

Lord of the Claims Part I Frodo Objects

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I. Introduction

This outline will focus on the filing and possible objections to secured claims in Chapter 13 Bankruptcies in the context of mortgage backed securities. Claims filed by a Trustee of a securitized (pooled or bundled) trust sometimes lack proper documentation to show that the trust owns or holds the note.

What does Securitization mean?

According to Investopedia it is the process through which an issuer creates a financial instrument by combining other financial assets and then [marketing](#) different tiers of the repackaged instruments to investors. The process can encompass any type of financial asset and promotes liquidity in the marketplace. (This means that certificates are sold to investors. The investors are paid a return or dividend on the certificates and the money flowing in from sales of certificates could be used to finance more mortgage loans.)

[Mortgage-backed securities](#) are a perfect example of securitization. By combining mortgages into one large pool, the issuer can divide the large pool into smaller pieces based on each individual mortgage's inherent risk of default and then sell those smaller pieces to investors

<http://www.investopedia.com/terms/s/securitization.asp#axzz1Zph3ruuy>

Securitization of residential mortgages [*13] is "the process of aggregating a large number of notes secured by deeds of trust in what is called a mortgage pool, and then selling security interests in that pool of mortgages." Kurt Eggert, Held Up In Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine, *35 Creighton L. Rev.* 503, 536 (2002). The process begins with a borrower negotiating with a mortgage broker for the terms of the loan. Then, the mortgage broker either originates the loan in its own name or in the name of another entity, which presumably provides the money for the loan. Almost immediately, the broker transfers the loan to the funding entity. "This lender quickly sells the loan to a different financial entity, which pools the loan together with a host of other loans in a mortgage pool." *Id.* at 538. *In re Alcide*, 2011 Bankr. LEXIS 1989, at, 12-13 (May 27, 2011 D. Pa., citing, *In re Weisband*, 427 B.R. 13, 21 (Bankr. D. Ariz. 2010).

In the lending industry (mortgage lending) securitization is accomplished by the pooling of mortgage notes to Securitized Trusts which are set up to own and hold pools of mortgage loans. The trusts in turn issue securities to sell to investors. The trust has a tax exempt status under the Internal Revenue Code to create Real Estate Mortgage Investment Conduits (REMICs) to issue the certificates. The securitized trusts are also known as REMIC trusts.

Section 860D of the I.R.C. defines REMIC

§ 860D. REMIC defined.

(a) General rule. For purposes of this title, the terms 'real estate mortgage investment conduit' and 'REMIC' mean any entity--

(1) to which an election to be treated as a REMIC applies for the taxable year and all prior taxable years,

(2) all of the interests in which are regular interests or residual interests,

(3) which has 1 (and only 1) class of residual interests (and all distributions, if any, with respect to such interests are pro rata),

(4) as of the close of the 3rd month beginning after the startup day and at all times thereafter, substantially all of the assets of which consist of qualified mortgages and permitted investments...

The REMIC trusts are created by a Pooling and Servicing Agreement (PSA) or Trust Agreement among the institutional actors of the trust. The PSA for most trusts will be registered with the SEC along with a Prospectus which can be found on the SEC web site at www.sec.gov. You can also Google the name of the trust and often find the PSA or Trust Agreement as a short cut to the SEC web site. *See*, Appendix 1 as an example of portions of a PSA and a prospectus on file with the SEC.

In addition, the sponsor and the depositor will usually enter into some kind of Mortgage Loan Sale or Assignment Agreement to facilitate the negotiation of the note to the trustee, via the depositor.

The parties to the Trust Agreement or PSA will be the Trustee, the Master Servicer, the Sponsor, Depositor and a Custodian.

Generally, there will be a sequence of conveyances required by Section 2.01 of the Trust Agreement or PSA. The sequence is as follows:

Originator



Sponsor



Depositor



Trustee

The originator will not transfer the note directly to the Trust. The sequence of conveyances is necessary to make the sale of the notes bankruptcy remote.

The Depositor must convey the mortgage notes to the Trustee by a particular date which will be defined by the PSA or Trust Agreement as the closing date. This will also be the startup date under the IRC for purposes of maintaining tax exempt status for the transfer of mortgage loans into the trust.

Practice pointer: If the Pooled Trust does not own or hold the note (if it cannot provide sufficient evidence/documentation to show this) it does not have standing and lacks the status of a Real Party in Interest to file a claim on the Chapter 13 and is not entitled to Relief from the Automatic Stay.

II. Constitutional and Prudential Standing

A. Constitutional (Article III) Standing

Standing is constitutional requirement, grounded in Article III of the U.S. Constitution. *In re Hwang*, 396 B.R.757,768 (Bankr. C.D. CA 2008) 2008 Bankr. LEXIS 2969

The U.S. Supreme Court has stated the standing requirement as follows: [HN12] "To qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis v. FEC*, 128 S. Ct. 2759, 2768, 171 L. Ed. 2d 737 (2008).

Standing is a "threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). Hence, "a defect in standing cannot be waived; it must be raised, either by the parties or by the court, whenever it becomes apparent." *United States v. AVX Corp.*, 962 F.2d 108, 116 n. 7 (1st Cir.1992).

"In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III." *Id.*

The threshold question of justiciability is a minimal standard – a party can show a case or controversy by showing concrete injury, traceability and redressability

B. Prudential Standing

Apart from this minimum constitutional mandate, the Supreme Court recognizes other limits on the class of persons who may invoke the courts' decisional remedial powers. *Id.* at 499. These prudential limitations are self-imposed rules of judicial restraint, and principally concern whether the litigant (1) asserts the rights and interests of a third party and not his or her own, (2) presents a claim arguably falling outside the zone of interests protected by the specific law invoked, or (3) advances abstract questions of wide public significance essentially amounting to generalized grievances more appropriately addressed to the representative [*769] branches. *In re Hwang at*, 768.

"In the context of relief from the automatic stay, the requirements of standing and real party in interest are often confused because of the similarity in language between § 362(d) [**26] and Rule 17 of the Federal Rules of Civil Procedure. Section 362(d) provides that relief from stay shall be granted "[O]n request of a party in interest." This is a substantive requirement, and it is

relatively broad: many parties are parties in interest for the purposes of § 362(d). IndyMac rightly argues that it qualifies as a party in interest for this motion. *In re Hwang* at, 769.

The "real party in interest" requirement, on the other hand, is generally regarded as one of many "prudential" considerations that have been "judicially engrafted onto the Article III requirements for standing." *See, e.g., In re Village Rathskeller*, 147 B.R. 665, at 668 (Bankr. S.D.N.Y. 1992). To obtain relief in federal court, a party must meet both the constitutional requirements (standing) and the prudential requirements (including real party in interest).

C. Commentary

Some of the first published decisions dealing with standing in regard to a relief from stay motion focused on the idea that the Court had to determine whether the creditor had a colorable claim.

As the Court noted in *In re Maisel*, 378 B.R. 19, 21 (Bankr. D. Mass. 2007), "[t]he plain language of section 362 of the Bankruptcy Code requires that one be a 'party in interest' to seek relief from stay." Although the United States Court of Appeals for the First Circuit in *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 32 (1st Cir. 1994), determined that relief from stay hearings should not involve a full adjudication on the merits of claims, defenses, or counterclaims, but rather should involve a determination of "whether a creditor has a colorable claim to property of the estate," this Court must ensure that Deutsche Bank is, in fact, a party in interest with standing to bring the Motion for Relief from Stay now before the Court. *In re Robin Hayes*, 393 B.R. 259, 266 (D. Mass. 2008)

The colorable claim standard seems to imply a lower standard for the creditor to meet to pursue a relief from stay motion. It is possible for the Court in focusing on the colorable claim determination will look to Section 362(d) which references a "party in interest" and ignore Rule 7017 which defines a "real party in interest". Later cases seem to focus more on the concept of Prudential Standing and Real Party in Interest in determining standing.

D. Cases which denied standing

In re Wilhelm, 407 B.R. 392, 209 Bankr. LEXIS 1857

In re Schwartz 366 B.R. 26 (Bankr. Mass. 2007)

In re Robin Hayes, 393 B.R. 259(Bankr. D.Mass. 2008)

In re Vargas, 396 B.R. 511 (Bankr. C.D. Cal. 2008)

In re Maisel, 378 B.R. 19 (D. Mass. 2007)

In re Tarantola, 2010 Bankr. LEXIS 2435(July 29, 2010 D. Az.)

In re Weisbad, 427 B.R. 13, 2010 Bankr. LEXIS 981 (D.Az. 2010)

E. Cases lifting the stay

In re Almeida, 417 B.R. 140; 2009 Bankr. LEXIS 3991 (July 24, 2009 D. Mass.)

In re Relks, 2009 Bankr. LEXIS 4144 (December 18, 2009 D. Wyo.)

In re Canellas, 2010 Bankr. LEXIS 390 (February 9, 2010 D. Fla.)(Court finds assignment of mortgage sufficient to lift stay)

III. Two Basic Theories to Challenge Standing

- A. The Claimant or movant must show compliance with the conveyance requirements of the PSA in order for the Trust to own or hold the mortgage and note. The transfer of the note requires a true sale, with proper negotiation and delivery in accordance with the PSA and Mortgage Loan Sale and/or Assignment Agreement.

See, In re Robin Hayes, 393 B.R. 259; 2008 Bankr. LEXIS 2191(Court notes Deutsche Bank was the trustee and party to a trust under the PSA. Deutsche Bank failed to trace the identity of various holders and servicers of the mortgage from the originator. D.B. submitted various documents including portions of the PSA to support its claim that it held the note. D.B. failed to show that it was a party in interest and that it was asserting its own rights in that those of another entity. D.B. failed to provide evidence that the debtor's loan was included in the PSA and failed to provide a mortgage loan schedule to support its claim.)

This theory argues that the trust is established by the PSA generally, under the laws of New York and the trustee's rights, obligations, duties and all authority are derived from the formation of the trust. The trustee's only capacity or authority to acquire mortgage loans is by adhering to strict compliance with the PSA. In other words, the trustee does not have any authority to acquire mortgage loans outside the terms of the PSA. When the trustee files a claim in a bankruptcy it appears solely in its capacity as trustee under the terms of the PSA.

1. Cases which have rejected PSA challenges to standing

Kelly v. Deutsche Bank National Trust Company 2011 W.L. 226295 (D. Mass. June 9, 2011)(Debtor does not have standing to invoke the PSA or prospectus because he is neither a party nor a third party beneficiary of the agreement.)

In re Almeida 417 B.R. 140 (Bankr. D. Mass. 2009) (Even if direct assignment to the trust violated the PSA, giving rise to unfavorable tax, regulatory, contractual and tor consequences, neither the PSA or the consequences would render the assignment itself invalid. The Court indicated the debtor was not a third party beneficiary of the PSA and asserted the debtor lacked standing to object to breaches of the trust.)

See also, In re Samuels 415 B.R. 8 (Bankr. D. Mass. 2009)

- B. Claimant must show negotiation and delivery of the note under Article 3 of the Uniform Commercial Code. Note this assumes the mortgage note is a negotiable instrument.

1. In Wisconsin, Chapter 403 governs Negotiable Instruments.

- a. Applicable statutes.

Section 403.104 Negotiable Instrument

(1) Except as provided in subs. (3) and (4), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if all of the following apply:

(a) It is payable to bearer or to order at the time that it is issued or first comes into possession of a holder.

(b) It is payable on demand or at a definite time.

(c) It does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain any of the following:

1. An undertaking or power to give, maintain or protect collateral to secure payment.

2. An authorization or power to the holder to confess judgment or realize on or dispose of collateral.

3. A waiver of the benefit of any law intended for the advantage or protection of an obligor.

(2) "Instrument" means a negotiable instrument.

(3) An order that meets all of the requirements of sub. (1), except sub. (1)(a), and otherwise falls within the definition of check in sub. (6) is a negotiable instrument and a check.

(4) A promise or order other than a check is not an instrument if, at the time that it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this chapter.

(5) An instrument is a note if it is a promise and is a draft if it is an order. If an instrument falls within the definition of both note and draft, a person entitled to enforce the instrument may treat it as either.

(6) "Check" means a draft, other than a documentary draft, payable on demand and drawn on a bank or means a cashier's check, teller's check, or demand draft. An instrument may be a check even though it is described on its face by another term, such as money order.

(7) "Cashier's check" means a draft with respect to which the drawer and drawee are the same bank or branches of the same bank.

(8) "Teller's check" means a draft drawn by a bank on another bank, or payable at or through a bank.

(9) "Traveler's check" means an instrument that is payable on demand, that is drawn on or payable at or through a bank, that is designated by the term "traveler's check" or by a substantially similar term, and that requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument.

(10) "Certificate of deposit" means an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money. A certificate of deposit is a note of the bank.

(11)

(a) Except as provided under par. (b), "demand draft" means a writing that is not signed by a customer, as defined in s. 404.104 (1) (e), that is created by a 3rd party under the purported authority of the customer for the purpose of charging the customer's account with a bank, that contains the account number of that account, and that contains at least

one of the following:

1. The customer's name.
2. A notation that the customer authorized the demand draft.
3. The statement "No signature required," "Authorization on file," or "Signature on file," or words to that effect.

(b) "Demand draft" does not include a check drawn by a fiduciary, as defined in s. [403.307 \(1\) \(a\)](#).

Section 403.106 Unconditional Promise or Order

(1)

(a) Except as otherwise provided in this section, for the purposes of s. [403.104 \(1\)](#), a promise or order is unconditional unless it states any of the following:

1. An express condition to payment.
2. That the promise or order is subject to or governed by another writing.
3. That rights or obligations with respect to the promise or order are stated in another writing.

(b) A reference to another writing does not of itself make the promise or order conditional.

(2) A promise or order is not made conditional by a reference to another writing for a statement of rights with respect to collateral, prepayment or acceleration or because payment is limited to resort to a particular fund or source.

(3) If a promise or order requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the promise or order, the condition does not make the promise or order conditional for the purposes of s. [403.104 \(1\)](#). If the person whose specimen signature appears on an instrument fails to countersign the instrument, the failure to countersign is a defense to the obligation of the issuer, but the failure does not prevent a transferee of the instrument from becoming a holder of the instrument.

(4) If a promise or order at the time that it is issued or first comes into possession of a holder contains a statement, required by applicable statutory or administrative law, to the effect that the rights of a holder or transferee are subject to claims or defenses that the issuer could assert against the original payee, the promise or order is not thereby made conditional for the purposes of s. [403.104 \(1\)](#); but if the promise or order is an instrument, there cannot be a holder in due course of the instrument.

Section 403.109 Payable to Bearer or to Order

(1) A promise or order is payable to bearer if any of the following applies:

(a) It states that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment.

(b) It does not state a payee.

(c) It states that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person.

(2) A promise or order that is not payable to bearer is payable to order if it is payable to the order of an identified person or to an identified person or order. A promise or order that is payable to order is payable to the identified person.

(3) An instrument payable to bearer may become payable to an identified person if it is specially endorsed under s. [403.205 \(1\)](#). An instrument payable to an identified person may become payable to bearer if it is endorsed in blank under s. [403.205 \(2\)](#).

Section 403.201 Negotiation

(1) "Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder.

(2) Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its endorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.

Section 403.203 Transfer of Instrument; Rights Acquired by Transfer

(1) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

(2) 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, but the transferee may not acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

(3) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of endorsement by the transferor, the transferee has a specifically enforceable right to the unqualified endorsement of the transferor, but negotiation of the instrument does not occur until the endorsement is made.

(4) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this chapter and has only the rights of a partial assignee.

Section 403.204 Endorsement

1) "Endorsement" means a signature, other than that of a signer as maker, drawer or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of negotiating the instrument, restricting payment of the instrument or incurring the endorser's liability on the instrument, but regardless of the intent of the signer, a signature and its accompanying words is an endorsement unless the accompanying words, terms of the instrument, place of the signature or other circumstances unambiguously indicate that the signature was made for a purpose other than endorsement. For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.

(2) "Endorser" means a person who makes an endorsement.

(3) For the purpose of determining whether the transferee of an instrument is a holder, an endorsement that transfers a security interest in the instrument is effective as an unqualified endorsement of the instrument.

(4) If an instrument is payable to a holder under a name that is not the name of the holder, endorsement may be made by the holder in the name stated in the instrument or in the holder's name or both, but signature in both names may be required by a person paying or taking the instrument for value or collection.

Section 403.205 Special Endorsement; Blank Endorsement; Anomalous Endorsement

(1) If an endorsement is made by the holder of an instrument, whether payable to an identified person or payable to bearer, and the endorsement identifies a person to whom it makes the instrument payable, it is a special endorsement. If specially endorsed, an instrument becomes payable to the identified person and may be negotiated only by the endorsement of that person. The principles stated in s. [403.110](#) apply to special endorsements.

(2) If an endorsement is made by the holder of an instrument and it is not a special endorsement, it is a blank endorsement. If endorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially endorsed.

(3) The holder may convert a blank endorsement that consists only of a signature into a special endorsement by writing, above the signature of the endorser, words identifying the person to whom the instrument is made payable.

(4) "Anomalous endorsement" means an endorsement made by a person who is not the holder of the instrument. An anomalous endorsement does not affect the manner in which the instrument may be negotiated

Section 403.301 Person entitled to enforce instrument

Person entitled to enforce instrument. "Person entitled to enforce" an instrument means the holder of the instrument, a nonholder in possession of the instrument who has the rights of a holder, or a person not in possession of the instrument who is entitled to enforce the instrument under s. [403.309](#) or [403.418 \(4\)](#). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

Section 403.401 Signature

(1) A person is not liable on an instrument unless the person signed the instrument, or the person is represented by an agent or representative who signed the instrument and the signature is binding on the represented person under s. [403.402](#).

(2) A signature may be made manually or by means of a device or machine and may be made by the use of any name, including a trade or assumed name, or by a word, mark or symbol executed or adopted by a person with present intention to authenticate a writing.

Section 403.308 and Status as holder in due Courts

1) In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or adjudicated incompetent at the time of trial of the issue of validity of the signature. If an action to enforce the instrument is brought against a person as the undisclosed principal of a person who signed the instrument as a party to the instrument, the plaintiff has the burden of establishing that the defendant is liable on the instrument as a represented person under s. [403.402 \(1\)](#).

(2) If the validity of signatures is admitted or proved and there is compliance with sub. [\(1\)](#), a plaintiff producing the instrument is entitled to payment if the plaintiff proves

entitlement to enforce the instrument under s. [403.301](#), unless the defendant proves a defense or claim in recoupment. If a defense or claim in recoupment is proved, the right to payment of the plaintiff is subject to the defense or claim, except to the extent the plaintiff proves that the plaintiff has rights of a holder in due course which are not subject to the defense or claim.

Section 403.309 Enforcement of Lost, destroyed or stolen instrument

(1) A person not in possession of an instrument is entitled to enforce the instrument if all of the following apply:

(a) The person was in possession of the instrument and entitled to enforce it when loss of possession occurred.

(b) The loss of possession was not the result of a transfer by the person or a lawful seizure.

(c) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(2) A person seeking enforcement of an instrument under sub. (1) shall prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, s. [403.308](#) applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

Case analysis

Welcome to Renendale Mr. Anderson.

In re Wilhelm, 407 B.R. 392, 2009 Bankr. LEXIS 1857 (D. Idaho)

1. **Wilhelm appears to be a case involving extremely sloppy paperwork and lack of documentation to support relief from stay motions by several movants. Even though there was no opposition to the motions, “the Court cannot simply grant relief on that basis. Rather, the Court must first satisfy itself that relief is proper.” Id. at 2.**
2. **The Court actually had five different motions before it and found the following common factual issues. First, none of the notes presented with the motions named the movant as the payee. Second, none of the notes were endorsed either in blank or to any specific person or entity.**

Movant

Payee

Indymac Federal Bank, FSB	Land Home Financial Services
JP Morgan Chase Bank	Aegis Wholesale Corporation
JP Morgan Chase Filed on behalf of BOA as Trustee	WMC Mortgage
Ocwen Loan Servicing on behalf of HSBC Bank USA, N.A as Trustee	Ownit Mortgage Solutions
Aurora Loan Services	Plaza Home Mortgage

3. **Discussion of standing and real party in interest**

4. Standing and the real-party-in-interest requirement are related, but not identical, concepts. Standing encompasses both constitutional and prudential elements. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975); *In re Simplot*, 2007 WL 2479664, at *9 (Bankr. D. Idaho. Aug. 28, 2007). To have constitutional standing, the litigant must allege an "injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis v. Fed. Election Comm'n*, ___ U.S. ___, 128 S. Ct. 2759, 2768, 171 L. Ed. 2d 737 (2008). Prudential standing includes the idea that the injured party must assert its own claims, rather than another's. *See, e.g., Warth*, 422 U.S. at 499. Thus, the real-party-in-interest doctrine generally falls within the prudential standing doctrine. *See Hwang*, 396 B.R. at 769. That is, [**13] as "a prudential matter, a plaintiff must assert 'his own legal interests as the real party in interest, *Dunmore v. United States*, 358 F.3d 1107, 1112 (9th Cir. 2004), as found in *Fed. R. Civ. P. 17*[']'" *Mitchell*, 2009 Bankr. LEXIS 866, 2009 WL 1044368, at *2. *Id.* at, 12-13.

5. **The Court went on to review the standing issues in regard to the movant's interests and the note. In doing so, the Court analyzes the real party in interest as the person entitled to enforce the note.**

6. Applying these principles in the § 362 stay relief context, each Movant must show that it has an interest in the relevant note, and that it has been injured by debtor's conduct (presumably through a default on the note). Such is necessary to establish constitutional standing. *Cf. In re Hayes*, 393 B.R. 259, 268-70 (Bankr. D. Mass. 2008) (movant lacked standing altogether as it failed to show the note was transferred to it, and thus had no rights of its own to assert). Beyond that, Movants must also show they have the right, under applicable substantive law, to enforce the notes. As explained by one court, the

"real party in interest in relief from stay is whoever is entitled to enforce the obligation sought to be enforced." *Jacobson*, 402 B.R. at 366; see also *id.* at 367 ("Generally, a party without the legal right under applicable substantive law to enforce the obligation at issue . . . lacks prudential standing."); *In re Sheridan*, 09.1 I.B.C.R. at 25, 2009 Bankr. LEXIS 552, 2009 WL 631355, at *4 [**14]. In other words, Movants must also satisfy the prudential, real-party-in-interest standing component. *Id.* at, 14.

7. **Using this analysis, the Court posed two threshold questions in regard to each of the relief from stay motions. First, whether the movants had established an interest in the notes and second, are the movants entitled to enforce the notes. The Court answered both of these threshold questions in the negative.**
8. **In rejecting the movants argument that relief from stay motions do not need to be pursued by a real party in interest, and that they do not have the burden of proving standing to obtain relief the Court asserted the following.**
9. As to the real-party-in-interest argument, this Court recently held that motions brought under § 362(g) are subject to *Federal Rule of Civil Procedure 17's* requirement that actions be prosecuted in the name of the real party in interest. *In re Sheridan*, 09.1 I.B.C.R. at 25, 2009 Bankr. LEXIS 552, 2009 WL 631355, at *3. As explained in *Sheridan*:
10. Under *Rule 9014*, which by virtue of *Rule 4001(a)(1)* governs stay relief requests, certain "Part VII" rules are applicable. See *Rule 9014(c)*. Among these incorporated rules is *Rule 7017*, which in turn incorporates *Fed. R. Civ. P. 17*, and *Rule 17(a)(1)* provides that "An action must be prosecuted in the name of the real party in interest." *Id.* at, 15.
11. **Bank of America and HSBC also argued that they could establish standing solely by the allegations in the motions. In addition, they argued that the party challenging standing has the burden to disprove standing. As to the first argument, the Court stated,**
12. Bank of America/HSBC initially fail to recognize that this Court may raise standing issues *sua sponte*.¹⁴ Similarly, they fail to acknowledge that a party seeking to invoke a federal court's jurisdiction must prove its standing. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). This obligation exists separate and apart from other elements of a plaintiff's claim. See *id.* As the Supreme Court explained, because elements of standing are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the [**400] burden of proof, *i.e.*, with the manner and degree of evidence [**17] required at the successive stages of the litigation. *Id.* at, 17.

13. **The Court also engaged in a discussion in regard to the burden of proof pertaining to relief from stay motions.**
14. As applied in the stay relief context, movants bear the burden of proof on standing, in addition to the other elements necessary to obtain relief. *Cf., e.g., In re Hayes, 393 B.R. at 267* ("To have standing to seek relief from the automatic stay, [movant] Deutsche Bank was required to establish that it is a party in interest and that its rights are not those of another entity.").
15. As for the proof required to demonstrate standing, it depends upon the stage of the proceedings. At the pleading stage, plaintiffs in federal court may rely on the allegations of their complaint to establish standing. *Lujan, 504 U.S. at 561*. Similarly, stay relief movants may initially rely upon their motion. But if a trustee or debtor objects to a **[**18]** stay relief motion based upon lack of standing, the movant must come forward with evidence. Additionally, if the stay relief motion itself reveals a lack of standing, movants cannot rest on the pleadings. *See, e.g., Sprewell v. Golden State Warriors, 266 F.3d 979, 988-89, amended on denial of pet'n for reh'g, 275 F.3d 1187 (9th Cir. 2001. Id. at, 17-18.*
16. As Bank of America/HSBC correctly point out, § 362(g) imposes upon the party opposing stay relief the burden of proof on all issues -- other than the existence of the debtor's equity in the collateral. *See generally 3 Collier on Bankruptcy P 362.10* (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. rev. 2009). But § 362(g) "does not address the burden of going forward with evidence, **[**20]** which is generally placed upon the party seeking relief." *Id.* As explained in *In re Kowalsky, 235 B.R. 590, 594 (Bankr. E.D. Tex. 1999)*, "the party requesting relief from the stay must sustain the initial burden of production or going forward with the evidence to establish that a *prima facie* case for relief exists before the respondent is obligated to go forward with its proof." *Accord In re [**401] Elmira Litho, Inc., 174 B.R. 892, 900 (Bankr. S.D.N.Y.1994)* ("[A] party can bear the initial burden of going forward even if it does not bear the ultimate burden of persuasion. If it fails to carry its initial burden, the Court will dismiss its application without requiring the party that bears the ultimate burden of persuasion to offer any evidence."). So it is here. To make out a *prima facie* case, Bank of America/HSBC must demonstrate standing.
17. **After rejecting the movant's arguments pertaining to standing and burden of proof, the Court went on to review the substantive law governing negotiable instruments. The Court determined that in order to resolve the standing and real party in interest issues before it, it had to determine who had the right to enforce the note. Since bankruptcy law does not provide for enforcement of promissory notes, the Court looked to article three of the Idaho Uniform Commercial Code.**

18. Under Article 3, persons entitled to enforce an instrument include: (1) a "holder of the instrument," and (2) "a nonholder in possession of the instrument who has the rights of a holder[.]" *Idaho Code* § 28-3-301(i), (ii). *Id. at*, 21
19. **The Court noted that in order to be the holder of an instrument the party must 1. possess the note and 2. the note must be payable to the person in possession of the note or to bearer. Since none of the notes had been endorsed either in blank or specifically to the movants, none of them could claim to be a holder of the instrument.**
20. **The Court went on to determine whether any of the movants had the status of non-holders in possession of the instrument with the rights of a holder. A non-holder in possession includes persons who acquire physical possession of an unendorsed note however, the non-holder must show the transaction by which the non-holder acquired the note.**
21. A "nonholder in possession of the instrument who has the rights of a holder," *Idaho Code* § 28-3-301(ii), includes persons who acquire physical possession **[**22]** of an unindorsed note. *See Idaho Code* § 28-3-203 (1), (2).¹⁷ As the statutory comments explain, however, such nonholders must "prove the transaction" by which they acquired the note:
- If the transferee is not a holder because the transferor did not indorse, the transferee is nevertheless a person entitled to enforce the instrument under *Section 3-301* if the transferor was a holder at the time of transfer. Although the transferee is not a holder, under *subsection (b)* [*sic*, (2)] the transferee obtained the rights of the transferor as holder. *Because the transferee's rights are derivative of the transferor's rights, those rights must be proved. Because the transferee is not a holder, there is no presumption under Section 3-308 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 **[*402]** through which the transferee acquired it. Id. at*, 22-23
22. **Note that the analysis at this point in the case under the Idaho Uniform Commercial Code, the Court references § 28-3-203 (1), (2). a statute similar or identical to Section 403.203(1) of the Wisconsin Uniform Commercial Code which states, "an instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." Wis. Stat. Section 403.203**
23. **In Wilhelm, the Court noted that the note, by its terms was not payable to the movants as transferees and the transferees had to explain the possession of the unendorsed notes by proving the transaction by which the movants acquired the**

notes, or in other words explain the purpose of the transfer and the purpose would have to be the right to enforce the instrument.

24. The Court also went on to determine that the movants had not shown actual possession of the notes.

25. Importantly, however, if a person "proves the transaction" by which it acquired the note, but fails to show possession, he or she cannot enforce the note. *See generally 11 Am. Jur. 2d Bills and Notes § 210* (2009) (discussing differences between a "holder" of a note, and an "owner" of a note). Again, the statutory comments explain:

[A] person who has an ownership right in an instrument might not be the person entitled to enforce the instrument. For example, suppose X is the owner and holder of an instrument payable to X. X sells the instrument to Y but is unable to deliver immediate possession to Y. Instead, X signs a document conveying all of X's right, title **24** and interest in the instrument to Y. Although the document may be effective to give Y a claim of ownership of the instrument, Y is not the person entitled to enforce the instrument until Y obtains possession of the instrument. No transfer of the instrument occurs under *Section 3-203(a)* until it is delivered to Y.

26. In making this determination, the Court once again noted that the movants could not show possession of the notes because the notes were not endorsed as required by the UCC. The Court found the declarations of the movants to fail as inadmissible legal conclusions.

27. The Court questions whether the declarants appreciated the legal significance of the term "holder" and meant to assert the legal conclusion, or whether they simply signed form declarations provided to them, presumably by Counsel. **26** Further, Movants cannot rely on these declarations to demonstrate that Movants are nonholders in possession of the notes, with rights to enforce. *See Idaho Code § 28-3-203*, cmt. 2. Not only do the declarations fail to actually state that Movants *possess* the notes, there is no foundation for any such statement. *See generally Fed. R. Evid. 602* (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"). Nor is there foundation for the declaration testimony regarding Movants' purported ownership interest in the notes. *See generally Fed. R. Evid. 602, 803(6)*.

28. Finally, the Court determined that the movants could not rely upon an assignments of the mortgages through Mortgage Electronic Registration Systems because there was nothing to show that MERS had any authority to transfer the notes.

29. **In the Kemp case, the debtor challenged the claimant's right to enforce the note permanently on the argument that the note was not properly endorsed to the claimant as a transferee and had never been placed in the transferee's possession. The Court sustained the debtor's objection to the Proof of Claim based upon the testimony of a former Countrywide Bank employee. the employee testified that the original note had never left the possession of Countrywide Bank (as the originator of the loan). In addition, the claimant originally produced a note with no endorsement on it accompanied by an unsigned allonge in favor of "America's Wholesale Lender" and directing the debtor to "pay to the order of Countrywide Home Loans, Inc., d/b/a America's Wholesale Lender". Id., at 4. At the trial, Countrywide produced a new undated allonge directing the debtor to "pay to the order of Bank of New York, as trustee for the Certificateholders CWABS, Inc., Asset-Backed Certificates, Series 6006-8". Moreover, the new allonge was never attached to the note.**
30. **Note that an allonge is a separate paper from the note that may contain an endorsement for the negotiation or transfer of the note. Section 403.204 of Wisconsin Statutes states, "for the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument." This section of the Wisconsin UCC basically states that an allonge must be affixed that is, attached to the note.**
31. **While the Court ultimately based its decision on an analysis of the Uniform Commercial Code, it did take note the requirements under the PSA for the proper transfer of the note to the pooled trust.**
32. Shortly after the execution by the debtor of the note and mortgage, the instruments executed by the debtor were apparently pooled with other [*5] similar instruments and sold as a package to the Bank of New York as Trustee. On June 28, 2006, a Pooling and Servicing Agreement ("PSA" or "the Agreement") was executed by CWABS, Inc. as the depositor, with Countrywide Home Loans, Inc., Park Monaco, Inc. and Park Sienna, LLC as the sellers, Countrywide Home Loans Servicing LP ("Countrywide Servicing") as the master servicer, and the Bank of New York as the Trustee. Pursuant to the Agreement, the depositor was directed to transfer the Trust Fund, consisting of specified mortgage loans and their proceeds, including the debtor's loan, to the Bank of New York as Trustee, in return for certificates referred to as Asset-backed Certificates, Series 2006-8. The sellers sold, transferred or assigned to the depositor "all the right, title and interest of such Seller in and to the applicable Initial Mortgage Loans, including all interest and principal received and receivable by such Seller." PSA § 2.01(a) at 52. In turn, the depositor immediately transferred "all right title and interest in the Initial Mortgage Loans," including the debtor's loan, to the Trustee, for the benefit of the certificate holders. Id.
33. The Agreement expressly provided [*6] that in connection with the transfer of each loan, the depositor was to deliver "the original Mortgage Note, endorsed by manual or facsimile signature in blank in the following form: 'Pay to the order of _____ without

recourse', with all intervening endorsements that show a complete chain of endorsement from the originator to the Person endorsing the Mortgage Note." PSA § 2.01(g)(i) at 56. Most significantly for purposes of this discussion, the note in question was never indorsed in blank or delivered to the Bank of New York, as required by the Pooling and Servicing Agreement. *Id. at, 4-6.*

34. **Note that the Court seems to simply assume that the debtor's note and mortgage were actually pooled with other notes and then sold to the Bank of New York as Trustee. Ultimately, the Court found that while the debtor's mortgage had been assigned to the Bank of New York, Countrywide had not transferred possession of the note to the trustee.**
35. In sum, we have established on this record that at the time of the filing of the proof of claim, the debtor's mortgage had been assigned to the Bank of New York, but that Countrywide did not transfer possession of the associated note to the Bank. Shortly before trial in this matter, the defendant executed an allonge to transfer the note to the Bank of New York; however, the allonge was not initially affixed to the original note, and possession of the note never actually changed. The Pooling and Servicing Agreement required an indorsement and transfer of the note to the Trustee, but this was not accomplished prior to the filing of the proof of claim. The defendant has now produced the original note and has apparently affixed the new allonge to it, but the original note and allonge still have not been transferred to the possession of the Bank of New York. Countrywide, the originator of the loan, filed the proof of claim on behalf of the Bank of New York as Trustee, claiming that it was the servicer for the loan. Pursuant to the PSA, Countrywide Servicing, and not Countrywide, Inc., was the master [*11] servicer for the transferred loans.⁸ At all relevant times, the original note appears to have been either in the possession of Countrywide or Countrywide Servicing.⁹
36. **In disallowing the claim, the Kemp Court applied Section 502(b)(1) of the Bankruptcy Code.**
37. With this factual backdrop, we turn to the issue of whether the challenge to the proof of claim filed on behalf of the Bank of New York, by its servicer Countrywide, can be sustained. [HN1] Under the Bankruptcy Code, a claim is deemed allowed unless a party in interest objects. *11 U.S.C. § 502(a)*. If an objection to a claim is made, the claim is disallowed "to the extent that . . . such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." *11 U.S.C. § 502(b)(1)*.
38. **The Court found the Countrywide claim to be unenforceable under the New Jersey UCC for two reasons. First, the Bank of New York as the owner of the note had never had possession of the note and that was fatal to its enforcement. Second, upon the sale of the note and mortgage to the trustee, the note was not properly endorsed to the new owner and that also defeated the enforceability of the note. We can see that the testimony of the Countrywide witness hurt their argument because the witness stated the note had never been transferred to the trustee and therefore BONY never had possession of the note. While the Kemp case is certainly going to**

be remembered for this testimony, it is important to keep in mind that the improper endorsement on the note would have in and of itself been sufficient to deny the claim under the Uniform Commercial Code. Further, it is also important to note that the Court did look at the PSA and the conveyance requirements.

39. In analyzing the standing and enforceability issues, the Court referenced a section of the New Jersey Uniform Commercial Code that mirrors Section 403.301 of the Wisconsin UCC.

40. A party is entitled to enforce a negotiable instrument if it is "the holder of the instrument, a nonholder in possession of the instrument who has the rights [*14] of a holder, or a person not in possession of the instrument who is entitled to enforce the instrument pursuant to 12A:3-309 or subsection d. of 12A:3-418." *N.J.S.A. 12A:3-301*. In this case, the creditor may not enforce the instrument under any of the three statutory qualifiers.

41. Also, it is noteworthy that the Kemp Court analyzed the statute with three qualifiers for enforcement while the Wilhelm Court noted only two qualifiers.

42. In analyzing the trustee's status as a holder of the note, the Court found,

"Mere ownership or possession of a note is insufficient to qualify an individual as a 'holder.'" *Adams v. Madison Realty & Dev. Inc.*, 853 F.2d 163, 166 (3d Cir. 1988). Where, as here, the ownership of an instrument is transferred, the transferee's attainment of the status of "holder" depends on the negotiation of the instrument to the transferee. *N.J.S.A. 12A:3-201(a)*. The two elements required for negotiation, both of which are missing here, are the transfer of possession of the instrument to the transferee, and its indorsement by the holder. *N.J.S.A. 12A:3-201(b)*. *Id. at, 14*

43. The second element required to negotiate an instrument to the transferee, i.e., indorsement of the instrument by the holder, is also missing here. [HN4] An indorsement means "a signature, other than that of a signer [*16] as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of negotiating the instrument, restricting payment of the instrument, or incurring indorser's liability on the instrument." *N.J.S.A. 12A:3-204*. The indorsement may be on the instrument itself, or it may be on "a paper affixed to the instrument." *Id.* Such a paper is called an "allonge", defined as "[a] slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements." See Black's Law Dictionary at 88 (9th Ed. 2009).

44. The Kemp Court also found the claimant failed to qualify as a non-holder in possession with the rights of a holder.

45. Nor does the claimant qualify as a non-holder in possession who has the rights of a holder. [HN6] "A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument." *N.J.S.A. 12A:3-301*. The Official Comment to *section 3-301* adds that [HN7] this definition:

includes a person in possession of an instrument who is not a holder. A nonholder in possession of an instrument includes a person that acquired rights of a holder by subrogation or under *Section 3-203(a)*. It also includes both a remitter that has received an instrument from the issuer but has not yet transferred or negotiated the instrument to another person and also any other person who under applicable [*20] law is a successor to the holder or otherwise acquires the holder's rights.

46. *Id.* at UCC Comment to § 3-301. Countrywide, the originator of the loan and the original "holder" of the note, sold the note to the Bank of New York as Trustee. In this way, the Bank of New York is a successor to the holder. As a successor to the holder of the note, the Bank of New York would qualify as a non-holder in possession who could enforce the note by its servicer if it had possession of the note. Because the Bank of New York does not have possession of the note, and never did, it may not enforce the note as a nonholder in possession.

47. **This has an echo of the analysis of *Wilhelm*. Had the claimant been able to show that it did have possession of the note, it would still have had to show the Court that the purpose of receiving delivery of the note was to obtain the right to enforce the instrument. Remember Section 403.203 of the Wisconsin UCC.**

48. **In regard to the non-holder not in possession, the Kemp court noted that this category would allow a claimant to enforce a note that had been lost, destroyed, or stolen. In addition, a provision concerning payment or acceptance by mistake did not apply in the Kemp case.**

In re Veal, 2011 LEXIS 2359 (June 10, 2011 BAP 9TH Cir.)

49. **The Veal case also contains an analysis of the U.C.C. In Veal, the BAP panel overruled the trial Court's decision to lift the stay based upon an assignment of the mortgage without any showing that either Wells Fargo had obtained the note.**

50. **In the Veal case**, "Among other objections, the Veals contended that AHMSI lacked standing. According to the Veals, AHMSI needed to establish that it was authorized to act as servicing agent on behalf of Wells Fargo, and that either AHMSI or Wells Fargo had to be qualified as holders of the Note, within the meaning of Arizona's version of the Uniform Commercial Code." *Id.* at, 6.

51. The Veal Court goes into a discussion of Prudential Standing and Real Party in Interest.

52. Even though Wells Fargo and AHMSI may meet the constitutional minima for standing, this determination does not end the inquiry. They must also show they have standing under various prudential limitations on access to federal courts. Prudential [*16] standing "embodies judicially self-imposed limits on the exercise of federal jurisdiction." *Sprint*, 554 U.S. at 289 (quoting *Elk Grove*, 542 U.S. at 11); *County of Kern*, 581 F.3d at 845.

53. In this case, one component of prudential standing is particularly applicable. It is the doctrine that a plaintiff must assert its own legal rights and may not assert the legal rights of others. *Sprint*, 554 U.S. at 289; *Warth*, 422 U.S. at 499; *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 971 (9th Cir. 2009).

54. This formulation of the prudential standing doctrine, however, [*17] conflates somewhat with the real party in interest doctrine found in *Rule 7017*.¹⁰ While at least one prominent authority maintains that the third party standing doctrine and the real party in interest requirement are legally distinct, 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, Civil § 1542 (3d ed. 2010), another authority succinctly summarizes the practical distinction: "Generally, real parties in interest have standing, but not every party who meets the standing requirements is a real party in interest." 4 *Moore's Federal Practice* § 17.10[1], at p.17-15 (3d ed. 2010) (footnotes omitted).

55. The Veal court focused on whether Wells Fargo or AHMSI were a real party in interest noting how well its purpose and function are understood. It appears that this commentary dealt with Article 3 and Article 9 of the UCC and raised the Court's awareness that Article 9 can come into play for the transfer or sale of mortgage notes to another party, including a securitized trust. However, while the Court references some sections of Article 9, its primary analysis seems to be under Article 3 with focus on the person entitled to enforce the note.

56. *Civil Rule 17(a)(1)* starts simply: "An action must be prosecuted in the name of the real party in interest." Although the exact definition [*19] of a real party in interest may defy articulation, its function and purpose are well understood. As stated in the Advisory Committee Notes for *Civil Rule 17*,

In its origin the rule concerning the real party in interest was permissive in purpose: it was designed to allow an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as *res judicata*.

57. Most real party in interest inquiries focus on whether the plaintiff or movant holds the rights he or she seeks to redress.
58. Real party in interest doctrine thus melds procedural and substantive law; it ensures that the party bringing the action owns or has rights that can be vindicated by proving [*21] the elements of the claim for relief asserted. It also has another key aspect, as the Advisory Committee Notes acknowledge: if the party bringing the action loses on the merits, it ensures that the person defending the action can preclude anyone from ever seeking to vindicate, or collect on, that claim again.
59. **The Veal court notes that it must make a determination of the applicable substantive law in order to do the proper analysis of the Real Party status of Wells Fargo and /or AHMSI. In doing so, it looks not only to Article 3 of the UCC, but references Article 9 as well.**
60. **In its review of the law, the court notes, “Article 3, however, deals primarily with payment obligations surrounding a negotiable instrument, and the identification of the proper party to be paid in order to satisfy and discharge the obligations represented by that negotiable instrument. As will be seen, Article 3 does not necessarily equate the proper person to be paid with the person who owns the negotiable instrument. Nor does it purport to govern completely the manner in which those ownership interests are transferred. For the rules governing those types of property rights, Article 9 provides the substantive law.¹⁷ UCC § 9-109(a)(3) (Article 9 “applies to . . . a sale of . . . promissory notes”).¹⁸ Article 9 includes rules, for example, governing the effect of the transfer of a note on any security given for that note such as a mortgage or a deed of trust.¹⁹ As a consequence, Article 9 must be consulted to answer many questions as to who owns or has other property interest in a promissory note. From this it follows that the determination [*25] of who holds these property interests will inform the inquiry as to who is a real party in interest in any action involving that promissory note.” *Id. at*, 24-25.**

The court references Section 9-203(a)(3), 9-102(a)(65), 9-102(a)(47) and 9-203(g).

61. **These statutes correspond to the following Sections under Chapter 409 of Uniform Commercial Code – Secured Transactions of Wis. Stats.**

409.102 Definitions and index of definitions. (1) CHAPTER 409 DEFINITIONS. In this chapter:

(cs) “Collateral” means the property subject to a security interest or agricultural lien. The term includes:

1. Proceeds to which a security interest attaches;
2. Accounts, chattel paper, payment intangibles, and promissory notes that have been sold;

(Lm) “Instrument” means a negotiable instrument or any other

writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary endorsement or assignment. The term does not include investment property; letters of credit; or writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card.

409.203 Attachment and enforceability of security interest; proceeds; supporting obligations; formal requisites.

(6) PROCEEDS AND SUPPORTING OBLIGATIONS. The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by s. 409.315 and is also attachment of a security interest in a supporting obligation for the collateral.

62. **At footnote 12 of the decision, the court indicates that it looked to a pending commentary of the Permanent Editorial Board for the Uniform Commercial Code.**
63. **The court discusses the “Person Entitled to Enforce the Note under UCC Article 3-102.**

Article 3 of the UCC and the Concept of a "Person Entitled to Enforce" a Note

Article 3 provides a comprehensive set of rules governing the obligations of parties on the Note, including how to determine who may enforce those obligations and to whom those obligations are owed. See *UCC § 3-102*; Miller & Harrell, *supra*, § 1.02. Contrary to popular opinion, these rules do not absolutely require physical possession of a negotiable instrument in order to enforce its terms. Rather, Article 3 states that the ability to enforce a particular note - a concept central to our standing inquiry - is held by the "person entitled to enforce" the note. *UCC § 3-301*.

64. A thorough understanding of the concept of a "person entitled to enforce" is key to sorting out the relative rights and obligations of the various parties to a mortgage transaction. In particular, the person obligated on the note - a "maker" [*27] in the argot of Article 3²⁰ - must pay the obligation represented by the note to the "person entitled to enforce" it. *UCC § 3-412*. Further, if a maker pays a "person entitled to enforce" the note, the maker's obligations are discharged to the extent of the amount paid. *UCC § 3-602(a)*. Put another way, if a maker makes a payment to a "person entitled to enforce," the obligation is satisfied on a dollar for dollar basis, and the maker never has to pay that amount again. *Id.* See also *UCC § 3-602(c)*.
65. **The Court goes on to analyze the concept of the person entitled to enforce the note “with the holder” of the note.**

66. At least two [*28] ways exist in which a person can acquire "person entitled to enforce" status.²² To enforce a note under the method most commonly employed, the person must be the "holder" of the note. *UCC § 3-301 (i)*.
67. The concept of a "holder" is set out in detail in *UCC § 1-201(b)(21)(A)*, providing that a person is a holder if the person possesses the note and either (i) the note has been made payable to the person who has it in his possession²³ or (ii) the note is payable to the bearer of the note. This determination requires physical examination not only of the face [*29] of the note but also of any indorsements.²⁴
- 68. The Court also expressed its thoughts pertaining to a transfer of the note outside of Article 3 negotiation and references a sale of notes in bulk that implies a nonholder in possession of the note may have the rights of a holder.**
69. The Veals contend that only a holder may enforce the Note, or seek relief from the automatic stay to enforce it. Their analysis is incomplete, for Article 3 provides another way in which an entity can become a "person entitled to enforce" a negotiable instrument. This third way involves the person attaining the status of a "nonholder in possession of the [note] who has the rights of a holder." *UCC § 3-301(ii)*.
70. More commonly, however, a person becomes a nonholder in possession if the physical delivery of the note to that person constitutes a "transfer" but not a "negotiation." Compare *UCC § 3-201* (definition of negotiation) with *UCC § 3-203 (a)* (definition of transfer). Under the UCC, a "transfer" [*31] of a negotiable instrument "vests in the transferee any right of the transferor to enforce the instrument." *UCC § 3-203 (b)*. As a result, if a holder transfers the note to another person by a process not involving an Article 3 negotiation - such as a sale of notes in bulk without individual indorsement of each note - that other person (the transferee) obtains from the holder the right to enforce the note even if no negotiation takes place and, thus, the transferee does not become an Article 3 "holder." See Comment 1 to *UCC § 3-203*.
71. This places a great deal of weight on the UCC's definition of a "transfer." *UCC § 3-203 (a)* states that a note is transferred "when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." As a consequence, while the failure to obtain the indorsement of the payee or other holder does not prevent a person in possession of the note from being the "person entitled to enforce" the note, it does raise the stakes. Without holder status and the attendant presumption of a right to enforce, the possessor of the note must demonstrate both the fact of the delivery and the purpose [*32] of the delivery of the note to the transferee in order to qualify as the "person entitled to enforce."
- 72. The Veal Court goes on to discuss the transfer of a note as it would relate to Civil Procedure Rule 17 for the status of a real party in interest.**

73. The "transfer" concept is not only bound up in the enforcement of the maker's obligation to pay the debt evidenced by the note, but also in the ownership of those rights. Put another way, one can be an owner of a note without being a "person entitled to enforce."²⁵ This distinction may not be an easy one to draw, but it is one the UCC clearly embraces. While in many cases the owner of a note and the person entitled to enforce it are one and the same, this is not always the case, and those cases are precisely the cases in which *Civil Rule 17* would require joinder of the real party in interest.
74. The Veals should not care who actually owns the Note - and it is thus irrelevant whether the Note has been fractionalized or securitized - so long as they do know who they should pay. Returning to the patois of Article 3, so long as they know the identity of the "person entitled to enforce" the Note, the Veals should be content.²⁷
75. Initially, a note is owned by the payee to whom it was issued. If that payee seeks either to use the note as collateral or sell the note outright to a third party in a manner not within Article 3,²⁸ Article 9 of the UCC governs that sale or loan transaction and determines whether the purchaser of the note or creditor of the payee obtains a property interest in the note. See *UCC § 9-109(a) (3)*.
- 76. The Court also notes that standing for AHMSI as a servicer would call for different evidence than what would be required for Wells Fargo.**
77. Here, neither AHMSI nor Wells Fargo was the initial payee of the Note. Due to this fact, each was required to demonstrate facts sufficient to establish its respective standing. See note 11, *supra*. In this regard, facts that would be sufficient for AHMSI are different from those that would be sufficient for Wells Fargo. As to Wells Fargo, it had to show it had a colorable claim to receive payment pursuant to the Note, which it could accomplish either by showing it was a "person entitled to enforce" the Note under Article 3, or by showing that it had some ownership or other property interest in the Note. As to AHMSI, as it sought a distribution from the estate in payment of the Note, it had to show that it was a "person entitled to enforce" the Note, or was the agent of such a person.
78. Under § 362(d), the bankruptcy court may grant relief from the automatic stay "[o]n request of a party in interest." The Bankruptcy Code does not define the term "party in interest." "Status as 'a party in interest' under § 362(d) 'must be determined on a case-by-case basis, with reference to the interest asserted and how [that] interest is affected by the automatic stay.'" *Kronemyer*, 405 B.R. at 919 (quoting *In re Woodberry*, 383 B.R. 373, 378 (Bankr. D.S.C. 2008)).
79. Our prior precedent is appropriately lenient with respect to standing for stay relief. This Panel said in *Kronemyer* that "[c]reditors may obtain relief from the stay if their interests would be harmed by continuance of the stay." *Kronemyer*, 405 B.R. at 921. Collier uses a similarly expansive statement: "Any party affected [*38] by the stay should be entitled to seek relief." 3 Collier on Bankruptcy ¶ 362.07[2] (Henry Sommer and Alan Resnick, eds., 16th ed. 2011).

80. But *Kronemyer* does not precisely address the discrete issue presented here: whether Wells Fargo's interests are "harmful by [*39] the continuance of the stay." The answer to that question requires examination of both the nature of stay litigation generally and the specific nature of the nonbankruptcy rights Wells Fargo seeks to vindicate.
81. The Veals pursue two different arguments. Initially, they argue that the GSF Assignment is invalid because it bears an undated notarial acknowledgment. They also argue that the Sand Canyon Assignment is invalid because it was not executed until after the Veals filed for bankruptcy and after Wells Fargo filed its relief from stay motion.
82. In granting Wells Fargo's motion for relief from stay, the bankruptcy court found that Wells Fargo had established a "colorable claim" based on two of Wells Fargo's exhibits: (1) a copy of an assignment of mortgage from GSF (the original lender) to Option One (the "GSF Assignment"); and (2) a copy of an assignment of mortgage from Sand Canyon Corporation formerly known as Option One Mortgage Corporation to Wells Fargo (the "Sand Canyon Assignment"). According to the bankruptcy court, whoever possessed or held rights in the Note was irrelevant.
83. The Veal Court also reviews the "party in interest" referenced under Section 362(d) of the Bankruptcy Code, noting that the Bankruptcy Court found that Wells Fargo had established a "colorable claim" based on two assignments of mortgage. The Veal court notes that the Assignment of Mortgage without a transfer of the note makes the mortgage ineffective and unenforceable as to the transferee. The Veal Court finds that Wells Fargo does not have a colorable claim against property of the estate because it did not show that it has any interest in the note either as a holder or a nonholder in possession of the note with the rights of a holder. The Veal Court also goes on to discuss the debtor's objection to the claim stating that the procedure for objecting to a claim directs the Bankruptcy Court to disallow the claim if the debtor has a legitimate non-bankruptcy law defense under Section 502(b)(1). The Court notes that AHMSI must show that it has an agency relationship with a person entitled to enforce the note. Absent that, the claim filed by AHMSI would apparently be disallowed by the Bankruptcy Court.
84. The key to this argument is that, under the common law generally, the transfer of a mortgage without the transfer of the obligation it secures renders the mortgage ineffective and unenforceable in the hands of the transferee. *Restatement (Third) of Property (Mortgages) § 5.4 cmt. e* (1997) ("in general a mortgage [*44] is unenforceable if it is held by one who has no right to enforce the secured obligation").³¹ As stated in a leading real property treatise:

When a note is split from a deed of trust "the note becomes, as a practical matter, unsecured." *Restatement (Third) of Property (Mortgage) § 5.4 cmt. a* (1997). Additionally, if the deed of trust was assigned without the note, then the assignee,

"having no interest in the underlying debt or obligation, has a worthless piece of paper."

85. ... to show a colorable claim against the Property, Wells Fargo had to show that it had some interest in the Note, either as a holder, as some other "person entitled to enforce," or that it was someone who held some ownership or other interest in the Note. See *In re Hwang*, 438 B.R. 661, 665 (C.D. Cal. 2010) (finding that holder of note has real party in interest status). None of the exhibits attached to Wells Fargo's papers, however, establish its status as the holder, as a "person entitled to enforce," or as an entity with any ownership or other interest in the Note.
86. the colorable claim standard [*50] set forth in *Robbins* does not free Wells Fargo from the burden of establishing its status as a real party in interest allowing it to move for relief from stay, as this is the way in which Wells Fargo satisfies its prudential standing requirement.
87. In particular, because it did not show that it or its agent had actual possession of the Note, Wells Fargo could not establish that it was a holder of the Note, or a "person entitled to enforce" the Note.³⁵ In addition, even if admissible, the final purported assignment of the Mortgage was insufficient under Article 9 to support a conclusion that Wells Fargo holds any interest, ownership or otherwise, in the Note. Put another way, without any evidence tending to show it was a "person entitled to enforce" the Note, or that it has an interest in the Note, Wells Fargo has shown no right to enforce the Mortgage securing the Note. Without these rights, Wells Fargo cannot make the threshold showing of a colorable claim to the Property that would give it prudential standing to seek stay relief or to qualify as a real party in interest.
88. The Veals contend that AHMSI's purported claim - as opposed to any security for that claim - is subject to objection under Article 3 of the UCC. If correct, their nonbankruptcy objection provides a sufficient basis for disallowance of the claim. § 502(b)(1). When ruling on such an objection, the bankruptcy court makes a substantive ruling that binds the parties in all other proceedings and may finally adjudicate the parties' underlying rights. As stated in *Katchen v. Landy*, 382 U.S. 323, 86 S. Ct. 467, 15 L. Ed. 2d 391 (1966):
89. The [*52] bankruptcy courts "have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession."
90. *Id.* at 327 (quoting *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 481, 60 S. Ct. 628, 84 L. Ed. 876 (1940)). Courts have adopted this characterization of the effect of claim objection proceedings under the somewhat different, and more expansive, jurisdictional structure in place under the 1978 Bankruptcy Code. *EDP Med. Computer Sys., Inc. v. United States*, 480 F.3d 621, 624 (2d Cir. 2007); *Siegel v. Fed. Home Loan*

Mortg. Corp., 143 F.3d 525, 529-30 (9th Cir. 1998); *Bank of Lafayette v. Baudoin (In re Baudoin)*, 981 F.2d 736, 742 (5th Cir. 1993).

91. Consistent with this view, orders in claim objection proceedings have been given issue and claim preclusive effect.
92. The Veals challenge AHMSI's status as the real party in interest to file a proof of claim with respect to the Note. This argument stands on somewhat different [*54] grounds than the similar objection to Wells Fargo's stay relief. Unlike a motion for relief from the stay, the claim allowance procedure has finality, as § 502(b)(1) explicitly directs a bankruptcy court to disallow a claim if a legitimate nonbankruptcy law defense exists. Again, unlike motions for relief from the automatic stay, there will be no subsequent determination of the parties' relative rights and responsibilities in another forum. The proceedings in the bankruptcy court are the final determination. As a result, *Civil Rule 17's* policy of preventing multiple liability is fully implicated.
93. When debtors such as the Veals challenge [*58] an alleged servicer's standing to file a proof of claim regarding a note governed by Article 3 of the UCC, that servicer must show it has an agency relationship with a "person entitled to enforce" the note that is the basis of the claim. If it does not, then the servicer has not shown that it has standing to file the proof of claim. See, e.g., *In re Minbatiwalla*, 424 B.R. 104, 108-11 (Bankr. S.D.N.Y. 2010); *Hayes*, 393 B.R. at 266-70; *In re Parrish*, 326 B.R. 708, 720-21 (Bankr. N.D. Ohio 2005).
94. The bankruptcy court here apparently concluded as a matter of law that the identity of the person entitled to enforce the Note was irrelevant. Its analysis followed the Mortgage instead of the Note. We disagree. In the context of a claim objection, both the injury-in-fact requirement of constitutional standing and the real party in interest requirement of prudential standing hinge on who holds the right to payment under the Note and hence the right to enforce the Note. *In re Weisband*, 427 B.R. 13, 18-19 (Bankr. D. Ariz. 2010). See also *U-Haul*, 793 F.2d at 1038 (holding that real party in interest is the "party to whom the relevant substantive law grants a cause of action"). In other words, Wells [*59] Fargo (or AHMSI as Wells Fargo's servicer) must be a "person entitled to enforce" the Note in order to qualify as a creditor (or creditor's agent) entitled to file a proof of claim. Otherwise, the estate may pay funds to a stranger to the case; indeed, the primary purpose of the real party in interest doctrine is to ensure that such mistaken payments do not occur.

Concluding Remarks

There seems to be a trend for Courts to look more closely at the status of a movant in relief from stay motions as to the status of the real party in interest. This goes beyond a showing of some kind of "colorable claim". Debtor's counsel should review documentation attached to all proofs of claim when dealing with any claim on file by a securitized trust. The issues of standing and real party in interest will continue to rise if there is a continuing lack of documentation, including allonges signed shortly before or after the bankruptcy

filing and possibly post-filing assignments of mortgages. *See*, Appendix III in the materials for examples of endorsements and allonges.

MORGAN STANLEY ABS CAPITAL I INC.,
Depositor,

WELLS FARGO BANK, NATIONAL ASSOCIATION,
Servicer and Custodian,

NC CAPITAL CORPORATION
Responsible Party,

WMC MORTGAGE CORP.,
Responsible Party,

DECISION ONE MORTGAGE COMPANY, LLC,
Responsible Party,

DEUTSCHE BANK NATIONAL TRUST COMPANY,
Trustee

and

LASALLE BANK NATIONAL ASSOCIATION,
Custodian

POOLING AND SERVICING AGREEMENT

Dated as of June 1, 2006

MORGAN STANLEY ABS CAPITAL I INC. TRUST 2006-HE4

MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2006-HE4

ARTICLE I

DEFINITIONS

ARTICLE II

CONVEYANCE OF MORTGAGE LOANS;
REPRESENTATIONS AND WARRANTIES

Section 2.01	Conveyance of Mortgage Loans.....
Section 2.02	Acceptance by the Trustee of the Mortgage Loans.....
Section 2.03	Representations and Warranties; Remedies for Breaches of Representations and Warranties with Respect to the Mortgage Loans.....
Section 2.04	Execution and Delivery of Certificates.....
Section 2.05	REMIC Matters.....
Section 2.06	Representations and Warranties of the Depositor.....

ARTICLE III

ADMINISTRATION AND SERVICING
OF MORTGAGE LOANS

Section 3.01	Servicer to Service Mortgage Loans.....
Section 3.02	Subservicing Agreements between the Servicer and Subservicers.
Section 3.03	Successor Subservicers.....



Section 3.04	Liability of the Servicer.....
Section 3.05	No Contractual Relationship between Subservicers and the Trustee.....
Section 3.06	Assumption or Termination of Subservicing Agreements by Trustee.....
Section 3.07	Collection of Certain Mortgage Loan Payments.....
Section 3.08	Subservicing Accounts.....
Section 3.09	Collection of Taxes, Assessments and Similar Items; Escrow Accounts.....
Section 3.10	Collection Accounts.....
Section 3.11	Withdrawals from the Collection Accounts.....
Section 3.12	Investment of Funds in the Collection Accounts and the Distribution Account.....
Section 3.13	Maintenance of Hazard Insurance and Errors and Omissions and Fidelity Coverage.....
Section 3.14	Enforcement of Due-on-Sale Clauses; Assumption Agreements.....
Section 3.15	Realization upon Defaulted Mortgage Loans.....
Section 3.16	Release of Mortgage Files.....
Section 3.17	Title, Conservation and Disposition of REO Property.....
Section 3.18	Notification of Adjustments.....
Section 3.19	Access to Certain Documentation and Information Regarding the Mortgage Loans.....
Section 3.20	Documents, Records and Funds in Possession of the Servicer to Held for the Trustee.....
Section 3.21	Servicing Compensation.....
Section 3.22	Annual Statement as to Compliance.....
Section 3.23	Annual Reports on Assessment of Compliance with Servicing Criteria; Annual Independent Public Accountants' Attestation Report.....
Section 3.24	Trustee to Act as Servicer.....
Section 3.25	Compensating Interest.....
Section 3.26	Credit Reporting; Gramm-Leach-Bliley Act.....
Section 3.27	Transfer of Servicing for Certain Mortgage Loans.....

ARTICLE IV

DISTRIBUTIONS AND
ADVANCES BY THE SERVICER

Section 4.01	Advances.....
Section 4.02	Priorities of Distribution.....
Section 4.03	Monthly Statements to Certificateholders.....
Section 4.04	Certain Matters Relating to the Determination of LIBOR.....
Section 4.05	Allocation of Applied Realized Loss Amounts.....
Section 4.06	Swap Account.....

ARTICLE V

THE CERTIFICATES

Section 5.01	The Certificates.....
Section 5.02	Certificate Register; Registration of Transfer and Exchange of Certificates.....
Section 5.03	Mutilated, Destroyed, Lost or Stolen Certificates.....
Section 5.04	Persons Deemed Owners.....
Section 5.05	Access to List of Certificateholders' Names and Addresses....
Section 5.06	Maintenance of Office or Agency.....

ARTICLE VI

THE DEPOSITOR AND THE SERVICER

Section 6.01	Respective Liabilities of the Depositor and the Servicer.....
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Section 6.02	Merger or Consolidation of the Depositor or the Servicer.....
Section 6.03	Limitation on Liability of the Depositor, the Servicer and Others.....
Section 6.04	Limitation on Resignation of the Servicer.....
Section 6.05	Additional Indemnification by the Servicer; Third-Party Claims.....

ARTICLE VII

DEFAULT

Section 7.01	Events of Default.....
Section 7.02	Trustee to Act; Appointment of Successor.....
Section 7.03	Notification to Certificateholders.....
Section 7.04	Termination Without Cause.....

ARTICLE VIII

CONCERNING THE TRUSTEE

Section 8.01	Duties of the Trustee.....
Section 8.02	Certain Matters Affecting the Trustee and the Custodians.....
Section 8.03	Trustee Not Liable for Certificates or Mortgage Loans.....
Section 8.04	Trustee May Own Certificates.....
Section 8.05	Trustee's Fees and Expenses.....
Section 8.06	Eligibility Requirements for the Trustee.....
Section 8.07	Resignation and Removal of the Trustee.....
Section 8.08	Successor Trustee.....
Section 8.09	Merger or Consolidation of the Trustee.....
Section 8.10	Appointment of Co-Trustee or Separate Trustee.....
Section 8.11	Tax Matters.....
Section 8.12	Periodic Filings.....
Section 8.13	Tax Treatment of Upper-Tier CarryForward Amounts, Basis Risk CarryForward Amounts and Class IO Shortfalls; Tax Classification of the Excess Reserve Fund Account, Swap Account and the Interest Rate Swap Agreement.....
Section 8.14	Custodial Responsibilities.....

ARTICLE IX

TERMINATION

Section 9.01	Termination upon Liquidation or Purchase of the Mortgage Loans.....
Section 9.02	Final Distribution on the Certificates.....
Section 9.03	Additional Termination Requirements.....

ARTICLE X

MISCELLANEOUS PROVISIONS

Section 10.01	Amendment.....
Section 10.02	Recordation of Agreement; Counterparts.....
Section 10.03	Governing Law.....
Section 10.04	Intention of Parties.....
Section 10.05	Notices.....
Section 10.06	Severability of Provisions.....
Section 10.07	Assignment; Sales; Advance Facilities.....
Section 10.08	Limitation on Rights of Certificateholders.....
Section 10.09	Inspection and Audit Rights.....
Section 10.10	Certificates Nonassessable and Fully Paid.....
Section 10.11	Rule of Construction.....
Section 10.12	Waiver of Jury Trial.....

Section 10.13 Opinions of Internal Counsel of WMC.....
Section 10.14 Third Party Rights.....
Section 10.15 Regulation AB Compliance; Intent of the Parties;
Reasonableness.....

SCHEDULES

Schedule I Mortgage Loan Schedule
Schedule II Representations and Warranties of Wells Fargo, as Servicer
Schedule III Representations and Warranties of Morgan Stanley ABS Capital I
Inc. as to the Mortgage Loans
Schedule IV Representations and Warranties of WMC, as to the WMC Mortgage
Loans
Schedule V Representations and Warranties of WMC as to WMC
Schedule VI Representations and Warranties of Decision One, as to the Decision
One Mortgage Loans
Schedule VII Representations and Warranties of NC Capital, as to the NC Capital
Mortgage Loans
Schedule VIII Representations and Warranties of NC Capital as to NC Capital
Schedule IX Representations and Warranties of Wells Fargo, as Custodian
Schedule X Representations and Warranties of LaSalle, as Custodian

EXHIBITS

Exhibit A Form of Class A, Class M and Class B Certificate
Exhibit B Form of Class P Certificate
Exhibit C-1 Form of Class R Certificate
Exhibit C-2 Form of Class RX Certificate
Exhibit D Form of Class X Certificate
Exhibit E Form of Initial Certification of Custodians
Exhibit F Form of Document Certification and Exception Report of Custodians
Exhibit G Form of Residual Transfer Affidavit
Exhibit H Form of Transferor Certificate
Exhibit I Form of Rule 144A Letter
Exhibit J Form of Request for Release
Exhibit K Form of Contents for Each Mortgage File
Exhibit L Form of Certification to be provided with Form 10-K
Exhibit M Form of Certification to be provided by the Trustee to Depositor
Exhibit N Form of Certification to be provided by the Servicer to Depositor
Exhibit O WMC Purchase Agreement

Exhibit P Decision One Purchase Agreement
Exhibit Q NC Capital Purchase Agreement
Exhibit R Option One Mortgage Agreements
Exhibit S Form of Servicer Power of Attorney
Exhibit T Servicing Criteria
Exhibit U Additional Form 10-D Disclosure
Exhibit V Additional Form 10-K Disclosure
Exhibit W Form 8-K Disclosure Information
Exhibit X Interest Rate Swap Agreement
Exhibit Y Form of Wells Fargo Servicer Reports
Exhibit Z Countrywide Servicing Agreement
Exhibit AA Form of Additional Disclosure Notification

THIS POOLING AND SERVICING AGREEMENT, dated as of June 1, 2006, among MORGAN STANLEY ABS CAPITAL I INC., a Delaware corporation, as depositor (the "Depositor"), WELLS FARGO BANK, NATIONAL ASSOCIATION, a national banking association ("Wells Fargo"), as servicer (in such capacity, the "Servicer") and a custodian, NC CAPITAL CORPORATION, a California corporation, as a responsible party ("NC Capital"), WMC MORTGAGE CORP., a California corporation, as a responsible party ("WMC"), DECISION ONE MORTGAGE COMPANY, LLC, as a responsible party ("Decision One"), DEUTSCHE BANK NATIONAL TRUST COMPANY, a national banking association, as trustee (the "Trustee") and LASALLE BANK NATIONAL ASSOCIATION, as a custodian ("LaSalle" and, together with Wells Fargo in its capacity as custodian, the "Custodians").

W I T N E S S E T H:

In consideration of the mutual agreements herein contained, the parties hereto agree as follows:

PRELIMINARY STATEMENT

The Trustee shall elect that five segregated asset pools within the Trust Fund (exclusive of (i) the Prepayment Premiums, (ii) the Swap Assets, (iii) the Excess Reserve Fund Account, and (iv) the right of the Offered Certificates to receive Basis Risk CarryForward Amounts and, without duplication, Upper-Tier CarryForward Amounts and the obligation to pay Class IO Shortfalls) be treated for federal income tax purposes as comprising five REMICs (each, a "Trust REMIC" or, in the alternative, Pooling-Tier REMIC-1, Pooling-Tier REMIC-2, the Lower-Tier REMIC, the Upper-Tier REMIC and the Class X REMIC, respectively). The Class X Interest, Class IO Interest and each Class of Offered Certificates (other than the right of each Class of Offered Certificates to receive Basis Risk CarryForward Amounts and, without duplication, Upper-Tier CarryForward Amounts and the obligation to pay Class IO Shortfalls) represents ownership of a regular interest in a REMIC for purposes of the REMIC Provisions. The Class R Certificates represent ownership of the sole class of residual interest in each of the Lower-Tier REMIC and the Upper-Tier REMIC for purposes of the REMIC Provisions. The Class RX Certificates represent ownership of the sole class of residual interest in the Class X REMIC for purposes of the REMIC provisions. The Class RC Certificates represent ownership of the sole class of

residual interest in Pooling-Tier REMIC-1 for purposes of the REMIC provisions. The Startup Day for each Trust REMIC described herein is the date referenced in Section 2.05. The latest possible maturity date for each regular interest is the latest date referenced in Section 2.05. The Class X REMIC shall hold as assets the Class UT-X Interest as set out below. The Upper-Tier REMIC shall hold as assets the several classes of uncertificated Lower-Tier Regular Interests, set out below. The Lower-Tier REMIC shall hold as assets the several classes of uncertificated Pooling-Tier REMIC-2 Regular Interests. Pooling-Tier REMIC-2 shall hold as assets the several classes of uncertificated Pooling-Tier REMIC-1 Regular Interests. Pooling-Tier REMIC-1 shall hold as assets the assets of the Trust Fund (exclusive of (i) the Prepayment Premiums, (ii) the Swap Assets, (iii) the Excess Reserve Fund Account, and (iv) the right of the Offered Certificates to receive Basis Risk CarryForward Amounts and, without duplication, Upper-Tier CarryForward Amounts and the obligation to pay Class IO Shortfalls).

For federal income tax purposes, each Class of Offered Certificates represents a beneficial ownership of a regular interest in the Upper-Tier REMIC, the right to receive Basis Risk CarryForward Amounts (and, without duplication, Upper-Tier CarryForward Amounts), and the obligation to pay Class IO Shortfalls; the Class X Certificates represent beneficial ownership of the Class X Interest, the Class IO Interest, the Interest Rate Swap Agreement, the Swap Account, the Excess Reserve Fund Account and the right to receive Class IO Shortfalls, subject to the obligation to pay Basis Risk CarryForward Amounts (and, without duplication, Upper-Tier CarryForward Amounts); and the Class P Certificates represent beneficial ownership of the Prepayment Premiums, which portions of the Trust Fund shall be treated as a grantor trust under subpart E, Part I of subchapter J of the Code (the "Grantor Trust").

Article 1. Definitions

Whenever used in this Agreement, the following words and phrases, unless the context otherwise requires, shall have the following meanings:

Agreement: This Pooling and Servicing Agreement and all amendments or supplements hereto.

Assignment of Mortgage: An assignment of the Mortgage, notice of transfer or equivalent instrument in recordable form (other than the assignee's name and recording information not yet returned from the recording office), reflecting the sale of the Mortgage to the Trustee.

Closing Date: June 23, 2006.

Cut-off Date: The date or dates designated as such on the related Mortgage Loan Schedule with respect to the related Mortgage Loan Package.

Custodian: Deutsche Bank Trust Company Americas, or the Custodian's successor in interest or permitted assigns, or any successor to the Custodian under the Custodial Agreement as therein provided.

Depositor: The depositor, as such term is defined in Regulation AB, with respect to any Securitization Transaction.

Depository: The initial Depository shall be The Depository Trust Company, the nominee of which is CEDE & Co., as the registered Holder of the Book-Entry Certificates. The Depository shall at all times be a "clearing corporation" as defined in Section 8-102(a)(5) of the Uniform Commercial Code of the State of New York.

Depository Institution: Any depository institution or trust company,

including the Trustee, that (a) is incorporated under the laws of the United States of America or any State thereof, (b) is subject to supervision and examination by federal or state banking authorities and (c) has outstanding unsecured commercial paper or other short-term unsecured debt obligations that are rated "P-1" by Moody's, "F1+" by Fitch and "A-1" by Standard & Poor's (to the extent they are Rating Agencies hereunder).

Depository Participant: A broker, dealer, bank or other financial institution or other Person for whom from time to time a Depository effects book-entry transfers and pledges of securities deposited with the Depository.

MERS: Mortgage Electronic Registration Systems, Inc., a Delaware corporation, and its successors in interest.

MERS(R) System: MERS mortgage electronic registry system, as more particularly described in the MERS Procedures Manual.

Mortgage: The mortgage, deed of trust or other instrument securing a Mortgage Note, which creates a first lien, in the case of a First Lien Loan, or a second lien, in the case of a Second Lien Loan, on the Mortgaged Property.

Mortgage File: The items pertaining to a particular Mortgage Loan referred to in Exhibit A annexed hereto, and any additional documents required to be added to the Mortgage File pursuant to this Agreement.

Mortgage Interest Rate: The annual rate of interest borne on a Mortgage Note with respect to each Mortgage Loan.

Mortgage Interest Rate Cap: With respect to an Adjustable Rate Mortgage Loan, the limit on each Mortgage Interest Rate adjustment as set forth in the related Mortgage Note.

Mortgage Loan: An individual Mortgage Loan which is the subject of this Agreement, each Mortgage Loan originally sold and subject to this Agreement being identified on the applicable Mortgage Loan Schedule, which Mortgage Loan includes without limitation the Mortgage File, the Monthly Payments, Principal Prepayments, Liquidation Proceeds, Condemnation Proceeds, Insurance Proceeds, Servicing Rights and all other rights, benefits, proceeds and obligations arising from or in connection with such Mortgage Loan, excluding replaced or repurchased mortgage loans.

Mortgage Loan Schedule: The schedule of Mortgage Loans setting forth the following information with respect to each Mortgage Loan in the related Mortgage Loan Package: (1) the Seller's Mortgage Loan identifying number; (2) the Mortgagor's name; (3) the street address of the Mortgaged Property including the city, state and zip code; (4) a code indicating whether the Mortgagor is self-employed; (5) a code indicating whether the Mortgaged Property is owner-occupied; (6) the number and type of residential units constituting the Mortgaged Property; (7) the original months to maturity or the remaining months to maturity from the related Cut-off Date, in any case based on the original amortization schedule and, if different, the maturity expressed in the same manner but based on the actual amortization schedule; (8) with respect to each First Lien Loan, the Loan-to-Value Ratio at origination, and with respect to each Second Lien Loan, the CLTV at origination; (9) the Mortgage Interest Rate as of the related Cut-off Date; (10) the date on which the Monthly Payment was due on the Mortgage Loan and, if such date is not consistent with the Due Date currently in effect, such Due Date; (11) the stated maturity date; (12) the first payment date; (13) the amount of the Monthly Payment as of the related Cut-off Date; (14) the last payment date on which a payment was actually applied to the outstanding principal balance; (15) the original principal amount of the Mortgage Loan; (16) the principal balance of the Mortgage Loan as of the close of business on the related Cut-off Date, after deduction of payments of principal due and collected on or before the related Cut-off Date; (17)

delinquency status as of the related Cut-off Date; (18) with respect to each Adjustable Rate Mortgage Loan, the Interest Rate Adjustment Date; (19) with respect to each Adjustable Rate Mortgage Loan, the Gross Margin; (20) with respect to each Adjustable Rate Mortgage Loan, the Lifetime Rate Cap under the terms of the Mortgage Note; (21) with respect to each Adjustable Rate Mortgage Loan, a code indicating the type of Index; (22) the type of Mortgage Loan (i.e., Fixed or Adjustable Rate Mortgage Loan, First or Second Lien Loan); (23) a code indicating the purpose of the loan (i.e., purchase, rate and term refinance, equity take-out refinance); (24) a code indicating the documentation style (i.e., full, alternative or reduced); (25) asset verification (Y/N); (26) the loan credit classification (as described in the Underwriting Guidelines); (27) whether such Mortgage Loan provides for a Prepayment Penalty and, if applicable, the Prepayment Penalty period; (28) the Mortgage Interest Rate as of origination; (29) the credit risk score (FICO score); (30) the date of origination; (31) with respect to Adjustable Rate Mortgage Loans, the Mortgage Interest Rate adjustment period; (32) with respect to each Adjustable Rate Mortgage Loan, the Mortgage Interest Rate adjustment percentage; (33) with respect to each Adjustable Rate Mortgage Loan, the Mortgage Interest Rate floor; (34) with respect to each Adjustable Rate Mortgage Loan, the Mortgage Interest Rate Cap as of the first Interest Rate Adjustment Date; (35) with respect to each Adjustable Rate Mortgage Loan, the Periodic Rate Cap subsequent to the first Interest Rate Adjustment Date; (36) with respect to each Adjustable Rate Mortgage Loan, a code indicating whether the Mortgage Loan provides for negative amortization; (37) with respect to each Adjustable Rate Mortgage Loan with negative amortization, the negative amortization limit; (38) a code indicating whether the Mortgage Loan is a High Cost Loan; (39) a code indicating whether the Mortgage Loan is a Balloon Mortgage Loan; (40) the Due Date for the first Monthly Payment; (41) the original Monthly Payment due; (42) a code indicating the PMI Policy provider and percentage of coverage, if applicable; (43) Appraised Value; (44) appraisal type; (45) automated valuation model (AVM); (46) appraisal date; (47) with respect to the related Mortgagor, the debt-to-income ratio; (48) with respect to each MERS Designated Mortgage Loan, the MERS Identification Number; (49) a code indicating whether the Mortgage Loan was purchased from a correspondent; and (50) a code indicating whether the Mortgage Loan does not comply with Subsection 9.02 (ooo). With respect to the Mortgage Loans in the aggregate, the Mortgage Loan Schedule shall set forth the following information, as of the related Cut-off Date: (1) the number of Mortgage Loans; (2) the current aggregate outstanding principal balance of the Mortgage Loans; (3) the weighted average Mortgage Interest Rate of the Mortgage Loans; (4) the weighted average maturity of the Mortgage Loans; (5) the applicable Cut-off Date; and (6) the applicable Closing Date.

Mortgage Note: The note or other evidence of the indebtedness of a Mortgagor secured by a Mortgage.

Mortgaged Property: With respect to each Mortgage Loan, the Mortgagor's real property securing repayment of a related Mortgage Note, consisting of an unsubordinated estate in fee simple or, with respect to real property located in jurisdictions in which the use of leasehold estates for residential properties is a widely-accepted practice, a leasehold estate, in one or more separate and complete tax parcels of real property improved by a Residential Dwelling.

Mortgagor: The obligor on a Mortgage Note.

Originator: New Century Mortgage Corporation, its successors in interest and assigns.

Sponsor: Morgan Stanley Mortgage Capital Inc., a New York corporation, and its successors in interest, as purchaser of the Mortgage Loans under each of the Purchase Agreements.

REMIC: A "real estate mortgage investment conduit" within the meaning of Section 860D of the Code.

Startup Day: As defined in Section 2.05.

NOTE: Section 2.05 defines Startup day as "The "Startup Day" of each Trust REMIC for purposes of the REMIC Provisions shall be with respect to each Trust REMIC, other than the Class X REMIC, the Closing Date, and with respect to the Class X REMIC, November 21, 2006.

Transfer: Any direct or indirect transfer or sale of any Ownership Interest in a Residual Certificate.

Trust Fund: The corpus of the trust created hereunder consisting of (i) the Mortgage Loans and all interest and principal with respect thereto received on or after the related Cut-off Date, other than such amounts which were due on the Mortgage Loans on or prior to the related Cut-off Date; (ii) the Collection Accounts, Excess Reserve Fund Account, the Distribution Account, and all amounts deposited therein pursuant to the applicable provisions of this Agreement; (iii) property that secured a Mortgage Loan and has been acquired by foreclosure, deed-in-lieu of foreclosure or otherwise; (iv) the Closing Date Deposit Amount; (v) the Interest Rate Swap Agreement; (vi) the Swap Assets; (vii) the Depositor's rights under the Option One Agreement (solely insofar as the agreement relates to the Option One Mortgage Loans), (viii) the Countrywide Servicing Agreement, and (ix) all proceeds of the conversion, voluntary or involuntary, of any of the foregoing.

Trustee: Deutsche Bank National Trust Company, a national banking association, and its successors in interest and, if a successor trustee is appointed hereunder, such successor.

Article 2

CONVEYANCE OF MORTGAGE LOANS; REPRESENTATIONS AND WARRANTIES

Section 2.01 Conveyance of Mortgage Loans.

(a) The Depositor, concurrently with the execution and delivery hereof, hereby sells, transfers, assigns, sets over and otherwise conveys to the Trustee for the benefit of the Certificateholders, without recourse, all the right, title and interest of the Depositor in and to the Trust Fund, and the Trustee, on behalf of the Trust, hereby accepts the Trust Fund.

(b) In connection with the transfer and assignment of each Mortgage Loan, the Depositor has delivered or caused to be delivered to Wells Fargo, in its capacity as Custodian, with respect to the WMC Mortgage Loans, to LaSalle with respect to the Decision One Mortgage Loans and to the Trustee with respect to the NC Capital Mortgage Loans and the Option One Mortgage Loans, for the benefit of the Certificateholders the following documents or instruments with respect to each Mortgage Loan so assigned:

(i) the original Mortgage Note bearing all intervening endorsements, endorsed "Pay to the order of _____, without recourse" and signed (which may be by facsimile signature) in the name of the last endorsee by an authorized officer. To the extent that there is no room on the face of the Mortgage Note for endorsements, the endorsement may be contained on an allonge, unless the Trustee or applicable Custodian, as applicable, is advised in writing by the applicable Originator (if required by the applicable Purchase Agreement) or the Depositor that state law does not so allow;

(ii) the original of any guaranty executed in connection with the Mortgage Note;

(iii) the original Mortgage with evidence of recording thereon or a certified true copy of such Mortgage submitted for recording. If, in connection with any Mortgage Loan, the original Mortgage cannot be delivered with evidence of recording thereon on or prior to the Closing Date because of a delay caused by the public recording office where such Mortgage has been delivered for recordation or because such Mortgage has been lost or because such public recording office retains the original recorded Mortgage, the applicable Originator or the Depositor, as applicable, shall deliver or cause to be delivered to the Trustee or applicable Custodian, as applicable, a photocopy of such Mortgage certified by the applicable Originator or the Depositor, as applicable, to be a true and complete copy of such Mortgage and shall forward to the Trustee or applicable Custodian, as applicable, such original recorded Mortgage within 14 days following the applicable Originator's or the Depositor's, as applicable, receipt of such Mortgage from the applicable public recording office; or in the case of a Mortgage where a public recording office retains the original recorded Mortgage or in the case where a Mortgage is lost after recordation in a public recording office, a copy of such Mortgage certified by such public recording office to be a true and complete copy of the original recorded Mortgage;

(iv) the originals of all assumption, modification, consolidation or extension agreements, with evidence of recording thereon or a certified true copy of such agreement submitted for recording;

(v) the original Assignment of Mortgage for each Mortgage Loan endorsed in blank (except with respect to MERS Designated Mortgage Loans);

(vi) the originals of all intervening assignments of Mortgage (if any) evidencing a complete chain of assignment from the applicable originator (or MERS with respect to each MERS Designated Mortgage Loan) to the last endorsee with evidence of recording thereon or a certified true copy of such intervening assignments of Mortgage submitted for recording, or if any such intervening assignment has not been returned from the applicable recording office or has been lost or if such public recording office retains the original recorded assignments of Mortgage, the applicable Responsible Party or the Depositor, as applicable, shall deliver or cause to be delivered a photocopy of such intervening assignment, certified by the applicable Responsible Party or the Depositor, as applicable, to be a true and complete copy of such intervening assignment and shall forward to the Trustee or applicable Custodian, as applicable, such original recorded intervening assignment within 14 days following the applicable Responsible Party's or the Depositor's, as applicable, receipt of such from the applicable public recording office; or in the case of an intervening assignment where a public recording office retains the original recorded intervening assignment or in the case where an intervening assignment is lost after recordation in a public recording office, a copy of such intervening assignment certified by such public recording office to be a true and complete copy of the original recorded intervening assignment;

(vii) the original mortgagee title insurance policy or a copy thereof, or a certified true copy of the related policy binder or commitment for title certified to be true and complete by the title insurance company; and

(viii) the original of any security agreement, chattel mortgage or equivalent document executed in connection with the Mortgage (if provided).

The applicable Responsible Party shall cause to be delivered to the Trustee or applicable Custodian, as applicable, the applicable recorded document promptly upon receipt from the respective recording office but, solely with respect to the WMC Mortgage Loans, in no event later than one year from the date such Mortgage Loan was sold by WMC to the Sponsor. The Depositor will use its reasonable efforts to assist the Trustee and the Servicer in enforcing the obligations of Option One under the Option One Agreements.

The Depositor shall cause to be delivered to the Trustee or Custodian, as applicable, the applicable recorded document promptly upon receipt from the respective recording office but in no event later than 180 days from the Closing Date.

If any Mortgage has been recorded in the name of Mortgage Electronic Registration System, Inc. ("MERS") or its designee, no Assignment of Mortgage in favor of the Trustee will be required to be prepared or delivered and instead, the Servicer shall take all reasonable actions as are necessary at the expense of the applicable Originator to the extent permitted under the related Purchase Agreement and otherwise at the expense of the Depositor to cause the Trust to be shown as the owner of the related Mortgage Loan on the records of MERS for the purpose of the system of recording transfers of beneficial ownership of mortgages maintained by MERS.

From time to time, the Depositor or the Servicer, as applicable, shall forward to the Trustee or applicable Custodian, as applicable, additional original documents, additional documents evidencing an assumption, modification, consolidation or extension of a Mortgage Loan in accordance with the terms of this Agreement upon receipt of such documents. All such mortgage documents held by the Trustee or applicable Custodian, as applicable, as to each Mortgage Loan shall constitute the "Custodial File".

On or prior to the Closing Date, each Originator shall deliver to the applicable Custodian Assignments of Mortgages, in blank, for each Mortgage Loan. The Originators shall cause the Assignments of Mortgages and complete recording information to be provided to the Servicer in a reasonably acceptable manner. No later than thirty (30) Business Days following the later of the Closing Date and the date of receipt by the Servicer of the complete recording information for a Mortgage, the Servicer shall promptly submit or cause to be submitted for recording, at the expense of the applicable Originator as required pursuant to the related Purchase Agreement and at no expense to the Trust Fund, the Trustee, the Servicer, or the Depositor, in the appropriate public office for real property records, each Assignment of Mortgage referred to in Section 2.01(b)(v). Notwithstanding the foregoing, however, for administrative convenience and facilitation of servicing and to reduce closing costs, the Assignments of Mortgage shall not be required to be completed and submitted for recording with respect to any Mortgage Loan (i) if the Trustee, the Custodians and each Rating Agency have received an Opinion of Counsel, satisfactory in form and substance to the Trustee and each Rating Agency to the effect that the recordation of such Assignments of Mortgage in any specific jurisdiction is not necessary to protect the Trustee's interest in the related Mortgage Note, (ii) if such Mortgage Loan is a MERS Designated Mortgage Loan or (iii) if the Rating Agencies have each notified the Depositor in writing that not recording any such Assignments of Mortgage would not cause the initial ratings on any Offered Certificates to be downgraded or withdrawn; provided, however, that the Servicer shall not be held responsible or liable for any loss that occurs because an Assignment of Mortgage was not recorded, but only to the extent the Servicer does not have prior knowledge of the act or omission that causes such loss. Unless the Depositor gives the Servicer notice to the contrary, the Depositor is deemed to have given the Servicer notice that the condition set forth in clause (iii) above is applicable. However, with respect to the Assignments of Mortgage referred to in clauses (i) and (ii) above, if foreclosure proceedings occur against a Mortgage Property, the Servicer shall record such Assignment of

Mortgage at the expense of the applicable related Originator (and at no expense to the Servicer) as required pursuant to the related Purchase Agreement. If the Assignment of Mortgage is to be recorded, the Mortgage shall be assigned to "Deutsche Bank National Trust Company, as trustee under the Pooling and Servicing Agreement dated as of June 1, 2006, Morgan Stanley ABS Capital I Inc. Trust 2006-HE4." In the event that any such Assignment of Mortgage is lost or returned unrecorded because of a defect therein, the applicable Responsible Party shall promptly cause to be delivered a substitute Assignment of Mortgage to cure such defect and thereafter cause each such assignment to be duly recorded. If there is such a defect with respect to an Option One Mortgage Loan, the Trustee shall notify the Depositor and Option One. If, within ten (10) Business Days of receipt of such notice by Option One, it fails to cure such defect, the Trustee shall notify the Depositor of such failure. The Trustee shall pursue all legal remedies available to the Trustee against Option One, if the Trustee has received written notice from the Depositor directing the Trustee to pursue such legal remedies.

In the event that such original or copy of any document submitted for recordation to the appropriate public recording office is not so delivered to the applicable Custodian within one year following the date such Mortgage Loan was sold by such Originator to the Sponsor, and in the event that such Originator does not cure such failure within 30 days of discovery or receipt of written notification of such failure from the Depositor, the related Mortgage Loan shall, upon the request of the Depositor, be repurchased by such Originator at the price and in the manner specified in Section 2.03. The foregoing repurchase obligation shall not apply in the event that the applicable Originator cannot deliver such original or copy of any document submitted for recordation to the appropriate public recording office within the specified period due to a delay caused by the recording office in the applicable jurisdiction; provided, that such Originator shall instead deliver a recording receipt of such recording office or, if such recording receipt is not available, an officer's certificate of an officer of such Responsible Party, confirming that such document has been accepted for recording.

Notwithstanding anything to the contrary contained in this Section 2.01, in those instances where the public recording office retains or loses the original Mortgage or assignment after it has been recorded, the obligations of the applicable Originator shall be deemed to have been satisfied upon delivery by the applicable Originator to the applicable Custodian prior to the Closing Date of a copy of such Mortgage or assignment, as the case may be, certified (such certification to be an original thereof) by the public recording office to be a true and complete copy of the recorded original thereof.

On or prior to the Closing Date, the Depositor shall deliver to the Trustee and the Custodians, as applicable, a copy of the Data Tape Information in an electronic, machine readable medium in a form acceptable to the Depositor, the Trustee or the Custodians, as applicable.

(c) The Depositor does hereby establish, pursuant to the further provisions of this Agreement and the laws of the State of New York, an express trust (the "Trust") to be known, for convenience, as "MORGAN STANLEY ABS CAPITAL I INC. TRUST 2006-HE4" and Deutsche Bank National Trust Company is hereby appointed as Trustee in accordance with the provisions of this Agreement. The parties hereto acknowledge and agree that it is the policy and intention of the Trust to acquire only Mortgage Loans meeting the requirements set forth in this Agreement, including without limitation, the representations and warranties set forth in paragraph (aaa) of Schedule IV, paragraph (yy) of Schedule VI and paragraph (aaa) of Schedule VII to this Agreement. The Trust's fiscal year is the calendar year.

(d) The Trust shall have the capacity, power and authority, and the Trustee on behalf of the Trust is hereby authorized, to accept the sale, transfer, assignment, set over and conveyance by the Depositor to the Trust of

all the right, title and interest of the Depositor in and to the Trust Fund (including, without limitation, the Mortgage Loans), pursuant to Section 2.01(a). The Trustee on behalf of the Trust is hereby directed to enter into the Interest Rate Swap Agreement.

Section 2.02 Acceptance by the Trustee of the Mortgage Loans. The Trustee and the Custodians shall acknowledge, on the Closing Date, receipt by the Trustee or the applicable Custodian, as applicable, on behalf of the Trustee of the documents identified in the Initial Certification in the form annexed hereto as Exhibit E, and declares that it holds and will hold such documents and the other documents delivered to it pursuant to Section 2.01, and that it holds or will hold such other assets as are included in the Trust Fund, in trust for the exclusive use and benefit of all present and future Certificateholders. The Trustee and the Custodians shall maintain possession of the related Mortgage Notes in the States of California, Minnesota or Utah unless otherwise permitted by the Rating Agencies.

In connection with the Closing Date, the Trustee and the Custodians shall be required to deliver via facsimile (with original to follow the next Business Day) to the Depositor and the Servicer or the Countrywide Servicer, as applicable, an Initial Certification prior to the Closing Date, or, with the Depositor's consent, on the Closing Date, certifying receipt of a Mortgage Note and Assignment of Mortgage for each applicable Mortgage Loan. Neither the Trustee nor the Custodians shall be responsible to verify the validity, sufficiency or genuineness of any document in any Custodial File.

Within 90 days after the Closing Date, the Trustee and each Custodian shall, for the benefit of the Holders of the Certificates, ascertain that all documents identified in the Document Certification and Exception Report in the form attached hereto as Exhibit F with respect to the Mortgage Loans for which it is acting as the Custodian, are in its possession, and shall deliver to the Depositor, the Servicer or the Countrywide Servicer, as applicable, and the Trustee, if delivered by a Custodian, a Document Certification and Exception Report, in the form annexed hereto as Exhibit F, to the effect that, as to each applicable Mortgage Loan listed in the Mortgage Loan Schedule (other than any Mortgage Loan paid in full or any Mortgage Loan specifically identified in such certification as an exception and not covered by such certification): (i) all documents identified in the Document Certification and Exception Report and required to be reviewed by it are in its possession; (ii) such documents have been reviewed by it and appear regular on their face and relate to such Mortgage Loan; (iii) based on its examination and only as to the foregoing documents, the information set forth in items (1), (2), (7) and (9) of the Mortgage Loan Schedule and items (1), (9) and (17) of the Data Tape Information respecting such Mortgage Loan accurately reflects the information set forth in the Custodial File; and (iv) each Mortgage Note has been endorsed as provided in Section 2.01 of this Agreement. Neither the Trustee nor the Custodians shall be responsible to verify the validity, sufficiency or genuineness of any document in any Custodial File.

Within 90 days after the Closing Date, the Servicer (for the benefit of the Holders of the Certificates, based solely on the list of MERS Designated Mortgage Loans and screen printouts from the MERS(R) System provided to the Servicer by each applicable Originator no later than 45 days after the Closing Date) shall confirm, on behalf of the Trust, that the Trustee is shown as the Investor with respect to each MERS Designated Mortgage Loan on such screen printouts. If the Trustee is not shown as the Investor with respect to any MERS Designated Mortgage Loans on such screen printouts, the Servicer shall promptly notify the related Originator of such fact, and such Person shall then either cure such defect or repurchase such Mortgage Loan in accordance with Section 2.03.

The Trustee and the Custodians shall retain possession and custody of each applicable Custodial File in accordance with and subject to the terms

and conditions set forth herein. The Servicer shall promptly deliver to the Trustee or the applicable Custodian, as applicable, upon the execution or receipt thereof, the originals of such other documents or instruments constituting the Custodial File as come into the possession of the Servicer from time to time.

Each Responsible Party shall deliver (or the Depositor, as applicable, shall use reasonable efforts to cause Option One to deliver) to the Servicer or the Countrywide Servicer, as applicable, copies of all trailing documents required to be included in the Custodial File at the same time the original or certified copies thereof are delivered to the Trustee or the applicable Custodian, as applicable, including but not limited to such documents as the title insurance policy and any other Mortgage Loan Documents upon return from the public recording office. Such documents shall be delivered by the applicable Responsible Party at such Responsible Party's expense (or the Depositor shall use reasonable efforts to cause Option One to deliver such documents at Option One's expense pursuant to the Option One Agreements) to the Servicer.

Section 2.03 Representations and Warranties; Remedies for Breaches

of Representations and Warranties with Respect to the Mortgage Loans. (a) Wells Fargo in its capacity as Servicer hereby makes the representations and warranties set forth in Schedule II hereto to the Depositor and the Trustee as of the dates set forth in such Schedule.

(b) WMC hereby makes the representations and warranties set forth in Schedule IV and Schedule V hereto to the Depositor, the Servicer and the Trustee as of the dates set forth in such Schedules. Decision One hereby makes the representations and warranties set forth in Schedule VI hereto to the Depositor, the Servicer and the Trustee as of the dates set forth in such Schedule. NC Capital hereby makes the representations and warranties set forth in Schedule VII and Schedule VIII hereto to the Depositor, the Servicer and the Trustee as of the dates set forth in such Schedules.

(b) Wells Fargo in its capacity as Custodian hereby makes the representations and warranties, set forth in Schedule IX hereto to the Trustee as of the dates set forth in such Schedule IX. LaSalle hereby makes the representations and warranties, set forth in Schedule X hereto to the Trustee as of the dates set forth in such Schedule X.

(c) The Depositor hereby makes the representations and warranties set forth in Schedule III hereto to the Trustee as of the dates set forth in such Schedule.

(d) It is understood and agreed by the parties hereto that the representations and warranties set forth in this Section 2.03 shall survive the transfer of the Mortgage Loans by the Depositor to the Trustee, and shall inure to the benefit of the parties to whom the representations and warranties were made notwithstanding any restrictive or qualified endorsement on any Mortgage Note or Assignment of Mortgage or the examination or failure to examine any Mortgage File. Upon discovery by any of the parties to this Agreement of a breach of any of the foregoing representations and warranties that materially and adversely affect the value of any Mortgage Loan or the interest of the Trustee or the Certificateholders therein, the party discovering such breach shall give prompt written notice to the other parties.

(e) Upon discovery by any of the parties hereto of a breach of a representation or warranty made by the Depositor or a Responsible Party, as applicable, under this Agreement, that materially and adversely affects the value of any Mortgage Loan or the interests of the Trustee or the Certificateholders therein, the party discovering such breach shall give prompt written notice thereof to the other parties. Upon receiving written notice of a breach of a representation and warranty or written notice that a Mortgage Loan

MORGAN STANLEY ABS CAPITAL I INC. TRUST 2006-HE4
FREE WRITING PROSPECTUS

IMPORTANT NOTICE REGARDING THE CONDITIONS
FOR THIS OFFERING OF ASSET-BACKED SECURITIES

The asset-backed securities referred to in these materials are being offered when, as and if issued. In particular, you are advised that asset-backed securities, and the asset pools backing them, are subject to modification or revision (including, among other things, the possibility that one or more classes of securities may be split, combined or eliminated), at any time prior to issuance or availability of a final prospectus. As a result, you may commit to purchase securities that have characteristics that may change, and you are advised that all or a portion of the securities may not be issued that have the characteristics described in these materials. Our obligation to sell securities to you is conditioned on the securities and the underlying transaction having the characteristics described in these materials. If we determine that condition is not satisfied in any material respect, we will notify you, and neither the issuer nor the underwriter will have any obligation to you to deliver all or any portion of the securities which you have committed to purchase, and there will be no liability between us as a consequence of the non-delivery.

STATEMENT REGARDING THIS FREE WRITING PROSPECTUS

The depositor has filed a registration statement (including a prospectus) with the SEC for the offering to which this communication relates. Before you invest, you should read the prospectus in that registration statement and other documents the depositor has filed with the SEC for more complete information about the depositor, issuing entity and this offering. You may get these documents for free by visiting EDGAR on the SEC web site at www.sec.gov. Alternatively, the depositor or the underwriter or any dealer participating in the offering will arrange to send you the prospectus if you request it by calling toll-free 1-866-718-1649.

The registration statement referred to above (including the prospectus) is incorporated in this free writing prospectus by reference and may be accessed by clicking on the following hyperlink:
http://www.sec.gov/Archives/edgar/data/1030442/000090514806002120/efc6-1020_forms3a.txt



THIS FREE WRITING PROSPECTUS IS SUBJECT TO COMPLETION AND IS DATED MAY 12, 2006 PROSPECTUS SUPPLEMENT
(To Prospectus dated March 14, 2006)

\$2,093,125,000
Mortgage Pass-Through Certificates, Series 2006-HE4
Morgan Stanley ABS Capital I Inc. Trust 2006-HE4
Issuing Entity
Morgan Stanley ABS Capital I Inc.
Depositor
Morgan Stanley Mortgage Capital Inc.
Sponsor
Wells Fargo Bank, National Association
Servicer

The following classes of certificates are being offered pursuant to this prospectus supplement and the accompanying prospectus:

Class	Original Class Certificate Balance	Pass-Through Rate
Class A-1	\$ 859,060,000	Variable
Class A-2	\$ 261,740,000	Variable
Class A-3	\$ 370,990,000	Variable
Class A-4	\$ 238,440,000	Variable
Class M-1	\$ 74,523,000	Variable
Class M-2	\$ 65,883,000	Variable
Class M-3	\$ 39,962,000	Variable
Class M-4	\$ 34,561,000	Variable
Class M-5	\$ 35,642,000	Variable
Class M-6	\$ 32,401,000	Variable
Class B-1	\$ 30,241,000	Variable
Class B-2	\$ 28,081,000	Variable
Class B-3	\$ 21,601,000	Variable

You should read the section entitled "Risk Factors" starting on page S-13 of this prospectus supplement and page 8 of the accompanying prospectus and consider these factors before making a decision to invest in the certificates.

The certificates represent interests in the issuing entity only and are not interests in or obligations of any other person.

Neither the certificates nor the underlying mortgage loans will be insured or guaranteed by any governmental agency or instrumentality.

Assets of the Issuing Entity --

- o The issuing entity is a trust whose assets consist primarily of fixed and adjustable rate, first-lien and second-lien mortgage loans secured by residential real properties.

The certificates --

- o The certificates represent beneficial interests in the assets of the issuing

entity, as described in this prospectus supplement; and

- o The certificates will accrue interest at a rate equal to one-month LIBOR plus a related fixed margin, subject to certain caps, as described in this prospectus supplement under "Summary--Pass-Through Rates."

Credit enhancement --

- o Subordination as described in this prospectus supplement under "Description of the Certificates--Priority of Distributions Among Certificates,"
- o Overcollateralization as described in this prospectus supplement under "Description of the Certificates--Overcollateralization Provisions," and
- o Excess interest as described in this prospectus supplement under "Description of the Certificates--Overcollateralization Provisions."

Interest Rate Support --

- o An interest rate swap agreement with Morgan Stanley Capital Services Inc., as swap provider, for the benefit of the certificates as described in this prospectus supplement under "Description of the Certificates--Interest Rate Swap Agreement."

THE SECURITIES AND EXCHANGE COMMISSION AND STATE SECURITIES REGULATORS HAVE NOT APPROVED OR DISAPPROVED OF THE OFFERED CERTIFICATES OR DETERMINED IF THIS PROSPECTUS SUPPLEMENT OR THE ACCOMPANYING PROSPECTUS ARE TRUTHFUL OR COMPLETE. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

Morgan Stanley ABS Capital I Inc. will not list the certificates on any securities exchanges or on any automated quotation system of any securities association. Each class of certificates will receive monthly distributions of interest, principal or both, commencing on July 25, 2006.

MORGAN STANLEY

June , 2006

TABLE OF CONTENTS

SUMMARY.....	S-5
RISK FACTORS.....	S-13
THE MORTGAGE LOAN POOL.....	S-25
General.....	S-25
Prepayment Premiums.....	S-26
Adjustable Rate Mortgage Loans.....	S-26
The Index.....	S-27
Underwriting Guidelines.....	S-27
The Mortgage Loans.....	S-41
Credit Scores.....	S-42
THE SPONSOR.....	S-43
STATIC POOL INFORMATION.....	S-44
THE DEPOSITOR.....	S-44
THE ISSUING ENTITY.....	S-45
THE SERVICERS.....	S-45
General.....	S-45
Wells Fargo Bank, National Association.....	S-45
THE TRUSTEE.....	S-47
THE CUSTODIANS.....	S-48
General.....	S-48
Wells Fargo Bank, National Association.....	S-48
LaSalle Bank National Association.....	S-49
INTEREST RATE SWAP COUNTERPARTY.....	S-49
DESCRIPTION OF THE CERTIFICATES.....	S-49
General.....	S-49
Book-Entry Registration.....	S-50
Definitive Certificates.....	S-53
Assignment of the Mortgage Loans.....	S-54
Delivery of Mortgage Loan Documents.....	S-54
Representations and Warranties Relating to the Mortgage Loans.....	S-55
Payments on the Mortgage Loans.....	S-59
Distributions.....	S-60
Administration Fees.....	S-61
Priority of Distributions Among Certificates.....	S-61
Distributions of Interest and Principal.....	S-61
Allocation of Principal Payments to Class A Certificates.....	S-66
Swap Account.....	S-66
Calculation of One-Month LIBOR.....	S-68
Excess Reserve Fund Account.....	S-68
Interest Rate Swap Agreement.....	S-68
Overcollateralization Provisions.....	S-70
Reports to Certificateholders.....	S-71
THE POOLING AND SERVICING AGREEMENT.....	S-73
General.....	S-73
Subservicers.....	S-73
Servicing, Trustee and Custodial Fees and Other Compensation and Payment of Expenses.....	S-73
P&I Advances and Servicing Advances.....	S-74
Prepayment Interest Shortfalls.....	S-75
Servicer Reports.....	S-75
Collection and Other Servicing Procedures.....	S-76
Hazard Insurance.....	S-77
Realization Upon Defaulted Mortgage Loans.....	S-77
Removal and Resignation of a Servicer.....	S-78
Eligibility Requirements for Trustee; Resignation and	

Removal of Trustee.....	S-79
Termination; Optional Clean-up Call.....	S-80
Certain Matters Regarding the Depositor, the Servicers, the Trustee and the Custodians.....	S-81
Amendment.....	S-81
PREPAYMENT AND YIELD CONSIDERATIONS.....	S-82
Structuring Assumptions.....	S-82
Defaults.....	S-88
Prepayment Considerations and Risks.....	S-88
Overcollateralization Provisions.....	S-89
Subordinated Certificates.....	S-90
Effect on Yields Due to Rapid Prepayments.....	S-91
Weighted Average Lives of the Offered Certificates.....	S-91
Decrement Tables.....	S-91
Hypothetical Available Funds and Supplemental Interest Rate Cap Table.....	S-100
Final Scheduled Distribution Date.....	S-107
FEDERAL INCOME TAX CONSIDERATIONS.....	S-107
General.....	S-107
Taxation of Regular Interests.....	S-107
Status of the Offered Certificates.....	S-108
The Basis Risk Contract Component.....	S-108
Other Matters.....	S-110
STATE AND LOCAL TAXES.....	S-110
ERISA CONSIDERATIONS.....	S-110
LEGAL INVESTMENT.....	S-112
LEGAL MATTERS.....	S-112
REPORTS TO CERTIFICATEHOLDERS.....	S-113
RATINGS.....	S-113
GLOSSARY.....	S-114
ANNEX I - CERTAIN U.S. FEDERAL INCOME TAX DOCUMENTATION REQUIREMENTS....	I-1
ANNEX II - INTEREST RATE SWAP SCHEDULE.....	II-1
ANNEX III - MORTGAGE LOAN TABLES.....	III-1

SUMMARY

This summary highlights selected information from this prospectus supplement and does not contain all of the information that you need to consider in making your investment decision. You should read this entire prospectus supplement and the accompanying prospectus carefully to understand all of the terms of the offering of the certificates.

The Transaction Parties

Sponsor. Morgan Stanley Mortgage Capital Inc., a New York corporation with its principal executive offices at 1585 Broadway, New York, New York 10036, telephone number (212) 761-4000.

Depositor. Morgan Stanley ABS Capital I Inc., a Delaware corporation with its principal executive offices at 1585 Broadway, New York, New York 10036, telephone number (212) 761-4000.

Issuing Entity. Morgan Stanley ABS Capital I Inc. Trust 2006-HE4.

Trustee. Deutsche Bank National Trust Company, a national banking association. The corporate trust office of the trustee is located at 1761 East St. Andrew Place, Santa Ana, California 92705, Attention: Trust Administration MS06H4, and its telephone number is (714) 247-6000.

Servicer. Wells Fargo Bank, National Association, a national banking association. The principal executive office of Wells Fargo Bank, National Association is located at 1 Home Campus, Des Moines, Iowa 50328. Substantially all of the mortgage loans will be serviced by Wells Fargo Bank, National Association.

Responsible Parties.

- o WMC Mortgage Corp., a California corporation. The principal executive office of WMC Mortgage Corp. is located at 3100 Thornton Avenue, Burbank, California 91504, and its telephone number is (800) 736-5000.
- o Decision One Mortgage Company, LLC, a North Carolina limited liability company. The principal executive office of Decision One Mortgage Company, LLC is located at 6060 J.A. Jones Boulevard, Suite 1000, Charlotte, North Carolina, and its telephone number is (704) 887-2664.
- o NC Capital Corporation, a California corporation. The principal executive office of NC Capital Corporation is 18400 Von Karman, Suite 1000, Irvine, California 92612 and its telephone number is (949) 440-7030.

Custodians.

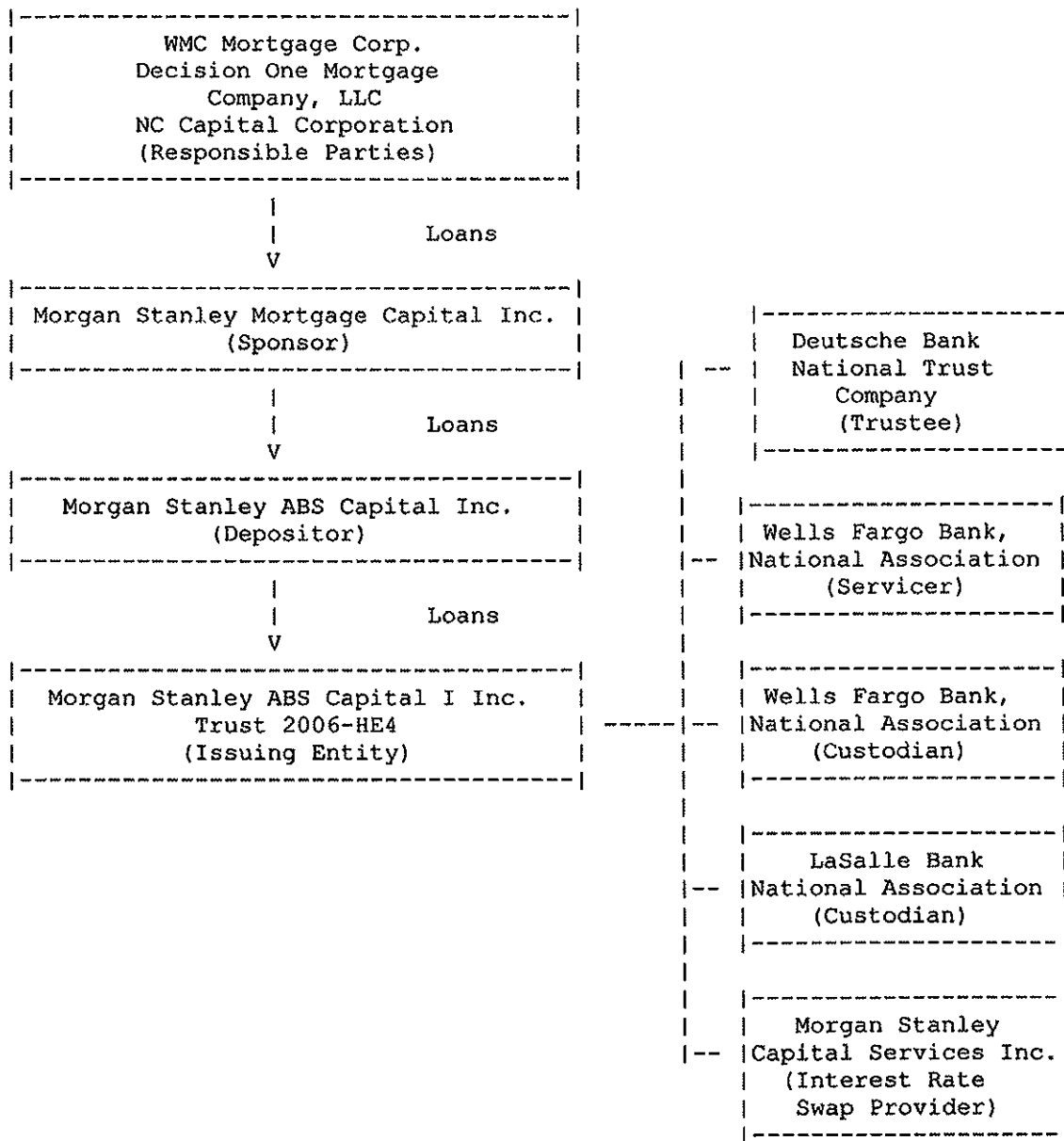
- o Solely with respect to the WMC mortgage loans, Wells Fargo Bank, National Association, a national banking association. The principal office of Wells Fargo Bank, National Association, as custodian, is located at 24 Executive Park, Suite 100, Irvine, California 92614, and its telephone number is (949) 757-5100.

- o Solely with respect to the Decision One mortgage loans, LaSalle Bank National Association, a national banking association. The principal executive office of LaSalle Bank National Association is located at 2571 Busse Road, Suite 200, Elkgrove Village, Illinois 60007, and its telephone number is (847) 766-6429.

- o The trustee will have the custodial responsibilities with respect to the mortgage files for all of the remaining mortgage loans.

Swap Provider. Morgan Stanley Capital Services Inc., a Delaware corporation. Morgan Stanley Capital Services Inc. conducts business in the over-the-counter derivatives market, engaging in a variety of derivatives products, including interest rate swaps, currency swaps, credit default swaps and interest rate options with institutional clients. The principal executive office of the swap provider is located at 1585 Broadway, New York, New York 10036, and its telephone number is (212) 761-4000.

The following diagram illustrates the various parties involved in the transaction and their functions.



ADJUSTABLE RATE NOTE

(LIBOR Six-Month Index (As Published In *The Wall Street Journal*) - Rate Caps)

THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MY MONTHLY PAYMENT. THIS NOTE LIMITS THE AMOUNT MY INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE I MUST PAY.

April 6, 2006
[Date]

Irvine
[City]

California
[State]

[Property Address]

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$220,800.00 (this amount is called "Principal"), plus interest, to the order of Lender. Lender is BNC MORTGAGE, INC., A DELAWARE CORPORATION

I will make all payments under this Note in the form of cash, check or money order.

I understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 7.475%. The interest rate I will pay may change in accordance with Section 4 of this Note.

The interest rate required by this Section 2 and Section 4 of this Note is the rate I will pay both before and after any default described in Section 7(B) of this Note.

Solely for the purpose of computing interest, a monthly payment received by the Note Holder within 30 days prior to or after the date it is due will be deemed to be paid on such due date.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payments on the first day of each month beginning on June 1, 2006

I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied to interest before Principal. If, on May 1, 2036, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at OONC, Attn: Payment Processing, P.O. Box 44042, Jacksonville, FL. 32231-4042 or at a different place if required by the Note Holder.

(B) Amount of My Initial Monthly Payments

Each of my initial monthly payments will be in the amount of U.S. \$1,540.09. This amount may change.

(C) Monthly Payment Changes

Changes in my monthly payment will reflect changes in the unpaid principal of my loan and in the interest rate that I must pay. The Note Holder will determine my new interest rate and the changed amount of my monthly payment in accordance with Section 4 of this Note.

MULTISTATE ADJUSTABLE RATE NOTE - LIBOR SIX-MONTH INDEX (AS PUBLISHED IN *THE WALL STREET JOURNAL*) -
Single Family - Family Use UNIFORM INSTRUMENT
Amended for Wisconsin

BSBN(WU) 0000

Form 8520 1/01

VMP MORTGAGE FORMS - (800) 621-7231

Page 1 of 4

Initials
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*BNC Mortgage, Inc., Assignor, hereby assigns to U.S. Bank National Association, as trustee for Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2006-4, Assignee, all of its right, title, and interest in and to that certain Mortgage Note executed by [REDACTED] as borrowers, to BNC Mortgage, Inc., as lender, dated April 6, 2006, in the original stated sum of \$220,800.00, a copy of said Mortgage Note being attached hereto as an Exhibit.

The Assignment of the above-referenced Mortgage Note is without recourse.

Dated this 2 day of Dec, 2009.

*BNC Mortgage, Inc.

BY: 

Whitney K. Cook

Assistant Secretary

PRINT NAME & TITLE

*Chase Home Finance LLC
As-Attorney-In-Fact-For



NOTE

Loan Number: [REDACTED]

FEBRUARY 22, 2006
[Date]

WAUWATOSA
[City]

WISCONSIN
[State]

[REDACTED]
[Property Address]

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$ 240,000.00 (this amount is called "Principal"), plus interest, to the order of the Lender. The Lender is CSMC, INC., DBA DIRECT MORTGAGE FUNDING. I will make all payments under this Note in the form of cash, check or money order.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 7.750 %.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

Solely for the purpose of computing interest, a monthly payment received by the Note Holder within 30 days prior to or after the date it is due will be deemed to be paid on such due date.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payment on the 1ST day of each month beginning on APRIL 1, 2006. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied to interest before Principal. If, on MARCH 1,

2036, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at P.O. BOX 26556, WAUWATOSA, WISCONSIN 53226-0556

or at a different place if required by the Note Holder.

(B) Amount of Monthly Payments

My monthly payment will be in the amount of U.S. \$ 1,719.39

4. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note.

I may make a full Prepayment or partial Prepayments without paying a Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount, before applying my Prepayment to reduce the Principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due date or in the amount of my monthly payment unless the Note Holder agrees in writing to those changes.

5. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits,

ALLONGE TO NOTE

ALLONGE TO NOTE DATED FEBRUARY 22, 2006

IN FAVOR OF CSMC, INC., DBA DIRECT MORTGAGE FUNDING

AND EXECUTED BY 

PAY TO THE ORDER OF

WITHOUT RECOURSE
CSMC, INC., DBA DIRECT MORTGAGE FUNDING

BY 

RODNEY WEIS

TITLE: ASSISTANT VICE PRESIDENT



PAY TO THE ORDER OF

WITHOUT RECOURSE
AMERICAN MORTGAGE COMPANY

BY:  KIRKLANDS CORP. CEO

BY:  SPONSORING SUBSTITUTION