IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

WELLS FARGO BANK, N.A. AS TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT RELATING TO IMPAC SECURED ASSETS CORP.,MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-2

Case No.: 05-2009-CA-0XXXX

Plaintiff,

v.

MELISSA A. DOE, ET AL.

Defendants,
_____/

DEFENDANT MELISSA A. DOE AND JOSEPH T. DOE'S
SECOND AMENDED ANSWER AND AFFIRMATIVE DEFENSES

Defendants Melissa DOE and Joseph DOE ("Defendants"), files this, their Second Amended Answer and Affirmative Defenses, and in doing so, states:

GENERAL ALLEGATIONS

1. Paragraph 1 is admitted.
2. Paragraph 2 is denied
3. Paragraph 3 is admitted in that a Note and Mortgage were executed. Paragraph 3 is denied in that a Note and Mortgage were not delivered.
4. Paragraph 4 is denied.
5. Paragraph 5 is denied. Plaintiff has alleged a lost note. In two prior lawsuits, case number 2006-CA-054198 (Wells Fargo v. DOE) and 2007-CA-26280 (Deutsche Bank v. DOE), each foreclosing entity claimed a lost note count and also claimed it owned and held the note. There is no endorsement on the note and Plaintiff has not provided any evidence of ownership of the Note. The assignment of mortgage that plaintiff attaches to its complaint is a complete fraud. It is a back-dated assignment, and it document states that Margie Kwaitanowski executed it and that Jeffrey Stephan witnessed it. These individuals did not sign the document and had no authority to sign the document.
6. Paragraph 6 is admitted
7. Paragraph 7 is denied. In particular, Plaintiff has not and can not show that defaut has

occurred or that notice of default has been sent to defendant as required by paragraphs 15, 18, 19, 20, 22 of the Mortgage and paragraphs 7 and 10 of the Note. Additionally, the default date alleged in paragraph 7 of the complaint conflicts with default date alleged in paragraph 10 of the complaint.

8. Paragraph 8 is denied in that all conditions precedent have not occurred. In particular, Plaintiff has not and can not show that defaut has occurred or that notice of default has been sent to defendant as required by paragraphs 15, 18, 19, 20, 22 of the Mortgage and paragraphs 7 and 10 of the Note.
9. Paragraph 9 is denied.
10. Paragraph 10 is denied. Additionally, the default date alleged in paragraph 7 of the complaint conflicts with default date alleged in paragraph 10 of the complaint.
11. Paragraph 11 is denied for lack of knowledge.
12. Paragraph 12 is denied.
13. Paragraph 13 is denied.
14. Paragraph 14 is denied for lack of knowledge.
15. Paragraph 15 is denied for lack of knowledge.
16. Paragraph 16 is denied.
17. Paragraph 17 is admitted in that a Note and Mortgage were executed. Paragraph 17 is denied in that a Note and Mortgage were not delivered.
18. Paragraph 18 is denied in that a true and correct copy of the mortgage was not attached to the complaint or recorded.
19. Paragraph 19 is denied. In two prior lawsuits, case number 2006-CA-054198 (Wells Fargo v. DOE) and 2007-CA-26280 (Deutsche Bank v. DOE), each foreclosing entity claimed a lost note count and also claimed it owned and held the note. There is no endorsement on the note and Plaintiff has not provided any evidence of ownership of the Note. The assignment of mortgage that plaintiff attaches to its complaint is a complete fraud. It is a back-dated assignment, and it document states that Margie Kwaitanowski executed it and that Jeffrey Stephan witnessed it. These individuals did not sign the document and had no authority to sign the document. The plaintiff had no entitlement to enforce the instruments.

20. Paragraph 20 is denied.

21. Paragraph 21 is denied for lack of knowledge.

FIRST AFFIRMATIVE DEFENSE
Lack of Notice of Breach/Lack of Adequate Notice of Breach (Default)

22. The plaintiff failed to provide the Defendant with either notice of breach or adequate notice of breach as required by required by paragraphs 15, 18, 19, 20, 22 of the Mortgage and paragraphs 7 and 10 of the Note and as also required by 24 C.F.R. 3500.21 and 24 CFR 203.604.

23. The Note requires that notice must be given to the borrowers by first class mail or by delivery to the property address. The plaintiff failed to comply with this requirement. The Mortgage requires written notice must be given to the borrowers in writing by first class mail or delivered to the property address. The plaintiff failed to comply with this requirement.

24. The Mortgage provides a covenant and a condition that no suit may be commenced until after the notice of breach is given. Paragraph 20 of the Mortgage provides in relevant part:

> Neither the Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action.

25. Paragraph 18 of the Mortgage provides in relevant part: The notice [of acceleration]shall provide a period of not less than 30 days from the date the notice [of breach] is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. Plaintiff failed to comply with this provision.

26. Paragraph 15 of the Mortgage provides:

> Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

27. Paragraph 22 of the Mortgage provides in relevant part:

> Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify (a) the default, (b) the action required to cure the default, (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured, and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure.

28. The issue of a lack of a notice of default is a material fact sufficient to defeat summary judgment. Morrison v. U.S. Bank, N.A., 36 Fla. L. Weekly D1646 (Fla. 5th DCA July 29, 2011) A default notice from the "lender" is a condition precedent prior to filing a complaint. Amedas v. Brown, 505 So.2d 1091 (Fla. 2nd DCA 1987); Dykes v Trustbank Savings. F.S,B., 567 So.2d 958 (Fla. 2nd DCA 1990); Gomez v. American Savings and Loan Ass`n, 515 So.2d 301 (Fla, 4th DCA 1987): Rashid v. Newberry Federal Savings and Loan Association, 502 So.2d 1316 (Fla. 3rd DCA 1987); Rashid v. Newberry Federal Savings and Loan Association, 526 So.2d 772 (Fla. 3rd DCA 1988).

SECOND AFFIRMATIVE DEFENSE
Lack of Standing to Enforce Note

29. Plaintiff did not possess the note on the date that action was filed and therefore lacks standing.

30. On the date the action was filed the note was not made payable to the plaintiff nor was it indorsed in blank even if plaintiff possessed it; therefore Plaintiff lacks standing.

31. Plaintiff did not own the note on the date the action was filed and therefore lacks standing to enforce the Note.

THIRD AFFIRMATIVE DEFENSE
Plaintiff Lacks Standing Because the Note is NOT a Negotiable Instrument

32. Plaintiff alleges that it is the owner and holder of the Note.

33. Plaintiff's allegation in this regard are seemingly meant to infer that it is the holder of the note, and therefore entitled to enforce same as a person entitled to enforce under F.S. §673.3011; however in this case Plaintiff is not, and cannot be, the holder of the note because the note is not a negotiable instrument.

34. In order to be the holder of the note or a person in possession of a note under Article 3 of the UCC, i.e., Chapter 673 of the Florida Statutes, Plaintiff would have to be "in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." Isaac v. Deutsche Bank Nat Trust Co., 74 So. 3d 495 (Fla. 4th DCA 2011) (citing Fla. Stat. § 671.201(21)(a)). If the note attached to the Complaint is not a negotiable instrument, then Plaintiff cannot be a holder, and only the true **owner** of the note could enforce it. BAC Funding Consortium, Inc. v. Jean-Jacques, 28 So. 3d 936, 939 (Fla. 2d DCA 2010) (stating that standing requires "valid assignment, proof of purchase of the debt, or evidence of an effective transfer").

35. The note is not negotiable because it contains additional undertakings beyond the mere payment of money. A negotiable instrument is defined as a promise to pay "a fixed amount of money, with or without interest or other charges described in the promise on order." Fla. Stat. § 673.1041(1). A negotiable instrument, by definition, does not "state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money." Fla. Stat. § 673.1041(1)(c). An instrument that contains such additional undertakings, therefore, is not a negotiable instrument. A negotiable instrument should be "simple, certain, unconditional, and subject to no contingencies. As some writers have said, it must be a 'courier without luggage.'" Mason v. Flowers, 107 So. 334, 335 (Fla. 1926). The incorporation of any other obligations or terms destroys the instrument's negotiability. Holly Hill Acres, Ltd. v. Charter Bank, 314 So. 2d 209 (Fla. 2d DCA 1975) (where promissory note incorporates terms of mortgage, "the note is rendered non-negotiable.").

36. The note attached to Plaintiff's Complaint incorporates outside terms to determine the amounts due under the note, rendering it conditional and destroying its negotiability. Among other conditions within the note, paragraph 5 of the note renders it non-negotiable because it makes it impossible to determine the "fixed amount of money" owed under the note. Specifically, it provides, in pertinent part: *If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me which exceeded permitted limits will be refunded to me.* In other words, in order to determine the amount due under the note, one must make reference to an outside source—the statutes and case law governing maximum charges on loans. By incorporating these legal findings into the note's calculation of amounts due, paragraph 5 destroys its negotiability. *See* Holly Hill Acres, 314 So. 2d at 211 n. 4 (noting that the negotiability of an instrument is to be determined by the face of the instrument alone).

37. Paragraph 4 is another example in the note that imposes additional, non-payment undertakings on the borrower, therefore destroying its negotiability. Specifically, that

paragraph imposes notice requirements on the borrower if certain conditions are met: *I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment". When I make a Prepayment,* ***I will tell the Note Holder in writing that I am doing so.*** (Emphasis added.)

38. This additional requirement of written notice, among other additional undertakings within the addendum, is a conditional undertaking, other than the payment of money, imposed on the borrower, and it destroys negotiability. To that end, this loan is similar to that found in GMAC v. Honest Air Conditioning and Heating, 933 So. 2d 34 (Fla. 2d DCA 2006). That case involved a contractual loan payment that the court described, "creates a series of obligations upon the… purchaser" including payment according to a payment schedule, giving the creditor a security interest, protection of that security interest, and payment of late fees. Id. at 36–37. Each of those undertakings destroyed the negotiability of the instrument. Likewise, the language of the note that requires the borrower to provide written notice of prepayment is a condition beyond the mere payment of money—impermissible in a negotiable instrument. Id. This note is not negotiable and therefore can have no holder.

39. Further, Paragraph 10 references a writing outside of the Note by reference to a "Security Instrument", i.e., the Mortgage, and states that the "Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note."

40. While mere reference to a mortgage (i.e., another "writing") would not strip the note of its negotiability, making the note subject to the security agreement by having to refer to the security for "how and under what circumstances" payment in full of the note may be required does makes the "promise or order" condition under Florida Statutes § 673.1061(b), and renders the note non-negotiable.

41. The status of a negotiable instrument must be determined from its face, and the rationale of requiring that a negotiable instrument should not be subject to another writing is set forth in the Official Comments of the U.C.C. Section 3-106 in that "the holder of a negotiable instrument should not be required to examine another document to determine rights with respect to payment."

42. In fact, it would be impossible to look at the note itself and figure out how much money is owed, or even be able to confirm that monthly payment set forth in the note is the actual monthly payment to be made by the borrower, without looking at mortgage, and other obligations and writings contained in the mortgage.

43. For example, the Mortgage states that additional amounts may be added on to the monthly payments set forth in the note for escrow payments towards taxes, insurance, mortgage insurance, community association dues, fees and assessments, etc…

44. The note itself is nothing more than a starting point of an amount due and monthly payments, but the mortgage actually sets forth and describes multiple undertakings by the borrower and the lender, and includes additional amounts which may be due under the note, and describes when and how payments under the note may be due in full and how much is actually owed.

45. The promissory note attached to Plaintiff's Complaint is clearly not a negotiable instrument. It contains multiple undertakings, beyond the mere payment of money, that make it impossible to determine the certain amount promised, and further is subject to another document for purposes of determining payment of the note and amounts that could be owed under the note, thus destroying its negotiability. Because the note is not a negotiable instrument, the Plaintiff cannot be its "holder", and accordingly, Plaintiff has no right to enforce the subject note or mortgage in this action.

46. Only the note's true "owner" has standing to pursue this foreclosure, and the present foreclosure action against Defendants must therefore be dismissed.

FOURTH AFFIRMATIVE DEFENSE
Failure to Provide Notice of Assignment

47. Plaintiff did not deliver to Defendant a notice of the assignment of the mortgage to plaintiff as required by section 559.715, Fla. Stat. Therefore, a condition precedent to the filing of the action has not been fulfilled and the action should be dismissed.

48. Florida Statutes section 559.715 provides "An assignee of a mortgage and Note must give the debtor written notice of such assignment within thirty (30) days after the assignment."

FIFTH AFFIRMATIVE DEFENSE
Illegal Charges Added to Balance

49. On information and belief, Plaintiff has charged and/or collected payments from Defendants for attorneys fees, legal fees, foreclosure costs, advances, other fees and charges, property preservation charges, inspection fees, late fees, and other predatory lending fees and charges that are not authorized by or in conformity with the terms of the subject note and mortgage. Plaintiff wrongfully added and continues to unilaterally add these illegal charges to the balance Plaintiff claims is due and owing under the subject note and mortgage.

50. In particular, Plaintiff charged $249.25 for property inspections that were not carried out, $334.00 for an appraisal that was not done, Plaintiff did not pay the ad valorum taxes of $5,147.65, nor did it pay $4,674.02 for hazard insurance premiums and it did not incur wire fees of $15.00.

SIXTH AFFIRMATIVE DEFENSE
Failure to State a Claim

51. Upon information and belief, the mortgage note has been paid in whole or in part by one or more undisclosed third party(ies) who, prior to or contemporaneously with the closing on the "loan", paid the originating lender in exchange for certain unrecorded rights to the revenues arising out of the loan documents.

52. Upon information and belief and in connection with the matters the subject of paragraph "1" above, Plaintiff (foreclosing party) has no financial interest in the note or mortgage.

53. Upon information and belief, the revenue stream deriving from the note and mortgage was eviscerated upon one or more assignments of the note and mortgage to third parties and parsing of obligations as part of the securitization process, some of whom were joined as co-obligors and co-obligees in connection with the closing.

54. To the extent that Plaintiff has been paid on the underlying obligation has no legal interest therein or in the note or mortgage, or does not have lawful possession of the note or mortgage, Plaintiff's allegations of capacity to institute foreclosure constitutes a fraud upon the Court.

55. Based upon one or more of the affirmative defenses set forth herein, Defendants are entitled to a release and satisfaction of the note and mortgage and dismissal of the foreclosure claim with prejudice.

Seventh Affirmative Defense
Violation of 15 U.S.C. 1692 et. seq., and F.S. 559.552

56. On information and belief, Plaintiff violated provisions of the Federal Fair Debt Collection Practices Act at 15 USC 1692, et. seq. and provisions of the Florida Consumer Practices Act at F.S. 559.552 because it did not have any right to enforce collection of this Mortgage and Note because it did not respond to defendant's Qualified Written Request (copy attached to this Answer and Affirmative Defenses), it did not have standing, it did not comply with all conditions precedent, it has no legally enforceable claim against the Defendant, it did not comply with the contract requirements for default, and it simply does not have a mortgage on subject property.

57. Florida Consumer Practices Act (FCCPA, F.S. 559.552) provides protection for consumers in foreclosure. The FCCPA prohibits Plaintiff from collecting underlying mortgage debt involved in this action be asserting its right to foreclose when Plaintiff knows that such right does not exist because Plaintiff did not comply with the applicable federal default servicing obligations and guidelines prior to filing this foreclosure action.

58. F.S. 559.72 (9) provides (in pertinent part): Prohibited practices generally. In collecting consumer debts, no person shall: (9) Claim, attempt, or threaten to enforce a debt when such person assert(s) the existence of some other legal right when such person knows that the right does not exist.

59. The FCCPA applies to anyone attemting to collect a consumer debt unlawfully and F.S. 559.72 "includes all allegedly unlawful attempts at collection consumer claims" Seaton Jackson v. Wells Fargo Home Mortgage, Inc., 12 Fla. L.Weekly Supp. 188 (Fla. 6th Circuit 2004) citing Williams v Streeps Music Co., Inc., 333 So. 2d 65 (Fla. 4th DCA 1976). See also Hart v. GMAC Mortgage Corporation, 246 B.R. 709 (D. Mass. 2000) (Debtor stated a cause of action under the FDCPA where continuation of foreclosure proceeding amounted to conduct " the natural consequence of which was to harass, oppress, or abuse").
60. Plaintiff has not shown that it owns the Note or Mortgage.

Eighth Affirmative Defense
Estoppel and F.S. 673.3051

61. The defendants assert the defense of Estoppel and Florida Statutes section 673.3051. The subject promissory note is non-negotiable paper. The Plaintiff is not a holder in due course and on information and belief, the original promissory note is lost or stolen. Florida law provides "An obligor is not obliged to pay the instrument if the person seeking enforcement of the instrument does not have rights of a holder in due course and the obligor proves that the instrument is a lost or stolen instrument." § 673.3051(3), Fla. Stat. (2013)

62. "The assignee of defaulted negotiable paper occupies the status of the holder of a nonnegotiable instrument. As to those occupying this status, the rule appears to be: There cannot be a holder in due course of a nonnegotiable instrument, and the doctrine of protecting a bona fide holder for value without notice and before maturity does not apply, no matter how widely or how narrowly the instrument may miss being negotiable or how the parties themselves may have regarded the instrument." Guaranty Mortg. & Ins. Co., v. Harris, 182 So. 2d 450, 453 (1st DCA 1966) (emphasis added). This concept is codified in § 673.3021(1)(b)(3) which defines a Holder in Due Course as one who takes an instrument "Without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series;".

Ninth Affirmative Defense
Collateral Source Payments

63. Plaintiff has received payments from the alleged default of the note. Defendant demands credit for and application of any and all collateral source payments Plaintiff, its predecessors in interest, co-owners, trust beneficiaries, certificate holders, or any others associated with this Note and Mortgage have received or will be entitled to receive from

any source whatsoever as a result of the default claimed, including credit default insurance, credit default swaps, whether funded directly by insurance and/or indemnity agreement or indirectly paid or furnished by means of federal (i.e. TARP funds) assistance on an apportioned basis for loans or groups of loans to which the subject mortgage loan of the action is claimed.

Tenth Affirmative Defense
Violation of Federal Truth in Lending Act (TILA), 15 U.S.C. §1641

64. Defendant requested information from Plaintiff as required by 15 U.S.C. §1641(g) (see documents attached to this Answer and Affirmative Defenses). 15 U.S.C. §1641(g) requires:

(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 ownership of the debt is recorded; and
(E) any other relevant information regarding the new creditor.

65. Plaintiff, its agents and attorneys failed to provide defendants with notice of an assignment of the mortgage loan in violation of 15 U.S.C. §1641(g).

CLAIM FOR ATTORNEY'S FEES

66. Defendant hereby request they be awarded attorney's fees pursuant to the terms of the promissory Note and Mortgage and also pursuant to section 57.105(7), Florida Statutes (2011).

Wherefore Clause

67. Wherefore, Defendant demands judgement against Plaintiff and requests the court deny Plaintiff's requested relief of foreclosure, and award reasonable attorney's fees and costs to the Defendant, order discharge, release or cancellation of the alleged Mortgage and send Plaintiff forwith without day.

/s/ George Gingo
George Gingo FBN 879533
400 Orange Street
Titusville, FL 32796
(321)223-1831
gingo.george@gmail.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing is being furnished by this 20th day of February, 2014 via email pursuant to the Florida Rules of Judicial Administration to Stephen Wilson, c/o Brock and Scott, 1501 N.W. 49th Street, Suite 200, Fort Lauderdale, FL 33309 via email at stephen.wilson@brockandscott.com and FLCourtDocs@brockandscott.com; and to Greenspoon Marder P.A., 100 West Cypress Creek Road, Suite 700, Fort Lauderdale, FL 33309 via email gmforeclosure@gmlaw.com.

/s/ George Gingo
George M. Gingo, FBN 879533