To Be Argued By:
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APL-2019-00119
Suffolk County Clerk's Index No. 66298/14

Court of Appeals

STATE OF NEW YORK

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,

Plaintiff-Respondent,

—against—

ROSS R. CALIGURI a/k/a ROSS CALIGURI,

Defendant-Appellant,

PENTAGON FEDERAL CREDIT UNION, AMERICAN EXPRESS CENTURION BANK, BRIDGEHAMPTON NATIONAL BANK, REVCO ELECTRICAL SUPPLY, INC., EMIL NORSIC AND SON, INC., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., and JOHN DOE and JANE DOE #1 through #7, the last seven (7) names being fictitious and unknown to the plaintiff, the persons or parties intending being the tenants, occupants, persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the Complaint,

Defendants.

BRIEF OF PLAINTIFF-RESPONDENT JPMORGAN CHASE BANK, N.A.

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CORPORATE DISCLOSURE STATEMENT

In compliance with Rule 500.1(c) of the Rules of Practice for the Court of Appeals of the State of New York, Respondent JPMorgan Chase Bank, N.A. states that the publicly held corporate parent of JPMorgan Chase Bank, N.A. is JPMorgan Chase & Co.

STATEMENT OF STATUS OF RELATED LITIGATION

In compliance with Rule 500.13(a) of the Rules of Practice for the Court of Appeals of the State of New York, Respondent JPMorgan Chase Bank, N.A. states that to the best of its knowledge there is no active related litigation and all prior related litigation has concluded as of the date this brief is filed.

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PRELIMINARY STATEMENT

Ross Caliguri borrowed a million dollars, secured by his house in the Hamptons. After only a few years, he stopped making payments. He does not dispute that he defaulted on his obligation, and he never has.

Instead, Caliguri opposes foreclosure with two affirmative defenses that are based more on fiction than fact. The first defense is that, even if *someone* can foreclose on the property after Caliguri's undisputed default, maybe it is not JPMorgan Chase Bank, N.A. ("Chase"). Caliguri never hints at who he thinks the right plaintiff might be, and the record makes plain that it is Chase. Chase acquired Caliguri's note from its only prior holder—a bank that failed after the financial crisis—through a transaction with the Federal Deposit Insurance Corporation. And Chase offered evidence of the precise date when Chase's records show that Caliguri's note came into its physical custody and the precise place where it stores it, and it attached a copy of the note to the complaint. A written transferee or a possessor of a note may sue to enforce it, and Chase showed that it is both. Caliguri offers no evidence to the contrary. The suggestion that there is some other true party in interest has not been substantiated by competent evidence at any point in this proceeding.

Caliguri's second defense is that, although *someone* signed the papers borrowing a million dollars secured by his Hamptons house, maybe it was not him.

Caliguri never hints at who he thinks the mystery forger might be, and the record, including his notarized signature, makes plain that the signature was his. Caliguri signed the consolidation agreement that resulted in the operative note and mortgage in the physical presence of a notary public, and he made payments for nearly a year. Bald assertions of forgery do not create a dispute of fact, and Caliguri has submitted no evidence to support his forgery story—not even a sworn denial that he signed the documents. Neither of these unsupported—and indeed flatly contradicted—affirmative defenses precluded the grant of summary judgment.

Having failed to dispute Chase's prima facie case or to support his affirmative defenses, Caliguri retreats to an argument that adjudicating summary judgment at all was premature. He asks this Court to adopt a new categorical rule in foreclosure cases: if the defendant asks to inspect the original of the mortgage note, for any reason or no reason, the original must be produced prior to summary judgment. It is unnecessary for the Court to consider that rule, which has no ultimate bearing on this appeal. If the Court nonetheless does consider it, it should reject it, since there is no basis in precedent or statute to impose that categorical procedural requirement.

Caliguri last asks this Court to hold that a long-concluded earlier foreclosure action that did not adjudicate the merits of Chase's foreclosure claim nevertheless

has preclusive effect in this case. That argument contradicts on-point precedent of this Court and should be rejected.

It has now been over a decade since Caliguri made any payment on his one-million-dollar debt. Yet he has continued to live in and enjoy the house in the Hamptons that he offered as security in order to obtain that loan. His arguments for why Chase could not foreclose on the mortgage have no merit and presented no reason to delay entry of summary judgment. And the actual substantive issue—whether the property is subject to foreclosure after Caliguri defaulted on his note—is beyond dispute. The Supreme Court reached that conclusion in a comprehensive and well-reasoned opinion, and the Appellate Division affirmed. Chase respectfully asks this Court to do the same.

QUESTIONS PRESENTED

1. Did the court below properly grant summary judgment when Chase demonstrated its prima facie case and Caliguri put no facts into dispute?

Answer: Yes.

2. Are dismissals for lack of standing or noncompliance with a discovery order not final decisions on the merits to which preclusion doctrines apply, as this Court has long held?

Answer: Yes.

STATEMENT OF FACTS

A. The Note And Mortgage

Ross Caliguri owns a multimillion-dollar home in the Hamptons. *See, e.g.*, *In re Caliguri*, 431 B.R. 324, 325 (Bankr. E.D.N.Y. 2010). Over the years, Caliguri has used that property as collateral to obtain extensive credit. In November 2005, Caliguri executed an adjustable-rate note in favor of Washington Mutual Bank, F.A. ("WaMu") in the principal sum of $945,000. R.351-357. He secured that note through a mortgage on his Hamptons house, which was recorded in the Suffolk County Clerk's Office. R.358-387. Caliguri later executed a second adjustable-rate note in the principal sum of $7,175.28, also secured by a duly recorded mortgage on the same house. R.388-428.

In October 2007, Caliguri consolidated these debts and mortgages by entering into a Consolidation, Extension, and Modification Agreement (CEMA) with WaMu, combining the first two notes and mortgages to form a single lien in the amount of $1,000,000. R.77. Under the CEMA, the parties "combin[ed] into one set of rights and obligations all of the promises and agreements stated in the Notes and Mortgages including any earlier agreements which combined, modified, or extended rights and obligations under any of the Notes and Mortgages." R.240. Caliguri "agree[d] to take over all of the obligations under the Notes and Mortgages as consolidated and modified by this Agreement as Borrower." R.239.

"This mean[t]," the CEMA provided, "that [Caliguri] will keep all of the promises and agreements made in the Notes and Mortgages even if some other person made those promises and agreements before [him]." R.239.

Simultaneously with and pursuant to the CEMA, Caliguri executed a new Consolidated Note and secured the debt with a new Consolidated Mortgage. R.239. The CEMA provided that Caliguri "agree[d] to pay the amounts due under the Notes in accordance with the terms of the Consolidated Note," which "supersede[d] all terms, covenants, and provisions of the [prior] Notes," and "to be bound by the terms set forth in the Consolidated Mortgage which will supersede all terms, covenants, and provisions of the [prior] Mortgages." R.240. Caliguri also expressly agreed in the CEMA that he "ha[d] no right of set-off or counterclaim, or any defense to the obligation of the Consolidated Note or the Consolidated Mortgage." R.240. The parties relied on Fannie Mae form documents for each of the CEMA (Form 3172), Consolidated Note (Form 3526), and Consolidated Mortgage (Form 3033), and signed and notarized them as provided. R.239-252; *see also* Fannie Mae, https://www.fanniemae.com/content/legal_form/3526.pdf.

In particular, Caliguri initialed each page of the CEMA and signed it at the end—in person in the presence of a notary public, who notarized the document. R.239-241. The CEMA was recorded in the Suffolk County Clerk's Office on

November 23, 2007, with the Consolidated Note and Consolidated Mortgage attached to it. R.236-237.

B. Chase's Acquisition Of WaMu's Assets And Liabilities

In September 2008, WaMu failed and its federal chartering authority closed the bank and placed in under the receivership of the Federal Deposit Insurance Corporation ("FDIC"). R.472. In a Purchase and Assumption Agreement entered into with the FDIC, Chase agreed to assume substantially all the liabilities of WaMu and to purchase substantially all of its assets. R.472; *see also* R.479 (Assumption of Liabilities), R.480 (Purchase of Assets). That is, Chase purchased from the FDIC, and the FDIC sold, assigned, transferred, conveyed, and delivered to Chase, "all right, title, and interest of the [FDIC] in and to all of the assets (real, personal and mixed, wherever located and however acquired)" of WaMu. R.480 (Assets Purchased by Assuming Bank). Chase "specifically purchase[d] all mortgage servicing rights and obligations of" WaMu. *Id.*

The Purchase and Assumption Agreement assigned and transferred WaMu's negotiable instruments and mortgages. The parties agreed that the FDIC "assigns, transfers, conveys and delivers" records to Chase including "[l]oan and collateral records" and "deeds, mortgages, abstracts, surveys, and other instruments or records of title pertaining to real estate or real estate mortgages." R.490 (Transfer of Records). And the FDIC "shall deliver to [Chase] all Records … as soon as

practicable on or after the date of this Agreement." R.491 (Delivery of Assigned Records). As part of their obligation to continuing cooperation, the parties further agreed "to execute and deliver such additional instruments and documents of conveyance as shall be reasonably necessary to vest in the appropriate party its full legal or equitable title in and to the property transferred pursuant to this Agreement." R.492.

As the Supreme Court put it in this case, "As a result of the purchase agreement, on September 25, 2008, [Chase] became the owner of the loans and loan commitments of WaMu by operation of law." R.10.[1]

C. Chase Records The Assignment Of Caliguri's Mortgage

A few months after Chase acquired Caliguri's loan and loan commitments as part of its agreement with the FDIC to acquire WaMu's assets, on August 13, 2009, Chase recorded the assignment of Caliguri's mortgage with the Suffolk County Clerk's Office. R.276-280. The assignment references both of the earlier mortgages and describes that they were "consolidated" in the duly recorded Consolidated Mortgage "by a Consolidation, Extension and Modification

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[1] *See also, e.g.*, *Wash. Mut. Bank v. Nussen*, 138 A.D.3d 828, 829 (2d Dep't 2016) (recognizing that Chase "acquired all of the plaintiff's loans and loan commitments"); *JP Morgan Chase Bank, N.A. v. Shapiro*, 104 A.D.3d 411, 412 (1st Dep't 2013) (same). This caselaw is consistent with the conclusions of courts across the country. *See, e.g.*, *Hillside Metro Assocs., LLC v. JPMorgan Chase Bank, N.A.*, 747 F.3d 44, 46 (2d Cir. 2014); *Ames v. JP Morgan Chase Bank, N.A.*, 783 S.E.2d 614, 620 (Ga. 2016).

Agreement dated the 31st day of October, 2007 and recorded on the 23rd day of November, 2007 … to form a single lien in the amount of [o]ne million dollars ($1,000,000) and interest." R.279. The assignment provides that Chase, as successor in interest to WaMu, was thereby assigned "the said Mortgage, [t]ogether with all moneys now owing or that may hereafter become due or owing in [r]espect thereof, and the full benefit of all the powers and of all the covenants and [p]rovisions therein contained, and … the Assignor's beneficial interest under the Mortgage." R.279. In addition to its reference to the CEMA, the assignment expressly provides for Chase "to have and to hold the said Mortgage *and Note*." R.279 (emphasis added).

D. Caliguri Defaults On The Consolidated Note

Pursuant to the CEMA and Consolidated Note executed in October 2007, Caliguri agreed to make initial payments on the debt of just under $6,000 a month. R.247. He did so, but for less than a year. In September 2008, he failed to make his monthly payment, and he has never cured that failure. R.90. On the contrary, he has never made another payment on the debt whatsoever.

E. The Foreclosure Proceedings

1. *The First Foreclosure Action.* Chase first brought foreclosure proceedings against Caliguri in 2009. R.37; *JPMorgan Chase Bank, N.A. v. Caliguri*, Suffolk County Index No. 25638-2009. That action was dismissed

without reaching the merits. There, Caliguri asserted as an affirmative defense to the foreclosure complaint that Chase lacked standing to foreclose; he served discovery as to standing, and moved to compel responses on standing, which the court granted. R.37. He then moved "for an order granting summary judgment dismissing this mortgage foreclosure action with prejudice, striking the complaint and, in the alternative, other sanctions," under C.P.L.R. § 3126 (penalties for refusal to comply with order or to disclose) and C.P.L.R. § 3212 (summary judgment). R.37.

That motion was "granted as set forth" in the court's order. R.37. The order explained that Chase had not demonstrated its standing factually since it had "submitted only the affirmation of its attorney, who [did] not have personal knowledge of the facts," and had not established standing as a matter of law since its documentary evidence did not show that it held the note when the action was commenced. R.38. In the alternative, the court's order struck the complaint under § 3126 as a sanction because Chase served interrogatory responses that, in the court's view, were willfully noncompliant with an earlier discovery order that had resolved a number of discovery disputes, including production of the original of the note. R.38-39. "In light of all of the foregoing," the court "grant[ed] [Caliguri's] motion for summary judgment and str[uck] [the] complaint." R.39.

2. *The Quiet Title Action.* Caliguri then initiated his own, new action against Chase seeking to quiet title on the property. R.663. The basis for the quiet-title claims was the dismissal of the first foreclosure action. R.664. Chase moved to dismiss under C.P.L.R. § 3211(a)(7), arguing that Caliguri failed to state a cause of action because that dismissal was not on the merits. R.664. The trial court agreed. It explained that the "plain language" of the dismissal order showed that, although the earlier dismissal "characterizes the application of [Caliguri] in that case as one *requesting* a dismissal of the action 'on the merits,' it is clear from a reading of the plain language" that the court granted his motion only "*as set forth hereinafter*" in the order. R.664. And the two bases for dismissal in the order, lack of standing and discovery violations, did not adjudicate the merits.

The trial court accordingly granted Chase's motion to dismiss the quiet-title action (R.665), and the Second Department affirmed. *Caliguri v. JPMorgan Chase Bank, N.A.*, 121 A.D.3d 1030 (2d Dep't 2014). "Contrary to [Caliguri's] contention," the court explained, "dismissal premised on lack of standing is not a dismissal on the merits." *Id.* at 1031 (citing, *inter alia*, *Landau, P.C. v. LaRossa, Mitchell & Ross*, 11 N.Y.3d 8, 13 n.3 (2008)). "Furthermore, the alternative basis for dismissal of the prior action, the striking of the complaint for noncompliance with a discovery order, was not a dismissal on the merits" either. *Id.* (citing, *inter*

alia, *Maitland v. Trojan Elec. & Mach. Co.*, 65 N.Y.2d 614, 615-616 (1985)). This Court denied Caliguri leave to appeal that decision. 25 N.Y.3d 911 (2015).

3. *The Current Foreclosure Action*. Chase initiated new foreclosure proceedings in August 2014, alleging that Caliguri had defaulted on his obligations under the CEMA and Consolidated Note and Mortgage. R.144-151. Chase attached to the complaint the CEMA with the Consolidated Note and Consolidated Mortgage annexed to it, as well as the recorded assignment of the Consolidated Mortgage to Chase. R.146-147.

Caliguri filed a non-verified answer. To the 27 substantive paragraphs of the complaint, he gave a single, one-paragraph response: "Upon information and belief, Caliguri is unable to admit or deny the allegations made in Paragraph Nos. 1 through 27. For purposes of this Answer, said allegations are denied." R.56. He then raised eight affirmative defenses. R.56-60. Relevant here, in two defenses he asserted that the dismissal of the first foreclosure proceedings had preclusive effect in this action. R.57-58. In two others, he asserted that "the complaint fail[ed] to establish that Chase ha[d] standing to commence this action by demonstrating that it ha[d] actual possession of the original mortgage note" and that "the consolidated note … [was] not properly assigned by the FDIC to JPMorgan Chase" because Chase "failed to present any evidence … that a federal banking agency approved the transfer." R.58-60. And in the last relevant defense, "Caliguri denie[d] the

authenticity and genuineness of the mortgage notes annexed to the complaint" without elaboration. R.59.

Caliguri served interrogatories and document requests on April 10, 2015. R.587-600. One request asked that Chase "make the original mortgage note and the original mortgage assignment available for inspection" within 30 days. R.597. On June 2, 2015, Caliguri's lawyer wrote a letter to Chase raising the outstanding discovery requests. R.672. He stated that he would "take all appropriate measures" unless he received them by June 16. R.672.

On June 8, 2015, Chase moved for summary judgment under C.P.L.R. § 3212. R.72-73. That filing automatically stayed discovery. *See* C.P.L.R. § 3214(b); *see also* R.80. In support of its motion, Chase provided evidence of the mortgage and the unpaid note by attaching copies of the CEMA, Consolidated Note, and Consolidated Mortgage to its attorney's affirmation. R.75-88.

Chase also provided evidence of Caliguri's default through the sworn affidavit of Chase Vice President Kimberly Jernee. R.89-94. Jernee testified that Caliguri "failed to make the payment that was due for 9/1/2008 under the Loan Documents and has failed to make subsequent payments to bring the loan current, and the entire loan balance is now due and owing to [Chase]." R.90. She calculated the amount then due, which included principal, interest, and costs and fees, at over $1.4 million. R.91-92.

Chase's motion also responded to Caliguri's affirmative defenses. *First*, as to whether preclusion doctrines applied, Chase explained that dismissals for lack of standing or discovery violations are not on the merits, as the trial court and Appellate Division in the quiet-title action had held based on well-established precedent. R.82-83. *Second*, as to its standing, Chase addressed both its possession and the written transfer of the Consolidated Note. On possession, Chase offered the "Affidavit of Note Possession" of Chase Vice President Sherry Stafford. R.95-97. Stafford averred that it was Chase's business practice to store notes in a secured facility in Monroe, Louisiana; that Chase maintained possession of the Consolidated Note at its storage facility at 780 Delta Drive, Monroe, Louisiana; and that Chase received the Consolidated Note on September 19, 2012. R.95. Stafford swore to her affidavit before a Louisiana notary public in Ouachita Parish, Louisiana (where Monroe is located). R.96-97. She also attached to it a copy of the Consolidated Note. R.98-103 Chase argued that these "specific factual details of the physical delivery date of the Note to [Chase] and how and where Chase has physically stored the Note … [were] sufficient to establish under even the most rigorous tests … that [Chase] demonstrated its standing, *prima facie*." R.84. This evidence of possession was all the more persuasive, Chase explained, in view of the fact that Caliguri "did not allege that any entity other than

[Chase] is claiming an interest in the Mortgage or an entitlement to payments on the Mortgage debt." R.84.

As to the validity of the assignment from the FDIC to Chase of WaMu's assets, and whether a federal banking agency approved that transfer (as Caliguri contended was required), Chase attached the Purchase and Assumption Agreement, which established that approval by all required governmental authorities was a condition precedent to the agreement. R.86, 494. Chase explained that courts have routinely taken judicial notice of this agreement, which is a publicly available government document. R.86; *see also supra* note 1.

Third, on Caliguri's one-line authenticity defense, Chase noted that C.P.L.R. § 3016(b) requires that "where a … defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." R.84-85. Chase argued that, under this rule, Caliguri had "provided no evidence to raise a triable issue of fact as to whether the mortgage notes were authentic or genuine." R.85.

On June 18, 2015, Caliguri opposed Chase's motion for summary judgment and filed his own cross-motion. *See* R.638-661. He opposed Chase's motion on the ground that the Stafford Affidavit did not establish standing because, under this Court's decision in *Aurora Loan Services, LLC v. Taylor*, 25 N.Y.3d 355 (2015), an original of the note *must* be produced if the defendant asks for it. R.645-647.

And he cross-moved for summary judgment on his own behalf because Chase had not produced the original Consolidated Note when he asked. R.651. In the alternative, he moved the court to compel discovery responses under C.P.L.R. § 3124—although not for a continuance of the summary-judgment motion under C.P.L.R. § 3212(f). R.655-657. He attached to this filing only (1) the orders from the first foreclosure action, (2) a list of his motions pending before this Court, (2) his answer and discovery requests, (3) his June 2 discovery letter, and (4) the *Aurora Loan* decision. R.662-673. Notably absent was an affidavit offering facts or evidence relevant to Chase's foreclosure claim or his purported defenses. And his submission did not mention his supposed authenticity defense at all.

After Chase responded, Caliguri filed a reply, which did remember his authenticity defense. He argued that by "refus[ing] to produce the original mortgage note for inspection and examination, JPMorgan Chase [was] attempting to usurp the ability of Caliguri to challenge the authenticity and genuineness of the original mortgage note." R.703. But he did not say more about why he believed the Consolidated Note or his signature on it to be inauthentic. And he again offered no proof or evidence to attempt to put authenticity into dispute.

F. The Decisions Below

In a comprehensive opinion, the trial court granted Chase's motion for summary judgment. R.4-14. To begin, the court denied Caliguri's cross-motion to

compel discovery for failing to make a good-faith effort to resolve the issues, while also recognizing that Chase's filing for summary judgment imposed an automatic stay of discovery. R.12. It then held that Chase had established its prima facie entitlement to summary judgment by producing "the endorsed notes, the mortgages, the CEMA, the assignment and evidence of nonpayment." R.8.

The court next concluded that none of Caliguri's affirmative defenses was meritorious. As to standing, the court held that Chase proved its prima facie standing by both possession and written transfer: Chase evidenced its possession at the time it filed suit with the Jernee and Stafford Affidavits and the "attachment [of the Consolidated Note] to the e-filed complaint," and Chase showed that it "became the owner of the loans and loan commitments of WaMu by operation of law" through the Purchase and Assumption Agreement and submitted "the written assignment," "which was executed and recorded prior to commencement" and "includes a reference to the indebtedness/note/CEMA." R.10-11.

As to the other affirmative defenses, including authenticity, the court held that Chase "submitted sufficient proof to establish, prima facie, that [they] … are subject to dismissal due to their unmeritorious nature." R.11 (citing, *inter alia*, *Banco Popular N. Am. v Victory Taxi Mgt., Inc.*, 1 N.Y.3d 381, 384 (2004) ("Something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature.")). And in addition, the court held,

Caliguri had "validly waived any right of set off, counterclaims or defenses to any of the obligations of the consolidated note and mortgage under the express terms of the CEMA." R.11.

Having concluded that Chase had established prima facie the merits of its claim for foreclosure and the meritlessness of the affirmative defenses, the court explained that it was then "incumbent upon [Caliguri] to submit proof sufficient to raise a genuine question of fact rebutting [Chase's] prima facie showing or in support of the affirmative defenses asserted in the answer." R.12. Finding that he "offered no proof or arguments in support of any of the pleaded defenses asserted in the answer," the court dismissed them. R.12. It explained that "the opposing papers [were] insufficient to raise any genuine question of fact requiring a trial on the merits of [Chase's] claims for foreclosure and sale" or "to demonstrate any bona fide defenses." R.13. "Notably," the court wrote, Caliguri "did not deny having received the loan proceeds and having defaulted on the subject loan payments." R.13.

For all these reasons, the court awarded Chase summary judgment, struck Caliguri's answer, and dismissed his affirmative defenses, all with prejudice.

The Appellate Division affirmed in a unanimous decision. *JPMorgan Chase Bank, N.A. v. Caliguri*, 168 A.D.3d 819 (2d Dep't 2019). *First*, it held that Chase had "demonstrated its prima facie entitlement to judgment as a matter of law by

producing the mortgage, the unpaid note, and evidence of default." *Id.* at 820. *Second*, it confirmed that Chase had established standing by attaching a copy of the Consolidated Note to the complaint. *Id.* And it found that, "[i]n opposition, the defendant failed to raise a triable issue of fact" and his "remaining contentions [were] without merit." *Id.* at 821. Thus it affirmed that the court properly granted Chase's motion for summary judgment.

This Court granted leave to appeal in part.[2] 33 N.Y.3d 1046 (2019).

SUMMARY OF ARGUMENT

I. Chase demonstrated its prima facie foreclosure case on the merits. As the summary-judgment movant, Chase was required to make only a prima facie showing of entitlement to judgment as a matter of law. It satisfied the well-established elements of a prima facie foreclosure claim by producing the Consolidated Mortgage, Consolidated Note, and affidavit testimony proving Caliguri's default. Nothing more was needed to shift the burden to Caliguri.

II. Once Chase demonstrated its prima facie entitlement to judgment as a matter of law, Caliguri failed to offer admissible evidence raising a dispute of material fact. *First*, Caliguri made no attempt to dispute Chase's prima facie case.

[2] This Court denied leave to appeal "insofar as [Caliguri] seeks review of so much of the Appellate Division order as affirmed the denial of the motion for reassignment," but "otherwise granted" it. 33 N.Y.3d at 1046.

Second, Caliguri failed to establish by affidavit or proof that he had any real affirmative defense that he should have been permitted to defend. Despite purporting to contest Chase's standing, he offered no evidence to put it into dispute. Instead, the unrebutted evidence in the record demonstrated that Chase had physical possession of the Consolidated Note at the time the action was commenced—Chase offered an affidavit from a party familiar with its recordkeeping that detailed precisely when and where Chase came into possession of the note and attached a copy of it to the complaint at filing. The unrebutted evidence also demonstrated that Chase was the written transferee of the note after Chase purchased and assumed that asset from WaMu. That evidence established standing, and Caliguri failed to rebut it.

Caliguri's purported authenticity defense fares no better. His sole factual claim is that the signature page of the Consolidated Note was not notarized—which ignores the fact that the Consolidated Note was annexed to the CEMA, which *was* notarized. And the CEMA—which Caliguri indisputably personally signed—contains an express waiver of any defenses as to the Consolidated Note, including authenticity. Further, Caliguri notably never claimed that he did not sign the CEMA, Consolidated Note, or Consolidated Mortgage under which he made payments for nearly a year—which, of course, he is best suited to know. In short,

Caliguri offers nothing but the sort of bare forgery allegations that this Court has held fail to raise a dispute of fact precluding summary judgment.

III. Having failed to show summary judgment was improper, Caliguri next tries to argue that it was premature. This claim centers on Caliguri's request that this Court adopt a new categorical rule in mortgage cases that if a defendant asks to inspect the original of the note in discovery, for any reason or no reason, that original *must* be produced before summary judgment can issue. That rule need not even be entertained to decide this appeal and, in any event, is based solely on a misreading of this Court's precedent and the relevant statutes. To the extent the Court considers it, it should reject it, along with Caliguri's other miscellaneous arguments for why summary judgment should have been delayed.

IV. Finally, dismissal of the first foreclosure action had no preclusive effect on this case. That action was dismissed for lack of standing and as a discovery sanction, neither of which constitutes the adjudication on the merits required for res judicata or collateral estoppel. And the law-of-the-case doctrine applies only during the *same* litigation before it reaches final judgment. Thus, no preclusion doctrine applies to the foreclosure.

ARGUMENT

I. CHASE DEMONSTRATED ITS PRIMA FACIE ENTITLEMENT TO SUMMARY JUDGMENT

Chase met its initial burden as the movant on summary judgment. "To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor, and he must do so by tender of evidentiary proof in admissible form." *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 1067 (1979) (quoting N.Y. C.P.L.R. § 3212(b)). Under C.P.L.R. § 3212(b), a motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions." Thus, this Court has explained, a "proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law." *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985).

The prima facie elements of a mortgage-foreclosure action are well established: "a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage, the unpaid note, and evidence of the default." *CitiMortgage, Inc. v. Guillermo*, 143 A.D.3d 852, 853 (2d Dep't 2016); *Bank of N.Y. Mellon v. Slavin*, 156 A.D.3d 1073, 1075 (3d Dep't 2017); *Dasz, Inc. v. Meritocracy Ventures, Ltd.*, 108 A.D.3d 1084, 1085 (4th Dep't 2013); *E. N.Y. Sav. Bank v. 924 Columbus Assocs., L.P.*, 216 A.D.2d 118, 119 (1st Dep't 1995);

see also Germania Life Ins. Co. v. Rae, 99 N.Y. 674, 674 (1885) ("*Prima facie*, the bond and mortgage established [the mortgagee's] right to the extent which he claimed, and the burden fell upon the other parties of destroying its effect.").

Chase carried its burden with respect to those prima facie elements. As it did with the complaint, Chase attached the CEMA—which includes as exhibits both the Consolidated Note and the Consolidated Mortgage—to its summary-judgment motion. *See* R.75-87; R.429-436. In section 3(A) of the Consolidated Note, Caliguri promises to "make all payments under this Note." R.440. Specifically, he agreed to "make a payment on the first day of every month, beginning on December 01, 2007, … until I have paid all of the principal and interest and any other charges." R.440. The payments were to total $5,937.50 each month. R.440. In section 7, Caliguri acknowledges, "If I do not pay the full amount of each monthly payment on the date it is due, I will be in default," and "[i]f I am in default, … the Note Holder may require me to pay immediately the full amount of Principal that has not been paid and all the interest that I owe on that amount." R.442. Chase thus satisfied its obligation to produce the operative mortgage and the unpaid note.

Chase also demonstrated Caliguri's default. The Jernee Affidavit explains that "Chase is the loan servicer *and* the Plaintiff in this action." R.90. "As a mortgage servicer," the affidavit continues, "Chase collects payments from

Borrower and maintains up-to-date electronic records concerning the loans it services in its electronic record-keeping system." R.90. Jernee explained that she had "access to the business records of Chase, including the business records for and relating to the Borrower's loan," and made her "affidavit based upon [her] review of those records relating to the loan and from [her] own personal knowledge of how they are kept and maintained"—which was "by Chase in the course of its regularly conducted business activities," "at or near the time of the event, by or from information transmitted by a person with knowledge," and under "the regular practice to keep such records in the ordinary course of regularly conducted business activity." R.90.

Based on her personal review of these business records, Jernee attested that Caliguri "failed to make the payment that was due for 9/1/2008 under the Loan Documents and has failed to make subsequent payments to bring the loan current." R.90. Testimony about records kept in the ordinary course of business within a reasonable time by someone with personal knowledge of a business's practices and procedures is sufficient evidence to prove that the transactions took place—or, in this case, that the promised transactions did *not* take place. *See* N.Y. C.P.L.R. § 4518(a); *see also, e.g.*, *Citibank, N.A. v. Cabrera*, 130 A.D.3d 861, 861 (2d Dep't 2015) ("A proper foundation for the admission of a business record must be

provided by someone with personal knowledge of the maker's business practices and procedures."). Chase thus carried its initial burden as to Caliguri's default.

In short, Chase provided evidence of the mortgage, the unpaid note, and default. Nothing more is needed to shift the burden to the defendant at summary judgment. *See* N.Y. C.P.L.R. § 3212(b); *Winegrad*, 64 N.Y.2d at 853.

II. CALIGURI FAILED TO PUT MATERIAL FACTS INTO DISPUTE IN RESPONSE

"[W]here the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action[.]" *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560 (1980). Caliguri failed to do so. *First*, he made no attempt to dispute the facts establishing Chase's prima face case. *Second*, he did not put Chase's standing into dispute; it was established by ample evidence and rebutted by none. *Third*, his "authenticity" defense is a fiction based on nothing but bald assertions and contentions flatly contradicted by the record.

A. Caliguri Failed To Rebut Chase's Prima Facie Case

At no point has Caliguri disputed the fundamental underlying facts of the case. He has never denied that he entered into the CEMA and executed the Consolidated Note and Mortgage, despite his purported "authenticity" defense. He does not deny that, under those loan documents, he borrowed $1 million and secured the debt with a mortgage on his house in the Hamptons. He has never

denied receiving the loan proceeds. He has never disputed that he made payments for less than a year, but stopped repaying that loan altogether over a decade ago. And he does not disagree that he owed Chase over $1.4 million dollars in principal, interest, and fees and costs when Chase initiated this foreclosure proceeding.

Instead, on these foundational issues, Caliguri has said nearly nothing. All he had to say in his answer was that, "[u]pon information and belief, Caliguri is unable to admit or deny the allegations made in Paragraph Nos. 1 though 27 [of the complaint]"—in other words, *every* paragraph of the complaint—and so "[f]or purposes of this Answer, said allegations are denied." R.56. He never contested them in his cross-motion for and opposition to summary judgment (*see* R.638-661) or his reply in support of his cross-motion (*see* R.696-706). As the Supreme Court put it, "[n]otably, the answering defendant did not deny having received the loan proceeds and having defaulted on the subject loan payments." R.13 (citing *Citibank, N.A. v. Souto Geffen Co.*, 231 A.D.2d 466, 466 (1st Dep't 1996) (affirming summary judgment to plaintiff that "established a prima facie case by showing the existence of the note and defendants' default in payment" where "[d]efendants do not deny that they have not made payments of interest or principal")). He never disputed them before the Appellate Division, nor has he before this Court, either in his motion for leave to appeal or his opening brief.

In short, the parties agree that Caliguri borrowed $1 million, secured the debt with his Hamptons house, and failed to meet his payment obligations.

B. Caliguri Raised No Factual Disputes Over Chase's Standing

Having failed to dispute Chase's prima facie evidence of its foreclosure claim, Caliguri must offer his own evidence to show that he has a meritorious defense. As this Court has explained, once the movant satisfies its prima facie burden, it is "then mandatory upon [the nonmovant] to submit evidentiary facts or materials, by affidavit or otherwise, rebutting the prima facie showing … and demonstrating the existence of a triable issue of ultimate fact." *Indig v. Finkelstein*, 23 N.Y.2d 728, 729 (1968). "The burden upon a party opposing a motion for summary judgment," however, "is not met merely by a repetition or incorporation by reference of the allegations contained in pleadings or bills of particulars, verified or unverified." *Id.* "Some evidentiary facts are required to be put forward." *S.J. Capelin Assocs., Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 343 (1974). And if the nonmovant "fails to controvert [the movant's] evidence and establish by affidavit or proof that it has a real defense and should be permitted to defend, the court may determine that no issue triable by jury exists between the parties and grant a summary judgment." *Gen. Inv. Co. v. Interborough Rapid Transit Co.*, 235 N.Y. 133, 143 (1923).

That is the case here. Caliguri relies on two affirmative defenses: standing and authenticity. But he failed to offer evidence to support either one. Indeed both defenses are flatly contradicted by the record and so were rejected by the Supreme Court and the Appellate Division for good reason.

1. Caliguri did not put Chase's standing into dispute.

Caliguri's first affirmative defense is that Chase lacked standing to sue. To have standing, a plaintiff must "have an actual legal stake in the matter in dispute." *N.Y. State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 212 (2004). In mortgage-foreclosure actions, where the note and mortgage unquestionably entitle *someone* to foreclose once default is proved, the question of standing boils down to "[w]hether the action is being pursued by the proper party." *Wells Fargo Bank Minn., N.A. v. Mastropaolo*, 42 A.D.3d 239, 243 (2d Dep't 2007). "Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, *when challenged*, must be considered at the outset of any litigation." *Soc'y of Plastics Indus., Inc. v. Cty. of Suffolk*, 77 N.Y.2d 761, 769 (1991) (emphasis added). Thus, lower courts have held that "[w]here standing is

put into issue by a defendant's answer, a plaintiff must prove its standing if it is to be entitled to relief." *Mastropaolo*, 42 A.D.3d at 242 (emphasis added).[3]

Caliguri failed to put Chase's standing into issue, by his answer or otherwise. To begin, his answer was not verified and thus had no evidentiary value. *Cf.* N.Y. C.P.L.R. § 105(u) (providing that "[a] 'verified pleading' may be utilized as an affidavit whenever the latter is required"); *Sanchez v. Nat'l R.R. Passenger Corp.*, 21 N.Y.3d 890, 891 (2013) (holding that, under C.P.L.R. § 105(u), a *verified* pleading can constitute sufficient proof of a material issue of fact to carry a nonmovant's burden at summary judgment).

Moreover, even if Caliguri's answer had been verified, it would have been insufficient to put standing into issue for purposes of summary judgment. At summary judgment, Caliguri as the nonmoving party had an "obligation not only to rebut that prima facie showing but also to demonstrate the existence of a triable issue of ultimate fact by presenting proof in evidentiary form," which cannot be satisfied even by a "verified answer [that] may be used as an affidavit" if "the

[3] Some lower courts have phrased this conclusion in a way that suggests that a plaintiff must prove its standing in order to be entitled to summary judgment once a defendant merely "raise[s] the issue of standing as an affirmative defense in his answer." *McCormack v. Maloney*, 160 A.D.3d 1098, 1099 (3d Dep't 2018). That phrasing taken literally would be inconsistent with a century's worth of summary-judgment practice requiring that a nonmovant must "establish by … *proof* that it has a real defense and should be permitted to defend." *Gen. Inv. Co.*, 235 N.Y. at 143 (emphasis added).

answer sets forth no evidentiary facts." *Bethlehem Steel Corp. v. Solow*, 51 N.Y.2d 870, 872 (1980). That is the case here. Caliguri's answer sets forth no evidentiary facts concerning Chase's standing. *See* R.58-59. It relies solely on legal arguments (erroneous ones about preclusion, as discussed at *infra* Part IV). "[T]hat does not help [Caliguri] in this case." *Solow*, 51 N.Y.2d at 827. Caliguri's answer thus failed to put standing into dispute for purposes of summary judgment.

His summary-judgment motion papers fare no better. He opposed Chase's motion and supported his cross-motion with two attorney affirmations. R.638-661, R.696-709. But it is well established that "the bare affirmation of [an] attorney who demonstrated no personal knowledge … is without evidentiary value and thus unavailing" in opposition to summary judgment. *Zuckerman*, 49 N.Y.2d at 563. Caliguri's attorney affidavits predominately recap the earlier foreclosure and quiet-title proceedings and this case's procedural history. R.638-661, 696-709. They do not demonstrate or purport to demonstrate personal knowledge of facts concerning Chase's standing.

Nor do they "serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form', e.g., documents, transcripts." *Zuckerman*, 49 N.Y.2d at 563. Caliguri's attorney affirmation attaches five court decisions, a list of Caliguri's motions then pending before this Court, his answer, his first set of interrogatories, and a letter his

attorney wrote to Chase. R.662-673. The second attorney affirmation attaches just one document, a court decision. R.710-711. None of these documents is evidence in admissible form contesting Chase's standing.

Because Caliguri's "submissions failed to raise any triable issues of fact as to standing, Supreme Court properly awarded summary judgment in favor of plaintiff." *Bank of N.Y. Mellon v. Rutkowski*, 148 A.D.3d 1341, 1343 (3d Dep't 2017) (affirming summary judgment to mortgagee because the "defendant submitted an affirmation and surreply affirmation of his counsel" that were "not based upon personal knowledge of the operative facts," which was "insufficient to defeat a motion for summary judgment").

This Court's decision in *Ehrlich v. American Moninger Greenhouse Manufacturing Corp.* illustrates this point. 26 N.Y.2d 255 (1970). In that case, American Moninger issued a demand note to Ehrlich but eventually stopped making payments, and she sued. *Id.* at 257. Although the note recited that it was for "value received," American Moninger argued in opposition to summary judgment that "there was actually no consideration." *Id.* at 257-258. The trial court granted Ehrlich summary judgment, and the Appellate Division and this Court both affirmed. "In opposing plaintiff's motion for summary judgment," this Court explained, "it was incumbent upon the defendants to do more than merely raise an issue of consideration." *Id.* at 259. "It was essential for the defendants, in

claiming absence of consideration, to state their version of the facts in evidentiary form." *Id.* Since they failed to do so, summary judgment was proper.

Just so here. It is incumbent on Caliguri to do more than merely raise the issue of standing. He must state his version of the facts—the version in which Chase does not have standing to foreclose under the CEMA and Consolidated Note and Mortgage—in evidentiary form. Yet he makes no effort to do so. As in *Ehrlich*, the courts below unanimously agree that his naked allegations cannot defeat summary judgment. And, as in *Ehrlich*, this Court should affirm.

2. The record demonstrates that Chase did have standing.

The Court can and should affirm based solely on Caliguri's failure to offer any evidence to support his affirmative standing defense. He fails to carry his burden, and so summary judgment was correctly entered. In addition, however, the record more than demonstrates that Chase *did* have standing to foreclose.

Under New York's Uniform Commercial Code, the holder of a negotiable instrument may enforce it. *See* N.Y. U.C.C. § 3-301. A "holder" is "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." *See* N.Y. U.C.C. § 1-201(21); *see also Hartford Accident & Indem. Co. v. American Express Co.*, 74 N.Y.2d 153, 159 (1989) ("The threshold status of 'holder' requires possession of an instrument drawn, issued or indorsed to him or to his order or to bearer or in blank.").

There are two ways to acquire standing to enforce a note from the holder under the U.C.C. Section 3-301 provides that "[t]he holder of an instrument … may *transfer* or *negotiate* it." N.Y. U.C.C. § 3-301 (emphases added). "*Transfer* of an instrument vests in the transferee such rights as the transferor has therein" but does not make the transferee a holder. *Id.* § 3-201(1) (emphasis added). Therefore a transferee still "must account for his possession of the unindorsed paper by proving the transaction through which he acquired it." *Id.* § 3-201 cmt. 8. "*Negotiation*," on the other hand, "is the transfer of an instrument in such form that the transferee becomes a holder." *Id.* § 3-202(1) (emphasis added). To effectuate negotiation, "[i]f the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery." *Id.* And it is "too long and too well settled in this state to permit it now to be questioned that a mortgage given to secure notes is an incident to the latter and stands or falls with them." *Weaver Hardware Co. v. Solomovitz*, 235 N.Y. 321, 331-332 (1923).

From these principles, the Appellate Divisions have devised a unanimous test for standing in mortgage-foreclosure cases. "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident." *U.S. Bank, N.A. v. Collymore*, 68

A.D.3d 752, 754 (2d Dep't 2009) (citing *Weaver Hardware*, 235 N.Y. at 331; *Payne v Wilson*, 74 N.Y. 348, 354-355 (1878)); *see also Merritt v. Bartholick*, 36 N.Y. 44, 46 (1867) (discussing transfer "by a written assignment" or "by manual delivery"). Chase satisfied both tests.

a. *Chase proved its standing by possession.*

Chase proved its standing by way of physical delivery of the note prior to the commencement of the foreclosure action.

1. *Chase proved standing with testimony detailing its possession.* Chase provided detailed evidence of its precommencement possession of the Consolidated Note. In support of its summary-judgment motion, Chase attached the affidavit of Sherry Stafford, a Chase Vice President who oversees custody and who specifically testified about possession. *See* R.95-97. To reiterate, Stafford affirmed that "Chase is the custodian of the collateral documents" for Caliguri's loan; that she had "access to the business records … concerning the loan," which were "maintained … in the course of … regularly conducted business activities and [were] made at or near the time of the event, by or from information transmitted by a person with knowledge" pursuant to a "regular practice to keep such records in the ordinary course of … regularly conducted business activity." R.95. And her testimony was "based upon [her] review of those records and from [her] knowledge of how they are kept and maintained." R.95.

Based on her review, Stafford provided ample proof of Chase's possession of the Consolidated Note. She testified that it is Chase's regular business practice to store notes secured by mortgages and deeds in a secured facility in Monroe, Louisiana and that Chase maintains possession of the Consolidated Note at its storage facility at 780 Delta Drive, Monroe, Louisiana. R.95. Chase received the original of the Consolidated Note into its custodial system of record on September 19, 2012—two years before Chase commenced these foreclosure proceedings. R.95. She attached copies of the original Consolidated Note and the recorded CEMA and Consolidated Mortgage. R.98-141.

This affidavit is more detailed than the one this Court held was sufficient in *Aurora Loan*. There, the plaintiff submitted an affidavit from its "legal liaison," who stated:

> [B]ased on her "personal knowledge" of the facts as well as her "review of the note, mortgage and other loan documents" and "related business records … kept in the ordinary course of the regularly conducted business activity," the "original Note has been in the custody of Plaintiff Aurora Loan Services, LLC and in its present condition since May 20, 2010." [She] also stated that, "prior to the commencement of the action, Aurora Loan Services, LLC, has been in exclusive possession of the original note and allonge affixed thereto, indorsed to Deutsche Bank Trust Company Americas as Trustee, and has not transferred same to any other person or entity."

25 N.Y.3d at 359-360. The affidavit submitted here was more specific and more comprehensive. Stafford testified not just that she had reviewed Chase's business records, but that she had "knowledge of how they are kept and maintained." R.95.

She testified with specificity about what Chase's business practices are for storing notes. R.95. And she testified not merely that Chase possessed the Consolidated Note, but precisely where and how Chase possessed it, and how she knew. R.95. As to timing, she provided "the exact delivery date." *Aurora Loan Servs., LLC v. Taylor*, 114 A.D.3d 627, 629 (2d Dep't 2014) ("[S]ince the exact delivery date was provided, there is no further detail necessary for the plaintiff to establish standing."). Notably, that delivery date was years before these foreclosure proceedings commenced; this was not a close call. *Cf. Aurora Loan*, 25 N.Y.3d at 361 (plaintiff commenced foreclosure action four days after coming into possession of the note). In short, the Stafford Affidavit "clarif[ied] the situation completely" as to Chase's possession. *Id.* at 362.

Accordingly, Chase more than satisfied the requirement to establish prima facie that it possessed the note before filing suit. *See, e.g.*, *Deutsche Bank Nat. Tr. Co. v. Brewton*, 142 A.D.3d 683, 685 (2d Dep't 2016) (requiring affidavit of possession from affiant "personally familiar with the plaintiff's record-keeping practices and procedures").

2. *Chase proved standing by attaching a copy of the Consolidated Note to the complaint.* In addition to this detailed testimonial proof, Chase showed its possession by attaching copies of the CEMA, Consolidated Note, and Consolidated Mortgage to the complaint when it was filed. Possessing a copy of a document is

prima facie evidence of possession of the original—that is, it is "evidence which is sufficient to establish the facts unless rebutted." *Powers v. Powers*, 207 A.D.2d 637, 638 (3d Dep't 1994) (citing Black's Law Dictionary 1071 (5th ed. 1979)), *rev'd on other grounds*, 86 N.Y.2d 63 (1995); *see, e.g.*, *People v. Gower*, 42 N.Y.2d 117, 121 (1977) (holding that either "originals or copies" of breathalyzer reports "would be admissible in evidence to lay the necessary foundation for receipt of the results of breathalyzer tests"); *cf.* N.Y. C.P.L.R. § 4539(a) (providing that a "satisfactorily identified" copy of a document created in the regular course of business "is as admissible in evidence as the original"). Attaching a copy *when filing* also shows the required timing.

For good reason, then, the First and Second Departments have held that a plaintiff establishes its prima facie standing "by demonstrating that the original note was in its possession when it commenced the action, as evidenced by its attachment of a copy of the original note, endorsed in blank, to the summons and complaint when the action was commenced." *E.g.*, *Deutsche Bank Nat'l Tr. Co. v. Kingsbury*, 171 A.D.3d 871, 872 (2d Dep't 2019); *Bank of N.Y. Mellon v. Knowles*, 151 A.D.3d 596, 597 (1st Dep't 2017) ("[I]f the note is affixed to the summons and complaint at the time the action is commenced, it is unnecessary to give factual details of the delivery to establish that possession was obtained prior to a particular date.").

This conclusion follows from this Court's decision in *Aurora Loan*, 25 N.Y.3d 355. That case establishes the showing required for a plaintiff to prove standing by possession at the summary-judgment stage. This Court explained that a plaintiff is "vested with standing to foreclose" when from the record "'[i]t can reasonably be inferred ... that physical delivery of the note was made to the plaintiff' before the action was commenced." *Id.* at 361 (quoting *Aurora Loan*, 114 A.D.3d at 629). Attaching a copy of the endorsed note to the complaint satisfies that requirement—it can be reasonably inferred from the plaintiff's ability to attach a copy of the endorsed note to the complaint that the original note had been transferred to the possession of the plaintiff prior to the time of filing.

Of course, that inference might be disproved in some cases. Attaching a copy of the note to the complaint does not *irrefutably* prove that the plaintiff possessed the original when commencing the action. But offering irrefutable proof is not the movant's burden. The movant's burden under *Aurora Loan* is to offer proof from which its standing can be reasonably inferred. Attaching a copy of the note to the complaint satisfies that prima facie obligation, after which it becomes the nonmovant's burden to disprove it.

3. *Caliguri failed to rebut the evidence of Chase's possession.* After Chase proved its possession of the note twice over, it was "then mandatory" for Caliguri "to submit evidentiary facts or materials, by affidavit or otherwise,

rebutting the prima facie showing … and demonstrating the existence of a triable issue of ultimate fact." *Indig*, 23 N.Y.2d at 729. Caliguri made no attempt to do so, in his answer or any of his summary-judgment filings. He did not offer proof or even argument to rebut the reasonable inference that Chase was able to attach a copy of the note to the complaint because it possessed the note at the time it filed the complaint. And he offered no proof to rebut the detailed facts showing Chase's possession laid out in Stafford's sworn affidavit.

Instead, Caliguri's attorney's affidavit mentions only that he was told in October 2011 that the Consolidated Note was held in a storage facility in Amherst, New York. R.654. Even if true, that allegation does not call into question the testimony of the Stafford Affidavit regarding the Consolidated Note's location four years later or, ultimately, Chase's possession when filing suit in 2014. In short, "with respect to the note, the affidavit from an officer of plaintiff who avers that plaintiff was in possession of the original note prior to the commencement of this action was uncontroverted." *JPMorgan Chase Bank, N.A. v. Verderose*, 154 A.D.3d 1198, 1201 (3d Dep't 2017).

In sum, "[e]very piece of documentary evidence … conclusively indicate that" Chase had standing to foreclose. *Ehrlich*, 26 N.Y.2d at 259. The mere "explanation of defendants … is not sufficient to overcome the overwhelming documentary evidence offered by the plaintiff." *Id.* And that is all Caliguri offers.

b. *Chase proved its standing by written transfer.*

Chase also proved its standing by written transfer of the underlying note prior to the commencement of the foreclosure action. Chase commenced this foreclosure action in August 2014. R.142. As described in Chase's motion for summary judgment, Chase became the purchaser of the loans and other assets of WaMu—the original holder of the Consolidated Note—six years earlier, in September 2008, after WaMu entered receivership by the FDIC. R.78. Chase proved the transaction by which it acquired the note by attaching its Purchase and Assumption Agreement with the FDIC to the summary-judgment motion. R.468. "Courts have found that the P & A Agreement evinced that JPMC purchased all of WAMU's loans and loan commitments, and therefore had the right to foreclose on a defaulting borrower." *JP Morgan Chase Bank, N.A. v. Miodownik*, 91 A.D.3d 546, 547 (1st Dep't 2012); *see supra* note 1.

This evidence conclusively establishes Chase's standing to foreclose by a written transfer of the underlying note years before the foreclosure proceeding began. There is no question that its acquisition of Caliguri's Consolidated Note in September 2008 preceded commencement of these foreclosure proceedings in August 2014. *Cf. Wells Fargo Bank, N.A. v. Marchione*, 69 A.D.3d 204, 207 (2d Dep't 2009) (no standing when the complaint was filed prior to the execution of the written transfer of the note). And the recorded assignment of the Consolidated

Mortgage, although not dispositive by itself, provides further proof of Chase's written acquisition of the Consolidated Note: it expressly references the CEMA, the creation of "a single lien in the amount of [o]ne million dollars ($1,000,000) and interest," the transfer of "all moneys now owing or that may hereafter become due or owing," and that Chase will "have and … hold the said Mortgage *and Note*." R.279 (emphasis added). This evidence belies any concerns about the scope of the transfer. *Cf., e.g.*, *Aurora Loan Servs., LLC v. Weisblum*, 85 A.D.3d 95, 109 (2d Dep't 2011) (finding standing insufficiently proved when the plaintiff "produced no documents indicating an assignment to it of the second note and mortgage or of the entire consolidated note and CEMA"). Caliguri makes no attempt to contradict this evidence or prove otherwise. He makes no mention of these facts at all. Chase therefore undisputedly demonstrated its standing by written transfer of the note.

C. Caliguri's Authenticity Defense Is Fictional

Caliguri's second affirmative defense is that the Consolidated Note and his signature on it are not authentic. Caliguri raised it in his answer by the single unadorned statement that he "denies the authenticity and genuineness of the mortgage notes annexed to the complaint." R.59. Caliguri did not mention authenticity again until his reply affidavit, in which he cited it as the reason he needed a forensic investigator to inspect the original of the Consolidated Note. But

he still offered no reason why he questioned its authenticity in the first place. It is little surprise, then, that the Supreme Court rejected this defense, *see* R.11 (citing *Beitner v. Becker*, 34 A.D.3d 405, 408 (2d Dep't 2006) (holding that "the defendant failed to raise a triable issue of fact in opposition by his conclusory assertions that he did not sign the note")), and the Appellate Division affirmed. This Court should do the same.

Caliguri primarily contests authenticity because the signature page of the Consolidated Note is "not notarized or certified." Br. 21, 24-25. This cramped characterization of the facts borders on misrepresentation. The notarized CEMA incorporates the Consolidated Note and Consolidated Mortgage by reference and they are affixed to it as exhibits. R.237-240. Each document is signed or signed and notarized as the Fannie Mae templates provide. Caliguri cannot and does not claim that his signatures were forged: the notary public witnessing the execution of the CEMA affirmed that Caliguri personally appeared before her and proved his identity before signing. R.243. And Caliguri made payments under the CEMA for nearly a year. Caliguri's contention now that the signature page of the Consolidated Note was not *additionally* notarized (when it was not required to be) does nothing to put his signature on that document into dispute.

What's more, Caliguri expressly waived any "any defense to the obligations of the Consolidated Note or the Consolidated Mortgage" in the duly notarized

CEMA. *See* R.240. As the Supreme Court indicated, such waivers are valid and enforceable. *See* R.11-12 (citing *Chem. Bank N.Y. Tr. Co. v. Batter*, 31 A.D.2d 802, 802 (1st Dep't 1969)). So, on the CEMA that he indisputably personally signed, Caliguri knowingly waived his right to raise an authenticity defense as to the Consolidated Note.

Other than his notarization counterfactual, Caliguri offers nothing but bald assertions of forgery—which are perhaps the paradigmatic example of an "issue [that] is not genuine, but feigned," leaving "in truth nothing to be tried." *Curry v. Mackenzie*, 239 N.Y. 267, 270 (1925). This Court has expressly held that "[s]omething more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature." *Victory Taxi Mgt.*, 1 N.Y.3d at 384; *see also, e.g.*, *Kramer v. Harris*, 9 A.D.2d 282, 283 (1st Dep't 1959) ("Defendant's tenuous effort at issue creation implemented by incredible conclusory facts and gross assertions of coincidental forgeries is not sufficient to defeat summary judgment."). Caliguri offers nothing more.

Were there more to offer—any actual basis to assert forgery—Caliguri has been in the position to offer it from the outset. Caliguri himself surely knows whether he did or did not sign the document. He questions the Stafford Affidavit because "there was no representation that Ms. Stafford … attended the refinancing ceremony," but he himself attended the refinancing ceremony, or knows that he did

not. Br. 24. He proclaims that "it is doubtful that anyone can claim that the purported original mortgage note was, in fact, executed by Caliguri and not a forgery," but he himself executed the Consolidated Note, or can deny it. Br. 23. There is no need for the opinion of a "forensic document specialist." Br. 23, 24, 26, 27, 29; R.702. It would be the work of a moment for Caliguri to swear in an affidavit that he did not sign the Consolidated Note. But in the extensive proceedings below, Caliguri has never done so. Instead he offers only a "mystery as to what [he thinks] actually happened, instead of a contradictory factual version which would support [his] contentions," relying on "conclusory assertions, which defy reality and are inconsistent with the pattern of events." *Kramer*, 9 A.D.2d at 283. That is insufficient to defeat summary judgment. *See id.* ("It is not enough that a defendant deny a plaintiff's presentation in summary judgment. He must state his version, and he must do so in evidentiary form.").

This Court has considered similar facts before. In *P.D.J. Corp. v. Bansh Properties, Inc.*, the plaintiff sued the defendant to recover on two promissory notes. 29 A.D.2d 927 (1st Dep't 1968). Copies of the notes were attached to the plaintiff's motion for summary judgment, and the defendant did not deny that it had executed them. *Id.* at 928. Instead, the defendant claimed that one note was merely a sham engineered to falsely show a receivable on the plaintiff's books and that the plaintiff had agreed to destroy another note after the defendant provided

certain services. *Id.* The Appellate Division granted summary judgment on the concededly executed notes since the defendant's alleged defenses were without evidentiary support and refuted by evidence in the record. *Id.* at 927-928. This Court affirmed without opinion. *See* 23 N.Y.2d 971 (1969).

This case is analogous. Caliguri offers an unsupported assertion of fraud that is refuted by all the evidence in the record. Under those circumstances, as in *P.D.J. Corp.*, summary judgment is warranted. *See also, e.g.*, *Richard v. Credit Suisse*, 242 N.Y. 346, 350 (1926) ("The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial.").

* * *

C.P.L.R. § 3212 dictates that summary judgment "*shall* be granted if, upon *all the papers and proof submitted*, the cause of action or defense shall be established *sufficiently* to warrant the court as a matter of law in directing judgment in favor of any party" (emphasis added). Chase established its cause of action and Caliguri failed to dispute it. Chase was therefore entitled to summary judgment, as the Supreme Court and Appellate Division rightly held.

III. THERE WAS NO REASON TO FORESTALL SUMMARY JUDGMENT

Summary judgment was amply justified in this case. Chase carried its prima facie burden to show that Caliguri borrowed a million dollars, secured the debt with his house in the Hamptons, and then stopped repaying it. Caliguri offered no proof to the contrary, instead relying on defenses of standing and authenticity that are themselves wholly disproved by the record. There were, in short, no facts at issue and Chase was entitled to judgment as a matter of law.

Because he could not prevent summary judgment, Caliguri tries to postpone it. He argues that granting summary judgment was not exactly *wrong*, just premature. And so he asks this Court to adopt a categorical rule: if the plaintiff asks to inspect the original of the note in discovery, for any reason or no reason, that original *must* be produced before summary judgment can issue. *See* Br. 18. But that rule has no basis except for Caliguri's misreading of this Court's *Aurora Loan* decision and the relevant U.C.C. provisions—and it is unnecessary to consider it in this appeal anyway. Caliguri's ancillary arguments that summary judgment was premature—based largely on C.P.L.R. provisions that he has waived or overlooked—are equally meritless. Summary judgment was both properly timed and properly granted.

A. The Original Of A Note Need Not Be Produced On Demand

Caliguri asks the Court to impose a novel categorical procedural rule upon every one of the thousands of foreclosure proceedings in this State: that whenever a mortgage-foreclosure defendant demands to inspect the original of a note, for whatever baseless reason or for no reason at all, summary judgment cannot be granted until that original is produced. The Court should decline the invitation.

At the outset, the Court need not consider this issue. Production of the original Consolidated Note in this particular case was not even arguably necessary. Why Caliguri thinks it was necessary has been a moving target. In his motion for leave to appeal, and below, Caliguri argued that an original note must be produced on demand to prove standing. *See, e.g.*, Mot. for Leave at 12-14; R.647. Producing the original note to prove possession is unnecessary in general, *see supra* at 31-39, and producing it on demand in discovery is not particularly probative of possession at the time of filing—but in this case Chase proved standing separately by written transfer anyway. For all of those reasons, it is unnecessary to take up this novel claim to resolve the standing question.

Caliguri offers a different reason to require the original note to be produced in his opening brief. There Caliguri suggests that the original note must be produced not to prove standing, but in response to his authenticity defense and under the U.C.C. *See* Br. 18-29. It is unclear whether he still contends that an

original note must be produced *whenever* demanded, or only whenever demanded by a defendant with an authenticity defense—but in any event, his authenticity defense is wholly unsubstantiated and rightfully viewed as frivolous for the reasons above. *See supra* Part II.C. Both his standing and authenticity defenses fail on the merits without any need to take up this question.

If this Court does consider it, however, it should be rejected on the merits. In fact this Court already *has* rejected it on the merits, in *Aurora Loan*. There, the defendants—represented by the same attorney that Caliguri is now—advanced this identical argument: "that to demonstrate possession of the note Aurora had to produce the original mortgage note for examination." 25 N.Y.3d at 362. In this first bite at the apple, Caliguri's counsel argued that the best-evidence rule required this result. The Court rejected that argument as entirely unsupported. *See id.* ("Although the Taylors assert that the best evidence rule should require production of the original, they fail to cite any authority holding that such is required in this context."). The Court also commented that "there is no indication in the record that the Taylors ever requested such production in discovery or moved Supreme Court to compel such production." *Id.*

Caliguri's counsel picks this phrase to take his second bite at the apple. He argues that by this comment, this Court "inferred … that if discovery of the original note is demanded, the note must be produced prior to the making of the

motion for summary judgment." Mot. for Leave 13; *see also* Br. 27. Not so. The Court's comment merely makes the commonsense point that the Taylors could not fault the plaintiff for not producing something they did not request. Essentially, the Court is observing that the Taylors forfeited this point.

That conclusion does not mean that if the Taylors *had* asked for the original note, they would have been entitled to it. That is an error of logic. And in fact, Caliguri's attorney made this exact same error of logic in *Aurora Loan*. There, the Taylors "misconstrue[d] the legal principle that 'an entity with a mortgage but no note lack[s] standing to foreclose' to also mean the opposite—that an entity with a note but no mortgage lacks standing." 25 N.Y.3d at 361 (citation omitted). Here, Caliguri misconstrues the legal principle that a defendant need not produce a document that is not requested to also mean *its* opposite—that once something is requested, it must be produced. That argument is just as erroneous now as it was then.

Caliguri's other basis for imposing this new rule is § 3-307 of the U.C.C. *See* Br. 19-22. That section provides that "[w]hen the effectiveness of a signature is put in issue (a) the burden of establishing it is on the party claiming under the signature; but (b) the signature is presumed to be genuine or authorized" (subject to an exception not relevant). This argument fares no better. On its face, this U.C.C. provision offers no support for a broad rule that an original note must be produced

whenever demanded. It concerns only the narrow circumstances when "the effectiveness of a signature is put in issue." N.Y. U.C.C. § 3-307(1).

And this section expressly provides that a signature is presumed to be genuine or authorized. When the U.C.C. "provides that a fact is 'presumed,' the trier of fact *must* find the existence of the fact *unless and until* evidence is introduced that supports a finding of its nonexistence." N.Y. U.C.C. § 1-206 (emphases added). In the case of signatures, that presumption "means that until some evidence is introduced which would support a finding that the signature is forged or unauthorized the plaintiff is not required to prove that it is authentic." *Id.* § 3-307 cmt. 1. In other words, the party contesting the signature must offer some evidence to put it into dispute first, and only then must the other party prove its authenticity by a preponderance of the evidence. *See id.* Because Caliguri offered no evidence to put his signature's authenticity into dispute, Chase had no obligation to prove its authenticity.

Chase certainly had no obligation to prove the signature's authenticity by the narrow and specific grounds that Caliguri demanded, the production of the original note. That conclusion is consistent with the normal workings of summary judgment. A mortgage-foreclosure plaintiff might choose to produce the original note to make out its prima facie case. But it need not meet its burden with the particular evidence the defendant wants; it may support its motion "by other

available proof" as it chooses. N.Y. C.P.L.R. 3212(b). And once the plaintiff offers evidence that demonstrates the prima face elements of its claim, the defendant cannot simply insist on *different* evidence. He must offer his own evidence to put the material facts into dispute. If a mortgage-foreclosure defendant does offer proof sufficient to put material facts into dispute, and producing an original of the note would resolve that dispute, the plaintiff can choose to produce it then. But Caliguri offers no legal justification to impose a requirement that every mortgage-foreclosure plaintiff must produce the original note for the defendant's inspection in any case whenever asked in order to make out its prima face case.

In sum, Caliguri's cornerstone argument finds no support in the sources from which he draws it and contradicts the normal course of civil procedure. The Court should reject Caliguri's newly invented, but baseless, categorical rule.

B. There Was No Other Reason To Delay Summary Judgment

With no basis for his central argument to delay summary judgment, Caliguri throws a few other miscellaneous arguments against the wall. None sticks.

First, in his opening brief before this Court, Caliguri invokes C.P.L.R. § 3212(f) for the first time, after never doing so below. Br. 26-27. That subsection provides that, "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated,

the court *may* deny the motion or *may* order a continuance to permit affidavits to be obtained or disclosure to be had and *may* make such other order as may be just" (emphases added). But Caliguri never asked the Supreme Court to exercise its discretion under this provision. He did not mention § 3212(f) even once in his summary-judgment papers. *See* R.638-661, 696-709. On the contrary, he himself *cross-moved* for summary judgment. In other words, Caliguri made the strategic decision to attempt to win the case outright by arguing that "[t]he failure to provide discovery after a reasonable amount of time has passed is a ground for the granting of summary judgment," R.654, rather than try to postpone summary judgment by seeking discovery. *Cf. HSBC Bank USA, N.A. v. Arias*, 112 A.D.3d 785, 786 (2d Dep't 2013) (affirming that a party's motion for summary judgment was premature when that very party continued to seek discovery). He has therefore waived any argument that he was entitled to relief under § 3212(f).

Second, a motion to postpone summary judgment under § 3212(f) would have been meritless anyway. "A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant." *Buto v. Town of Smithtown*, 121 A.D.3d 829, 830 (2d Dep't 2014) (internal quotation marks and citation omitted). Discovery is not a fishing expedition, and the "[m]ere hope that

the defendants will later uncover evidence to prove affirmative defenses provides no basis for postponing a decision on the summary judgment question." *Kennerly v. Campbell Chain Co.*, 133 A.D.2d 669, 670 (2d Dep't 1987); *see also Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 448 (2016) ("[B]ald, conclusory assertions or speculation and '[a] shadowy semblance of an issue' are insufficient to defeat summary judgment, as are merely conclusory claims." (citation omitted)). Caliguri has never attested that he did not sign the CEMA—which he paid on for nearly a year—or contested that he defaulted on it. His unsupported and unexplained claims of forgery did not warrant delaying summary judgment. Where defendants "fail[] to make the necessary evidentiary showing," a motion under § 3212(f) will be denied. *Preferred Capital, Inc. v. PBK, Inc.*, 309 A.D.2d 1168, 1169 (4th Dep't 2003).

Third, Caliguri overlooks that Chase's motion for summary judgment resulted in an automatic stay of discovery. C.P.L.R. § 3214(b) provides unequivocally that "[s]ervice of a notice of motion under rule 3211, 3212, or section 3213 stays disclosure until determination of the motion unless the court orders otherwise." Since discovery was automatically stayed, Caliguri had no

basis to file a motion to compel Chase to provide discovery.[4] The Supreme Court correctly acknowledged this fact, *see* R.12, and yet Caliguri still ignores it.

In sum, Caliguri's ancillary arguments that summary judgment should have been postponed are no stronger than his primary claim. The Court should reject them.

IV. THE EARLIER FORECLOSURE PROCEEDINGS HAVE NO PRECLUSIVE EFFECT ON THIS ONE

Having failed to show that summary judgment was improper or untimely, Caliguri brings a final, last-ditch argument. He claims that the dismissal of the first foreclosure action has a preclusive effect on this one. *See* Br. 29-39. The first foreclosure action was dismissed for two reasons. *First*, citing C.P.L.R. § 3212, the court concluded that Chase had failed to raise a dispute of fact as to standing. The court reached that conclusion because Chase had opposed Caliguri's motion for summary judgment with "only the affirmation of its attorney, who [did] not have personal knowledge of the facts," and with "documentary evidence annexed thereto … [that] fail[ed] to establish as a matter of law that plaintiff was the owner and holder of the subject note(s) and mortgage(s) at the time of commencement of

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[4] Chase acknowledges that it had not yet responded to Caliguri's discovery requests when it moved for summary judgment. The discovery requests were served on April 10, 2015, and requested a response by April 30 and production of the original note by May 10. R.587-600. Chase filed for summary judgment on June 8, 2015. R.72.

this action." R.38. *Second*, citing C.P.L.R. § 3126, the court struck the complaint because Chase served discovery responses that the court viewed as noncompliant with a previous discovery order. R.38.

Caliguri argues that this decision requires dismissal of the current action (or production of the original note in it) under the doctrine of law of the case as well as res judicata and collateral estoppel. But that dismissal has no binding or preclusive effect in this action.

A. Law Of The Case Applies Only In The Course Of A Single Litigation Before Final Judgment

The law-of-the-case doctrine is inapplicable here. "As distinguished from issue preclusion and claim preclusion … law of the case addresses the potentially preclusive effect of judicial determinations *made in the course of a single litigation before final judgment*." *People v. Evans*, 94 N.Y.2d 499, 502 (2000) (emphasis added). This action is not part of a "single litigation" with the first foreclosure proceeding. Caliguri hypothesizes that maybe this foreclosure case and the earlier one *could* be considered a "single litigation," but this Court's decision in *People v. Evans* forecloses that conjecture. It makes clear that "the course of a single litigation" ends at "final judgment." *Id.* Final judgment was entered in the first foreclosure proceeding years ago. No decisions in that case constitute the law of this case.

B. Res Judicata And Collateral Estoppel Do Not Apply Because The Earlier Dismissal Was Not An Adjudication On The Merits

"Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action." *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 347 (1999). A "necessary element of res judicata" is "a final determination on the merits" of the cause of action. *Landau*, 11 N.Y.3d at 13. Similarly, collateral estoppel requires that "the issue previously litigated was necessary to support a valid and final judgment on the merits." *Conason v. Megan Holding, LLC*, 25 N.Y.3d 1, 17 (2015) (citation omitted). That is not the case here. On its face, neither of the two grounds for dismissal of the first foreclosure action addressed—let alone finally determined—the merits of the foreclosure claim.

The dismissal as a discovery sanction had nothing to do with the merits of the foreclosure claim. It had nothing to do with the cause of action at all. It turned solely on the court's view that Chase's interrogatory responses were willfully noncompliant with an earlier discovery order. *See* R.39. The court did not specify that it was "striking plaintiff's complaint in this action" on the merits. R.39; *see* N.Y. C.P.L.R. § 5013 ("A judgment dismissing a cause of action before the close of the proponent's evidence is not a dismissal on the merits unless it specifies otherwise."); *Maitland*, 65 N.Y.2d at 615 ("Where, as here, a dismissal of a cause of action occurs prior to the close of proponent's evidence, the dismissal will not

be deemed on the merits so as to preclude the commencement of a second action.”). Although Caliguri moved for “an order granting summary judgment dismissing this mortgage foreclosure action with prejudice,” the court granted his motion only “as set forth hereinafter.” R.37. And what is set forth thereinafter did not adjudicate the merits of the foreclosure cause of action.[5]

The same is true of the dismissal on standing grounds. This Court has often recognized that dismissals for lack of standing do not resolve the merits of the claim. *See, e.g.*, *Landau*, 11 N.Y.3d at 13 (holding that a decision does not have preclusive effect where “[t]he record before us reveals that the only matter[] litigated below concern the standing” of the plaintiffs); *see also Matter of Schulz v. New York*, 81 N.Y.2d 336, 347 (1993) (recognizing that a disposition of a case based on a lack of standing only does not consider the merits of the claim); *Town of Hardenburgh v. New York*, 52 N.Y.2d 536, 540 (1981) (same).

Those decisions apply fully here. In fact, those decisions apply with particular force in mortgage foreclosure cases like this one. Mortgage notes are negotiable instruments that are freely transferable by their very nature, so determining standing in one case can never be binding on a future case because

[5] Caliguri cites C.P.L.R. § 205 (at Br. 30), but that provision has nothing to do with the preclusive effect of a dismissal as a discovery sanction. It simply extends the statute of limitations by six months when an otherwise timely case is dismissed for certain reasons and does not include discovery sanctions among them.

enforceability can change at any given point in time. Who possesses or has been assigned a note on one specific date can readily differ on another date. But a court's decision on standing pertains only to the single particular date on which that case was filed. It would make no sense for a decision about possession or assignment on one single date to finally determine possession or assignment as to all future dates. *See, e.g.*, *U.S. Bank N.A. v. Friedman*, 175 A.D.3d 1341, 1341-1342 (2d Dep't 2019) (holding that a prior action that "was dismissed for lack of standing, without reaching the merits of the foreclosure claim itself," had no preclusive effect, including because the issue whether plaintiff possessed the note when commencing an earlier action was not identical to whether it had possession when commencing the later action); *State of N.Y. Mortg. Agency v. Massarelli*, 167 A.D.3d 1296, 1297 (3d Dep't 2018) (explaining that dismissal for lack of standing "would not normally be entitled to res judicata effect because it was focused on plaintiff's ability to bring the [first] action rather than 'the merits of the claim' itself," and "[t]o accord res judicata effect to the dismissal order would bar a court from ever addressing the merits of plaintiff's mortgage foreclosure claim, even if plaintiff became able to demonstrate its standing to sue"). Dismissal for lack of standing must necessarily be without prejudice to the rights of a future holder of the negotiable instrument (whether the same party or a different one).

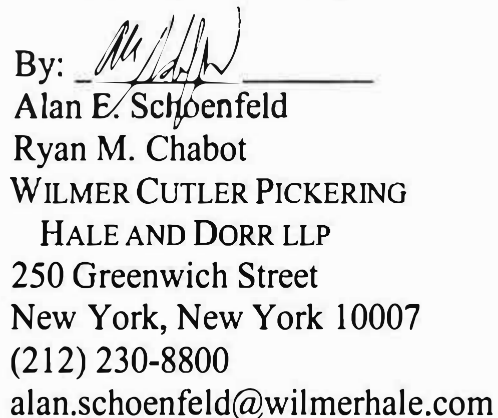
Caligurí's collateral-estoppel argument fails for an additional reason: the issue of "whether the purported original mortgage note had to be produced" was not necessary to the dismissal on either ground. Br. 39. As to the discovery violations, the court struck the complaint as a sanction for noncompliant interrogatory responses, not failing to produce the original note. *See* R.39. Failure to produce the original note was not necessary to that decision. And the dismissal for lack of standing makes no mention of production of the original note at all. So the issue as Caliguri defines it was not necessary to the judgment, which was not on the merits in any event.

The dismissal of the earlier foreclosure action therefore has no preclusive effect on foreclosure in this action.

CONCLUSION

For these reasons, the Court should affirm the grant of summary judgment to Chase.

Respectfully submitted,



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NEW YORK STATE COURT OF APPEALS
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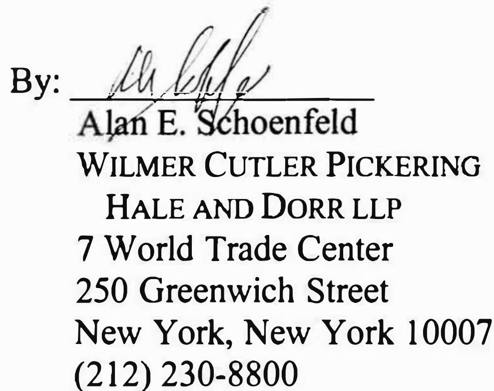

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