In the instant Adversary Proceeding, regardless of, and quite apart from, res judicata, Debtor has the right to have the dischargeability of Defendants' purported secured claim determined by this Court in a bankruptcy proceeding. Additionally, Defendants' claim may be dischargable or avoidable in bankruptcy under Section 522 on the basis of, inter alia, fraud.[3] Adv.C. ¶¶ 76-83. Since the issues of dischargeability and avoidance of Defendants' purported secured lien hinge on the determination and resolution of the claims contained in the Adversary Complaint, those claims withstand the res-judicata-based motion to dismiss.

Lastly, to the extent that the Adversary Complaint is not viewed or construed to include such a claim of dischargeability/avoidance, **Debtor hereby respectfully moves for leave to amend to include such a claim**.

## III. Debtors Adversary Claims Are Meritorious.

### A. Counts I (Violaiton of Foreclosure Statutes), II (Declaratory Judgment), and IV (Fraud) Each State A Claim For Relief Supported by Ultimate Facts.

As a preliminary matter, Defendants' argument that Debtor's claim against them for violating Virginia's nonjudicial foreclosure statutes somehow turns Virginia into a judicial foreclosure state, MTD at 14-16, is a red herring. Apart from not being true, it is utterly irrelevant whether Debtor's valid claims against Defendants for foreclosure statutes violations would have any systemic effect on Virginia's nonjudicial foreclosure. It is axiomatic that every person has a right to bring a valid claim for violation of law supported by ultimate facts and within the jurisdiction of the court. As long as such a claim is stated, it can proceed.

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[3] Likewise, the state court judgment, even if it had some preclusive effect in this Adversary (which it does not) could be re-considered based on fraud pursuant to Va. Code § 8.01-428(D) (allowing final judgments to be set aside for fraud).

While it is true that a party that complies with Virginia's nonjudicial foreclosure procedure may foreclose out-of-court, such nonjudicial foreclosure *would not be available where the very compliance with the nonjudicial foreclosure procedure is challenged*., as long as such challenge is valid under applicable evidentiary principles, as discussed below.

At best, Defendants can be heard to say that a borrower cannot make merely a conclusory allegation that the foreclosing party cannot foreclose (for whatever reason), thereby necessitating a judicial determination of every foreclosure, even one presumptively valid. While this may be true, that is entirely *not* what Debtor has done in this case. The debtor has adduced concrete evidence (similar to competing affidavits in a summary judgement proceeding) that casts sufficient doubt on Defendants' prima facie claim of compliance with applicable foreclosure procedures. *See*, *e.g.*, Adv.C. ¶¶ 3-27, ¶ 21 & n.1; Exhibits C (SEC filings showing securitization of the loan and the loan's transfer process, as well as the parties involved, to be *different* from and irreconcilable with those claimed by Defendants in the course of their nonjudical foreclosure proceeding), and E (Defendants' own written statement tending to establish they are not in possession of the note) thereto, as well as **Exh. B** (media coverage of Mr. Allotey – deed of appointment signer – as a fraudulent signer & **C** (affidavit of Lynne Semonyak establishing fraudulent nature of the deed of appoinment) hereto. Debtor therefore defeated the Deed of Appointment's prima facie validity, if any. *See*, *e.g.*, *Graham v. County of Gloucester, Va.*, 668 F. Supp. 2d 734, 736 (E.D. Va. 2009) (in summary judgment context, opposing party can "present specific facts demonstrating that there is a genuine issue for trial [which facts] must be presented in the form of exhibits and sworn affidavits," rather than bare allegations); *Lim v. Choi*, 256 Va. 167 (Va. 1998) (*prima facie* validity of a deed may be overcome by other documents or evidence); *Moffitt v. Com.*, 434 S.E.2d 684, 16 Va.App. 983 (Va. App., 1993) (in a civil

proceeding, "[*prima facie* evidence produces *for the time being* a certain result, but that the result *may be repelled*") (emphasis added).

Once the Debtor has come forward with *evidence* (rather than bare allegations) that casts doubt on Defendants' claimed compliance with the nonjudicial foreclosure requirements, a valid claim for relief has been stated, and such a claim no longer be defeated by mere reliance on the nonjudicial nature of the foreclosure process. The details of Defendants' noncompliance with Virginia's foreclosure laws are addressed below.

**B. The Deed of Appointment Was Not Executed By The Claimed Secured Party Or Its Agent.**

The Deed of Appointment is signed by one Liquenda Allotey as Vice President for American Home Mortgage Servicing, Inc. ("AHMSI"), as "Servicing Agent for [Deutsche Trust]." Ms. Allotey's signature was apparently notarized by in the State of Minnesota, County of Dakota, by Carmela D. Lagarile, a notary public.

The Deed of Appointment does not contain even a scintilla of evidence of the purported agency relationship, such as a Power of Attorney or a Servicing Agreement. AHMSI's authority to act on behalf of Deutsche Bank (the claimed secured party) is dependent upon the existence of a specified relationship of AHMSI and Deutsche Bank. Absent evidence of agency relationship, the Deed of Appointment is deficient and violates both Virginia Statutes and the terms of the Deed of Trust.

**C. The Deed of Appointment Was Fraudulently Executed By An Individual Falsely Claiming To Be An Employee of AHMSI.**

The Deed of Appointment is executed by one Liquenda Allotey as Vice President for American Home Mortgage Servicing, Inc. ("AHMSI"), as Servicing Agent. Adv.C. Exh. D (Deed of Apppointment). In connection with this litigation, Plaintiff had the Deed of Appointment and

the other loan documents examined by Lynn E. Szymoniak, Esq., a document fraud expert. Ms. Szymoniak's credentials, as well as her findings and conclusions are set forth in her sworn Affidavit attached hereto as **Exhibit C**. In short, Ms. Szymoniak's affidavit and evidence adduced thereto tend to establish that Mr. Allotey was never an employee of Defendant AHMSI, but is an employee of Lender Processing Services, a mortgage default services company whose primary business is to draft "missing documents" to facilitate foreclosures. *Id* at 5. Based on Ms. Szymoniak's affidavit and accompanying evidence, a genuine issue of fact exists as to whether the Deed of Appointment is fraudulently executed, so that Debtor's fraud and lack-of-authority claims withstands the motion to dismiss.

**D. A Genuine Issue Of Fact Exists As To The Authenticity of The Allonge.**

Similarly to the Deed of Appointment, the allonge relied upon by Defendants does not appear to be authentic, and at least an issue of fact exists as to its authenticity and veracity. Defendants argue that Deutsche Bank is the secured party entitled to enforce the Note because the Note was allegedly transferred to it via the allonge. MTD at 17-18. The allonge, however, cannot save Defendants, because the transfer of the Note that the allonge purports to document would have been impossible in light of the securitization agreements pertaining to the trust that purports to hold the mortgage with Deutsche as Securitization Trustee. Additionally, the form of the allonge on its face is fraught with problems rendering the allonge legally invalid. These defects are addressed in detail below.

**1. The Allonge Is Inauthentic and Invalid Because Deutsche As Trustee Lacks Capacity to Acquire Any Rights In the Note, Via An Allonge or Otherwise.**

Defendant Deutsche Bank, as Trustee for the OPT2 securitization trust recited in the Deed of Appointment ("OPT2 Trust"), lacks capacity to acquire any rights in the subject Note

(and therefore also to appoint substitute trustees or to otherwise act with respect to Plaintiff's property) because Deutsche is acting as a trustee for (1) a non-existing trust and (2) for a trust that, even when it existed, acquired all of its mortgage notes from HSBC Bank, not Option One Mortgage Corporation (Option-One) as claimed by Defendants via the allonge, MTD at 17-18. This alone warrants denial of Defendants' motion to dismiss.

Indeed, Deutsche presents itself as "Trustee for HSI Asset Securitization Corporation 2006-OPT2 Mortgage Pass-Through Certificates, Series 2006-OPT2." Adv.C. Exh. D. Thus, its capacity to act is limited by the scope of its duties as the securitization trustee and by the trust agreement, we well as by the existence and validity of the underlying securitization trust. *See*, *e.g.*, *Replace Retail, LLC. v. Universal Renovation USA Corp.*, 2009 NY Slip Op 30889 (N.Y. Sup. Ct. 2009) (an entity lacked capacity to seek relief where none of its documents established that it was registered as a corporation or other entity under state law).

The respective powers of a trustee must be interpreted by the plan documents, especially the trust agreement. *See*, *e.g.*, *Celotex Corp. v. City of New York*, 487 F.3d 1320 (11th Cir. 2007). Moreover, it is "[f]rom the trust [that] the trustee derives the rule of his conduct, the extent and the limit of his authority, the measure of his obligation." *Jones v. First Na'l Bank*, 226 So.2d 834, 835 (Fla. Dist. Ct. App. 1969). Therefore, the "trustee can properly exercise such powers and only such powers as (a) are conferred upon him in specific words by the terms of the trust, or (b) are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust." *Restatement (Second) of Trusts*, Section 186 (1959).

First, the underling securitization trust here appears to be defunct, or at least an issue of fact exists as to the trust's validity. For instance, the subject Trust purportedly holding the pool of mortgages that includes Plaintiff's loan is required to make annual SEC filings, including

Form 10-K annual report. *See*, *e.g.*, www.sec.gov (last visited June 2, 2010). The last such annual report filed by the 2006-OPT2 Trust dates as far back as March 29, 2007, more than 3 years (!) ago. Adv.C. Exh. C (SEC filings printout). Therefore, at a minimum, a material issue of fact exists as to whether the 2006-OPT2 Trust, on whose behalf Deutsche Trust purports to act as the Trustee, is defunct or has been dissolved either by the SEC for non-filing of required reports or voluntarily dissolved by virtue of third-party payments (such as credit default swaps and other financial devices amounting to third party insurance on toxic loans).

Additionally, even if the trust turns out not to be defunct (an issue that can be resolved, at the earliest, on a summary judgment motion), the same trust could not have acquired the Note directly from Option-One as claimed by Defendants because *all* mortgages acquired by the Trust (when it existed) came *solely* from HSBC Bank, not Option-One. *See* Adv.C. Exh. C (OPT2 Trust's SEC filings). Specifically, Exhibit 99.1 to the 2006-OPT2 Trust's SEC filing contains a "Mortgage Loan Purchase Agreement dated as of February 1, 2006, between HSI Asset Securitization Corporation, as Depositor, and HSBC Bank USA, National Association, as Seller." Adv.C. Exh. C (emphasis added). Thus, before Option-One could transfer the subject loan to Deutsche as Trustee, as Deutsche claims, Option-One would have had to transfer it first to HSBC, who is the stated seller and transferor of all of the mortgages in the subject pool into Deutsche's 2006-OPT2 Trust. *Id.* No evidence of HSBC's ownership of the Note (at least at some point) has been presented. On the contrary, the "evidence" presented would foreclose the possibility of HSBC ever owning or holding the Note since, according to Defendants themselves, the Note was supposedly transferred directly from Option-One to Deutsche as Trustee for the 2006-OPT2 Trust.

Additionally, the conveyance of mortgage loans into the trust that Defendants claim no holds the note is governed by the Pooling and Servicing Agreement (PSA). The PSA requires all "intervening endorsements" to be present for a valid transfer of the note into the trust. Because the trust is not a physical living being, it only has capacity to conduct transactions that comport with its settling rules and are not *ultra vires*. Thus, the trust here could not acquire any interest in the Note in the way claimed by Defendants via the allonge, as the absence of an endorsement in favor of HSBC renders the purported transfer to Deutsche ultra vires in violation of Section 2.01 of the PSA. See **Exh. E**.

On a motion to dismiss, Plaintiff's evidence is entitled to every reasonable inference in favor of Plaintiff. *C. Porter Vaughan, Inc. v. Dilorenzo*, 689 S.E.2d 656, 659 (Va. 2010). Taken in this light, the evidence discussed both contradicts Deed of Appointment's recitation that Deutsche is the "owner and holder of the note," and independently of the Deed of Appointment raises the issue of Deutsche's capacity to acquire any interest in the Note as Trustee for the OPT2 Trust.

This is therefore *not* a case where Plaintiff could be merely stonewalling an apparently rightful foreclosure using bare allegations challenging the secured party's right to foreclose. Here, Plaintiff has articulated specific, cogent reasons, and produced concrete and credible evidence in the form of public records, demonstrating Deutsche's *lack of capacity* as OPT2 Trustee to acquire any rights in the Note (via the purported Allonge or otherwise) or to act with respect to Plaintiff's property in any way.