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6 IN THE SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

7 In re:

8 OCCO and REBECCA DEJONGH,

9 Petitioners,

10 and

11 LAWYERS TITLE INSURANCE  
12 CORPORATION, a foreign company doing  
13 business in Washington State, and HSBC BANK  
14 USA, NATIONAL ASSOCIATION, a foreign  
15 corporation doing business in Washington State,  
16 and NOMURA HOME EQUITY LOAN, INC.  
17 ASSET-BACKED CERTIFICATES, SERIES  
18 2006-FM 1, a foreign corporation doing business in  
19 Washington State,

20 Respondents.

Case No 09-2-01254-1

DECLARATION OF COLIN DAVIS IN  
RESPONSE TO DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT

21 I, Colin Davis, hereby declare and state:

22 1. My name is Colin E. Davis. I am a resident of Pacheco, California. I am a forensic  
23 investigator in the field of residential foreclosure proceedings with an emphasis on mortgage  
24 loan securitization. I have upwards of 3000 hours of time logged in research with 1500 towards  
25 the area of securitization. I work and converse regularly with mortgage loan auditors, real  
estate attorneys and various experts in the field including those in the area of wholesale  
mortgage lending and securitization. I provide expert reports and opinions to be used in

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1 litigation where securitization of mortgage loans is a relevant issue. I operate the website  
2 <http://www.foreclosurediscovery.net>

3 2. I have been contacted by council for the Plaintiff, Gavin Flynn Esq., and asked to review  
4 the documentation recorded in the Clark county auditor's office and that which was provided  
5 to the Plaintiff through discovery in this case.  
6

7 3. I note that Defendant, Nomura Home Equity Loan Inc. is the Depositor for a Real Estate  
8 Mortgage Investment Conduit ("REMIC") and Defendant HSBC is the trustee for that REMIC  
9 as defined under subsection 860 A through G of the Internal Revenue Code. The REMIC is  
10 also known as a "securitized" mortgage backed securities trust.

11 4. The Nomura Home Equity Loan Trust Series FM-1 REMIC trust is populated with assets  
12 transferred to it by a succession of operations by several parties and administered by HSBC  
13 Bank as its trustee. Like all REMIC trusts, it contracts with several parties including a Servicer  
14 to collect payments from borrowers, a Master Servicer to collect from Servicers, and a  
15 Securities Administrator to make payments to certificate holders of the Mortgage Backed  
16 Securities it issues.  
17

18 5. My analysis deals with the transfer of "Mortgage Loans" from origination on to final  
19 acquisition by the REMIC trust as contemplated in the founding documents and evidenced by  
20 the documentation I was provided with. "Mortgage Loans", as defined in the Nomura trust's  
21 founding documents consist of homeowner's promissory notes and the mortgages or deeds of  
22 trust that secure them and other associated documents.  
23

24 6. In relation to the Nomura Home Equity Loan Trust Series FM-1, the relevant REMIC  
25 entity in this matter, the following parties are involved:

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1 7. Nomura Credit & Capital Inc. as Seller and Sponsor of the Mortgage Loans, Nomura  
2 Home Equity Loan Inc. as Depositor and Defendant in this case, HSBC Bank USA N.A. as  
3 Trustee for the Nomura Home Equity Loan Trust Series FM-1 and Defendant in this case.

4 8. I have examined the following documents which relate to the Nomura Home Equity Loan  
5 Trust Series FM-1: Pooling and Servicing Agreement and exhibits including the Mortgage  
6 Loan Purchase Agreement and other exhibits (“PSA”), Prospectus and Prospectus Supplement  
7 and all documents which have been registered with the Securities and Exchange Commission  
8 EDGAR database in relation to this entity. I have also examined the relevant Deed of Trust,  
9 Assignment of Deed of Trust, a Notice of Default, a Notice of Trustee Sale, and a copy of the  
10 DeJongh promissory note. All of these documents were provided to the Plaintiff through  
11 discovery.  
12

13 9. My familiarity with REMIC trust indentures allows me to locate and isolate sections of  
14 the documentation which I believe are relevant to Plaintiff’s case. The Pooling and Servicing  
15 Agreement including its exhibits is the central founding document and is an indenture of the  
16 trust.  
17

18 10. It is important to locate the specific language which warrants the transfers of right, title  
19 and interest in the Mortgage Loans into the trust. Like all REMIC trusts, I find in the PSA that  
20 the Seller/Sponsor, in this case Nomura Credit & Capital Inc., purchases its Mortgage Loans  
21 from outside parties (often known as originators) and then sells them to the Defendant, Nomura  
22 Home Equity Loan Inc., who acts as a Depositor. In the Nomura trust’s PSA, it describes how  
23 the Depositor creates the REMIC trust and then sells its interest in the Mortgage Loans to the  
24 trust. HSBC acts as its trustee and is to hold legal title to the Mortgage Loans.  
25

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1  
2 Order of operations:

3 Originator -> Seller/Sponsor-> Depositor -> Trust /Trustee.  
4

5  
6 Transfer of interest according to the founding documents:

7 11. Among other sections, sections 2.01 – 2.04 of Article II of the PSA titled “Conveyance of  
8 Trust Fund Representations and Warranties” clearly contemplate the operations concerning  
9 transfer of right, title and interest in the Mortgage Loans from the Seller of the loans to the  
10 Depositor and then to the Trustee of the trust.

11 12. Defendant Nomura Home Equity Loan Inc., as Depositor, clearly warrants in  
12 section 2.04 of the PSA that it has acquired good title in the Mortgage Loans and has acquired  
13 its interest by the Closing Date to be transferred to the trust: *“The Depositor hereby represents  
14 and warrants to the Trustee as of the Closing Date, following the transfer of the Mortgage  
15 Loans to it by the Sponsor, the Depositor had good title to the Mortgage Loans and the related  
16 Mortgage Notes were subject to no offsets, claims, defenses or counterclaims.”*  
17

18 13. The Depositor acquires its interest through a purchase of the Mortgage Loans  
19 from Nomura Credit & Capital Inc. known as the “Sponsor” in the main body of the PSA, and  
20 as the “Seller” in the Mortgage Loan Purchase Agreement, which is Exhibit C to the PSA. In  
21 section 7 (viii) of the Mortgage Loan Purchase Agreement., the Seller, warrants that is has  
22 acted in accordance with applicable laws and that is has all right title and interest in the  
23 Mortgage Loans. *“Immediately prior to the sale of the Mortgage Loans to the Purchaser as  
24  
25*

1 *herein contemplated, the Seller was the owner of the related Mortgage and the indebtedness*  
2 *evidenced by the related Mortgage Note...*"

3 14. Sections 1, 2, and 4 (a) of the Mortgage Loan Purchase Agreement state that all transfers  
4 of the Mortgage Loans will be from Seller to Purchaser and be completed on or before the  
5 Closing Date of January 30, 2006. Sections 3 (c), and 4 (b) together state that in accordance  
6 with the Pooling and Servicing Agreement, the loans and all right, title and interest will be  
7 subsequently transferred from the Purchaser, who is the Depositor and Defendant Nomura  
8 Home Equity Loan Inc., to HSBC as Trustee for the trust, and by the Closing Date.

9  
10 15. It is clear that the founding documents contemplate a complete transfer of interest in  
11 Mortgage Loans to be contributed to the trust by the Closing Date of January 30, 2006.

12 **PLAINTIFF'S ASSIGNMENT OF DEED OF TRUST**

13  
14 16. I have reviewed the Assignment of Deed of Trust which was recorded in the Clark  
15 County auditor's office as Document No. 4437139, dated 3-25-2008. This assignment was  
16 executed by Victor Parisi as Vice President of Mortgage Electronic Registration Systems on 3-  
17 12-2008.

18 17. This assignment states that it "grants assigns and transfers to HSBC Bank USA National  
19 Association as Trustee for Nomura Home Equity Loan Inc. Asset Backed Certificates Series  
20 2006 FM-1 all beneficial interest under that certain deed of trust...together with the promissory  
21 note..."

22  
23 **18.** This is nearly the exact language used in the Nomura REMIC trust's founding  
24 documents, described above, which is reserved to Defendant as Depositor, *and only to the*  
25 *Depositor. Only the Depositor may transfer the mortgage and note to the trust according to*

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1 *the founding documents and only on or around the Closing Date which is January 30, 2006,*  
2 *over two years prior to the date of this assignment.*

3 19. Language in the indentures pertaining to assignments and transfers consistently relates to  
4 the trust's Closing Date. In fact, I have found no language in these particular documents, or in  
5 any other REMIC documents that I have studied, where an assignment such as the instant  
6 assignment of deed of trust and note to the Trustee, is permissible at a date significantly after  
7 the Closing Date. Considering that the IRS REMIC provisions at U.S. Title 26 860 G (3)  
8 dictate that permitted contributions called "Qualified Mortgages" will be within 90 days of a  
9 REMIC's startup date, I understand this to be the primary reason that assignments to the trust  
10 will not be at so late a date. Additionally, the trust indentures warrant that only performing  
11 loans will be contributed to the trust. It makes no common sense that HSBC would buy a non-  
12 performing note at the time the assignment was executed.

13  
14  
15 **20.** It is concerning that the assignment of deed of trust related to the DeJongh case states that  
16 it not only transfers interest in the deed of trust, but that for consideration, it acts to transfer the  
17 note as well. *Again, there is no language in any of the Nomura Home Equity Loan Trust*  
18 *FM-1 founding documents where any party other than the Depositor, Nomura Home Equity*  
19 *Loan Inc, is given permission to transfer mortgage notes to HSBC as Trustee at any time or*  
20 *under any exceptions.*

21  
22 21. It is worth pointing out again that the DeJongh loan was to be transferred from its  
23 originator, a now bankrupt entity called Fremont Investment and Loan, to the Seller/Sponsor  
24 Nomura Credit & Capital Inc, then to the Depositor Nomura Home Equity Loan Inc. and  
25 finally to HSBC Bank USA N.A. as trustee for the REMIC trust. This means that in order for

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1 HSBC to have gained legal title and interest in the DeJongh mortgage, three legal and complete  
2 transfers of the promissory note and deed of trust must have been made, all according to  
3 Washington state law, according to the trust indentures, and subject to New York law as well,  
4 where this trust was founded. The documentation provided to me for review does not evidence  
5 this complete transfer of interest.  
6

7 22. Another problem demonstrated on the face of the documents is a clear conflict of interest  
8 in one person having three related roles. That person is Victor Parisi.

9 23. Victor Parisi, acting as Vice President of MERS, signed the assignment of deed of trust  
10 which purportedly assigned all of Fremont's interest to HSBC Bank. *See Assignment of Deed*  
11 *of Trust*. The document he executed states that it was to be returned to Popular Mortgage  
12 Servicing, Inc.

13  
14 24. The following day, Victor Parisi, acting as Vice President of HSBC Bank, signed the  
15 Appointment of Successor Trustee, which named Lawyers Title Insurance Corporation as  
16 Successor Trustee. That document also indicated that it was to be forwarded to Popular  
17 Mortgage Servicing, Inc.

18 25. Victor Parisi is also the Vice President of Popular Mortgage Servicing and according to  
19 Judge Schack of King's County New York, other companies as well. Popular Mortgage  
20 Servicing is known in the mortgage industry as having employed "Robo-Signers", parties who  
21 mass-produce documents for which they have no knowledge of the transaction they attest to.

22  
23 In HSBC v. Marci Perboo, et all, 2008 Judge Schack wrote the following about Victor Parisi:

24 **Further, plaintiff must address a second matter if it renews its application for an**  
25 **order of reference upon compliance with CPLR § 3215 (f). In the instant action, as**  
**noted above, Victor F. Parisi, in his affidavit, dated December 14, 2007, states he is**  
**Vice President of EQUITY ONE. Yet, the September 28, 2007 assignment from**

1           **MERS as nominee for PEOPLE’S CHOICE to HSBC is signed by the same Victor**  
2           **F. Parisi, as Vice President of MERS. In my November 20, 2007 decision and order**  
3           **in HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR**  
4           **NOMURA HOME EQUITY LOAN, INC. ASSET-BACKED CERTIFICATES**  
5           **SERIES 2006-FM2 v SANDOVAL, Index Number 8758/07, the same Victor F.**  
6           **Parisi assigned the underlying mortgage and note as Vice President of MERS to**  
7           **HSBC on March 13, 2007, and then signed the affidavit of merit as Vice President of**  
8           **EQUITY ONE, authorized servicer for HSBC, the next day, March 14, 2007. Did**  
9           **Mr. Parisi change his employment from March 13, 2007 to March 14, 2007, and**  
10           **again from September 28, 2007 to December 14, 2007? The Court is concerned that**  
11           **Mr. Parisi might be engaged in a subterfuge, wearing various corporate hats. Before**  
12           **granting an application for an order of reference, the Court requires an affidavit**  
13           **from Mr. Parisi describing his employment history for the past three years.**

14           26. Combined with the date of execution and recordation being over 2 years since the  
15           Nomura FM-1 trust was closed, and prohibited from taking contributions, the total amount of  
16           discrepancies in the assignment of deed of trust is alarming.

#### 17           **Mortgage Electronic Registrations Systems (“MERS”)**

18           27. Mortgage Electronic Registrations Systems or “MERS” was listed in the DeJongh deed  
19           of trust as the “Nominee of Lender and Lender’s successors and assigns”. It is also called  
20           “beneficiary of record” in the deed of trust. On their website at <http://mersinc.org>, MERS  
21           describes that “MERS acts as nominee in the county land records for the lender and servicer.  
22           Any loan registered on the MERS® System is inoculated against future assignments because  
23           MERS remains the nominal mortgagee no matter how many times servicing is traded.”

24           28. A large number of courts around the country have concluded that the MERS system is  
25           defective and does not act to transfer title to the mortgages by the method it employs. A close  
26           examination of MERS is needed, but other flaws reject the effectiveness of the use of the

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1 MERS system used for the DeJongh mortgage. In a recent New York Bankruptcy case, Judge  
2 Grossman reviewed the MERS membership documents and observed that nowhere in any of  
3 the MERS membership documents is MERS authorized to assign the interests of Promissory  
4 Notes or Mortgages. In re Agard, Case No. 810-77338-reg, US Bc'y Ct, E.D.N.Y. (2011).

5  
6 29. The Nomura FM-1 REMIC trust's founding documents contemplate that MERS related  
7 loans would be exempt from some recordation requirements of non-MERS or traditional  
8 mortgage liens. This is because MERS was designed to enable parties to the transfer of  
9 mortgages to forego written execution and recording of assignments in the county recorder's  
10 offices, substituting a very old practice for private electronic recordation, or not to execute  
11 assignments at all. Regardless of the legality of this method, the security of a MERS related  
12 mortgage lien is only held by MERS member entities that are registered with the MERS system  
13 and have submitted the requisite legal documents.

14  
15 30. I have searched the MERS on-line directory for MERS members and found that the  
16 Seller, Nomura Credit & Capital Inc. is a MERS member but *the Depositor and Defendant,*  
17 *Nomura Home Equity Loan Inc. is not a registered MERS member.* Therefore, the transfer  
18 of the promissory note to the Depositor as required in the founding documents for a successful  
19 contribution to the REMIC trust could not depend on the MERS system to transfer the deed of  
20 trust to HSBC as trustee, only a physically executed assignment could do that. And since the  
21 Nomura FM-1 trust's indentures warrant that the Depositor has full right title and interest in the  
22 notes *and* mortgages as of the closing date, the DeJongh property, which was not assigned until  
23 2008, could not be part of the Nomura FM-1's assets.  
24  
25

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1 31. Additionally, there is no warranty in the founding documents concerning the use of  
2 MERS as a legally permissible system which comports with state laws. Out of nearly 1000  
3 pages of founding documents for the Nomura FM-1 loan trust, and the mortgage contracts  
4 themselves, there is no description whatsoever of how promissory notes will be secured by  
5 mortgages using the MERS system.  
6

7 **GOVERNING LAW**

8 32. Section 11:03 of the Pooling and Servicing Agreement states that:

9 **“THIS AGREEMENT SHALL BE CONSTRUED IN ACCORDANCE WITH AND  
10 GOVERNED BY THE SUBSTANTIVE LAWS OF THE STATE OF NEW YORK  
11 APPLICABLE TO AGREEMENTS MADE AND TO BE PERFORMED IN THE  
12 STATE OF NEW YORK AND THE OBLIGATIONS, RIGHTS AND REMEDIES OF  
13 THE PARTIES HERETO AND THE CERTIFICATEHOLDERS SHALL BE  
14 DETERMINED IN ACCORDANCE WITH SUCH LAWS WITHOUT REGARD TO  
15 THE CONFLICTS OF LAWS PRINCIPLES THEREOF OTHER THAN THE  
16 PROVISIONS OF SECTIONS 5-1401 AND 5-1402 OF THE NEW YORK GENERAL  
17 OBLIGATIONS LAW.”**

18 *PSA §11:03.*

19 33. If the parties who created the Nomura REMIC trust breached their indentures to acquire  
20 any Mortgage Loans, those contributions would be void under New York law. New York  
21 Trust law dictates that a trustee’s actions outside the terms of the indentures are void. See *Dye*  
22 *v. Lewis*, 326 N.Y.S.2d 581, 68 Misc.2d 434 (N.Y.Sup., 1971), (The authority of a trustee to  
23 whom a mortgage had been delivered under a trust indenture was subject to any limitations  
24 imposed by the trust instrument, and every act in contravention of the trust was void.);  
25 Warren's Weed New York Real Property 14-140 § 140.58 (“It is a fundamental principle of  
trust law that the instrument under which the trustee acts is the charter of his rights. Therefore,  
in administering the trust, he must act in accordance with its terms. This rule applies to every

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1 kind of trustee, regardless of whether the trustee is to hold, invest or pay over income, or to sell  
2 or liquidate for the benefit of creditors.”).

3 34. The transfer of negotiable mortgage notes to or from a REMIC trust is governed under  
4 the Uniform Commercial Code (“U.C.C.”) Article 3 as adopted by the several states, a REMIC  
5 trust’s indentures, and the laws of the state that the trust was founded in. Mortgages and Deed  
6 of Trust to or from a REMIC trust are governed under the law of the state the property is  
7 located in, the mortgage contracts themselves, and the indentures of a securitized REMIC trust.  
8 The law of mortgages of the state the trust was founded in may also apply.

9  
10 35. It is my opinion that the documents provided to me for review do not evidence a proper  
11 and therefore legal transfer of the Defendant’s note or mortgage to the Nomura 2006 FM-1  
12 trust. This particular assignment of deed of trust appears to be evidence of one of two  
13 possibilities. Either its an attempt to convey an unqualified contribution to the Nomura FM-1  
14 trust, breaking the terms of the trust’s indentures, New York trust law, and IRS code governing  
15 REMIC’s, which would render the assignment void, or it’s its an attempt to make onlookers  
16 believe that a typical and traditional foreclosure is taking place, when in fact it is not.

17  
18 36. I declare under penalty of perjury under the laws of the State of Washington the  
19 foregoing is true and correct to the best of my ability.  
20

21 Signed in Pacheco, California on \_\_\_\_\_

22  
23  
24 \_\_\_\_\_  
Colin Davis

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DECLARATION OF SERVICE

I, Gavin Flynn, hereby certify that I have served a true and correct copy of the foregoing

*Declaration of Colin Davis* upon the individual(s) listed herein by the following means:

Lance Olsen	<input checked="" type="checkbox"/> U.S. Mail (First Class)
Routh Crabtree Olsen, P.S.	<input checked="" type="checkbox"/> Facsimile
3535 Factoria Blvd. SE, Suite 200	<input checked="" type="checkbox"/> Email
Bellevue WA 98006	<input type="checkbox"/> Hand Deliver

Mark J. Phelps of	<input checked="" type="checkbox"/> U.S. Mail (First Class)
FIDELITY NATIONAL TITLE GROUP, INC.	<input checked="" type="checkbox"/> Facsimile
1200 – 6 <sup>TH</sup> AVENUE, SUITE 1900	<input type="checkbox"/> Email
SEATTLE, WA 98101	<input type="checkbox"/> Hand Deliver

I declare under the penalties of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Vancouver, Washington, this \_\_\_\_ day of \_\_\_\_\_, 2011.

\_\_\_\_\_  
Gavin Flynn  
Attorney at Law