No. 260A11 FOURTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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LINDA G. DOBSON, Plaintiff-Appellant, v. SUBSTITUTE TRUSTEE SERVICES, INC., Substitute Trustee and WELLS FARGO BANK MINNESOTA, N.A. as Trustee for Equivantage Home Equity Loan Trust, 1996-4, Note Holder, EQUVANTAGE, INC., and AMERICA'S SERVICING COMPANY, Defendants-Appellees.	)	From Duplin County No. 07 CVS 1017 COA10-632

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PROPOSED BRIEF OF *AMICI CURIAE* NORTH CAROLINA JUSTICE CENTER, NORTH CAROLINA ADVOCATES FOR JUSTICE, CENTER FOR RESPONSIBLE LENDING, MAINE ATTORNEYS SAVING HOMES, THE FINANCIAL PROTECTION LAW CENTER, AARP, AND THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF PLAINTIFF-APPELLANT

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ISSUE PRESENTED

I. DID THE COURT OF APPEALS ERR IN REVERSING THE TRIAL COURT'S AWARD OF SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF-APPELLANT, MS. DOBSON?

INTRODUCTION

"[F]oreclosure under a power of sale in a mortgage is not favored in the law, and its exercise by the mortgagee will be watched with jealousy." *In re Michael Weinman Assocs.*, 333 N.C. 221, 228, 424 S.E.2d 385, 389 (1993).

In the current foreclosure crisis and during the decade leading up to it, mortgage servicers have increasingly ignored this principle. In their effort to "streamline" practices to save money and improve efficiency, the nation's largest servicers too often have engaged in questionable practices that infect the integrity of the foreclosure process, and undermine the confidence of the market, consumers and the courts in the fairness and propriety of foreclosures. That confidence can be restored only by ensuring strict compliance with the laws that undergird the foreclosure process and ensure its integrity – the Uniform Commercial Code (UCC) and the Rules of Evidence.

It is for this reason that *amici*, the North Carolina Justice Center, the Center for Responsible Lending,[1] North Carolina Advocates for Justice, the Financial Protection Center, Maine Attorneys Saving Homes and the AARP, write to explain the widespread abuses in the mortgage servicing and foreclosure industry and to urge this Court to reinforce two basic but fundamental principles of law. First,

[1] Special thanks to our intern, Christa Wittenberg, University of Michigan Law School, Class of 2012, for her extraordinary work on the brief.

strict compliance with Article 3 of the UCC is essential in determining who has the right to enforce the note in a foreclosure proceeding and under what circumstances. Second, affidavits submitted in North Carolina foreclosure proceedings must satisfy the general standards for evidence submitted by affidavit, just as they would in any other court proceeding.

Amici share the concern of Judge Hunter (dissenting) that the majority's decision may be construed to permit alleged holders to evade their burden of proof and foreclose "merely by producing photocopies of the instrument" and with affidavits that are facially incompetent. *See Dobson v. Sub. Tr. Servs.*, -- S.E.2d --, 2011 WL 1854315, at *5 (N.C. Ct. App. May 17, 2011) (Hunter, J. dissenting). The trial court got it right. Its decision to enjoin Wells Fargo Bank, Minnesota, N.A. as Trustee for Equivantage Home Equity Loan Trust 1996-4 (Wells Minnesota)[2] from foreclosing until it could produce the note and prove its right to enforce it should be upheld. The Court of Appeals decision failed to follow these basic and long-standing principles of law and should be reversed.

[2] To distinguish between the two separate defendant Wells Fargo entities we refer to defendant, Wells Fargo Bank, Minnesota, N.A. as Trustee for Equivantage Home Equity Loan Trust 1996-4, the purported note holder, as "Wells Minnesota" and the defendant servicer, Wells Fargo Home Mortgage, a.k.a. Wells Fargo Bank N.A., a.k.a. America's Servicing Company as "America's Servicing Company" or "ASC."

SUMMARY OF ARGUMENT

Two sets of bedrock rules form the critical underpinnings that create confidence in the integrity of the courts, certainty of property rights and the foreclosure process. The Uniform Commercial Code defines and sets the standards for transferring, owning and enforcing negotiable instruments. The Rules of Evidence set the standards for assessing whether evidence is sufficient to prove up claims in a court of law. Recent practices designed by mortgage servicers to expedite foreclosures and avoid the legitimate costs associated with proper foreclosure practices have led to an alarming erosion of these bedrock rules and a severe decline in confidence in the integrity of the foreclosure process. Systemic fraudulent practices, such as robo-signing and other abusive document creation and record-keeping practices have led to wide-ranging public and private investigations, including a joint federal regulatory enforcement action against all fourteen of the largest mortgage servicers and an ongoing fifty-state attorney general investigation of these practices.

Established legal principles have been ignored in the flood of foreclosures created by the real estate bubble. *Amici* respectfully submit that compliance with these basic, foundational rules will preserve confidence in the courts and North Carolina's foreclosure process, and will assure that no homeowner ever loses a

home because it is quicker or easier to fabricate documents than to present proper evidence to our courts.

ARGUMENT

I. PRESENTING THE NOTE AND PROVING THE RIGHT TO ENFORCE IT UNDER THE UCC

Article 3 of the UCC defines the law of negotiable instruments, who has the right to enforce those instruments and what must be proven to establish the right to enforce the note in a foreclosure action. Article 3 is codified in §§ 25-3-101 to 25-3-605 of the North Carolina General Statutes.

A. Historical Background of Article 3 of the Uniform Commercial Code

"The practice of this country is to require that the note should be produced, or its absence accounted for, and the rule is a safe one." *Sheehy v. Mandeville*, 11 U.S. 208, 218 (1812). This plain statement of the rule in 1812 remains good law today. In this case where the defendant defaulted, Chief Justice Marshall came to this clear conclusion: "default dispenses with the proof of the note, **but not with its production**." *Id.* (emphasis added).

The rule of law stated by Chief Justice Marshall was consistent with the law of the merchant that was developing simultaneously in England during the fourteenth through eighteenth centuries and that ultimately led to England's Statute of Anne in 1704 and then to its Bills of Exchange Act in 1882. These acts in turn

were the models for the Uniform Negotiable Instruments Law promulgated in this country in 1924 by the National Conference of Commissioners of Uniform State Laws (NCCUSL). In 1952, this same elemental principle of negotiable instruments law, requiring production of the original note in a suit upon it, was carried forward by the NCCUSL into Article 3 of the modern Uniform Commercial Code adopted by all fifty states.[3]

B. The Dobson Note Is a Negotiable Instrument That Can Be Enforced Only in Accordance with the Provisions of Article 3 of the UCC.

The Dobson note is a negotiable instrument. It is negotiable because it meets the negotiability criteria of N.C. Gen. Stat. § 25-3-104(a): (1) it is payable "to the order of Lender," (2) it is payable at a definite time, and (3) it contains no promises other than for the payment of money except for undertakings expressly permitted by N.C. Gen. Stat. § 25-3-104(a)(3). (R p. 152.) Wells Minnesota agreed that the Dobson note is negotiable by opposing Dobson's motion for summary judgment[4] by claiming it was a holder of the Dobson note with the right

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[3] For a detailed history regarding the development of the law leading to the provisions of Article 3 of the Uniform Commercial Code, see William H. Lawrence, *Understanding Negotiable Instruments and Payment Systems* § 1.03 (Matthew Bender & Co. 2002).

[4] Wells Minnesota was unable to establish its right to foreclose in the proceeding before the Duplin County Clerk of Superior Court. *See Dobson*, 2011 WL 1854315, at *1. Dobson filed the instant action to enjoin Wells Minnesota from serial attempts to foreclose until an accounting could be completed to determine whether she was in default and if so, how much she owed and whether Wells

to enforce it.[5] Whether Wells Minnesota has the right to enforce the Dobson note and what it must prove to establish it is a holder in a court enforcement action are defined by Article 3 of the UCC. N.C. Gen. Stat. §§ 25-3-301(i) & 25-3-308(b).

The rules set forth in Article 3 of the UCC, and their formalities (such as the one requiring production of the original note) were developed by financial institutions and the financial services industries for their own protection.[6] Thus, "[f]inancial institutions, noted for insisting on their customers' compliance with numerous ritualistic formalities, are not sympathetic petitioners in urging relaxation of an elementary business practice." *Adams v. Madison Realty & Dev., Inc.*, 853 F. 2d 163, 169 (3d Cir. 1988).

Minnesota was the holder of her note with the right to enforce it. *See* R pp. 3-13. Dobson filed the successful motion for summary judgment that resulted in a ruling in her favor and ultimately this appeal. *See* R pp. 368-72.

[5] "'Holder' means . . . [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." N.C. Gen. Stat. § 25-1-201(21). Wells Minnesota asserted its holder status through its affiant Jennifer Robinson, stating: "Wells Fargo is the present and current holder of the Note." R p 238, Robinson Aff. ¶ 7. However, as discussed *infra* Section III.B, this statement of Jennifer Robinson is a legal conclusion that Courts disregard. Wells Minnesota must prove, not simply declare, that it has the status of a holder.

[6] *See generally* Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 Creighton L. Rev. 441 (1979).

C. Wells Minnesota Was Required to Produce the Original Note in Court in Order to Be Entitled to a Judgment upon it.

Here, Wells Minnesota unjustifiably argues for a relaxation of the requirement of the Uniform Commercial Code that requires it to produce the original negotiable note in court when seeking recovery upon it. This requirement is drawn from UCC §§ 3-301 and 3-308(b). UCC § 3-301(i) (N.C. Gen. Stat. § 25-3-301(i)) requires that a party claiming to be a "holder" of a note (as Wells Minnesota claims to be here), be in possession of the note in order to be entitled to enforce it. When that enforcement right is asserted in a court proceeding, Wells Minnesota must then produce the note in court. N.C. Gen. Stat. § 25-3-308(b) states:

> (b) If the validity of signatures is admitted or proved and there is compliance with subsection (a) of this section, **a plaintiff producing the instrument** is entitled to payment if the plaintiff proves entitlement to enforce the instrument under G.S. 25-3-301, unless the defendant proves a defense or claim in recoupment.

(emphasis added). UCC § 3-308(b) is the only section in Article 3 where the terms "plaintiff" and "defendant" are used; it clearly is specifying what the plaintiff must do **in court**. The plaintiff must produce the original note in court to become entitled to a court order for the defendant to pay the plaintiff.[7]

[7] The ordinary party roles — where lender is plaintiff and the homeowner is the defendant — are reversed in this case. The lender here too must produce the note to refute Ms. Dobson's competent evidence that Wells Minnesota is

The requirement for the production of the original note arises out of the unique nature of negotiable instruments. Anglo-American jurisprudence requires the production of the original instrument[8] because its value, much like money, subsists in the instrument itself. *See* UCC § 3-203 official cmt. 1 ("An instrument is a reified right to payment. The right is represented in the instrument itself."). A photocopy of an instrument has no more value or significance than a photocopy of a dollar bill. [9]

Construing provisions of the UCC that are equivalent to those in force in North Carolina, the Missouri Court of Appeals explained that "[i]n the case of suit on the note, presentment of the note or satisfactory proof that it has been lost or destroyed are essential elements of the case because **the instrument itself is the exclusive ground for the cause of action**." *Union Sav. Bank v. Cassing*, 691 S.W.2d 513, 514 (Mo. Ct. App. 1985) (emphasis added). Without the **instrument**, meaning the original document bearing the signatures of the maker(s) and any indorsees, there simply is no cause of action.

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not the holder in possession; as discussed n. 4, *supra*, an affiant's assertion cannot substitute for production, nor is it entitled to any weight.

[8] "'Instrument' means a negotiable instrument." N.C. Gen. Stat. § 25-3-104(b).

[9] The only exception to this rule is for electronically created "substitute checks." These are permitted by the federal Check 21 Act, 12 U.S.C. §§ 5001-5018, but with rigorous warranty requirements to protect against the presentment of duplicates. 12 U.S.C. § 5004 (2006).

The requirement for the production of the original note **in court** arises out of the particular rights that arise in favor of the person in possession of it under N.C. Gen. Stat. § 25-3-301. While there can be an infinite number of photocopies of any given promissory note, there can be only one original. Only by requiring the production of that single original note can the court, and the note obligor, be certain that the person claiming rights under that note is the party who is truly entitled to enforce it. And, only by rigorous adherence to that requirement can the court protect a homeowner against a second claim on the note by some other person coming forward with proof of actual possession of the original note.

The unique manner in which the enforcement rights of negotiable notes are transferred also mandates that the original note be produced in court when enforcement is being sought. Article 3 of the UCC provides that the right to enforce a note may be transferred by delivery of the note, but such delivery does not transfer any right to enforce the note as holder unless the indorsements necessary to create holder status are on or affixed to the original note. *See* N.C. Gen. Stat. §§ 25-3-203 & 25-3-204.

Article 3 of the UCC permits an indorsement to be made upon the instrument itself, or on a separate piece of paper[10] "affixed" to the note. N.C. Gen. Stat. § 25-3-204(a). As with checks, indorsements made on promissory notes are

[10] This separate but attached paper is "sometimes termed an 'allonge.'" *Comm'l Sec. Co. v. Main St. Pharm'y*, 174 N.C. 655, 656, 94 S.E. 298, 298 (1917).

often made on the back of the signature page of the note, such that inspection of a photocopy of the note (where often only the printed sides of pages are copied) may not reveal such indorsements. The court, in inspecting only a photocopy of a note, cannot determine whether any purported allonge appearing on a separate page from the note is truly affixed to the original note as required by N.C. Gen. Stat. § 3-204(a). *See, e.g.*, *Deutsche Bank Nat'l Trust Co. v. Tarantola (In re Tarantola)*, No. 4:09-bk-09703-EWH, 2010 WL 3022038, at *3-4 (Bankr. D. Ariz. July 29, 2010) (holding that an allonge created after the commencement of litigation "to get the attorneys the [evidence] that they needed" to create standing, but not in existence at the time of filing and never affixed to the original note, does not create an indorsement) (internal citations omitted).

Further, without examining the original note, it is not possible for the court to determine with certainty the order of indorsements on a note bearing multiple indorsements (including possible multiple allonges), a finding crucial to a determination of whether the purported indorsements are in the correct order to convey holder status to the person seeking enforcement. *See Hills v. Gardiner Sav. Inst.*, 309 A.2d 877, 880 (Me. 1973) ("An instrument's usefulness in negotiation or transfer can only be evidenced by looking at it or any attachments.").

The Dobson note consists of two printed pages of text. Because the original note has never been produced in court in this case, it was not possible for the

Superior Court to know, nor is it possible for this Court to know, whether the original note was printed on the front and back sides of the same sheet of paper, or whether it was printed on only one side each of two sheets of paper. Without knowing this, it was not possible for the Superior Court to determine whether the purported indorsement of EquiVantage, Inc. is stamped on a separate sheet of paper, or whether it is on the back side of the second page of a two-page note. This is significant because if the original note was printed on the front and back sides of the same sheet of paper, then the purported indorsement must be on a separate sheet of paper, and Wells Minnesota[11] has offered no proof as to whether the separate sheet of paper (an allonge) was "affixed" to the note as required by N.C. Gen. Stat. § 25-3-204. Further, the production of only a photocopy of a note leaves open the possibility that another allonge may exist, indorsing the note to a different party. This leaves Ms. Dobson open to a possible future claim by such a party coming forward with the original note and asserting a claim based upon such a differing indorsement. *See In re Gilbert*, -- N.C. App. --, 711 S.E.2d 165, --, 2011 WL 1645699, at *5 (N.C. Ct. App. May 3, 2011) ("Establishing that a party is the holder of the note is essential to protect the debtor from the threat of multiple judgments on the same note").

[11] Through its failure to produce the note, Wells Minnesota was unable to present sufficient evidence to rebut Dobson's claim that it lacks physical possession of the note and that the note is not properly indorsed to the correct trustee of the relevant trust.

These requirements of Article 3 for a party to produce the original note with proper indorsements in court are meaningful technicalities. Failures of compliance with these Article 3 requirements are creating disorder and difficulties for courts and homeowners across the country. For example, GMAC Mortgage LLC was sanctioned in Maine for its "bad faith" filing of an affidavit through which it attempted to establish U.S. Bank as holder using a fabricated note indorsement. *See James v. U.S. Bank Nat'l Ass'n*, 272 F.R.D. 47, 48 (D. Me. 2011).[12] The affiant, Jeffrey Stephan, attached to his affidavit a photocopy of the note, with an attached allonge signed by Stephan himself. (From the inception of the case, and throughout pre-trial discovery, GMAC had maintained that a different photocopy of the note showing no indorsement to U.S Bank was a true and correct copy of the original note.) When GMAC was confronted by James with proof that the Stephan allonge, purporting to indorse the note to the plaintiff, U.S. Bank, was a fabrication, it immediately retreated and claimed that Stephan's purported indorsement was a "mistake." U.S. Bank then produced yet another version in the form of a photocopy of the note now bearing two entirely new and also suspect, stamped indorsements on the signature page. Before further investigation could be made into the authenticity of the two new indorsements, GMAC Mortgage dismissed its foreclosure action and settled the homeowner's counterclaims.

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[12] *Amici* CRL and Thomas A. Cox, Esq. were co-counsel in the Maine case.

If GMAC had complied with the dictates of UCC § 3-308(2) by producing the original note at the time that summary judgment was sought, it would have been impossible for it to present an admittedly false allonge and possibly fabricated indorsements. Similiarly, in *Deutsche Bank Nat'l Trust Co. v. Babb*, RE-09-01, (Me. Dist. Ct., Bidd.) the foreclosing plaintiff presented a photocopy of a note bearing a stamped indorsement immediately below the borrowers' signature. The copy was ultimately shown to be a fabrication when the original note was produced at trial containing two indorsements on the back side of the signature page and no indorsement on the front.

Foreclosing parties must be held to the rules created by the banks for their own benefit, and embodied in Article 3 of the UCC. Any failure by courts to enforce those requirements will expose (often unrepresented) homeowners to the potential of erroneous judgments in favor of parties not entitled to them and to subsequent note enforcement actions by other parties proving actual possession of the original note. The requirement for the production of the original note bearing proper indorsements is a simple one. Holding financial institutions to this requirement, created by them for their benefit, does not impose an undue burden.

D. Ms. Dobson Did Not Waive Her Right to Compel Wells Minnesota to Produce the Original Note.

The majority and dissenting opinions in the Court of Appeals disagreed whether Ms. Dobson had waived her claim that Wells Minnesota was required to produce the original note. Those opinions highlight the critical difference between a situation where a note obligor "admits that the documents shown him are correct copies of the original," *In re Helms*, 55 N.C. App. 68, 70, 284 S.E.2d 553, 554 (1981), and a situation where the obligor makes no such admission.

As Judge Hunter noted in his dissent, there is no admission by Ms. Dobson in this case that the photocopy of the note produced by Wells Minnesota is a correct copy of the original. *See Dobson*, 2011 WL 1854315 at * 6-7. And thus, once Ms. Dobson produced competent evidence that Wells Minnesota did not possess the note, she was entitled to summary judgment against Wells Minnesota unless Wells Minnesota came forward and produced the original note as required under N.C. Gen. Stat. § 25-3-308(2). Because Wells Minnesota failed to provide this proof, the Superior Court properly entered summary judgment for Ms. Dobson. As Judge Hunter accurately stated, any contrary holding "impermissibly shifts the burden of proving Defendants' [Wells Minnesota's] photocopy of the Note is not an accurate copy of the original to Dobson, when it is the Defendants who, allegedly, have possession of the instrument." *Dobson*, 2011 WL 1854315 at *7. Especially here, where Ms. Dobson had already presented sufficient evidence

that Wells Minnesota was not in possession to obtain summary judgment, such a shifting of the burden of proof would be contrary to N.C. Gen. Stat. § 25-3-308(2). Furthermore, any wrongful shifting of the burden of proof to the note obligor would have left Ms. Dobson in the impossible position of having to prove the inaccuracy of the photocopy without access to the original document.

The only time that it is appropriate to dispense with the requirement for the production of the original note is when the note obligor specifically and in explicit terms waives his/her right to require production of the original note (or when the note has been lost, destroyed or stolen as discussed in the following section of this brief). An admission that a photocopy of a note is a correct copy of the original (as it existed at some point in time) is not such a waiver.

E. A Photocopy of a Note, by Itself, Is Never Sufficient to Prove the Right of a Party to Enforce a Negotiable Note.

The UCC Article 3 requirement for production of the original note in a court action to enforce it is further reinforced by the lost, destroyed and stolen note provisions of Article 3 set forth at N.C. Gen. Stat. § 25-3-309.[13] An interpretation

[13] **Enforcement of lost, destroyed, or stolen instrument**

> (a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be

of N.C. Gen. Stat. § 25-3-308(b) as always allowing proof of a right to enforce a note upon production of a photocopy would render N.C. Gen. Stat. § 25-3-309 completely meaningless. N.C. Gen. Stat. § 25-3-309 describes the proof that is required when the enforcing party is unable to produce the original note. (This is not the case here as there is no claim by Wells Minnesota that it was unable to produce the original note.) This section of the UCC reinforces the concept that the original note must be produced in **all** circumstances **except** those limited circumstances described in § 25-3-309(a)—those circumstances being limited to instances where the note has been lost, destroyed or stolen.

When a note has been lost, destroyed or stolen, the party seeking enforcement has to prove each of the three factors delineated in subpart (a) of N.C. Gen. Stat. § 25-3-309 (see footnote 12). In addition, under subpart (b), the enforcing party must prove the terms of the note and the party's right to enforce it,

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found or is not amenable to service of process.

(b) A person seeking enforcement of an instrument under subsection (a) of this section must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, G.S. 25-3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

N.C. Gen. Stat. § 25-3-309.

which is the sole instance under UCC Article 3 where a photocopy can be used. Once the proof under subpart (a) is made and proof of the terms of and right to enforce the note is made under subpart (b), a court is still not permitted to enter an judgment for enforcement of the note unless and until it finds that the note obligor is adequately protected, or protection is ordered, by the court, against the possibility of some other person (such as a party actually in possession of the original note) producing and claiming the right to enforce it.

Production of a photocopy to prove the terms of the note is only one of the elements of proof required under N.C. Gen. Stat. § 25-3-309. If this Court were to adopt a rule that a photocopy of a note was sufficient even where there is no claim that the note had been lost, destroyed or stolen, then no rational party would ever submit itself to the proof requirements of N.C. Gen. Stat. § 25-3-309. Even in lost, destroyed or stolen note situations, the party seeking enforcement would opt for the simple requirement of only producing a photocopy of the note. In that way the enforcing party would avoid compliance with and thereby eviscerate the protections for the "lost" note obligor built into Article 3 to protect against another party claiming on the note.

The core principle of N.C. Gen. Stat. § 25-3-309 is to provide protection for the "lost" note obligor when there is a risk of an original note turning up in another party's hands. The entire structure of Article 3 is built around the concept that

production of the original note is what entitles a party to enforce it and that note obligors must be protected against multiple claims being made on the note. If those concepts are abandoned, not only does N.C. Gen. Stat. § 25-3-309 become meaningless, but so too do all of the other provisions of Article 3 regarding transfer and indorsement of notes. The concept of what it means to be a "holder" would be destroyed. Literally, the entire structure of Article 3 collapses if the principle of N.C. Gen. Stat. § 25-3-308(b) requiring production of the original note is abandoned.

F. The Interdependency of the Rules in UCC Article 3

Article 3 of the UCC is an elegant and utterly inter-dependant set of rules governing negotiable instruments. With the functionality of every section of Article 3 dependent upon all other sections, any failure to enforce one section diminishes or nullifies the efficacy of other sections. The provisions of Article 3 that create specific rights in persons having possession of original notes, and that require that indorsements be made on those original notes or be affixed to them, lead inevitably to the requirement that original notes must be presented in court when enforcement of them is sought. It is therefore critical that the wise ruling of Chief Justice Marshall "to require that the note should be produced, or its absence accounted for," *Sheehy v. Mandeville,* 11 U.S. 208, 218 (1812), remain the law of

the land. If that requirement is taken away or weakened, then the entire structure of Article 3 of the UCC collapses.

II. AFFIDAVITS IN FORECLOSURE PROCEEDINGS MUST COMPLY WITH BASIC STANDARDS FOR AFFIDAVITS IN COURT PROCEEDINGS

A. In North Carolina, Foreclosure Affidavits Must Present Admissible Facts Based on Personal Knowledge

It is "well settled" in North Carolina, as in other states, that affidavits must be based on personal knowledge. *Bird v. Bird*, 363 N.C. 774, 777, 688 S.E.2d 420, 422 (2010) (discussing the standard under Rule 56(e));[14] *see also Lemon v. Combs*, 164 N.C. App. 615, 621-22, 596 S.E.2d 344, 348 (2004) (applying the personal knowledge requirement of Rule 56(e) to Rule 43(e), which governs evidence on motions generally). Indeed, "it is a **general legal principle** that affidavits must be based upon **personal knowledge**." *Id.* at 622, 596 S.E.2d at 348.

> The affidavit must in some way *show* that the affiant is personally familiar with the facts so that he could personally testify as a witness. The personal knowledge of the facts asserted in an affidavit is not presumed from a mere positive averment of facts but rather the court should be shown how the affiant knew or could have known such facts and if there is no evidence from which an inference of personal knowledge can be drawn, then it is presumed that such does not exist.

[14] North Carolina Rule of Civil Procedure 56(e) provides that "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C. Gen. Stat. § 1A-1, Rule 56.

Id. at 622-23, 596 S.E.2d at 349 (emphasis added) (quoting 3 Am. Jur. 2d *Affidavits* § 14).[15]

These rules apply to mortgage foreclosure proceedings, just as they do to any proceeding in which affidavits are submitted in support of requests for relief. *See In re Gilbert*, 2011 WL 1645699, at *8-10 (finding affidavits not based on personal knowledge incompetent evidence of possession); *see also In re Brown*, 156 N.C. App. 477, 485-86, 577 S.E.2d 398, 403-04 (2003) ("we find no reason why this Court should distinguish between affidavits filed in support of a motion for summary judgment and affidavits filed in support of a petition for foreclosure"); *Lemon*, 164 N.C. App. at 620-23, 596 S.E.2d at 347-49 (citing cases that apply the personal knowledge requirement in motions for summary judgment, default judgment, to dismiss for lack of jurisdiction, for Rule 11 sanctions, and for search warrants).

The affidavit of Jennifer Robinson,[16] submitted in support of Wells Minnesota's opposition to Dobson's summary judgment motion, fails to comply with these well-established principles of North Carolina law. Affiant Robinson

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[15] This is consistent with the personal knowledge requirement in the Rules of Evidence, which provides that a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." *See* Rule 602, N.C. Gen. Stat. § 8C-1, Rule 602 ("A). The same language appears in Rule 602 of the Federal Rules of Evidence.

[16] The Robinson Affidavit appears at R pp. 237-41, with attachments at R pp. 242-355.

asserts that she is employed by the servicer, ASC, as "a Default Litigation Specialist . . . and **I am familiar with and have personal knowledge of the Linda G. Dobson account** more specifically described below." R p. 237, Robinson Aff. ¶ 2 (emphasis added). Robinson's failure to detail her job responsibilities at ASC renders her sworn statements facially incompetent as evidence; she fails to show that she is a "qualified witness" under Evidence Rule 803(6) to authenticate the business records of ASC, and she fails to show that she is a competent witness under Rule of Civil Procedure 56(e) to make sworn statements as to the content of those records. She fails to meet the requirement that her "affidavit must in some way show that the affiant is personally familiar with the facts so that [s]he could personally testify as a witness." *Lemon v. Combs*, 164 N.C. App. at 622, 596 S.E.2d at 349 (quoting 3 Am. Jur. 2d *Affidavits* § 14).

A closer look at the record also suggests that Ms. Robinson could not have had true, first-hand knowledge of any matters relating to the Dobson mortgage which was originated in 1996 and allegedly assigned to Wells Minnesota in 2001; her limited employment history with ASC dates only to August of 2006,[17] and her sworn interrogatory response proves ASC's knowledge is limited to the

[17] A discovery response sworn to by Jennifer L. Robinson on January 4, 2008, states that Ms. Robinson has her address in Frederick, Maryland (where her affidavit was notarized), and that she has been "Default Litigation Specialist for America's Servicing Company, Employed at the above-referenced position for 5 months." R p. 198, response to interrogatory 1.

information that is contained in the "call log/servicing notes."[18] It is therefore unsurprising that the trial court declined to rely upon any factual statement in this affidavit in considering Wells Minnesota's opposition to the Dobson summary judgment motion.

B. In North Carolina, Affidavits May Not Be Used to Supplant the Court's Function to Decide Questions of Law

It is also a long-standing and uncontroversial principle of the law of North Carolina that affidavits must present **facts** based on personal knowledge, not legal conclusions. *See, e.g., Singleton v. Stewart*, 280 N.C. 460, 467, 186 S.E.2d 400, 405 (1972) (holding an affidavit statement referring to the notice required for a binding contract was inadmissible as a legal conclusion); *Ward v. Durham Life Ins. Co.*, 90 N.C. App. 286, 289, 186 S.E.2d 400, 405 (1988) ("A trial court may not consider portions of an affidavit not based on the affiant's personal knowledge or which merely state the affiant's legal conclusion."); Brandis on North Carolina Evidence § 130 (3d ed. 1988).

Despite the clarity of North Carolina law, Wells Minnesota purports to establish itself as holder by fiat solely through Ms. Robinson's conclusory statement: "Wells Fargo [Minnesota] is the present and current holder of the Note."

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[18] "[T]he extent of the information any individual employed by Wells [Minnesota] would have in regards to the Plaintiff's account is obtainable from the call log/servicing notes and the payment and transaction history." *See* R p. 200, response to interrogatory 5.

R p. 238, Robinson Aff. ¶ 7.[19] However, as an unsupported **legal** conclusion that only the court is competent to make (based on a review of the evidence including the original note), this must fail. *See Ward*, 90 N.C. App. at 289, 186 S.E.2d at 405. Under the UCC, the facts required to prove holder status are possession of the note and indorsements sufficient to give the possessor the right to enforce it. Those facts are missing from Robinson's affidavit, and it is doubtful that she was a competent witness to prove them.

As an employee of the servicer, ASC, and not of the purported note-holder, Wells Minnesota, it is unlikely that Ms. Robinson was in a position to know whether Wells Minnesota possesses the original note, raising the strong suspicion that her conclusory statement lacks any factual underpinning.[20] This should come as no surprise given the significant inconsistencies in the record regarding

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[19] Ms. Robinson's affidavit makes clear that her use of the name "Wells Fargo" refers to Wells Minnesota. (R p. 237, Robinson Aff. ¶ 3.)

[20] In fact, the pooling and servicing agreements governing mortgage-backed securities generally provide clear criteria for storage of the notes and frequently prohibit the mortgage servicer from serving as the custodian of any original documents. Such restrictions apply here. The pooling and servicing agreement for the Equivantage Home Equity Loan Trust 1996-4 was not put in the record presented to the trial court and is not included in the record on appeal. This pooling and servicing agreement can be obtained electronically. *See* Pooling and Servicing Agreement Relating to Equivantage Home Equity Loan Trust Among Equivantage Acceptance Corp., as Sponsor, Equivantage Inc., as Servicer, and Norwest Bank Minnesota, N.A., as Trustee, §§ 3.5, 3.6, 8.14 (Nov. 1, 1996), *available at* http://www.sec.gov/Archives/edgar/data/933505/0001005477-96-000590.txt.

origination, transfers and assignments of the note,[21] not the least of which is Wells Minnesota's interrogatory admission that the Dobson loan origination file has apparently gone missing.[22]

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[21] Robinson identifies three different entities as possible noteholders—Norwest Bank Minnesota as Trustee, Wells Fargo Minnesota as Trustee or Norwest Home Imp.—but she did not provide facts to substantiate that any one of these entities is in possession of the note, a defect that may derive from Robinson's employment by ASC and not Wells Minnesota. *Compare* Robinson's assertions that: (1) the payment rights in the Note were "assigned to Norwest Bank Minnesota, National Association, as Trustee of Equivantage Home Equity Loan Trust 1996-4 under the pooling and servicing agreement dated as of November 01, 1996 . . . by way of an assignment dated September 28, 2001," (R p. 238, Robinson Aff. ¶ 6), *with* (2) a Consent Order dated April 28, 2005, authenticated by Robinson (R p. 238, Robinson Aff. ¶ 14), which recites that the Note had been assigned to "A.S.C. Servicer for Norwest Home Imp." (R p. 290), *and* (3) that Norwest Bank Minnesota is "now known as Wells [Minnesota]" (R p. 238, Robinson Aff. ¶ 6). Ms. Robinson also failed to provide any explanation or supporting documentation as to how Norwest Bank Minnesota may have become Wells Minnesota.

[22] In response to an interrogatory directly asking (1) whether Wells Minnesota had "in [its] possession the loan origination documents," and if not (2) which person or corporation was in possession of these documents, Wells Minnesota responded:

> The Defendant Wells [Minnesota] was not the original lender for this loan, but acquired the loan by way of assignment. … If the Defendant Wells [Minnesota] has the requested documentation, said documentation would be located in an origination file that should have been sent to the Defendant Wells [Minnesota] at the time of assignment. At the time these interrogatories were answered, the Defendant Wells [Minnesota] is unsure as to whether a loan origination file was sent to it at the time of assignment.
>
> …
>
> In the event that Wells [Minnesota] does not have the loan origination file in its possession, Wells Fargo [Minnesota] is unsure as to which person or entity would have a copy of the loan origination file.

R pp. 201-02, response to Interrogatory 9.

Robinson's affidavit, including her failure to explain the basis of her asserted personal knowledge, and her statements of legal conclusion devoid of supporting factual statements, all improper under North Carolina law, are the same fundamental defects seen in other robo-signed affidavits widely used by the mortgage servicing industry. The North Carolina Court of Appeals recently considered affidavits of GMAC Mortgage, LLC, including an affidavit of robo-signer Jeffrey Stephan, which, like the affidavit statement of Jennifer Robinson, purported to identify the "holder of the Note and Deed of Trust." *In re Gilbert*, 2011 WL 1645699, at *8. The *Gilbert* court considered and disregarded these "conclusory" statements because they were "a legal conclusion that is to be determined by a court of law on the basis of factual allegations." *Id.* at *9. The court further found that an affidavit statement asserting possession was incompetent because it did not supply those "facts from which the trial court could determine who has possession of the Note." *Id.*

The factual and legal deficiencies in the Robinson affidavit specifically, and those in the industry generally, reinforce the importance of strict adherence to the requirements for affidavits in North Carolina.

III. ABUSES IN THE EXECUTION OF AFFIDAVITS AND OTHER DOCUMENTS IMPUGN THE INTEGRITY OF THE FORECLOSURE PROCESS

The recent foreclosure crisis has revealed stunning patterns of abuse by lenders and mortgage servicers at every stratum of our nation's mortgage system, from deceptive conduct at origination[23] to outright fraud in foreclosure proceedings. *See, e.g., James*, 272 F.R.D. at 49 (sanctioning GMAC for filing fraudulent affidavits in support of summary judgment in foreclosure proceedings).

It has unfortunately become routine practice for all large mortgage servicers to file so-called "robo-signed" affidavits, in which employees of entities seeking to foreclose sign sworn statements attesting to purported facts of which they have no knowledge.[24] As described more fully below, in most cases the robo-signer simply checks that the name and signature are accurate and never even looks at the loan file. The fundamental untrustworthiness of robo-signed foreclosure affidavits filed by mortgage servicers and the risk of extraordinary resultant harm to home-owners

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[23] For example, on July 20, 2011 the Federal Reserve fined Wells Fargo Company and Wells Fargo Financial $85 million for "falsify[ing] borrowers' income information" in mortgage applications between 2004 and 2008. Press Release, Bd. of Governors of the Fed. Reserve Sys. (July 20, 2011), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/20110720a.htm

[24] *See* Fed. Reserve Sys., Office of the Comptroller of the Currency, & Office of Thrift Supervision, *Interagency Review of Foreclosure Policies and Practices* 7 (2011), *available at* http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf (*Interagency Review*) (sanctioning the fourteen largest servicers for unsafe and unsound foreclosure practices).

makes it all the more important for this Court to reaffirm what is already the law in North Carolina: affidavits made without personal knowledge, that assert legal conclusions, or that fail to establish the basis for the affiant's knowledge, are not competent evidence.

A. To Streamline the Foreclosure Process and Cut Costs, Mortgage Companies Routinely File Untrustworthy Affidavits and Fraudulent Documents.

Robo-signing and other fraudulent mortgage servicer practices have gained widespread attention in the wake of the foreclosure crisis, but it has been "standard industry practice" for mortgage servicers filing foreclosure actions to submit false affidavits, fraudulently backdated documents and other fraudulent documents[25] in court "for most of the past decade."[26] *Foreclosed Justice: Causes and Effects of*

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[25] In addition to false affidavits, mortgage servicers have also fabricated mortgage assignments and other documents, including on behalf of entities that no longer even exist. *See* Paul Kiel, *Internal Doc Reveals GMAC Filed False Document in Bid to Foreclose* (July 27, 2011, 1:07 PM), http://www.propublica.org/article/gmac-mortgage-whistleblower-foreclosure/single.

[26] For further testimony and reports detailing these practices over the past decade, see, for example, Congressional Oversight Panel, *November Oversight Report: Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation* 46-49 (2010), *available at* http://cybercemetery.unt.edu/archive/cop/20110402010313/http://cop.senate.gov/documents/cop-111610-report.pdf (COP Report); *Foreclosed Justice: Causes and Effects of the Foreclosure Crisis: Hearing Before the Comm. on the Judiciary, H.R.*, 111th Cong. 292, (Dec. 2 & 15, 2010) (Testimony of Thomas A. Cox, Esq., Volunteer Program Coordinator, Maine Attorneys Saving Homes 3-16), *available at* http://judiciary.house.gov/hearings/pdf/Cox101202.pdf (Cox Test.); *Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing:*

the Foreclosure Crisis: Hearing Before the Comm. on the Judiciary, H.R., 111th Cong. 126 (Dec. 2 & 15, 2010) (Testimony of James A. Kowalski, Jr., Law Offices of James A. Kowalski, Jr., PL, Jacksonville, FL 1-2) (Kowalski Test.) (emphasis omitted).[27] Unfortunately, these practices have become the norm as mortgage companies have bypassed the steps that are legally required to foreclose on a home. *See COP Report* at 10-13, 46-47; *Interagency Review* at 7; Kowalski Test. at 1-4; Cox Test. at 3-7.

Having taken extensive depositions of robo-signers over a period of years, Mr. Kowalski explained in his Congressional testimony how robo-signing works:

> [M]ost of the servicers use "Signing Officers" – rows of individuals who sit before reams of documents prepared by others, with not even a modest wink at the business records exception to the hearsay rule, and who sign the documents only to have the document transported across the business campus to rows of notaries, who attest to the signatures without ever complying with the basics of their state's notary laws.

Kowalski Test. at 1-2; *see also* Cox Test. at 6-7. It is the job of these robo-signers to simply sign documents without verifying any of the statements or even checking the loan file, at best reviewing only a few facts from a computer screen, facts they

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Hearing Before the Subcomm. on Hous. & Cmty. Opportunity of the H. Comm. on Fin. Servs., 111th Cong. 229 (Nov. 18, 2010) (Testimony of Julia Gordon, Senior Policy Counsel, Center for Responsible Lending 11) (Gordon Test.) *available at* http://www.responsiblelending.org/mortgage-lending/policy-legislation/congress/Gordon-Waters-testimony-final.pdf.

[27] *Available at* http://judiciary.house.gov/hearings/pdf/Kowalski101202.pdf

have no responsibility for generating. *See In re Wilson*, No. 07-11862, 2011 WL 1337240, at *9 (Bankr. E.D. La. Apr. 7, 2011). Depositions and trial testimony of mortgage servicer employees and government investigations have confirmed the accuracy of Mr. Kowalski's description.[28] *See, e.g.*, *In re Wilson*, 2011 WL 1337240 at *9-12; *Interagency Review* at 7.

[28] A full accounting of robo-signing practices throughout the country is beyond the capabilities of this brief. However, *amici* provide several examples of typical deposition testimony: Deposition of Xee Moua, Vice-President of Loan Documentation for Wells Fargo Home Mortgage (Moua Dep.), *taken in Wells Fargo Bank, NA v. Stipek*, No. 50 2009 CA 012434XXXXMB AW (Fla. Cir. Ct. Mar. 9, 2010), *available at* http://www.lsnj.org/NewsAnnouncements/Foreclosure/materials/EXHIBITGWellsFargoDepositionMoua.pdf; Deposition of Jeffrey Stephan, Limited Signing Officer for GMAC (Stephan Dep. Maine), *taken in Fed. Nat'l Mortg. Ass'n v. Bradbury,* BRI-RE-09-65 (Me. Dist. Ct., June 7, 2010), *filed in U.S. Bank Nat'l Ass'n v. James*, No. 2:09-cv-00084-JHR (D. Me. July 20, 2010), ECF No. 153-1; Deposition of H. John Kennerty, Loan Administration Manager and Vice-President of Loan Documentation at Wells Fargo Mortgage (Kennerty Dep.), *taken in Geline v. Nw. Tr. Servs., Inc.*, No. 09-2-46576-2 SEA (Wash. Super. Ct. May 20, 2010), *available at* http://www.lsnj.org/NewsAnnouncements/Foreclosure/materials/EXHIBITGWellsFargoDepositionKennerty.pdf; Deposition of Beth Ann Cotrell., Operations Supervisor for Chase Home Finance (Cotrell Dep.), *taken in Chase Home Finance, LLC v. Koren*, No. 50-2008-CA-016857 (Fla. Cir. Ct. May 17, 2010), *available at* http://www.lsnj.org/NewsAnnouncements/Foreclosure/materials/EXHIBITGChaseDepositionCottrell.pdf; *see also* Deposition of Jeffrey Stephan, Limited Signing Officer for GMAC (Stephan Dep. Florida), *taken in GMAC Mortg. LLC v. Neu*, No. 50 2008 CA 040805XXXX MB (Fla. Cir. Ct. Dec. 10, 2009), *filed in U.S. Bank Nat'l Ass'n v. James*, No. 2:09-cv-00084-JHR (D. Me. July 20, 2010), ECF No. 153-6.

Wells Fargo Home Mortgage (Wells Fargo),[29] one of the largest mortgage companies in the country, executes all of the documents necessary for foreclosures nationwide from an office in Fort Mill, South Carolina. *See* Kennerty Dep. 4:22-23, 7:7-20 ("Yes. . . . My office is the one that handles all of it [for the entire country]."). Based almost exclusively on what their computer system pops up and spits out, employees sign all documents that are presented to them without verifying any substantive information. *See* Kennerty Dep. 43:1-48:25; 56:7-; 57:21-64:20; *see also* Moua Dep. 9:7-11:20, 29:4-39:24 (testimony by Wells Fargo employee that she executed as many as 300-500 foreclosure documents in a two hour period each day and that her only responsibility was to ensure that her name and title were correct before signing).

By design, the sole responsibility of employees in the document execution department is, as the name suggests, to execute documents, trusting that some other division of Wells Fargo has confirmed that the information is correct:

> Q. So how do you know when you're signing this document that it's true and correct?
> A. There are people that are responsible for . . . maintaining that foreclosure matrix. . . .
> Q. Who puts the information into the matrix?
> A. It's generated from our foreclosure departments. Specifically, I don't know who. . . .
> Q. And so when you sign [these documents], you don't have any independent knowledge about whether or not the information is truthful,

[29] Wells Fargo Home Mortgage is the same entity that is the servicer in the Dobson case, "doing business as America's Servicing Company." R p. 237.

> you're relying on other people in the process to make sure that the information is correct on the document that you're signing?
> A. Yes.

Kennerty Dep. 62:8-64:20.

Employees tasked with executing documents have little training or knowledge of foreclosure. For example, Ms. Moua was given the title of Vice President of Loan Documentation, and with it the authority to sign on Wells Fargo's behalf, two years after being hired as a temporary worker in the document execution department. Moua Dep. 9:7-11:20, 39:13-24. Her sworn statements have included legal conclusions that servicers typically include in robo-signed affidavits and are similar to those made in this case,[30] such as "there's no genuine issue of material fact" and "[p]laintiff is entitled to enforce the note and mortgage." *Id.* at 41:2-24. Not surprisingly, Moua did not even understand her own assertions—that is, the meaning of "no genuine issue of material fact." *Id.* at 41:14-16.

The same practices are employed at every major mortgage servicer. *See, e.g., Interagency Review* at 7; *TCIF REO2, LLC v. Leibowitz*, No. 16-2004-CA-4835 (Fl. Cir. Ct., Duval Cnty. May 1, 2006) (sanctioning GMAC Mortgage, LLC for filing fraudulent affidavits); Stephan Dep. Maine 46:9-47:21; 61:24-68:3

[30] *See* R p. 238, Robinson Aff. ¶ 7 ("Wells Fargo is the present and current holder of the Note."); *id.* p. 239-40, ¶¶ 14, 15 ("Plaintiff again defaulted"); *id.* p. 240, ¶ 19 ("Although not germane to a power of sale foreclosure hearing")

(testifying that as GMAC's limited signing officer, he signed between 8,000 to 10,000 documents a month without reading them, including summary judgment affidavits, and that this conduct reflected GMAC's official policy); Cotrell Dep. 9:19-14:2, 56:12-57:1, 73:13-76:4 (testimony by employee of Chase Home Finance that she signed thousands of affidavits a month to be used in foreclosure proceedings, including affidavits of default and affidavits of lost notes and mortgages, all without verifying any information); Cotrell Dep. 11:11-18 ("Q. . . . you stated 'That plaintiff is entitled to enforce the note and mortgage.' Again, did you have personal knowledge of that? A. No knowledge. Q. Did you do anything to verify that statement? A. No.").

B. Federal and State Governments Respond to Mortgage Servicers' Fraudulent Conduct.

Although robo-signing practices have been ongoing for years, the recent foreclosure crisis brought them into the spotlight, leading to government investigations by the federal prudential regulators, the Departments of Justice (DOJ), Treasury and Housing and Urban Development (HUD), all fifty state attorneys general, and even some state and federal courts.

The federal prudential regulators investigated the foreclosure practices of the fourteen largest mortgage servicers, including Wells Fargo, and issued a report and consent orders, imposing sanctions. They found these servicers routinely created foreclosure documents that violate state and federal law, "emphasizing speed and

cost efficiency over quality and accuracy." *Interagency Review* at 7 (finding practices at each of the fourteen largest servicers investigated "resulted in unsafe and unsound practices and violations of applicable federal and state law and requirements"). In their investigation of the fourteen largest servicers, who account for sixty-eight percent of the mortgage servicing industry, the regulators were unable to identify a single entity that conducted its foreclosure business properly. *See id.*

The federal prudential regulators found "critical weaknesses" in the practices of these largest servicers, including "numerous inaccurate affidavits and other foreclosure-related documents," *Id.* at 1-2, 8. Each servicer was required to enter into a compliance program and to retain an independent examiner to conduct an in-depth review of foreclosures filed in 2009 and 2010, and to assess the harm to homeowners caused by its errors. *Id.* at 13. That further review was essential to redressing servicer problems and reforming practices because, as the federal regulators acknowledge, their investigation only scratched the surface. *Id.* at 1.

No investigation was made regarding the accuracy of servicing records that were the basis for sending a homeowner to foreclosure in the first place.

> The file reviews did not include a complete analysis of the payment history of each loan prior to foreclosure or potential mortgage-servicing issues outside of the foreclosure process. Accordingly, **examiners may not have uncovered cases of misapplied payments or unreasonable fees, particularly when these actions occurred prior to the default that led to**

> **the foreclosure action.** The foreclosure-file reviews also may not have uncovered certain facts related to the processing of a foreclosure that would lead an examiner to conclude that a foreclosure otherwise should not have proceeded.

Id. at 2 (emphasis added).

At the same time, other federal agencies, including the Treasury Department, DOJ and HUD, have joined forces in their own investigation of robo-signing practices. U.S. Gov't Accountability Office, *Mortgage Foreclosures: Documentation Problems Reveal Need for Ongoing Regulatory Oversight, GAO-11-433*, at 36-37 (2011) (GAO Report).[31] HUD also found potential violations of the False Claims Act for federal reimbursements obtained by servicers for money lost in foreclosures based on faulty documentation. *See* Shahien Nasiripour, *Confidential Federal Audits Accuse Five Biggest Mortgage Firms of Defrauding Taxpayers*, Huffington Post (May 17, 2011).[32]

General Roy Cooper of North Carolina is on the executive committee of the fifty-state attorney general investigation and has been joined by the North Carolina Commissioner of Banks. *See* Press Release, Nat'l Ass'n of Attorneys Gen., 50 States Sign Mortgage Foreclosure Joint Statement (Oct. 13, 2010).[33] The attorneys

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[31] *Available at* http://www.gao.gov/new.items/d11433.pdf

[32] *Available at* http://www.huffingtonpost.com/2011/05/16/foreclosure-fraud-audit-false-claims-act_n_862686.html

[33] *Available at* http://www.naag.org/joint-statement-of-the-mortgage-foreclosure-multistate-group.php

general were the first to challenge the foreclosure and robo-signing practices of the large servicers that "may constitute a deceptive act and/or an unfair practice or otherwise violate state laws." *Id.* Although this in-depth investigation is ongoing, Attorneys General Cooper and Lisa Madigan of Illinois have recently expressed their intent to file lawsuits against servicers if settlement discussions with servicers break down. *See* Nick Gale, *Madigan and Other Attorneys General Meet with Banks on Foreclosure Practices*, WJBC (June 23, 2011).[34]

Individual attorneys general have also taken action. Former Ohio Attorney General Richard Cordray (recently nominated to head the Consumer Financial Protection Bureau) sued GMAC to enjoin foreclosures resulting from robo-signed affidavits. *See Ohio v. GMAC Mortgage, LLC*, 760 F. Supp. 2d 741 (N.D. Ohio 2011). Attorney General Terry Goddard of Arizona wrote to mortgage servicers expressing concern over robo-signing practices and inaccurate documentation, informed them that use of robo-signed documents "would likely constitute a violation of the Arizona Consumer Fraud Act," and demanded review of robo-signed documents and assurances that servicers will comply with Arizona state law. Letter from Terry Goddard, Attorney Gen., State of Ariz., to Servicers 1, 2

[34] *Available at* http://wjbc.com/madigan-and-other-attorneys-general-meet-with-banks-on-foreclosure-practices/

(Oct. 7, 2010).[35] The California Attorney General demanded that JP Morgan Chase halt foreclosures until it could demonstrate compliance with California law, because its prior verification of compliance was "suspect" based on use of robo-signed affidavits. Letter from Benjamin Diehl, Deputy Attorney Gen., State of Cal., to Steve Stein, SVP Channel Dir., JP Morgan Chase 1-2 (Sept. 30, 2010).[36]

Attorneys general in Michigan, Delaware, New York, and Illinois have also entered the fray. *See* Michelle Conlin & Pallavi Gogoi, *AP Exclusive: Mortgage 'Robo-Signing' Goes On*, Associated Press, abcnews.go.com (July 19, 2011).[37] In Michigan, the Attorney General stepped up his investigation of fraudulent documents filed with register of deeds offices throughout the state, taking "the rare step in June of filing criminal subpoenas to out-of-state mortgage processing companies after 23 county registers of deeds filed a criminal complaint with his office over robo-signed documents they say they have received." Conlin & Gogoi, *Mortgage 'Robo-Signing' Goes On; see also* Press Release, MI Office of the

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[35] *Available at* http://www.azag.gov/press_releases/oct/2010/Mortgage%20Loan%20Servicer%20Letter.pdf

[36] *Available at* http://ag.ca.gov/cms_attachments/press/pdfs/n1996_jp_morgan_chase_letter_.pdf

[37] *Available at http://abcnews.go.com/Business/wireStory?id=14100478*

Attorney Gen., *Schuette Issues Subpoenas in Criminal Probe of Mortgage Processors* (June 15, 2011).[38]

Many other states are continuing to investigate and take action, including in Guilford County, North Carolina, where the Register of Deeds received so many suspect documents in 2010 and 2011, that he had "no choice" but to "stop[] accepting questionable paperwork." *See* Conlin & Gogoi, *Mortgage 'Robo-Signing' Goes On*; Michelle Conlin & Pallavi Gogoi, *Lawmakers Call for Hearings on Robo-Signing*, Associated Press, July 20, 2011.[39]

Courts, too, have taken independent steps to protect their integrity, scrutinizing foreclosure affidavits, dismissing or delaying foreclosures, imposing new filing requirements,[40] and sanctioning large servicers who file robo-signed

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[38] http://www.michigan.gov/ag/0,1607,7-164-46849_47203-257956--,00.html.

[39] *Available at* http://abcnews.go.com/Business/wireStory?id=14110280

[40] The highest courts of three states—New Jersey, Vermont and New York—all established rules in residential foreclosure actions to require plaintiff's counsel to certify that they have communicated with an employee of the foreclosing entity who has personally reviewed and confirmed the accuracy of documents. *See* Glenn A. Grant, Acting Admin. Dir. of the Courts, *Notice to the Bar* (Dec. 20, 2010), *available at* http://www.judiciary.state.nj.us/notices/2010/n101220a.pdf; Vt. R. Civ. P. 80.1(g)(2); Andrew Keshner, *New Court Rule Says Attorneys Must Verify Foreclosure Papers*, N.Y. L.J., Oct. 21, 2010; Admin. Order of the Chief Admin. Judge of the NY Courts (Mar. 2, 2011), *available at* http://www.nycourts.gov/attorneys/pdfs/AdminOrder_2010_10_20.pdf. Failure to follow the new court rules in New York could result in dismissal of the foreclosure. *See, e.g.*, *Wash. Mut. Bank v. Phillip*, No. 16359/08, 2010 WL 4813782, at *5 (N.Y. Sup. Ct. Nov. 29, 2010) (giving plaintiff's counsel forty-five

affidavits. *See, e.g.*, *HSBC Bank USA, N.A. v. Taher*, 2011 WL 2610525, at *15-18 (N.Y. Sup. Ct., July 1, 2011) (dismissing foreclosure case where three robo-signed affidavits had been filed and issuing a show cause order to President and CEO of HSBC Bank to account for its repeated conduct in filing robo-signed affidavits); *HSBC Mortg. Servs., Inc. v. Murphy*, 2011 ME 59, ¶¶ 10-17, 19 A.3d 815, 820-22 (2011) (vacating summary judgment based on "inherently untrustworthy" affidavits).

In December 2010, the New Jersey court system entered a series of orders after identifying "serious questions about the accuracy and reliability of documents submitted to courts by lenders and service providers in support of foreclosure complaints," Order to Show Cause, *In re Residential Mortg. Foreclosure Pleading & Document Irregularities*, No. F-059553-10 (N.J. Super. Ct. Ch. Div. Dec. 20, 2010) (Order to Show Cause),[41] and concerns about "instances of pervasive 'robo-signing' in foreclosure and bankruptcy filings" in New Jersey, Admin. Order 01-2010 at 3, *In re Residential Mortg. Foreclosure Pleading & Document Irregularities* (Dec. 20, 2010) (Admin. Order).[42] The court required nearly all servicers to document that their foreclosure practices were not in violation of the

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days to correct deficiencies in paperwork or the court would dismiss the foreclosure).

[41] *Available at* http://www.judiciary.state.nj.us/notices/2010/n101220c.pdf.

[42] *Available at* http://www.judiciary.state.nj.us/notices/2010/n101220b.pdf.

law, but ordered six large servicers with a record of "questionable practices," including Wells Fargo, to show cause why the court "should not suspend the processing of all foreclosure matters" and impose sanctions. Order to Show Cause at 2.

Despite the reports, investigations, sanctions, and promises to stop, robo-signing and other fraudulent practices remain ongoing in North Carolina and throughout the nation. *See* Conlin & Gogoi, *Mortgage 'Robo-Signing' Goes On*. Just last month, ten senators wrote to the federal banking regulators after new reports emerged that "mortgage servicers continue to engage in widespread 'robo-signing'" asking that investigatory documents regarding these practices be made public. Letter from Ten U.S. Senators to John Walsh, Acting Comptroller of the Currency, Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., and Martin Gruenberg, Acting Chairman, Fed. Deposit Ins. Corp. (July 20, 2011).[43] These investigations demonstrate that the problem of robo-signed affidavits is one that pervades the mortgage industry, is not likely to be soon remedied, and causes significant harm to homeowners trying to save their homes.

[43] *Available at* http://menendez.senate.gov/imo/media/doc/Letter%20to%20regulators%20on%20transparency%20in%20foreclosure%20reviews.pdf

C. Robo-Signing and Other Fraudulent Practices Result in Wrongful Foreclosures.

The law in North Carolina (and elsewhere) requiring affidavits to be (1) signed by a person with personal knowledge of the facts, who (2) makes statements of fact not legal conclusions, and (3) explains the basis of his or her knowledge, is not just formality for formality's sake. When these rules go unenforced for long enough, the type of conduct described above is the inevitable result. And while the full scope of mortgage servicers' fraudulent conduct may yet be unknown, it is already clear that robo-signed affidavits have had real, harmful effects on homeowners, including wrongful foreclosures.

i. Robo-signed affidavits are fundamentally unreliable as evidence of ownership or default

Although servicers have claimed their documentation practices did not result in wrongful foreclosure, the evidence demonstrates otherwise. While we will likely never know how many homeowners were wrongfully foreclosed on, the abusive and fraudulent conduct detailed above can and does result in wrongful foreclosures against homeowners who are not in default, and also presents a serious risk that multiple banks will seek to foreclose on the same mortgage and note. *See, e.g.*, *COP Report* at 5; *The Need for Nat'l Mortg. Servicing Standards:*

Hearing Before the S. Comm. on Banking, Housing & Urban Affairs, 112th Cong. (May 12, 2011) (Testimony of Diane E. Thompson 12-15) (Thompson Test.).[44]

Instances of multiple banks claiming ownership of the same note and attempting to foreclose on the same mortgage have already begun to appear. *See, e.g., Ruscalleda v. HSBC Bank USA*, 43 So.3d 947, 949 (Fla. Dist. Ct. App. 2010) (reversing award of summary judgment in favor of the foreclosing bank after discovering that HSBC Bank and American Home Mortgage Servicing "were simultaneously attempting to foreclose on the exact same mortgage in two different divisions of the [same] court"). U.S. Bank and Wells Fargo Bank have sued on the same note and both attempted to foreclose on the same house. *Compare Wells Fargo Bank, N.A. v. Yulee*, No. 2010-CA-004731 (Fla. Cir. Ct. Apr. 14, 2010), *reprinted in* Kowalski Test. at Ex. 1, *with U.S. Bank Trust Nat'l Assoc. v. Yulee*, 2009-CA-003074 (Fla. Cir. Ct. 2009), *reprinted in* Kowalski Test. at Ex. 1. Similarly, both Bank of America and PennyMac have sought to foreclose on the same property in a case involving the law firm of David J Stern.[45] *See* Susannah

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[44] *Available at* http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=f7e75053-78b6-4a27-b2bb-0e8ebca7d7f5&Witness_ID=d9df823a-05d7-400f-b45a-104a412e2202.

[45] The Law Offices of David J. Stern is one of the foreclosure mill firms currently under investigation by the Florida Attorney General for engaging in widespread robo-signing and other fraudulent practices in foreclosure proceedings. *See Florida A.G. Investigating Three More Foreclosure Law Firms*, Miami Herald (Feb. 9,

Nesmith, *Retired Cook Fights Two Banks to Save Home of 47 Years from Foreclosure*, Daily Bus. Rev., December 1, 2010.

ii. False affidavits mask servicer errors that lead to wrongful foreclosure

In addition to problems regarding ownership of the note, in many cases affidavits regarding the fact and amount of default are fundamentally unreliable.[46]

A recent bankruptcy case explains how inaccuracies resulting from typical but improper mortgage servicing practices can result in wrongful foreclosures of homeowners who are not delinquent.[47] *See In re Wilson*, 2011 WL 1337240, at *7-12. A mortgage servicer moved to lift the bankruptcy stay claiming a delinquency

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2011), *available at* http://www.miamiherald.com/2011/02/09/2058301/florida-ag-investigating-three.html.

[46] The Dobson case presents an example of faulty affidavit evidence regarding the fact and amount of default. After the Clerk denied foreclosure on that basis, Ms. Dobson sought an equitable accounting in large part because ASC does not know how much she actually owes. *See Dobson*, 2011 WL 1854315, at *1-2.

[47] Due to their unique role in overseeing debtor estates, bankruptcy judges have been instrumental in uncovering many details of the mortgage servicing industry's malfeasance. *See, e.g.*, *In re Wilson*, 2011 WL 1337240 at *5 & n.38 (detailing fraudulent policies and practices of Lender Processing Services in connection with the filing of affidavits of default in foreclosure proceedings); *In re Parsley*, 384 B.R. 138 (Bankr. S.D. Tex. 2008) (detailing the relationship between Countrywide and its local and national counsel, including counsel's role in constructing mortgage payment histories for court proceedings without input from Countrywide and Countrywide's policy barring communication with its local counsel). While uncovered by bankruptcy judges, these types of abusive servicing practices are "not peculiar to loans involved in bankruptcy"; they are "systematic" and "exist during all stages of [a] loan's administration." *In re Stewart*, 391 B.R. 327, 340 (Bankr. E.D. La. 2008).

in the account, even though the debtor had made all payments and was current under the bankruptcy plan. *Id.* at *7-9. The judge determined that the affidavit purporting to establish the delinquency was a "sham." *Id.* at 9. The affiant had "no personal knowledge regarding the loan file save for the three (3) or four (4) facts read off a computer screen that she neither generates nor understands." *Id.* at *9. She did not know that the debtors had timely sent their payments because the payments "were not posted [in the computer system]," which, per company policy, was the only source of information she reviewed prior to signing foreclosure affidavits.[48] *Id.* at *6, 13.

The Louisiana Bankruptcy court's punctilious analysis of the "evidence" presented by the servicer and the contrary evidence of the homeowner and bankruptcy trustee exposed the wrongful attempt to foreclose in the absence of a delinquency. The judge's thorough analysis made it abundantly clear that affidavits routinely submitted by servicers in support of foreclosure—whether to

[48] The testimony by the mortgage servicer in this case is consistent with other testimony regarding the "dual track" that prevents homeowners who are actually current from demonstrating that the foreclosure was wrongfully filed, and prevents those behind in their payments from mitigating the effects of a default. "The most significant problem . . . is the 'dual track' system, where homeowners dealing with one unit of a servicer on a loan modification will quickly end up in a foreclosure handled by another unit of the same servicer" because of "firewalls between themselves, where an employee of one unit cannot even access the computer database used by another unit – even where the information is critical and could either (1) prevent a foreclosure or (2) demonstrate that the foreclosure was wrongly filed in the first place." Kowalski Test. at 2.

establish ownership of the note or default—are just as likely to be false as true and are insufficiently reliable to substitute for live testimony in courts. *Id.* at *9-10, *12-13 (sanctioning mortgage company).

Other pervasive errors lead to the filing of false affidavits and wrongful foreclosures, including routine failures of servicers to properly apply payments in the manner required by the note and mortgage and improper assessments of unwarranted fees to customers' accounts.[49] In *In re Stewart*, 391 B.R. 327 (Bankr. E.D. La. 2008), for example, the court determined that Wells Fargo's computer system had been programmed to systematically apply payments contrary to the terms of the notes and mortgages, choosing to first satisfy "late charges and inspection fees instead of the principal and interest outstanding," where it was required to apply payments first to escrow, interest and principal, and only then to fees. 391 B.R. at 348-50. Wells Fargo also had a "corporate practice" of failing to notify borrowers of certain charges assessed against their accounts, charges which

[49] Judge Norgle recently approved a final settlement in multi-district litigation against Ocwen Loan Servicing. *See* Revised Final Approval Order and Judgment, *In re Ocwen Fed. Bank FSB Mortg. Servicing Litig.*, No. 04-CV-2714 (N.D. Ill. July 1, 2011), ECF No. 476. Ocwen agreed to pay $7,000,000 to settle claims that it engaged in a wide variety of improper practices in servicing subprime mortgages, including failing to properly credit borrower payments and improperly force-placing hazard insurance on properties that were already insured, leading to improperly assessed "late charges, delinquencies, or defaults, and in some cases leading to improper foreclosures." Class Pls.' Mot. & Mem. in Supp. of Prelim. Approval at 2, *In re Ocwen Federal Bank FSB Mortg. Servicing Litig.* (N.D. Ill. Dec. 13, 2010), ECF No. 358.

were also frequently improper. *Id.* at 342. It should come as no surprise that a "corporate practice" of misapplying payments and wrongfully assessing charges inevitably leads to demands for "substantially erroneous and increased payments," as it did in *In re Stewart*, 391 B.R. at 355, or to inaccurate allegations of default and wrongful foreclosure.

The prevalence of wrongful foreclosures filed in the absence of default by the homeowner is substantiated by a recent survey of attorneys representing homeowners in foreclosure. "[N]inety-six attorneys from thirty-four states reported representing over 1,200 homeowners who had been placed into foreclosure by a servicer **when they were current on their payments**." Thompson Test. at 12 (emphasis added). Unfortunately, homeowners facing wrongful foreclosure can usually avoid foreclosure only if they can obtain legal representation.[50] Without a lawyer, the vast majority are ill-equipped to defend themselves against abusive practices. That is particularly true if they do not keep documentation of their complete payment history.

However, default judgments and *pro se* defendants are common in the foreclosure context because only a tiny fraction of homeowners facing foreclosure are able to obtain legal representation. For example, ninety-four percent of

[50] "The reconciliation of Debtor's account took Wells Fargo four months to research and three hearings before [the] Court to explain." *In re Stewart*, 391 B.R. at 355. This close attention is a luxury few borrowers can afford. *See* Thompson Test. at 62-63 (describing lack of representation among homeowners).

foreclosure cases in New Jersey are characterized by an "absence of any meaningful adversarial proceeding." Admin. Order at 3. In Maine, ninety-four percent of homeowners in foreclosure are unable to obtain legal representation. *See* Nan Heald, *Justice for Some, A Report on Unmet Legal Needs in Maine* 1, (2009).[51]

iii. Wrongful foreclosure of active duty military personnel

Finally, wrongful foreclosures and illegal overcharges of active duty military members provide an especially troubling example of the harm from mortgage servicers' use of robo-signed and fraudulent documents. Federal law strictly prohibits lenders from foreclosing on active duty military personnel absent a court order. *See* Servicemembers Civil Relief Act (SCRA), 50 U.S.C. App. §§ 527, 533. North Carolina similarly imposes additional duties with respect to active military personnel. N.C. Gen. Stat. Ann. § 45-21.12A (West 2011). If a lender or mortgage servicer does attempt to foreclose and the homeowner fails to appear, the foreclosing plaintiff must always file an affidavit attesting that the homeowner is not on active military duty in any action. 50 U.S.C. App. § 521.

Recent investigations have revealed that lenders and mortgage servicers routinely disregard even these laws and file affidavits falsely claiming that servicemember homeowners are not on active military duty. *See* Dem. Staff S. of

[51] *Available at* http://www.mbf.org/JusticeforSomeFinalUnmetNeeds3-10.pdf.

Comm. on Oversight & Gov't Reform, 112th Cong., *Fighting on the Home Front: The Growing Problem of Illegal Foreclosures Against U.S. Servicemembers* (July 12, 2011);[52] Forum: *Fighting on the Home Front: The Growing Problem of Illegal Foreclosures Against U.S. Servicemembers*, 112th Cong. (July 12, 2011) (statement of Captain Kenneth R. Gonzales);[53] *Interagency Review* at 1, 3, 7 (finding wrongful foreclosure of servicemembers in even the "relatively small number of files" reviewed).

In response, the Department of Justice has taken enforcement action against Bank of America and Saxon Mortgage for illegal foreclosures on active duty service members in violation of the SCRA between 2006 and 2009 and has obtained $22 million in relief for the victims. *See* Press Release, U.S. Dep't of Justice, Justice Department Settles with Bank of America and Saxon Mortgage for Illegally Foreclosing on Servicemembers (May 26, 2011). Similarly, responding to a civil class action, JPMorgan Chase recently agreed to pay $56 million to compensate approximately **6,000 service members** for wrongfully foreclosing on their homes and/or for overcharging them in violation of the SCRA. *See* Mem. in

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[52] *Available at* http://democrats.oversight.house.gov/images/stories/FULLCOM/712%20soldier%20forum/Report%20--%20Fighting%20on%20the%20Home%20Front%2007-12-11.pdf.

[53] *Available at* http://democrats.oversight.house.gov/images/stories/FULLCOM/712%20soldier%20forum/Statement%20of%20Captain%20Kenneth%20R%20Gonzales.pdf

Supp. of Pet. for Prelim. Approval of Class Action Settlement, *Rowles v. Chase Home Fin., LLC*, No. 9:10-1756-MBS (D.S.C. Apr. 21, 2011), ECF 36-1; Jef Feely, JPMorgan Settles Military Mortgage Suits for $56 Million, Bloomberg Businessweek (Apr. 21, 2011, 4:49 PM).[54]

Investigations into wrongful foreclosures of active duty military and other violations of the SCRA are ongoing and the full extent of banks' and servicers' wrongful conduct toward members of the military remains unknown.[55] More broadly, mortgage servicers' continued use of false and untrustworthy affidavits in foreclosure proceedings across the country demonstrates the need to enforce existing laws regarding the sufficiency of affidavits.

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[54] *Available at* http://www.businessweek.com/news/2011-04-21/jpmorgan-settles-military-mortgage-suits-for-56-million.html.

[55] The House Committee on Oversight and Government Reform recently announced that it would seek documents from the nation's ten largest mortgage servicers relating to their treatment of active duty military and their families. Lily Leung, *Banks to be Put on the Spot for Military Foreclosures*, San Diego Union Tribune (July 14, 2011, 11:29 PM), *available at* http://www.union-trib.com/news/2011/jul/14/issa-led-group-put-banks-spot-illegal-military-for/. In the Senate, a bill has been introduced to double the maximum criminal penalties for violations of the SCRA and to establish other protections for servicemembers from wrongful foreclosure. *See* S. 486, 112th Cong. (1st Sess. 2011); *see also Hearing on Legislation Pending Before the S. Comm. on Veterans' Affairs*, 112th Cong. (1st Sess. June 8, 2011) (statement of Senator Sheldon Whitehouse), *available at* http://veterans.senate.gov/hearings.cfm?action=release.display&release_id=7ea9a7b8-dda1-4e67-983e-71f6a051ec7a.

The solution is simple: affidavits should be filed only by individuals who have actually reviewed the physical loan documents and other records and confirmed their accuracy, and original documentation should be demanded by the courts. The affidavits themselves should contain enough information so that Courts and parties can evaluate whether statements are based on personal knowledge or custody and control. Moreover, there is no reason to ever accept as "evidence" statements of legal conclusions that are not appropriately part of an affidavit. It is time to restore confidence in the integrity of the foreclosure process by ensuring strict compliance with the bedrock rules: the UCC and the Rules of Evidence.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reinstate the ruling of the trial court, entering partial summary judgment for Ms. Dobson.

Respectfully submitted this 5th day of August 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 5, 2011, I served a copy of the foregoing *Amicus Brief* upon all counsel of record by depositing a copy with the United States Post Office, postage prepaid, addressed as follows:

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