FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2010 CP-10 5825

Selene RMOF REO Acquisitions LLC

PLAINTIFF(S)

Furmanchik

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

FILED
2014 MAR 28 AM 9:16
JULIE ARMSTRONG
CLERK OF COURT

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : Upon review of Defendant's 59(e) motion, it is respectfully denied.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:
N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

8062
Judge Code

3/20/2014
Date

RECEIVED
JUN 16 2014
SC Court of Appeals

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first-class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Selene RMOF REO Acquisitions LLC Plaintiff, vs. MELISSA FURMANCHIK; MASONBOROUGH AT PARK WEST ASSOCIATION, INC.; WELLS FARGO BANK, N.A. Defendant.	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2010-CP-10-5825 **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**

Plaintiff's Attorney:	Defendant's Attorney:
Jason Wyman, Bar No. _____ Address: P.O. Box 100200 Cola. S.C. 29202 Phone: _____Fax _____ E-mail: _____Other: _____	MARY LEIGH ARNOLD, P.A., Bar No. 00419 Address: 749 Johnnie Dodds Blvd., Suite B Mount Pleasant, S.C. Phone: 843-971-6053 Fax843-971-6055 E-mail: _____Other: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: _____
Estimated Time Needed: _____ Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ 2/20/2014
Signature of Attorney for ☐ Plaintiff /☒ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $_____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____

☐ MOTION FEE COLLECTED: $ _____

☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2010-10-5825
	)	
Selene RMOF REO Acquisition, LLC	)	
	)	
Plaintiff,	)	MOTION FOR RECONSIDERATION
	)	AND VACATE
v.	)	
	)	
Melissa Furmanchik; Masonborough At Park West Association, Inc.; Wells Fargo Bank, N.A.:	)	
	)	
Defendant(s).	)	

TO: THE HONORABLE MIKELL R. SCARBOROUGH, MASTER-IN-EQUITY, CHARLESTON COUNTY AND ROGERS TOWNSEND THOMPSON, LLP, ATTORNEYS FOR PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, Melissa Furmanchik (hereinafter "Defendant"), by and through her undersigned attorney will move before the Master-In-Equity for Charleston County, at chambers, Charleston County Courthouse, Charleston, South Carolina, at such place and time as the court may appoint, in order for the Court to reconsider that certain Order of Foreclosure, which appears by examination of the public record to have been filed on February 7, 2014 (hereinafter "Order"), but not received until February 12, 2014. Defendant makes this motion pursuant all applicable Rules of Civil Procedure including but not limited to Rules 7, 50, 52, 59, 60 and 71, SCRCP. The basis for said motion is as follows:

1. On June 20, 2013 a hearing was held before this Court. On July 11, 2013, this Court *sua sponte* issued an Order stating "after trial and review of defendant's Rule 59e, this court finds that the matter should be reopened for the express purpose of taking additional testimony with regards to the note and subsequent modification agreement. This is done

pursuant to Rule 50(d), SCRCP. This matter is to be reset for Monday, August 12 at 10:00 a.m." This Court improperly relied on Rule 50(d), SCRCP. First no motion was made by Plaintiff pursuant to Rule 50, SCRCP. Second, Rule 50(d), SCRCP provides for a judgment notwithstanding the verdict. In order for Rule 50(d), SCRCP to applicable here the Court would have had to rule in favor of the Defendant at the time of the June 20, 2013 hearing which it did not. Third, even if it were appropriate for this Court to act *sua sponte* (which Defendant contends it was not), the Court had to act within ten (10) days of the June 20, 2013 hearing. See *State v. Dicapua*, 680 S.E.2d 292, 383 S.C. 394 (S.C. 2009)(citing *Southern Railway Co. v. Coltex, Inc.*, 285 S.C. 213, 214, 329 S.E.2d 736, 736 (1985) (" The sole issue is whether a trial judge *ex mero motu* can grant a new trial on a ground not raised by a party. We hold he cannot.")): *See also*, *Heins v. Heins,* 543 S.E.2d 224, 344 S.C. 146 (Ct. App. 2001)(a Family Court judge does not have the authority to alter or amend a judgment, *sua sponte,* once the judgment is more than 10-days-old). Lastly, and with all due respect to this Court by the Court on its own accord providing the Plaintiff with an opportunity to correct evidentiary issues and present additional evidence after it had closed its case, remove itself from being a neutral and placed itself in the role of an advocate on behalf of Plaintiff. This Court should not have provided for a new hearing for the benefit of Plaintiff to present additional evidence and to correct evidentiary issues presented at the time of the hearing, when Plaintiff had not sought that relief. This Court should have granted judgment in favor of Defendant due to lack of evidence and proof.

2. Plaintiff failed to establish the proper foundation for the introduction of a single exhibit it offered into evidence through Plaintiff's witness Mamie Clark. (Plaintiff's Exhibit 1 Note (First); Exhibit 2 Mortgage; Exhibits 3, 4, 5 and 6, Assignment of Mortgages; Exhibit 7

payment history, Exhibit 8, Wells Fargo Demand letter; Exhibit 9 Judgment Figures; Exhibit 2A Modification Agreement; Exhibit 2B exhibits to "Exhibit 2A" including a Second Note, Fixed/Adjustable Rate Rider, Addendum to Note for Interest Only Payments, and Interest Only Payment Rider; and Exhibit 2C which is a combination of Exhibits 2A and 2B)

Ms. Clark is an employee of Selene Finance, L. P. and holds the job title of Contested Default Case Manager. (Tr. P. 7). Ms. Clark testified she was authorized to testify on behalf of her company (Tr. P. 8), a company which is different from the named Plaintiff, Selence RMOF REO Acquisitions, LLC. (Tr. P. 9). Ms. Clark further testified as follows: she was not an employee of the originally named Plaintiff, Wachovia Mortgage Corporation (Tr. P. 32); she is not an employee of the substituted Plaintiff, Selence RMOF REO Acquisitions, LLC. (Tr. 33.); the allonge presented was not affixed to the Note offered as an exhibit (Tr. P. 33); the allonge was not prepared by her or anyone at Selene (Tr. P. 37); she was not the custodian of records for Selene Finance L. P. (Tr. P. 34, ln 4-16); the current owner of the note and mortgage was Selene RMOF REO Acquisition, LLC (Tr. P. 26); that she did not know the person who signed the note David Furmanchik nor could she identify his signature (Tr. P. 35); the Note presented, on the fifth page, has several endorsements one of which is marked void (Tr. P. 35); a second endorsement is marked canceled and she has no knowledge as to why it is marked canceled (Tr. P. 36); she had no knowledge or documentation that showed how the Note came into Selene's possession (Tr. P. 36); there is no endorsement on the Note from MERS (Tr. P. 38); there is no endorsement on the Note to Selene Finance L.P. (Tr. P. 38); there is no endorsement on the Note to SRMOF 2009-1 Trust (Tr. P. 38); there is no endorsement on the Note to

Selene RMOF REO Acquisitions, LLC (Tr. P. 38); that the Note identified as Exhibit 1 does not provide an interest rate (Tr. P. 39); that no interest would be owed under the Note identified as Exhibit 1 due to zero being specified as the interest rate (Tr. P. 41); the principle amount due is $464,000 (Tr. P. 30); late charges assessed were $1,232.42 (Tr. P. 30); interest from December 1, 2009 through June 20, 2013 is $105,069.78 (Tr. P. 30); total tax charges are $3,932.21 (Tr. P. 31); flood insurance chargers were $11,727.77 (Tr. P. 31); property inspections totaled $169 (Tr. P. 31); charges for BPO's and appraisals were $200.00 (Tr. P. 31)

The sequential transfers of the Note and Mortgage admitted into evidence are illustrated below:

NOTE	**MORTGAGE**
Wachovia Mortgage Corp.	MERS
↓	↓
Wachovia Bank, N.A.	Wachovia Mortgage
↓	↓
Blank	Selene Finance LP
	↓
	SRMOF 2009-1 Trust
	↓
	SELENE RMOF REO
	Acquisition, LLC

At time of the second hearing held on August 12, 2013, Ms. Clark was the only offered witness. Ms. Clark testified that Exhibit 2A was a mortgage modification dated August 31, 2006 (Tr. Vol. II, p. 9). She further testified that Exhibit 2C was a combination of Exhibits 2A and 2B. (Tr. Vol. II P. 13); that Mr. Furmanchik signed the mortgage modification but Mrs. Furmanchik had not (Tr. Vol. II P. 14-15); that the document starting on Page 265 is identified as and entitled as a Fixed Adjustable Rate Note which is not signed by Mrs. Furmanchik (Tr. Vol. II, P. 15); that the Fixed Adjustable Rate Note is a brand new note (Tr. Vol. II, P. 15-16); the new Fixed Adjustable Rate Note has no allonge (Tr. Vol. II, p. 16); the new Fixed Adjustable Rate Note has no endorsement (Tr. Vol. II, p. 16); and that Wachovia never endorsed or assigned the new Fixed Adjustable Rate Note to any other entity. (Tr. Vol. II. P. 16). This Court erred in admitting Plaintiff's exhibits over Defendant's objections.

A number of the South Carolina Rules of Evidence are relevant to explaining the foundation which should have been required to be laid down by Plaintiff's witness prior to testifying as to Plaintiff's Exhibits. Rule 602, SCRE, states: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony." Rule 803(6), SCRE, states "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness,

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Rule 901, SCRE, states "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

In this case Plaintiff witness Plaintiff's witness did not testify in such a manner to lay a proper foundation for the admission of Plaintiff's Exhibits. The witness offered to testify, testified she was an employee of Selene Finance, LP. The witness acknowledged she was not an employee of the presently named Plaintiff, Wachovia, or Wells Fargo. The witnessed acknowledged the Note and Mortgage were originated by Wachovia Mortgage Corporation. The witness testified that that the signature page of the Note contains several endorsements, such of which are marked void and/or cancelled, but she did not know why the endorsements were marked void and/or cancel. The witness testified that the allonge which Plaintiff alleges grants it title to the Note is not affixed to the Note. The witness testified that the documents in question were not created by Selene Finance, LP or Plaintiff. The witness testified she had no evidence or testimony that established the chain of title of Note. She offered no testimony which would establish how or when Plaintiff became in possession of the Note. Upon direct examination the witness testified that she is a default case manager whose duties include to "review loans where there are differences to attempt to resolve those issues" and testify at trials. Upon cross-examination the witness testified that see is not the custodian of records for Selene Finance, LP, then changes to testimony to state that her duties and functions do be the custodian of records for the documents in question. Plaintiff failed to establish the witness had the required personal knowledge as required by Rule 602, SCRE to authenticate the documents. See *Hundley ex rel. Hundley v.*

Rite Aid of South Carolina Inc., 339 S.C. 285, 529 S.E. 2d 45 (Ct. App. 2000)("generally under Rule 602, SCRE [a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.")

Plaintiff failed to a lay a proper foundation for the documents to be considered business records pursuant to Rule 803(6), SCRE, or that Plaintiff's witness could testify a custodian of records or other qualified witness pursuant to 803(6), SCRE. "A business record without evidence about the manner in which it is prepared or the source of its information does not meet the requirements in S.C. Code Section 19-5-510 or Rule 803(6), SCRE. Business records entries must have been made at or near the time of the act to which they relate; the purpose of this mandate is to aid in establishing that the record was honestly and fairly kept..." *State v. Rice*, 375 S.C. 302, 652 S.E. 2d 409 (Ct. App. 2007). The Court erred in admitting the exhibits offered by Plaintiff in contradiction to the provisions of Rule 803, SCRE. Neither a proper foundation nor an exception to hearsay was established by Plaintiff any document entered into evidence. Plaintiff's witness admitted that neither the Note nor Mortgage was originated by her employer or the entity for which she was testifying. (Exhibits 1 and 2). She had no knowledge as the assignments entered into evidence. (Exhibits 3, 4, 5 and 6). She offered no evidence of how the records were created or maintained, the source of the information, where maintained or when they were created. She certainly offered not a single shred of evidence that allowed for the admission of documents clearly created by Wells Fargo an entity with which she testified she had absolutely no relationship. (Exhibits 8 (Wells Fargo Demand letter) and 9 (Wells Fargo Account History)).The Court erred by admitting these documents into evidence.

The Court further erred in allowing Exhibit 2C into evidence at the continuation

hearing or reopening hearing, but assuming for the sake of argument that Plaintiff did seek to admit the Exhibit 2C through evidence of a proper witness at the August 12, 2013 hearing, said evidence should not have been admitted because Plaintiff did not produce the original. Rule 1002, SCRE, states "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." Rule 1003, SCRE, states "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." In this case both a genuine question as to authenticity of the original and circumstance that it would be unfair to admit the duplicate in lieu of the original are both present. The Court erred by admitting a Modification Agreement which Plaintiff's witness did not testify to in the original hearing. Further the Court erred by admitting a second note which is separate and distinct from the first note which certainly raises issues as to its authenticity.

Finally as the court noted in the August hearing "Did we go into the document 2B then? That was the one in issue? . . . 2B is the one I let in and we never did talk about. That's the only reason I reopened this thing, is to talk about 2B." However, then the Court asks "Is that the original?" Plaintiff states that it is not, saying "The original we're waiting on in West Columbia." Here thee are clearly questions as to authenticity, it would be highly prejudicial to accept a duplicate, Plaintiff was well aware the documents were the remaining issue, and yet with over a month in between the two hearing Plaintiff failed to present the original documents at the second hearing.

This Court erred by relying on the case of *Midfirst Bank vs. Oklahoma*

Savings and Loan Association, 893 F. Supp. 1304 (D.S.C. 1944). A district court case decision has no binding authority on this Court. The cases of *High v. High*, 389 S.C. 226, 697 S.E. 2d. 690 (Ct. App. 2010); and State v. *Rice*, 375 S.C. 302, 652 S.E. 2d 409 (Ct. App. 2007) are persuasive and binding. Clearly Plaintiff did not establish the elements set forth in *High* or *Rice* and it was an abuse of discretion for this Court to enter the documents into evidence.

3. Court erred in determining Plaintiff had a right to enforce the negotiable instrument and had standing as the real party in interest. A holder is a person in possession of instrument drawn, issued, transferred, or indorsed to him or to his order or to bearer or in blank". S.C. Code An. §36-1-201(20)(2003). "However, possession is not necessarily sufficient to make one a holder. The payee is always a holder if the payee has possession. Whether other persons qualify as holder depends upon whether the instrument initially is payable to order or payable to bearer, and whether the instrument has been endorsed. Accordingly, a third party must prove both physical possession and the right to enforcement either through either a proper indorsement or transfer by negotiation. *See Bank of New York vs. Romero*, Op. No. _____ (Feb. 13, 2013, S.Ct. N. M.)(see attached opinion).

The Note presented as Exhibit "1" was initially made in favor of Wachovia Mortgage Corporation. As testified by Plaintiff's witness, the last page of the Note contains several endorsements which are either cancelled or marked void. The one endorsement not altered is undated and from Wachovia Mortgage to Wachovia Bank, N.A. (n/k/a Wells Fargo). Accompanying the Note is an Allonge. The Allonge is not affixed to the Note. No testimony was offered that it was to be affixed. The Allonge purports to transfer the Note in

blank from Wells Fargo. No other endorsements or allonge exist. The Note does not have sufficient endorsements to accomplish transfer to the now named Plaintiff. The evidence is completely lacking to establish Plaintiff is the holder of the Note. The Court erred in determining Plaintiff is the holder.

Additionally the Modification submitted at the time of the second hearing contains a complete Fixed Adjustable Rate Note. There is no endorsement on this document. Thus, to Court erred in allowing judgment on a note that there is not one iota of evidence that establishes it was endorsed to anyone much less the Plaintiff.

4. Where a negotiable note is secured by mortgage, the note and mortgage are inseparable, and the assignment of the note carries the mortgage with it, while an assignment of the mortgage alone is a nullity. *Carpenter v. Longan*, 83 U.S. 271, 21 L. Ed. 313, (1872); *In re Leisure Time Sports, Inc.* 194 B.R. 859, 861 (9th Cir. 1996) (stating that "[a] security interest cannot exist, much less be transferred, independent from the obligation which it secures" and that, "[i]f the debt is not transferred, neither is the security interest"); *Kelley v. Upshaw*, 39 Cal. 2d 179, 192 (1952) (stating that assigning only the deed without a transfer of the promissory note is completely ineffective); see also Restatement (3d) of Property (Mortgages) § 5.4 (stating that "[a] mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the *obligation* that the mortgage secures"); *South Carolina Nat. Bank v. Halter*, 293 S.C. 121, 359 S.E.2d 74 (S.C.App. 1987) (The assignment of a mortgage as distinct from the debt it secures is nugatory and confers no rights upon the transferee, *Hahn v. Smith,* 157 S.C. 157, 154 S.E. 112 (1930), absent some indication that the parties also intended to transfer the debt. 59 C.J.S. Mortgages Section 359 (1949)).

The transfer of the Note and Mortgage do not take the same path. The independent transfers of the Mortgage are nugatory. The Plaintiff here has not rights to enforce the Mortgage and lacks standing. The Court erred in determining the now named Plaintiff has the right to enforce the Note and Mortgage.

Based on the foregoing, which is subject to amendment once a final Oder of Foreclosure is presented, the within action should be dismissed.

PLEASE BE PRESENT TO DEFEND IF SO MINDED.

MARY LEIGH ARNOLD, P.A.

Mary Leigh Arnold
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Mount Pleasant, SC 29464
(843) 971-6053
Sammie@,maryamoldlaw.com
Attorney for Defendant

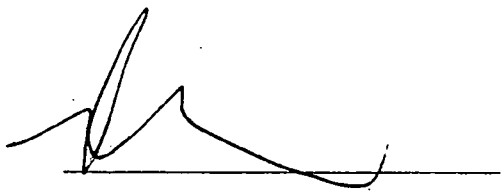
February 20, 2014
Mt. Pleasant, SC

CERTIFICATE OF MAILING

The undersigned, Assistant to Attorney Mary Leigh Arnold, Attorney for Defendant hereby certifies that on the 20 day of February, 2014, she caused a copy of the **MOTION TO RECONSIDER AND VACATE** to be placed in an envelope with first-class postage, prepaid, and mailed to the following:

The Honorable Mikell R. Scarborough
MASTER IN EQUITY- CHARLESTON COUNTY
100 Broad Street, Ste. 266
Charleston, SC 29401

Jason D. Wyman
Rogers Townsend & Thomas, PC
P.O. Box 100200
Columbia, SC 29202



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: _____

Filing Date: February 13, 2014

Docket No. 33,224

BANK OF NEW YORK as Trustee for POPULAR FINANCIAL SERVICES MORTGAGE/PASS THROUGH CERTIFICATE SERIES #2006,

Plaintiff-Respondent,

v.

JOSEPH A. ROMERO and MARY ROMERO, a/k/a MARY O. ROMERO, a/k/a MARIA ROMERO,

Defendants-Petitioners.

ORIGINAL APPEAL ON CERTIORARI
James A. Hall, District Judge

Joshua R. Simms, P.C.
Joshua R. Simms
Albuquerque, NM

Frederick M. Rowe
Daniel Yohalem
Katherine Elizabeth Murray
Santa Fe, NM

for Petitioners

Rose Little Brand & Associates, P.C.
Eraina Marie Edwards
Albuquerque, NM

Severson & Werson
Jan T. Chilton
San Francisco, CA

for Respondents

Gary K. King, Attorney General
Joel Cruz-Esparza, Assistant Attorney General
Karen J. Meyers, Assistant Attorney General
Santa Fe, NM

for Amicus Curiae New Mexico Attorney General

Nancy Ana Garner
Santa Fe, NM

for Amicus Curiae Civic Amici

Rodey, Dickason, Sloan, Akin & Robb, P.A.
Edward R. Ricco
John P. Burton
Albuquerque, NM

James J. White
Ann Arbor, MI

for Amicus Curiae New Mexico Bankers Association

OPINION

DANIELS, Justice.

{1} We granted certiorari to review recurring procedural and substantive issues in home mortgage foreclosure actions. We hold that the Bank of New York did not establish its lawful standing in this case to file a home mortgage foreclosure action. We also hold that a borrower's ability to repay a home mortgage loan is one of the "borrower's circumstances" that lenders and courts must consider in determining compliance with the New Mexico Home Loan Protection Act, NMSA 1978, §§ 58-21A-1 to -14 (2003, as amended through 2009) (the HLPA), which prohibits home mortgage refinancing that does not provide a reasonable, tangible net benefit to the borrower. Finally, we hold that the HLPA is not preempted by federal law. We reverse the Court of Appeals and district court and remand to the district court with instructions to vacate its foreclosure judgment and to dismiss the Bank of New York's foreclosure action for lack of standing.

I. FACTUAL AND PROCEDURAL BACKGROUND

{2} On June 26, 2006, Joseph and Mary Romero signed a promissory note with Equity One, Inc. to borrow $227,240 to refinance their Chimayo home. As security for the loan, the Romeros signed a mortgage contract with the Mortgage Electronic Registration Systems

(MERS), as the nominee for Equity One, pledging their home as collateral for the loan.

{3} The Romeros allege that Equity One cold-called them and urged them to refinance their home for access to their home's equity. The terms of the Equity One loan were not an improvement over their current home loan: Equity One's interest rate was higher (starting at 8.1 percent and increasing to 14 percent compared to 7.71 percent), the Romeros' monthly payments were greater ($1,683.28 compared to $1,256.39), and the loan amount due was greater ($227,240 compared to $176,450). However, the Romeros would receive a cash payout of nearly $43,000, which would cover about $12,000 in new closing costs and provide them with about $30,000 to pay off other debts.

{4} Both parties agree that the Romeros' loan was a no income, no assets loan (NINA) and that documentation of their income was never requested or verified. The Romeros owned a music store in Espanola, New Mexico, and Mr. Romero allegedly told Equity One that the store provided him an income of $5,600 a month. Also known as liar loans because they are based solely on the professed income of the self-employed, NINA loans have since been specifically prohibited in New Mexico by a 2009 amendment to the HLPA and also by federal law. *See* NMSA 1978, § 58-21A-4(C)-(D) (requiring a creditor to document a borrower's ability to repay); 15 U.S.C.A. § 1639c(a)(1) (2010) (requiring creditors to make a reasonable and good-faith effort to determine a borrower's ability to repay); *see also* Pub. L. No. 111-203, § 1411(a)(1), 124 Stat. 2142 (2010) (same). The Romeros stated that they did not read the note or the mortgage contracts thoroughly before signing them, allegedly because of limited time for review, the complexity of the documents, and their own limited education. They admit having signed a document prepared by Equity One reciting that the home loan provided them a "reasonable tangible net benefit" based on the $30,000 cash payout.

{5} The Romeros soon became delinquent on their increased loan payments. On April 1, 2008, a third party—the Bank of New York, identifying itself as a trustee for Popular Financial Services Mortgage—filed a complaint in the First Judicial District Court seeking foreclosure on the Romeros' home and claiming to be the holder of the Romeros' note and mortgage with the right of enforcement.

{6} The Romeros responded by arguing, among other things, that the Bank of New York lacked standing to foreclose because nothing in the complaint established how the Bank of New York was a holder of the note and mortgage contracts the Romeros signed with Equity One. According to the Romeros, Securities and Exchange Commission filings showed that their loan certificate series was once owned by Popular ABS Mortgage and not Popular Financial Services Mortgage and that the holder was JPMorgan Chase. The Romeros also raised several counterclaims, only one of which is relevant to this appeal: that the loan violated the antiflipping provisions of the New Mexico HLPA, Section 58-21A-4(B) (2003).

{7} The Bank responded by providing (1) a document showing that MERS as a nominee for Equity One assigned the Romeros' mortgage to the Bank of New York on June 25, 2008,

(MERS), as the nominee for Equity One, pledging their home as collateral for the loan.

{3} The Romeros allege that Equity One cold-called them and urged them to refinance their home for access to their home's equity. The terms of the Equity One loan were not an improvement over their current home loan: Equity One's interest rate was higher (starting at 8.1 percent and increasing to 14 percent compared to 7.71 percent), the Romeros' monthly payments were greater ($1,683.28 compared to $1,256.39), and the loan amount due was greater ($227,240 compared to $176,450). However, the Romeros would receive a cash payout of nearly $43,000, which would cover about $12,000 in new closing costs and provide them with about $30,000 to pay off other debts.

{4} Both parties agree that the Romeros' loan was a no income, no assets loan (NINA) and that documentation of their income was never requested or verified. The Romeros owned a music store in Espanola, New Mexico, and Mr. Romero allegedly told Equity One that the store provided him an income of $5,600 a month. Also known as liar loans because they are based solely on the professed income of the self-employed, NINA loans have since been specifically prohibited in New Mexico by a 2009 amendment to the HLPA and also by federal law. *See* NMSA 1978, § 58-21A-4(C)-(D) (requiring a creditor to document a borrower's ability to repay); 15 U.S.C.A. § 1639c(a)(1) (2010) (requiring creditors to make a reasonable and good-faith effort to determine a borrower's ability to repay); *see also* Pub. L. No. 111-203, § 1411(a)(1), 124 Stat. 2142 (2010) (same). The Romeros stated that they did not read the note or the mortgage contracts thoroughly before signing them, allegedly because of limited time for review, the complexity of the documents, and their own limited education. They admit having signed a document prepared by Equity One reciting that the home loan provided them a "reasonable tangible net benefit" based on the $30,000 cash payout.

{5} The Romeros soon became delinquent on their increased loan payments. On April 1, 2008, a third party—the Bank of New York, identifying itself as a trustee for Popular Financial Services Mortgage—filed a complaint in the First Judicial District Court seeking foreclosure on the Romeros' home and claiming to be the holder of the Romeros' note and mortgage with the right of enforcement.

{6} The Romeros responded by arguing, among other things, that the Bank of New York lacked standing to foreclose because nothing in the complaint established how the Bank of New York was a holder of the note and mortgage contracts the Romeros signed with Equity One. According to the Romeros, Securities and Exchange Commission filings showed that their loan certificate series was once owned by Popular ABS Mortgage and not Popular Financial Services Mortgage and that the holder was JPMorgan Chase. The Romeros also raised several counterclaims, only one of which is relevant to this appeal: that the loan violated the antiflipping provisions of the New Mexico HLPA, Section 58-21A-4(B) (2003).

{7} The Bank responded by providing (1) a document showing that MERS as a nominee for Equity One assigned the Romeros' mortgage to the Bank of New York on June 25, 2008,

three months after the Bank filed the foreclosure complaint and (2) the affidavit of Ann Kelley, senior vice president for Litton Loan Servicing LP, stating that Equity One intended to transfer the note and assign the mortgage to the Bank of New York prior to the Bank's filing of the foreclosure complaint. However, the Bank of New York admits that Kelley's employer Litton Loan Servicing did not begin servicing the Romeros' loan until November 1, 2008, seven months after the foreclosure complaint was filed in district court.

{8} At a bench trial, Kevin Flannigan, a senior litigation processor for Litton Loan Servicing, testified on behalf of the Bank of New York. Flannigan asserted that the copies of the note and mortgage admitted as trial evidence by the Bank of New York were copies of the originals and also testified that the Bank of New York had physical possession of both the note and mortgage at the time it filed the foreclosure complaint.

{9} The Romeros objected to Flannigan's testimony, arguing that he lacked personal knowledge to make these claims given that Litton Loan Servicing was not a servicer for the Bank of New York until after the foreclosure complaint was filed and the MERS assignment occurred. The district court allowed the testimony based on the business records exception because Flannigan was the present custodian of records.

{10} The Romeros also pointed out that the copy of the "original" note Flannigan purportedly authenticated was different from the "original" note attached to the Bank of New York's foreclosure complaint. While the note attached to the complaint as a true copy was not indorsed, the "original" admitted at trial was indorsed twice: first, with a blank indorsement by Equity One and second, with a special indorsement made payable to JPMorgan Chase. When asked whether either of those two indorsements included the Bank of New York, Flannigan conceded that neither did, but he claimed that his review of the records indicated the note had been transferred to the Bank of New York based on a pooling and servicing agreement document that was never entered into evidence.

{11} The district court also heard testimony on the circumstances of the loan, the points and fees charged, and the calculus used to determine a reasonable, tangible net benefit. Following trial, the district court issued a written order finding that the Flannigan testimony and the assignment of the mortgage established the Bank of New York as the proper holder of the Romeros' note and concluding that the loan did not violate the HLPA because the cash payment to the Romeros provided a reasonable, tangible net benefit. The district court also determined that because the Bank of New York was a national bank, federal law preempted the protections of the HLPA.

{12} On appeal, the Court of Appeals affirmed the district court's rulings that the Bank of New York had standing to foreclose and that the HLPA had not been violated but determined as a result of the latter ruling that it was not necessary to address whether federal law preempted the HLPA. *See Bank of N.Y. v. Romero*, 2011-NMCA-110, ¶ 6, 150 N.M. 769, 266 P.3d 638 ("Because we conclude that substantial evidence exists for each of the district court's findings and conclusions, and we affirm on those grounds, we do not address

the Romeros' preemption argument.").

{13} We granted the Romeros' petition for writ of certiorari.

II. DISCUSSION

A. The Bank of New York Lacks Standing to Foreclose

1. Preservation

{14} As a preliminary matter, we address the Bank of New York's argument that the Romeros waived their challenge of the Bank's standing in this Court and the Court of Appeals by failing to provide the evidentiary support required by Rule 12-213(A)(3) NMRA. *See Bank of N.Y.*, 2011-NMCA-110, ¶¶ 20-21 (dismissing the Romeros' challenge to standing as without authority and based primarily on the note's bearer-stamp assignment to JPMorgan Chase); *see also* Rule 12-213(A)(3) ("A contention that a verdict, judgment or finding of fact is not supported by substantial evidence shall be deemed waived unless the summary of proceedings includes the substance of the evidence bearing upon the proposition.").

{15} We have recognized that "the lack of [standing] is a potential jurisdictional defect which 'may not be waived and may be raised at any stage of the proceedings, even sua sponte by the appellate court.'" *Gunaji v. Macias*, 2001-NMSC-028, ¶ 20, 130 N.M. 734, 31 P.3d 1008 (citation omitted). While we disagree that the Romeros waived their standing claim, because their challenge has been and remains largely based on the note's indorsement to JPMorgan Chase, whether the Romeros failed to fully develop their standing argument before the Court of Appeals is immaterial. This Court may reach the issue of standing based on prudential concerns. *See New Energy Economy, Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 16, 149 N.M. 42, 243 P.3d 746 ("Indeed, 'prudential rules' of judicial self-governance, like standing, ripeness, and mootness, are 'founded in concern about the proper—and properly limited—role of courts in a democratic society' and are always relevant concerns." (citation omitted)). Accordingly, we address the merits of the standing challenge.

2. Standards of Review

{16} The Bank argues that under a substantial evidence standard of review, it presented sufficient evidence to the district court that it had the right to enforce the Romeros' promissory note based primarily on its possession of the note, the June 25, 2008, assignment letter by MERS, and the trial testimony of Kevin Flannigan. By contrast, the Romeros argue that none of the Bank's evidence demonstrates standing because (1) possession alone is insufficient, (2) the "original" note introduced by the Bank of New York at trial with the two undated indorsements includes a special indorsement to JPMorgan Chase, which cannot be ignored in favor of the blank indorsement, (3) the June 25, 2008, assignment letter from MERS occurred *after* the Bank of New York filed its complaint, and as a mere assignment

of the mortgage does not act as a lawful transfer of the note, and (4) the statements by Ann Kelley and Kevin Flannigan are inadmissible because both lack personal knowledge given that Litton Loan Servicing did not begin servicing loans for the Bank of New York until seven months after the foreclosure complaint was filed and after the purported transfer of the loan occurred. For the following reasons, we agree with the Romeros.

{17} The Bank of New York does not dispute that it was required to demonstrate under New Mexico's Uniform Commercial Code (UCC) that it had standing to bring a foreclosure action at the time it filed suit. *See* NMSA 1978, § 55-3-301 (1992) (defining who is entitled to enforce a negotiable interest such as a note); *see also* NMSA 1978, § 55-3-104(a), (b), (e) (1992) (identifying a promissory note as a negotiable instrument); *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 9 n.1, 144 N.M. 471, 188 P.3d 1222 (recognizing standing as a jurisdictional prerequisite for a statutory cause of action); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570-71 n.5 (1992) ("[S]tanding is to be determined as of the commencement of suit."); *accord* 55 Am. Jur. 2d *Mortgages* § 584 (2009) ("A plaintiff has no foundation in law or fact to foreclose upon a mortgage in which the plaintiff has no legal or equitable interest."). One reason for such a requirement is simple: "One who is not a party to a contract cannot maintain a suit upon it. If [the entity] was a successor in interest to a party on the [contract], it was incumbent upon it to prove this to the court." *L.R. Prop. Mgmt., Inc. v. Grebe*, 1981-NMSC-035, ¶ 7, 96 N.M. 22, 627 P.2d 864 (citation omitted). The Bank of New York had the burden of establishing timely ownership of the note and the mortgage to support its entitlement to pursue a foreclosure action. *See Gonzales v. Tama*, 1988-NMSC-016, ¶ 7, 106 N.M. 737, 749 P.2d 1116 ("One who holds a note secured by a mortgage has two separate and independent remedies, which he may pursue successively or concurrently; one is on the note against the person and property of the debtor, and the other is by foreclosure to enforce the mortgage lien upon his real estate." (internal quotation marks and citation omitted)).

{18} Because the district court determined after a trial on the issue that the Bank of New York established standing as a factual matter, we review the district court's determination under a substantial evidence standard of review. *See Sims v. Sims*, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 930 P.2d 153 ("We have many times stated the standard of review of a trial court's findings of fact: Findings of fact made by the district court will not be disturbed if they are supported by substantial evidence."). "'Substantial evidence' means relevant evidence that a reasonable mind could accept as adequate to support a conclusion." *Id.* "This Court will resolve all disputed facts and indulge all reasonable inferences in favor of the trial court's findings." *Id.* However, "[w]hen the resolution of the issue depends upon the interpretation of documentary evidence, this Court is in as good a position as the trial court to interpret the evidence." *Kirkpatrick v. Introspect Healthcare Corp.*, 1992-NMSC-070, ¶ 14, 114 N.M. 706, 845 P.2d 800; *see also United Nuclear Corp. v. Gen. Atomic Co.*, 1979-NMSC-036, ¶ 62, 93 N.M. 105, 597 P.2d 290 ("'Where all or substantially all of the evidence on a material issue is documentary or by deposition, the Supreme Court will examine and weigh it, and will review the record, giving some weight to the findings of the trial judge on such issue.'" (citation omitted)).

3. None of the Bank's Evidence Demonstrates Standing to Foreclose

{19} The Bank of New York argues that in order to demonstrate standing, it was required to prove that before it filed suit, it either (1) had physical possession of the Romeros' note indorsed to it or indorsed in blank or (2) received the note with the right to enforcement, as required by the UCC. *See* § 55-3-301 (defining "[p]erson entitled to enforce" a negotiable instrument). While we agree with the Bank that our state's UCC governs how a party becomes legally entitled to enforce a negotiable instrument such as the note for a home loan, we disagree that the Bank put forth such evidence.

a. Possession of a Note Specially Indorsed to JPMorgan Chase Does Not Establish the Bank of New York as a Holder

{20} Section 55-3-301 of the UCC provides three ways in which a third party can enforce a negotiable instrument such as a note. *Id.* ("'Person entitled to enforce' an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the [lost, destroyed, stolen, or mistakenly transferred] instrument pursuant to [certain UCC enforcement provisions]."); *see also* § 55-3-104(a)(1), (b), (e) (defining "negotiable instrument" as including a "note" made "payable to bearer or to order"). Because the Bank's arguments rest on the fact that it was in physical possession of the Romeros' note, we need to consider only the first two categories of eligibility to enforce under Section 55-3-301.

{21} The UCC defines the first type of "person entitled to enforce" a note—the "holder" of the instrument—as "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." NMSA 1978, § 55-1-201(b)(21)(A) (2005); *see also* Frederick M. Hart & William F. Willier, *Negotiable Instruments Under the Uniform Commercial Code*, § 12.02(1) at 12-13 to 12-15 (2012) ("The first requirement of being a holder is possession of the instrument. However, possession is not necessarily sufficient to make one a holder. . . . The payee is always a holder if the payee has possession. Whether other persons qualify as a holder depends upon whether the instrument initially is payable to order or payable to bearer, and whether the instrument has been indorsed." (footnotes omitted)). Accordingly, a third party must prove both physical possession *and* the right to enforcement through either a proper indorsement or a transfer by negotiation. *See* NMSA 1978, § 55-3-201(a) (1992) ("'Negotiation' means a transfer of possession . . . of an instrument by a person other than the issuer to a person who thereby becomes its holder."). Because in this case the Romeros' note was clearly made payable to the order of Equity One, we must determine whether the Bank provided sufficient evidence of how it became a "holder" by either an indorsement or transfer.

{22} Without explanation, the note introduced at trial differed significantly from the original note attached to the foreclosure complaint, despite testimony at trial that the Bank of New York had physical possession of the Romeros' note from the time the foreclosure complaint was filed on April 1, 2008. Neither the unindorsed note nor the twice-indorsed

note establishes the Bank as a holder.

{23} Possession of an unindorsed note made payable to a third party does not establish the right of enforcement, just as finding a lost check made payable to a particular party does not allow the finder to cash it. *See* NMSA 1978, § 55-3-109 cmt. 1 (1992) ("An instrument that is payable to an identified person cannot be negotiated without the indorsement of the identified person."). The Bank's possession of the Romeros' unindorsed note made payable to Equity One does not establish the Bank's entitlement to enforcement.

{24} The Bank's possession of a note with two indorsements, one of which restricts payment to JPMorgan Chase, also does not establish the Bank's entitlement to enforcement. The UCC recognizes two types of indorsements for the purposes of negotiating an instrument. A blank indorsement, as its name suggests, does not identify a person to whom the instrument is payable but instead makes it payable to anyone who holds it as bearer paper. *See* NMSA 1978, § 55-3-205(b) (1992) ("If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a 'blank indorsement.'"). "When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." *Id.*

{25} By contrast, a special indorsement "identifies a person to whom it makes the instrument payable." Section 55-3-205(a). "When specially indorsed, an instrument becomes payable to the identified person and may be negotiated only by the indorsement of that person." *Id.*; *accord* Baxter Dunaway, *Law of Distressed Real Estate*, § 24:105 (2011) ("When an instrument is payable to an identified person, only that person may be the holder. A person in possession of an instrument not made payable to his order can only become a holder by obtaining the prior holder's indorsement.").

{26} The trial copy of the Romeros' note contained two undated indorsements: a blank indorsement by Equity One and a special indorsement by Equity One to JPMorgan Chase. Although we agree with the Bank that if the Romeros' note contained only a blank indorsement from Equity One, that blank indorsement would have established the Bank as a holder because the Bank would have been in possession of bearer paper, that is not the situation before us. The Bank's copy of the Romeros' note contained two indorsements, and the restrictive, special indorsement to JPMorgan Chase establishes JPMorgan Chase as the proper holder of the Romeros' note absent some evidence by JPMorgan Chase to the contrary. *See Cadle Co. v. Wallach Concrete, Inc.*, 1995-NMSC-039, ¶ 14, 120 N.M. 56, 897 P.2d 1104 ("[A] special indorser . . . has the right to direct the payment and to require the indorsement of his indorsee as evidence of the satisfaction of own obligation. Without such an indorsement, a transferee cannot qualify as a holder in due course." (omission in original) (internal quotation marks and citation omitted)). Because JPMorgan Chase did not subsequently indorse the note, either in blank or to the Bank of New York, the Bank of New York cannot establish itself as the holder of the Romeros' note simply by possession.

{27} Rather than demonstrate timely ownership of the note and mortgage through

JPMorgan Chase, the Bank of New York urges this Court to infer that the special indorsement was a mistake and that we should rely only on the blank indorsement. We are not persuaded. The Bank provides no authority and we know of none that exists to support its argument that the payment restrictions created by a special indorsement can be ignored contrary to our long-held rules on indorsements and the rights they create. *See, e.g., id.* (rejecting each of two entities as a holder because a note lacked the requisite indorsement following a special indorsement); *accord* NMSA 1978, § 55-3-204(c) (1992) ("For the purpose of determining whether the transferee of an instrument is a holder, an indorsement that transfers a security interest in the instrument is effective as an unqualified indorsement of the instrument.").

{28} Accordingly, we conclude that the Bank of New York's possession of the twice-indorsed note restricting payment to JPMorgan Chase does not establish the Bank of New York as a holder with the right of enforcement.

b. None of the Bank of New York's Evidence Demonstrates a Transfer of the Romeros' Note

{29} The second type of "person entitled to enforce" a note under the UCC is a third party in possession who demonstrates that it was given the rights of a holder. *See* § 55-3-301 ("'Person entitled to enforce' an instrument means . . . a nonholder in possession of the instrument who has the rights of a holder."). This provision requires a nonholder to prove both possession and the transfer of such rights. *See* NMSA 1978, § 55-3-203(a)-(b) (1992) (defining what constitutes a transfer and vesting in a transferee only those rights held by the transferor). A claimed transferee must establish its right to enforce the note. *See* § 55-3-203 cmt. 2 ("[An] instrument [unindorsed upon transfer], by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it.").

{30} Under this second category, the Bank of New York relies on the testimony of Kevin Flannigan, an employee of Litton Loan Servicing who maintained that his review of loan servicing records indicated that the Bank of New York was the transferee of the note. The Romeros objected to Flannigan's testimony at trial, an objection that the district court overruled under the business records exception. We agree with the Romeros that Flannigan's testimony was inadmissible and does not establish a proper transfer.

{31} As the Bank of New York admits, Flannigan's employer, Litton Loan Servicing, did not begin working for the Bank of New York as its servicing agent until November 1, 2008—seven months after the April 1, 2008, foreclosure complaint was filed. Prior to this date, Popular Mortgage Servicing, Inc. serviced the Bank of New York's loans. Flannigan had no personal knowledge to support his testimony that transfer of the Romeros' note to the Bank of New York prior to the filing of the foreclosure complaint was proper because Flannigan did not yet work for the Bank of New York. *See* Rule 11-602 NMRA ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the

witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony."). We make a similar conclusion about the affidavit of Ann Kelley, who also testified about the status of the Romeros' loan based on her work for Litton Loan Servicing. As with Flannigan's testimony, such statements by Kelley were inadmissible because they lacked personal knowledge.

{32} When pressed about Flannigan's basis of knowledge on cross-examination, Flannigan merely stated that "our records do indicate" the Bank of New York as the holder of the note based on "a pooling and servicing agreement." No such business record itself was offered or admitted as a business records hearsay exception. *See* Rule 11-803(F) NMRA (2007) (naming this category of hearsay exceptions as "records of regularly conducted activity").

{33} The district court erred in admitting the testimony of Flannigan as a custodian of records under the exception to the inadmissibility of hearsay for "business records" that are made in the regular course of business and are generally admissible at trial under certain conditions. *See* Rule 11-803(F) (2007) (citing the version of the rule in effect at the time of trial). The business records exception allows the records themselves to be admissible but not simply statements about the purported contents of the records. *See State v. Cofer*, 2011-NMCA-085, ¶ 17, 150 N.M. 483, 261 P.3d 1115 (holding that, based on the plain language of Rule 11-803(F) (2007), "it is clear that the business records exception requires some form of document that satisfies the rule's foundational elements to be offered and admitted into evidence and that testimony alone does not qualify under this exception to the hearsay rule" and concluding that "'testimony regarding the contents of business records, unsupported by the records themselves, by one without personal knowledge of the facts constitutes inadmissible hearsay.'" (citation omitted)). Neither Flannigan's testimony nor Kelley's affidavit can substantiate the existence of documents evidencing a transfer if those documents are not entered into evidence. Accordingly, Flannigan's trial testimony cannot establish that the Romeros' note was transferred to the Bank of New York.

{34} We also reject the Bank's argument that it can enforce the Romeros' note because it was assigned the mortgage by MERS. An assignment of a mortgage vests only those rights to the mortgage that were vested in the assigning entity and nothing more. *See* § 55-3-203(b) ("Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course."); *accord* Hart & Willier, *supra*, § 12.03(2) at 12-27 ("Th[is] shelter rule puts the transferee in the shoes of the transferor.").

{35} Here, as Equity One and MERS explained to the district court in a joint filing seeking to be dismissed as third parties to the Romeros' counterclaims, "MERS . . . is merely the nominee for Equity One, Inc. in the underlying Mortgage and was not the actual lender. MERS is a national electronic registry which keeps track of the changes in servicing and ownership of mortgage loans." *See also* Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. Cin. L. Rev.

1359, 1361-63 (2010) (explaining that MERS was created by the banking industry to electronically track and record mortgages in order to avoid local and state recording fees). The Romeros' mortgage contract reiterates the MERS role, describing "MERS [a]s a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns." A "nominee" is defined as "[a] person designated to act in place of another, usu. in a very limited way." *Black's Law Dictionary* 1149 (9th ed. 2009). As a nominee for Equity One on the mortgage contract, MERS could assign the mortgage but lacked any authority to assign the Romeros' note. Although this Court has never explicitly ruled on the issue of whether the assignment of a mortgage could carry with it the transfer of a note, we have long recognized the separate functions that note and mortgage contracts perform in foreclosure actions. *See First Nat'l Bank of Belen v. Luce*, 1974-NMSC-098, ¶ 8, 87 N.M. 94, 529 P.2d 760 (holding that because the assignment of a mortgage to a bank did not convey an interest in the loan contract, the bank was not entitled to foreclose on the mortgage); *Simson v. Bilderbeck, Inc.*, 1966-NMSC-170, ¶¶ 13-14, 76 N.M. 667, 417 P.2d 803 (explaining that "[t]he right of the assignee to enforce the mortgage is dependent upon his right to enforce the note" and noting that "[b]oth the note and mortgage were assigned to plaintiff. Having a right under the statute to enforce the note, he could foreclose the mortgage."); *accord* 55 Am. Jur. 2d *Mortgages* § 584 ("A mortgage securing the repayment of a promissory note follows the note, and thus, only the rightful owner of the note has the right to enforce the mortgage."); Dunaway, *supra*, § 24:18 ("The mortgage only secures the payment of the debt, has no life independent of the debt, and cannot be separately transferred. If the intent of the lender is to transfer only the security interest (the mortgage), this cannot legally be done and the transfer of the mortgage without the debt would be a nullity."). These separate contractual functions—where the note is the loan and the mortgage is a pledged security for that loan—cannot be ignored simply by the advent of modern technology and the MERS electronic mortgage registry system.

{36} The MERS assignment fails for several additional reasons. First, it does not explain the conflicting special indorsement of the note to JPMorgan Chase. Second, its assignment of the mortgage to the Bank of New York on June 25, 2008, three months after the foreclosure complaint was filed, does not establish a proper transfer prior to the filing date of the foreclosure suit. Third, except for the inadmissible affidavit of Ann Kelley and trial testimony of Kevin Flannigan, nothing in the record substantiates the Bank's claim that the MERS assignment was meant to memorialize an earlier transfer to the Bank of New York. Accordingly, neither the MERS assignment nor Flannigan's testimony establish the Bank of New York as a nonholder in possession with the rights of a holder by transfer.

c. Failure of Another Entity to Claim Ownership of the Romeros' Note Does Not Make the Bank of New York a Holder

{37} Finally, the Bank of New York urges this Court to adopt the district court's inference that if the Bank was not the proper holder of the Romeros' note, then third-party-defendant Equity One would have claimed to be the rightful holder, and Equity One made no such claim.

{38} The simple fact that Equity One does not claim ownership of the Romeros' note does not establish that the note was properly transferred to the Bank of New York. In fact, the evidence in the record indicates that JPMorgan Chase may be the lawful holder of the Romeros' note, as reflected in the note's special indorsement. As this Court has recognized,

> The whole purpose of the concept of a negotiable instrument under Article 3 [of the UCC] is to declare that transferees in the ordinary course of business are only to be held liable for information appearing in the instrument itself and will not be expected to know of any limitations on negotiability or changes in terms, etc., contained in any separate documents.

First State Bank at Gallup v. Clark, 1977-NMSC-088, ¶ 10, 91 N.M. 117, 570 P.2d 1144. In addition, the UCC clarifies that the Bank of New York is not afforded any assumption of enforcement without proper documentation:

> Because the transferee is not a holder, there is no presumption under Section [55-]3-308 [(1992) (entitling a holder in due course to payment by production and upon signature)] that the transferee, by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it.

Section 55-3-203 cmt. 2. Because the Bank of New York did not introduce any evidence demonstrating that it was a party with the right to enforce the Romeros' note either by an indorsement or proper transfer, we hold that the Bank's standing to foreclose on the Romeros' mortgage was not supported by substantial evidence, and we reverse the contrary determinations of the courts below.

B. A Lender Must Consider a Borrower's Ability to Repay a Home Mortgage Loan in Determining Whether the Loan Provides a Reasonable, Tangible Net Benefit, as Required by the New Mexico HLPA

{39} For reasons that are not clear in the record, the Romeros did not appeal the district court's judgment in favor of the original lender, Equity One, on the Romeros' claims that Equity One violated the HLPA. The Court of Appeals addressed the HLPA violation issue in the context of the Romeros' contentions that the alleged violation constituted a defense to the foreclosure complaint of the Bank of New York by affirming the district court's favorable ruling on the Bank of New York's complaint. As a result of our holding that the Bank of New York has not established standing to bring a foreclosure action, the issue of HLPA violation is now moot in this case. But because it is an issue that is likely to be addressed again in future attempts by whichever institution may be able to establish standing to foreclose on the Romero home and because it involves a statutory interpretation issue of substantial public importance in many other cases, we address the conclusion of both the