SUPREME COURT – STATE OF NEW YORK
Present: HON. VICTOR G. GROSSMAN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM

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U.S. BANK NATIONAL ASSOCIATION not in its Individual Capacity but Solely as Trustee for the RMAC TRUST, SERIES 2016-CTT,

Plaintiff,

-against-

MICHAEL M. SPELLER, ELLEN M. FITZSIMMONS, et al.,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 500088 / 2022
Mot. Seq. No. 7

SECOND SUPPLEMENTAL DECISION AND ORDER

A. THE OCTOBER 31, 2023 SUMMARY JUDGMENT DECISION

Plaintiff U.S. Bank National Association ("U.S. Bank") moved herein for summary judgment in this residential mortgage foreclosure action. In its October 31, 2023 Decision and Order upon the motion, the Court awarded U.S. Bank summary judgment on all issues except the Bank's standing to foreclose. On the issue of standing, the Court wrote:

> The record shows that the Mortgage was assigned by written assignment dated May 31, 2016 to U.S Bank, and further, that U.S. Bank was in physical possession of the Note together with an Allonge endorsed in blank by the original lender as of October 2016 and at the time this action was commenced. Based on certain alleged discrepancies in the appearance of the Note as produced at various stages of the proceedings over the years, Mr. Speller contested U.S. Bank's claim that it was in physical possession of the *original* Note.
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> Accordingly, by Notice dated August 2, 2023, the Court directed U.S. Bank "to produce the original Note and Allonge in court on [August 22, 2023], together with an affidavit or affidavits accounting in detail for custody of the said original Note and Allonge during the period October 22, 2019 through and including January 26, 2022, the date this action was commenced." The original Note was duly produced, and inspection thereof obviated any issue as to whether the Note in U.S. Bank's possession is in fact the original. However, U.S Bank did not produce the original Allonge. Instead, it produced (i) an

> allonge bearing an endorsement from the original lender to HSBC Mortgage Services, Inc. (the plaintiff in the 2009 and 2010 foreclosure actions), (ii) an allonge bearing an endorsement from HSBC Mortgage Services, Inc. to the LSF8 Master Participation Trust (on whose behalf U.S. Bank Trust, N.A. commenced the 2015 foreclosure action), and (iii) an allonge bearing an endorsement in blank by the LSF8 Participation Trust. The accompanying affidavit of Anthony Younger does not account for the whereabouts of the Allonge endorsed in blank by the original lender, or for the provenance of the three different allonges produced in Court which, so far as appears from the record, were not in U.S. Bank's possession when this action was commenced.
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> "A plaintiff may demonstrate its standing in a foreclosure action through proof that it was in possession of the subject note endorsed in blank, or the subject note and a firmly affixed allonge endorsed in blank, at the time of commencement of the action." *Wells Fargo Bank, N.A. v. Mitselmakher,* 216 AD3d 1056, 1057 (2d Dept. 2023). U.S. Bank unquestionably possessed the original Note as well as an Allonge endorsed in blank when it commenced this action. However, the fact that the Allonge was not affixed to the Note annexed to the Complaint as well as the disparity between the Allonge proffered at the commencement of this action (and with the complaints in all three prior foreclosure actions) and the three allonges produced in court on August 22, 2023 gives rise to an unresolved question concerning U.S. Bank's standing herein.

Decision and Order dated October 31, 2023, pp. 5-7.

B. THE CPLR §3212[c] TRIAL ON PLAINTIFF'S MOTION TO STRIKE THE AFFIRMATIVE DEFENSE OF LACK OF STANDING

Accordingly, the Court permitted discovery and scheduled an immediate trial pursuant to CPLR §3212(c) on that portion of U.S. Bank's motion which was to strike the Defendants' affirmative defense of lack of standing. A bench trial took place on February 27, 2024. Ellen Brandt, an employee of mortgage servicer Nationstar Mortgage LLC, testified on behalf of U.S. Bank. Defendant Michael Speller testified on behalf of the defense. In post-trial submissions, U.S. Bank contended that it established standing to foreclose, and Defendants, in opposition, contended *inter alia* that U.S. Bank's evidence failed to show that it was in possession of the original Note with the three Allonges affixed thereto as of January 26, 2022, the date of commencement of this action. On this issue, the Court wrote:

In *JPMorgan Chase Bank, N.A. v. Caliguri,* 36 NY3d 953 (2020), the Court of Appeals wrote:

> In this mortgage foreclosure action, defendant raised the affirmative defense of standing in his answer. Accordingly, to be entitled to summary judgment dismissing that defense, plaintiff bore the burden to demonstrate, as a matter of law, that it had standing to foreclose. There is no "checklist" of required proof to establish standing. Here, plaintiff satisfied its burden through evidence that it possessed the note when it commenced this action, including a copy of the original note endorsed in blank, and other supporting material, including an affidavit of possession based on an employee's review of plaintiff's business records (*see Aurora Loan Servs., LLC v. Taylor,* 25 NY3d 355, 361…)…

JPMorgan Chase Bank, N.A. v. Caliguri, supra, 36 NY3d at 954. *See also, Wells Fargo Bank, N.A. v. Mitselmakher, supra,* 216 AD3d 1056, 1057 (2d Dept. 2023).

The Second Department, in *U.S. Bank Trust, N.A. v. O'Driscoll,* 168 AD3d 783 (2d Dept. 2019), affirmed a determination that the plaintiff had established standing to foreclose on proof akin to that presented in this case. The Court wrote:

> At a hearing to determine whether the plaintiff had standing to prosecute this action, the plaintiff presented the testimony of Jamar Harris, a default servicing officer for Caliber Home Loans…, the servicer of the loan at issue. ***Harris testified that the plaintiff obtained the original note on December 3, 2013. Specifically, he testified that the original note had been sent to Wells Fargo as custodian for the plaintiff on that date.***
>
> In a decision dated March 30, 2017, a Court Attorney Referee determined that the plaintiff had established standing. In the order appealed from, the Supreme Court granted the subject branch of the plaintiff's motion, and denied O'Driscoll's motion.
>
> A plaintiff has standing to maintain a mortgage foreclosure action where it is the holder or assignee of the underlying note at the time the action is commenced (*see U.S. Bank, N.A. v. Collymore,* 68 AD3d 752, 753-754…)….[T]he physical delivery of the note prior to the commencement of the action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*Dyer Trust 2012-1 v. Global World Realty, Inc.,* 140 AD3d 827, 828…). "[A]n assignment of a note and mortgage need not be in writing and can be effectuated by physical delivery" (*Bank of N.Y. v. Silverberg,* 86 AD3d 274, 280…; *see Aurora Loan Servs., LLC v. Taylor,* 25 NY3d 355, 361-362…). Testimony from the loan's servicer may be used to establish standing (*see U.S. Bank, N.A. v. Godwin,* 137 AD3d 1260, 1261-1262…).
>
> We agree with Supreme Court's determination that the plaintiff had submitted evidence sufficient to establish standing [cit.om.]…

U.S. Bank Trust, N.A. v. O'Driscoll, supra, 168 AD3d at 784-785 (emphasis added).

However, subsequent decisions by the Second Department give the Court pause. In *HSBC Bank USA, N.A. v. Boursiquot,* 204 AD3d 980 (2d Dept. 2022), the Second Department wrote:

> Here, the plaintiff failed to establish, prima facie, that it had standing to commence this action. In support of its motion, the plaintiff asserted that it was the holder of the note at the time the action was commenced. However, the plaintiff failed to present admissible evidence establishing that it was in possession of the note, endorsed in blank or specially to it, at the time the action was commenced in or about March 2010. The plaintiff relied upon the affidavit of Nichelle Jones, a senior loan analyst of Ocwen Financial Corporation whose indirect subsidiary is Ocwen Loan Services, LLC (hereinafter Ocwen), the plaintiff's loan servicer. Jones attested that she reviewed the servicing records maintained by Ocwen in its ordinary course of business, that a prior servicer's records were integrated into Ocwen's records and relied upon by Ocwen, and that, based upon her review, ***"Ocwen's Servicing Records" reflect that the note was physically delivered on April 28, 2006, to Wells Fargo Bank, N.A., which, Jones attested, serves as custodian on behalf of the plaintiff pursuant to a pooling and servicing agreement dated October 1, 2006. Jones further averred that the plaintiff "continues to be the owner and holder of the Note." Even if Jones' affidavit were sufficient to lay a proper foundation for the admission of "Ocwen's Servicing Records," no records were submitted therewith which establish that the plaintiff was the holder of the note when this action was commenced*** (*see Deutsche Bank Natl. Trust Co. v. Schmelzinger,* 189 AD3d at 1175…). Although the foundation for the admission of a business record may be provided by the testimony of the custodian, "it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" [cit.om.]. "Without submission of the business records, a witness's testimony as to the contents of the records is inadmissible hearsay" [cit.om.].

HSBC Bank USA, N.A. v. Boursiquot, supra, 204 AD3d at 982-983 (emphasis added). *See also, Bank of New York Mellon Trust Co., N.A. v. Andersen,* 209 AD3d 817, 820 (2d Dept. 2022)("***although Verdooren stated that Wells Fargo had possession of the note on the plaintiff's behalf at the time the action was commenced, the documents attached to Verdooren's affidavit failed to establish this fact***").

The evidence at trial, coupled with U.S. Bank's ability to produce the original Note (in the form referenced in the collateral tracking screen as of October 22, 2019) pursuant to Court order in August 2023 and again at trial in February 2024, tells heavily in favor of U.S. Bank's standing to prosecute this foreclosure action. Nevertheless, under the authorities cited above the Bank's evidence of standing is technically defective.

Inasmuch as U.S. Bank's standing is predicated on its claim to be the holder of a Note endorsed in blank, its standing herein depends on proof of its physical possession of the Note as of the date of commencement – January 26, 2022. As U.S. Bank observes in its post-trial submission, it established through its mortgage servicer's business records and the testimony of Ms. Brandt that the Note was in the possession of Rushmore as U.S. Bank's agent on October 22, 2019. However:

- The collateral tracking screen (Exhibit 3) shows that the Note was thereafter Federal Expressed to Wells Fargo.

- **There is no documentary evidence that (a) Wells Fargo was holding the Note as custodian for Rushmore, for U.S. Bank or for the RMAC Trust, Series 2016-CTT, or (b) that Wells Fargo continued to hold the Note until January 26, 2022.**

- Since Ms. Brandt initially testified to a lack of knowledge whether there was a custodian other than Rushmore, her subsequent testimony that Wells Fargo "would have been the custodian" is unreliable and in any event constitutes inadmissible hearsay in the absence of a supporting business record.

- The August 23, 2023 affidavit of Anthony Younger (Defendants' Exhibit G) to the effect that the Note was "sent to the custodian Wells Fargo Bank, N.A." and "remains in the possession of custodian Wells Fargo Bank, N.A." is incompetent to prove the facts asserted. As an admission by Plaintiff, the affidavit constitutes evidence admissible against Plaintiff but inadmissible hearsay if offered on Plaintiff's behalf. *See, Reed v. McCord,* 160 NY 330, 341 (1899); *Secor v. Kohl,* 67 AD2d 358, 363 (2d Dept. 1979).

"A trial court, in the exercise of its discretion and for sufficient reasons, may allow a party to reopen and supply defects in evidence which have inadvertently occurred." *Commonwealth Land Title Ins. Co. v. Islam,* 220 AD3d 739, 741 (2d Dept. 2023). *See also, MRI Enterprises, Inc. v. Comprehensive Medical Care of New York, PC,* 122 AD3d 595, 596 (2d Dept. 2014); *Fischer v. RWSP Realty, LLC,* 63 AD3d 878 (2d Dept. 2009); *Kay Foundation v. S & F Towing Service of Staten Island, Inc.,* 31 AD3d 499, 501 (2d Dept. 2006). There is ample justification for allowing U.S. Bank the opportunity to reopen to cure the technical defects in its evidence on the issue of standing. In the interest of justice, cases should be resolved on the merits, and there is good reason here to believe that U.S. Bank, acting on behalf of the RMAC Trust, Series 2016-CTT -- and no one else -- possessed standing to commence this foreclosure action on January 26, 2022. There is no discernible prejudice to Defendants, who will be afforded a fair opportunity to contest the evidence, if any, that U.S. Bank produces upon reopening. Finally, the resultant delay will be minimal.

Supplemental Decision and Order, pages 8-11.

C. THE REOPENED CPLR §3212[c] TRIAL

1. The Evidence

On June 3, 2024, the Court held the reopened trial pursuant to CPLR §3212(c) on that portion of U.S. Bank's motion which was to strike the Defendants' affirmative defense of lack of standing. Via the testimony of Charles Brehm, an employee of Computershare (successor to Wells Fargo Bank, N.A. as custodian), U.S. Bank introduced Exhibit 13, which is entitled "TRANSACTION ADDENDUM (Custody) RMAC REMIC TRUST, SERIES 2020-1". The documents states as follows:

> This Transaction Addendum…is entered into as of April 16, 2020, by and among ROOSEVELT MANAGEMENT COMPANY LLC ("RMC"), as program administrator …, U.S. BANK NATIONAL ASSOCIATION ("USB"), not in its individual capacity but solely as trustee for the RMAC TRUST, SERIES 2016-CTT (in such capacity, the "Legal Title Trustee"), USB, not in its individual capacity but solely as trustee (in such capacity the "Trustee") for the RMAC REMIC Trust, Series 2020-1 (the "2020-1 Trust") and WELLS FARGO BANK, N.A., as custodian (in such capacity, the "Custodian"). This Transaction Addendum incorporates by reference the terms and conditions of the Second Amended and Restated Master Custodial Agreement (the "Agreement") dated as of June 10, 2011, as amended and restated to and including July 23, 2013, by and among the Program Administrator, Roosevelt Mortgage Acquisition Company, as owner, and the Custodian, as modified by the Omnibus Assignment and Assumption of Contracts dated as of October 22, 2015, between Roosevelt Mortgage Acquisition Company, as assignor, and Roosevelt Management Company LLC, as assignee, and as such may be further amended from time to time….
>
> 1. ***Trustee hereby engages the Custodian to provide the services described in the Agreement with respect to the 2020-1 Trust.***
>
> 2. ***The initial Mortgage Loan Schedule related to this Transaction Addendum is attached hereto as Exhibit A.***
>
> 3. The Custodian hereby agrees that the representations and warranties listed in Article 5 of the Agreement are true and correct as of the date of this Transaction Addendum, and that the word "Custodial Agreement" as used in such Article includes this Transaction Addendum.

4. From time to time in connection with ***each deposit of Mortgage Loans prior to the Asset Closing Date***, additional Mortgage Loan Schedules with respect to such Mortgage Loans shall be delivered to the Custodian to attach to Exhibit A to this Transaction Addendum.

5. ***With respect to each Mortgage Loan made subject to this Transaction Addendum, all assignments and endorsements shall initially be in blank or into the name of the above referenced trust.***

6. Modifications of the Agreement (if any) with respect to the Mortgage Files held pursuant to this Transaction Addendum: None.

The Mortgage Loan Schedule annexed as Exhibit A to the Transaction Addendum contains the Speller mortgage loan, which is listed as follows:

seller loan no.	**loan no.**	**series name**	**New Trust**	**Custodian**
9802259300	7600476451	RMAC 2016-D	RMAC REMIC 2020-1	Wells Fargo

Through Mr. Brehm, U.S. Bank also introduced Exhibit 14, which is a custodial activity report for the Speller loan file. Prior to September 28, 2016, the loan file was maintained under the "Acc" designation "RSVT-WAREHOUSE." On September 28, 2016, there was a "transfer in" to the "Acc" designation "RSVT-REMIC20165", where the loan file remained until February of 2020. The following activity then occurred:

Trans. Date	Trans. Descr.	Acc
2/10/2020	Transfer Out	RSVT-REMIC20165
2/10/2020	Transfer In	RSVT-WAREHOUSE
5/7/2020	Transfer Out	RSVT-WAREHOUSE
5/7/2020	Transfer In	RSVT-REMIC20201
6/17/2022	Transfer Out	RSVT-REMIC20201
6/17/2022	Transfer In	RSVT-2016DPASSTHRU

The loan file thereafter remained under the "Acc" designation "RSVT-2016DPASSTHRU."

According to Mr. Brehm, the custodian maintained possession of the Speller note on behalf of the Plaintiff in this action – U.S. Bank National Association, not in its individual capacity but solely as trustee for the RMAC Trust Series 2016-CTT – throughout this period except on two occasions (in October 2019 and August 2023) when it was temporarily released to the loan servicer. When pressed on the fact that the name "RMAC Trust Series 2016-CTT" does not appear in connection with the Speller mortgage loan either in Exhibit A to the Transaction Addendum or in the custodial activity report, Mr. Brehm testified:

> …Those exact same letters do not appear on here, and I can tell you in my expert opinion and in 25 years' experience that that's absolutely not unusual. Depending on what system you print this information out from, if it's the collateral database, it's the securities database, or the custodial database, all three of those databases could have different names for the exact same trust. That's industry standard, because the different teams call them different things. It's very frustrating for us internally. We wish they would all be called the same, but they're not. But they have to at least be close, which in this one, 2016D, yeah, that makes sense to me…
>
> …So when we put something out on our website – for example, CTSLink is our system of record, it would be named exactly what the deal is legally called, but internally, analytics calls is something different; bond calls it something different; loan accounting calls it something different; the custody group calls it something different. And it takes years to figure out.

Mr. Brehm testified that since 2016 the Speller mortgage loan was maintained under the designation RMAC 2016D; and further, that the name RMAC Trust Series 2016-CTT is inter-changeable with abbreviation "RSVT-2016DPASSTHRU" on the custodial activity report.

2. The Parties' Contentions

The Defendants contend that U.S. Bank's own documents – Exhibits 13 and 14 – demonstrate that:

- the Speller mortgage loan was transferred from the RMAC Trust, Series 2016-CTT to the RMAC REMIC Trust, Series 2020-1 in 2020; and
- Wells Fargo as custodian for the RMAC REMIC Trust, Series 2020-1 possessed the Note at the time this action was commenced in January 2022.

Defendants conclude that the Plaintiff in this action -- U.S. Bank National Association, not in its individual capacity but solely as trustee for the RMAC Trust Series 2016-CTT – being neither the assignee nor the holder of the Note, lacks standing to prosecute this foreclosure action.

Plaintiff, in response, points to its designation in Exhibit 13 as the "Legal Title Trustee" of the Speller mortgage loan, in which capacity it purportedly held legal title to the Note in January 2022 and therefore has standing to foreclose.

D. LEGAL ANALYSIS

"'Where, as here, a defendant places the plaintiff's standing in issue, the plaintiff must prove its standing in order to be entitled to relief' (*JPMorgan Chase Bank, N.A. v. Austern,* 193 AD3d 830, 831…); *see Deutsche Bank Natl. Trust Co. v. Schmelzinger,* 189 AD3d 1173, 1174…). 'A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it was either the holder or assignee of the underlying note at the time the action was commenced' (*HSBC Bank USA, N.A. v. Gilbert,* 189 AD3d 1377, 1379…; *see Aurora Loan Servs., LLC v. Taylor,* 25 NY3d 355, 361-362…; *U.S. Bank N.A. v. Haughton,* 189 AD3d 1305, 1306…)." *Deutsche Bank National Trust Co. v. Smartenko,* 199 AD3d 643 (2d Dept. 2021).

U.S. Bank having proffered no evidence that it is the assignee of the Note, its standing herein turns on whether it was the "holder" thereof when this action was commenced.

"A promissory note [is] a negotiable instrument within the meaning of the Uniform Commercial Code." *HSBC Bank USA, N.A. v. Carchi,* 177 AD3d 710, 712 (2d Dept. 2019) (quoting *Mortgage Elec. Registration Sys., Inc. v. Coakley,* 41 AD3d 674 [2d Dept. 2007]); *U.S. Bank N.A. v. Nelson,* 169 AD3d 110, 124-125 (2d Dept. 2019). "[T]he word 'holder' is

a legal term defined in the Uniform Commercial Code as the person 'in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.'" *U.S. Bank N.A. v. Nelson, supra,* 169 AD3d at 124. *See,* UCC 1-201[b][21]. *See also, Deutsche Bank National Trust Co. v. Smartenko, supra*; *U.S. Bank N.A. v. Moulton,* 179 AD3d 734, 736 (2d Dept. 2020); *U.S. Bank N.A. v. Brody,* 156 AD3d 839, 840 (2d Dept. 2017). Thus, "holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff." *Wells Fargo Bank, NA v. Ostiguy,* 127 AD3d 1375, 1376 (2d Dept. 2015). *See,* UCC 1-201[b][21], 3-202, 3-204. *See also, Hartford Acc. & Indem. Co. v. American Express Co.,* 74 NY2d 153, 159 (1989); *Marine Midland Bank, N.A. v. Price, Miller, Evans & Flowers,* 57 NY2d 220, 224-225 (1982). "Where the note has been indorsed in blank, the holder must establish its standing by demonstrating that the original note was physically in its possession at the time of the commencement of the action (*see Deutsche Bank Natl. Trust Co. v. Brewton,* 142 AD3d at 685; *U.S. Bank, N.A. v. Collymore,* 68 AD3d 752, 754…)." *OneWest Bank, N.A. v. FMCDH Realty, Inc.,* 165 AD3d 128, 131 (2d Dept. 2018).

As Defendants accurately observe, Plaintiff's Exhibits 13 and 14 appear on their face to show that Plaintiff herein was ***not*** in possession of the Speller Note in January 2022 when this action was commenced. In that regard, it should be observed that:

- Paragraphs 2, 4 and 5 of the Transaction Addendum (Ex. 13) appear to reflect or contemplate a transfer of mortgage loans to the RMAC REMIC Trust, Series 2020-1;
- the Speller mortgage loan is listed on Exhibit A thereto as one of the mortgage loans that was the subject of the Transaction Addendum;
- Paragraph 1 of the Transaction Addendum (Ex. 13) states that Wells Fargo was being engaged not by Plaintiff, but by U.S. Bank National Association, not in its individual capacity but solely as trustee for the RMAC REMIC Trust, Series 2020-1, to provide custodial services "with respect to the 2020-1 Trust"; and

- consistent with the Transaction Addendum, the custodial activity report (Ex. 14) appears to reflect a transfer of custody of the Speller loan file to the "REMIC 20201" account on May 7, 2020, shortly after the April 16, 2020 date of the Transaction Addendum.

Furthermore, ownership of the Speller Note by the RMAC REMIC Trust, Series 2020-1 would appear to be consistent with the nature of a REMIC transaction. "A Real Estate Mortgage Investment Conduit ('REMIC') is a legal entity that holds a fixed pool of mortgage and issues ownership interests in those mortgages to investors." *Houck v. U.S. Bank, N.A., as Trustee,* 689 Fed. Appx. 662, 664 n. 2 (2d Cir. 2017). In other words, a REMIC trust "consists of a pool of mortgages…the beneficial ownership of which has been sold to various investors in the form of certificates representing their undivided ownership interest in the total pool." *Bank of America, N.A. v. 3301 Atlantic, LLC,* 2012 WL 2529196 at *1 (E.D.N.Y., June 29, 2012). The notes are owned by the REMIC trust for the benefit of its investors. *See, Springer v. U.S. Bank N.A. as Trustee,* 2015 WL 9462083 at *2 (S.D.N.Y., Dec. 23, 2015); *Le Bouteiller v. Bank of New York Mellon,* 2015 WL 5334269 at *1 (S.D.N.Y., Sept. 11, 2015); *Bank of America, N.A. v. 3301 Atlantic, LLC,* 2013 WL 12357754 at *1 (E.D.N.Y., Jan. 22, 2013). A typical transaction was described by the court in *Ace Securities Corp. Home Equity Loan Trust, Series 2007-HE3 v. DB Structured Products, Inc.,* 5 F.Supp.3d 543 (S.D.N.Y. 2014):

> An RMBS securitization involves the sale to investors of securities, or RMBS, issued by a trust. (For tax reasons, the trust is typically organized as a Real Estate Mortgage Investment Conduit, or "REMIC." [cit.om.] The trust's assets consist of numerous residential mortgage loans; the payments made on the loans are "passed through" to the investors holding the RMBS, who receive distributions on their securities to the extent and in the priority provided for by the securitization documents. [cit.om.]
>
> A securitization generally involves a "sponsor," which is an affiliate of a bank, which acquires mortgage loans from their originators. The sponsor then sells the loans to a special purpose entity known as the "depositor," which is typically affiliated with the sponsor, and which immediately transfers (or "deposits") the mortgage loans into the trust. The trust then issues securities to the depositor, which sells them to investors

> through an underwriter. In this way, the proceeds generated by the sale of the securities ultimately finance the purchase of the mortgage loans. A trustee then holds the loans and administers the trust for the benefit of the investors. And a "servicer" is engaged to collect payments on the underlying loans in a manner consistent with the securitization documents. [cit.om.]

Id., at 547-548.

In the face of the evidence of record, plaintiff U.S. Bank National Association, not in its individual capacity but solely as trustee for the RMAC Trust Series 2016-CTT, has not proven its standing to foreclose. Absent the documents underlying the transaction referenced in the Transaction Addendum (including the documents referenced in the Addendum), Plaintiff has not validated its claim to ownership as "legal title trustee" of the Speller mortgage loan. Neither has Plaintiff reconciled the concept of a "legal title trustee" with the requirements of the Uniform Commercial Code. The Speller Note, indorsed via allonge in blank, was bearer paper, enforceable by whoever was in possession thereof. Plaintiff neither contests the fact that its own documents (Exs. 13 and 14) evidence a transfer of possession of the Note to the 2020-1 Trust, nor explains how despite that transfer it can have continued to maintain its status as "holder" of the Note with the concomitant right to foreclose. The testimony of custodian Charles Brehm does not remedy the deficiency because the business records on which he relied simply do not establish Plaintiff's "holder" status. *See, HSBC Bank USA, N.A. v. Boursiquot, supra,* 204 AD3d at 982-983; *Bank of New York Mellon Trust Co., N.A. v. Andersen, supra,* 209 AD3d at 820 ("although Verdooren stated that Wells Fargo had possession of the note on the plaintiff's behalf at the time the action was commenced, the documents attached to Verdooren's affidavit failed to establish this fact"). Consequently, Plaintiff's motion for summary judgment striking the Defendants' lack of standing defense must be denied.

The question remains whether Defendants are entitled to dismissal of this action on the ground of Plaintiff's purported lack of standing. Ordinarily, "where a defendant moves for summary judgment dismissing the complaint on the ground of lack of standing, 'the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing, rather than on the plaintiff to affirmatively establish standing' (*U.S. Bank N.A. v. Pickering-Robinson,* 197 AD3d 757, 763…[2021])." *Fossella v. Adams,* 225 AD3d 98, 108-109 (2d Dept. 2024). Procedurally, however, Defendants did not move for summary judgment on standing grounds. Rather, the Court held U.S. Bank's motion for summary judgment in abeyance pending an immediate trial pursuant to CPLR §3212(c) on that portion of its motion which was to strike the Defendants' affirmative defense of lack of standing. *See, HSBC Bank USA v. Corrazzini,* 148 AD3d 1314 (3d Dept. 2017). "Where…a defendant places the plaintiff's standing in issue, the plaintiff must prove its standing in order to be entitled to relief" (*Deutsche Bank National Trust Co. v. Smartenko, supra*), and if after a trial pursuant to Section 3212[c] on the discrete issue of standing the plaintiff has not established its standing *prima facie*, the action is subject to dismissal. *See, Loancare, a Div. of FNF Servicing Inc. v. Coleman,* 46 Misc.3d 1225(A) at *5 (Sup. Ct. Kings Co. 2015).

Here, there are elements of the record which circumstantially support the Plaintiff's claim of standing. The last recorded assignment of the Speller mortgage is the assignment to Plaintiff recorded on September 29, 2017; there is no recorded assignment of the mortgage to the 2020-1 Trust. Moreover, when Plaintiff became the owner of the Speller Note, written notice of the change of ownership was given to the mortgagors, as it was when the Note was again transferred after the commencement of this action; no notice of any change was given in connection with the 2020-1 Trust. However, despite having been afforded multiple opportunities to come forward

with evidence of its standing herein, Plaintiff has not established *prima facie* that it was the assignee or the holder of the Note as of the date of commencement. The Court must perforce conclude that Plaintiff lacks standing herein, wherefore the action is dismissed.

It is therefore

ORDERED, that Plaintiff's motion for summary judgment on the issue of standing is denied, and the Complaint herein is dismissed on the ground of Plaintiff's lack of standing, and it is further

ORDERED, that Defendants as prevailing parties herein being entitled to an award of expenses incurred in defense of this action pursuant to Real Property Law §282(1), Defendants may electronically file an affidavit of expenses within twenty (20) days of the date of this order.

The foregoing constitutes the decision and order of the Court.

Dated: August 14, 2024
Carmel, New York

ENTER

HON. VICTOR G. GROSSMAN, J.S.C.