

**U.S. BANK, N.A.  
AS TRUSTEE OF THE  
RASC SERIES 2007-EMX1 TRUST**

**vs.**

**Case No.: CV-2009-901113**

**Defendants,**

## STATE OF NEW YORK )

COUNTY OF NEW YORK )

1. My name is Thomas J. Adams.

2. I am a partner with the firm of Paykin, Krieg & Adams in New York, New York.

3. My area of expertise is in the field of securitization. My curriculum vitae is attached to this affidavit.

4. Let me briefly summarize my experience for the Court. I began my career as an Associate at Thatcher, Proffitt & Wood in New York City working on Mortgage securitizations in 1989. In this position I was one of the lawyers who worked on the very first vintage of pooling and servicing agreements which dealt with the 1986 amendments to the IRS tax code creating the REMIC Structures. My career progressed from Thatcher, Proffitt & Wood through a series of industry positions which all dealt with various aspects of Mortgage loan securitization as set out in my Curriculum vitae. I

am familiar with the industry standards, customs, practices and legal requirements of mortgage loan securitizations. I am also familiar with the law governing the creation, powers, authorities and limitations of the securitization trusts and their counterparties including the Trustees and Servicers for the securitization trusts.

5. I have been retained by the defendants in this matter to review the documents presented to the Court and to opine as to whether the Plaintiff in this action is in fact the owner of the promissory note secured by a mortgage upon which the plaintiff has foreclosed and claimed ownership.

6. In formulating my opinion I have reviewed the subject mortgage, the mortgage assignment and the promissory note which were submitted to this Court and the documents which created the Trust that is the plaintiff in this lawsuit.

7. The trust agreement which created the Trust that is the plaintiff in this action is called a Pooling and Servicing Agreement and is filed under oath with the Securities and Exchange Commission and is available online through the Edgar website at SEC.gov. The Trust agreement is filed as exhibit 10.1 to form 8-k with the SEC. There is also an additional agreement for the sale of mortgage loans called an "Assignment and Assumption Agreement" and listed as exhibit 10.2 to the 8-k filed with the SEC.

8. I am told that these documents have been filed as a supplement to the defendants' motion for a new trial in this case. Also, I have personal knowledge of this particular transaction as a result of my employment with the certificate insurer for this particular securitization. At the time this deal was created I was employed by Financial Guaranty Insurance Corporation and I was in charge of the Mortgage Backed Securities Division of my employer. I am personally familiar with the specific terms of this agreement as well as the specific requirements of this agreement and the counterparties

expectations regarding the industry standards and practices which were in place when this deal was consummated.

9. Section 11.04 of the PSA (page 69 of 117) is an election by the parties to the Trust that the Trust will be governed under the laws of the State of New York. This Court would be required to consider the impact of the actions of any party to the Trust agreement which violated the Trust agreement under New York Law.

10. The Trust agreement (known as the PSA) sets forth how the trust acquires its assets. The Trust agreement sets forth both powers and the limits of the powers of the Trust. The Assignment and Assumption Agreement is incorporated into the Trust Agreement as Exhibit R to the Trust Agreement.

11. The PSA and the Assignment and Assumption Agreement when read together require that each party to the sale of the mortgage loans endorse each promissory note to the next party in the chain of title until the promissory note is endorsed to the Trustee for the benefit of the Trust. This requirement is included in Paragraph 2 of the Assignment and Assumption Agreement found on page 2 of 11 of the Assignment and Assumption Agreement. In the PSA this requirement is found at Section 2.01(b)(i) on page 31 of 117.

12. According to the requirements set forth in the Trust Agreement I would expect to see a series of endorsements of the promissory note reflective of each party who had an ownership interest in the promissory note culminating with a specific endorsement to the Trustee on behalf of this particular trust and that this series of endorsements could have occurred no later than ninety days after the closing date set forth in the PSA which was March 12, 2007 (This is found at page 32 of 117 of the PSA).

This would have been the industry standard, custom and practice and the absence of these endorsements on this promissory note is very compelling.

13. The copy of the promissory note which was filed into evidence in this case does not contain a specific endorsement of the promissory note to the Trust as called for by the Trust Agreement. Further, this document does not contain any of the intermediary endorsements **required** by the agreement. The note in its present form does not include any evidence that this trust owns this loan.

14. I am told that the plaintiff contends in this case that the mortgage assignment from MERS as nominee for Mortgage Lenders Network, USA Inc. DBA Lenders Network dated July 29, 2008 was the method by which the promissory note was conveyed to the Trust in this case.

15. I note for the Court's benefit that a transfer to the Trust on July 29, 2008 violates the terms of the Trust found in the PSA.

16. The PSA states explicitly at section 2.01 that the assets of the trust were conveyed to the trust on the date the PSA was executed (Page 31 of 117) on March 12, 2007.

17. Additionally, the parties to the PSA required three different certifications in the PSA which were made by the Master Document Custodian to the Trustee that all of the mortgage loans purchased by this Trust were present and that each promissory note contained every endorsement that was required by the agreement including a specific endorsement to the Trust. Examples of the form of the Certification are at pages 89 and 90 of 117 in the PSA.

18. Also, in section 2.02 on page 33 of 117 the PSA states that the Trustee or its agent the Custodian will verify that the endorsements are present and certify this fact within 90 days of the Closing date (March 12, 2007).

19. Additionally, Section 2.03(b) of the PSA (page 34 of 117) constitutes a warranty by the Depositor that at the time the Depositor sold the assets to the Trust that the Depositor was the owner of the assets. The industry standard, custom and practice would have required under the terms of this PSA which these parties chose that at the very least the promissory notes which constituted the assets of this Loan Trust be endorsed through the chain of ownership to the Depositor by the Closing Date of March 12, 2007. The Depositor in this securitization was Residential Asset Securities Corporation. There is no endorsement on the promissory note involving this Party. Therefore, based on my experience in this industry, its customs, requirements and practices, I can not conclude that this particular promissory note was ever owned by Residential Asset Securities Corporation.

20. As to the assertion that this promissory note was acquired by this Trust on July 29, 2008, there are additional obstacles which make this assertion improbable or impossible depending upon the Court's interpretation of New York Law. In Section 2.06 of the PSA (page 35 of 117) there are express limitations on the right of the Trust to act. In Section 8.02(b) (page 62 of 117) The PSA expressly states that the Trustee shall not accept any contribution of assets to the Trust Fund unless the Trustee shall have obtained an opinion of counsel that the contribution will not cause any REMIC to fail to qualify as a REMIC or subject the Trust Fund to any Federal Tax on "prohibited transactions" which are defined under the Tax Code. These types of limitations are common and are present in this or a similar form in every pooling and servicing

agreement which seeks to create a securitized trust that can claim the tax benefits of REMIC status under the US Tax Code. In fact, in the industry, Pooling and Servicing Agreements such as the one in this case are principally designed to protect the certificate holders (the investors) by expressly limiting the Trustee's powers so that the Trustee does not cause the investors to incur a substantial tax penalty as a result of a mistake on the Trustee's part.

21. In fact, Article X of this PSA (pages 66-67 of 117) set forth further explicit restrictions on the powers of the Trustee and the Master Servicer and prohibits either of them from acquiring any assets beyond the Closing date of the Trust in paragraphs (f) and (i) without a proper opinion of counsel that this acquisition would not violate the REMIC provisions of the Tax Code. These types of limitations are common and are present in this or a similar form in every pooling and servicing agreement which seeks to create a securitized trust that can claim the tax benefits of REMIC status under the US Tax Code.

22. Based upon the information provided to me and the documents that I have reviewed I can state that the allegation that the Trust obtained this promissory note on July 29, 2008 would violate the REMIC provisions of the IRS tax code for a number of reasons. First, the loan was in default on July 29, 2008. Therefore the loan could not have been a "qualified mortgage loan" under the IRS tax code because a qualified mortgage loan is a performing mortgage loan. Second, the alleged transfer to the trust was after the closing day and after the certificates were issued, in effect, the Plaintiff is claiming to have transferred an asset to a trust that has by its own terms been closed for more than two years at the time the alleged transfer took place. Third, the promissory note was not endorsed to the trust by the depositor and is devoid of the required chain

of endorsements to establish a true sale under the applicable portions of the IRS tax code. The claim that the transfer occurred in this manner is an extreme deviation from the industry standards and practices as well as the terms of the Pooling and Servicing Agreement governing this transaction.

23. In addition to the reasons set forth in Paragraph 22 that casts serious doubt upon the assertion that this trust owns this loan are the representations and warranties set forth in the PSA and the Assignment and Assumption Agreement that represent that the loans sold to the trust according to the terms of the PSA were owned by at least two other parties prior to their conveyance to the Trust. Those parties are not present on this promissory note as would be expected under the industry standards if they ever had any ownership interest in this promissory note. Additionally, the PSA provides no mechanism for Mortgage Lenders Network USA, Inc. to convey an asset to this trust. Also, the entities acting as counterparties to this Trust, U.S. Bank in particular, have a duty to the investors not to even attempt to acquire an asset for this trust outside the terms of the PSA pursuant to Section X dealing with the REMIC provisions.

24. I also note that the Assignment of Mortgage that was submitted in this case to the Court as evidence of the transfer of the Mortgage and the promissory note to the Trust indicates that the Assignment of the Mortgage carried with it the promissory note to the Trust. The assignment of the Mortgage is by MERS.

25. I reviewed the MERS Procedures Manual which is available for download at <http://www.mersinc.org/MersProducts/manuals.aspx?mpid=1> .

26. This mortgage assignment violates MERS own written procedures found at page 66 of the MERS Procedures Manual which states that "MERS cannot transfer

the beneficial rights to the debt. The debt can only be transferred by properly endorsing the promissory note to the transferee.” A proper negotiation to this Trust would require a specific negotiation to this trust in conformity with the time frames set forth in the PSA.

27. I am also informed that the person who signed this mortgage assignment is not an actual Vice President of MERS but is actually an attorney who is employed by the law firm working for the Plaintiff.

28. Based on my personal knowledge of the terms of this transaction as well as my review of the documents presented to the Court as the evidence that this Trust, the Plaintiff in this case, owns the promissory note signed by Erica Congress, it is my opinion that this Trust does not own this promissory note based upon the evidence that the attorneys for this Trust have provided to this Court and my personal knowledge of the requirements that were applicable to this securitization through my involvement with this deal through my employer.

29. Further, because of the strict requirements of this Pooling and Servicing Agreement it is my opinion that this Trust could not become the owner of this promissory note as claimed by the Plaintiff without running afoul of the express terms of the Pooling and Servicing Agreements and without an opinion of counsel to the certificate insurer (my former employer), the Master Servicer and the Trustee that the proposed acquisition would not be an Adverse event under the REMIC provisions of the US Tax Code.

---



I make this affidavit on personal knowledge.

Further affiant saith not.

  
\_\_\_\_\_  
Thomas J. Adams,  
Affiant

STATE OF NEW YORK

COUNTY OF NEW YORK

**SWORN TO AND SUBSCRIBED BEFORE ME** on this 26 day of  
March 2010, witness my hand and official seal of office.

  
\_\_\_\_\_  
NOTARY PUBLIC  
State at Large  
My Commission Expires: \_\_\_\_\_

JOSEPH N. PAYKIN  
Notary Public, State of New York  
No. 02PA5018218  
Qualified in New York County  
Commission Expires Sept. 20, 1999

Dec 20, 2013