

IN THE UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW JERSEY

IN RE:	)	Bankruptcy No. 08-18700
	)	
	)	
JOHN T. KEMP,	)	
	)	
Debtor.	)	
-----	)	
JOHN T. KEMP,	)	Adversary No. 08-02448
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
COUNTRYWIDE HOME LOANS, INC.,	)	Camden, New Jersey
	)	August 11, 2009
Defendant.	)	10:24 a.m.
	)	
-----	)	

TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE JUDITH H. WIZMUR  
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Plaintiff:	BRUCE LEVITT, ESQUIRE LEVITT & SLAFKES, PC 76 South Orange Avenue, Suite 305 South Orange, New Jersey, 07079 Cherry Hill, New Jersey 08003
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I N D E X

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>BY THE COURT</u>
For the Defendant:					
Linda DeMartini	12	14	23 26	25	28 53

<u>OPENING STATEMENT:</u>	<u>PAGE NUMBER</u>
By Mr. Levitt	4

<u>ARGUMENTS:</u>	<u>PAGE NUMBER</u>
By Mr. Levitt	6, 32
By Mr. Kaplan	11, 36

<u>EXHIBITS:</u>	<u>IDENT</u>	<u>EVID</u>
For the Defendant:		
D-1 Allonge to promissory note	13	62
D-2 Power of attorney from Bank of New York	37	62
D-3 Servicing agreement	37	
For the Plaintiff and Defendant:		
J-1 Interest only adjustable rate note	22	62

1 (The following was heard in open court at 10:24 a.m.)

2 THE COURT: All right, Kemp. Appearances, please.

3 MR. LEVITT: Good morning, Your Honor, Bruce Levitt,  
4 Levitt and Slafkes, for the plaintiff.

5 MR. KAPLAN: Harold Kaplan on behalf of Frankel  
6 Lambert on behalf of the defendant.

7 THE COURT: Okay. We're here to consider the  
8 complaint of the plaintiff seeking to expunge the proof of  
9 claim of the secured creditor, the mortgage servicer on the  
10 basis that inadequate documentation has been supplied. Lots  
11 of questions are raised here. I'll gladly take initial  
12 presentations and then hear from witnesses in the normal  
13 course. Counsel?

14 MR. LEVITT: Your Honor, I think counsel for  
15 defendant and I have stipulated to most of the facts in this  
16 case and that is that there was a note signed, a mortgage was  
17 signed, there is a recorded assignment of mortgage and a proof  
18 of claim was filed in this Court; no documentation attached to  
19 the proof of claim. We've stipulated --

20 THE COURT: There was some documentation attached --

21 MR. LEVITT: A proof of amount due.

22 THE COURT: No, I think the note and mortgage were  
23 attached.

24 MR. LEVITT: Bottom line, no endorsement to the  
25 note, no allonge, no documentation --

1 THE COURT: There was an unexecuted allonge  
2 actually.

3 MR. LEVITT: The note that I saw -- exactly, Your  
4 Honor, there was an unexecuted allonge that was attached I  
5 believe to the proof of claim. We have -- in fact we've  
6 agreed that certain of the documents can be admitted into  
7 evidence on stipulation -- again, the note, the mortgage and  
8 the -- the recorded assignment of mortgage.

9 I'm stipulating that these are copies, I'm not  
10 stipulating as to who has the original or where the original  
11 is, but certainly my client, if he were to be on the stand,  
12 would testify that he signed the note, he signed the mortgage.  
13 And Your Honor's correct, it's there's essentially an  
14 adversary proceeding to expunge the proof of claim, but also  
15 fix extent and validity of the lien to the extent that the  
16 lien exists.

17 I think based upon the stipulated facts and the  
18 fact that we can agree to certain documents to be admitted in  
19 evidence, I'm not so sure that it's necessary for the  
20 plaintiff to even testify here because he would testify that  
21 he signed the note, he's on the mortgage. But again, and I  
22 think counsel and I both agree, the issue here is is there an  
23 enforceable note and at that point I think the burden shifts  
24 to the defendant to come forth with evidence to show that  
25 there is an enforceable note.

1 I have submitted a trial brief, Your Honor, I've  
2 submitted my proposed findings of fact and conclusions of law.  
3 I don't believe there's any further need for an opening  
4 statement. It's all there.

5 THE COURT: Well, let me ask you a couple of  
6 questions --

7 MR. LEVITT: Certainly, Your Honor.

8 THE COURT: -- because I have tremendous further  
9 needs in this case. The assignment of mortgage has language  
10 that is rather comprehensive involving assignment of note as  
11 well, and it is a recorded document. What impact, if any,  
12 does that have on our concerns?

13 MR. LEVITT: None, Your Honor. First of all, if you  
14 look at that assignment, it was signed by MERS, it wasn't  
15 signed by the initial lender, Countrywide. If you look at the  
16 mortgage, MERS is a nominee under the mortgage only. MERS has  
17 absolutely nothing to do with the promissory note and I can  
18 submit not as a matter of evidence but for the Court to take  
19 its own judicial notice, if you go to the MERS website, MERS  
20 says they're repository for mortgages.

21 They have nothing to do with them so there's nothing  
22 signed by Countrywide as the initial lender which transfers  
23 the mortgage, which transfers the note, endorses the note, so  
24 that -- and I believe I cited Your Honor to the Wells case and  
25 I believe it's a similar issue in the Wells case.

1 THE COURT: Well, you know, the Wells case relies on  
2 Madison, the Madison Realty case from the Third Circuit.

3 MR. LEVITT: With regard to the note itself and the  
4 endorsement.

5 THE COURT: Yes.

6 MR. LEVITT: But there's some language in Wells  
7 dealing with that assignment language that it appears in the  
8 assignment of the mortgage and the Court in that case rejected  
9 it and in fact, I can cite Your Honor to another case that  
10 quite frankly I just came up with yesterday that was decided  
11 on July 7th out of the District of Idaho, the In Re: Wilhelm  
12 case -- 407-BR-392, decided by the Chief Bankruptcy Judge, on  
13 point also with regard to the same issue as discussed in  
14 Wells, as well as the fact that a MERS assignment is not an  
15 endorsement of a note.

16 THE COURT: So let's say that you're right, that the  
17 failure to demonstrate -- and we'll see what is able to be  
18 demonstrated regarding the affixing of the allonge to the note  
19 -- let's say that there is no affixing to the extent that the  
20 Code requires.

21 In the Third Circuit discussion, while the Circuit  
22 agrees that in order for there to be holder in due course  
23 status for Uniform Commercial Code requirements, there needs  
24 to be that affixation, if that's the correct word, and if it's  
25 not there, tough luck. It says -- the Court does in that

1 case, that that's not the end of the story --

2 MR. KAPLAN: Correct.

3 THE COURT: -- that there can be transferee status  
4 regarding the note and that if the note is otherwise shown to  
5 have been transferred, there may not be holder in due course  
6 status which comes with opportunities to assert certain  
7 defenses like fraud and the like, but there will be  
8 opportunity to enforce the obligation.

9 MR. KAPLAN: Correct, Your Honor.

10 MR. LEVITT: I'm well aware.

11 THE COURT: So how do I read that and where does  
12 that -- where would that leave us here?

13 MR. LEVITT: Again, it's not my burden, Your Honor.  
14 It's the defendant's burden to show that if they're not a  
15 holder, and my understanding was they're just -- they're  
16 taking the position that they are a holder based upon allonge,  
17 but if they're taking the position they're not a holder but a  
18 transferee, they have to prove, number one, that they have  
19 possession of the original note so the original note has to be  
20 in Court here today, and they have to prove each of the  
21 transfers of that note to the bank's -- to the --

22 THE COURT: The original note has to be in their  
23 possession? What section of the Code are you relying on?

24 MR. LEVITT: I believe I'm referring to 3-203, Your  
25 Honor, and again --



1 THE COURT: 3-203(A)? 3-203 --

2 MR. LEVITT: Actually, Your Honor, I believe they  
3 have to show the transfer of the instrument under 3-203 --

4 THE COURT: (B)? (A) --

5 MR. LEVITT: I guess (A) deals with the transfer --

6 THE COURT: (A) -- "An instrument when it is  
7 delivered by a person other than its issuer" --

8 MR. LEVITT: Correct.

9 THE COURT: -- "for the purpose of giving it to the  
10 person receiving delivery the right to enforce the  
11 instrument."

12 MR. LEVITT: Your Honor, regardless of whether  
13 you're claiming to be a holder under an endorsement or if  
14 you're claiming to be a holder or a transferee, you have to  
15 have physical possession of the note. The UCC requires they  
16 have physical --

17 THE COURT: And that's --

18 MR. LEVITT: -- physical possession of the note.

19 THE COURT: -- that's 203(A) --

20 MR. LEVITT: Correct.

21 THE COURT: -- physical possession.

22 MR. LEVITT: Physical. And, Your Honor -- and  
23 again, I'll -- and I apologize because I just found the case  
24 yesterday, Wilhelm addresses that issue also and Wilhelm says  
25 that you've got to show the transfers, how the ultimate holder

1 or the person in possession of that note came into possession  
2 of the note and they actually have to have physical possession  
3 of the note, not a copy, the actual note. But that's not my  
4 burden --

5 THE COURT: I'm not looking --

6 MR. LEVITT: -- and if the plaintiff's going to take  
7 that position --

8 THE COURT: I'm looking at you to articulate clearly  
9 the standards that I ought to be looking for --

10 MR. LEVITT: Correct.

11 THE COURT: -- and these sections are not cited in  
12 your brief. That's --

13 MR. LEVITT: Well, Your Honor --

14 THE COURT: That's a bit of a --

15 MR. LEVITT: Well but, Your Honor, I did -- it was  
16 very clear in the brief with regard to the fact that they  
17 could be a holder, they could be an owner, they could be a  
18 transferee, very clear in the brief and I cited the Court to  
19 both the Third Circuit decisions as well as the Wells decision  
20 and the Wells decision as I included it in there, albeit in a  
21 footnote, has an excellent discussion of how a party can even  
22 be the owner of a note but not have the right to enforce it.

23 But both Wells and the Third Circuit decision as  
24 well as this case that I just came up with address the various  
25 ways that a party can be -- can enforce a negotiable

1 instrument. And again, my understanding from discovery and  
2 from my limited involvement in this litigation is that the  
3 defendant is taking the position that they hold and they're a  
4 holder by way of endorsement, and if they have proofs to the  
5 contrary then -- and I'm not going to change the UCC, Your  
6 Honor, the UCC says what it says.

7 THE COURT: It certainly does. I thank you, sir.  
8 Mr. Kaplan?

9 MR. KAPLAN: Your Honor, I guess my reading of the  
10 paperwork is we were fighting over whether or not Bank of New  
11 York as the trustee was in fact the transferee holder of the  
12 note.

13 THE COURT: That was certainly the focus of the  
14 argument, but it doesn't take away the UCC requirements. Are  
15 you asserting holder in due course status?

16 MR. KAPLAN: Well, I don't believe that was  
17 particularly an issue or a challenge. There was no allegation  
18 of fraud or anything. His client admitted in the stipulation  
19 of facts that he signed the note, signed the mortgage, okay,  
20 and that there is a validly filed apparently assignment in the  
21 County Clerk's Office assigning the mortgage to the Bank of  
22 New York as trustee.

23 In addition, Ms. Scovish provided to counsel a copy  
24 of the endorsed allonge since this was filed evidencing a  
25 transfer of the note to Bank of New York, and I have the

1 original in my hand, okay? My witness will certainly testify  
2 to the document. It's a document that's maintained in the  
3 ordinary course of business --

4 THE COURT: Well, let's hear from your witness then.

5 MR. KAPLAN: Okay.

6 THE COURT: Good. Come on up. If you would remain  
7 standing for a moment; place your left hand on the Bible and  
8 raise your right hand.

9 LINDA DeMARTINI, DEFENSE WITNESS, SWORN

10 THE COURT: Please have a seat. Your full name,  
11 first and last, and spell your last name, please.

12 THE WITNESS: My name is Linda DeMartini. The last  
13 name is spelled D-E capital M-A-R-T-I-N-I.

14 DIRECT EXAMINATION

15 BY MR. KAPLAN:

16 Q Okay, Ms. DeMartini, would you -- who are you employed by?

17 A I am employed by Bank of America Home Loans, formally  
18 known as Countrywide Home Loans.

19 Q Okay. And how long have you been employed there?

20 A A total of almost ten years.

21 Q And what is your position there?

22 A I am an operational team leader for the Litigation  
23 Management Department currently. I've been there just about a  
24 year.

25 Q Are you familiar with the documents relating to Mr. Kemp's

1 mortgage loan?

2 A Yes, I am.

3 Q Okay. Now who, based upon your knowledge of the loan  
4 documents, who's presently the owner, holder, transferee of  
5 the note?

6 A Well, the owner as in the investor, that would be Bank of  
7 New York, and we -- we are the servicer, Bank of America Home  
8 Loan, Servicing, LP, formally known as Countrywide Home Loan  
9 Servicing, LP.

10 Q Okay.

11 MR. KAPLAN: I'd like this marked as I guess D-1.

12 Okay, may I approach the witness, Your Honor?

13 THE COURT: Yes.

14 BY MR. KAPLAN:

15 Q Could you tell the Court what that document is?

16 A That's the allonge to the promissory note.

17 Q And is that the original?

18 A Yes, this is.

19 Q And it references -- what -- could you -- and who signed  
20 that document?

21 A Sharon Mason.

22 Q And what's Ms. Mason's position with Country --

23 A She is Vice President. She's actually part of our  
24 Bankruptcy Risk Litigation Management Department. She's  
25 actually my boss's boss.

1 Q Okay. And you're familiar with Ms. Mason's signature?

2 A Yes, I know it very well.

3 Q And that's Ms. Mason's signature?

4 A Definitely.

5 Q And the allonge is -- the purpose of the allonge?

6 A It shows the transfer to Bank of New York as the trustee.

7 Q Okay. So it -- it's your testimony that Bank of New York  
8 is trustee as the holder or the investor of that loan?

9 A Yes, that's correct.

10 MR. KAPLAN: Your Honor, essentially she has  
11 testified to the document. I really don't have any other  
12 questions that --

13 THE COURT: Well, let's cross.

14 CROSS-EXAMINATION

15 BY MR. LEVITT:

16 Q Ms. DeMartini, you said you're familiar with the loan  
17 documents?

18 A Hm-hmm.

19 Q What do they consist of?

20 A Well, we've got the notice there, the mortgage is there.  
21 In our system we have any of the documents -- settlement  
22 statement, title policy, every single document that would have  
23 been signed at the time that the loan was taken out.

24 Q When was the first time that you saw those documents?

25 A A few weeks ago.

1 Q Were you at all involved in the preparation of the proof  
2 of claim?

3 A No, I was not involved in the proof of claim. That would  
4 have been before it got to the Litigation Department.

5 Q When was the first time that you saw the allonge to the  
6 promissory note?

7 A Approximately two weeks ago.

8 Q And how was it that you came to see the allonge to the  
9 promissory note?

10 A Well, in my role as a supervisor in the department I have  
11 litigation specialists who work for me. When cases are coming  
12 up, I review their cases as a regular matter of course so I'd  
13 be reviewing the documents with that. When this date came up  
14 as far as having this hearing today and it became known to me  
15 that I was most likely going to be the one traveling here to  
16 be a part of it, I made sure that I got involved in every  
17 aspect of the case.

18 Q When was this allonge prepared?

19 A This allonge would have been prepared by my specialists.  
20 I don't have the exact date committed to memory, but this  
21 would have been done within the last couple of months most  
22 likely.

23 Q So one of your employee's prepared the allonge?

24 A One of my employee's would have taken -- would have gotten  
25 the allonge and we would have been the ones that obtained the

1 signature from Sharon, yes.

2 Q So it was just recently signed?

3 A Fairly recently signed, yes.

4 Q Signed essentially in contemplation or in the course of  
5 this litigation, correct?

6 A Most likely.

7 Q And it was prepared in your office?

8 A It would have been -- whether it was originally prepared  
9 in my office or not I can't answer to that. I can tell you it  
10 was signed in our office because Sharon's the one that signed  
11 it --

12 Q So the original --

13 A -- and I've been to her office.

14 Q -- the original was located in your office?

15 A Yes.

16 Q Where's your office located?

17 A Simi Valley, California.

18 Q And has the original of this allonge remained in your  
19 office until you appeared here today?

20 A We had sent it on to -- to our attorneys. They were in  
21 possession of it.

22 Q And again, who do you believe is the holder of the note  
23 and mortgage here?

24 A Well, Countrywide -- Bank of America -- whatever we're  
25 calling ourselves these days, we are Bank of America now -- we



1 originated this loan. It was originated via a broker and it's  
2 really always been a Countrywide loan. The investor is Bank  
3 of New York. We are the servicer of the loan.

4 Q Now, when you say it's really a Countrywide loan, wasn't  
5 it sold? Wasn't this loan securitized and ultimately sold --  
6 sold to this trust?

7 A Right, it would have been securitized and sold. They are  
8 the investors of the loan. But we are the ones that would  
9 have originated it, we are the ones that have always serviced  
10 it.

11 Q Today who is the owner of the loan?

12 A Bank of New York.

13 Q Bank of New York?

14 A As -- as the trustee for the certificate holder CWABS,  
15 Asset-Backed Securities series number --

16 Q And who is in possession of the note?

17 A Who is in possession of the note? We have the note in our  
18 origination file.

19 Q So -- so Bank of New York as trustee does not hold the  
20 note, is that correct, or is not in possession of the note?

21 A The original note to my knowledge is in the origination  
22 file.

23 Q Where is the -- do you have it here today?

24 A No, I don't have it with me here today.

25 Q So you don't have the note?

1 A It's in our office.

2 Q So it's in your office, it's not with this trust that owns  
3 the -- that's supposedly holds the -- or is the owner of this  
4 note, is that correct?

5 A That's correct.

6 Q And your testimony is that this allonge was never  
7 submitted to -- it was never in the possession of Bank of New  
8 York as trustee for the certificate holder, is that correct?

9 MR. KAPLAN: Your Honor, I object. Countrywide or  
10 Bank of America is the servicer. They possess and hold all  
11 the documents.

12 THE COURT: Don't give me an argument, that's not an  
13 objection to the question. I don't mean to be -- to cut your  
14 off, but you're welcome to make that argument bottom line, but  
15 that's a perfectly proper question.

16 BY MR. LEVITT:

17 Q And this allonge, it's a stand-alone document, correct?  
18 It's not attached to anything, is that correct?

19 A I'm not sure I'm understanding your question.

20 Q Was there anything -- when you brought the original that's  
21 in front of you, did you remove it? Was it stapled to  
22 something else?

23 A No, it wouldn't have necessarily been stapled to something  
24 else. There would have probably been other documents showing  
25 the -- you know, we would have shown her the note. We would

1 have reviewed all of that before.

2 Q And where are all the documents that you showed her?

3 A Well, I have copies of -- I have a copy of the note, I  
4 have a copy of the deed with me here today.

5 Q And those --

6 A They're signed copies.

7 Q Can you show me exactly the documents that you showed her  
8 when you had her sign this allonge?

9 A They're probably right -- well, they would be in that  
10 clump there. That's mostly the Pooling and Servicing  
11 Agreement, the larger one.

12 Q This one?

13 A Yeah. There's the note in there, there's the deed and the  
14 mortgage and you sign it.

15 Q You just --

16 MR. KAPLAN: May I provide this --

17 MR. LEVITT: -- I'm sorry.

18 MR. KAPLAN: -- provide this note?

19 MR. LEVITT: Yeah, go ahead.

20 THE WITNESS: Because this was provided to me by my  
21 specialist to -- to bring along so that I have the documents  
22 here for you today.

23 BY MR. LEVITT:

24 Q Let me ask you this. Did you show those documents to --  
25 is it Sharon Mason?

1 A Did I personally show the documents? Whoever brought her  
2 -- and to be honest with you, I don't know if it was me or my  
3 specialist, Dee, who brought them to her -- whoever brought  
4 them to her would have had them with them, yes, whichever of  
5 the two of us.

6 Q Who brought them to her?

7 A Generally speaking, it would have been me, but I don't  
8 recall bringing this particular one to her so I believe it was  
9 Dee.

10 Q So you don't recall bringing it, you don't recall -- and  
11 you don't know what documents were shown to her, is that  
12 correct?

13 A No, I know what documents were shown to her because  
14 they're right here and they -- and they're all together.

15 Q Did you bring those documents to Sharon Mason? Did you  
16 personally?

17 A Not to my knowledge, no.

18 Q Do you know specifically who brought those documents to  
19 Ms. Mason?

20 A My specialist, Dee.

21 Q And you saw her bring the documents to Ms. Mason?

22 A Did I physically stand over her --

23 Q Yes.

24 A -- and witness it? No.

25 Q Okay. Is the original note in that stack of documents?

1 A An imaged copy of the signed note is in here.

2 Q Is --

3 A The absolute original, no, it is not.

4 Q And again, my question before was was this attached to the  
5 note? This allonge, was it attached physically, with a  
6 staple, with a piece of glue -- was it attached?

7 A With a staple? No, because then it would have a hole in  
8 it. But it would have been brought along with it. We would  
9 have shown it to her.

10 Q But again, now again getting back to my other question, so  
11 this is a stand-alone document, it wasn't attached to  
12 anything?

13 A Okay, then yes.

14 Q Okay. And can you take a look at the -- what you believe  
15 to be the good copy of the note that you have?

16 A Okay.

17 Q Do you mind separating it from the rest of the papers?

18 A Sure, I'll take it apart.

19 (Pause in proceedings)

20 A Okay, and your question?

21 MR. LEVITT: Your Honor, may I approach the witness?

22 THE COURT: Sure.

23 BY MR. LEVITT:

24 Q Not the mortgage, the note --

25 A Yeah, I've got all kinds of stuff.

1 MR. LEVITT: Your Honor, if you could excuse us one  
2 second. There seems to be a discrepancy between what the  
3 witness has and what my office was provided.

4 THE COURT: Certainly.

5 MR. KAPLAN: Judge --

6 THE COURT: And while you look at that, let me see  
7 what's going on with the other case. You're welcome to take a  
8 few minutes.

9 (The Court hears another matter)

10 MR. LEVITT: Your Honor, with counsel's permission,  
11 since we have stipulated, I'd like to provide a copy to Your  
12 Honor.

13 THE COURT: All right. Is this a copy that we can  
14 mark?

15 MR. LEVITT: It's an exact copy and we can mark that  
16 as joint Exhibit 1, I believe.

17 THE COURT: J-1, interest only adjustable rate note.

18 BY MR. LEVITT:

19 Q Now, that document is the note that was contained in your  
20 file?

21 A Yes.

22 Q And there's no endorsement on the last page of that note,  
23 is there?

24 A No --

25 Q There's --

1 A -- there's no signature.

2 Q Is there room on the bottom if somebody wanted to put Pay  
3 To The Order Of? Would there be room on the bottom?

4 A Well, I'm sure you could find a way to fit it in.

5 Q Okay.

6 MR. LEVITT: I have no further questions of this  
7 witness, Your Honor.

8 THE COURT: All right.

9 MR. KAPLAN: Cross-examine, Your Honor?

10 THE COURT: Please, please.

11 REDIRECT EXAMINATION

12 BY MR. KAPLAN:

13 Q Ms. DeMartini, is it generally the custom to -- for your  
14 investor to hold the documents?

15 A No. They would stay with us as the servicer.

16 Q And are documents ever transferred to the investor?

17 A If we service-release them they would be transferred to  
18 whomever we're service-releasing them to.

19 Q So I believe you testified Countrywide was the originator  
20 of this loan?

21 A Yes.

22 Q So Countrywide had possession of the documents from the  
23 outset?

24 A Yes.

25 Q And subsequently did Countrywide transfer these documents

1 by assignment or an allonge?

2 A Yes.

3 Q And --

4 A Well, transferred the rights, yes, transferred the  
5 ownership, not the physical documents.

6 Q So the physical documents were retained within the  
7 corporate entity Countrywide or Bank of America?

8 A Correct.

9 Q Okay. And would you say that this is standard operating  
10 procedure in the mortgage banking business?

11 A Yes. It would be normal -- the normal course of business  
12 as the reason that we are the servicer, as we're the ones that  
13 are doing all the servicing, and that would include retaining  
14 the documents.

15 Q Now, you were asked about whether or not the note could be  
16 -- was endorsed at the bottom. Is it generally the practice  
17 to endorse the actual note or to use an allonge?

18 A It's -- I've never seen an actual note that has an  
19 endorsement on the bottom.

20 Q So would you say it's normal --

21 A It's generally more --

22 Q -- to have an allonge?

23 A Yeah, it would be more normal to have an allonge.

24 Q Okay. And once the allonge was signed, what would  
25 generally happen to the allonge?



1 A Well, it would also be imaged and it would be recorded and  
2 it would be put in our system and it would be kept as a normal  
3 course. In a situation like this, we forwarded it onto the  
4 attorneys because of the case but --

5 Q Okay. And if it had not been forwarded to the attorneys,  
6 what would have happened to the allonge?

7 A It would have ended up in the file with everything else.

8 Q And the note attached to it?

9 A Yes.

10 Q Thank you.

11 MR. KAPLAN: I have no further questions, Your  
12 Honor.

13 MR. LEVITT: Just briefly, Your Honor.

14 REXCROSS-EXAMINATION

15 BY MR. LEVITT:

16 Q Ms. DeMartini, you testified that this allonge was just  
17 prepared a couple of weeks ago, correct?

18 A Yeah, a short time ago, yes.

19 Q And wasn't it prepared because counsel called up and said  
20 we need and allonge?

21 A Yes.

22 Q So it wasn't your normal course to have an allonge in this  
23 situation, correct?

24 A Well --

25 Q When was this loan made?

1 A This loan was taken out I believe in 2006 -- yes.

2 Q So between 2006 and 2009 when you got a phone call from  
3 counsel that said we've got a problem, prepare an allonge,  
4 there was no allonge, correct?

5 A There wasn't an allonge prior to that, no. This loan,  
6 like I said, it was always -- this was a loan that we  
7 originated that has always been within the company that yes,  
8 it was sold to -- as Bank of New York as the trustee and  
9 securitized, but there wasn't a need for an allonge prior to  
10 this case.

11 Q Because there was no litigation pending, correct?

12 A Well, because there was no litigation --

13 Q Thank you.

14 A -- and because there was nothing to -- to get in the way  
15 of the fact of the normal course of -- of the way that this  
16 loan's being executed and being --

17 Q That's fine.

18 A -- being serviced.

19 Q Thank you.

20 MR. LEVITT: That's it, Your Honor.

21 MR. KAPLAN: One more question, Your Honor.

22 REDIRECT EXAMINATION

23 BY MR. KAPLAN:

24 Q Was it the intention of Countrywide to assign both its  
25 rights in the mortgage and the note to Bank of -- to Bank of

1 New York as trustee?

2 A Yes.

3 THE COURT: Say that again?

4 BY MR. KAPLAN:

5 Q Was it the intention of Countrywide to assign its rights  
6 in both the note and the mortgage to Bank of New York?

7 MR. LEVITT: I'm going to object to the question,  
8 Your Honor. I'm not sure this witness is competent to answer  
9 that question based upon the foundation laid.

10 THE COURT: I agree.

11 MR. KAPLAN: Well, Your Honor, they -- to the extent  
12 that there wasn't a physical document at some -- at the time,  
13 they remediated that by signing the allonge and facilitating  
14 their intentions.

15 THE COURT: Well, that's certainly a valid argument,  
16 but it's not -- it still doesn't answer the question of  
17 whether Ms. DeMartini can speak for Countrywide in terms of  
18 their intent in doing anything.

19 MR. KAPLAN: Well, it's evidence that it was their  
20 intent to assign the mortgage.

21 THE COURT: It very well may be, and we'll leave it  
22 at that.

23 MR. KAPLAN: Okay.

24 THE COURT: Objection sustained. Let me ask you a  
25 couple of questions.

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EXAMINATION

BY THE COURT:

Q There was an unexecuted allonge to America's Wholesale Lender that was filed with the proof of claim. Is that in your file as well, that --

A Yeah. I have the -- the unsigned copy in there.

Q And it is unsigned?

A The old one? Yeah, that's the -- the copy I have, it looks like it's unsigned, yeah.

Q So is it the normal practice of Countrywide not to sign allonges in the normal course?

A I can't answer to why that one was unsigned and that was in there. When a loan goes into bankruptcy, our Bankruptcy Department is the one that would be the ones actually preparing and filing the proof of claim. Our group gets involved when things turn to litigated matters --

Q But I'm not --

A -- and so that's why I can't speak to what they do in their -- in their normal course of action. I haven't seen an unsigned one before.

Q Well, I'm not talking about the process of filing a proof of claim. I'm talking about the customary business practice of Countrywide when a loan is transferred, when ownership is transferred, when in this case the mortgage assignment occurred on March 24th, 2008, correct?

1 A Yes.

2 Q And would that have been the date that the ownership of  
3 the note and mortgage were sought to be transferred to Bank of  
4 New York as trustee?

5 A That would have been the day they got the ownership, yes.

6 Q So the question is whether you know whether it's normal  
7 practice for Countrywide to execute an allonge at the time  
8 that that transfer takes place.

9 A I don't believe that they're always executed exactly when  
10 the transfer takes place. I believe that it often times  
11 happens that it happens after the fact.

12 Q And does it always happen?

13 A I can speak that it always happens, no.

14 Q So there's no routine that requires internally, to your  
15 knowledge, that the allonge be executed in connection with the  
16 transfer of ownership?

17 A No, I don't think that there is a norm in that respect  
18 because in a normal course of action and for -- and normal is  
19 kind of a hard word anyway -- but --

20 Q A normal business practice, an ordinary --

21 A -- but as a normal business practice with a normal loan,  
22 often times there really isn't a need for it unless the loan  
23 is going to continually to be sold, and since this loan was --  
24 yes, it was transferred to Bank of New York as trustee as it  
25 was securitized, but it wasn't that another mortgage company

1 had the loan and then we bought it from them. Like I  
2 mentioned, this was always done by Countrywide and we  
3 securitized it and we -- you know, we sold it to them --

4 Q This was done --

5 A -- and so --

6 Q -- I'm not asking whether it was necessary, I am asking  
7 whether there was an ordinary business practice to sign an  
8 allonge and the answer is no, there was not?

9 A I don't believe so.

10 Q Countrywide, the same entity as the originator of the  
11 loan, serviced the loan from the outset or was it a different  
12 aspect of the company?

13 A No. It would have always been the same. Even though Bank  
14 of America has taken over Countrywide so to speak and we are  
15 now wholly owned by Bank of America, all of the Countrywide  
16 loans are still being serviced and the Bank of America --  
17 prior Bank of America loans, they're all still being serviced  
18 and done separately. This has always been by Countrywide.

19 Q Okay. Putting aside the takeover by Bank of America, this  
20 loan was given on May 31st, 2006, correct?

21 A Yes.

22 Q And when the loan was given, after the loan was given,  
23 Countrywide Home Loans, Inc. retained the servicing on the --

24 A Yes, that's correct.

25 Q And as of March 24th, 2008, that continued to be the case,

1 is that right?

2 A That's correct.

3 Q And there was a Pooling and Servicing Agreement between  
4 Countrywide and --

5 A Bank of New York.

6 Q -- Bank of New York --

7 A Yes.

8 Q -- regarding the continued servicing of the loan, is that  
9 right?

10 A That's correct.

11 Q And to your knowledge -- I think you might have the  
12 servicing arrangement --

13 A Yes, I brought a copy of it.

14 Q -- with you, to your knowledge, is there any provision  
15 that in the servicing of this loan that Countrywide acts as  
16 the agent for Bank of New York in terms of possession of  
17 original documents including the note in connection with this  
18 transaction?

19 A I have the Pooling and Servicing Agreement there. It's  
20 over 200 pages long. I'll be very honest; I did not read the  
21 entire Pooling and Servicing Agreement. I do know that it is  
22 our normal course of action with the loans that we service  
23 that we are the ones that retain the -- that we retain those  
24 documents.

25 Q Could such a clause be included in that, and if there were

1 such a clause, would that -- what would be the effect of that?  
2 Should I look for that clause? Should I ask you to look for  
3 that clause, or is it a fruitless enterprise?

4 MR. LEVITT: Your Honor, I think -- and I have it  
5 also and it is a very thick document, Your Honor -- there are  
6 other provisions in this document that I think would be --  
7 even if there was something in there that says they could  
8 retain documents, there's other provisions in this document  
9 which would be contradictory because there's provisions in the  
10 Pooling and Servicing Agreement that say that documents have  
11 to be delivered to an intermediary between Bank of America and  
12 Bank of New York, the --

13 THE COURT: Well, shouldn't I consider all of that?  
14 In other words, your -- one of your key points is the note was  
15 not properly transferred because possession of the original  
16 note was not given to the new owner, is that right?

17 MR. LEVITT: Partially, Your Honor.

18 THE COURT: Okay.

19 MR. LEVITT: But again, I'm not --

20 THE COURT: What's the --

21 MR. LEVITT: -- but I'm not raising --

22 THE COURT: What part of it is --

23 MR. LEVITT: -- but I'm not -- I'm not defending  
24 this. The proofs that have been submitted to the Court are  
25 that there's a piece of paper that they're calling an allonge



1 that was prepared in the course of this litigation that  
2 they're relying on as an endorsement.

3 THE COURT: You're right.

4 MR. LEVITT: I haven't --

5 THE COURT: You're right, but --

6 MR. LEVITT: But I haven't heard --

7 THE COURT: -- I'm asking the question, and maybe it  
8 should have been asked otherwise, but if there is such a  
9 provision in the servicing agreement about the retention of  
10 possession as agent for the owner --

11 MR. LEVITT: And if -- if --

12 THE COURT: -- what part of your argument is it? In  
13 other words, you say possession of the document is part of the  
14 argument. What else is a part of the argument?

15 MR. LEVITT: No, but possession -- you have to have  
16 possession of the document but in addition to possession, you  
17 either have to have an endorsement, or you have to have proof  
18 that these documents were actually transferred to the ultimate  
19 owner, even if the agent for the owner is holding them. But  
20 there still has to be proof that it was delivered from A to B  
21 to C but none of those proofs have been submitted and it's not  
22 my burden, Your Honor.

23 If counsel wants to say all right, forget the holder  
24 argument, I lost on holder but here's my case that this note  
25 was transferred from A to B to C, here's the delivery receipts

1 and yeah, it may be sitting in somebody's vault in California  
2 and not with this trust, fine. But I haven't heard those  
3 proofs and I don't think the Pooling and Servicing Agreement  
4 gives us that, Your Honor. We need to see the delivery  
5 receipts, we need to show the chain and there's nothing before  
6 the Court.

7 THE COURT: Understood. Mr. Kaplan, is there  
8 anything in those documents in the Pooling and Servicing  
9 contract that would --

10 MR. KAPLAN: That's a good question, Your Honor,  
11 but, you know --

12 THE COURT: Don't you think you --

13 MR. KAPLAN: -- and I believe the witness's  
14 experience is that documents are not physically transferred  
15 from party to party to party.

16 THE COURT: But it's not experience that we're  
17 talking about, it's UCC requirements.

18 MR. KAPLAN: I understand.

19 THE COURT: Is Mr. Levitt right when he says that  
20 some kind of delivery of possession is required in order to  
21 qualify as a transferee, not a holder? I think we've pretty  
22 well established that the affixing that is required for holder  
23 in due course status as not apparent in this case, has not  
24 been established, but if you establish under UCC requirements  
25 that there is a proper transfer, there may still be

1 opportunity to enforce the obligation.

2 MR. KAPLAN: Right. Your Honor, I understand but, I  
3 mean, there's no way I'm going to argue that there was a  
4 physical transfer. Countrywide was the servicer, the  
5 originator. They had the documents --

6 THE COURT: Right, there was no --

7 MR. KAPLAN: -- they physically signed the necessary  
8 documents required to document their ownership interests being  
9 transferred to the trust --

10 THE COURT: That's the issue. In other words,  
11 I'm --

12 MR. KAPLAN: -- but they didn't physically deliver  
13 it.

14 THE COURT: -- I'm raising the possibility that the  
15 Pooling and Servicing Agreement might contain provisions that  
16 would serve to offer Countrywide an out, meaning I'm not --  
17 you know, here to advocate Countrywide's cause, but I am here  
18 to get to the -- as close as I can to what should happen here.

19 MR. LEVITT: Your Honor, I'll answer the question  
20 because I did see in the index -- and if Your Honor would like  
21 I can hand up the Pooling and Servicing Agreement. This is  
22 the Pooling and Servicing Agreement that was provided by the  
23 defendant and I'll call your attention to Section 8-13.

24 THE COURT: Thank you.

25 MR. KAPLAN: What page is he on?

1 MR. LEVITT: It's 150.

2 THE COURT: 8.13, "Access to records of the trustee.  
3 The trustee shall afford the sellers, the depositor, the  
4 master servicer, the NIM Insurer and each certificate owner  
5 upon reasonable notice during normal business hours access to  
6 all records maintained by the trustee" --

7 MR. LEVITT: That tells me the trustee has the  
8 records, Your Honor. That's as close as I can get. But I'll  
9 let you finish.

10 THE COURT: Well, yes, that doesn't seem to get at  
11 it. If there is no authority in this document for Countrywide  
12 to act as the agent for the trustee in maintaining the  
13 original documents, then we face squarely the question of  
14 whether lack of possession by the owner, the retention of  
15 possession by the servicer, violates the transferee status of  
16 the owner, or whether the servicer who filed the proof of  
17 claim can stand by that status to succeed against this  
18 challenge.

19 MR. KAPLAN: Well, Your Honor, the servicer has  
20 authority to act in servicing the loan, including filing a  
21 proof of claim under the Pooling and Servicing Agreement. In  
22 addition, I believe there's a power or attorney that Bank of  
23 New York has provided to Countrywide to act on their behalf to  
24 administer --

25 THE COURT: Well, where is that?

1 MR. KAPLAN: I'd be happy to provide that to Your  
2 Honor. Okay, we can mark that as Defendant's Exhibit 2.

3 THE COURT: Did we mark this copy of the servicing  
4 agreement as Defendant's Exhibit 3?

5 MR. KAPLAN: That's fine, Your Honor.

6 THE COURT: And did we allow you a chance to look at  
7 this document to ascertain what in it might be helpful to  
8 you --

9 MR. KAPLAN: Your Honor, there's --

10 THE COURT: -- rather than just leaving it to me to  
11 peruse?

12 MR. KAPLAN: Well, that's fine, Your Honor, we'll be  
13 happy to go through and submit to Your Honor references to the  
14 various provisions in the document.

15 THE COURT: Okay, let's take a look, D-2, power of  
16 attorney signed by the trustee. "Under the Pooling and  
17 Servicing Agreements" -- "constituting and appointing  
18 Countrywide Home Loan Servicing, LP full power of substitution  
19 and re-substitution for the limited purpose of executing and  
20 recording any and all documents necessary to effect a  
21 foreclosure of a mortgage loan, the disposition of an REO  
22 property, an assumption agreement or modification agreement to  
23 supplement -- or supplement to the mortgage note, mortgage or  
24 deed of trust and a reconveyance, deed of reconveyance or  
25 release or satisfaction of mortgage or such instrument

1 releasing the lien of a mortgage in connection with the  
2 transactions contemplated in those certain Pooling and  
3 Servicing Agreements, by and among the undersigned," et  
4 cetera.

5 "The undersigned also grants" -- "full power and  
6 authority to do and perform each and every act and thing  
7 requisite and necessary to be done in and about the premises  
8 as fully to all intents and purposes as might or could be done  
9 in person to effect items one, two and three above, hereby  
10 ratifying and confirming all that said attorneys in fact and  
11 agents or any of them or their substitutes may lawfully do or  
12 cause to be done by virtue hereof."

13 Well, there's a question mark -- does this power of  
14 attorney authorize the agent/servicer to hold the original  
15 documents in substitution for and satisfaction of the  
16 requirements of the UCC. I mean, that's a question mark.

17 MR. KAPLAN: I understand. I understand, Your  
18 Honor. But, I mean, Your Honor's probably familiar, mortgage  
19 lenders and servicers don't normally transfer documents back  
20 and forth in order to effectuate physical transfer. They  
21 utilize agents or servicers to execute documents and retain  
22 the documents and they don't send them across the country by  
23 messengers or Federal Express to go to different vaults to be  
24 maintained because --

25 THE COURT: And that's fine. That's --

1 MR. KAPLAN: And that's standard --

2 THE COURT: I mean, I'm not accepting your testimony  
3 as an expert --

4 MR. KAPLAN: Yeah, I know, I know.

5 THE COURT: -- to that effect --

6 MR. KAPLAN: But I think it's reasonable --

7 THE COURT: -- but I'm accepting it and it may very  
8 well be reasonable. Is it permissible under the Code.

9 MR. KAPLAN: I understand, okay.

10 THE COURT: That's all I'm asking.

11 MR. KAPLAN: All I'm saying is I believe that it's a  
12 standard business practice amongst the mortgage banking  
13 industry and servicing industry not to physically move  
14 documents from party to party unless there is a change of  
15 servicing, in which case the physical files then must be sent  
16 to the new servicer, not necessarily the new investor, holder  
17 or -- you know, recorded owner of an assignment of mortgage,  
18 et cetera, but the new servicer.

19 THE COURT: Well, it certainly makes sense and  
20 presumably the Pooling and Servicing Agreement will clarify  
21 that there is agency status for that purpose and we would try  
22 to understand whether that would be sufficient for UCC  
23 purposes. What else should I be looking at, counsel? We're  
24 talking first about possession. What else are we talking  
25 about? All right, let me ask one question before I forget. I

1 take it that the allonge that we've looked at, the new  
2 allonge, has not been recorded?

3 MR. KAPLAN: Well, normally you would not record a  
4 note, Your Honor. The note passes from party to party. It's  
5 like a check --

6 THE COURT: Right.

7 MR. KAPLAN: -- it doesn't get recorded in the  
8 County Clerk's Office generally --

9 THE COURT: That's fine.

10 MR. KAPLAN: -- so it would normally be placed in  
11 original -- with all the original documents and essentially  
12 attached to the note.

13 THE COURT: Understood. Okay, what else should I be  
14 looking at?

15 MR. LEVITT: Your Honor, if Your Honor does want to  
16 focus on the Pooling and Servicing Agreement, there are other  
17 provisions in the Pooling and Servicing Agreement that Your  
18 Honor might want to look at, specifically -- and if I could  
19 just grab my copy --

20 THE COURT: Of course. Is this your copy?

21 MR. LEVITT: Yes, it is. Actually, I have -- I have  
22 excerpts -- copies of excerpts, Your Honor, and I'll --  
23 actually I'll hand up the original to you so --

24 MR. KAPLAN: I would also argue, Your Honor, in that  
25 -- as I said, I believe it's standard operating procedure for



1 servicers, especially when they were the originator of the  
2 documents and when they sell them or securitize them and  
3 remain the servicer, to execute the documents that are  
4 required for transfer, but that there's not a physical  
5 transfer. And if you're going to determine --

6 THE COURT: Mr. Kaplan, you're testifying about the  
7 ordinary --

8 MR. KAPLAN: My witness I think can testify to that  
9 but I think --

10 THE COURT: Well, you're welcome to have --

11 MR. KAPLAN: -- I think Your Honor can --

12 THE COURT: -- her testify.

13 MR. LEVITT: She has.

14 MR. KAPLAN: -- I think Your Honor's experience can  
15 reasonably allow you to take judicial notice that documents  
16 don't go from party to party, that they remain with the  
17 servicer.

18 MR. LEVITT: I don't -- I don't think the --

19 THE COURT: I'm not going to take judicial notice of  
20 that.

21 I noticed that this particular copy is unsigned. Do  
22 you know when the Pooling and Servicing Agreement would have  
23 been signed?

24 THE WITNESS: We went to get a signed copy the other  
25 day and we were told that it is not customary for us to have

1 the signed document so I wasn't able to access the signed  
2 document. We have the copy --

3 THE COURT: But --

4 THE WITNESS: -- but we don't have the signed  
5 original. I don't have the signed of that. That's the one  
6 document I don't have the original -- access to the original  
7 of.

8 MR. LEVITT: Your Honor, again, I'm not in any way,  
9 shape or form testifying but I can advise the Court that I  
10 spent many hours trying to find this Pooling and Servicing  
11 Agreement on the SEC website where they have to be filed and I  
12 could not find it, so the only copy of the Pooling and  
13 Servicing Agreement that I have is this unsigned copy provided  
14 by counsel for the defendant which I have to accept as a valid  
15 document.

16 But I can tell Your Honor, the SEC website is where  
17 -- where you can find them; I can't find it. I can find a lot  
18 of others in a similar name but with different numbers. I  
19 can't find this one.

20 THE COURT: Is there reference in this document that  
21 I have in my hand to this particular mortgage?

22 THE WITNESS: I don't have it in front of me.

23 THE COURT: There are all kinds of exhibits --

24 THE WITNESS: It's --

25 THE COURT: -- that have numbers but don't have

1 substance.

2 (Pause in proceedings)

3 THE COURT: Have you looked at that, counsel?

4 MR. LEVITT: Excuse me, Your Honor?

5 THE COURT: Have you looked at whether there is  
6 reference to this particular mortgage?

7 MR. LEVITT: No, Your Honor. Your Honor, it wasn't  
8 again my experience -- because I've been reading a lot of  
9 these lately -- my experience is there's a schedule that's  
10 annexed. Very often I'm finding that they don't include the  
11 schedule in the filing with SEC I guess for privacy purposes  
12 and you're directed to whichever law firm is the firm that  
13 filed the documents with the SEC, but I wasn't even provided  
14 the schedule as part of this submission.

15 And again, I went onto the SEC website looking for  
16 it and couldn't find it. I will also point out to Your Honor  
17 that the copy that I was provided and the copy that's in front  
18 of Your Honor on the first page references a draft. It says  
19 "Sidley" -- I guess Sidley and Austin was the law firm, it was  
20 their draft dated 06/27/06. I don't believe, again because  
21 this is labeled draft, this may not be the operative document  
22 but it is the only document that I was provided by the  
23 defendant.

24 MR. KAPLAN: I understand, Your Honor, and I wasn't  
25 involved in transmitting the document but I am aware that it

1 does say that.

2 THE COURT: Well, I think you need to get involved  
3 and --

4 MR. KAPLAN: I did -- I did ask specifically for a  
5 document that was signed and essentially was final.

6 THE COURT: Essentially?

7 MR. KAPLAN: Well, it was a final document --  
8 signed, final document, not as alleged, a draft.

9 THE COURT: And you didn't get it?

10 MR. KAPLAN: And I have not, no.

11 THE COURT: So we don't know what this is, nor do we  
12 know whether it applies to this particular situation. The  
13 only clue we have is that it's between Countrywide and the  
14 Bank of New York trustee and that it relates to Asset-Backed  
15 Certificate Series 2006/8 --

16 MR. KAPLAN: Right.

17 THE COURT: -- which suggests that it might be the  
18 same pool, but we don't know whether it was executed. We have  
19 questions raised because it's not on the SEC website and we  
20 don't have a specific listing of this particular mortgage, and  
21 I take it that additional time will not help you?

22 MR. KAPLAN: Well, I don't have physical access. It  
23 would be up to Countrywide or Bank of America --

24 THE COURT: Well, you as counsel for Countrywide --

25 MR. KAPLAN: Well, Your Honor, I would certainly

1 request additional time to allow Countrywide, the defendant,  
2 to procure the documents, provide them to counsel and Your  
3 Honor, as well as for us to synopsise the information  
4 contained in there pertaining to possession and retention of  
5 documents.

6 THE COURT: Well, you know, this is a serious  
7 consequence -- this meaning the relief sought by the  
8 plaintiff. If there are substantial gaps in my ability to  
9 follow the stream, then the plaintiff will be successful. I  
10 would offer that opportunity to Countrywide.

11 If they can't come up with a signed legitimate  
12 verified copy of it -- and it can be in the first instance the  
13 final executed document with some tie-in to this mortgage --  
14 somebody has an exhibit that would, you know, list this  
15 mortgage theoretically -- and if they don't, that's a problem  
16 -- with a certification from a qualified Countrywide  
17 representative that this is what it purports to be.

18 If there are further questions, we can take further  
19 testimony, either in Court or by telephone conference call. I  
20 hate to make you come back from California, although -- and  
21 it's not very nice this time of year in New Jersey, I will  
22 grant you that, but we can, you know, try to keep going in  
23 terms of getting it.

24 There is a limit and there is a burden, I fully  
25 agree with you, counsel. I'm pushing the envelope to see

1 where we get to in terms of lining these things up or not.  
2 That's what I'm aiming for because I frankly don't want to  
3 grant relief if there is something for instance in these  
4 documents and if the final draft has been executed and so  
5 forth that should guide resolution of this decision. It has  
6 major implications potentially. I mean, you know, my written  
7 decision may be ignored but it may be a basis for other such  
8 relief and I'd like to get it right if I can so --

9 MR. KAPLAN: I share that thought, Your Honor. I  
10 was going to mention, it does have significant ramifications  
11 because of what -- you know, the document and the physical  
12 retention of documents or physical transfer of the documents  
13 might mean to other -- you know, loans.

14 THE COURT: Then I urge Countrywide to take it  
15 seriously and to direct their attention to -- meaning if there  
16 are things that they want under seal for any reason, that's  
17 certainly something that we would accommodate in the first  
18 instance subject to objection so there is opportunity to work  
19 with them on this, but they've got to come to the table, and I  
20 think that's demonstrated by this hearing.

21 So if -- if there can be a -- if you're right,  
22 counsel, number one that possession is required but if that  
23 possession is demonstrated by agency, one might disagree about  
24 whether possession can be demonstrated by agency. Perhaps  
25 that's another question that is posed, even if the documents

1 do support that. But let's assume that Countrywide gets over  
2 that hurdle. What else would we look at -- should be look at?

3 MR. LEVITT: Again, Your Honor, the lack of  
4 endorsement, the fact that there's no allonge affixed so --

5 THE COURT: Well, affixing of the allonge we've sort  
6 of -- we're done with. We're -- this is not going to be a  
7 holder in due course but I'm not sure that it matters. You're  
8 right that there is no affixing, there's no proof that this  
9 was affixed in the way that the Third Circuit imagined was  
10 necessary -- not imagined but proclaimed was necessary.

11 Your assertion would be that the allonge that was  
12 executed two weeks ago should not be considered as an  
13 appropriate transfer because it was post-petition, it was in  
14 the litigation, it wasn't effective as of the date of the  
15 proof of claim or better yet, as of the date of the filing of  
16 the petition and that therefore, it is invalid.

17 MR. LEVITT: Correct, Your Honor.

18 THE COURT: And that is a very legitimate and  
19 important issue and I would appreciate Mr. Kaplan dealing with  
20 that.

21 MR. LEVITT: And so getting to the other portion,  
22 Your Honor, the only -- and it has nothing to do with holder  
23 in due course, we're not raising the fraud issue, we're not  
24 raising those issues. The issue is does this creditor have  
25 the right to enforce the note. So with regard to the allonge,

1 luckily I have a Third Circuit decision that makes it easy.  
2 With regard to the other, there's only one other way to  
3 enforce and that's to take the rights of the transferee --  
4 transferor under the Third Circuit decision and under 3-203.

5 And again there, Your Honor, if my position is the  
6 trust has to be in possession of the note and the trust has to  
7 prove that it took possession and if we're going to deal with  
8 the Pooling and Servicing Agreement -- and, Your Honor, one of  
9 the reasons why I wasn't moving it into evidence was because  
10 to me it wasn't competent evidence at this point, again, it  
11 wasn't my burden, but if counsel is going to find the  
12 legitimate document that's recorded with the SEC, well that's  
13 going to be the Bible, Your Honor, and that's going to say  
14 that this note had to be delivered.

15 Whether it ultimately ended up with the trust --  
16 with the servicer, the Pooling and Servicing Agreement, if  
17 it's at all close to this draft or like every other Pooling  
18 and Servicing Agreement I've read, it's going to say it would  
19 have had to be physically transferred first from Countrywide  
20 was the originator to the depositor, and then from the  
21 depositor ultimately to the trust.

22 The physical documents according to the Pooling and  
23 Servicing have to be transferred and in this document you're  
24 going to see it had to be endorsed. We're not going to have  
25 that here. So if they can prove that these documents were



1 physically transferred, meaning there's delivery receipts  
2 showing they were physically transferred from A to B, from B  
3 to C, and if C decided to let its agent hold them, I think,  
4 Your Honor --

5 THE COURT: Well, there's no question on this record  
6 and, you know, I'm ready to accept it as fact that these  
7 original documents never moved. I mean, that was the  
8 testimony.

9 MR. LEVITT: And if that's the case, Your Honor, I  
10 think we're done because unless the documents were physically  
11 transferred, the trust ultimately could decide to let its  
12 agent -- you know, Countrywide here, despite the witness's  
13 beliefs and assertions, Countrywide here is wearing two  
14 different hats, it's wearing the hat as Countrywide Home  
15 Mortgage, the one that originated these mortgages, packaged  
16 them and got rid of them as quickly as they possibly could,  
17 that's hat number one, and then as another way to make money,  
18 they're a servicer.

19 THE COURT: Right.

20 MR. LEVITT: So it's two different -- from all  
21 practical purposes and in fact I think the Pooling and  
22 Servicing Agreement will show, it's two separate and distinct  
23 legal entities, both Countrywide entities, now Bank of America  
24 entities. So if A, which is Countrywide the originator, ended  
25 up securitizing and selling this loan they would have had to

1 have followed the terms of the Pooling and Servicing Agreement  
2 to get it into the hands of the trust and then D, which is  
3 Countrywide the servicer, could have gotten possession. And  
4 even if it meant -- even if they stayed in the same vault but  
5 if it meant that there was a delivery receipt from A to D or A  
6 to B to C to D, that's what they have to prove.

7 And because they're saying that, now maybe they do  
8 have those delivery receipts and if they want to produce them,  
9 that's great, but if that document never moved from that safe,  
10 first of all they're in violation of their Pooling and  
11 Servicing Agreement, they're in violation of the UCC -- we're  
12 done.

13 THE COURT: If they're in violation of the UCC, I'm  
14 agreeing with you. If they're in violation of the Pooling and  
15 Servicing Agreement, I wonder how a debtor can avail  
16 themselves of enforcement of the pooling and servicing --

17 MR. LEVITT: Third-party beneficiary.

18 THE COURT: I'm sorry?

19 MR. LEVITT: They're the third-party beneficiary of  
20 this contract.

21 THE COURT: Beneficiary in terms of where the  
22 documents are -- that's a tough one.

23 MR. LEVITT: In terms of -- and sometimes it's  
24 third-party detriment too because we have all these problems  
25 of the way these servicers act, but the reality is, Your

1 Honor --

2 THE COURT: It's a whole other story.

3 MR. LEVITT: -- we're referenced, again, they're  
4 going to produce the document, we're going to be referenced as  
5 one of the loans that are subject to this Pooling and  
6 Servicing Agreement.

7 THE COURT: Yes, but the moving around of the  
8 documents are not for the benefit of the third-party  
9 beneficiary. You can make the argument that they are because  
10 they act upon the UCC protections of knowing who's holding  
11 what. That's not an unreasonable argument and I'm thinking it  
12 out as we go, but here's what I need, counsel. Because your  
13 submission didn't focus, I would -- because you didn't have  
14 the --

15 MR. LEVITT: I --

16 THE COURT: -- the factual basis --

17 MR. LEVITT: Correct.

18 THE COURT: -- now you do, I would appreciate your  
19 honing in on your arguments. They are to -- we've eliminated  
20 the affixing as we've said, but I'm interested in the  
21 possession element. At the same time that I allow the  
22 defendant to amplify upon their argument by future submission,  
23 not only of a document that is a final version if you have it  
24 and can get it and can certify that that's what it is and a  
25 focus on what provisions in that document I should -- on both

1 sides pay attention to -- obviously, when you get it you  
2 provide it to counsel as well, in addition to any argument  
3 that you would focus me on.

4 So it's half-baked. We've made some progress.  
5 We've understood certain factual predicates that the documents  
6 remained where they were, that the allonge was created two  
7 weeks ago and those are important facts to fit into the  
8 equation.

9 Did you have a comment, sir?

10 MR. KAPLAN: Yeah, I'm just -- I'm just a little --  
11 and believe me, I understand where Your Honor is heading. I'm  
12 not -- I know I'm not going to change Your Honor's mind, but  
13 I'm a little troubled by the fact that we're accepting a  
14 representation here. And this witness is in the Litigation  
15 Department, this witness is not the person that was  
16 responsible for the Pooling and Servicing Agreement or how  
17 these documents are dealt with.

18 I think at the very least, even if we don't have  
19 live testimony, we need to have something from someone who can  
20 say they're custodian of records that truly tracks this.  
21 We're accepting a representation --

22 THE COURT: Which representation?

23 MR. KAPLAN: The representation that they stayed in  
24 the same vault and they never moved. We don't know that, Your  
25 Honor. We're -- this is --

1 THE COURT: But let's examine --

2 MR. KAPLAN: -- and a lot of that is counsel's  
3 representation.

4 THE COURT: -- Ms. DeMartini in terms of her  
5 knowledge of that fact.

6 EXAMINATION

7 BY THE COURT:

8 Q You've testified that these documents, the originals, the  
9 files --

10 A Have remained with Countrywide.

11 Q -- stayed with -- now, are there two different entities?  
12 This note was entered into with Countrywide Home Loans, Inc.

13 A Yes.

14 Q Is that the same as Countrywide Home Loan Servicing, LP?

15 A Countrywide Home Loan Servicing, LP is the -- is our  
16 service -- is the portion of the business that does the  
17 servicing of the loan so they are slightly different in that  
18 they were both part of the -- what was formerly Countrywide  
19 Financial Corporation. Countrywide Servicing Home Loans, LP  
20 was the servicing portion of that business. They would -- and  
21 Countrywide Home Loans would have been the ones that  
22 originated the loan.

23 Q Well, let's talk first about your experience with the  
24 company. You said that you started about ten years ago?

25 A Yes.

1 Q And with which company, the servicer or the --

2 A I've always been involved with servicing.

3 Q In the servicing.

4 A Yes.

5 Q And what were your positions with servicing?

6 A Oh, I've had a lot of positions with servicing. I've been  
7 a customer service representative, I've been a supervisor,  
8 I've been a trainer, I've been a training developer, I've  
9 managed our Policies and Procedures writers, I've been a  
10 Communications leader, I've been a senior team leader, I've  
11 been a team leader auditor, a team leader trainer -- I've done  
12 all kinds of things all within the customer contact area of  
13 servicing.

14 And as being part of customer contact we had to --  
15 we were involved in every aspect of the servicing. We were  
16 the ones that did all of the speaking to the borrowers about  
17 anything to do with their loans so I had to know about  
18 everything in order to be able to do that and in order to be  
19 able to train the customer service representatives.

20 In order to do that, as I stated before, I went over  
21 to the -- we were called the Case Management Department; now  
22 we're called the Litigation Management Department. We are  
23 part of servicing as well under -- under -- in the loan admin  
24 servicing, what used to be loan admin servicing as a  
25 supervisor last September.

1 Q What contact, if any, during your experience with  
2 Countrywide Servicing have you had with the loan originator  
3 aspect of the company?

4 A I've never been involved specifically with the  
5 originations of the -- of the loans. As a servicer, we get  
6 involved after the loan is established and we're the ones that  
7 then deal with everything after the fact.

8 Q What do you -- are you aware of the procedures that occur  
9 internally as between the originator and the servicer as soon  
10 as the loan is given?

11 A Well, after the loan's originated, then it's going to what  
12 we would have called boarded our system. I would be familiar  
13 with it from the time that it boarded on --

14 Q What does that mean?

15 A Boarded is when it would get put into the computer system.  
16 That would be when the documents are all imaged and then  
17 stored. That all happens when the loan comes on board or  
18 becomes a part of our servicing. What happens to it prior to  
19 that as far as the origination process inasmuch as the  
20 underwriting or any of that, that I'm not as familiar with,  
21 no.

22 Q When the file is -- when the loan is boarded, who does  
23 that?

24 A Let me find the best way to describe that. Well, the  
25 documents themselves, we have a Documents Department that

1 would be in charge of imaging and then they would be the ones  
2 that would be storing the original documents. We have a  
3 system --

4 Q Is that within your servicing company?

5 A That would be under our servicing company, yes.

6 Q Have you ever dealt in that department -- the Documents  
7 Department?

8 A I have not physically worked in that department. I've  
9 been in that building, I -- but for me to specifically be the  
10 one doing that, no, I haven't.

11 Q Have you had occasion to go there to look for a document  
12 let's say or --

13 A I've had occasion to speak to people -- the documents --  
14 some of them are stored -- they're stored there and then we  
15 also have other storage facilities. These particular  
16 documents are in our building because I looked these ones up,  
17 but --

18 Q What do you mean, you've looked these up -- these ones up?

19 A Well, when we went to order the originations file we  
20 looked -- looked for the -- the documents. The documents had  
21 been previously requested by our Foreclosure Department and so  
22 that's where they're located right now. The physical  
23 documents are in the Foreclosure Department.

24 Q The original physical documents?

25 A Yeah.



1 Q So is it your custom to request original documents --

2 A The --

3 Q -- from this department when the Litigation Department  
4 needs them?

5 A If they're requested by counsel, if they're requested for  
6 various things with whether it's within a foreclosure or a  
7 bankruptcy. But if there's something that comes up where  
8 we're being asked to prove something, then it's becoming more  
9 customary lately.

10 It never used to be to where the originals were ever  
11 requested but lately more and more of the time of day of  
12 things around the country, we are being asked to physically  
13 produce the originals more frequently.

14 Q And you would direct those inquiries to the Document  
15 Department?

16 A Yes, Document Request. It's our DMS system, it's our  
17 Document Request.

18 Q And so to your knowledge, the original documents, the  
19 origination documents, the notes and the mortgages are  
20 maintained in that facility?

21 A Yes.

22 Q To your knowledge, are they ever moved except for  
23 inquiries from counsel? Are they ever moved to follow the  
24 transfer of ownership?

25 A I can't say that they're never moved because, I mean, with

1 this many millions of loans as we have I wouldn't presume to  
2 say that, but it is not customary for them to move.

3 Q Do you have personal knowledge of under what circumstances  
4 they would move or whether and to what extent they're ever  
5 moved?

6 A Not -- not specifically to what I would be comfortable  
7 testifying to, no.

8 Q Okay. In terms of this particular transaction, from your  
9 experience of requesting these original documents, were you  
10 able to establish that these were not moved?

11 A We were able to establish that they're in our -- what we  
12 call the 400 Building which is the building that we're --  
13 where we're at and we were able to establish that that's where  
14 they're located and that's -- we were still in the process of  
15 trying to physically get them to bring them here today but it  
16 just -- I wasn't able to obtain them in time.

17 Q And your information is that they may be at the  
18 Foreclosure Department, but are you certain that they weren't  
19 moved out of the servicing company?

20 A We had Federal Express tracking. Even when we move  
21 something internally like that a lot of times it will go Fed  
22 Ex so that we have that tracking so that's how I know that  
23 they went there because I have the tracking number --

24 Q I see.

25 A -- so that's how I know that they're there, and I don't

1 have any receipt or any tracking that they've ever moved  
2 beyond that.

3 Q Understood.

4 THE COURT: Did I generate additional questions?

5 MR. KAPLAN: No, Your Honor.

6 MR. LEVITT: No, Your Honor.

7 THE COURT: All right. Are there any other  
8 questions for Ms. DeMartini?

9 MR. LEVITT: No, Your Honor.

10 THE COURT: Thank you, Ms. DeMartini. You may step  
11 down.

12 (Witness excused)

13 MR. LEVITT: Your Honor, I don't want to beat a dead  
14 horse but I think the testimony establishes, you can't -- you  
15 can't apply 3-203 unless there's a transfer. The testimony  
16 has established there's never been a transfer so I don't know  
17 why we're looking at 203. There hasn't been a transfer. Even  
18 if it -- if it stayed in the same place, Your Honor, there  
19 hasn't been a transfer.

20 THE COURT: I appreciate that argument. You may be  
21 right. I'd like to have --

22 MR. LEVITT: I --

23 THE COURT: -- my head around it in terms of what  
24 others have said, what the interpretation of the UCC provision  
25 has been and so forth.

1 MR. KAPLAN: Well, we'll certainly address that,  
2 Your Honor, but my experience has been that the documents  
3 don't always get transferred so we would have a big problem  
4 obviously with the ramifications of mortgage bankers and  
5 servicers executing documents in order to indicate a transfer  
6 on the books and records of the parties, but not physically  
7 moving the documents from building to building or from hand to  
8 hand.

9 THE COURT: Noted. Let me offer you 30 days to  
10 produce any other documents -- If you don't produce them I'll  
11 deal with what I have --

12 MR. KAPLAN: I understand, Your Honor.

13 THE COURT: -- and argument to advance your cause  
14 that a lack of transfer physically doesn't matter, and the  
15 submissions should be in by September 9th. We'll offer  
16 through September 18th for response and we will reconvene on  
17 September 24th at 10:00 a.m. -- Thursday, September 24th to  
18 hopefully complete this consideration. Question?

19 MR. KAPLAN: No, Your Honor. I just for purposes of  
20 the record, I'd like to move the exhibits into evidence.

21 THE COURT: We're talking about --

22 MR. KAPLAN: I think it's 1, 2 and 3, Defendant's 1,  
23 2 and 3.

24 THE COURT: Well, I'm not too --

25 MR. LEVITT: I don't -- but we haven't -- but all

1 we've handed up -- well, I handed up the note, that I can -- I  
2 guess it's a joint exhibit.

3 MR. KAPLAN: Is that J-1? Right.

4 MR. LEVITT: Defendant's Exhibit 2 was --

5 THE COURT: The power of attorney.

6 MR. LEVITT: I have no opposition to that being  
7 admitted into evidence.

8 THE COURT: Okay.

9 MR. LEVITT: 3 I think is the Pooling and Servicing  
10 Agreement which I would oppose because again, the whole  
11 discussion was --

12 MR. KAPLAN: Your Honor --

13 MR. LEVITT: -- it may not be a valid document.

14 MR. KAPLAN: I understand. We'll submit that. And  
15 D-1 was the allonge.

16 THE COURT: Well, we'll admit it into evidence --

17 MR. KAPLAN: Right.

18 THE COURT: -- the import of it is yet to be  
19 determined. And do I have that?

20 MR. KAPLAN: I'll give you a copy if you don't, Your  
21 Honor.

22 MR. LEVITT: Your Honor, I do have the mortgage and  
23 the assignment of mortgage if Your Honor would like it for the  
24 record. We have agreed -- we'd stipulate --

25 THE COURT: That is in the -- it is attached to

1 the --

2 MR. LEVITT: Attached to the proof of claim, yeah.

3 MR. KAPLAN: Yes, it was attached to the proof of  
4 claim.

5 THE COURT: Yes, so we do have that and I appreciate  
6 that.

7 MR. KAPLAN: Again, the one that -- well actually I  
8 guess the witness did say that she had the one with the  
9 unsigned allonge so that's fine.

10 THE COURT: Yes. All right, so D-1 and D-2 and J-1  
11 into evidence, D-3 for identification only at this point.  
12 Then we will see you on September 24th.

13 MR. LEVITT: Thank you, Your Honor.

14 MR. KAPLAN: Thank you, Your Honor.

15 THE COURT: And I thank you all.

16 (Proceedings concluded at 11:50 a.m.)

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C E R T I F I C A T I O N

I, Diane Gallagher, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

      /s/Diane Gallagher                 November 22, 2010

DIANE GALLAGHER

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