**UNITED STATES DISTRICT COURT FOR THE**

**NORTHERN DISTRICT OF GEORIGA**

**ATLANTA DIVISION**

**Wekesa O. Madzimoyo,
Plaintiff,**

**v.**

 **THE BANK OF NEW YORK**

**MELLON TRUST COMPANY, NA., formerly known as The Bank of New
York Trust Company, N.A., JP MORGAN
CHASE BANK, NA, GMAC MORTGAGE, LLC , MCCURDY AND CANDLER, LLC
and ANTHONY DEMARLO, Attorney**

**CIVIL ACTION FILE**

**No. 1:09-CV-02355-CAP-GGB**

**}**

**}**

**}**

**}**

**}**

**}**

**}**

**}**

**}**

**Defendants**

**PLAINTIFF’S MOTION FOR SUMMARY JUDGEMENT**

AGAINST **THE BANK OF NEW YORK**

**MELLON TRUST COMPANY, NA., formerly known as The Bank of New
York Trust Company, N.A., JP MORGAN
CHASE BANK, NA, GMAC MORTGAGE, LLC , MCCURDY AND CANDLER, LLC
and ANTHONY DEMARLO, Attorney**

Comes now PLAINTIFF Wekesa O. Madzimoyo, appearing pro se, and makes the following motion for summary judgment based upon undisputable facts and controlling law.

PLAINTIFF Madzimoyo contends that there is no genuine dispute concerning the following statement of material facts:

1. Plaintiff signed a security deed with FT MORTGAGE COMPANIES DBA EQUIBANC MORTGAGE CORPORATION on March 23, 1999 which was recorded in the office of the clerk of the superior court of DEKALB COUNTY.
2. To date there has not been one officially recorded assignment, transfer or sale associated with the property located at 852 Brafferton Place, Stone Mountain, GA 30083. (Claim 2 of ORIGINAL COMPLAINT.)
3. OCGA – 44 – 14 – 162.2 requires that the current holder of the mortgage loan record the assignment of the security deed, which shows the present owner of the mortgage loan, in the public record in the office of the clerk of the superior court of the county in which the real property is located before conducting the foreclosure sale. (Claim 2 of ORIGINAL COMPLAINT.)
4. Although, Georgia is a non judicial foreclosure state, OCGA – 44 – 14 – 162.2 strictly governs the process and requires that ALL action proceed from the “secured creditor” and holder in due course.
5. To date, not one of the Defendants has provided official verification of their standing as agent, debt collector, lender, note holder, services, investor, trustee, attorney-in-fact or otherwise in this matter. (See Certificate of Service Receipts of letters to DEFENDANTS requesting verification of debt in ORIGINAL COMPLAINT.)
6. PLAINTIFF MADZIMOYO is not, nor has he ever been in default on his mortgage loan for SUBJECT PROPERTY. (See AFFADAVIT attached.)
7. On July 29, 2009, upon being presented evidence of Plaintiff’s considerable documented effort to get verification from the DEFENDANTS given their breech of GA recording and foreclosure laws OCGA – 44 – 14 – 162.2 (SEE attachment ORIGINAL COMPLAINT), DEKALB COUNTY SUPERIOR COURT JUDGE TANGELA M. BARRIE ordered the DEFENDANTS to “bring the proper evidence of the chain of title” on the SUBJECT PROPERTY located at 852 Brafferton Place, Stone Mountain, GA 30083. (See SUMMONS FROM ORIGINAL COMPLAINT.)
8. The DEFENDANTS have failed to provide such evidence either in that COURT or this one.

**STATEMENT OF UNCONTROVERTED MATERIAL FACTS**

1. GA LAW --- requires that any foreclosing party establish itself as holder-in-due course. To date, neither of the DEFENDANTS have done this. This verification of proof of ownership was not provided to PLAINTIFF MADZIMOYO since his first asking beginning on \_\_\_\_\_\_\_\_\_\_ through today, December 29, 2010. (See response letters from DEFENDANTS in ORIGINAL COMPLAINT.)
2. **Pursuant to Rule 9027** “When a claim or cause of action is removed to a district court… the claim or cause of action prior to its removal shall remain valid and effectual notwithstanding such removal. All injunctions issued, orders entered and other proceedings had prior to removal shall remain in full force and effect until dissolved or modified by the court.”

DEFENDANTS have not even attempted to adhere to JUDGE BARRY’s ORDER of July 29, 2009, and have provided no evidence of their standing in this matter whatsoever.

DEFENDANTS have not provided any evidence that they did not violate GA law.

(FDCPA), 15 U.S.C. §§ 1692-1692p.

1. The DEFENDANTS inability to produce evidence to successfully challenge these facts are evidenced by their:
	1. Attempts to redirect the COURTS attention away from their breech of the aforementioned GA laws governing property recordation, assignment and foreclosure
	2. Attempts to direct the COURT away from their wanton disregard for Federal Laws (FDCPA), 15 U.S.C. §§ 1692-1692p protecting Plaintiff’s right to debt verification- including knowing the actual secured creditor and holder in due course for his property
	3. Ignoring Judge TANGELA BARRIE’S standing order that followed the case with Removal
	4. Alleging that the Plaintiff defaulted on his mortgage payments and sought unjust court relief, in spite of the signed modification agreement that required the Plaintiff to be current on his mortgage at the time the Plaintiff started the action seeing debt verification under (FDCPA), 15 U.S.C. §§ 1692-1692p was commenced. (See Affidavit and ORIGINAL COMPLAINT)
	5. Attempts to redirect the COURT and restate the Plaintiff’s case as an Internet inspired “Produce the note scam.” In this regard the DEFENDANTS have even said “that Plaintiff cannot produce a Georgia law requiring “either a lender or its attorney conducting the foreclosure sale” to “Produce The Note.” (See DEFENDANTS MOTIONS FOR JUDGEMENT ON THE PLEADINGS)
2. The aforementioned attempts at redirection while ignoring their obligation to produce evidence that they did not break GA Law OCGA§ 44 – 14 – 162.2 (a-c) as alleged by the Plaintiff and ordered by DEKALB Superior Court Judge, Tangela Barrie proves that they cannot provide such evidence - now or in the future.
3. **STANDARD OF REVIEW**

Summary judgment is proper if “the pleadings, the discovery and disclosure

materials on file, and any affidavits show that there is no genuine issue as to any

material fact and that the movant is entitled to judgment as a matter of law.” Fed.

R. Civ. P. 56(c). When the movant would bear the burden of proof at trial, the

movant “must show affirmatively the absence of a genuine issue of material fact.”

Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993) (quoting U.S. v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991)). The movant “must show that, on all essential elements of its case on which it bears the burden of proof Case 1:07-cv-02736-CC, Document 67, Filed 09/16/2009, Page 2 of 10 at trial, no reasonable jury could find for the non-moving party.” Id. If the moving party fails to make this showing, then the motion must be denied and the court need not consider the non-movant’s response to the summary judgment motion. Fitzpatrick, 2 F.3d at 1116. If, however, the movant satisfies this initial burden, the non-movant must “come forward with evidence sufficient to call into question the inference created by the movant’s evidence on the particular material fact.” Id.

However, Rule 56, “[b]y its very terms, . . . provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment, the requirement is that there be no genuine issue of material fact.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original). The non-movant may not “rely merely on the mere allegations or denials of the [non-movant’s] pleading; rather, its response must – by affidavits or as otherwise provided in this rule – set forth specific facts showing a genuine issue for trial.” Fed. R. Civ. P. 56(e). An issue is not genuine if it is created by evidence that is “merely colorable” or is “not significantly probative.” Substantive law will identify which facts are material. Id. at 248. Anderson, 477 U.S. at 249-50.

**CONCLUSION**

For all of the foregoing reasons, PLAINTIFF respectfully submits that he is entitled to summary judgment and the following:

1. Injunctive and declaratory relief permanently enjoining DEFENDANTS from foreclosing or any collection of alleged debt on SUBJECT PROPERTY.
2. Restorative relief ordering the Defendants to return to Plaintiff all monies collected by them under false pretence and paid to them while Plaintiff he was under the induced assumption that they were indeed the secured creditor and holder in due course.
3. Granting of other relief as deemed appropriate by the COURT that takes in consideration damages done to the Plaintiff during the process of pursuing his lawful right to know the real creditor and holder in due course on SUBJECT PROPERTY (as provided for both by GA Law and Fair Debt Credit Protection Act)
4. If the Court deems it inappropriate to grant the aforementioned, Plaintiff believes it within his right and respectfully asks the court to accept our AMENDED COMPLAINT and reset the discovery calendar (four months) to begin in January, 2010 or when the Amended Complaint is accepted.

Submitted this \_\_\_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_, 2010

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Wekesa O. Madzimoyo

 Pro See Litigant

852 Brafferton Place

Stone Mountain, GA 30083

404-324-1310

**FONT VERIFICATION**

Pro se Litigant, Wekesa Madzimoyo, certifies that this document has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1C, namely Times New Roman (14 point).

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Wekesa O. Madzimoyo

 Pro se Litigant

**CERTIFICATE OF SERVICE**

 I hereby certify that I have served the foregoing on the following by electronic mail or by placing a copy of the same in the United States mail, postage prepaid and properly addressed, this the 26th day of October, 2010 to:

Frank R. Olson, Esq.

McCurdy & Candler, LLC

P.O. Box 57

Decatur, GA 30031

404-373-1612

Kelly L. Atkinson

Counsel for Defendants

GMAC Mortgage LLC

JP Morgan Chase Bank

The Bank of New York Mellon Trust Company

Troutman Sanders LLP

5200 Bank of America Plaza

600 Peachtree Street, N.E,

Atlanta, GA 30308-2216

404-885-3000