

Cause No. 2022-29461

KIRK MCCLOUD and
LETTINA MCCLOUD

IN THE DISTRICT COURT OF

V.

DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE, IN TRUST FOR
REGISTERED HOLDERS OF LONG BEACH
MORTGAGE LOAN TRUST 2006-5, ASSET-
BACKED CERTIFICATES 2006-5,
SELECT PORTFOLIO SERVICING, INC.,
and MCCARTHY & HOLTHUS, LLP

HARRIS COUNTY, TEXAS

165th JUDICIAL DISTRICT

Plaintiffs' Response to Defendants' Motion for Summary Judgment and Plaintiffs' Motions to File Late Response and for Continuance

Plaintiffs object to Movants' Summary Judgment Evidence because the Affiant, who is employed by SPS, never admits or acknowledges that she is the business records custodian for the records attached to her affidavit or that the records attached to the Affidavit are either the originals or true and correct copies thereof. She also cannot attest to the validity and veracity of the information and documents of at least three note holders and two or more prior servicers before SPS became a servicer 10 years after the original note was signed, thus the evidence to support the Motion is unreliable and untrustworthy. Plaintiffs file this Response late by agreement. Plaintiffs also request a continuance of the hearing on the Motion because the discovery isn't complete, discovery period doesn't end until September 18, 2023, and Plaintiffs' counsel has had to deal with medical issues regarding his father and moved his father into an assisted-living facility in the past month and became his father's Power of Attorney in the past two weeks, thus affecting his ability to further respond to the Motion at this time.

1. Plaintiffs, KIRK MCCLOUD and LETTINA MCCLOUD, hereby respond to *Defendants' Motion for Summary Judgment on All Claims of Plaintiffs on Both Traditional and No-Evidence Grounds* filed on March 1, 2023 ("the Motion") by Defendants DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE, IN TRUST FOR REGISTERED HOLDERS OF LONG BEACH MORTGAGE LOAN TRUST 2006-5, ASSET-BACKED CERTIFICATES 2006-5 ("Deutsche Bank"), and SELECT PORTFOLIO SERVICING, INC. ("SPS") (collectively referred to herein as "Movants"). By agreement of the Parties, Plaintiffs file this Response late. Plaintiffs further ask the Court to continue the hearing on the Motion until discovery has been completed, which this request for continuance is opposed by Movants.

Objection to Summary Judgment Evidence

2. Plaintiffs object to Movants' Summary Judgment Evidence, more specifically, the *Affidavit of Select Portfolio Servicing, Inc.* ("the Affidavit") and the exhibits attached thereto.

3. Sherry Benight, the Affiant therein, admits that she's a "Document Control Officer with Select Portfolio Servicing, Inc." See Paragraph 1 of the Affidavit attached as Exhibit 1 to the Motion. However, she never states, admits, or acknowledges that she is the business records custodian for SPS or for the records attached to the Affidavit.

4. She also cannot act as a business records custodian for Deutsche Bank because she is not employed by Deutsche Bank. Furthermore, she was not employed by

the original lender Long Beach Mortgage Company on April 25, 2006. *See the Fixed/Adjustable Rate Note* attached as Exhibit 1-A to the Motion.

5. Washington Mutual Bank is alleged to have been the Successor-In-Interest to Long Beach Mortgage Company, and it was Washington Mutual Bank who assigned the Note to Deutsche Bank as Trustee on May 1, 2007. *See Assignment of Note and Deed of Trust* attached as Exhibit 1-C to the Motion. However, there is no proof of succession from Long Beach Mortgage Company to Washington Mutual Bank included as evidence in the Motion.

6. Furthermore, Deutsche Bank apparently signed a *Limited Power of Attorney* on February 4, 2016 to appoint JPMorgan Chase Bank, National Association (“Chase Bank”), as the Servicer, and then Chase Bank signed a *Limited Power of Attorney* on February 17, 2016 to appoint SPS as its “Sub-Servicer” on February 17, 2016. *See the Limited Power of Attorneys* attached as Exhibit 1-G to the Motion. Thus, SPS was not involved in the loan at issue herein for 10 years.

7. Despite SPS not having been involved in the loan until 10 years after the original Note was signed, Movants expect this Court to accept the affidavit of a person employed by a mortgage servicer that is not the original holder of the note, the successor holder of the note, the third holder of the note, nor any of the prior servicers of the note, including but not limited to Chase Bank and any prior servicers for the ten years prior to Chase Bank becoming the servicer. The Affiant admits in the Affidavit

that there are records created by prior servicers (and the alleged evidence shows that there were prior servicers and note holders for 10 years) but expects this Court to accept the validity and veracity of prior records simply because they were incorporated into SPS' records.

8. The veracity of the records is called into question when the affiant has no direct connection to any of the holders of the note or prior services and can't be called upon as the business records custodian of any of the noteholders or prior servicers. This is extremely important herein because the Affiant never states that the records attached to the Affidavit are either the originals or true and correct copies thereof.

9. Additionally, the Affiant's knowledge only comes from her review of records, and she has no personal knowledge of the actual events allegedly shown by the records, including any alleged defaults. In fact, the Affiant fails to note the applications for refinancing and many communications that Plaintiffs had with SPS over the years.

10. Plaintiffs therefore object to the Affidavit and the exhibits attached thereto because the Affiant is not qualified to attest to the facts included in the Affidavit or all the records attached to the Affidavit. Plaintiffs further object to the Affidavit and the exhibits attached thereto because the Affidavit doesn't meet the evidentiary requirements of a business records affidavit under Rule 902(1) of the Texas Rules of Evidence.

11. Furthermore, to the extent Movants intend the Affidavit to be more than just

a business records affidavit, Affiant has no personal knowledge of some of the events surrounding the formation of the note and payment history of Plaintiffs before SPS became the servicer 10 years later and thus cannot attest to the validity and veracity of those documents and information. Thus, Plaintiffs also object to the Affidavit and the exhibits attached thereto because the facts therein go beyond a mere business records affidavit and are not trustworthy.

12. Plaintiffs ask the Court to strike the Summary Judgment Evidence attached to the Motion for the reasons noted herein above and thus deny the Motion without any supporting evidence.

Motion to File Late Response

13. Benjamin K. Sanchez, Plaintiffs' counsel, conferred with Michael Hord, Movants' counsel, on Wednesday, April 19, 2023, regarding continuing the hearing of the Motion on April 21, 2023, which Mr. Hord opposed. Mr. Sanchez also conferred on filing a late response to the Motion, to which Mr. Hord agreed.

14. Thus, by agreement, Plaintiffs ask the Court to accept this Response despite it not being filed a week before the hearing on the Motion.

Motion for Continuance

15. Benjamin K. Sanchez, Plaintiffs' counsel, has been dealing with the deteriorating health of his father since last June. Mr. Sanchez's long-time (51 years) step-mother passed away in April last year, and his father's health started to decline soon

thereafter. Mr. Sanchez's father's health took a turn for the worse in the past couple of months, so much so that Mr. Sanchez had to recently move his father to an assisted-living facility last month and then take over as Power of Attorney this month.

16. By his father moving into an assisted-living facility, Mr. Sanchez no longer must take his father to dialysis three times a week, but Mr. Sanchez and his wife are sharing the load of taking him to his doctor appointments, surgeries, and cancer treatments.

17. Mr. Sanchez is the only child of his father, who has no one else to care for him. Mr. Sanchez had been unable to focus much on his cases. Although Mr. Sanchez and his wife are still the only persons available to take his father to the doctors and hospital, the load has been greatly lifted by his father's recent move into the assisted-living facility and no longer having to take his father three days a week to dialysis because the facility assists in that function now.

18. The discovery period in this case doesn't end until September 18, 2023. There is still more written discovery and depositions to conduct before the discovery period has ended. Mr. Sanchez not only has had a great load lifted by his father's move into a facility but also has hired more employees to support his work for all of his clients, including Plaintiffs herein.

19. Given that the discovery period hasn't ended and the recent burdens of their counsel, Plaintiffs ask the Court to continue the hearing on the Motion until after the

discovery period has ended. There is no urgency herein because Deutsche Bank has agreed to stay any post-foreclosure eviction attempts until after this case has concluded. Deutsche Bank's eviction counsel has been professional and courteous regarding this matter, but unfortunately Deutsche Bank's counsel herein deems it necessary to try to end this case early at any cost despite the discovery period and trial herein being months away.

Prayer

20. For these reasons, Plaintiffs ask the Court to accept this agreed-upon late Response and continue the hearing on the Motion until after September 18, 2023, and in the alternative, should the Court not grant the continuance, then strike Movants' Summary Judgment Evidence and deny the Motion.

Respectfully submitted,

/s/ Benjamin K. Sanchez
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Unsworn Declaration of Benjamin K. Sanchez

My name is Benjamin K. Sanchez. My date of birth is May 11, 1969, and my law firm's address is 150 W. Parker Rd., Ste. 201, Houston, TX 77076. I declare under penalty of perjury that I have read the facts in this document, and they are within my personal knowledge and true and correct. Executed in Harris County, Texas on April 21, 2023, by /s/ Benjamin K. Sanchez.

Certificate of Conference

I hereby certify that I conferred with Movants' counsel regarding the Motion to File Late Response and Motion for Continuance by telephone on April 19, 2023, and he indicated he agreed to the Motion to File Late Response and opposed the Motion for Continuance, by /s/ Benjamin K. Sanchez.

Certificate of Service

I hereby certify that this document was served on all counsel via Texas E-Filing Manager on April 21, 2023, by /s/ Benjamin K. Sanchez.

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

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