STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO. CUM-24-360

DEUTSCHE BANK TRUST COMPANY AMERICAS, AS TRUSTEE FOR RESIDENTIAL ACCREDIT LOANS, INC., MORTGAGE ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-QA2,

Plaintiff-Appellant,

vs.

S. SHERMAN B. KENDALL A/K/A SHERMAN B. KENDALL, et al.

Defendants-Appellees.

ON APPEAL FROM JUDGMENT ENTERED BY THE SUPERIOR COURT FOR CUMBERLAND COUNTY DOCKET NO. PORSC-RE-17-303

BRIEF OF APPELLANT DEUTSCHE BANK TRUST COMPANY AMERICAS, AS TRUSTEE

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I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Loan Transaction

This action arises from a December 29, 2006 loan, given by Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.) ("Homecomings") to Defendants John M. Kendall and S. Sherman B. Kendall (the "Kendalls"), in exchange for which the Kendalls executed and delivered to Homecomings a $850,000.00 promissory note (the "Note"), secured by a mortgage recorded against the Kendalls' property (the "Mortgage"). Appendix ("A"), 76-103. The Mortgage was secured by property known as 28 Hammond Road, Falmouth, Maine (the "Property") and recorded in the Cumberland County Registry of Deeds in Book 24738, Page 19. A82-A103.

B. Transfer of the Note and Mortgage to Deutsche Bank

After origination, Homecomings indorsed the Note and delivered it to Residential Funding Company, LLC, which indorsed the Note and delivered it to "Deutsche Bank Trust Company Americas as Trustee." A76-A81; 11/2/2023 Trial Tr. 124:14-128:13. Deutsche Bank Trust Company Americas as Trustee subsequently indorsed and delivered the Note via an affixed allonge to Plaintiff Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2007-QA2 ("Deutsche Bank"). *Id.*

The Mortgage was also assigned two times. First, on September 9, 2010, Mortgage Electronic Registration Systems, Inc. ("MERS"), acting solely as nominee for

Homecomings, assigned the Mortgage to "Deutsche Bank Trust Company Americas as Trustee for RALI 2007QA2," (the "MERS Assignment") which assignment was recorded on September 24, 2010 in Book 28110, Page 222 of the Cumberland County Registry of Deeds. A108; 11/2/2023 Trial Tr. 145:1-146:8. Then, because these MERS assignments were no longer valid following this Court's decision in *Bank of Am., N.A. v. Greenleaf*, 2014 ME 89, 96 A.3d 700, on July 20, 2017, Homecomings executed a Quitclaim Assignment of the Mortgage in favor of Deutsche Bank, which was recorded on August 11, 2017 in Book 34229, Page 268 of the Cumberland County Registry of Deeds (the "Quitclaim Assignment"). A109-A110; 11/2/2023 Trial Tr. 146:16-148:3. The Quitclaim Assignment was signed by Homecomings through its attorney-in-fact, Ocwen Loan Servicing, LLC ("Ocwen"), in accordance with a Limited Power of Attorney effective November 1, 2013 ("Power of Attorney"), which gave Ocwen the authority to, among other things, "execut[e] assignments of mortgages." A222-A225; 11/2/2023 Trial Tr. 148:8-150:6 and A255-A259; 11/28/2023 Trial Tr. 49:19-51:3.[1]

The November 15, 2013 Power of Attorney was recorded with the Androscoggin County Registry of Deeds on August 23, 2013 in Book 10024, Page 46, A222-A225, whereas the October 21, 2013 Power of Attorney was recorded with the

[1] The parties offered competing Limited Powers of Attorney, both of which the trial court admitted as full exhibits.

Cumberland County Registry of Deeds on July 5, 2017 in Book 34136, Page 162. A255-A259.

C. The Foreclosure Action.

The Kendalls defaulted on their loan by failing to make the payment due on December 1, 2009, after which Deutsche Bank filed this action on December 6, 2017. A6, A45. The Kendalls filed an Answer and Request for Mediation on January 30, 2018 and although the matter was referred to mediation, a Final Mediator's Report was filed on March 19, 2018 following the first mediation session as a result of the Kendall's failure to appear. A7-A8.

A Scheduling Order issued on March 23, 2018 with a discovery deadline of June 21, 2018 and on April 1, 2018, John Kendall filed a letter with the trial court asking for the matter to be re-assigned to mediation. A9. The trial court granted John Kendall's request, and a final mediation ultimately took place on July 27, 2018 after which a Final Mediator's Report was filed, reflecting that the matter had not been resolved. A9-A10.

A new Scheduling Order issued on August 2, 2018 with a discovery deadline of November 1, 2018 and a bench trial was thereafter scheduled for December 4, 2018. A11. Counsel for the Kendalls filed his Notice of Appearance on October 22, 2018 and Deutsche Bank thereafter filed a Motion to Continue the Trial and Enlarge the Discovery Deadlines by motion dated October 29, 2018, with consent of the Kendalls' counsel. A11-A12. The trial court granted Deutsche Bank's motion on October 30,

2018 and a trial management conference was thereafter held on July 17, 2019. A12-A14.

On September 5, 2019, the Kendalls filed a Motion for Summary Judgment, which Deutsche Bank opposed on September 17, 2019. A14. In that Motion, the Kendalls did not challenge Deutsche Bank's standing to prosecute the foreclosure but instead argued that the foreclosure action was barred by the statute of limitations. The Kendalls filed their Reply on September 24, 2019 and the trial court issued its order, denying the Kendalls' Motion for Summary Judgment on October 1, 2019, finding that Deutsche Bank's foreclosure action was not time-barred. *Id.*

Deutsche Bank thereafter, commencing on November 2, 2020, filed several motions to stay the foreclosure matter, each of which were granted until the final stay expired on December 31, 2021. A15-A17. A pretrial conference was held on September 1, 2023 and the matter proceeded to its first day of trial on November 2, 2023. A18-A20. The second and third days of trial proceeded on November 15, 2023 and November 28, 2023. A20-A21.

During trial, Deutsche Bank presented the following evidence relevant to this appeal. First, there was a copy of the Note, admitted as Exhibit A-1 (the "Note"); Deutsche Bank also produced the original for inspection during the trial. A76-A81; 11/2/2023 Trial Tr. 123:11-124:3, 124:14-128:13. Both the Kendalls' counsel and the Court examined the original Note. 11/2/2023 Trial Tr. 123:11-124:3.

Next, there was a copy of the power of attorney that authorized Ocwen Loan Servicing, LLC to execute the allonge appended to the original Note on behalf of Deutsche Bank Trust Company Americas, as Trustee, admitted as A-3, absent objection. A212-A221; 11/2/2023 Trial Tr. 131:23-133:20. Deutsche Bank also presented the subject mortgage (the "Mortgage"), which was admitted as Exhibit B, similarly absent objection. A82-A103; 11/2/2023 Trial Tr. 134:8-135:1. These documents established that Deutsche Bank was the holder of the Note, with the power to enforce it.

As to proving the rights to the Mortgage, Deutsche Bank offered into evidence: Exhibits C-1, C-2 and C-3, which consisted of: (1) the MERS Assignment; (2) the Quitclaim Assignment; and (3) the recorded Limited Power of Attorney. A108-A110, A222-A225; 11/2/2023 Trial Tr. 145:1-146:8, 146:16-148:3, 148:8-150:6. Each of those exhibits were admitted over counsel's objection, although the Kendalls' counsel later introduced and had admitted a different version of the Limited Power of Attorney. A255-A259; 11/28/2023 Trial Tr. 49:19-51:3. Additionally, Deutsche Bank marked for identification Exhibits I (the Pooling and Servicing Agreement), I-2 (the Mortgage Loan Schedule), and I-3 (the Assignment and Assumption Agreement), representing additional evidence that Deutsche Bank was the beneficiary owner of the Mortgage as the trustee of the trust into which the Kendalls' loan was deposited. 11/2/2023 Trial Tr. 186:20-196:7. The court ultimately took the parties' arguments

regarding the admissibility of Exhibits I, I-2 and I-3 under advisement. 11/2/2023 Trial Tr. 186:20-196:7.

Finally, during day 3 of the trial, Deutsche Bank offered its Exhibit K, which consisted of a collection of bankruptcy documents from a Chapter 11 Voluntary Bankruptcy in which Homecomings was identified as a debtor. Exhibit K, ECF 6065-A, p. 17 ¶ 76; 11/28/2023 Trial Tr. 14:2-19:10. The purpose of Exhibit K was to establish for the trial court that the Limited Power of Attorney given to Ocwen Loan Servicing, LLC (admitted as two different versions - Plaintiff's Exhibit C-3 and Defendant's Exhibit C-3-A) was still in effect at the time that the Quitclaim Assignment was executed. Here too, the court ultimately took the parties' arguments regarding the admissibility of Exhibit K under advisement. 11/28/2023 Trial Tr. 18:16-19.

D. Post-Trial Motions and Decision.

Following post trial briefing, the trial court entered judgment in the Kendalls' favor by order dated February 7, 2024, declining to take judicial notice of Deutsche Bank's Exhibit K and concluding that Deutsche Bank had failed to prove its standing to foreclose as the owner of the Mortgage. A26-A34, A111-A190. It stated:

> Taken together, the exhibits appear to grant Ocwen Loan Servicing LLC the right to assign the Kendall's mortgage to Plaintiff on behalf of Homecomings Financial, LLC. However, the quitclaim assignment was executed on July 20, 2017, and the court heard evidence that Homecomings Financial, LLC liquidated its assets and went out of business in bankruptcy in late 2013.

A.29. In the main, the trial court was misguided in finding: (i) that Homecomings Financial, LLC went out of business in late 2013; (ii) that the 2012 bankruptcy divested Homecomings of any ownership rights in the Mortgage such that it had nothing left to assign; (iii) that it could not take judicial notice of the bankruptcy documents found in Deutsche Bank's Exhibit K; (iv) that it had received conflicting evidence regarding ownership of the mortgage; (v) that the Limited Power of Attorney authorizing Ocwen Loan Servicing, LLC to execute the Quitclaim Assignment was no longer valid; and (vi) that the Quitclaim Assignment was therefore invalid, leaving Deutsche Bank short of its requisite proof of ownership of the Mortgage.

Deutsche Bank thereafter filed its consolidated Rule 59 Motion for Reconsideration and Rule 52 Motion for Findings of Fact and Conclusions of Law (the "Post-Trial Motion"). A51-A75. In the Post-Trial Motion, Deutsche Bank argued that the trial court had erred (i) in its finding that the Limited Power of Attorney used to sign the Quitclaim Assignment was without effect; and (ii) in its finding that it was required to identify an existing beneficiary ownership in the Mortgage by Homecomings to give any effect to the Quitclaim Assignment. *Id.*

More specifically, Deutsche Bank argued that (i) the trial court had received no evidence for it to conclude that Homecomings had gone out of existence following the 2012 bankruptcy; (ii) even if Homecomings dissolved (notwithstanding the absence of evidence to support that conclusion), it intended the Limited Power of Attorney to survive its dissolution; (iii) the beneficiary owner of the Mortgage since 2007 was

Deutsche Bank; and (iv) there is a difference between the beneficiary owner and the sale of the "servicing rights" that were owned by Homecomings at the time of its bankruptcy. *Id.*

In addition, the Post-Trial Motion also walked the Court through the significance of it failing to admit Exhibits I, I-2 and I-3, which collectively showed that Deutsche Bank has the beneficiary interest in the Mortgage: (i) the Note was Indorsed by Homecomings to Residential Funding Company, LLC (Exhibit A-1, A80), (ii) Residential Funding Company, LLC, by the Assignment and Assumption Agreement, sold to Residential Accredit Loans, Inc., a group of loans (Exhibit "I-3"); (iii) the Assignment and Assumption Agreement states the loans purchased would be deposited in the Mortgage Asset-Backed Pass-Through Certificates Series 2007-QA1 – the same trust for which Deutsche Bank is the trustee (Exhibit "I-3"); (iv) the Note was indorsed to Deutsche Bank – consistent with the deposit of the loan to this Trust (Exhibit A-1, A80-A81); and (v) the Mortgage Loan Schedule listed the Kendalls' loan as one of the loans in the Trust (Exhibit "I-2").

After the Post-Trial Motion was fully briefed, the trial court entered its order granting Deutsche Bank only part of the relief it had requested. A35-A42. Specifically, the trial court reversed its prior decision and granted Deutsche Bank's request to take judicial notice of Exhibit K. A41. Otherwise, the trial court stood on its prior ruling that Deutsche Bank had failed to prove that it owned the Mortgage. A35-A42. This appeal followed. A24.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Did the trial court commit legal error when it concluded that Deutsche Bank had failed to prove its standing to foreclose?

B. Did the trial court commit legal error when it concluded that the Limited Power of Attorney used to sign the Quitclaim Assignment was without effect?

C. Did the trial court commit legal error in determining that it was required to identify an existing beneficiary ownership in the Mortgage by Homecomings to give any effect to the Quitclaim Assignment?

D. Did the trial court commit legal error in refusing to admit the Pooling and Servicing Agreement, Mortgage Loan Schedule and Assignment and Assumption Agreement which Further Establishes the ownership of Plaintiff of the Mortgage?

III. SUMMARY OF ARGUMENT

The Judgment in the Kendalls' favor was in error and should be vacated with an order remanding this matter to the trial court with an instruction to enter judgment in favor of Deutsche Bank or to engage in further proceedings.

The trial court's basis for entering judgment for the Kendalls was premised solely on its determination that Deutsche Bank had failed to prove that it was the owner of the Mortgage. However, the undisputed evidence shows that Deutsche Bank had established its standing – both with respect to its entitlement to enforce the Note and with respect to its ownership of the Mortgage – before the end of the first day of trial and the trial court received **no evidence** to suggest that Homecomings ceased to exist following the voluntary Chapter 11 Bankruptcy filed in 2012. In concluding that

Deutsche Bank had failed to establish its standing to foreclose, the trial court committed three separate errors.

First, the trial court erred in its finding that the Limited Power of Attorney used to sign the Quitclaim Assignment was without effect. At most, the trial court received evidence that Homecomings went through bankruptcy. However, no party offered any evidence to support the trial court's finding that Homecomings ceased doing business outside of the State of Maine, which finding served as the backbone for its conclusion that the Limited Power of Attorney was no longer in effect at the time that the Quitclaim Assignment was executed. The trial court did receive evidence, however, that even if Homecomings dissolved, Homecomings intended the Limited Power of Attorney to survive its dissolution. A copy can continue to exist after bankruptcy.

Second, the trial court erred in its finding that it was required to identify an existing beneficiary ownership in the Mortgage by Homecomings to give any effect to the Quitclaim Assignment. The evidence before the trial court supported the conclusion that (i) the beneficiary owner of the Mortgage since 2007 – when the loan was deposited into the loan trust -- was Deutsche Bank; and (ii) the trial court failed to grasp the difference between the beneficiary owner and the sale of the "servicing rights" that were owned by Homecomings at the time of its bankruptcy, and the sale to Ocwen of the servicing rights whilst Homecomings was in bankruptcy.

Third, the trial court erred in refusing to admit the Purchase and Sale Agreement, the Mortgage Loan Schedule and the Assignment and Assumption Agreement, further evidencing Deutsche Bank's interest in the Mortgage as the beneficiary owner, in two respects. First, it treated the contracts as hearsay, when they are not. And second, even if the documents are hearsay, the trial court was required to (i) take judicial notice of those documents and admit them pursuant to Me. R. Evid. 201(b) or (ii) admit them in light of the Kendalls' concession that they fell within the business records exception to the hearsay rule.

IV. ARGUMENT

A. Deutsche Bank Provided Competent Evidence of its Standing to Foreclose.

1. Standard of review.

Based on the evidence before it, the trial court erroneously determined that Deutsche Bank had failed to prove its standing. "We review the facts underlying a determination of standing for clear error … and we review the court's ultimate determination of standing de novo as an issue of law." *Greenleaf*, 2014 ME 89, ¶ 6.

2. The trial court committed legal error when it concluded that Deutsche Bank had failed to prove its standing to foreclose.

As a preliminary matter, there appears to be no dispute that Deutsche Bank is the holder of the Note. The definition of a "holder" includes "[t]he person in possession of a negotiable instrument that is payable ... to an identified person that is

the person in possession." 11 M.R.S. § 1–1201(21)(a) (2012). And, a holder of an instrument is entitled to enforce it. 11 M.R.S. § 3–1301(1).

The evidence before the trial court supports this undisputed conclusion based on its determination that Deutsche Bank was in physical possession of the original Note which contained three endorsements: (i) Homecomings indorsed the Note and delivered it to Residential Funding Company, LLC; (ii) Residential Funding Company, LLC indorsed the Note and delivered it to "Deutsche Bank Trust Company Americas as Trustee"; and (iii) Deutsche Bank Trust Company Americas as Trustee subsequently indorsed and delivered the Note via an affixed allonge to Deutsche Bank. A76-A81; 11/2/2023 Trial Tr. 123:11-124:3, 124:14-128:13.

Both the Kendalls' counsel and the Court examined the original Note. 11/2/2023 Trial Tr. 123:11-124:3. And, a copy of the power of attorney evidencing Ocwen Loan Servicing, LLC's authority to execute the indorsement on the allonge was admitted as A-3, absent objection. A212-A221; 11/2/2023 Trial Tr. 131:23-133:20.

Accordingly, the only real dispute before this Court is whether Deutsche Bank is the owner of the Mortgage. *Greenleaf*, supra, ¶ 12 ("Thus, whereas a plaintiff who merely holds or possesses – but does not necessarily own – the note satisfies the note portion of the standing analysis, the mortgage portion of the standing analysis requires the plaintiff to establish *ownership* of the mortgage.") (emphasis in original).

Here too, however, the evidence is conclusive and substantively undisputed. Deutsche Bank presented the Mortgage, which was admitted as Exhibit B, absent

objection. A82-A103; 11/2/2023 Trial Tr. 134:8-135:1. As Exhibits C-1 through C-3, Deutsche Bank offered (i) the MERS Assignment; (ii) the Quitclaim Assignment; and (iii) the recorded Limited Power of Attorney. A108-A110, A222-A225; 11/2/2023 Trial Tr. 145:1-146:8, 146:16-148:3, 148:8-150:6. Each of those exhibits were admitted over counsel's objection, although the Kendalls' counsel later introduced and had admitted a different version of the Limited Power of Attorney. A255-A259; 11/28/2023 Trial Tr. 49:19-51:3. Additionally, during day 3 of the trial, Deutsche Bank offered its Exhibit K, representing a collection of bankruptcy documents from a Chapter 11 Voluntary Bankruptcy in which Homecomings was identified as a debtor (Exhibit K, ECF 6065-A, p. 17 ¶ 76; 11/28/2023 Trial Tr. 14:2-19:10), which the trial court ultimately took judicial notice of in response to the Post-Trial Motion. 11/28/2023 Trial Tr. 18:16-19; A35-A42.

Notably, the facts of this case regarding Deutsche Bank's standing to foreclose are a virtual mirror image of those in *Deutsche Bank Trust Company Americas v Clifford*, 2021 ME 11. And there, this Court unequivocally held that Deutsche Bank had proven "all the required elements to foreclose by a preponderance of the evidence." *Id.* at ¶ 20.

Notably absent from the trial court's record is *any* evidence supporting the Kendalls' unsubstantiated argument that the Limited Power of Attorney given to Ocwen Loan Servicing, LLC was ineffective for *any* reason, let alone as a result of Homecomings' entry into a voluntary Chapter 11 Bankruptcy in 2012.

Having met its burden of proof, the trial court erred in concluding that Deutsche Bank had failed to prove its standing to foreclose.

B. The Limited Power of Attorney Authorized the Execution of the Quitclaim Assignment.

1. Standard of review.

Based on the evidence before it, the trial court erroneously determined that the Limited Power of Attorney was without effect when the Quitclaim Assignment was executed. "We will set aside a finding of fact only if there is no competent evidence in the record to support it. … The fact-finder is permitted to adopt any version of the evidence and to draw any reasonable inferences that flow from the testimony." *Town of Carmel v. McSorley*, 2002 ME 33, ¶ 9, 791 A.2d 102, 106.

2. The trial court committed legal error when it concluded that the Limited Power of Attorney used to sign the Quitclaim Assignment was without effect.

The whole premise for the trial court's determination that the Limited Power of Attorney was without effect to authorize the execution of the Quitclaim Assignment – that Homecomings went through a voluntary Chapter 11 bankruptcy – is belied by the evidence before the trial court and, frankly, just plain error.

Regardless of which Limited Power of Attorney this Court considers – Plaintiff's C-3 or Defendant's C-3-A – the record is undisputed that at the time the Limited Power of Attorney was executed, Homecomings was part of a Bankruptcy in the United States Bankruptcy Court for the Southern District of New York, under Case Number 12-12020-mg (the "Bankruptcy"). Exhibit K. And, where the trial court

granted Deutsche Bank's request to take judicial notice of Exhibit K, containing certain of the Bankruptcy records, the following are also not in dispute:

1. Ocwen purchased certain assets from the Bankruptcy Estate through an Asset Purchase Agreement that was approved by the Bankruptcy Court on November 21, 2012. Exhibit K, ECF 2246.

2. Those assets are described in Section 2.1 of the Asset Purchase Agreement (filed in the Bankruptcy) generally as "Mortgage Servicing Rights." Exhibit K, ECF 2246-1, p. 38.

3. Section 2.5(a) of the Asset Purchase Agreement required Sellers (including Residential Capital, LLC ("ResCap")) to cause any Affiliate Seller to "transfer, assign, convey and deliver to Purchaser" any "assets or properties that would be deemed to be Purchased Assets if such Affiliate Seller were a Seller" under the Asset Purchase Agreement. Exhibit K, ECF 2246-1, p. 43.

4. The Asset Purchase Agreement defined "Affiliate of the Sellers" as "only direct and indirect Subsidiaries of ResCap" which includes Homecomings as one of its wholly owned subsidiaries. Exhibit K, ECF 2246-1, p. 9.

5. Section 6.1 of the Asset Purchase Agreement required the delivery of a "power of attorney" to Ocwen under certain circumstances. Exhibit K, ECF 2246-1, pp. 64-65. ("If at any time after the Closing, Purchaser shall consider or be advised that any assurances or any other actions or things are necessary or desirable (a) to vest, perfect or confirm ownership (of record or

otherwise) in Purchaser, as applicable, its title or interest in the Purchased Assets or (b) otherwise to carry out this Agreement or the Ancillary Agreements, Sellers shall use commercially reasonable efforts to execute and deliver all bills of sale, instruments of conveyance, UCC filings, powers of attorney, assignments, assurances and orders and take and do all such other actions and things as may be reasonably requested by Purchaser, in order to vest, perfect or confirm any and all right, title and interest in, to and under such rights, properties or assets in the Purchased Assets.")

6. The Limited Power of Attorney was executed by Homecomings in specific contemplation of the Asset Purchase Agreement that was approved through the Bankruptcy on November 21, 2012. A222 and A256 ("…in connection with mortgage loans and mortgage loan servicing rights purchased by Ocwen pursuant to the Asset Purchase agreement, by and among Residential Capital, LLC, Residential Funding Company, LLC …. being one or more of the Companies … and Ocwen, dated as of November 2, 2012, as amended."); *see also* Exhibit K, ECF 2246-1.

Again, notably absent from the trial court's record is *any* evidence pertaining to the Kendalls' unsubstantiated argument that the Limited Power of Attorney given to Ocwen Loan Servicing, LLC was ineffective for *any* reason, let alone as a result of Homecomings' entry into a voluntary Chapter 11 Bankruptcy in 2012. Nevertheless, even if this Court were to find that Homecomings was dissolved through the

Bankruptcy, that does not mean the powers granted in the Limited Power of Attorney dissolve too. Rather, the complete opposite is true – they continue given the circumstances by which the Limited Power of Attorney was granted.

While as a general matter, as in most states, a power of attorney does not survive the death or dissolution of the principal, a power of attorney "coupled with an interest, or given for a valuable consideration, or when it is part of a security, is ***irrevocable*** unless there is an express stipulation that it is revocable." *Palmer v. Palmer*, C.A. No. 5693, 1979 Del. Ch. LEXIS 351, *5 (Del. Ch. Feb. 14, 1979); *see also*, *Aveta Inc. v. Cavallieri*, 23 A.3d 157, 168 (Del. Ch. 2010) ("[a] grant of authority will be upheld as irrevocable when it is 'coupled with an interest'" (citation omitted)).[2]

That is, where the attorney-in-fact is interested in the subject matter at issue, events that would otherwise terminate the power of attorney, such as the principal's death or dissolution, or an attempt to revoke the power of attorney, do not end the attorney's authority. This Court appears to follow this general rule. *See Harper v. Little*, 2 Me. 14, 16 (Me. 1822) ("As to the first question; --the ancient and general rule of law is, that a power of attorney expires with the life of the constituent. … And the only exception is where the power is coupled with an interest…"); *Sullivan v. Prudential Ins. Co. of Am.,* 131 Me. 228, 160 A. 777, 779 (1932) ("Contracts of partnership are

[2] Homecomings is a Limited Liability Company incorporated in the State of Delaware and so consideration of Delaware law is appropriate here.

affected, as the statute uses the term, by the civil death of the party; so also are contracts altogether personal, as to serve the other party to the contract; and contracts where one is acting for another, such as agencies or powers of attorney, **where the agency or power is not coupled with an interest**." (emphasis added)).[3]

The next question, then, is whether the Limited Power of Attorney to Ocwen was coupled with an interest. The test of an agency coupled with an interest is defined in 2 Williston on Contracts § 280 (3d ed.) at pp. 301-302: "Does the agent have an interest or estate in the subject matter of the agency independent of the power conferred, or does the estate or interest accrue by or after the exercise of the power conferred? If the former, it is an agency coupled with an interest, or as has been suggested, a proprietary power; if the latter, it is not." A power of attorney granted to a mortgage servicer is coupled with an interest because it "is not simply an interest in the

[3] The rule that the death of the principal does not terminate powers of attorney in which the agent is interested is consistent with longstanding law throughout the United States. "This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an 'interest,' it survives the person giving it, and may be executed after his death." *Hunt v. Rousmanier's Adm'rs*, 21 U.S. (8 Wheat.) 174, 203 (1823) (Marshall, C.J.); *see also*, *Pan Am. Petroleum Corp. v. Cain*, 340 S.W.2d 93, 95-96 (Tex. Civ. App. 1960) ("it is equally well settled that a power coupled with an interest does not terminate with the death of the principal or grantor"), *aff'd*, 355 S.W.2d 506 (1962); *Succession of Toombs*, 118 So. 488, 489 (La. 1928) ("While ordinarily a power of attorney is terminated by the death of the principal, yet this is not so when the power of attorney is coupled with an interest."); *Wells v. Foss*, 69 A. 155, 155 (Vt. 1908) ("The law is established beyond question that the death of the principal instantly terminates the power of the agent, unless coupled with an interest, and that all subsequent dealings with the agent are void and of no effect.").

power itself, but is an interest in the loans upon which the power was to operate." *In re Mortgages, Ltd.*, 559 B.R. 508, 519 (Bankr. D. Ariz. 2016).

Here, this interest can be seen from the Limited Power of Attorney, which states that Ocwen is being substituted in the "name place and stead and for the benefit in connection with mortgage loans and mortgage servicing rights purchased by Ocwen pursuant to the Asset Purchase Agreement." A222, A256 (emphasis added). The Asset Purchase Agreement as stated in the Limited Power of Attorney is the same Asset Purchase Agreement that was introduced at trial (Exhibit K, ECF 2246-1), and which was approved by the Bankruptcy Court (Exhibit K, ECF 2246). And, the evidence supports the conclusion that the Limited Power of Attorney was part of that sale, as it was executed during the Bankruptcy, is consistent with the Asset Purchase Agreement and specifically identifies that it was being executed in contemplation of the Asset Purchase Agreement. A222, A256. It would make no legal sense for Ocwen to have purchased the servicing rights, requiring a Power of Attorney as part of its Asset Purchase Agreement (which was approved by the bankruptcy court), only to have the Power of Attorney unenforceable as a result of the same bankruptcy proceeding through which it purchased the servicing rights in the first place.

In the absence of any evidence that both (i) Homecomings ceased to exist through the Bankruptcy; ***and*** (ii) the Limited Power of Attorney given to Ocwen was not coupled with an interest, the trial court erred in its conclusion, as a matter of law, that the Limited Power of Attorney was not in effect at the time that the Quitclaim

Assignment was executed. This Court should respectfully vacate the trial court's decision and remand this matter to the trial court with an instruction to enter judgment in favor of Deutsche Bank.

C. The Quitclaim Assignment was Effective to Transfer Homecomings' Remaining Interest in the Mortgage to Deutsche Bank.

1. Standard of review.

Based on the evidence before it, the trial court erroneously determined that Homecomings did not have any existing beneficiary ownership interest in the Mortgage. "We will set aside a finding of fact only if there is no competent evidence in the record to support it. … The fact-finder is permitted to adopt any version of the evidence and to draw any reasonable inferences that flow from the testimony." *McSorley*, supra, ¶ 9.

2. The trial court committed legal error in determining that it was required to identify an existing beneficiary ownership in the Mortgage by Homecomings to give any effect to the Quitclaim Assignment.

This Court has made clear that standing can be establish where MERS was the nominee for the original mortgagee and a quitclaim or ratification assignment was obtained from the original lender. *See JPMorgan Chase Bank, N.A. v. Lowell*, 2017 ME 32, ¶ 2 n.2, 156 A.3d 727, 728 n.2 (2017) ("As a result of the quitclaim assignment [to JPMorgan from Wells Fargo, with whom original lender Wachovia had merged], it appears that JPMorgan's standing to pursue this foreclosure action is not at issue, and Lowell does not contend otherwise.") (dictum); *Deutsche Bank Nat'l Trust Co. v. Monzel*,

No. OXF-17-181, 2017 Me. Unpub. LEXIS 110 (Me. Dec. 7, 2017) (holding that an assignment from MERS and a quitclaim assignment from the original lender to the foreclosing plaintiff was among the "competent evidence in the record to support the [trial] court's explicit and implicit findings that each of the eight elements of foreclosure was satisfied."); *Clifford*, supra at FN 1 (same).

Each of the above-referenced matters acknowledged the sufficiency of those assignments in the context of establishing the various plaintiffs' standing to foreclose without engaging in further inquiry relating to the signer's ownership interest in the mortgage. In short, "less is more." But, it appears as though the trial court may have gotten gummed up with the nuances of mortgage ownership in title – as defined in *Greenleaf* – beneficial ownership, and servicing rights. The evidence is clear – and substantively undisputed – that Deutsche Bank is the owner of the mortgage by virtue of the Quitclaim Assignment from Homecomings as mandated by this Court's decision in *Greenleaf*. A82-A103; 11/2/2023 Trial Tr. 134:8-135:1; A108-A110, A222-A225; 11/2/2023 Trial Tr. 145:1-146:8, 146:16-148:3, 148:8-150:6; A255-A259; 11/28/2023 Trial Tr. 49:19-51:3; Exhibit K, ECF 6065-A, p. 17 ¶ 76; 11/28/2023 Trial Tr. 14:2-19:10; 11/28/2023 Trial Tr. 18:16-19; A32-A39.

Significantly, and as discussed supra, this Court's ultimate affirmation of the trial court's order granting judgment for the foreclosing plaintiff in *Clifford* involved the very same fact pattern as that which faced the trial court here. Homecomings

originated the loan and Ocwen executed the Quitclaim Assignment under the authority granted to it by the Power of Attorney executed by Homecomings. *Clifford*, supra.

Where the trial court appears to have gone off track, however, is by inadvertently conflating mortgage ownership (the element Deutsche Bank is required to prove in support of its standing) with beneficial ownership and servicing rights. Deutsche Bank's efforts to introduce additional evidence to support a finding that it was *also* the beneficial owner of the mortgage by and through the Purchase and Sale Agreement were erroneously rejected by the Court. A37-A41. However, that is not a requisite element that this Court has identified for a party to prove its right to foreclose. And, even though Deutsche Bank may disagree with the trial court's decision in that regard, it also means that the trial court erred in taking those documents into consideration in suggesting that Deutsche Bank had failed "to explain or produce proof of … how the mortgage got from Homecomings Financial, LLC to Residential Accredit Loans, Inc." A40.

Moreover, Deutsche Bank's witness, Sally Torres ("Ms. Torres"), testified that Ocwen had purchased Homecomings' servicing rights by and through the Bankruptcy. 11/2/2023 Trial Tr. 111:18-20, 118:20-21; 11152-23 Trial Tr. 30:6-16. But, a transfer of servicing rights does not constitute a transfer of the ownership rights in the Mortgage. Accordingly, the trial court's suggestion that it "heard conflicting evidence about which entity held the mortgage at the time of the bankruptcy" related to the testimony by Ms. Torres pertaining to the relationship between Homecomings, GMAC

Mortgage and Residential Funding (A33) is simply unsupported by the testimony and the documented evidence.

The standard of proof is not beyond a reasonable doubt, but rather it is by a preponderance of the evidence – thus, more likely than not that Deutsche Bank has standing. *MTGLQ Investors, L.P. v. Alley*, 166 A.3d 1002, 1005 (Me. 2017). Where Deutsche Bank has proven by a preponderance of the evidence that it is the owner of the Mortgage, this Court should find that the trial court erred in holding otherwise.

D. The PSA Documents Were Admissible as a Matter of Law.

1. Standard of review.

Based on the evidence before it, the trial court erroneously determined that the Pooling and Servicing Agreement, its Mortgage Loan Schedule and the Assignment and Assumption Agreement (collectively, the "PSA Documents") were inadmissible. "[W]hen we review a *trial* ruling regarding the admissibility of a business record, we review foundational findings for clear error and the ultimate determination of the record's admissibility for abuse of discretion." *Beneficial Maine, Inc. v. Carter*, 2001 ME 77, ¶ 9, 25 A.3d 96, 100 (emphasis in original; citing *Bank of Am., N.A. v. Barr,* 2010 ME 124, ¶ 17, 9 A.3d 816, 820).

2. The trial court committed legal error when it refused to admit the PSA Documents.

Notwithstanding the undisputed record evidence demonstrating that Deutsche Bank has standing to foreclose in this matter, the trial court erred in refusing to admit

the PSA Documents, which also, in addition to the Quitclaim Assignment, proves Deutsche Bank's ownership of the Mortgage.

During the first day of trial, Deutsche Bank offered its Exhibits I, I-2 and I-3 – the PSA Documents – representing additional evidence that Deutsche Bank was the beneficiary owner of the Mortgage. 11/2/2023 Trial Tr. 186:20-196:7. The court took the parties' arguments regarding the admissibility of the PSA Documents under advisement (11/2/2023 Trial Tr. 186:20-196:7) and ultimately ruled in its July 15, 2024 Order on the Post-Trial Motion that (i) it could not take judicial notice of the PSA Documents as Securities and Exchange Commission ("SEC") filings; and (ii) even if it could, the PSA Documents did not establish that Deutsche Bank was the owner of the beneficiary interest in the Mortgage. A35-A42. The trial court's ruling was in error, because the PSA Documents were both admissible and relevant.

First, and most simply, the trial court made a blatant mistake in ruling that the PSA Documents are hearsay. It is a fundamental rule of evidence that a contract, such as the PSA Documents, are not hearsay, and therefore it is irrelevant whether the business records exception was established at trial. *Sutler v. Redland Ins. Co.*, 2013 U.S. Dist. LEXIS 97480, 2013 WL 3732873 (D. Mass. July 12, 2013). Rather the PSA Documents, which are contracts, are considered verbal acts and not assertions of fact, and are therefore not hearsay in the first place. *See* Me. R. Evid. 801(a) & (c)(2). *Mueller v. Abdnor*, 972 F.2d 931, 937 (8th Cir. 1992), citing 2 McCormick, Evidence § 249, at 101 (4th ed. 1992) ("it is widely held that a contract" is a verbal act and not

hearsay); *Creaghe v. Iowa Home Mut. Cas. Co.*, 323 F.2d 981, 984 (10th Cir. 1963); *West Coast Truck Lines, Inc.* v. *Arcata Comm. Recycling Center, Inc.*, 846 F.2d 1239, 1246 n.5 (9th Cir.), cert. denied, 488 U.S.856, 102 L. Ed. 2d 119, 109 S. Ct. 147 (1988) (same); *Island Directory Co.* v. *Iva's Kinimaka Enterprises, Inc.*, 10 Haw. App. 15, 21-22, 859 P.2d 935 (1993) (same); *Moen v. Thomas*, 2001 ND 95, P 12, 627 N.W.2d 146, 150 (N.D. 2001) (same); *Thomas C. Cook, Inc.* v. *Rowhanian*, 774 S.W.2d 679, 685 (Tex. App. 1989) (same).

Rather, a contract – assuming that it is relevant -- is admissible solely upon a witness vouching for it. *Sutler,* 2013 U.S. Dist. LEXIS 97480, at * 5-6. Here, Ms. Torres identified the Pooling and Servicing Agreement, and the purpose of it. 11/2/2023 Trial Tr. 188:7-11 (identifying the document); 188:24-190:14 (describing the Pooling and Servicing Agreement). Ms. Torres also referenced Exhibit "I-2", which is the mortgage loan schedule, part of the Pooling and Servicing Agreement, which shows the Kendalls' loan as being part of the Trust. 11/2/2023 Trial Tr. 192:4-11.

Accordingly, a decision to exclude the PSA Documents on the basis that they were hearsay constituted error.

Even if hearsay, moreover, the trial court erred when it found that it could not take judicial notice of the PSA Documents or could not simply admit them under the business records exception to the hearsay rule. As to the latter, counsel for the Kendalls admitted that the Pooling and Servicing Agreement was admissible under the

business records exception. 11/2/2023 Trial Tr. 187:21-23. And as to the former, Ms. Folsom represented to the trial court that the Pooling and Servicing Agreement was taken directly from the SEC Website. 11/2/2023 Trial Tr. 187:25-188:2.

The PSA Documents are therefore subject to being "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Me. R. Evid. 201(b). It is broadly known that judicial notice should be taken of SEC filings. *FindWhat Inv. Grp. v. FindWhat.com*, 658 F.3d 1282, 1297 (11th Cir. 2011); *Lindsay v. Wells Fargo Bank, N.A.,* 2013 U.S. Dist. LEXIS 129694 (D. Mass. July 14, 2013). And, Me. R. Evid. 201(c)(2) makes clear that a trial court "***must*** take judicial notice if a party requests it and the court is supplied with the necessary information." (Emphasis added.)

Moreover, the fact that the Pooling and Servicing Agreement is not signed is not a reason to deny admission. Rather, "the fact that an agreement is unsigned does not make it per se inadmissible. Such document may be authenticated by other means" and may be relevant to demonstrate the existence of an agreement between the parties. *United States v. Tin Yat Chin*, 371 F.3d 31, 37-38 (2d Cir. 2004) (observing that Fed. R. Evid. 901 only requires "sufficient proof . . . so that a reasonable juror could find in favor of authenticity or identification," which is not "a particularly high hurdle") (internal quotation marks omitted); *10 Ellicott Square Court Corp. v. Mountain Valley Indem. Co.*, 634 F.3d 112, 124 (2d Cir. 2011) (recognizing that under New York

law "[a]n unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound") (internal quotation marks omitted).

The fact that the Pooling and Servicing Agreement was presented as an unsigned document goes to its weight, as opposed to its admissibility and here, the Kendalls did not dispute the validity of the Pooling and Servicing Agreement or its contents in the first place. *Howaniec v Lilley*, Me. Super. Docket No. CV-11-492 (Aug. 26, 2014, J. Wheeler) (holding that an unsigned copy of a contingency fee agreement was "best evidence" where the defendants failed to provide contradicting evidence); see also *Tyco Thermal Controls, LLC v. Redwood Industrials, LLC,* 2012 U.S. Dist. LEXIS 94793 (N.D. Cal. July 9, 2012). Indeed, it has been held that testimony relating to an unsigned Pooling and Servicing Agreement does not in and of itself, make it inadmissible. *See Humphreys v. Bank of Am.,* 2013 U.S. Dist. LEXIS 67451 (W.D. Tenn. May 13, 2013).

Having established three different paths to admissibility, the next question goes to relevance. Here too, as with Deutsche Bank's primary evidence of standing, the Kendalls did not provide the trial court with **any** evidence to contradict the contents of the PSA Documents or the implications of those documents with regard to Deutsche Bank's beneficiary interest in the Mortgage. In fact, in the Post-Trial Motion, Deutsche Bank identified and articulated 16 proposed findings of fact related to the PSA Documents, each of which the Kendalls failed to substantively dispute.

A55-A57, ¶¶ 8-15, 17-21 and 23-25; A191-A201.[4] Instead, they relied solely on their position that the PSA documents were unsigned, "were not supported by a valid evidentiary foundation" and "were not admitted in evidence," completely disregarding the fact that the admissibility of those documents had been taken under advisement by the trial court and no ruling had thereafter issued. A194-A197. The trial court acknowledged as much in its July 15, 2024 Order. A37-A38 ("The court did not admit these exhibits at trial but instead took them under advisement and did not reach their admissibility because it found that Plaintiff's foreclosure failed on other grounds.")

Having established that the PSA Documents were both admissible and relevant, this Court should find that the trial court erred in refusing to admit those documents as further evidence of Deutsche Bank's interest as a beneficiary owner of the Mortgage.

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[4] In fact, even this was not required. Deutsche Bank provided the foundational requirements for the admission of the documents upon which it relies. Once that happened, the documents and what is contained in them, are evidence. When a document is available, testimony is not required with regard to its contents, because the document "speaks for itself." *Grant v. Frost*, 13 A. 881, 881 (Me. 1888) ("In such case the written contract must govern. It speaks for itself. The parties having reduced their contract to writing, their rights must be governed by and depend upon its terms as therein expressed, irrespective of any parol evidence of what was intended, or what took place previous to or at the time of the making of the contract."); *Daigle Oil Co. v. Pelletier Sanitation, Inc.*, Me. Super. Ct. Docket No. CARSC-CV-19-177 (Feb 14, 2020, J. Stewart) ("If a contract is not ambiguous, the construction of the contract is a question of law to be resolved by considering the writing as a whole and giving the language its plain meaning.")(citing Andrew M. Horton, et.al, Maine Civil Remedies, §10-4(a), (4th ed. 2004).); see also *Frietas v. Emhart Corp.,* 715 F.Supp. 1149, 1151 (D. Mass. 1989).

V. CONCLUSION

For all the foregoing reasons, the Court should vacate the February 7, 2024 Judgment, and remand this matter to the trial court with an instruction to enter judgment in favor of Deutsche Bank.

Respectfully submitted,

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December 4, 2024

CERTIFICATE OF SERVICE

I, Brett L. Messinger, certify that on the date indicated below, I have sent two copies of the within Brief of Appellant to each of the parties listed below by United States Mail, first-class, postage prepaid addressed as listed below:

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