has none of these rights under the Deed of trust, and is not even mentioned in the Note. MERS is not given any independent authority to enforce the Deed of Trust under its terms and MERS status as beneficiary under the Deed of Trust is only "nominal." While the [Borrower] acknowledges in the Deed of Trust that MERS can exercise lender's rights as "necessary to comply with law or custom," this acknowledgment is not accompanied by any actual allocation of authority to non-judicially foreclose on the deed of trust*"…. **or to substitute the trustee** (emphasis added).

## V. WHAT ARE THE ELEMENTS OF THE [TRUST INDENTURE] THE BORROWER/TRUSTOR/SETTLOR WAS ALLEGEDLY APPROVING TO IMPOSE AN ENFORCEABLE OBLIGATION?

Simply put, "NONE."

[No] Trust-Indenture-documents were provided to borrower [SMITH] before the close of escrow. Therefore, [SMITH] could not approve nor consent to the Trust Indenture. [SMITH] did not intend to express nor create the Trust Indenture to impose an enforceable obligation as described in that

[undisclosed] Trust Indenture. The original [Deed of Trust] shows the [intent] of [SMITH] to consent to the bargain as described therein and contracted between [SMITH] and [First Magnus Financial] as Lender. However, the [undisclosed] Trust Indenture allowed for [undisclosed] (Sponsor/Seller) Countrywide to [actually] fund or [attempt] to replace by [Novation] the original loan-number from escrow and to then bill [SMITH] directly for that NON-CONSENTED-TO-LOAN [account-number] while continuing to transfer the original [false, defective] obligation to [Defendant] Freddie Mac as an [Electronic Transferrable Record],…NONE of which is supported by current law and none of which was consented to by [SMITH]. Freddie Mac has private Corporate [Trust Indenture Documents] and specific servicing Guides that are among the most extensive in the real property finance industry for passive REMIC-styled Investment Trusts. The [Trust Indenture] and servicing documents that allegedly pertain to [SMITH] have not been provided to [Trustor], regardless of multiple demands made for same through informal discovery.

[SMITH] DID NOT understand, agree nor consent to the [SIGNATURE-of-SMITH] being used as [security] for an unknown [additional] obligation for which [SMITH] was not [privy] to, but was expected to be the [Surety] of. [SMITH] DID NOT understand, agree nor consent to the [automatic-transfer-of-obligation-and-perfection-of-security-interests] using nothing more than the [undisclosed] Trust Indenture document itself, regardless of lacking legal acquired rights according to the California Commercial and Recording Statutes? ie., the [Public Record].

[SMITH] DID NOT understand, agree nor consent to an [Electronic] e-Note and/or e-Mortgage Deed of Trust, and did not sign these [electronic] documents by [electronic-signature]. [SMITH] DID NOT understand, agree nor consent to the unsafe and unsound e-Registration [attempt] by MERS dematerializing the original instruments, converting them into [electronic] transferable-records, then destroying those original instruments, while continuing to use the electronic [images] of those Instruments as the one-and-only-legal-original-obligation-to-pay.

"[I]f the third-party by any act whatsoever assists the trustee in wrongfully…. aiding in destroying or injuring trust property, there has been conduct upon which liability can be predicated...." The Law of Trusts and Trustees by George G. Bogert, rev. 2nd ed., (1982) at § 901, ch. 43, p. 260. Further, "Thus liability as a participant has been decreed by reason of the following acts: ...***aiding the trustee in a scheme to eliminate the beneficiary by foreclosure***...." Id at 263. (alteration added)

[Defendant] Freddie Mac [chose] to use MERS to [attempt] perfection of its interests [without] processing the original paper-tangible loan-package to the alleged [FHLMC SCH/ACT Ganesha TRUST] by the startup day of the trust,…which [must] have closed before the end of 2007 and be evidenced by becoming the [taxable] owner-of-record before January 2008. The Public Record fails to reflect [Defendant's] compliance with (IRC 860(D)) for this [strict] REMIC provision.

In fact,…Freddie Mac [Defendant] is not named in the Public Records <u>at all</u>, in connection to the real property of Plaintiff [Trustor], prior to the defective Trustee Sale on (09/05/2013).. No evidence exists in the record that can prove that [Defendant] Freddie Mac ever received the original mortgage loan-package and further;

"Under the common law or law merchant, delivery is evidence of the consummation of the contract involved in a bill or note and of the assent of the promisor and acceptance by the promisee. It is essential to the execution of the instrument and is the final act in execution, as essential to impart validity to the paper as is the signature of the maker. Signature alone does not constitute execution. As a general rule, a negotiable instrument, like any other written instrument, has no legal inception or valid existence as such until it has been delivered in accordance with the purpose and intention of the parties. Until that is done, it is a nullity and not the subject of ownership. The payee acquires no rights in the instrument prior to delivery. For all legal purposes an instrument to be considered as made on the date it is delivered. The NIL, declares the common law or law merchant and expressly provides that every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto." Id

[Defendant] created the [undisclosed] Original Trust Agreement for the [FHLMC SCH/ACT Ganesha TRUST] between Countrywide and [Defendant]. [SMITH] is NOT part of this "Original Trust Agreement" thus making the Deed of Trust a [sham]. The [SMITH] is not named as the [SMITH] nor [Creator] of this Trust and is not part of this Trust which makes the Deed of Trust executed at the signing table a [sham]

trust because the [SMITH] did not have the intention to create this trust nor was told that [his] loan-signature was being securitized is nothing less than Identity Theft.

[Defendant] Freddie Mac relies upon their "Trust Indenture Agreement" for the [FHLMC SCH/ACT Ganesha TRUST] to constitute the governing instrument of the Trust, and for that agreement to amend and restate the Original Trust Agreement.... The Deed of Trust [trustee], OLD REPUBLIC TITLE COMPANY, was acting as the façade [cloaking] the true Trust Indenture from [SMITH] which violated the Truth in Lending laws it is required to comply with. [SMITH] took no part in the making of the Trust Indenture which renders the Deed of Trust a [sham]. OLD REPUBLIC TITLE COMPANY may be liable for fraud since the property title is unmarketable by their own misconduct intentionally misleading the [SMITH] to believe what is not real; that he created an irrevocable trust at the closing table.

## VI. SHAM TRANSACTION ANALYSIS

BALLENTINE'S LAW DICTIONARY, 3rd ed. at 1171 defines [sham] several ways:
As an adjective: False, counterfeit, pretended, feigned, unreal. As a noun: Deception; any trick or fraudulent device that disappoints; a make-believe imposition; a humbug. Id citing *Williams v. Territory*, 13 Ariz 27, 108 P 243. See also West's Words and Phrases, vol. 39 at 262.

While the [sham] transaction analysis is peculiar to the government's attack on private trusts for tax purposes, it is instructive in this circumstance as there is a significant spread between the form of the DEED OF TRUST, the unidentified trust purportedly created, and well-settled trust law governing the Trustee's conduct sub judice. However, "Before determining whether a particular activity arises in or is connected with a trade or business, it must first be established that the transaction in question is bona fide and not a [sham].... What is of moment and appropriate is to "look beyond the form of an action to discover its substance." Zwick v. CIR, 731 F. 2d 1417 (1984). As [Defendant] has not presented the Trust Indenture for examination to determine the "terms of the trust" for <u>this</u> transaction, [Plaintiff], and therefore the court, will be unable to ascertain whether or not [Defendant], the Title Company or MERS were authorized to take the prima fascia actions purportedly authorized by this cognovit DEED OF TRUST. What <u>makes</u> this purported irrevocable trust so <u>unsafe and unsound</u> is MERS, [acting] as

nominee, a nonparty and stranger to the transaction, appointed [itself] to the rank of beneficiary, usurped the traditional power and authority of the [Trustor, Settlor], and improperly appointed the trustee. By doing so, it made [SMITH] an INVOLUNTARY SETTLOR, TRUSTOR to what appears to be multiple insider transactions to improperly seize his property rights by "deceit, craft and trickery." The only method to ascertain whether or not MERS was lawfully authorized to conduct itself in such a way is to examine the documents that created the trust itself to determine its terms. "By the 'terms of the trust' is meant the manifestation of intention of the settlor with respect to the trust expressed in a manner which admits of its proof in judicial proceedings. The intention of the settlor which determines the terms of the trust is his intention at the time of the creation of the trust and not his subsequent intention. The duties or powers of the trustee cannot be enlarged or diminished by a direction of the settlor given subsequent to the creation of the trust, except to the extent to which the settlor has reserved power to revoke or modify the trust to control its administration. If the manifestation of intention of the settlor is admissible in evidence, it is a term of the trust whether expressed by written or spoken words or by conduct." RESTATEMENT, TRUSTS, 2nd § 164, Duties and Powers of the Trustee, Comments a, b and c, at pp. 341-42.

For further clarity on [sham] transactions, we look to our English Common-Law background. The leading English case on the definition of a [sham] is *Snook v. London & West Riding Investments,* [9167] 2 QB at 801 (Diplock LJ) where the court held, relevant in part:

"I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the [sham] which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create." Id.
"Put more shortly, a [sham] exists where the parties say one thing intending another." *Donald v. Baldwyn* [1953] NZRL 313, 321, per F B Adams J., cited by Bingham LJ, *AG Securities v. Vaughn* [1990] 1 AC 417.

What was presented to [SMITH] at the signing table were documents totally different from the reality of the [Defendant's] Trust Indenture and the non-disclosure of Identity Theft wherein [SMITH's] signature

created a debt instrument which was securitized without [SMITH's] permission, knowledge or consent. This is just one in a series of substantial grounds for the court to declare a Constructive Trust so as to trace the unjust enrichment by the middleman actors to this transaction.

**In the alternative**, the court demanding (through Discovery propounded by Plaintiff) to see the wire transfer or canceled check placed into escrow, along with the full closing instructions, may prove to be all that's needed to [discover] whether the actual source of funds came from [First Magnus] the named-payee in the Note or an otherwise [unnamed] non-disclosed funding source, which is predatory per se and which would cause the original Note, and therefore the Deed of Trust, to be defective on its face and VOID ab intio.

## VII. HOW TO AVOID A SHAM TRUST

The essence is to ensure that the [Settlor] understands he is creating a trust, and intends to create a trust, and to cease to be the beneficial owner of the trust property. This is not primarily a matter of trust drafting. Again, the quality of trust administration is relevant to [sham]: the court may draw an inference from inappropriate trust administration that the [Settlor] did not intend to create a trust. The draftsman cannot draft his way out of a [sham]. **However, he can draft his way into one, by producing documentation which records untruths; which fails accurately to record the true intention of the Settlor;** or which is unnecessarily artificial. [**Covenant 20**] of the Deed of Trust is the prime example of the [sham] since it attempts to disclose the [**multiple-choices**] provided in the [sham] document, between the security following the Note [**or**] *a partial-interest in the Note* [eluding to] but never [actually] disclosing the [scheme of fractional-securitization] of the loan-signature-obligation and the security as electronic-transferrable-records, neither of which is currently supported by law. The greater the gap between the reality and the documentation, the higher and stronger the possible inference of [sham]." Id. This was the situation at the closing table between borrower [SMITH] and [First Magnus] as lender.

## VIII. SUBJECTIVE INTENTION AND DISHONESTY

In *Hitch v. Stone, Arden L.J.* made clear that the relevant test of intention is subjection. The parties must have intended to create different rights and obligations from those appearing from the relevant document. To rely solely on the objective intention of the parties would give direct effect to the [sham]: **a [sham] can only work its mischief if its objective appearance is treated as the reality.**

How dishonest need the intention be? According to *Midland Bank v. Wyatt* [1997] 1 B.C.L.C. 242, a fraudulent motive need not be established in order to prove that the transaction was a [sham] or pretense transaction. However, this has since been called into question, on the basis that "a find of [sham] carries with it a finding of dishonesty" (National Westminster Bank PLC v. Jones [2001] 1 B.C.L.C. 98, at [59]). In other words, **while dishonesty is not a formal pre-requisite for finding a [sham] it clearly is a pre-requisite that there be an intention to mislead, and it is hard to see how it could be denied that there is "a degree of dishonesty" in such case**.

Common intention is also a logical progression from the premise that trust instruments are bilateral agreements. Furthermore, **reckless indifference will be taken to constitute the necessary intention**. Per *Midland Bank PLC v. Wyatt,* a [sham] transaction will still remain a [sham] "even if one of the parties to it merely went along with the [sham] or not either knowing or caring about what he or she was signing."

## IX. CONSEQUENCES OF A SHAM

What consequences flow where it is established that a trust is a [sham]? The cases favor the view that a [sham] transaction is "void and unenforceable" and "wholly invalid and of no effect" and not merely voidable. **This view is taken in order to give practical effect to the underlying purpose of the [sham] doctrine: to enable the court to "see through" the false façade and "look at the real transaction."**

## X. IDENTITY THEFT

Arizona Revised Statute § 13-2008 defines the elements of identity theft.

A. A person commits taking the identity of another person or entity if the person knowingly takes,... manufacturers,... possesses or uses any personal identifying buying information... of another person... without the consent of that other person... with the intent to obtain or use the other person's... identity for any unlawful purpose or to cause loss to a person... whether or not the person or entity actually suffers any economic loss as a result of the offense..." (alteration added)

F. Taking the identity of another person… or knowingly accepting the identity of another person is a class 4 felony. Id.

**ELEMENTS OF 'IDENTITY THEFT' PERTINENT TO THE DEED OF TRUST BEING A [SHAM]**

**ELEMENT 1-** Knowingly used personal identifying information of another person.

The first element is that the Lender [First Magnus] and/or successors knowingly used the personal identifying information of [SMITH]. A person acts 'knowingly' with respect to conduct or circumstances when (he/she) is aware that (his/her) conduct is of such nature or that such circumstances exist. 'Personal identifying information' means any name, number or other information that may be used, alone or in conjunction with any other information, to identify a specific individual including, but not limited to, such individuals name, date of birth,… Social Security number,… or other unique physical representation.

**ELEMENT 2 -** Obtained Property.

The second element is that THE LENDER [First Magnus] and/or successors used the personal identifying information to obtain [or attempt to obtain] (money/credit…/property) in the name of the [Borrower]. The property that the defendant allegedly obtained in the name of [the Borrower] is [securitization of the signature creating the Promissory Note].

**ELEMENT 3 –** Without Consent.

The third element is that [First Magnus] and/or successors did not have the consent of [SMITH] to obtain this property in (his/her) name. A person does an act without consent of another person when (he/she) lacks such other person's agreement or consent to engage in the act. In summary, the lender [First Magnus] and/or successors 1) knowingly used [SMITH's] personally identifying information, 2) obtained [or attempted to obtain] something of value in the name of the [SMITH], and 3) did so without the consent of the [SMITH].

Observing the facts that the original documents signed at closing were pre-planned and pre-printed with MERS [e-Registration] Identification-Numbers on them,… and MERS trademark slogan being;

"**Processing Loans Not Paperwork**,"…. the effect was no less than the destruction of evidence proving Identity Theft, in fact, did happen at the signing table in escrow or immediately thereafter.

The original Trustee in this case is OLD REPUBLIC TITLE COMPANY. The Trustee owes its first Duty of Loyalty to the Beneficiary, however, "the loyalty doctrine applies to all persons in a fiduciary or confidential relation, for example, to executors, administrators, guardians, agents, partners, [etc.] and to those, who by reason of relationship has a superiority and dominance over others who trust them with business affairs and are, therefore, deemed to occupy a "confidential relation." TRUSTS, 6th ed., George T. Bogert, Hornbook Series, ch. 95, Trustee's Duty of Loyalty, pp. 334-35. Borrower [SMITH] had a fiduciary and confidential relationship with the trustee Title Insurance Company and [he] relied on the expected fair dealing and disclosures particular to real estate transactions. [SMITH] trusted the Trustee to perform, at a minimum, in compliance with the law.

"The title 'trustee' is not a mere description personae, but signifies a legal status which is sufficiently significant to put the public on notice. It is generally held that one dealing with a person or corporation purporting to act as a trustee is put upon inquiry as to the extent and scope of the trusteeship. It imposes the duty of investigation as to the equitable ownership before dealing with property over which

such person or corporation assumes to exercise control." *Cotte v. Sands,* 54 App. D.C. 396, 298 F. 1011 (1924), others cited cases omitted. (CCP § 2941)

## XI. FOLLOW THE MONEY INSTEAD OF THE PAPER

**SHAM PERSONIFIDE - UNSAFE & UNSOUND USE OF MERS TO E-REGISTER & E-TRANSFER BORROWER'S LOAN-NOTE-SIGNATURE ENABLED COUNTRYWIDE AS (SELLER/SPONSOR) TO SELL TO FREDDIE MAC THE UNFUNDED-LOAN & DEFECTIVE-INSTRUMENTS WHILE REALIZING INSTANT-CREDITING PROVIDED BY FREDDIE MAC TO (SELLER/SPONSOR) FOR THE NON-LOAN**

[Defendant], Freddie Mac, gave free reign to their [undisclosed] Warehouse Funding source, Countrywide, as their "Pre-Approved" (Seller/Sponsor) of mortgage loan-packages to Freddie Mac without [Defendant] supervising or overseeing the loan origination process of their own pre-approved (Seller/Sponsor). The Originator-Lender [First Magnus Financial, Inc.] misled [SMITH] by drafting the Note [mis]-naming [First Magnus] as the lender and [Payee] on the Note while knowing (*scienter*) that the funds placed into escrow came directly from Countrywide (or maybe another yet undisclosed funding source). The pre-approved (Seller/Sponsor) received immediate [credit] for the unfunded-loan-package of [SMITH] via 'electronic transfer' of the scanned image to [Defendant], without the (Seller/Sponsor) actually purchasing a [legitimate] loan through a 'true-sale',... and [failed] to process the tangible-seminal-documents forward to [Defendant]. This poor oversight by [Defendant], in contravention of their own [undisclosed] Trust Indenture, ultimately led the Originator-Lender and the (Seller/Sponsor) to abandon their traditional-lending-structure altogether. The [simple] use of MERS as an 'electronic registry' encouraged transferring only the scanned image of the mortgage-loan-package directly to Freddie Mac [Defendant] , (without first processing the original paper-tangible-loan-package to Freddie Mac),…for immediate credit going to the (Seller/Sponsor),…with a mere commission going to the Originating-Lender [First Magnus]. This action is not supported by law nor the Title Insurance Industry and is a [sham]. Similar in nature to a "Tier 2 Yield Spread Premium" transaction. (see example further below)

**TITLE INSURANCE**

In California, most real estate transactions are closed with a title insurance policy. Unknown title defects may attach to real estate. A mortgage Lender's greatest protection is a Lender's policy of title insurance.

**What is a Lender's policy of Title Insurance?**

This is sometimes called a loan policy and it is issued only to mortgage lenders. Generally speaking, it follows the assignment of the mortgage loan, meaning that the policy benefits the purchaser of the loan if the loan is sold. For this reason, these policies greatly facilitate the sale of mortgages in the secondary market. That market is made up of high-volume purchasers such as Fannie Mae and [Defendant] Freddie Mac, as well as private institutions.

The following case cites are from the American Land Title Association (ALTA) website and describes [this] process of unsupported [Warehouse Lending] which is predatory per se..

**In re *First American*, supra, 177 Cal App. 4th 106** -- Involved Massive Originator Fraud:

The [Warehouse Lender] wired funds directly into escrow, and [bypassed] the hands of the originator altogether. The Originator-Lender made no loan, and therefore, no loan could be sold to the [Warehouse Lender] or any other potential subsequent purchaser for value. (***First American*, at p.116**);

"*There must be an existing indebtedness between the named borrower and the lender. Unless there is an existing indebtedness between the named borrower and the lender, the Mortgage Deed of Trust has no existence*. *(**Coon v. Shry* (1930) 209 Cal. App. 612, 615***).*"*

"*Because there was no transfer of funds between the originator lender and the named borrower that created an indebtedness secured by the insured mortgage the [Warehouse Lender] does not meet the definition of an insured under Title Insurance policies." "Any losses suffered by the [Warehouse Lender] are not due to defects in the title or mortgage liens, but are entirely due to the failure of an existing indebtedness between the named borrower and the originating lender." "The liens would not be subject*

*to foreclosure because no indebtedness existed between the named borrower and the named payee*."

See (***Gateway Bank v. Ticori***)

**IF THE NAMED-LENDER [FIRST MAGNUS] DIDN'T FUND THE LOAN THEN ESCROW DIDN'T CLOSE**

Without fulfillment of the conditions precedent to closing escrow, escrow cannot close (specific performance).

**ESCROW - What is Escrow?**

An escrow is a neutral, independent account created to process a transaction such as a sale or loan. It protects the interests of all parties involved and favors neither the buyer nor seller. An escrow is created after the Purchase Contract is executed and becomes the depository for all monies, instructions and documents pertaining to the transaction.

**How does the Escrow process work?**

The escrow officer follows instructions based on the written terms of your Purchase Contract and the Lender's requirements for closing. The escrow officer secures the satisfaction of all requirements of the title commitment. Escrow cannot be completed until all terms and conditions have been met.

**Information [Borrower] needed to provide.**

[SMITH] was asked to complete a Statement of Identity for the Title Company. This is a confidential tool used to correctly identify all parties involved in the transaction. (This raises the issue of who the true Lenders are behind a nominee and alter-ego called MERS.)

**The duties of the Escrow officer are as follows:** (…. partial duties listed, with emphasis added),

1. Accept executed contract and issue earnest money receipt.
2. Request a commitment for the title insurance (shows requirements for issue of a title policy).
3. Record the appropriate documents with the county recorder.
4. Disburse final documents and money on the basis of mutual instructions and careful review of the exceptions.

**Identified conditions precedent in this case that may not have been met:**

1. No exception on Borrower [SMITH's] Closing Instructions for the security interest claimed by the "Warehouse Funding Source," (Countrywide as Seller/Sponsor) in the lenders closing instructions.

2. No exception on Borrower's closing instructions for the security interest claimed by MERS on the Security Instrument (Deed of Trust), which states "Borrower understands and agrees that MERS holds only legal title to the interest granted by the Borrower in this Security Instrument…"
3. The payee provided no money to escrow and the escrow company had full knowledge of this (in fact every other party had knowledge of this fact except the homeowner who was the least sophisticated party present).

**ESCROW NEVER CLOSED:**

In re ***Jacobitz v. Thomsen***, 238 Ill. App. 36, the Appellate Court correctly said, "the Note never became an obligation binding, as such, upon the defendants."

If escrow never closed there is failure of delivery of the assignment. The conclusive presumption of delivery avails an alleged note holder nothing if escrow did not close. **In California it is stated this way**:

…. No delivery of the note, within the meaning of section 3097 of the Civil Code, took place. As the court says in ***Sousa v. First California Co***. (1950), 101 Cal.App.2d 533,539 [225 P.2d 955]. Only after strict compliance with the condition imposed … does the escrow holder begin to hold for the party thereby entitled. …" ***Bogan v. Wiley*** (1949), 90 Cal.App.2d 288,292 [202 P.2d 824], holds, "No rule is better settled than the one that the payee gets no property in a negotiable instrument until its delivery." And ***Todd v. Vestermark*** (1956), 145 Cal.App.2d 374, 377 [302 P.2d 347], states: "… A delivery or recordation by or on behalf of the escrow holder prior to full performance of the terms of the escrow is a nullity. No title passes."

**THE PAYEE PROVIDED NO CONSIDERATION AT THE LOAN CLOSING**

…. Yet these respondents recognize the rule that the security interest serves as an incident to the debt (Civ. Code, 2909), and on oral argument before this Court admitted "if we didn't have a promissory note, and if it … wasn't an obligation … [t]here would be nothing for that security to secure; so it couldn't exist. Moreover, as the decisions have held, the mere recordation of a deed of trust by the escrow holder, in accordance with the trustor's instructions, does not establish delivery. Thus in ***Jeannerette v. Taylor*** (1934), 2 Cal.App.2d 568 [38 P. 2d 831] (petition for hearing in Supreme Court denied), the "title company, following plaintiff's instructions, recorded a deed to the property which she had signed and acknowledged, the defendant being named therein as the grantee. Following this the title company … mailed the recorded deed to defendant. The court then stated: "The evidence shows that this was done without express authority. … No one who had possession of the deed was authorized by plaintiff to deliver the same to the defendant. The delivery to the title company was for the limited purpose of recordation. No authority was thereby conferred to make delivery, and its act in mailing the instrument to the defendant did not have the effect of passing title…

**HOLDER AND HOLDER-IN-DUE-COURSE DO NOT APPLY IF THERE WAS NO CONSIDERATION AND ESCROW NEVER CLOSED:**

…. Since Builders did not become a holder-in-due-course, the conclusive presumption of delivery avails respondents nothing. (Civ. Code, 3097). The cited cases of ***Baker v. Butcher*** (1930), 106 Cal.App. 358,367 [289 P. 236], does not apply; respondent Walker's admission 231*231 that his rights depend upon the status of Builders as a holder-in-due-course proves fatal.
…. Respondents fourthly and finally contend that the conception of the payment of $4,022.14 as a condition precedent to delivery necessarily must [void] the entire transaction or work an unjust enrichment to appellants. In essence this contention suggests that appellants must rescind the contract in order that no unjust enrichment accrue to them; that, having elected to accept certain contractual benefits, they must ignore Henderson's breach of his duties. Yet respondents seek to collect upon a note under which appellants are not obligated for want of delivery; respondent's rights properly rest only upon the underlying contract or in quasi-contract. Thus, as is stated in ***Jacobitz v. Thompson***, supra (1925), 238 Ill. App. 36 – "the note never became an obligation binding, as such, upon the defendants. … The reversal in this case, however, will be without prejudice … to any right Thullen may have to recover from defendants whatever sum, if any, may be due from them under the terms of the original contract … or the value of work, labor and materials furnished. …" (pp. 38-39). ***Gray v. Baron***, supra (1910), 13 Ariz. 70, 74, likewise points out- "Under the terms of escrow agreement and the facts … that was no such delivery of the note … and … the judgment entered by the court for the plaintiff requiring the payment of the note … must be reversed as outside of the issues set forth in the pleadings. … The theory of the trial court seems to have been that the plaintiff had established a cause of action based upon the breach of contract to purchase the stock. The error of the trial court was … in attempting to enforce such a cause of action … in an action based simply upon the promissory note, and not one based upon the breach of the contract purchase.

(ALL OF THE ABOVE QUOTES COME FROM ***Borgonova vs. Henderson***, 182 Cal.App2d. 220 (1960)

(***Example) Escrow Closing Instructions***: *Notice the impossible funding by Mortgage Lender's Network*

(*Mortgage Lenders Network USA, Inc. presented these "Escrow Instructions")*…. "*Residential Funding Corporation [**has a security interest in any amounts advanced by it to fund this mortgage loan and in the mortgage loan funded with those amounts**]. You must immediately return any amounts advanced by Residential Funding Corporation not used to fund this mortgage loan. You also must immediately return all amounts advanced by Residential Funding Corporation if this mortgage loan does not close and fund within (1) business day of your receipt of those funds. Closing agent attorney acknowledges the foregoing instructions and understands a failure to properly follow set of instructions may result in legal recourse by Mortgage Lenders Network USA, Inc. **as the originating lender**. …."*

These practices of the Originating-Lender [First Magnus] and the (Seller/Sponsor) being [Countrywide] should be considered by the court as the nuclear explosion that mandates the declaration of a Constructive Trust…. or compels [discovery].

To further apprehend schemes of **NON-ORIGINATOR-FUNDING**, [Trustor] offers the additional example;

**(SELLER/SPONSOR) USING MERS FOR SIMILAR (NON-GSE) SECURITIZATION SCHEMES; TIER 2 YIELD SPREAD PREMIUMS (T2YSP) SUPPLY FUNDING DIRECTLY INTO ESCROW BYPASSING THE LAWS REQUIRING ORIGINATOR TO (ACTUALLY) FUND THE LOAN**

The following [**example**] is an over-simplification of the crime because most lawyers do not understand this process. The investor a pension fund, for example, comes to the investment banker and states it has $1 million to invest and wants the pension fund to receive a return of 5% ($50,000) annually. Investment banker says no problem, give me the $1 million dollars. Investment banker then finds a questionable and/or deadbeat borrower who wants to purchase a home. The borrower wants $500,000 to purchase the house. The investment banker okays the deal at 15% APR. They negotiate a bit and the investment banker [gives in] and will provide the money at 10% ($50,000) per year. Now the investment banker goes back to the pension fund and says he got what you wanted and the $50,000 is on the way. Now, the question is what happened to the other $500,000 the pension fund gave to the investment banker? It went into his pocket under the guise of trade fees, costs, and profits on the transaction. That is how the (**Tier2YSP**) works, upon two different yields, the original 5% and the 10% in our example.

As bad as the above (additional example) is, it pales in comparison to the [Defendant's] actual model and the assertion that [Defendant] has any legal right to the real property of Trustor [Plaintiff], which [Defendant] does not. [Defendant] received a defective e-Note and e-Deed of Trust and has never received the original instruments as they have been destroyed by the (Seller/Sponsor) when the two Instruments were e-Registered on the MERS e-Registry. **The Originator made no loan [and/or] the Sponsor/Seller never bought a loan.**

**FRAUD IN THE FACTUM** ... permeates the Original-Instruments evidencing the bargain between the parties, the closing transaction and every subsequently recorded document since inception and therefore, the entire transaction (from cradle to grave) is a SHAM TRANSACTION.

The original contracts, including the entire Chain-of-Title in the County Records, contains fraud in the factum and therefore cannot establish the legal rights of Freddie Mac [Defendant] to possess the real property of [Trustor] Plaintiff.

# SECTION 3: APPLICABLE EDUCATIONAL MATERIAL

## NEW YORK LAW (EXAMPLE)

**NEW YORK Estates, Powers and Trust Law § 7-1.18. Trust Asset**
Unless an asset is transferred into a lifetime trust, the asset does not become trust property.

**NEW YORK Estates, Powers and Trust Law § 7-2.4. Trustee's Duties**
A trustee's act that is contrary to the trust agreement is void.

**NEW YORK Estates, Powers and Trust Law § 5-1401. Choice of Law**

**1.** The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of the transaction covering in the aggregate not less than $250,000, including a transaction otherwise covered by subsection 1 of section 1–105 of the Uniform Commercial Code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state. This section shall not apply to any contract, agreement or undertaking (a) for labor or personal services (b) relating to any transaction for personal, family or household services, or see to the extent provided to the contrary in subsection 2 of section 1–105 of the Uniform Commercial Code.

**2.** Nothing contained in this section shall be construed to limit or deny the enforcement of any provision respecting choice of law in any other contract, agreement or undertaking.

**NEW YORK Estates, Powers and Trust Law § 5-1402. Choice of Forum**

**1.** Notwithstanding any act which limits or affects the right of a person to maintain an action or proceeding, including, but not limited to, paragraph (b) of section 1314 of the business Corporation Law and subdivision two of section 200-b of the banking law, any person may maintain an action or proceeding against a foreign corporation, nonresident, or foreign state where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to section 5–1401 and which (a) is a contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of the transaction covering in the aggregate, not less than $1 million, and (b) which contains a provision or provisions whereby such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state.

2. Nothing contained in this section shall be construed to affect the enforcement of any provision respecting choice of forum and any other contract, agreement or undertaking.

## SECTION: 3 APPLICABLE EDUCATION MATERAIL (continued)

### INFORMATION ON INDORSEMENT

*Uniform Commercial Code or [California's] State Equivalent*

**§ 3-204. INDORSEMENT**

(a) "Indorsement" means a signature, other than that of the signer as maker, drawer, or acceptor, that alone or accompanied by other words made on an instrument for the purpose of (i) negotiating the instrument (ii) restricting payment of the instrument, or I incurring endorsers liability on the instrument, but regardless of the intent of the signer, a signature and its accompanying words is an endorsement elicited comforting words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than endorsement. For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.

**§ 3-205. SPECIAL INDORSEMENT; BLANK INDORSEMENT; ANOMALOUS INDORSEMENT**

(a) If an endorsement is made by the holder of an instrument, whether payable to it and identified person or payable to bearer and the endorsement identifies a person to whom it makes the instrument payable, it is a "special endorsement." When specially indorsed, an instrument becomes payable to the identified person and may be negotiated only by the endorsement of that person. The principles stated in section 3–110 apply to special endorsements.

(b) If an endorsement is made by the holder of an instrument and it is not a special endorsement, it is a "blank endorsement." When indorsed in blank, and instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.

(c) The holder may convert a blank endorsement that consists only of a signature into a special endorsement by writing, above the signature of the endorser, words identifying the person to whom the instrument is made payable.

(d) "Anomalous endorsement" means an endorsement made by a person who is not the holder of the instrument. An anomalous endorsement does not affect the manner in which the instrument may be negotiated.

**MERS as a Microcosm for What's Wrong with the Entire Real Estate Settlement Industry.**

The idea of improving the process of land title recordation is a noble pursuit. The desire to create a land title recording system and the importance of maintaining the integrity of those records has roots as far back as the Plymouth Bay Colony in the 17th century. Unfortunately, the idea of the MERS registry fails in one key area: it was created to benefit the players at the expense of the game.

The MERS shareholders are all closely-related entities in the mortgage finance and title industries who have abandoned the benefits of maintaining the land record system in order to create a vehicle for short-term profiteering. Rather than simplify local county land titles, MERS has created more clouds on title and made it more difficult to accurately track "who owns" the title to the real estate. Rather than supporting the unique and often complex differences between states regarding their respective recording statutes, MERS has unraveled the spool and confused courtrooms across the United States by negating jurisdictional standing in foreclosure cases.

MERS has allowed for fraudulent actors, and their supporters, to access the land recording system by permitting robo-signed mortgage assignments to permeate land title records, jeopardized the sanctity of the mortgage foreclosure process and inserted uncertainty into the mortgage finance process. All of this has hastened mortgage securitization and MERS profits, which in turn, helped to facilitate the current housing crisis.

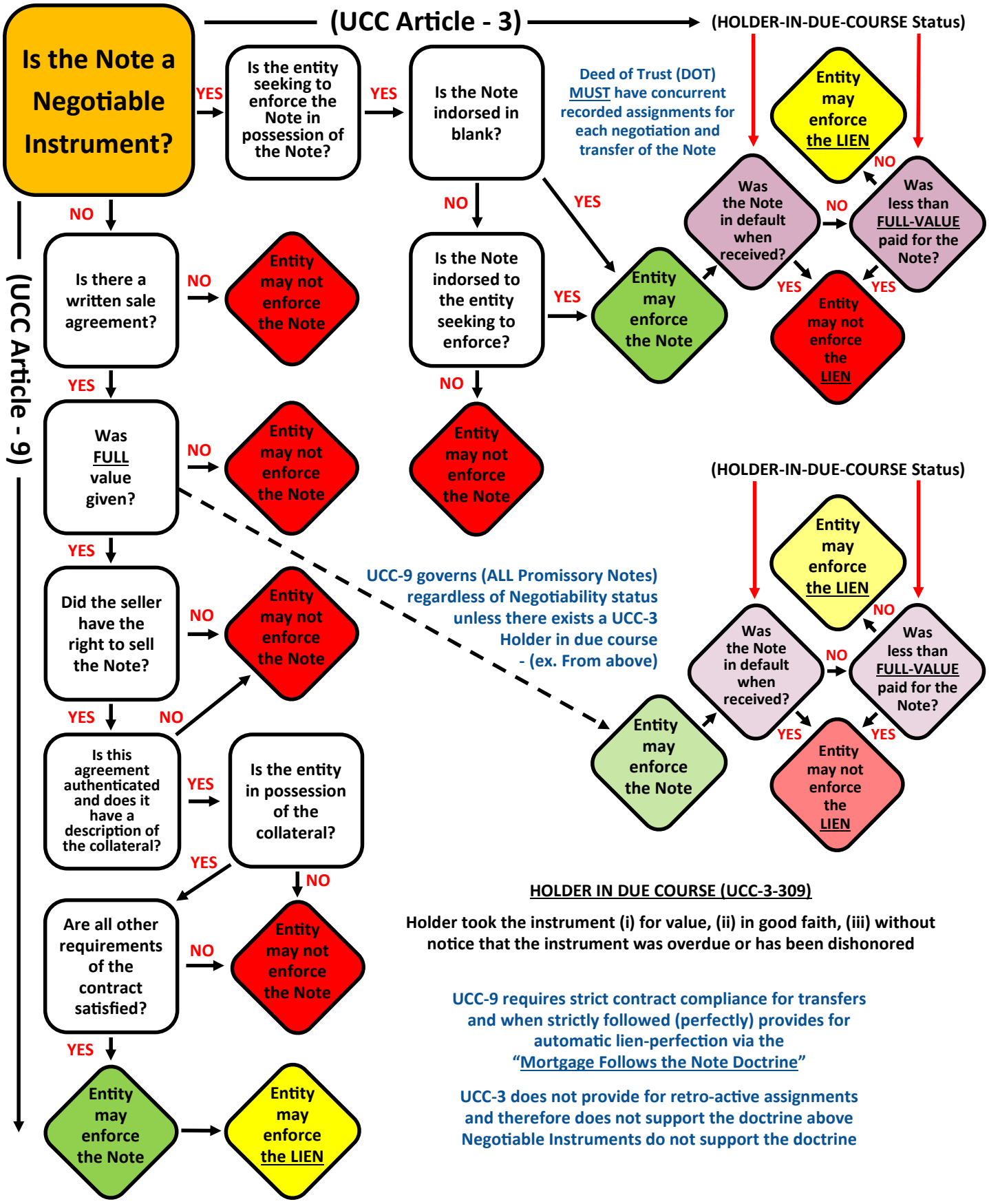
(Full article at link)
http://nailta.org/2011/07/27/nailta-issues-position-paper-on-hr-2425-mers-bill/

# UCC Articles 3 & 9 Flow Chart

**Person Entitled to Enforce the Note (& the Power of Sale)**

**Regardless whether the Promissory Note is Negotiable or Non-Negotiable**

**FULL consideration MUST be paid to perfect UCC-9 security or to be the Holder in Due Course under UCC-3**




**HOLDER IN DUE COURSE (UCC-3-309)**

Holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument was overdue or has been dishonored

UCC-9 requires strict contract compliance for transfers and when strictly followed (perfectly) provides for automatic lien-perfection via the "Mortgage Follows the Note Doctrine"

UCC-3 does not provide for retro-active assignments and therefore does not support the doctrine above Negotiable Instruments do not support the doctrine