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IN THE SUPREME COURT OF THE STATE OF DELAWARE

EUGENE MOSS, Defendant-Below, Appellant, v. DEUTSCHE BANK NATIONAL TRUST COMPANY, Plaintiff-Below, Appellee.	No. 55,2016 Court Below: Superior Court of the State of Delaware, in and for New Castle County (C.A. No. N11L-03-097-ALR)

APPELLEE'S ANSWERING BRIEF ON APPEAL

Dated: May 20, 2016

DUANE MORRIS LLP

Brett L. Messinger (*pro hac vice*)
30 South 17th Street
Philadelphia, PA 19103-4196
Tel: (215) 979-1508
Fax: (215) 979-1020
blmessinger@duanemorris.com

Jarret P. Hitchings (No. 5564)
222 Delaware Avenue, Suite 1600
Wilmington, DE 19801-1659
Tel: (302) 657-4900
Fax: (302) 657-4901
jphitchings@duanemorris.com

Attorneys for Plaintiff-Below, Appellee

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NATURE OF PROCEEDINGS

Defendant below, appellant Eugene Moss ("Moss"), owns residential real property located at 210 Porky Oliver Drive, Middletown, Delaware 19709 ("Property"). Docket Item 62 at 1.[1] On January 10, 2007, Moss executed a note in favor of New Century Mortgage Corporation for the original principal amount of $369,000.00 ("Note"). A000078; B214. On the same date, Moss executed and delivered a mortgage on the Property ("Mortgage") as security for the Note. A000015-37.

On March 9, 2011, as a result of payment defaults by Moss, plaintiff below and appellee Deutsche Bank National Trust Company, as Trustee for the Registered Holders of Morgan Stanley ABS Capital I Inc. Trust 2007-NC3 Mortgage Pass-Through Certificates Series 2007-NC3 ("Deutsche Bank") sought to foreclose on the Mortgage by filing a Complaint in the Superior Court of the State of Delaware in and for New Castle County ("Superior Court"). DI 1.

Moss answered the Complaint on April 12, 2011 (as subsequently amended on April 18 and June 17, 2011, "Answer"). DI 5; DI 6; DI 8. In the Answer, Moss asserted counterclaims against Deutsche Bank for collateral estoppel, breach of

[1] All further references to the record below are made as "DI" followed by the appropriate docket item and page number. References to the Appendix to Appellants' [sic] Opening Brief are made as "A" followed by the appropriate page number. References to Appellee's Appendix are made as "B" followed by the appropriate page number.

contract, common law fraud, equitable fraud, and alleged violations of the federal Fair Debt Collection Practices Act (collectively, "Counterclaims"). DI 8 at 2; B080-93. Deutsche Bank answered the Counterclaims on July 7, 2011. DI 9.

On August 14, 2013, Moss filed a motion for summary judgment ("2013 Motion").[2] DI 62. On December 18, 2013, following a hearing and supplemental briefing, the Superior Court entered an Order granting the 2013 Motion ("2013 Order"). DI 91. Deutsche Bank appealed the 2013 Order to this Court ("First Appeal").[3] On June 24, 2014, this Court entered an Order ("Remand Order") reversing the 2013 Order and remanding this case to the Superior Court for further proceedings. DI 95; *see also Deutsche Bank Nat'l Trust Co. v. Moss*, 99 A.3d 226 (Del. 2014).

On remand, the parties engaged in additional discovery and, thereafter, on August 14, 2015, Deutsche Bank filed its own motion for summary judgment ("2015 Motion"). DI 118 and 119; B142-261. On November 10, 2015, while the 2015 Motion was pending, Moss filed a motion to dismiss ("Moss Cross Motion"). DI 133. Pursuant to Superior Court Civil Rule 56, the Superior Court converted

[2] Moss previously moved for summary judgment on October 17, 2011 ("2011 Motion"). The Superior Court entered an Order denying the 2011 Motion on May 16, 2012. DI 56.

[3] The First Appeal was captioned *Deutsche Bank National Trust Company v. Moss*, No. 26, 2014 (Del. Supr. 2014).

the Moss Cross Motion to a motion for summary judgment. DI 140. On January 26, 2016, the Superior Court entered an Order ("2016 Order") (i) granting the 2015 Motion, (ii) denying the Moss Cross Motion, and (iii) entering judgment on the Complaint and Counterclaims in favor of Deutsche Bank and against Moss. DI 148.[4]

On February 4, 2016, Moss filed a Notice of Appeal ("Second Appeal") of the 2016 Order. As described more fully below, this Second Appeal challenges the Superior Court's entry of summary judgment in favor of Deutsche Bank regarding the Complaint. Moss does *not* appeal the Superior Court's entry of judgment against him and in favor of Deutsche Bank on the Counterclaims. On April 21, 2016, Moss filed his Opening Brief.[5] This is Deutsche Bank's Answering Brief on Appeal.

[4] The 2016 Order is published at *Deutsche Bank Nat'l Trust Co. v. Moss*, 2016 Del. Super. LEXIS 32 (Del. Super. Ct. Jan. 26, 2016).

[5] On May 3, 2016, Moss filed an amended opening brief to address certain formatting deficiencies. All references to Moss's Opening Brief herein are to that amended version.

SUMMARY OF ARGUMENT

1. The Superior Court correctly entered summary judgment in favor of Deutsche Bank on its *scire facias sur* mortgage Complaint. Deutsche Bank has standing to foreclose as the holder of the Mortgage, and Moss does not dispute that he is in default of his payment obligations thereunder. Moss has not presented any valid defenses to the Complaint, and his assertion that Deutsche Bank is required to prove ownership of the Note seeks to improperly impose upon a Deutsche Bank an element of proof not required by Delaware law. Nevertheless, Deutsche Bank is also the holder of the Note. Deutsche Bank submitted sufficient evidence to establish its entitlement to judgment before the Superior Court below. Accordingly, the Superior Court's grant of summary judgment in favor of Deutsche Bank and against Moss should be affirmed.

2. The Superior Court correctly held that Moss made prior judicial admissions acknowledging Deutsche Bank as the holder of the Mortgage. Moss made these admissions in multiple prior pleadings submitted to the Superior Court. Moss cannot now, later in the case, assert that Deutsche Bank is *not* the holder of the Mortgage. And even if the Superior Court did err in barring Moss's subsequent arguments based on his prior judicial admission, such error was harmless and was not the only basis for the Superior Court's 2016 Order. Accordingly, the Superior

Court's grant of summary judgment in favor of Deutsche Bank and against Moss should be affirmed.

STATEMENT OF FACTS

I. THE MORTGAGE.

As described above, Moss owns the Property, which is located at 210 Porky Oliver Drive, Middletown, Delaware 19709. DI 62 at 1. On January 10, 2007, Moss executed and delivered the Mortgage to Mortgage Electronic Registration Systems ("MERS"), as nominee for New Century Mortgage Corporation ("New Century"). *Id.* The Mortgage authorized MERS to act for New Century as follows:

> MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successor and assigns. MERS is the mortgagee under this Security Instrument.

A000016. The Mortgage further states:

> TRANSFER OF RIGHTS IN THE PROPERTY
>
> This Security Instrument secures to the Lender: (i) the repayment of the Loan, and all renewals, extensions and modification of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successor and assigns of MERS the following described property located in this County of New Castle

A000018.

The Mortgage was recorded in the Office of the Recorder of Deeds of New Castle County as Instrument Number 2007-0010804 on January 31, 2007.

A000016. Moss breached the terms of the Mortgage by failing to make the payment due and owing on September 1, 2009, and has made no payments since. DI 1 at 1; A000201; B210 and B285.

II. NEW CENTURY'S BANKRUPTCY AND ASSIGNMENT OF THE MORTGAGE.

On April 2, 2007, New Century filed a voluntary petition under chapter 11 of Title 11 United States Code §§ 101, *et seq*. ("Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware ("Bankruptcy Court").[6] *See* A00038. On that same date, New Century stopped originating loans. *See* B100.

On April 23, 2007, the Bankruptcy Court entered an Order approving the sale of New Century's loan servicing business to Carrington Capital Management, LLC and Carrington Mortgage Services, LLC (collectively, "Carrington"), pursuant to sections 105, 363 and 365 of the Bankruptcy Code ("Sale Order").[7] *Id.*; A000040-43. The sale closed on June 29, 2007. *Id.* Moss agrees that the

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[6] The New Century bankruptcy proceeding is styled *In re New Century TRS Holdings, Inc.*, et al., Case No. 07-10416. *Id.*

[7] The Order was entitled *Order Pursuant to Sections 105, 363 and 365 of the Bankruptcy Code and Rules 2002, 6004, 6006 and 9014 of the Federal Rules of Bankruptcy Procedure Approving (i) the Sale of Debtors' Servicing Business to Carrington Capital Management, LLC and Carrington Mortgage Services, LLC Pursuant to the Second Amended and Restated Asset Purchase Agreement, Dated as of May 21, 2007, Free and Clear of Liens, Claim, Encumbrances, and Interests, (ii) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases to Carrington as Part of Such Sale*, and is listed on the Bankruptcy Court's docket in Case No. 07-10416 at docket number 844. A000040-43.

Mortgage was one of the mortgages for which New Century assigned its servicing business. B099-100. On January 17, 2008, MERS, executed an assignment ("First Assignment") of the beneficial interest in the Mortgage to Deutsche Bank Trust Company Americas, f/k/a Banker's Trust Company, as Trustee and Custodian for Morgan Stanley, MSAC 2007-NC3 ("First Assignee"). A0000204.

The First Assignment was signed on January 17, 2008, and recorded in the Office of the Recorder of Deeds of New Castle County as Instrument Number 20080206-000730 on February 5, 2008. *Id*. In April 2009, Moss executed a loan modification agreement with the First Assignee ("Modification Agreement"). B251-56.

On April 1, 2010, the First Assignee, assigned the Mortgage to Deutsche Bank ("Second Assignment"). A000205-207. The Second Assignment was recorded in the Office of the Recorder of Deeds of New Castle County as Instrument Number 20100413-0017712 on April 13, 2010. A000205.

III. THE FORECLOSURE ACTION.

On March 9, 2011, Moss's failure to pay resulted in Deutsche Bank filing the Complaint to foreclose on the Mortgage. DI 1. In his Answer, Moss admitted to execution of both the Mortgage and the Modification Agreement. B060. In his first amended Answer, Moss again admitted to entering into the Modification Agreement and requested the Superior Court compel Deutsche Bank to honor the

Modification Agreement, thereby admitting that Deutsche Bank was the counter-party to the Mortgage. B070.

On October 17, 2011, Moss filed the 2011 Motion, wherein he admitted to executing and delivering the Mortgage. B094. Moreover, Moss admitted to modifying the terms of repayment of the Mortgage by way of the Modification Agreement. *Id*. The 2011 Motion was denied on May 16, 2012. DI 56.

IV. THE FIRST APPEAL.

On August 14, 2013, Moss filed the 2013 Motion. DI 62. Despite Moss's prior admissions in the 2011 Motion that he and Deutsche Bank had entered into the Modification Agreement, Moss claimed in his 2013 Motion that Deutsche Bank was not the real party in interest, and thus was not a proper party to pursue the foreclosure action. B099. On December 18, 2013, the Superior Court entered the 2013 Order granting summary judgment to Moss. DI 91.

Deutsche Bank appealed the 2013 Order on the grounds that the Superior Court had erred in determining that Deutsche Bank was not the holder of the Mortgage and Note. Deutsche Bank also argued that the Superior Court failed to consider the argument that Moss lacked standing to challenge the assignment of the Mortgage. This Court granted the appeal by reversing the Superior Court's decision, and on June 24, 2014, entered the Remand Order. *Moss*, 99 A.3d at 226 ("The Superior Court entered summary judgment in favor of Moss without

considering these arguments, which are not makeweight and have support in case law from other jurisdictions and even the Superior Court itself.").

V. THE ORDER ON APPEAL.

Following remand to the Superior Court, the parties engaged in additional discovery, and on August 14, 2015, Deutsche Bank filed the 2015 Motion. DI 118. On November 10, 2015, while the 2015 Motion was pending, Moss filed the Moss Cross Motion. DI 133. The Superior Court considered the Moss Cross Motion as a motion for summary judgment in accordance with Superior Court Civil Rule 56. DI 140.

On January 26, 2016, the Superior Court entered the 2016 Order, granting the 2015 Motion, denying the Moss Cross Motion, and entering judgment on the Complaint and Counterclaims in favor of Deutsche Bank and against Moss. DI 148; 2016 Del. Super. LEXIS 32. In the 2016 Order, the Superior Court specifically concluded that Deutsche Bank has standing to bring the foreclosure action as the holder of the Mortgage by assignment. *Id.* The Superior Court also expressly rejected any effort by Moss to assert a defense based on the authenticity of the Note. *Id.* at *10 ("*Scire facias sur* mortgage actions are *in rem* proceedings and are based upon the mortgage, not the note. Therefore, because this is an *in rem* proceeding to foreclose on the Mortgage and not an *in personam* action, Moss' arguments regarding the Note's authenticity are without merit.").

Moss commenced this Second Appeal on February 4, 2016. Moss does not appeal the denial of the Moss Cross Motion or the entry of judgment in favor of Deutsche Bank and against Moss on the Counterclaims. Instead, Moss purports only to challenge the Superior Court's entry of summary judgment on the Complaint in favor of Deutsche Bank. *See* App. Op. Br. at 3 ("[T]he Superior Court granted Deutsche Bank's motion for summary judgment. It is from that decision that Moss takes this appeal.").

ARGUMENT

I. DEUTSCHE HAS STANDING TO BRING THIS *SCIRE FACIAS SUR* MORTGAGE ACTION.

A. QUESTIONS PRESENTED.

Did the Superior Court err in holding that Deutsche Bank has standing to bring this *in rem scire facias sur* mortgage proceeding? The issue was presented in the Deutsche Bank Summary Judgment Motion, at page 4, and in the Reply in support of that motion, at pages 1-2.

B. STANDARD OF REVIEW.

This Court reviews an appeal of a Superior Court's decision on summary judgment *de novo*. *State Farm Mut. Auto. Ins., Co. v. Davis*, 80 A.3d 628, 632 (Del. 2013); *GMG Capital Investments, LLC v. Athenian Venture Partners, L.P.*, 36 A.3d 776, 779 (Del. 2012). This review extends to both "the facts and the law in order to determine whether or not the undisputed facts entitled the movant to judgment as a matter of law." *State Farm Mut. Auto. Ins., Co. v. Davis*, 80 A.3d at 632 (internal citation omitted). The Court may consider the entire record, including the pleadings and any issues such pleadings may raise, affidavits and other evidence in the record, as well as the trial court's order and opinion. *Pike Creek Chiropractic Ctr. v. Robinson*, 637 A.2d 418, 420 (Del. 1994).

C. MERITS OF ARGUMENT.

This is a *scire facias sur* mortgage action. Pursuant to Delaware law, such an action is an *in rem* proceeding used to foreclose a mortgage. *JPMorgan Chase Bank v. Hopkins*, 2013 Del. Super. LEXIS 401 (Del. Super. Ct. Sept. 12, 2013). To obtain judgment on a *scire facias sur* complaint, the plaintiff needs to show (i) a right to payment pursuant to the mortgage; and (ii) that the defendant defaulted by failing to make payments thereon when due. *See CitiMortgage, Inc. v. Kine*, 2011 Del. Super. LEXIS 543 (Del. Super. Ct. Nov. 1, 2011) (noting that summary judgment on *scire facias* complaint appropriate where parties did not dispute existence of mortgage or borrower's default); *Wells Fargo Bank, NA v. Nickel*, 2011 Del. Super. LEXIS 544 (Del. Super. Ct. Nov. 18, 2011) (same); *see also* 10 Del. C. § 5062D(b)(2) (requiring that to foreclose on a *scire facias sur* mortgage, Delaware requires only that a foreclosure complaint include "[a] statement of the debt remaining due and payable supported by an affidavit of the plaintiff or the mortgage holder or the agent or attorney of the plaintiff or mortgage holder.").

1. Moss Has Been in Default for Over Six Years.

In this case, there is no dispute that Moss defaulted on the Mortgage by failing to make payments for over six years. *See Moss*, 99 A.3d at 226 ("[T]here is no dispute that [Moss] owes a substantial sum of money to whoever now owns the mortgage loan and note."). Accordingly, in order to obtain judgment on its

Complaint, Deutsche Bank need only show that it has a right to payment under the Mortgage.

2. Deutsche Bank Is the Beneficiary of the Mortgage and Thus Has Standing to Enforce the Mortgage.

(a) Because Deutsche Bank Holds the Mortgage, It Has Standing to Enforce the Mortgage.

On this point there is likewise no dispute: Deutsche Bank is the proper party to enforce the Mortgage. The record demonstrates that Deutsche Bank is the mortgagee of record through the First and Second Assignments, each of which is recorded with the Recorder of Deeds for New Castle County. Deutsche Bank is therefore entitled to enforce the Mortgage in the instant foreclosure action.

(i) Deutsche may enforce the Mortgage because it holds the Note.

To foreclose on a *scire facias sur* mortgage, Delaware requires only that a foreclosure complaint include "[a] statement of the debt remaining due and payable supported by an affidavit of the plaintiff or the mortgage holder or the agent or attorney of the plaintiff or mortgage holder." 10 Del. C. § 5062D(b)(2). The statute does not require a plaintiff to prove that that it is the owner of the Note, only the holder. *Id*. 6 Del. C. § 3-301; *see also HSBC Mortgage Corporation (USA) v. Bendfeldt*, 2014 Del. Super. LEXIS 44 (Del. Super. Feb. 4, 2014) (holding "the Court will not address Defendants' challenge to Plaintiff's standing based on the Note, because *scire facias sur* mortgage actions are based upon the

mortgage, not the Note."). Thus, proving ownership of a note is not required in a Delaware foreclosure action. *See Davis v. 913 North Market Street Partnership*, 1996 Del. Super. LEXIS 579 (Del. Super. Ct. Dec. 12, 1996), *aff'd.*, 1997 Del. LEXIS 334 (Del. Sept. 19, 1997) (the note is a separate matter and is not part of a foreclosure action on the mortgage).

The Complaint was filed in March 2011. At that time, Deutsche Bank was holder of the Note indorsed in blank, and it prosecuted this case in that capacity. B214-219. Deutsche Bank was still the holder of the Note when an Allonge indorsing the Note to Deutsche Bank was prepared in February 2012. B219. The execution of the Allonge confirmed the same interest in the Note Deutsche Bank had maintained since it became its holder. *See id.*

Moss's arguments that Deutsche Bank is not entitled to summary judgment because it has not demonstrated that it is the owner of the Note is without support in Delaware law. By so arguing, Moss asks this Court to impose an obligation on Deutsche Bank that is not required under Delaware law: that Deutsche Bank establish it owns the Note before Deutsche Bank can foreclose. Delaware law imposes no such requirement. Notwithstanding that fact, Deutsche Bank has, in fact, shown that it is the holder of the Note, which is all that is required by 6 Del. C. § 3-301; *Bendfeldt*, 2014 Del. Super. LEXIS 44.

(ii) Moss's arguments regarding the authenticity of the Note are completely unsubstantiated.

Moss contends that Deutsche Bank's reliance on its status as a holder of the Note during the First Appeal calls into question the authenticity of the Note. That argument is arrant nonsense. Deutsche Bank did not rely on the Allonge when Moss originally obtained summary judgment in 2013. During the First Appeal, Deutsche Bank argued the Note was indorsed in blank because the Note was, in fact, endorsed in blank. B218. Moreover, Deutsche Bank did not – and could not – introduce the Allonge as part of the First Appeal since it was not part of the record below.[8]

Upon reversal and remand, the Allonge was provided to Moss.[9] Despite Moss's unsupported allegations to the contrary, the Allonge was never purposefully withheld, and was not conjured merely to fill some apocryphal hole in Deutsche Bank's case or its summary judgment argument. There was no hole. Deutsche Bank, as the holder of the Note, was entitled to enforce the Note. Moss's

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[8] *See* Del. Supr. Ct. R. 9(a) (requiring that the record on appeal consist of original papers or exhibits presented to the trial court); *see also Chrysler Corp. v. Chaplake Holdings, Ltd.*, 822 A.2d 1024 (Del. 2003) (recognizing that "it is a basic tenet of appellate practice that an appellate court reviews only matters considered in the first instance by the trial court."). Even if Deutsche Bank could have introduced or relied upon the Allonge before this Court during the First Appeal, it would have been in the exact same position and holding the same right to enforce the Note.

[9] *See* Oral Deposition of Eugene Moss dated January 14, 2015 at 60:5-9, B166.

unsupported suggestion that the Allonge was either purposefully withheld or fabricated is wholly without merit.

Moss was afforded an opportunity to inspect the Note throughout this case. *See, e.g.* Tr. of Hearing dated August 2, 2015, at 26:19 through 28:4, at B128-30. However, Moss failed to do so.

(b) New Century's Bankruptcy Is Irrelevant to Deutsche Bank's Standing to Enforce the Mortgage.

The Mortgage specifically mortgages, grants, and conveys the Property to MERS, solely as nominee for New Century, as lender, and its successors and assigns. *See* A000016. Thus, upon execution, before New Century entered bankruptcy, MERS held the beneficial interest in the Mortgage, along with the right to act on behalf of the lender and its successors and assigns, and was empowered to assign the Mortgage.

New Century filed for bankruptcy in April 2007, three months after the Mortgage was signed. Notwithstanding the bankruptcy, MERS remained the beneficial interest holder of the Mortgage. Thereafter, MERS executed the First Assignment. *See* A204.

MERS's authority to assign the Mortgage was not affected by New Century's bankruptcy. *See In re Marron*, 455 B.R. 1, 8 (Bankr. D. Mass. 2011) ("A lender's bankruptcy does not affect the ability of MERS to assign a mortgage . . . because the language of the mortgage [ ] stated that MERS was acting as

nominee for the lender and its 'successors and assigns' . . . [B]ankruptcy and dissolution would not prevent the lender's successors and assigns from seeking transfer of the mortgage from MERS."); *Camat v. Fed. Nat'l Mortg. Ass'n*, 2012 U.S. Dist. LEXIS 87667, at *7 (D. Haw. June 22, 2012) (holding homeowner's contention that a lender's nominee's assignment of a mortgage was invalid because the assignment occurred while lender was in bankruptcy was without a factual basis. The lender's "bankruptcy did not on its own affect the validity of the assignment. . . [the lender] transferred its beneficial interest in the mortgage to [the nominee] before instituting the bankruptcy proceedings."). Therefore, MERS properly executed the First Assignment pursuant to its authority under the Mortgage. New Century's bankruptcy had no effect on that or any other assignment.

3. Moss Lacks Standing to Contest the Validity of the Assignments.

Moss cannot challenge the validity of the Mortgage Assignment from MERS to the First Assignee because Moss is not a party to, nor a third-party beneficiary under, the Assignments. Previous decisions of this Court and other Delaware courts have found that only persons who are parties to, or third-party beneficiaries under, a contract have rights relating to the contract.[10] In order to qualify as a

[10] *See Browne v. Robb*, 583 A.2d 949, 954 (Del. 1990); *MetCap Securities, LLC v. Pearl Senior Care, Inc.*, 2007 Del. Ch. LEXIS 65, at *7 (Del. Ch. May 16, 2007);

third-party beneficiary, a party must be an intended, and not an incidental, beneficiary. *MetCap Securities,* 2007 Del. Ch. LEXIS 65, at *7. If a third-party "happens to benefit from the performance of the contract either indirectly or coincidentally, such third person has no rights under the contract." *Delmar News, Inc. v. Jacobs Oil Co.*, 584 A.2d 531,534 (Del. Super. Ct. 1990) (citing *Insituform of North America v. Chandler*, 534 A.2d 257 (Del. Ch. 1987)). Moss was not an intended beneficiary of the Mortgage assignments.

More specifically, courts in and outside of Delaware have expressly held that a mortgagee lacks the standing to challenge the validity of an assignment of a mortgage by a mortgagor, as the mortgagee is not a party to the assignment. *CitiMortgage, Inc. v. Bishop,* 2013 Del. Super. LEXIS 95, at *4 (Del. Super. Ct. March 4, 2013); *Branch Banking & Trust Co. v. Eid*, 2013 Del. Super. LEXIS 264, at *11 (Del. Super. Ct. June 13, 2013); *In re Perretta*, 2011 Bankr. LEXIS 4913 (Bankr. D. R.I. Dec. 16, 2011).

Here, Moss is not an intended beneficiary of any of the assignments. Because Moss has no legally cognizable interest in the assignments, he is not in any position to assert a challenge thereto.

NAMA Holdings, LLC v. Related World Market Center, LLC, 922 A.2d 417, 434 (Del. Ch. 2007); *Thomas v. Harford Mut. Ins. Co.*, 2003 Del. Super. LEXIS 36, at *3 (Del. Super. Ct. Jan. 31, 2003).

II. MOSS'S CHALLENGE TO THE MORTGAGE IS JUDICIALLY ESTOPPED BY HIS PRIOR ADMISSION THAT DEUTSCHE BANK IS THE OWNER OF THE MORTGAGE AND NOTE.

A. QUESTIONS PRESENTED.

Did the Superior Court err in holding that Moss's challenge to Deutsche Bank's foreclosure on the Mortgage was judicially estopped by Moss's prior admission in this case that Deutsche Bank is the Owner of the Mortgage and Note? The issue was presented in Deutsche Bank's Reply in Support of the Deutsche Bank Summary Judgment Motion, at page 3.

B. STANDARD OF REVIEW.

This Court reviews an appeal of a Superior Court's determination of judicial estoppel *de novo*. *La Grange Cmtys., LLC v. Glasgow, LLC*, 74 A.3d 653 (Del. 2013) ("The determination of judicial estoppel is a question of law and is reviewed *de novo*.").

C. MERITS OF ARGUMENT.

1. Moss's Judicial Admissions Barred Him from Challenging Deutsche Bank's Standing To Enforce the Mortgage.

Based on the First and Second Assignments, the Superior Court concluded that Deutsche Bank has standing to foreclose on the Mortgage. *Moss*, 2016 Del. Super. LEXIS 32 at *6-7. As an ancillary point, the Superior Court also held that "any right Moss may have had to challenge the assignment of the Mortgage is judicially estopped," *id.* at *7, because "Moss originally admitted that Deutsche

Bank was the owner of the Mortgage and Note and changed position throughout the proceedings." Moss argues that the Superior Court's application of the judicial estoppel doctrine was inappropriate because the Superior Court never adopted Moss's admission in an earlier decision. Whether or not Moss is correct (and he is not), the arguments above are dispositive on this Second Appeal.

The doctrine of judicial estoppel "is intended to preclude a party from arguing a position that is inconsistent with a position taken in the same or earlier related legal proceeding." *La Grange*, 74 A.3d at 653 (citation omitted). The purpose of the doctrine is to protect the integrity of the judicial proceedings. *Id.* The two requirements of judicial estoppel are that a litigant advances "an argument that contradicts a position previously taken by that same litigant, and that the Court was persuaded to accept as the basis for its ruling."

Moss does not dispute that in his Answer, amended Answer, second amended Answer, and 2011 Summary Judgment Motion, he admitted to the validity of the First Assignment and Deutsche Bank's standing to enforce the Mortgage. B060; B070; B080; *see, also,* B094. (admitting that "[o]n April 14, 2009 loan was modified of said mortgage with New Century Mortgage which was accepted and agreed upon by Defendant and Plaintiff"). He does not dispute that he asked the Superior Court to enforce a loan modification that he entered with Deutsche Bank. *Id*. Thus, Moss admitted in documents filed in the Superior Court

that Deutsche Bank was the counter-party to the Mortgage. He further admitted that he had negotiated modified mortgage terms with Deutsche Bank and had entered into the Modification Agreement. *Id*.

These admissions constitute judicial admissions under Delaware law. Judicial admissions are "[v]oluntary and knowing concessions of fact made by a party during judicial proceedings (*e.g.*, statements contained in pleadings, stipulations, depositions, or testimony; responses to requests for admissions; counsel's statements to the court)." *Merritt v. United Parcel Serv.*, 956 A.2d 1196, 1201 (Del. 2008). Such admissions "are limited to factual matters in issue and not to statements of legal theories or conceptions." *Levinson v. Del. Comp. Rating Bureau, Inc.*, 616 A.2d 1182, 1186 (Del. 1992) (citations omitted).

Judicial admissions "are traditionally considered conclusive and binding both upon the party against whom they operate, and upon the court." *Merritt*, 956 A.2d at 1201–02. A judicial admission is "not merely another layer of evidence, upon which the ... court can superimpose its own assessment of weight and validity. It is, to the contrary, an unassailable statement of fact that narrows the triable issues in the case." *Id*. at 1202 n.18 (quoting *Airco Indus. Gases, Inc. Div. of the BOC Gp., Inc. v. Teamsters Health & Welfare Pension Fund of Phila. & Vicinity*, 850 F.2d 1028, 1037 (3d Cir. 1988)); *see also*, *Ervin v. Vesnaver*, 2000 Del. Super. LEXIS 312, at *2 (Del. Super. Ct. June 20, 2000) ("Judicial admissions

are not a means of evidence but a waiver of all controversy and therefore are a limitation on the issues.").

Moss is correct that the Superior Court did not expressly adopt his earlier admission as a basis for a prior ruling. But Deutsche Bank never asserted that it did. Rather, Deutsche Bank argued that Moss's admissions be considered conclusive and binding upon the parties and the Superior Court as *judicial admissions*. *See* DI 139; B265.

Moss's admission that he and Deutsche Bank entered into the Modification Agreement and his request to the Superior Court to enforce the Modification Agreement against Deutsche Bank was an admission that Deutsche Bank was the proper counter-party to the Mortgage. Moss also admitted to Deutsche Bank's ability to enforce the underlying obligations by entering into the Modification Agreement and by making payments thereon. B096-97. Those admissions removed the issue of whether Deutsche Bank had standing to enforce the Mortgage from determination by the Superior Court. Moss's admissions are binding upon Moss and were thus properly considered by the Superior Court.

2. Even if Moss Had Not Previously Admitted that Deutsche Bank was the Owner of the Note and Mortgage, Deutsche Bank Would Still Be Entitled to Summary Judgment.

This 2016 Order should not be reversed even if the Superior Court is found to have erred in finding Moss's judicial admissions to be binding, such error is

harmless and would not otherwise alter the Superior Court's decision. *See*, *e.g.*, *Gaskill v. BesTemps*, 86 A.3d 1118 (Del. 2014) (refusing to reverse decision of Superior Court where alleged error below was harmless and there was substantial evidence in the record demonstrating alternative basis for same result). Here, the Superior Court's conclusion that Moss's judicial admissions were binding– and thus Deutsche Bank had standing to foreclose the mortgage – was *in addition to* its conclusion that Deutsche Bank had already affirmatively established standing.

Even without Moss's prior admissions, Deutsche Bank had established its standing to foreclose the Mortgage. Moreover, whether or not Moss is bound by his judicial admissions, Moss lacked standing to challenge the assignments. Because the record contained significant other evidence establishing Deutsche Bank's standing to foreclose the Mortgage, the Superior Court's judgment should be affirmed.

CONCLUSION

For the foregoing reasons, Deutsche Bank respectfully requests that the Superior Court's 2016 Summary Judgment Order be affirmed.

Dated: May 20, 2016

DUANE MORRIS LLP

/s/ Jarret P. Hitchings

Jarret P. Hitchings (No. 5564)
222 Delaware Avenue, Suite 1600
Wilmington, DE 19801-1659
Tel: (302) 657-4900
Fax: (302) 657-4901
jphitchings@duanemorris.com

Brett L. Messinger (*pro hac vice*)
30 South 17th Street
Philadelphia, PA 19103-4196
Tel: (215) 979-1508
Fax: (215) 979-1020
blmessinger@duanemorris.com

Attorneys for Plaintiff-Below, Appellee