

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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In re: :
 : Chapter 13
ANDREW D. KURLAND & BETH S. KURLAND, :
 : Case No. 09-24425 (RDD)
Debtors. :
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ANDREW D. KURLAND & BETH S. KURLAND, :
 :
Plaintiffs, :
:
-against- : Adv. Proc. No. 10-08200 (RDD)
:
US BANK, N.A. AS TRUSTEE FOR BEAR :
STEARNS BART 2006-1, WELLS FARGO :
BANK, N.A., MORTGAGE ELECTRONIC :
REGISTRATION SYSTEMS, INC., AND :
JP MORGAN CHASE BANK, N.A., :
:
Defendants. :
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ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Upon the motion, dated July 13, 2010, filed by Plaintiffs Andrew Kurland and Beth Kurland ("Plaintiffs") seeking summary judgment under Fed.R.Bankr.P. 7056 declaring that Defendants U.S. Bank N.A., as Trustee for Bear Stearns BART 2006-1, Wells Fargo Bank, N.A. and Mortgage Electronic Registration Systems, Inc. (collectively, the "Defendants") do not have a secured interest in Plaintiffs' property and that the Defendants' proof of claim in this case should be disallowed (the "Motion"); and upon the two supplemental memoranda filed by both parties; and upon the record of the hearings on the Motion held before this Court on August 5, 2010 and July 15, 2011; and after due deliberation and consideration, and for the reasons stated by the Court in its bench ruling at the conclusion of the July 15, 2011 hearing, it is hereby

ORDERED that Plaintiffs' Motion is denied.

Dated: White Plains, New York
August 1, 2011

/s/Robert D. Drain
Robert D. Drain
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

ANDREW D. KURLAND
AND BETH S. KURLAND,

Case No. 09-24425-rdd
New York, New York
July 15, 2011
2:18 p.m. to 4:01 p.m.

Debtors.

TRANSCRIPT OF CHAPTER 13 HEARING RE ADVERSARY MATTER
10-08200-RDD, KURLAND ET AL V. MERS ET AL
DOC #24; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
FILED BY NICOLE E. SCHIAVO ON BEHALF OF MERS,
US BANK, NA, WELLS FARGO BANK, N.A.
BEFORE THE HONORABLE STUART M. BERNSTEIN
UNITED STATES BANKRUPTCY JUDGE

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*Proceedings recorded by electronic sound recording.
Transcript produced by transcription service.*

1 THE COURT: Please be seated. Okay. Good afternoon.

2 MR. FEINBERG: Good afternoon.

3 THE COURT: This is Kurland v. US Bank, NA, et al.

4 And it's the hearing on the Plaintiff's motion for summary
5 judgment. I've reviewed, the motion and all of the pleadings,
6 and I have a few questions for the parties. But why don't I
7 hear briefly from you both, then I can ask my questions as part
8 of that process.

9 MR. FEINBERG: Yes, Your Honor. Eric Feinberg for the
10 Plaintiffs and Debtors. Our position is that the note and
11 mortgage to the extent that they were ever transferred at any
12 time were in violation of 362(a)(4) and (5) of the Bankruptcy
13 Code, which prohibits specifically the creation or perfection of
14 a secured interest after the filing of a bankruptcy petition.

15 In this case the note was originally endorsed and made
16 payable to Wells Fargo. There was an assignment of mortgage at
17 the same time or at some unknown time, but clearly before the
18 petition was filed, which was in the name of and made in the
19 name of US Bank. The note clearly was in the name and
20 enforceable by Wells Fargo with the mortgage ostensibly in the
21 name of US Bank. US Bank clearly at the time or at least prior
22 to the commencement of the petition was a holder of a naked
23 lien; a meaningless naked lien, an ineffective assignment of
24 mortgage. The mortgage would have been deemed void under New
25 York law since there was no contemporaneous transfer of the

1 mortgage note with it.

2 THE COURT: Would it have been deemed void or not
3 enforceable?

4 MR. FEINBERG: I mean under New York, it's considered
5 a nullity. Meaning the assignment itself is a nullity.

6 THE COURT: But what does that mean? The cases that
7 I've read that have used that language, and many of them use
8 that language, have used it in the context of the enforcement of
9 the mortgage either in a foreclosure proceeding in the state
10 court or in a diversity action in federal court or as to
11 standing to assert a right to relief from the automatic stay or
12 a claim. As far as I can see, none of them have dealt with the
13 issue of voiding the mortgage, and at least one of them, the
14 Five Star case, contemplates the reuniting of the note and the
15 mortgage so that they can be enforced. But it seems to me that
16 the nullity language, although very broadly stated, doesn't
17 support necessarily the view that the mortgage is void.

18 MR. FEINBERG: I mean indicative to the Five-Star
19 case, the federal case from the Eastern District --

20 THE COURT: Right.

21 MR. FEINBERG: -- talked about the possibility of
22 either the note being purchased by -- or the mortgage being
23 purchased by the subsequent note holder or vice versa, but it
24 never really dealt with the issue of, specifically head on.

25 THE COURT: Right. Do you have a case where a third

1 party, either a subsequent purchaser or a junior lien holder,
2 took in place of or over a senior mortgage on this?

3 MR. FEINBERG: Where there was an alleged splitting --

4 THE COURT: Right.

5 MR. FEINBERG: -- or separating of the mortgage or
6 note?

7 THE COURT: Right.

8 MR. FEINBERG: There is no case like that.

9 THE COURT: Okay.

10 MR. FEINBERG: I mean the question is what was the
11 effect of the assignment. Well, it never occurred. The
12 question of what happened to the mortgage or what happened to
13 the secured claim at that point, I suppose that's what the Court
14 is really asking. I don't know at that point how they can be
15 reconnected or at least in this context there is no evidence of
16 them being reconnected.

17 THE COURT: Well, but if --

18 MR. FEINBERG: And if they were ostensibly --

19 THE COURT: I'm sorry; can I interrupt you before I
20 lose that thought?

21 MR. FEINBERG: Okay.

22 THE COURT: What about the second endorsement that the
23 Defendants assert is an endorsement in blank by Wells Fargo?

24 MR. FEINBERG: Right. I mean, my position, first of
25 all, is the fact that Wells Fargo subsequently endorsed it in

1 blank might mean that or US Bank could make a claim to the
2 extent that Wells Fargo proves that it is holding it for US
3 Bank, but that was done post -- that was clearly done post
4 petition.

5 THE COURT: Right.

6 MR. FEINBERG: At that point, I mean, structurally, at
7 least at the commencement of this proceeding, there was a claim
8 where a note was owned by someone and the mortgage was
9 supposedly held by some other entity. And at the commencement
10 of the actual proceeding, there was no secured claim against
11 this property.

12 THE COURT: Right. Well, I understand that argument.
13 I was just trying to figure out, for purposes of this motion,
14 arguments in addition to the argument that either 362 or 544
15 would preclude the reuniting of the mortgage and note. For
16 example, it's not clear to me whether you're arguing in this
17 motion that -- or in response to the Defendant's objection to
18 the motion, that they haven't shown that the mortgage and note
19 have been reunited with sufficient evidence. I don't know if
20 you're objecting on that basis too. In other words, are you
21 objecting to the contention that US Bank now holds the note
22 endorsed in blank?

23 MR. FEINBERG: As a preliminary matter, I surely do
24 object to their claim. But even assuming they can make the
25 claim there was a debt and a claim that was not secured at the

1 time of the commencement --

2 THE COURT: No, I understand that point. I'm just
3 trying to figure out what are the issues here. I know that's an
4 issue. Is it --

5 MR. FEINBERG: I think it's a question of whether --

6 THE COURT: Do you also --

7 MR. FEINBERG: -- who really has the right to enforce
8 the note I think is a real issue. I think Wells Fargo claiming
9 that it is holding the note --

10 THE COURT: Right.

11 MR. FEINBERG: -- for US Bank, it would have to show
12 that it has the proper agency and the proper relationship to
13 claim, yes, we are holding this note and this is the reason we
14 can prove it. And the way they would prove it, I assume maybe
15 saying that pursuant to PSA, it's in the mortgage loan file, but
16 they'd have to show how they have a right to claim that they as
17 the servicer is actually holding this note on behalf of the US
18 Bank.

19 THE COURT: So, you dispute that they've shown
20 sufficient evidence to rebut the summary judgment motion?

21 MR. FEINBERG: That I do dispute. I don't think they
22 have shown sufficient evidence to show that.

23 THE COURT: Okay. And they also assert that US Bank
24 holds the note as it's been endorsed in blank and that they now
25 hold it.

1 MR. FEINBERG: Yeah, but how does one prove that? I
2 mean I suppose if the custodian was a custodian from US Bank
3 saying it was transferred to us, now we're the holder --

4 THE COURT: Right.

5 MR. FEINBERG: That would be one thing, but there have
6 never been any of those types of allegations in any of the
7 pleadings or any other types of affidavits.

8 THE COURT: Okay. All right. So, anyway I was
9 interrupting you, but I think I understand the issues for
10 purposes of this motion. Are there any other grounds in this
11 motion for --

12 MR. FEINBERG: I mean admittedly the 544 motion and
13 the complexity of dealing with 544 and whether the Debtor can
14 assert those rights, I admittedly did in fact contact the
15 trustee's office and ask them to come in on the motion, on the
16 544 motion.

17 THE COURT: I'm sorry; the US Trustee's office or
18 the --

19 MR. FEINBERG: No, Mr. Sapir's office.

20 THE COURT: The Chapter 13 Trustee. Okay.

21 MR. FEINBERG: And he has never picked up on it or
22 decided to come in on that petition.

23 THE COURT: When was the petition filed?

24 MR. FEINBERG: The petition was filed the last week in
25 December of 2009.

1 THE COURT: Okay. So, someone has until December of
2 2011 to bring in an avoidance action.

3 MR. FEINBERG: Right.

4 THE COURT: Okay. There was one other -- I mean since
5 I've been reviewing the standing cases, and neither side has
6 really dealt with this issue and maybe that's because it isn't
7 part of this motion, but I just want to make sure it isn't. The
8 proof of claim was filed before the bar date, but the bar date
9 has run. Depending upon when -- well, under your theory, it
10 doesn't matter. But if in fact the note was properly assigned
11 and therefore there's a basis for US Bank to be the creditor,
12 that may have happened after the bar date. I don't think that
13 issue is really addressed here, right?

14 MR. FEINBERG: Right. I'm not -- I'm trying to figure
15 out when it was --

16 THE COURT: Because no one has been talking about when
17 the assignment occurred other than that it post-petition.

18 MR. FEINBERG: It was clearly after Your Honor had
19 told us to file a motion for summary judgment, and pursuant to
20 that motion for summary judgment I think at that point they
21 acknowledged that it wasn't in fact in US Bank's name and that
22 they then subsequently endorsed it in blank from Wells Fargo.

23 THE COURT: Right.

24 MR. FEINBERG: And I don't know the date on that.

25 THE COURT: All right. So, I don't think that you, in

1 your motion, and you're certainly entitled to make more than one
2 summary judgment motion, and the Defendant is certainly entitled
3 to make a summary judgment motion in the future too, but I
4 think in this summary judgment motion, the issue of the standing
5 to file the proof of claim and whether it was late if they
6 didn't have standing at that moment, hasn't been addressed,
7 hasn't been raised.

8 MR. FEINBERG: It has not.

9 THE COURT: Do you agree with that?

10 MS. SCHIAVO: I agree Your Honor.

11 THE COURT: Okay.

12 (Comment to the Judge by his clerk at this time.)

13 THE COURT: Oh, all right. Okay. My clerk's telling
14 me that the US Trustee wanted to listen in. And we're not sure
15 they're on the line.

16 MR. FEINBERG: Okay.

17 THE COURT: They weren't dialed in at the beginning?

18 LAW CLERK: (Inaudible.)

19 THE COURT: Mr. Zipes, are you on the phone?

20 MR. ZIPES: (No response.)

21 (The Judge's clerk initiates a call to the US
22 Trustee's Office.)

23 MR. KHODOROVSKY: Mr. Hildbold:

24 MR. HILDBOLD: Yes. You're on now. So, please just
25 put your phone on mute. Thank you.

1 MR. KHODOROVSKY: I will do so presently. Thank you.

2 THE COURT: And Mr. Khodorovsky, we had started. We
3 thought you were on the line and then realized that you had not
4 been hooked in. And we've been going for about ten minutes.
5 And just basically going through what the issues are for this --
6 on this summary judgment motion.

7 MR. KHODOROVSKY: Thank you so much, Your Honor. I
8 will presently put my phone on mute. I most humbly apologize.
9 Thank you.

10 THE COURT: No, it's not your fault. Nothing to
11 apologize for.

12 MR. KHODOROVSKY: Thank you so much again, Your Honor.

13 THE COURT: Okay. You can go ahead, Mr. Feinberg.

14 MR. FEINBERG: In my estimation without dealing with
15 all of the other bases why this might not be a secured claim or
16 whether they have standing to file, or whether the proof of
17 claim is otherwise adequate, I've really limited to a very, very
18 specific issue that I thought would get the Court out from under
19 dealing with all of these other issues, which are very real and
20 alive and if this Court denies the motion, obviously you know
21 those issues might be subsequently addressed. But I definitely
22 at least it struck me as a very unusual situation where again a
23 claim that was otherwise unsecured at the time of commencement
24 of the petition, because secured assuming that it could become
25 secured and assuming the assignment of mortgage was affective

1 after the petition was filed. And it seemed to me that
2 362(a)(4) and (5) apply. And as a result such a creation of a
3 secured claim post-petition would be void under the Bankruptcy
4 Code. And I'll leave it at that.

5 THE COURT: Okay. And I already asked you about
6 whether you've been able to locate any cases that suggested that
7 the lien was actually void or that a third party could step in
8 in place of the lien holder and I have the answer on that. I'm
9 going to ask you a similar question which is whether there are
10 any cases although they -- I understand a lot of the cases use
11 the word "nullity." Whether there are any cases that say that
12 it's not really a lien, it's not secured.

13 MR. FEINBERG: Right. And I haven't found any cases
14 that have said it's no longer -- there's no lien or the lien is
15 forever void as a matter of law.

16 THE COURT: Right.

17 MR. FEINBERG: They just don't exist. On the other
18 hand there are no cases dealing with the consequences of what
19 happens when somehow a mortgage is split. And how do you
20 reconnect them? And what process would you need to go through
21 to reconnect them? There aren't any cases on that either. So,
22 it's not like there are no cases that support my position, but
23 there are equally no cases that would support the other
24 positions.

25 THE COURT: Right. I'm not sure about that second

1 point.

2 MR. FEINBERG: Okay.

3 THE COURT: But why don't we hear from counsel for the
4 Defendants?

5 MS. SCHIAVO: Nicole Schiavo, Hogan Lovells for the
6 Defendant.

7 I just want to clear up a few factual misstatements
8 before I get into the legal arguments. The first of which being
9 the -- well, I guess there was a dispute. But I believe the
10 client affidavit submitted in the first opposition to the
11 original motion made clear that both the note and mortgage were
12 assigned back in 2008 to US Bank.

13 THE COURT: No, but let's go through that because this
14 is a summary judgment motion and I need evidence to refute the
15 allegations in the motion. So, I'm looking at now the two
16 documents. The Rule 7056-1 statement by the Defendants, and
17 then the affidavit of Erin Herzl Roesch upon which that 7056-1
18 statement relies, I think, on relevant issues. And I'm focusing
19 first on the 7056-1 statement because of course under the Rules
20 the averments in the Plaintiff's 7056-1 statement are accepted
21 except to the extent disputed and supported by evidence in that
22 dispute.

23 So, I think the key paragraph here is Paragraph 7. The
24 Plaintiff's statements that "to date and at all relevant times
25 since, the assignment of mortgage has been in the name of US

1 Bank as trustee, while the debt, as evidenced by the note was
2 and still is made payable to Wells Fargo." And then the
3 response in the Defendant's statement says "disputed. At the
4 time of the assignment to US Bank of the mortgage, the note was
5 also transferred to US Bank as the note was endorsed in blank
6 and delivered to US Bank." I don't see any support for that
7 statement, and there's none cited in the 7056-1 affidavit.

8 The Paragraph that makes that allegation in Ms. Roesch's
9 affidavit is Paragraph 5, but it's belied by the exhibit, which
10 is only the assignment of the mortgage, and not the note or the
11 note endorsed in blank. Moreover, Ms. Roesch is not capable of
12 saying what's been physically delivered to US Bank since she
13 works for Wells Fargo. So, I don't see how that could be true,
14 unless I'm missing something.

15 MS. SCHIAVO: Well, Wells Fargo is the custodian for
16 US Bank, so then anything that was physically transferred to US
17 Bank would have been received by Wells Fargo. And she was able
18 to make that statement based on the notes and the system that
19 they have, which shows when things were received and are
20 contemporaneously then noted in their system.

21 THE COURT: Well, what is the basis for saying that it
22 was deliverered to -- so, contrary to this statement which says
23 that it was physically delivered to US Bank, which to my mind
24 means delivering it to US Bank as opposed to Wells Fargo since
25 "physically" means

1 MS. SCHIAVO: Well, it was delivered to US Bank
2 because delivering --

3 THE COURT: It doesn't say delivered to Wells Fargo as
4 agent to US Bank, but that's what you're saying it means?
5 Notwithstanding that the assignment that memorializes the
6 transfer annexed as Exhibit C doesn't do that?

7 MS. SCHIAVO: I'm sorry; the assignment doesn't do
8 what?

9 THE COURT: The assignment that's attached as Exhibit
10 C, which Roesch says memorializes the transfer, which you've
11 just referred to --

12 MS. SCHIAVO: Yes.

13 THE COURT: -- is the assignment by MERS of the
14 mortgage.

15 MS. SCHIAVO: That's correct.

16 THE COURT: It's not an assignment of the note by
17 MERS.

18 MS. SCHIAVO: That's correct.

19 THE COURT: Okay.

20 MS. SCHIAVO: The note was transferred via delivery
21 and became a bearer instrument because it was endorsed in blank
22 at that point in time.

23 THE COURT: Who was it delivered to?

24 MS. SCHIAVO: It was delivered to Wells Fargo as
25 custodian for US Bank.

1 THE COURT: And what is the evidence of that?

2 MS. SCHIAVO: The evidence of the custodial agreement?

3 THE COURT: Yes.

4 MS. SCHIAVO: The pooling and servicing agreement.

5 THE COURT: And where is that?

6 MS. SCHIAVO: I annexed it to my most recent
7 submission I believe it was.

8 THE COURT: Okay. Let me --

9 MS. SCHIAVO: It's Exhibit A.

10 THE COURT: Okay. What language are you relying on
11 here?

12 MS. SCHIAVO: At Section 2.01, it states that "upon
13 the sale of the mortgage loans, the ownership of each mortgage
14 note, the related mortgage loan and the related custodial
15 mortgage file and servicing file shall vest immediately in US
16 Bank" -- well --

17 THE COURT: The Purchaser.

18 MS. SCHIAVO: Right. "and shall be retained and
19 maintained by Wells Fargo in trust at the will of US Bank and
20 only in such custodial capacity."

21 THE COURT: Okay. But she says here in her affidavit
22 that -- well, how does she know it came to Wells Fargo endorsed
23 in blank?

24 MS. SCHIAVO: The loan documentation at that point
25 reflected that. And I actually --

1 THE COURT: But where does she say that? I mean I've
2 got to say, Paragraph 5 seems to say pretty clearly that the
3 note endorsed in blank was physically delivered to US Bank
4 pursuant to an assignment dated May 13, 2008, which memorialized
5 the transfer.

6 MS. SCHIAVO: I respectfully disagree. It states that
7 the note endorsed in blank and the mortgage were assigned and
8 physically delivered. And then an assignment which documented
9 the delivery of the mortgage -- I mean, perhaps it could --

10 THE COURT: Memorializing the transfers.

11 MS. SCHIAVO: Right. Perhaps it could have been
12 worded more carefully; however, it is an accurate reflection of
13 the factual history.

14 THE COURT: But on what basis -- again, I don't
15 understand how she knows it was delivered in blank and how I
16 know from what she knows. She doesn't refer to any record that
17 says that it was delivered in blank.

18 MS. SCHIAVO: At the point where this affidavit was
19 produced and created, I don't believe we were going beyond the
20 idea that there were issues of fact here, and thus that summary
21 judgment was inappropriate. It wasn't -- I understand that in
22 order to dispute something we need to bring evidence of it to
23 the contrary; however, there would have been far more detail had
24 we realized this would become an evidentiary issue, which
25 generally doesn't happen in a motion for summary judgment.

1 If there were issues of fact, which that was our
2 position from the very beginning, that motion for summary
3 judgment was inappropriate because there are issues of fact
4 here --

5 THE COURT: But --

6 MS. SCHIAVO: You know she does state that her
7 knowledge is based on review of the books and the records,
8 though it doesn't state specifically that way in that paragraph.

9 THE COURT: How could a note that was endorsed in
10 blank be delivered to Wells Fargo and subsequently be endorsed
11 by the original issuer?

12 MS. SCHIAVO: By the original issuer meaning ABC?

13 THE COURT: Yes.

14 MS. SCHIAVO: It wasn't. It was endorsed in blank and
15 then delivered to Wells Fargo as custodian for US Bank. That
16 was the last that it left ABC's hands and never went back.

17 THE COURT: Well -- okay.

18 MS. SCHIAVO: So, what I believe is the misstatement
19 by --

20 THE COURT: When was the proof of claim -- was the
21 proof of claim filed before or after this complaint?

22 MS. SCHIAVO: Before.

23 THE COURT: Okay.

24 MR. FEINBERG: I don't know. I don't think that
25 that's true.

1 MS. SCHIAVO: Before the complaint in the adversary
2 proceeding? It was based on the documentation annexed to the
3 proof of claim.

4 THE COURT: Right.

5 MS. SCHIAVO: So, clearly the proof of claim was filed
6 previously.

7 THE COURT: Right. Where it was endorsed.

8 MR. FEINBERG: It didn't necessarily have to be.

9 THE COURT: Well --

10 MR. FEINBERG: I'm trying to figure out the date of
11 the -- I think the adversary proceeding was filed in January of
12 2010, which was only a couple of weeks after the filing of the
13 petition. And the reason I can make certain claims --

14 THE COURT: All right. That's all right.

15 MR. FEINBERG: What?

16 THE COURT: That's all right. I'm not --

17 (Pause.)

18 THE COURT: And I guess my next question is looking --
19 and my copy is very faint. But it seems to me that the second
20 endorsement on here is the one to the right, right?

21 MS. SCHIAVO: That's right.

22 THE COURT: And is that signed by an officer at Wells
23 Fargo?

24 MS. SCHIAVO: It is, Your Honor.

25 THE COURT: Okay. And who holds this note now?

1 MS. SCHIAVO: US Bank. Well --

2 THE COURT: Through Wells Fargo.

3 MS. SCHIAVO: -- Wells Fargo as custodian for US Bank.

4 THE COURT: Okay. I guess I'm still -- the one thing
5 I'm still lacking here I think is how Ms. Roesch knows and
6 therefore conveys to me the knowledge that the note was endorsed
7 in blank originally.

8 MS. SCHIAVO: It is based on her review of the books
9 and records. I can tell Your Honor I've seen myself that there
10 exists --

11 THE COURT: But how can --

12 MS. SCHIAVO: -- a note that's endorsed in blank one
13 time. So that would be technically three steps ago. And that's
14 coming from my client's file. So, there is in existence a note
15 that is endorsed in blank before it was especially endorsed to
16 Wells Fargo. And it is that --

17 THE COURT: Well, is it an original note or a copy?

18 MS. SCHIAVO: It's original. Well, the original now
19 has all endorsements on it, because once you fill it in, you
20 can't undo it.

21 THE COURT: Right.

22 MS. SCHIAVO: But there is a copy. And so she was
23 able to determine that that was the note. That was the form of
24 the note when it was delivered on or about May 13 of 2008.

25 THE COURT: All right. Of course that isn't in the

1 affidavit.

2 MS. SCHIAVO: Again, it's based on -- she states that
3 her statements are based on her review of the notes of --

4 THE COURT: The books and records.

5 MS. SCHIAVO: -- the books and records, right. Again,
6 I agree that we could have gone more extensively into that. I
7 didn't at the time believe that that was necessary as it was the
8 subsequent endorsements that were really at issue. I wasn't
9 aware --

10 THE COURT: Well, if it was endorsed in blank and
11 delivered to Wells Fargo as custodian for US Bank pre-petition
12 there wouldn't be any issue.

13 MS. SCHIAVO: It's not our position that that's what
14 occurred.

15 THE COURT: I'm sorry; it's not your position that
16 that's what --

17 MS. SCHIAVO: That is what's occurred, but that's not
18 what was at issue in this motion for summary judgment. The
19 motion for summary judgment dealt with the fact that the note
20 was specially endorsed to Wells Fargo. So, we looked at it and
21 said let's address from that point on.

22 THE COURT: Okay.

23 MS. SCHIAVO: It is our position that from America's
24 Brokers --

25 THE COURT: All right. So, let me just then go on to

1 the next point then, which is that, as stated in the second
2 sentence -- I'm sorry; the third sentence of the response and
3 also Paragraph 7 of Ms. Roesch's affidavit that by a subsequent
4 endorsement of the note by Wells Fargo in blank, it has since
5 been transferred to US Bank and is payable to US Bank. And
6 again the contention is that that subsequent transfer is -- even
7 though it's been endorsed in blank, it's being held by Wells
8 Fargo still as agent for US Bank.

9 MS. SCHIAVO: That's correct, Your Honor. And it's
10 that point in particular that I believe there's a disconnect
11 between Debtor's counsel and our position, because he speaks as
12 to what happens when a mortgage is assigned without the note.
13 What happened here, if you want to go by what the document
14 reflects as opposed to what the parties are saying was the
15 actual intent, is that the note was endorsed without, in theory,
16 the mortgage. The note was then transferred without the
17 mortgage. And it is very well established in New York law that
18 the mortgage passes is incident if the note is transferred.

19 What the Debtor's counsel has consistently stated is
20 what happens the other way around, if the mortgage is assigned
21 without the note. And that's not what occurred in this case.

22 THE COURT: Right.

23 MS. SCHIAVO: And the reason why both myself and
24 Debtor's counsel has had difficulty in finding cases that
25 address how to reunite notes and mortgages is because for this

1 very reason, they can't be separated. There has been -- the
2 reason that a mortgage follows as incident to a note is because
3 there shouldn't be a case where a note and mortgage are
4 separated. And that is why case after case after case states
5 that a mortgage follows a note as incident to same.

6 So, in this case where the documentation reflects that
7 after you US Bank had possession of both note and mortgage, that
8 the note was then transferred to Wells Fargo, the mortgage went
9 with it. And then was transferred back, whether it be pre-
10 petition or postpetition, the mortgage went with it. So, each
11 time the note travelled, the mortgage had to travel with it as
12 incidents the same. There is no ability to split them.

13 And though I am not in agreement that it is definitive
14 that US Bank receive the note back after the petition date, it's
15 my position that it was just the wrong version of the note that
16 was annexed to the POC. Regardless, it would be a transfer of
17 both a note and a mortgage and there'd be no violation of 362,
18 and there'd no issue with the security interest because the note
19 and the mortgage never left the same party.

20 THE COURT: Okay. I understand that argument.

21 MS. SCHIAVO: And I know that Your Honor has asked us
22 to look beyond that, and at that point that was when we
23 explained that even if you had to assume that somehow the
24 mortgage didn't follow the note, which again, is contrary to
25 every case law, every law I can find in the state of New York,

1 the note was held was held by an agent for the mortgage and
2 again, because the entities were related, it would still be
3 secured. So, it was never an unsecured claim.

4 THE COURT: How do we know that this note is held as
5 an agent -- is this listed in the PSA?

6 MS. SCHIAVO: The entire loan schedule, everything is
7 available publicly.

8 THE COURT: I guess that's really not at issue in this
9 summary judgment case anyway, right? The Debtors aren't
10 contending that in this summary judgment motion that it's not
11 part of the pool of mortgages and underlying obligations that
12 were assigned to US Bank? Okay.

13 So, to summarize, your view of the statements that the
14 transfer of a mortgage without the note is a nullity is that
15 that goes to enforcement but not voiding the security interest
16 or voiding the mortgage, and you can subsequently enforce if you
17 reunite the two.

18 MS. SCHIAVO: It's my position that's irrelevant.
19 That didn't occur here and no one's alleging that it did occur.
20 It was the note that was transferred. And whether the note is
21 transferred and the mortgage follows, or the mortgage is
22 transferred and the note follows are two separate ideas.

23 THE COURT: No, I understand, but the cases say that
24 if someone other than the holder of the mortgage holds the note,
25 then the holder of the mortgage can't enforce the mortgage, and

1 therefore the mortgage is a nullity.

2 MS. SCHIAVO: Unless its agent holds the note, which
3 if you want to believe that the instruments didn't travel
4 together, then that was what occurred. And thus, they did not
5 become unsecured and that at this point, Your Honor had stated
6 the first time we made argument on the motion for summary
7 judgment that there really isn't much of a dispute; that at this
8 point, US Bank holds both the note and mortgage. So, then the
9 only argument could have been that on the petition date if the
10 note was held by Wells Fargo and the mortgage was held by US
11 Bank, as Well Fargo was holding same as an agent, there wasn't
12 any change in status and there would be no violation of 362, 544
13 or 549. And again that's assuming that there's standing for 544
14 and 549 which I believe it's quite clear that there isn't.

15 THE COURT: Okay. Anything else from either side? Do
16 you have anything else, Mr. Feinberg?

17 MR. FEINBERG: I mean as to the question of mortgages
18 must follow their notes, I mean none of these cases dealing with
19 what happens when these consequences or what happens when a
20 mortgage is in fact separated from its note says that in fact it
21 is a nullity, you have a debt that is owed, but you don't have a
22 collateral to enforce it. The cases talk about the prohibition
23 against it. It doesn't mean it can't happen. And it doesn't
24 happen a lot, and surely before this entire crisis had occurred
25 starting 2007, you rarely saw this. Now, you're seeing it

1 obviously much more, and this is why these issues are now much
2 more prominent. And we'll be -- I guess courts and litigants
3 will be fighting over this issue for the next few years.

4 THE COURT: What about the contention that there's
5 sufficient evidence raised to suggest that the note either as
6 endorsed to Wells Fargo or as allegedly issued originally, then
7 delivered originally in blank means that US Bank is in
8 possession of the note as far as -- as a legal proposition.

9 MR. FEINBERG: Well, I mean, as a preliminary matter,
10 the only entity I know that could even make an argument of
11 enforcing it pre-petition would have been Wells Fargo. I mean
12 Wells Fargo couldn't have given that note to US Bank and US Bank
13 couldn't have gone and said here, you have to pay me.

14 THE COURT: Well, if it was in blank it could have.

15 MR. FEINBERG: Right. So, that occurred after. And
16 to the extent that occurred, this goes to the argument of 362.

17 THE COURT: I'm sorry; the Defendants are contending
18 that the affidavit shows that the note was held in blank by
19 Wells Fargo pre-petition.

20 Mr. Feinberg: There's no evidence of that. I can't
21 even argue that point. They admit that they -- that upon
22 finding that the note wasn't made payable to Wells Fargo -- let
23 me use the exact words. It said it was filed in error and is
24 not an accurate reflection of the chain of custody. It said
25 that she had upon finding out about it not being endorsed, that

1 it being endorsed and made payable to Wells Fargo that they did
2 then get an endorsement. And she then re-endorsed it in blank.
3 Not that it was --

4 MS. SCHIAVO: Your Honor, that's not what it says,
5 respectfully.

6 MR. FEINBERG: Are you saying that that existed --

7 MS. SCHIAVO: I am saying that the affidavit states
8 upon review, I determined that the note was specifically
9 endorsed to Wells Fargo in error and the note has since been
10 further endorsed. She did not say that she did it. And it is
11 my client's position and it has been my client's position that
12 the note that was attached to the POC was not the most current
13 version of the note at that time, but was actually attached as
14 an error. And at the time of the petition, they had already
15 realized that there had been a mistake and the subsequent
16 endorsement had already been affixed to the note, thus the
17 current -- the note that we then annexed to this motion was the
18 version of the note in existence at the time of the petition and
19 it was an error on the part of counsel that annexed the wrong
20 version of the note.

21 THE COURT: But none of those timing points are in the
22 affidavit, right?

23 MS. SCHIAVO: Because there isn't a date on the
24 endorsements.

25 THE COURT: Right.

1 MS. SCHIAVO: And again, my client's position is that
2 somebody accidentally putting a rubber stamp on a note does not
3 effectuate --

4 THE COURT: Well, it's fine to have a position. I
5 have to deal with evidence.

6 MS. SCHIAVO: No I understand that, but if you look at
7 it and say if I have a check and I accidentally write my name in
8 it and say oh, crap, this isn't my check. Let me cross my name
9 out and hand it to somebody else, it never became mine to cash,
10 because there was never an intent for that to be mine. And
11 that's exactly what my client has stated is that there was never
12 an intent for this note to be made payable to Wells Fargo.

13 THE COURT: How do I know that since the issuer of the
14 note, whose intent's the key thing, is the endorser.

15 MS. SCHIAVO: Well, because at that point the note was
16 held by US Bank. At the point where it was especially endorsed
17 mistakenly to Wells Fargo, it was held by US Bank.

18 THE COURT: Look, look -- all right. I guess we're
19 going in circles here. But I just don't see the basis for the
20 contention that the note was assigned and delivered to US
21 Bank --

22 MS. SCHIAVO: I would be happy to provide further --

23 THE COURT: -- on or about May 13, 2008.

24 MS. SCHIAVO: I'd be happy to provide -- again, I
25 don't think it was realized the extent of detail that would have

1 been necessary at that point in time seven or eight months ago
2 when this affidavit was -- if further evidence is required, if
3 the original note is produced that can happen.

4 THE COURT: I guess that all goes to the following.
5 It seems to me that the basis for the Defendants to defeat the
6 motion is not based upon the assertion that Wells Fargo held a
7 note in blank on behalf of US Trust as trustee on and after
8 petition date, but rather that as is acknowledged, the note that
9 was, at some time unknown, endorsed to Wells Fargo has
10 subsequently and clearly postpetition been endorsed again by
11 Wells Fargo in blank.

12 MS. SCHIAVO: That's not --

13 THE COURT: And that Wells Fargo is holding it as
14 custodian for US Bank.

15 MS. SCHIAVO: It's not entirely my position.

16 THE COURT: Okay.

17 MS. SCHIAVO: It's my position that that last
18 endorsement in blank occurred prepetition.

19 THE COURT: The last endorsement?

20 MS. SCHIAVO: Yes.

21 THE COURT: How could that possibly be?

22 MS. SCHIAVO: Because someone had realized that there
23 was an error in a specific endorsement prior to --

24 THE COURT: No, but wait, wait, wait.

25 MS. SCHIAVO: -- and like I said it just wasn't --

1 THE COURT: I'm sorry; the response says the
2 "subsequent specific endorsement to Wells Fargo was in error.
3 This error was corrected by a subsequent endorsement of a note
4 by Wells Fargo in blank. Thus the note has since been
5 transferred back from Wells Fargo to US Bank."

6 MS. SCHIAVO: That's correct, but all that occurred
7 prepetition.

8 THE COURT: And where's the evidence of that? I mean
9 there's no citation to anything in the 7056-1 statement to
10 support that. I mean that timing just doesn't -- it's not
11 there. Clearly, that was a time when someone at Wells Fargo
12 could do this on more than just having reviewed the books and
13 records, I would think, right? And they could actually testify
14 as to personal knowledge that this was done? That can't be the
15 case.

16 MS. SCHIAVO: I believe if an evidentiary hearing was
17 scheduled on this I could bring in the proper person who
18 could --

19 THE COURT: Well, look, her affidavit says "after the
20 complaint in the above captioned adversary proceeding was filed
21 it came to my attention that the blank endorsement on the note
22 had been filled in to indicate Wells Fargo was the holder of the
23 note. I began to investigate the chain of custody of the note.
24 Upon review I determined that the note was specially endorsed to
25 Wells Fargo in error. The note however has since" -- that has

1 to be "since" after the complaint was filed, right? Because
2 "since" refers back to all of that review has "since" been
3 further endorsed by Wells Fargo in blank. So, it has to have
4 happened -- that has to have happened postpetition.

5 MS. SCHIAVO: I --

6 THE COURT: I mean that's what she says. She's not
7 lying is she?

8 MS. SCHIAVO: No, but I believe that perhaps how it
9 was worded wasn't perfect. But I'm telling you, my client's
10 position is that the version of the note that was annexed to the
11 POC was not the version of the note that was in existence at
12 that time. I understand the evidentiary issues that poses.

13 THE COURT: Well, that's fine. At that time it may
14 have been -- it may have had the second stamp by then.

15 MS. SCHIAVO: Correct.

16 THE COURT: Because the adversary proceed -- well, the
17 adversary was filed first. And so it's possible I guess that
18 that could be the case. But it's still postpetition then.

19 MS. SCHIAVO: Right. And I understand that
20 pinpointing the exact date is what would be necessary. And
21 being that that's going to be virtually impossible being that
22 there's no date on the endorsement, that is why we --

23 THE COURT: Well, then how do -- I mean if that's the
24 case how do I know that it came in prepetition in blank unless
25 there's some record that actually says when these things --

1 MS. SCHIAVO: There is.

2 THE COURT: But there's no record of endorsements?

3 MS. SCHIAVO: The note as it appears is scanned into
4 the system and then a date for when it was received is marked.
5 So, in making this affidavit she was able to look back in the
6 system; see the version of the note that was received; see the
7 on or about date in which it was physically received.

8 THE COURT: All right. None of which is in the
9 affidavit.

10 MS. SCHIAVO: I understand that the details are
11 lacking.

12 THE COURT: They don't scan the endorsements in and
13 record that too if it's subsequently endorsed?

14 MS. SCHIAVO: If they're subsequently endorsed, then
15 the note as updated -- because obviously this is all being done
16 in the original note.

17 THE COURT: Right.

18 MS. SCHIAVO: So, each time a change is made, the
19 original is re-scanned --

20 THE COURT: Right.

21 MS. SCHIAVO: -- and like I said --

22 THE COURT: And the date?

23 MS. SCHIAVO: -- you're able to look back into the
24 loan history and show --

25 THE COURT: Oh, so then we would know.

1 MS. SCHIAVO: -- that there is --

2 THE COURT: Then we would know when the endorsement
3 occurred.

4 MS. SCHIAVO: The idea that we will know exactly when
5 that occurred may not be an exact science, because there wasn't
6 a transfer.

7 THE COURT: Well, if it's scanned.

8 MS. SCHIAVO: Again, I can give you an on or about
9 date, but I don't know that being that we're talking about a
10 very --

11 THE COURT: Well, I have to assume then for purposes
12 of this motion that --

13 MS. SCHIAVO: That it was postpetition.

14 THE COURT: Yes.

15 MS. SCHIAVO: And I understood.

16 THE COURT: Okay.

17 MS. SCHIAVO: And that is why we then explained why
18 for several reasons --

19 THE COURT: All right.

20 MS. SCHIAVO: -- that's still not an issue. I just
21 wanted to make clear that isn't my position, while I can
22 appreciate that that's your understanding.

23 THE COURT: All right. Well, I understand that.

24 MS. SCHIAVO: Okay.

25 THE COURT: But again, given the motion it's incumbent

1 to state the position and again I think the only basis for
2 contesting the motion here is on the assumption that it was
3 subsequently endorsed in blank by Wells Fargo to be held in its
4 capacity as custodian for the US Bank as trustee.

5 MS. SCHIAVO: So, then if that was done postpetition
6 as the Court assumes --

7 THE COURT: Right.

8 MS. SCHIAVO: -- the note --

9 THE COURT: Then I understand the argument.

10 MS. SCHIAVO: Right.

11 THE COURT: Yeah. Okay.

12 MS. SCHIAVO: And that's been our position from the
13 beginning.

14 THE COURT: That's fine.

15 MS. SCHIAVO: This is really -- while the dates are
16 important, they're not decisive.

17 THE COURT: And, look, I'm not going to keep you in
18 suspense. I think that Wells Fargo wins on that point. I think
19 it loses on the other arguments for failure to set forth
20 sufficient evidence to carry the other arguments for purposes of
21 defeating the motion for summary judgment. So, let me go
22 through my ruling now. You all can sit down.

23 The Debtors in this case, Andrew and Beth Kurland,
24 filed an adversary proceeding seeking a declaration, among other
25 things that Defendants, US Bank, as trustee, and Wells Fargo

1 Bank, as custodian, Mortgage Electronic Registration Systems,
2 Inc., as mortgage holder, and JP Morgan Chase and the American
3 Brokers Conduit, Inc., do not have a valid and enforceable
4 secured claim against them in this case.

5 The proof of claim that was filed in this Chapter 13
6 case, attached to it -- or actually before we go to that --
7 asserted a claim on behalf of US Bank, as trustee; and attached
8 to it is documents supporting the claim, an assignment of the
9 mortgage and the related indebtedness secured by the mortgage by
10 Mortgage Electronic Registration Systems, Inc. or MERS, dated
11 May 13, 2011, and a note originally issued by the Kurland's to
12 American Brokers Conduit, Inc. that reflects an endorsement by -
13 - I'm sorry; that was issued and endorsed in blank to Wells
14 Fargo. Actually, I do have another question here, and I
15 apologize for interrupting my ruling here.

16 Going back to the note, are you saying that the
17 endorsement on the left is signed by Wells Fargo, and not by
18 American Brokers Conduit?

19 MS. SCHIAVO: It's both, Your Honor, because what
20 actually occurs is the top line and then what appears to be the
21 third and fourth line, and then the signature line and the lines
22 below occurred first. And that was done by American Broker's
23 Conduit and that makes it in blank.

24 THE COURT: All right. I just wanted to make sure --

25 MS. SCHIAVO: And in the second part --

1 THE COURT: -- that American Brokers' Conduit has
2 endorsed it.

3 MS. SCHIAVO: That's correct.

4 THE COURT: All right.

5 MS. SCHIAVO: It did. It was endorsed in blank
6 originally and then subsequently filled in.

7 THE COURT: Okay. Fine. So, it appeared from the
8 face of the proof of claim and the documents attached to it that
9 Wells Fargo Bank held the note, it having been specially
10 endorsed to it, and US Bank, as trustee, owned the mortgage, it
11 having been assigned to it by MERS, who was not the original
12 note holder, American Brokers Conduit, and therefore was
13 incapable of assigning the note.

14 The Debtors contended that, among others things, in
15 light of the foregoing US Bank, the claimant, did not have
16 authority or a basis for asserting a secured claim against the
17 Debtors. And that is the basis for the summary judgment motion
18 seeking a declaration that the Defendants do not have a
19 perfected secured or unsecured interest with regard to
20 Plaintiff's real property and otherwise any proof of claim by
21 Defendant should be disallowed.

22 Under Bankruptcy Rule 7056, which incorporates Federal
23 Civil Procedure 56, including Rule 56(a), the Court shall grant
24 summary judgment if the movant shows that there's no genuine
25 dispute as to any material fact, and it is entitled to judgment

1 as a matter of law.

2 Subject to Federal Rule of Civil Procedure 56(c)(2)
3 through (4) and 56(d) through (e), which are not applicable
4 here, a party asserting that a fact cannot be or is generally
5 disputed must support the assertion by (A) asserting the
6 particular parts of the record, including depositions, documents
7 or electronically stored information, affidavits or
8 declarations, stipulations, admissions, interrogatories, answers
9 or other materials, or (B) by showing that the record does not
10 establish the absence or presence, as the case may be, of a
11 general dispute. Federal Rule of Civil Procedure 56(c)(1). The
12 movant bears the initial burden to satisfy each material element
13 of its claim or defense. Vermont Teddy Bear Company v.
14 1800BearGram Company, 373 F.3d 241, 244 (2d Cir. 2004); Isaac v.
15 City of New York, 701 F. Sup. 2d 477, 485 (SDNY 2010) affirmed,
16 271 Fed Appendix 60 (2d Cir. 2008).

17 Upon such a showing the non-moving party must provide
18 evidence of a genuine issue of material fact to successfully
19 oppose the motion. Matsushita Electric Industries Company v.
20 Zenith Radio Corporation, 475 U.S. 574, 586 (1986). Facts are
21 material if they might affect the outcome of the suit under the
22 governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,
23 248 (1986). The Court is not to weigh the evidence, but is
24 instead required to view the evidence in the light most
25 favorable to the party opposing summary judgment, to draw all

1 reasonable inferences in favor of that party, and to eschew
2 creditability assessments. See *Amnesty America v. Town of West*
3 *Hartford*, 361 F.3d 113, 122 (2d Cir. 2004).

4 A summary judgment motion may not be defeated by conclusory or
5 self-serving statements, by simply raising metaphysical doubts
6 about a material fact or by identifying immaterial disputed
7 facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 247-248;
8 *Matsushita Electric*, 475 U.S. at 586. Although "if there is any
9 evidence in the record from any source from which a reasonable
10 inference in the nonmoving party's favor may be drawn, the
11 moving party simply cannot obtain a summary judgment." *Bender &*
12 *Bender, PC. v. Barnhard*, 481, F.3d 141, 148 (2d Cir. 2007). See
13 generally *Matsushita Electric*, 475 U.S. 586.

14 The underlying legal theory for the Plaintiff's motion
15 has recently been reconfirmed by the Appellate Division for the
16 Second Department, that "a transfer of a mortgage without the
17 debt is a nullity, and no interest is acquired by it." *Bank of*
18 *New York v. Silverberg*, 2011 W.L. 227973 at 4 (App. Div. 2d Dept.
19 June 2011), quoting *Merit v. Banthelich*, 36 NY 44 at 45. I
20 believe that's (1867).

21 The parties have submitted Rule 7056-1 statements
22 under Local Bankruptcy Rule 7056(a), in which there are really
23 only two disputes. First, the Plaintiffs assert that at some
24 unknown time, but presumably after -- I'm sorry, the Plaintiffs
25 state that not only the mortgage, but also the note were

1 assigned and delivered to US Bank on or about May 2008. The
2 Plaintiffs state that only the mortgage was delivered at such
3 time. The Defendants assert that, in addition, the note was
4 also delivered at such time to US Bank. The source for that
5 statement is not set forth as required by the Local Rules in the
6 Defendant's Rule 7056-1 statement. However, I will refer to the
7 affidavit of Erin Roesch, a litigation specialist at Wells
8 Fargo, who testifies that she is familiar with Wells Fargo's
9 books and records, although not that she is the custodian of
10 that property, and in particular states, in Paragraph 5 of her
11 affidavit, that the note endorsed in blank and the mortgage were
12 assigned and physically delivered to US Bank. She then states
13 in Paragraph 5, a copy of the assignment dated May 13, 2008,
14 memorializing the transfer is annexed to Plaintiff's motion as
15 Exhibit C. That assignment, as I've noted, does not reflect a
16 proper assignment of the note or physical delivery of the note,
17 so I am going simply by the conclusory statement by Ms. Roesch
18 that the note endorsed in blank was physically delivered to US
19 Bank.

20 Although she does not state that it was delivered
21 physically to Wells Fargo in its capacity as agent for US Bank
22 it was stated by counsel at oral argument that that's what was
23 meant by the phrase "physically delivered to US Bank." Even
24 assuming that is true, I find that the statement in Paragraph 5
25 of the affidavit is conclusory and is not supported by a

1 sufficient foundation in Ms. Roesch's affidavit to constitute
2 admissible evidence. So, for purposes of this summary judgment
3 motion, I do not believe that the Defendants have sufficiently
4 controverted the factual assertion that the note was not
5 delivered prior to the petition date in blank to US Bank, or to
6 Wells Fargo in its capacity as custodian for US Bank.

7 The second disputed factual issue is as to the time
8 that the note which bears an endorsement to Wells Fargo was
9 subsequently endorsed in blank by Wells Fargo and to be held by
10 Wells Fargo in its capacity as custodian for the documents under
11 the PSA for US Bank as trustee. It was suggested at oral
12 argument that the note may have been endorsed by Wells Fargo in
13 blank also before the petition date.

14 I actually believe that that assertion, though, is
15 contradicted by Paragraphs 6 and 7 of Ms. Roesch's affidavit,
16 which refer to the endorsement by Wells Fargo in blank occurring
17 since her review of the note, which appears to have taken place,
18 as she states in Paragraph 6 of her affidavit, after the
19 complaint was filed.

20 So, for purposes of this motion I believe it is
21 uncontroverted by any evidence that the note specifically
22 endorsed to Wells Fargo was then endorsed in blank by Wells
23 Fargo to be held as custodian for US Bank postpetition.

24 Finally, it is asserted in the affidavit that the note
25 was endorsed specifically to Wells Fargo in error, and that the

1 intention was that it be held by Wells Fargo always in blank on
2 behalf of US Bank. Again, I don't believe that Ms. Roesch's
3 affidavit sets forth sufficient evidence to state that it was
4 endorsed specifically to Wells Fargo in error. Again, she is
5 providing this affidavit as a litigation specialist with
6 knowledge of the books and records maintained by Wells Fargo.
7 She was not the person who endorsed the note originally endorsed
8 in blank by -- I'm sorry. She's not the person who stamped the
9 note Wells Fargo Bank, N.A.; at least she doesn't say that in
10 her affidavit that was endorsed in blank by AMC. And she gives
11 no basis other than her review of the books and records, which I
12 doubt would have said that it was endorsed in error, for that
13 conclusory statement.

14 What the parties agree upon, however, is -- I'm sorry.
15 What the evidence as asserted by the Debtors and the Debtors
16 acknowledge, however, for purposes of this motion, is that Wells
17 Fargo did in fact subsequently endorse in blank the note that
18 had previously been endorsed to it. And I'm assuming for
19 purposes of this motion that that endorsement occurred
20 postpetition.

21 As I've noted, the Plaintiff contend that because
22 under New York law at the time of the petition the mortgage was
23 "a nullity," because the holder of the note was not the
24 mortgagee, that the note cannot be enforced today,
25 notwithstanding that the holder of the note has since

1 acknowledged that it is holding it in blank for the mortgagee
2 and has so endorsed the note in blank. The argument is premised
3 upon the notion that if a mortgage is a nullity on the petition
4 date, the fact of the bankruptcy filing and either the automatic
5 stay under Section 362(a) or the effect of an intervening
6 hypothetical purchaser or lien status under Section 544(b) of
7 the Bankruptcy Code would prevent the mortgage from subsequently
8 becoming enforceable and preclude the holder of the note from
9 transferring the note to make the mortgage enforceable.

10 I have closely reviewed the case law and the relevant
11 statutes and believe that that assertion is incorrect as a
12 matter of law. As I noted, it is clear under New York law that
13 a transfer of a mortgage without the debt is a nullity and no
14 interest is acquired by it. See Bank of New York v. Silverberg,
15 2011, W.L. 227973 at 4, Mortgage Electronic Registration
16 Systems, Inc. v. Coakley, 838 N.Y.S.2d 622 (App. Div., 2d Dept.
17 2007). See also Five-Star Management, Inc. v. Rogers, 940 F.
18 Supp 512, 520-521 (EDNY 1996), which applies New Mexico law, but
19 states that New York law is not to the contrary, and the cases
20 cited therein.

21 The question arises, then, what does it mean to say
22 that the note -- I'm sorry -- that the mortgage is a "nullity?"
23 I conclude, based on my review of the cases and the relevant
24 statutes, that what the courts mean when they phrase the law in
25 that fashion is that the mortgage is not enforceable by the

1 party who is the assignee thereof, not that the mortgage is void
2 or voidable. As a result based upon the plain language of
3 Section 544(a), which is prefaced by the phrase "may avoid any
4 transfer of property of the Debtor or any obligation incurred by
5 the Debtor that is voidable by," that no party will be able to
6 avoid the underlying mortgage, which was to AMC based upon the
7 separation of the note and the mortgage whether that would
8 attempted to be done under 544(a)(1) or (a)(3) of the bankruptcy
9 code.

10 I conclude that the mortgage is not voidable for a
11 couple of reasons. First, as pointed out by the Defendants it
12 is clear as a general matter that once a promissory note is
13 tendered to and accepted by an assignee, the mortgage passes as
14 an incident to the note. Again, see Bank of New York v.
15 Silverberg, 2011, W.L. 2279723 at 4, citing Coakley, 838
16 N.Y.S.2d 622, and Weaver Hardware Company v. Schlomovitz, 235
17 NY2d 321, 331-332, (1923).

18 The Silverberg case stands for the proposition that
19 the contrary is just the opposite, i.e., as I've stated, if the
20 holder of the mortgage does not have the note it may not enforce
21 the mortgage. As stated by the Restatement (Third) of Property:
22 Mortgages, Section 5.4, the proper analogy here, as set forth by
23 Professor Smith, of the University of Arizona College of Law, is
24 that the note is analogous to a cow and the mortgage to the tail
25 of the cow. The cow can survive without a tail, but the tail

1 cannot survive without the cow. See also Armored Cars v. HSBC
2 Bank USA, 2011, W.L. 825151 at footnote 12 (D. Idaho, Feb. 9,
3 2011). I believe, in light of that case law, that the
4 subsequent endorsement by Wells Fargo in blank is sufficient to
5 enable enforcement, but more importantly that the fact that the
6 note and mortgage were initially separated, did not kill the
7 cow. In other words, did not make the mortgage unenforceable by
8 the noteholder.

9 The case law that deals with the separation of the
10 note and mortgage, although using the phrase 'renders the
11 security a nullity,' also makes it clear by its context that
12 it's dealing with the effectiveness of presenting a mortgage for
13 a foreclosure proceeding or other form of enforcement, as
14 opposed to the avoidance of the mortgage or letting third
15 parties defeat the mortgage and elevate their position -- third
16 parties asserting an interest in the property that are contrary
17 to or above the mortgage holder. See LaSalle Bank National
18 Association v. Laney, 2006 W.L. 2251721 (Sup. Suffolk Co.,
19 August 7, 2006), where the Court uses the nullity language but
20 is clearly dealing with the effectiveness at the time of a
21 foreclosure motion of the mortgage.

22 I have nevertheless found two decisions that take the
23 proposition one step farther and appear to recognize that the
24 mortgage itself is not void and that if in fact the note and
25 obligation were reunited they could enforced. That is in

1 addition to the dicta, of course, in the Five-Star case that I
2 previously cited. The first such case is Wells Fargo Bank, N.A.
3 v. Perry, 875 N.Y.S.2d 853 (Sup. Suffolk Co. 2009), in which the
4 Court recognized the ability of a mortgage holder to fix a note
5 problem but did not let the -- or did not also grant the
6 mortgage holder's request to have the filing records backdated
7 to the date of the issuance of the original mortgage, thereby
8 making a distinction between the filing records and the
9 effectiveness of the mortgage vis-à-vis third parties. A clear
10 implication of this ruling is that if in fact the mortgage had
11 been recorded at the time that the holder wanted it to be
12 backdated to, it would have been effective against intervening
13 parties, notwithstanding the problem with the note.

14 Secondly, in In re Leisure Time Sports, Inc., 194 B.R.
15 859 (9th Cir. BAP 1996), the trustee argued that the original
16 holder of the mortgage could not have a valid mortgage because
17 he assigned the note to a third party without the mortgage. I
18 got that backwards, I apologize. The trustee contended that not
19 only did the assignee of a mortgage lack a lien thereon because
20 it did not have the note, it also argued that the assignor could
21 not have a mortgage notwithstanding that he had the note. The
22 BAP reversed on that latter contention.

23 I recognize that there is a statement, which is dicta
24 or frankly double dicta, in In re Agard, 444 B.R. 231 (Bankr.
25 E.D.N.Y. 2011) as follows:

1 The movant's failure to show that US Bank holds the
2 note should be fatal to the movant's standing. . . ." And
3 here's the key language. "However, even if the movant could
4 show that US Bank is the holder of the note, it still would have
5 to establish that it holds the mortgage in order to prove that
6 it is a secured creditor with standing to bring this motion
7 before this Court.

8 While it is generally true that a mortgage travels a parallel
9 path with its corresponding debt obligation, the parties in this
10 case have adopted a process, which by its very terms, alters
11 this practice when mortgages are held by MERS as mortgagee of
12 record. By MERS' own account, the note in this case was
13 transferred among its members while the mortgage remained in
14 MERS' name. MERS admits that the very foundation of its
15 business model as described herein requires that the note and
16 mortgage travel divergent paths. Because the note and mortgage
17 do not travel together, movant must prove not only that it is
18 acting on behalf of a valid assignee of the note, but also that
19 it is acting on behalf of the valid assignee of the mortgage."
20 And that's at pages 246-247. No authority is cited for that
21 proposition, however, other than the cases that state that the
22 holder of the mortgage must have the note in order to enforce
23 the mortgage.

24 And I believe that while, of course, someone asserting a secured
25 claim must assert that it has the mortgage, there is no dispute

1 of that here. And I do not believe that it's a reading of the
2 law to state that if the mortgage and note are separated, the
3 holder of the mortgage cannot in fact assert that mortgage
4 interest if it later becomes, again, the holder of the note.

5 I will note that there is one case that does
6 contemplate the existence of intervening lien creditors taking
7 over the interest of a creditor who has a prior mortgage, but
8 not the note, if they get their subsequent interest before the
9 note is fixed or the note problem is fixed. That is Weaver
10 Hardware Company v. Schlomovitz, 235 NY at 321. However, that
11 court was dealing with a different note problem. This was not a
12 case where the holder of the note was different from the holder
13 of the mortgage. Rather, the note was usurious and was not
14 corrected until later. Unlike the cases that I've just
15 discussed, under General Obligations Law Section 5-511, usurious
16 contracts are deemed void, although that voiding may be
17 corrected by replacement of the usurious note with a non-
18 usurious note. So, given that fact, it's perfectly
19 understandable why intervening creditors would be able to step
20 in during the period that the note was void. And similarly they
21 could use Section 544(a) -- the trustee could use Section 544(a)
22 in a bankruptcy case.

23 In light of all of the foregoing I conclude that the
24 fact that the note and mortgage have effectively now been
25 reunited in that Wells Fargo holds the note in blank in its

1 capacity as custodian for US Bank means that again the note and
2 mortgage together are enforceable and there was no intervening
3 period when the mortgage was void or voidable. As a consequence
4 I do not believe that Section 362 prevents the endorsement in
5 blank by Wells Fargo of the note postpetition to render the
6 mortgage enforceable.

7 The mortgage was never void. It always existed. And
8 the note itself was not property of the Debtor's estate. And
9 the transfer of the note and the claim is specifically
10 contemplated by the Bankruptcy Rules, Bankruptcy Rule 3001(e).
11 I do not believe, therefore, that this was the type of
12 enforcement mechanism that Congress had in mind in Section
13 362(a) of the Code and that the stay would apply to the
14 endorsement of the note. See In re Samuels, 415 B.R. 8 at page
15 22 (Bankr. D. Mass. 2009).

16 Consequently, I find and conclude that the Debtors'
17 summary judgment motion should be denied on that basis. As we
18 noted at the start of this hearing, my ruling does not extend to
19 whether in fact the claim filed in this case on behalf of US
20 Bank was one that US Bank at the time had standing to file or
21 that Wells Fargo had standing to file on US Bank's behalf given
22 the factual issue as to whether, which is not addressed in this
23 particular context, but I've addressed it today, being whether
24 at the time US Bank had standing to file such a proof of claim
25 or whether there would be any ability to assert the claim after

1 standing was subsequently obtained. If that was done after the
2 bar date, that issue is an issue for another day. But on the
3 basis of this motion and the objection to it, and for the
4 reasons I've stated on the record the motion before me today is
5 denied.

6 So, counsel for the Defendants can submit an order
7 consistent with my ruling.

8 MS. SCHIAVO: Thank you, Your Honor.

9 THE COURT: Thanks.

10 MR. KHODOROVSKY: Thank you, Your Honor, for allowing
11 me to appear telephonically.

12 THE COURT: Sure. So, you don't have to settle that
13 order. Just send a copy to Mr. Feinberg when you send it to
14 chambers, so you can make sure it's consistent with my ruling.
15 And you can simply say the motion is denied for the reasons
16 stated on the record. You don't have to go through all of my --

17 MS. SCHIAVO: Yes, Your Honor.

18 THE COURT: -- conclusions and findings of fact. I
19 will ask you to order the transcript, and as I do when I have a
20 lengthy bench ruling, I'll review the transcript and correct it,
21 not only for typos and the like, but also, potentially, if I
22 decide to do this, correct my grammar and add other citations
23 and the like. If I do that, I'll file it separately. And I'm
24 just talking about my ruling now. I'm not talking about the
25 rest of the transcript as a modified bench ruling. But the

1 holding won't change.

2 MS. SCHIAVO: Thank you, Your Honor.

3 THE COURT: Okay. Thank you.

4 MR. FEINBERG: Your Honor?

5 THE COURT: Yes?

6 MR. FEINBERG: As to other issues relating to
7 discovery; I filed an AP; I just dealt with one issue relating
8 to summary judgment --

9 THE COURT: Right. Now, you need to think about -- I
10 think what you ought to do is schedule a discovery conference.
11 You can do that for a regular Chapter 13 day -- I mean a regular
12 pre-trial conference. And you should think about what's left in
13 this litigation and confer about any discovery in relation to
14 that.

15 I obviously didn't grant summary judgment to the
16 Defendants, but it's pretty clear what my ruling is on the
17 effect of the postpetition endorsement. So, there needs to be
18 some other factual issue or legal issue that you need to pursue.

19 MR. FEINBERG: Right.

20 THE COURT: And you don't need to tell me what that is
21 today.

22 MR. FEINBERG: Okay.

23 THE COURT: Just think about it and then confer about
24 discovery and/or whether there's any additional dispositive
25 motion that you want to deal with. Okay.

1 MR. FEINBERG: Thank you.

2 MS. SCHIAVO: Thank you, Your Honor.

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1 CERTIFICATION
23 I, Linda Ferrara, certify that the foregoing is a
4 correct transcript from the official electronic sound recording
5 of the proceedings in the above-entitled matter.

6 Dated: August 8, 2011

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Signature of Approved Transcriber