IN THE NEW MEXICO COURT OF APPEALS

PNC MORTGAGE, A DIVISION OF PNC BANK, NATIONAL ASSOCIATION, SUCCESSOR BY MERGER TO NATIONAL CITY MORTGAGE, A DIVISION OF NATIONAL CITY BANK FKA NATIONAL CITY BANK OF INDIANA,

Plaintiff-Appellee,

vs.

DANA ROMERO and
EUGENE ROMERO,

Defendants-Appellants.

No. 33,394
Santa Fe County
D-101-CV-2010-03002

BRIEF IN CHIEF OF APPELLANTS DANA ROMERO and EUGENE ROMERO

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ORAL ARGUMENT IS REQUESTED

STATEMENT OF COMPLIANCE

As required by Rule 12-213(G) NMRA, we certify that this brief complies with the type-volume limitation of Rule 12-213(F)(3). This brief utilizes Times New Roman typeface in 14 point type, and according to Microsoft Office Word for Mac 2011, the body of the brief contains 4,848 words and thus complies with NMRA 12-213(F)(3).

RECORDATION OF PROCEEDINGS AND CITATION TO THE RECORD

When citing to the record proper, counsel for Appellants uses the numbers assigned by the clerk to the trial court in preparing the record for transmission to the Court of Appeals, *e.g.*, "RP__".

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This appeal is from a grant of summary judgment in favor of Plaintiff-Appellee. In the court below, and here, Plaintiff-Appellee has the burden to show that there are no material issues of fact and that, as a matter of law, it is entitled to summary judgment. *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶ 7 (citing *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 141 N.M. 21, 150 P.3d 971 ("Where reasonable minds will not differ as to an issue of material fact, the court may properly grant summary judgment. All reasonable inferences are construed in favor of the non-moving party." (internal quotation marks and citations omitted)). "A fact is material for the purpose of determining whether a motion for summary judgment is meritorious if it will affect the outcome of the case." *Id.* (citing *Parker v. E.I. Du Pont de Nemours & Co.*, 121 N.M. 120, 124, 909 P.2d 1, 5 (N.M. App., 1995)).

Courts in New Mexico should be "mindful that summary judgment is a 'drastic remedial tool which demands the exercise of caution in its application,' and [they] review the record in the light most favorable to support a trial on the merits." *Woodhull v. Meinel,* 2009-NMCA-015, ¶ 7, 145 N.M. 533, 202 P.3d 126 (citing *Blauwkamp v. Univ. of N.M. Hosp.,* 114 N.M. 228, 231, 836 P.2d 1249, 1252 (N.M. App., 1992)). In the current case, the irregularities and gaps in Plaintiff-Appellee's case are such that, at a minimum, a trial on the merits rather than summary judgment in favor of Plaintiff-Appellee would be most warranted.

I. SUMMARY OF PROCEEDINGS

A. The Nature of the Case

This action is a foreclosure on the primary residence of Appellants, Dana Romero and Eugene Romero. Appellee filed a Complaint for Foreclosure seeking an *in rem* and *in personam* judgment on Appellants' residential property located in Glorieta, New Mexico, and summary judgment was granted in favor of Appellees in the court below.

B. The Course of Proceedings and the Disposition in the Court Below

Appellee filed a foreclosure complaint in the First Judicial District Court of Santa Fe County on August 23, 2010 [RP 001]. In its Complaint, Appellee purported to be authorized to file suit pursuant to Section 38-1-18 NMSA and/or Section 53-17-1 NMSA (1978) as amended (Complaint ¶ 1).

Appellee filed a Motion for Summary Judgment on November 19, 2012 [RP 098]; Appellants filed their Response on March 15, 2013 [RP 124]; Appellee's Reply was filed on April 3, 2013 [RP 139]. The Order from which this appeal is taken was entered on May 7, 2013 [RP 162], granting summary judgment in favor of Appellee, and the court below entered a Summary Judgment Decree of Foreclosure, and Appointment of Special Master on October 17, 2013 [RP 183].

Subsequent to Appellants' filing of a Notice of Appeal to this Court on November 14, 2013 [RP 188], and a Docketing Statement with this Court on

December 13, 2013, this Court issued a Notice of Proposed Summary Disposition on February 20, 2014, following which Appellee filed a Memorandum in Support of Proposed Summary Disposition on April 15, 2014 and Appellants filed a Memorandum in Opposition to Proposed Summary Disposition on April 16, 2014. On August 28, 2014, this Court issued its Second Notice of Assignment to the General Calendar.

Meanwhile, on February 13, 2014, the New Mexico Supreme Court, in *Bank of New York v. Romero*, 2014-NMSC-007, issued a precedential opinion, the holding of which has a direct and controlling bearing on the validity of the summary judgment below, particularly with respect to the jurisdictional matter of standing. The holding in *Bank of N.Y. v. Romero* has been interpreted and applied subsequently by this Court in two other relevant cases: *Deutsche Bank Nat'l Trust Co. v. Beneficial N.M. Inc.*, 2014-NMCA-90, and *Bank of N.Y. Mellon v. Lopes*, 2014-NMCA-___ (No. 32,310, July 22, 2014); and the Supreme Court has further clarified the standing issue in the foreclosure context, in *Bank of America v. Quintana*, No. 33,611, unpubl. dec. (N.M., February 27, 2014) (nonprecedential).

C. Summary of the Facts Relevant to the Issues Presented for Review

The material issue of fact that is in dispute is whether Appellee is the correct party to foreclose on the security lien—and to enforce the debt—in both cases against the Romeros and their property.

Attached to Appellee's Complaint was a copy of a Note, payable to "National City Mortgage a division of National City Bank of Indiana", bearing no indorsements (Complaint ¶ 3 and Exh. A) [RP 1, 6]. Also attached to the Complaint was a copy of a Mortgage (Complaint ¶ 4 and Exh. B) [RP 2, 10], with a security interest in the Romeros' home granted in favor of "National City Mortgage a division of National City Bank of Indiana"; there was no assignment of mortgage ("AoM") presented then or subsequently, to show that the ownership of the mortgage/security lien had changed (an absence that would later prove to be material).

In the absence of indorsement(s) on the Note and an AoM, Appellee would have the court believe that, through a series of corporate mergers and acquisitions (exhaustively documented and described by Appellee in numerous pleadings), Appellee was the successor in interest to the original lender and security holder under both the Note and the Mortgage. While that history might arguably show that Appellee is the successor to the corporate entity that originated the loan in the Romeros' favor, it does not show how or whether that succession included any interest in the subject Note or Mortgage. This selective history is highly deceptive.

The lack of an AoM is relevant—and fatal to Appellee's claim of being the right party in interest here—because Appellants submitted an affidavit from Eugene Romero as part of their Response to the Motion for Summary Judgment

[RP 131], attached to which was a letter from Appellee (the complete version of which was submitted as part of a Notice of Filing Error [RP 196]); the letter was dated September 27, 2012, and asserted that Appellee did not actually own the loan (the Note and Mortgage), but was merely the servicer on behalf of the owner, a securitized trust, a pool of assets called GSAA 2006-14, with Bank of America as trustee. Significantly, in Appellee's Reply to Appellants' Response (almost three years after filing its Complaint), Appellee attached, as Exhibit B, another version of the "original" Note [RP 153], this time containing two indorsements, one special and one in blank. Neither of the indorsements on the second Note was dated.

It is unlikely in the extreme that both versions of the Note are genuine, especially as the second version would appear to correct exactly those defects in Appellee's case that would defeat standing (at least with respect to the debt) if the only the version of the Note that was allowed to be considered was the one submitted at the time of the Complaint. And speaking of timing, Appellee produced the second version of the Note only after Appellants provided a copy of a letter showing that the Note had been transferred to an (unrelated) securitized trust, a turn of events that is convenient if not highly suspicious.

As part of Appellee's prima facie case, it alleged that it was the holder of the Note and Mortgage. Appellants disputed that Appellee was the holder of the Note and Mortgage and/or that the entity for which it was acting (the securitized trust)

was not the owner, because (i) the copy of the Note attached to the Complaint was substantially different from the version that was produced by Appellee subsequently in the proceedings, (ii) no AoM was ever admitted into evidence (or even alluded to) by Appellee, and (iii) the relationship of agent and principal (between Appellee as servicer and the securitized trust as owner) was never proven by Appellee prior to the grant of summary judgment.

More importantly, by Appellee's own evidence, the trust, called GSAA 2006-14, would most likely have accepted assets only during a very narrow window of time (usually 30-90 days) after the effective date of the trust.[1] The year of the effective date is usually in the name of the trust, as here it is 2006, so at the latest, the GSAA 2006-14 trust would have closed in early 2007. We also know that the merger that Appellee refers to did not close until 2008, so there is no way that the Romeros' Note and Mortgage could have been transferred to the trust while Appellee's assertion about its being the successor to the original lender by merger is also true. The strong inference here is that the Note and the Mortgage were transferred to the GSAA 2006-14 trust during the 2006 window, and then either the Note or the Mortgage (or both) was transferred back to Appellee, in its role as servicer for the GSAA 2006-14 trust at some point thereafter. Since Appellee has presented no AoM, the chain(s) of events set forth here is

[1] *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, Professor Kurt Eggert: 35 Creighton L.Rev. 503, 538-539 (2002).

hypothetical, but it is just such a muddled story of chain of title, which chain has not been proven or clarified by Appellee, that the Supreme Court in *Bank of N.Y. v. Romero* and this Court in *Deutsche Bank v. Beneficial* clamped down on—not for the benefit of borrowers, but in the name of judicial efficiency, equity and simple logic.

To be sure, Appellants' have not lodged this appeal simply because Appellee as plaintiff below turned out to be the servicer rather than the owner of the debt and security interest. Such an argument would not likely have merit, assuming that the plaintiff could still show standing as a holder under the Note and with right to enforce the Mortgage (as agent or nominee of the rights holder). It is, however, exactly because Appellee has been unable to make a convincing, logical case as to when and if the rights under the Note were negotiated (in UCC parlance) and the rights under the Mortgage were transferred to the GSAA 2006-14 trust as principal (with servicing rights retained by Appellee), that their claim of standing fails. Appellants did not fabricate this doubt; Appellee caused the confusion on its own.

Therefore, under any of these theories there remain substantial, material questions of fact in dispute such that the irregularities should preclude summary judgment in Appellee's favor.

II. ARGUMENT

A. The Trial Court Erred in Granting Summary Judgment Because Appellee Lacked Standing Under *Bank of N.Y. v. Romero*

In New Mexico, standing is generally viewed as a prudential, rather than jurisdictional, question, except where the cause of action derives from statutory law. *ACLU of NM v. City of Albuquerque*, 2008-NMSC-045, ¶ 17 n.1, 144 N.M. 471, 188 P.3d 1222.

It is now well established in New Mexico foreclosure cases that "standing is a jurisdictional prerequisite" and that "[s]tanding must be established at the time the complaint is filed" (*Bank of N.Y. Mellon v. Lopes*, ¶ 7, 8, citing *Deutsche Bank v. Beneficial,* ¶ 8. *See, also, Bank of N.Y. v. Romero,* ¶ 17 (citing *ACLU of N.M. v. City of Albuquerque*, ¶ 9 n.1). Moreover, courts in New Mexico "have recognized that the lack of [standing] is a potential jurisdictional defect which may not be waived and may be raised at any stage of the proceedings, even sua sponte by the appellate court." *Bank of N.Y. v. Romero,* ¶ 15 (internal quotation marks and citation omitted).

The proof of standing in a foreclosure action is quite rigorous. If a party asserts that its standing derives, by virtue of merger or acquisition, from its being the successor in interest to a contract party or named obligee under a negotiable instrument such as a promissory note, that party must show, through evidence admissible at trial, the chain of events and transactions whereby the asserting party

came to acquire such successor rights. "One who is not a party to a contract cannot maintain a suit upon it. If [the entity] was a successor in interest to a party on the [contract], it was incumbent upon it to prove this to the court." *Id.*, ¶ 17 (internal quotation marks and citation omitted; emphasis added). By extension, if a nominee or agent (such as a servicer) who purports to act on behalf of a trustee of a securitized trust (containing negotiable instruments such as mortgage loans) claims to be the party in interest entitled to bring a cause of action on behalf of such a trust, then the nominee or agent must show, by a chain of title and transactions as well as servicing and/or other agency agreements, consistent with the trust's formative and governing documents, how it came to be a holder of the subject note and/or mortgage at the time of commencing a suit thereupon. *See., e.g., Deutsche Bank v. Beneficial*, ¶ 12 ("if the lender produces the indorsed note after filing the complaint, the indorsement must be dated to show that the indorsement was executed prior to the initiation of the foreclosure suit.").

In short, "[a] plaintiff has no foundation in law or fact to foreclose upon a mortgage in which the plaintiff has no legal or equitable interest." *Bank of N.Y. v. Romero,* ¶ 17 (citing as accord, 55 Am. Jur. 2d *Mortgages* § 584 (2009)). And, in emphasizing the importance of adherence to the fundamental principles of both property and contract law (in the context of mortgage loan foreclosures), our Supreme Court has cited both practical and due process rationales: "[A]ny party

seeking to enforce a negotiable instrument must adequately demonstrate how it obtained the rights to do so in order to avoid multiple claims and unsupported lawsuits." *Bank of America v. Quintana*, ¶ 25.

In *Romero*, the Court set forth very specific parameters when looking at documentary evidence of a party's asserted claim to enforce an interest in a negotiable instrument such as a promissory note (under the statutory regime of the Uniform Commercial Code ("UCC") for negotiable instruments; NMSA 1978, § 55-3-101 *et seq.* (1992)). There, the Court determined that possession of a note in and of itself does not determine or establish that the possessor is a "holder" or otherwise entitled to enforce the instrument. *Bank of N.Y. v. Romero*, ¶ 23.

Under the UCC, a plaintiff obligee "is required to demonstrate...that it had standing to bring a foreclosure action at the time it filed suit." *Id.*, ¶ 17 (citing NMSA 1978, § 55-3-201(a) (1992) (emphasis added)). In addition, Plaintiff "has the burden of establishing timely ownership of the note and the mortgage to support its entitlement to pursue a foreclosure action." *Id.* (emphasis added and citation omitted). This evidentiary burden is a prerequisite of such an action, and cannot be papered over or otherwise documented *ex post*.

Further addressing the issue of proof of standing, this Court has set forth a two-pronged test: "In order to establish standing to foreclose, a lender must show that, at the time it filed its complaint for foreclosure, it had: (1) a right to enforce

the note, which represents the debt, and (2) ownership of the mortgage lien upon the debtor's property." *Deutsche Bank v. Beneficial,* ¶ 8 (emphasis added).

Therefore, if it can be shown that either the Note or the Mortgage, or both, was not validly transferred to the securitized trust on or before the date that its purported servicer commenced foreclosure proceedings against Appellants, and if Appellee cannot otherwise show how it came to be a holder, holder in due course or non-holder with rights of enforcement (as such terms are defined and applied in the UCC to negotiated instruments such as the Note), then Appellee does not have the requisite standing under the newly-articulated *Romero* standard.

In the court below, the proceedings of which preceded this Court's decision in *Beneficial*, the focus was largely on the nature of Appellee's claim to be a holder (as principal or agent) of the Note. This was, in part, because the fact that the loan was supposedly owned by another entity (not related to Appellee) did not come to light until after Appellee filed its Motion for Summary Judgment. As a result, and under the second prong of the *Beneficial* test, Appellee has not shown ownership of the mortgage lien (again, as principal or agent) by means of a valid, timely and relevant assignment of mortgage, and it caused confusion by proffering a second, incompatibly indorsed note, again after its Motion for Summary Judgment.

Put simply, even if this Court were to agree with Appellee on the issue of holding the Note, Appellee has not explained how—or whether—its principal (the

securitized trust called GSAA 2006-14) came to own the security interest, converting Appellee's action into, at best, an unsecured claim for monies owed, rather than a foreclosure against collateral.

In the current case, the proof of standing turns on documentary evidence, both missing and contradictory. "[W]hen the resolution of the issue depends upon the interpretation of documentary evidence, [the appellate] Court is in as good a position as the trial court to interpret the evidence." *Bank of N.Y. v. Romero*, ¶ 18 (internal quotation marks and citation omitted). The documentary evidence includes the letter from Appellee to Appellants regarding the ownership of the loan, the affidavit submitted by Appellee as part of its Motion for Summary Judgment and the two versions of the promissory note.

B. The Affidavit, Even if Admissible or Not Stricken, Fails to Prove the "Facts" that it Purports to Establish and is Therefore Irrelevant

The second issue that is before this Court on appeal is related to the first: that the Affidavit provided by Appellee in connection with its Motion for Summary Judgment in the court below fails to accomplish its apparent purpose; namely, to establish as undisputed the "fact" that Appellee has standing to bring a suit of foreclosure against Appellants.

The Supreme Court has made it clear that, where an affidavit is presented to prove a fact, it must attach the relevant document to which it attest to satisfy the proof or serve the document concurrently. *Bank of America v. Quintana,* ¶ 24

(citing Rule 1-056(E) NMRA ("Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.")). This serves a valuable procedural purpose: to ensure that the affiant has actually seen the document to which s/he attests.

Appellants have shown, both in the court below and here, that the affidavit provided by Appellees fails this simple test; and Appellants assert that, in so failing, the affidavit and its contents are inadmissible and should be stricken (whether or not they prayed the court below for such relief). Whether the affidavit is inadmissible or not, Appellants pray that this Court notice and take into consideration that such affidavit contradicts subsequent documentary evidence submitted by Appellee (namely, that two "original" versions of the Note, with inconsistent indorsement patterns, cannot both be genuine) and that, therefore, at a minimum, the affidavit is irrelevant and ineffective to prove Appellee's standing.

C. Production of the Note is a Rebuttable Presumption of Enforceability

Appellee spends an extraordinary amount of time and space reciting the history of corporate mergers between the original lender and security holder under the Note and Mortgage on the one hand, and Appellant as Plaintiff on the other. It may appear, at first blush, that a demonstration that if an independent Entity X at Time "A", after a series of corporate combinations, is wholly owned (whether by merger or by acquisition of divisions, subsidiaries and/or assets and liabilities) by

another entity Y at Time "B" then that is proof positive that Entity Y is the successor in interest to Entity X in all relevant ways and at all relevant times between A and B. But such a simplistic recitation of corporate lives is reductive and misleading in the extreme. We know, for example, that the merger happened at the parent level to the original lender and the Plaintiff below (i.e., National City Corp. merged into PNC Financial Services Group, Inc., with the latter as the surviving entity). It is also not a logical stretch that, in banking combinations, an acquisition of a target might not include all subsidiaries, all divisions, all assets and all liabilities (in a "cherry-picking" fashion). And finally, we know by Appellee's own admissions that the loan (Note, if not the Mortgage) was purportedly sold to an unrelated securitized trust.

The salient issue, therefore, is whether the litany of corporate combinations really clarifies—let alone proves—anything with respect to Appellee's interest in the subject of the action. This question is not theoretical, nor is it conclusory or speculative. It derives directly from Appellee's own submissions and omissions (such as its failure to provide an assignment of mortgage or evidence of the timing of indorsements to the Note), and includes an affidavit that attests that the copy of the unindorsed Note attached to the Complaint was "true and correct" (Motion for Summary Judgment, Exh. A para 3 [RP 106]), only to be followed shortly thereafter by Appellee's submission to the court below of another version of the

Note, this time with indorsements (Reply, Exh. B [RP 153]). Simply put, the assertion in the affidavit and the contents of the second Note cannot both be correct.

Appellee claims to be the holder of the Note, having submitted proof in the form of an "original" Note, now on file in the district court vault. The "original" Note on file is substantially different from the copy of the Note that Plaintiff attached to its Complaint, in that the later version contained two indorsements, while the prior version had no indorsements of any kind.

Production of an original note entitles the holder to a presumptive right to enforce the instrument, which presumption is rebuttable. New Mexico's Rules of Evidence address presumptions: "In a civil case, unless a state statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally." NMRE 11-301.

The standard for rebuttal is not high. *Ohio Citizens Bank of Toledo v. Venture Metal Prods. Co.,* 622 N.E.2d 758 (Ohio Ct. App. 1993). "Under California law, virtually any admissible evidence that the holder of the note is not the owner is sufficient to rebut the presumption. *(cites omitted)* ('[W]hen the party against whom . . . a presumption [affecting the burden of production] operates

produces some quantum of evidence casting doubt on the truth of the presumed fact, the other party is no longer aided by the presumption.')." *Oakmore Ranch Mngmt. v. Donnell,* 337 B.R. 222 at 228 (9th Cir. 2006).

In this case, Appellee's production of a second note, well into the proceedings, did not show how and when the indorsements thereon were applied. *Deutsche Bank v. Beneficial*, ¶ 12 ("[I]f the lender produces the indorsed note after filing the complaint, the indorsement must be dated to show that the indorsement was executed prior to the initiation of the foreclosure suit.").

Furthermore, this Court in *Beneficial* adopted the reasoning from other jurisdictions that "it is a fundamental precept of the law to expect a foreclosing party to actually be in possession of its claimed interest in the note, and to have the proper supporting documentation in hand when filing suit, showing the history of the note, so that the defendant is duly apprised of the rights of the plaintiff," and that "an original undated note with a blank indorsement only shows the bank had possession of the note but not that it held the note at the time the foreclosure suit was filed." *Id.* (internal quotation marks and citations omitted).

Appellants here produced evidence to rebut the presumption that Appellee validly held the Note and Mortgage, and thus were entitled to enforce them. This proof originated in the Affidavit of Mr. Eugene Romero which attached a copy of a letter from PNC indicating, on the second page thereof ([RP 131] as corrected in a

Notice of Error in Filing [RP 194]), that PNC did not own the Note. Appellee did not present any evidence to the contrary, once the rebuttable presumption was met. At the very least, Appellants have demonstrated the existence of a material issue of fact precluding granting summary judgment, and requiring reversal of same.

The most charitable interpretation of the inconsistent notes and the absence of an assignment of mortgage (to the GSAA 2006-14 trust) is that, somewhere along the line there was sloppiness and negligence in record keeping by Appellee and its predecessors in interest. More likely, however, is that Appellee and/or those acting on its behalf have attempted to perpetrate a deception upon this Court and the court below, with the glossing over of the break in chain of title and the eleventh hour production of the second Note.

It should also be noted that Appellee nowhere produced evidence that the Mortgage was validly transferred, and it could therefore be presumed that such assignment does not exist, rendering the assertion that Appellee "holds" the security interest, with right of enforcement, false. Indeed, "a note and a mortgage serve distinct contractual functions—the note is the debt while the mortgage is a pledged security for the debt." *Bank of N.Y. Mellon v. Lopes*, ¶ 11. "One who holds a note secured by a mortgage has two separate and independent remedies, which he may pursue successively or concurrently; one is on the note against the person and property of the debtor, and the other is by foreclosure to enforce the mortgage lien

upon his real estate." *Bank of New York v. Romero*, ¶ 17 (internal quotation marks and citation omitted). In its Reply [RP 143-44], Appellee asserts that it is "well-settled" that the mortgage follows the note and that, under the UCC Article dealing with security interests, "Section 55-9-203(g) NMSA 1978 explicitly provides that the transfer of a negotiable instrument automatically transfers the corresponding interest in the security instrument." The cited section says no such thing; rather, in its entirety, it says "The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage or other lien." Appellee then goes on to cite *Simson v. Bilderbeck, Inc.*, 76 N.M. 667, 669, 417 P.2d 803, 805 (N.M. 1966) for the proposition that "a mortgage is but an incident to the debt", but conveniently leaves out the next sentence: "The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage or other lien." *Id.* Interestingly, *Bank of N.Y. v. Romero* cites to *Bilderbeck* in reiterating the separate functions of the note and the mortgage, and no such "automatic" enforceability is shown. *Bank of N.Y. v. Romero*, ¶ 35.

In the context of this Court's review of the summary judgment granted below, the provision of the "dueling" Notes does not satisfy the substantial

evidence rule. *Deutsche Bank v. Beneficial*, ¶ 7 ("'Substantial evidence' means relevant evidence that a reasonable mind could accept as adequate to support a conclusion.") (internal quotation marks and citation omitted). Even when weighing the inferences and evidence in favor of the party that prevailed below (*id.*), it is simply not reasonable to assume that both versions of the Note are genuine; and Appellee has offered no explanation for the discrepancy. *Id.* ¶ 13 (where this Court reversed summary judgment in favor of plaintiff bank, in part because "[t]he Bank offer[ed] no explanation as to why it produced an unindorsed copy of the note made payable to [the original lender] instead of the indorsed note if it indeed had possession of the indorsed note when the complaint was filed.").

"The bottom line is the Bank needed to show it possessed the proper supporting documentation when it filed the foreclosure complaint." *Id.*

III. CONCLUSION

The 2014 New Mexico Supreme Court decision in *Bank of N.Y. v. Romero* (together with its progeny, including *Deutsche Bank v. Beneficial*) articulated a new, amplified understanding of the ways in which plaintiffs must prove standing in a foreclosure action, and such guidance is directly relevant to the instant appeal. As a fundamental principle of jurisdiction, any judgment entered in favor of a party that lacks standing will be a void judgment. For the foregoing reasons, Defendants-Appellants urge this Court to reverse the summary judgment of the

district court in favor of Plaintiff-Appellee based on recently decided case law in New Mexico, remand the case to the district court for further proceedings consistent with this Court's rulings, and for such other relief as this Court deems just and equitable. Due to the importance and novelty of the issues before this Court, and the potential impact of the Court's decision on hundreds of pending and prospective foreclosure cases, oral argument will assist the Court's informed disposition of this appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing Brief in Chief was served by electronic mail on this 6th day of October, 2014 on the following persons:

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