IN THE CIRCUIT COURT OF THE [redacted] JUDICIAL CIRCUIT
IN AND FOR [redacted] COUNTY, FLORIDA

[redacted]
Plaintiff,

Case Number: [redacted]

v.

[redacted]
Defendant.
_____/

DEFENDANT'S REPLY TO PLAINTIFF'S AMENDED MEMORANDUM OF LAW ON STANDING

At the close of the September 13, 2018 non-jury trial, Plaintiff asked the Court as follows, "…if [Y]our Honor is inclined to grant the Motion for Involuntary Dismissal, I would ask that Plaintiff further research this and submit a Memorandum of Law…." [Transcript P. 116 L. 19-22]. The Court obliged, limiting the focus as follows: "[t]he issue as far as I'm concerned is whether you need something signed by JPMorgan[1] when you're suing as the holder." [Transcript P. 117 L. 22-24]. The Court clarified that it wanted to know "whether it's necessary to have a documented [sic] in evidence signed by JPMorgan evidencing the transfer of trusteeship to [redacted]. And, therefore, the transfer or the assignment of the note from JPMorgan as trustee to [redacted] as trustee." [Transcript, P. 120 L. 2-10].

[1] The Court appeared to use "JPMorgan" during trial to reference either "JPMorgan Chase Bank, as Trustee" or "JPMorgan Chase Bank." Throughout this Reply, Defendant references "JPMorgan Chase Bank, as Trustee" as "JPMorgan."

In order to resolve this, the Court also requested law which addressed the following question: "When there's a trust…is the plaintiff in the lawsuit the trust or is the plaintiff in a lawsuit the trustee?" [Transcript, P. 106 L. 16-20]. The Court summarized the issue: "But it seems to me until I see a case otherwise, that the title is in the trustee not in the trust. And if that's true, then y*ou need an endorsement by JPMorgan or some kind of a transfer document of any kind really*." [Transcript P. 115 L. 6-10](emphasis added).

As to whether the Plaintiff is the trustee or the trust, Plaintiff concedes at trial that the party/Plaintiff is the trustee. [Transcript P. 107 L. 8-14][Transcript P. 108 L. 23-25]. In its September 28, 2018 Amended Memorandum, Plaintiff does not address this issue at all. As to whether there is any evidence of a transfer from JPMorgan to Plaintiff, Plaintiff incorrectly argues for the first time in its Memorandum that the PSA establishes this. Yet, it admits that "there is no document in evidence naming [Plaintiff] as the successor trustee." [Amended Memorandum P.8]. Lastly, Plaintiff takes the position that it does not need any additional documents because its authority is presumed since it executed the indorsement. But, Plaintiff did not execute the indorsement and its status as holder cannot be presumed in this scenario. For this and other reasons stated herein, Plaintiff's new arguments are wrong and the Court should involuntarily dismiss the action.

I. <u>The Plaintiff is the trustee, not the trust.</u>

Plaintiff conceded at trial that the party/Plaintiff is the trustee. As stated by its counsel, "*Plaintiff is the trustee* bringing in the action as the holder of the note, not as a representative." [Transcript P. 108 L. 23-25](emphasis added). It also yielded to the Court's understanding of this point:

> THE COURT: I've always said it doesn't matter … because the trustee … is the one with the title interest. It's the title is in the trustee.
> MS. MELTZER: *Right.*

[Transcript P. 107 L. 8-14](emphasis added).[2]

Despite this, and despite the Court requesting law in response to Plaintiff's request to brief the issue, Plaintiff has not provided anything to show that the party to this suit is the trust. It does not even address this issue in its Memorandum. No further inquiry should be needed on this point. However, there is ample Florida law which supports that the trustee of a trust is the party in this paradigm.

According to Black's Law Dictionary (10th ed. 2014), a "trustee" is "[s]omeone who stands in a fiduciary or confidential relation to another; esp., *one who, having legal title to property*, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary.")(emphasis added). In the context of Florida Statutes, Chapter 736, titled "Florida Trust Code," numerous provisions support the conclusion that the trustee *is* the party in a lawsuit. For example, courts have jurisdiction over trustees, not trusts, as per Florida Statute §736.0202. And, as per Florida Statute §736.02025, service of process is made on persons, not on trusts. Consider also that Florida courts are *not* able to exercise jurisdiction over trust agreements but must instead exercise jurisdiction over persons (personal jurisdiction). *See* §48.193, Fla. Stat. (2018) ("Acts subjecting person to jurisdiction of courts of state.").

[2] Immediately after this concession, the Court repeated why this issue is so important: "So it seems to me under those circumstances that by analogy you need to have an endorsement by one trustee to another trustee or at least some kind of a court order transferring it or something like that. A document, a contract document or something showing the transfer from one trustee to another trustee." [Transcript P. 107 L. 15-21].

Ultimately, Plaintiff concedes this issue. *The trustee is the Plaintiff, not the trust.* There are fundamental reasons for this in the law as the Court reiterated, "…title interest is in the trustee, not in the trust." [Transcript P. 108 L. 4-5]. And, there are numerous examples in the law that support the Court's understanding of this issue.

Accepting that the trustee is the party/Plaintiff, Plaintiff *now* asks the Court to look to the PSA as evidence of a transfer from JPMorgan to the Plaintiff. But there are several problems with this argument.

II. Plaintiff is attempting to use the PSA to show it is a non-holder with rights of a holder but it is bound to its pleadings.

Plaintiff has litigated its case as a holder. It pleaded this in paragraph seven of both its original and amended Complaints. Not once did Plaintiff plead that it was "[a] nonholder in possession of the instrument who has the rights of a holder." § 673.3011(2), FLA. STAT. (2018). At trial, Plaintiff unequivocally maintained this position. As stated by Plaintiff's counsel, "I understand Mr. Rosen's argument *had* Plaintiff pled that we were a non-holder with the rights of a holder. However, *we pled holder*." [Transcript P. 104 L. 4](emphasis added). Plaintiff's counsel continued, "Plaintiff is the trustee bringing in the action *as the holder* of the note…" [Transcript P. 108 L. 23-24](emphasis added).

[redacted]'s counsel clarified that this issue was not being tried by consent. [Transcript P. 47 L. 25 – P. 48. L. 1]("Their theory is they're a holder…"); [Transcript P. 94 L. 7-20]("Starting with the Plaintiff's pleading that they are a holder…. There are numerous discovery responses that pin down that holder is the issue… I don't anticipate Plaintiff changing from that position, but if it does, we can revisit that.")

The Court also framed the issue at hand with this understanding: "[t]he issue as far as I'm concerned is whether you need something signed by JPMorgan *when you're suing as the holder*. Pure and simple." [Transcript P. 117 L. 22-24].

Plaintiff cannot now change course. "The law is so well settled as to require no citation of authority that the issues to be tried are fixed by the pleadings." *Provident Nat. Bank v. Thunderbird Associates*, 364 So. 2d 790, 794 (Fla. 1st DCA 1978). The pleadings can only be amended in certain circumstances, none of which have happened here. So, Plaintiff is fixed to its claim that it is a holder, which it is not.

III. Plaintiff is not a holder.

As demonstrated by the indorsements on the Note and binding precedent, Plaintiff is not a holder. As to the indorsements, Plaintiff's recitation on pages two and three of its Memorandum are incorrect. The *original lender* on the Note is "Metropolitan Home Loans, Inc. A Florida Corporation." The Note itself bears no indorsements but there are three allonges. The *first allonge* indicates that "Metropolitan Home Loans, Inc. A Florida Corporation" indorsed the Note to "Novastar Mortgage Inc. a Virginia Corporation." The *second allonge* reflects that "Novastar Mortgage Inc., a Virginia Corporation" indorsed the Note to "JPMorgan Chase Bank, as Trustee JPMorgan Chase Bank, National Association as Trustee for the Novastar Home Equity Loan Asset-Bank Certificates, Series 2006-3." And, as copied from the *third allonge,* the indorsement was from:

without recourse to:

[redacted]

Plaintiff makes several misstatements of fact about the identity of both the indorser and indorsee in this third allonge. These misstatements are specified below in brackets.[3] As to the indorser:

> [redacted] **["Trustee" does not appear here]** to JP Morgan Chase Bank, as Trustee **["JPMorgan Chase Bank, National Association as Trustee" is missing]** for the Novastar Home Equity Loan Asset **["-" is missing]** Bank Certificates, Series 2006-3

As to the indorsee:

> [redacted] **["Trust Company, National Association" does not appear here]** [redacted] **["Trust Company, N.A." does not appear here]** as Successor Trustee to **["for" not "to"]** JP Morgan Chase Bank, **["N.A." is missing here]** as Trustee for the Novastar **["Mortgage Funding Trust, Series 2006-3 Novastar" is missing]** Home Equity Loan Asset-Bank **["Backed" not "Bank"]** Certificates, Series 2006-3[4]

Ultimately, this Court summarized the indorsements best by stating: "Here we got an endorsement to JPMorgan, but no endorsement by JPMorgan." [Transcript P. 105 L. 1-3]. As a result, the third allonge contains an "anomalous indorsement."

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[3] Plaintiff also misstates throughout its Memorandum that *it* signed this third allonge but as covered further below, this too is incorrect.

[4] Even the correct recitation of the indorsement does not exactly match the Plaintiff in this case. The Plaintiff is: "[redacted] **[specific indorsement states "Successor Trustee" instead of "Successor in Interest"]** to **[specific indorsement shows "for" instead of "to"]** [redacted]"

As stated by the Fourth District Court, "…'if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument *and its indorsement by the holder*.'" *PennyMac Corp. v. Frost*, 214 So. 3d 686, 688–89 (Fla. 4th DCA 2017)(citing §673.2011(2), FLA. STAT. (2018)). And, "[a]n indorsement 'made by a person who is not the holder' of the note is defined as an 'anomalous indorsement.'" *Id.* (citing § 673.2051(4), FLA. STAT. (2018)). This results in an indorsement which does not affect the transfer of the note. *Id.* (citing § 673.2051(4), FLA. STAT. (2018)).

Here, the *second allonge* indicates that the Note was specially indorsed to "JPMorgan Chase Bank, as Trustee JPMorgan Chase Bank, National Association as Trustee for the Novastar Home Equity Loan Asset-Bank Certificates, Series 2006-3." Assuming JPMorgan had possession at all times relevant, it would have been the holder. But, the *third allonge* purports to show that Ocwen Loan Servicing, LLC ("Ocwen") as attorney-in-fact for [redacted] attempted to indorse the Note *as successor to* JPMorgan. Since [redacted] cannot be a "holder,"[5] this is an anomalous indorsement.

The facts presented in this action are nearly identical to *Frost*. In that case, the borrower executed a note in favor of Washington Mutual Bank, F.A. *Id.* at 688. The note contained a purported indorsement from "JPMorgan Chase Bank, National Association, as successor in interest by purchase from the FDIC as Receiver of Washington Mutual Bank, f/k/a Washington Mutual Bank, F.A." *Id.* The Fourth District held that "…from *the face* of the note, JPMorgan's indorsement was an anomalous indorsement…" because "…JPMorgan could not have been a holder of the

[5] Florida Statute §671.201(21)(a) defines holder as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession."

note." *Id.* at 689. As a result, the purported indorsement by JPMorgan "did not negotiate the note." *Id.*

Here, the face of the Note similarly reveals that [redacted], via its agent Ocwen, signed the note as a purported "successor." Since neither Ocwen nor Bank of [redacted] are JPMorgan, the indorsement is anomalous. In its erroneous description of *Frost*, Plaintiff stated that "[t]he trial court issued a final judgment of foreclosure in favor of JPMorgan and the borrower appealed…." [Amended Memorandum, P. 4.] But in reality, the trial court granted Frost's motion for involuntary dismissal based on the argument that "…PennyMac failed to show how JPMorgan had the right to enforce the note at the time JPMorgan transferred the note to PennyMac." *Frost*, 214 So. 3d at 688. Neither PennyMac nor JPMorgan established they were a holder. *Id.*

Just like PennyMac in *Frost*, the Plaintiff is not a holder either. And, even if it could travel under any other theory, Plaintiff has failed to show how it had the right to enforce the Note at the time it purported to transfer the Note from JPMorgan.

IV. Even if Plaintiff could deviate from its pleadings, the Pooling and Servicing Agreement is not evidence of a transfer.

In *Frost*, the Fourth District Court explored PennyMac's possible right to enforce as a nonholder in possession with rights of a holder. *Id.* But as stated in Section II herein, Plaintiff made it very clear in its pleadings, discovery responses, and arguments at trial that it was not proceeding under that approach. So, this Court should not entertain this new argument. However, even if the Court did, dismissal is still warranted as the PSA does not evidence a transfer from JPMorgan to [redacted].

Plaintiff's new argument is that the PSA contains an "explicit provision" which provides for the appointment of a successor trustee. [Amended Memorandum P. 7]. But, *nothing in the PSA*

states that a change in trustee did or will happen. It certainly does not in any way reference that JPMorgan was replaced by the [redacted]

At best, Section 8.08 of the PSA contemplates potential scenarios in which a change of trustee may occur and provides various parameters as to how and when a change may be made. Plaintiff admits that "[t]he PSA also contemplates a change of Trustee." *Id.* at 6. But, contemplation of a possible change of trustees is not prima facie evidence that it happened between any entities, much less among the entities at hand.

The Court correctly stated: "So it seems to me under those circumstances [that the trustee, not the trust, is the party] that by analogy you need to have an endorsement by one trustee to another trustee or at least some kind of a court order transferring it or something like that. A document, a contract document or something showing the transfer *from one trustee to another trustee*." [Transcript P. 107 L. 15-21](emphasis added). And on this ultimate issue, Plaintiff admits that "there is no document in evidence naming [it] as the successor trustee." [Amended Memorandum P. 8].

The only thing the PSA seems to do is further support that a dismissal is warranted. Under the PSA, the trustee for the trust is "JPMorgan Chase Bank, National Association." So, at best, the PSA evidences that JPMorgan is the proper plaintiff. Plaintiff concedes this in footnote two on page six of its Amended Memorandum: "…the PSA affirmatively states the properly-endorsed Notes were given to the Trustee, who is JPMorgan. This is sufficient to establish the standing of JPMorgan." And, since JPMorgan is not the Plaintiff and there is no evidence of a transfer, judgment should not be granted to [redacted].

V. Plaintiff's status as holder is not presumed.

Plaintiff's next-to-last[6] argument is that "when [it] executed the endorsement as successor trustee, it's [sic] authority to do so was presumed under Sec. 673.3081(1)." [Amended Memorandum, P. 8.] First, Plaintiff did not execute any indorsements. It was Ocwen that executed the critical third indorsement as attorney-in-fact for [redacted]. Moreover, PennyMac also argued in *Frost* that the indorsement was presumed authentic and as Plaintiff concedes, "[t]he appellate court's response to PennyMac's argument regarding the indorsement is instructive to the case at hand." *Id.* at P. 4.

As stated in *Frost*, "PennyMac argues that JPMorgan's indorsement on the note was presumed to be authentic and authorized." *Frost*, 214 So. 3d at 689. But, it is only "a signature on the instrument [which is] generally 'presumed to be authentic and authorized.'" *Id.* (citing § 673.3081, FLA. STAT. (2018)). And, "the issue of whether a signature on an indorsement is 'authentic and authorized' is a separate question from the legal effect of the indorsement." *Id.* "Stated another way, the presumption that a signature on an indorsement is 'authentic and authorized' does not mean we must presume that JPMorgan was a holder of the note or that JPMorgan's indorsement negotiated the note." *Id.*

Here, the Court can apply §673.3081 to presume that Ocwen's signature, as attorney-in-fact, is "authentic and authorized" to sign for the [redacted]. But this does not mean we must presume that [redacted] (or Plaintiff) was a holder of the Note or that the indorsement negotiated the Note.

[6] Plaintiff ends the body of its Memorandum with one more brief argument – that it should not have to obtain necessary indorsements as that would be impractical. First, as indicated in *Frost* and *Murray*, actual successors can plead and prevail without being a holder. But more importantly, Plaintiff's subjective concept of what is impractical does not excuse it from following the law.

CONCLUSION

At the conclusion of trial, Plaintiff asked to brief the dipositive issues before the Court. As to whether the Plaintiff is a trust or trustee, Plaintiff conceded that it is the trustee during trial and did not address this in its Memorandum. As to whether a document is required to show a transfer from JPMorgan to [redacted], Plaintiff argues for the first time after trial that the PSA's contemplation of a possible transfer between unnamed entities is enough. But, for numerous reasons, it is not. And, this argument improperly deviates from the issues framed by the pleadings. Regardless, Plaintiff admits there is no evidence before the Court that establishes the critical transfer. Lastly, Plaintiff's claim that its signature on the Note is authentic and authorized is not supported by fact or law. Plaintiff did not sign the Note and there is no law which presumes it is the holder in this paradigm. Because Plaintiff failed to establish standing, this Court should involuntarily dismiss the action.

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CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to [redacted]; by e-mail via the Florida Courts E-filing Portal on October 15, 2018.

/s/ Evan M. Rosen
Florida Bar # 120103
Attorney for Defendant
Law Offices of Evan M. Rosen, P.A.
12 SE 7th Street, Suite 805
Fort Lauderdale, FL 33301
Telephone: (754) 400-5150
erosen@evanmrosen.com
For Service: eservice@evanmrosen.com