



Signed and Filed: December 25, 2013

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A handwritten signature in cursive script that reads "Dennis Montali".

DENNIS MONTALI  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re ) Bankruptcy Case  
KABITA CHOUDHURI, ) No. 13-30873DM  
Debtor. ) Chapter 13

**MEMORANDUM DECISION REGARDING MOTION FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

On December 13, 2013, this court held a hearing on the motion of Deutsche Bank National Trust Company ("Deutsche"), as Trustee for Goldman Sachs Home Equity Trust 2006-8, for summary judgment as to its standing to file its initial proof of claim (Claim No. 4-1) and its amended proof of claim (Claim No. 4-2) (collectively, the "POC") in this case. Kabita Choudhuri ("Debtor") opposed the motion, contending (among other things) that Deutsche has not established as a matter of undisputed fact that it is the holder of the underlying note or that Wells Fargo Bank N.A. ("Wells Fargo") is the servicer. Because Deutsche has not provided sufficiently complete documentary evidence to demonstrate that it is the assignee of the note or that Wells Fargo is its servicing

1 agent (either of which would support summary judgment here), the  
2 court is denying the motion. The standing issue will be addressed  
3 and determined at trial.

4 II. BACKGROUND

5 In December 2005, Debtor executed a promissory note ("Note")  
6 in the amount of \$679,000 in favor of Wells Fargo; the Note was  
7 secured by a deed of trust ("DOT") on Debtor's property located in  
8 Mill Valley, California. Joan Mills, as Vice President of Wells  
9 Fargo, endorsed the Note in blank. The declaration of Beverly  
10 Decaro, a loan verification analyst for Wells Fargo, indicates  
11 that Wells Fargo sold the Note to Goldman Sachs Mortgage Company  
12 ("Goldman Sachs") in February 2006. Attached to Ms. Decaro's  
13 declaration is an Assignment and Conveyance Agreement that  
14 purportedly identifies the Note as one of the transferred loans.  
15 However, Deutsche did not produce the list of the assigned  
16 mortgage loans (Exhibit A to the Assignment and Conveyance  
17 Agreement) to the court in its motion. Nothing in the text of the  
18 agreement specifically identifies the Note; consequently,  
19 production of the portion of the list so identifying Debtor's loan  
20 is essential. Deutsche contends that this list contains  
21 proprietary information; assuming this is true, it could produce a  
22 redacted version.

23 In paragraph 8 of her declaration, Ms. Decaro asserts that  
24 Goldman Sachs assigned the Note to Deutsche by virtue of an  
25 Assignment, Assumption and Recognition Agreement. Again, the text  
26 of that agreement does not specifically identify the Note and  
27 Debtor's loan but instead refers to a loan schedule that  
28 purportedly identifies the transferred loans. Deutsche did not

1 provide that loan schedule to the court. This agreement also  
2 provides that Wells Fargo is the master servicer on the loans  
3 identified in the schedule. However, without that loan schedule,  
4 the court cannot determine as a matter of undisputed fact that  
5 Wells Fargo is Deutsche's servicing agent on the Note.

6 On May 29, 2013, Wells Fargo assigned the DOT to Deutsche;  
7 the assignment was recorded on June 5, 2013 in the Official  
8 Records of Marin County. Exhibit "C" to the Declaration of Monica  
9 Cameron, Research/Remediation Specialist for Wells Fargo, at  
10 Docket No. 55-3.

11 III. DISCUSSION

12 As noted above, Deutsche has not provided the essential  
13 exhibits (a mortgage loan schedule) to the operative assignment  
14 agreements showing that Debtor's Note was one of many loans  
15 assigned to Deutsche and serviced by Wells Fargo. Deutsche  
16 nonetheless asserts that it has standing to enforce the Note and  
17 DOT because its servicing agent, Wells Fargo, has physical  
18 possession of the Note. Deutsche is correct that a person is  
19 entitled to enforce a negotiable instrument if it is the holder of  
20 the instrument or a nonholder in possession of the instrument  
21 having rights of a holder. Cal. Comm. Code § 3301.<sup>1</sup> In fact, a  
22

23 <sup>1</sup>California Commercial Code § 3301 states:

24 "Person entitled to enforce" an instrument means (a) the  
25 holder of the instrument, (b) a nonholder in possession  
26 of the instrument who has the rights of a holder, or (c)  
27 a person not in possession of the instrument who is  
28 entitled to enforce the instrument pursuant to Section  
3309 or subdivision (d) of Section 3418. A person may be  
a person entitled to enforce the instrument even though  
the person is not the owner of the instrument or is in  
wrongful possession of the instrument.

1 "person may be a person entitled to enforce the instrument even  
2 though the person is not the owner of the instrument or is in  
3 wrongful possession of the instrument." *Id.* Thus, Wells Fargo as  
4 possessor of the Note could enforce it. However, Wells Fargo is  
5 not the claimant; Deutsche is. Thus, Deutsche has to demonstrate  
6 that Wells Fargo (the possessor) is its agent on the Note, or it  
7 will have to demonstrate that it is holder or in possession of the  
8 Note.<sup>2</sup> In either case, it will need to produce the loan schedules  
9 (even if redacted to protect information as to other assigned  
10 loans) attached to the assignment agreements, or produce the  
11 original Note.

12 At this point, Deutsche's own evidence is internally  
13 inconsistent. Paragraph 6 of the Ms. Decaro's declaration  
14 indicates that the Note is physically stored by Deutsche, while  
15 paragraph 15 indicates that the Note is currently held in the  
16 offices of Wells Fargo's Corporate Trust Servicer in Minnesota.

17 Even though the court is denying summary judgment, it  
18 overrules Debtor's contentions that (1) the assignment of the DOT  
19 from Wells Fargo to Deutsche postpetition was "illegal," and (2)  
20 that the Note and DOT are unenforceable because they were "split,"  
21 with the assignment of the DOT occurring separately from the  
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25 <sup>2</sup>The "holder" of a negotiable instrument is the person in  
26 possession if the instrument is payable to bearer or endorsed in  
27 blank. Cal. Comm. Code § 1201(b)(21); *In re Macklin*, 495 B.R. 8  
28 (Bankr. E.D. Cal. 2013) ("When endorsed in blank, an instrument  
becomes payable to bearer and may be negotiated by transfer of  
possession alone."). In the case of an instrument payable to an  
identified person, the holder is the person in possession, if that  
person is the identified person. *Id.*

1 Note.<sup>3</sup> First, postpetition assignment of notes or mortgage  
2 instruments do not violate the automatic stay. *In re Ahmadi*, 467  
3 B.R. 782, 791-92 (Bankr. M.D. Penn. 2012); *In re Samuels*, 415 B.R.  
4 8, 22 (Bankr. D. Mass. 2009) ("The postpetition assignment of a  
5 mortgage and the related note from one holder to another is not a  
6 transfer of property of the estate. The mortgage and note are  
7 assets of the creditor mortgagee, not of the Debtor. Nor is the  
8 postpetition assignment of a mortgage and the related note an act  
9 to collect a debt; the assignment merely transfers the claim from  
10 one entity to another.").

11 Second, under California law, a deed of trust does not have  
12 an identity separate and apart from the note it secures.  
13 Therefore, if one party receives the note and another receives the  
14 deed of trust, the holder of the note prevails "*regardless of the*  
15 *order in which the interests were transferred.*" *Macklin*, 495 B.R.  
16 at 13 (emphasis added). See also *Hafiz v. Greenpoint Mortg.*  
17 *Funding, Inc.*, 652 F.Supp.2d 1039, 1043 (N.D. Cal. 2009) (The  
18 "request for declaratory relief is based on the erroneous theory  
19 that all defendants lost their power of sale pursuant to the deed  
20 of trust when the original promissory note was assigned to a trust  
21 pool. This argument is both unsupported and incorrect.");  
22 *Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal. App. 4th 497, 156  
23 Cal.Rptr.3d 912 (Cal. App. 4th Dist. 2013) (borrower does not have  
24 the right to bring a preemptive judicial action to determine  
25 defendants' standing to foreclose; foreclosing party need not have

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27 <sup>3</sup>The amount of Deutsche's claim was not the subject of the  
28 summary judgment. The court will therefore reserve for trial the  
Debtor's objections based on the amounts owed under the Note.

1 beneficial interest in promissory note and deed of trust).

2 IV. CONCLUSION

3 For the reasons set forth above, the court will deny  
4 Deutsche's motion for summary judgment. The court will conduct  
5 the trial on Debtor's objections to Deutsche's POC and Deutsche's  
6 objection to confirmation of Debtor's Chapter 13 Plan on February  
7 10, 2014, at 9:30 A.M. pursuant to the court's SECOND AMENDED  
8 ORDER REGARDING TRIAL DATE AND DISCOVERY DEADLINES entered on  
9 December 18, 2013 (Dkt. No. 70).

10 In light of this ruling, Debtor's objections to the evidence  
11 are moot. Counsel for Deutsche should serve and upload an order  
12 denying the motion for the reasons stated in this Memorandum  
13 Decision.

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\*\*END OF MEMORANDUM DECISION\*\*

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