

JUN 08 2012

SUSAN M SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

|                                |   |                      |                 |
|--------------------------------|---|----------------------|-----------------|
| In re:                         | ) | BAP No.              | EW-11-1537-PaDH |
|                                | ) |                      |                 |
| ARNOLD JOHN ALLEN, JR. and     | ) | Bk. No.              | 11-01152        |
| KIMBERLY FAITH ALLEN,          | ) |                      |                 |
|                                | ) |                      |                 |
| Debtors.                       | ) |                      |                 |
| _____                          | ) |                      |                 |
|                                | ) |                      |                 |
| ARNOLD JOHN ALLEN, JR.;        | ) |                      |                 |
| KIMBERLY FAITH ALLEN,          | ) |                      |                 |
|                                | ) |                      |                 |
| Appellants,                    | ) |                      |                 |
|                                | ) |                      |                 |
| v.                             | ) | <b>O P I N I O N</b> |                 |
|                                | ) |                      |                 |
| US BANK, NATIONAL ASSOCIATION, | ) |                      |                 |
|                                | ) |                      |                 |
| Appellee.                      | ) |                      |                 |
| _____                          | ) |                      |                 |

Argued and Submitted on May 16, 2012  
at Pasadena, California

Filed - June 8, 2012  
Ordered Published - June 14, 2012

Appeal from the United States Bankruptcy Court  
for the Eastern District of Washington

Honorable Patricia C. Williams, Bankruptcy Judge, Presiding

Appearances: \_\_\_\_\_  
 William Jeffrey Barnes argued for appellants Arnold  
 John Allen, Jr. and Kimberly Faith Allen; Ryan P.  
 McBride of Lane Powell, PC argued for appellee  
 US Bank, National Association.

Before: PAPPAS, DUNN and HOLLOWELL, Bankruptcy Judges.

1 PAPPAS, Bankruptcy Judge:

2

3 Chapter 13<sup>1</sup> debtors Arnold John Allen, Jr. and Kimberly Faith  
4 Allen (the "Allens") appeal the bankruptcy court's order  
5 overruling their objection to the claim of U.S. Bank, National  
6 Association ("USB"). We AFFIRM.

7

**FACTS**

8 According to the documentary evidence admitted without  
9 objection in the record of the bankruptcy court, the following  
10 facts and transactions of relevance to this appeal occurred.

11 On April 24, 2006, the Allens executed a promissory note (the  
12 "Note") in the amount of \$164,000 in favor of Dream House Mortgage  
13 Corporation ("DHMC"). An endorsement in blank appears on the  
14 third page of the Note, which reads, "Pay to the Order of; Without  
15 Recourse, By [signed initial "J"] John C. Pointe, President, Dream  
16 House Mortgage Corporation." There is also an allonge attached to  
17 the Note reciting substantially the same information, but with the  
18 addition of a date, April 28, 2006.

19 The Note was secured by a recorded deed of trust ("DOT")  
20 executed by the Allens on their property in Newport, Washington  
21 (the "Property"). In the DOT, Mortgage Electronic Registration  
22 Systems, Inc. ("MERS") is named as the grantee and nominee for  
23 DHMC.

24 On May 31, 2006, the president of DHMC executed a "Lost Note  
25 Affidavit and Agreement" (the "Lost Note Affidavit"). The Lost

26

---

27 <sup>1</sup> Unless otherwise indicated, all chapter, section and rule  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The  
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 Note Affidavit recites, among other things, that DHMC "was the  
2 current holder of the indebtedness evidenced by the" Note; the  
3 original Note had been lost, and attached to the allonge was a  
4 photocopy of the original in its files; and pursuant to a Mortgage  
5 Loan Sale Agreement ("MLSA") dated May 3, 2002, DHMC had "assigned  
6 all its rights, title and interest in and to the Mortgage Loan  
7 identified below [the Loan]" to DLJ Mortgage Capital Inc. ("DLJ").

8 On September 1, 2006, DLJ entered into a Pooling and  
9 Servicing Agreement ("PSA") that established the CSAB Mortgage-  
10 Backed Pass-Through Certificates, Series 2006-1. The parties to  
11 the PSA were Credit Suisse First Boston Mortgage Securities Corp.  
12 ("Credit Suisse"), the Depositor; DLJ, the Seller; Wells Fargo  
13 Bank N.A. ("Wells Fargo") as Servicer, Master Servicer and Trust  
14 Administrator; Washington Mutual Mortgage Securities Corp.  
15 ("WaMu") as Servicer; Select Portfolio Servicing, Inc. [later  
16 known as America's Servicing Co.] ("ASC") as Servicer; and USB as  
17 Trustee. The PSA provided for the transfer of the Note from DLJ  
18 to USB as Trustee under the PSA. To implement this transaction,  
19 DLJ first transferred the Note to Credit Suisse, the Depositor,  
20 and then Credit Suisse assigned the Note to USB, the Trustee.  
21 Section 201(a) of the PSA provides in part:

22 [Credit Suisse] hereby sells, transfers, assigns,  
23 delivers, sets over and otherwise conveys to [USB] for  
24 the benefit of the Certificateholders and the  
25 Certificate Insurer, without recourse, [Credit Suisse's]  
26 right, title and interest in and to (a) the Mortgage  
27 Loans listed in the Mortgage Loan Schedule ["MLS"].  
28

1 The MLS<sup>2</sup> attached to the PSA lists the Property, identified by the  
2 owner "Allen," and the same address listed in the Allens'  
3 bankruptcy schedules.

4 "Mortgage Loans" is a defined term in the PSA Article I; the  
5 term includes "related Mortgage Notes." Section 201(d) of the PSA  
6 provides that, "It is the express intent of the parties to this  
7 Agreement that the conveyance of the Mortgage Loans by [Credit  
8 Suisse] to [USB] be construed as a sale of the Mortgage Loans by  
9 [Credit Suisse] to [USB]." In addition, the PSA states in  
10 § 12.04(a) that:

11 It is the express intent of [Credit Suisse], [DLJ],  
12 [Wells Fargo, WaMu], and [USB] that (I) the conveyance  
13 by [DLJ] of the Mortgage Loans to [Credit Suisse]  
14 pursuant to the Assignment and Assumption Agreement and  
15 (v) the conveyance by [Credit Suisse] to [USB] as  
16 provided for in Section 2.01 of each of [DLJ's] and  
17 [Credit Suisse's] right, title and interest in the  
18 Mortgage Loans be, and be construed as, an absolute sale  
19 and assignment by [DLJ] to [Credit Suisse] and by  
20 [Credit Suisse] to [USB].

21 PSA §§ 201(b) (I) and 206 confirm the actual delivery and  
22 receipt of the Lost Note Affidavit from DLJ to Credit Suisse, and  
23 to USB. PSA §§ 3.01-3.03 provide that Wells Fargo and ASC have  
24 authority to service, administer, enforce and foreclose the  
25 Mortgage Loans to protect the interests of the trust "in the same  
26 manner as it protects its own interests in mortgage loans in its  
27 own portfolio[.]" The PSA was signed by officers of each of the  
28 parties.

---

26 <sup>2</sup> "MLSA" should not be confused with the similar acronym,  
27 "MLS." The Mortgage Loan Service Agreement (MLSA) was an  
28 agreement dated May 3, 2002, between DHMC and DLJ regarding  
assignment of mortgage loans from DHMC to DLJ. The Mortgage Loan  
Schedule (MLS) was the list of mortgage loans included in the PSA.

1           The Allens filed a petition for relief under chapter 13 on  
2 March 9, 2011. Their schedules listed no secured creditors, the  
3 value of the Property as \$180,000, and total unsecured debt of  
4 \$358,072.31. Two days later, the Allens filed a proposed  
5 chapter 13 plan which did not provide for any payment to secured  
6 creditors.

7           Wells Fargo filed a secured proof of claim in the Allens'  
8 bankruptcy case on March 31, 2011 in the amount of \$204,526.95  
9 (the "Wells Fargo Claim"). The Allens objected to the Wells Fargo  
10 Claim, arguing that Wells Fargo was not the lender, that the  
11 allonge was not attached to the Note that was attached to the  
12 Wells Fargo claim, and consequently, appeared to have been created  
13 after the Note, and that Wells Fargo had not established that it  
14 was holder of the Note entitled to enforce the Note or the DOT.

15           USB filed an amended proof of claim on June 7, 2011 (the "USB  
16 Claim") in its capacity as Trustee under the PSA. On June 22,  
17 2011, USB filed a response to the Allens' claim objection, noting  
18 that the Wells Fargo claim had been filed by Wells Fargo acting in  
19 its capacity as Servicer. USB described the history of the Note  
20 and DOT transactions, explaining that the Note had been lost, that  
21 USB had standing to file a proof of claim as a "person entitled to  
22 enforce the Note," and pointing out that any issues regarding the  
23 allonge were immaterial because an endorsement in blank appeared  
24 on the face of the Note.

25           The Allens objected again, this time to the USB claim, now  
26 challenging the "chain of possession" showing transfer of the Note  
27 from DHMC to USB.

28           The bankruptcy court conducted a hearing on the Allens'

1 objection to the USB claim on August 30, 2011. Both the Allens  
2 and USB were represented by counsel who were heard. Early in the  
3 hearing, the parties agreed to admit all of the documentary  
4 evidence offered by USB, including, among others documents, copies  
5 of the Assignment of Deed of Trust, the Note, the Lost Note  
6 Affidavit, the DOT, the PSA, and the MLS. During the hearing,  
7 counsel for USB presented to the bankruptcy court the original  
8 Lost Note Affidavit, with a copy of the Note attached to it, and  
9 the original DOT. Tr. Hr'g 46:23-25, August 30, 2011. The court  
10 verified that the documents had been signed, and that the DOT bore  
11 a recording stamp. Counsel for the Allens acknowledged that she  
12 had reviewed the original documents presented by USB, and did not  
13 object to their admission into evidence. The bankruptcy court  
14 took issues raised by the Allens' objection to the USB claim under  
15 submission.

16 On September 15, 2011, the bankruptcy court entered a  
17 "Memorandum Decision Re: Debtors' Amended Objection to U.S. Bank  
18 National Association's Amended Proof of Claim." In its decision,  
19 the court decided that USB's "Amended Proof of Claim is a valid  
20 claim." Among the bankruptcy court's findings and conclusions  
21 were that:

22 - The Lost Note Affidavit satisfied the requirements of  
23 applicable state law, RCW 62A.3-309, and therefore constituted an  
24 acceptable substitute for the original Note.

25 - The endorsement in blank on the face of the Note complied  
26 with the applicable requirements of the Bankruptcy Code to  
27 evidence transfer, and therefore, the allonge was superfluous.

28 - The contents of the Lost Note Affidavit demonstrated that

1 the transfer from DHMC to DLJ included the right to enforce the  
2 Note, and that such right could thereafter be transferred by DLJ  
3 to another.

4 - There was no evidence to indicate, or from which it could  
5 be inferred, that the transfer of the Note by DLJ was a transfer  
6 of less than all rights under the Note.

7 In summary, the bankruptcy court stated:

8 The Court finds that the Lost Note Affidavit is  
9 sufficient to replace the original Promissory Note. The  
10 endorsement in blank on the face of the Note was legally  
11 sufficient pursuant to RCW 62A.3-204. Wells Fargo d/b/a  
12 [ASC] is the agent of U.S. Bank and would have standing  
13 to file the claim so long as U.S. Bank is the person  
14 entitled to enforce the Note. The transfer of the Note  
15 from Dream House to DLJ was for the purpose of enforcing  
16 the Note. The evidence introduced by U.S. Bank  
17 satisfies its burden of demonstrating that it is the  
18 person entitled to enforce the Note. Therefore, U.S.  
19 Bank and/or [ASC] has standing to file the Proof of  
20 Claim. Debtor's Amended Objection (Docket No. 49) is  
21 OVERRULED. The Amended Proof of Claim filed on June 7,  
22 2011 is proof of a valid claim.

23 The bankruptcy court entered an Order overruling the Allens'  
24 objection to the USB claim on September 15, 2011. The Allens  
25 filed a timely notice of appeal.

#### 26 JURISDICTION

27 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
28 and 157(b)(2)(B). The Panel has jurisdiction under 28 U.S.C.  
§ 158.

#### ISSUES

Whether the bankruptcy court erred overruling the Allens'  
objection to the USB claim.

#### STANDARD OF REVIEW

"An order overruling a claim objection can raise legal issues  
(such as the proper construction of statutes and rules) which we

1 review de novo, as well as factual issues (such as whether the  
2 facts establish compliance with particular statutes or rules),  
3 which we review for clear error." Veal v. Am. Home Mortg.  
4 Servicing, Inc. (In re Veal), 450 B.R. 897, 918 (9th Cir. BAP  
5 2011). We review de novo whether a party has standing. Mayfield  
6 v. United States, 599 F.3d 964, 970 (9th Cir. 2010); In re Veal,  
7 450 B.R. at 906.

8 De novo review is independent, with no deference given to the  
9 trial court's conclusion. Barclay v. Mackenzie (In re AFI  
10  Holding, Inc.), 525 F.3d 700, 702 (9th Cir. 2008). Review under  
11 the clearly erroneous standard is significantly deferential,  
12 requiring a "definite and firm conviction that a mistake has been  
13 committed." Easley v. Cromartie, 532 U.S. 234, 242 (2001).

#### 14 **DISCUSSION**

15 Although the Allens did not list any secured debt for the  
16 Property in their bankruptcy schedules, they have not disputed  
17 that they executed the Note and DOT in connection with a home  
18 mortgage loan, that they owe over \$200,000 on that loan, or that  
19 some entity holds a secured claim in the bankruptcy case on  
20 account of that loan. The sole issue presented in this appeal is  
21 whether USB is that creditor.

22 The Allens have generally characterized that inquiry as one  
23 of standing; they allege that USB has failed to demonstrate it has  
24 standing to assert the claim in the bankruptcy case.<sup>3</sup> The

---

25  
26 <sup>3</sup> The issue of standing involves both "constitutional  
27 limitations on federal-court jurisdiction and prudential  
28 limitations on its exercise." Warth v. Seldin, 422 U.S. 490, 498  
(1975); In re Veal, 450 B.R. at 906. Only prudential standing is  
(continued...)



1 bankruptcy court disagreed.

2 Our opinion in In re Veal provides a comprehensive  
3 examination of standing in the context of a mortgage loan claim in  
4 a bankruptcy case and of the rights of parties entitled to enforce  
5 a promissory note. 450 B.R. at 902. As explained in that  
6 decision, a "person entitled to enforce the note," as defined in  
7 U.C.C. § 3-301, has the requisite standing to file a proof of  
8 claim in a bankruptcy case. Id. Washington's version of this  
9 U.C.C. provision is RCW 62A.3-301,<sup>4</sup> which lists three ways in

10

11 <sup>3</sup>(...continued)

12 at issue in this appeal, which requires that a party assert only  
13 its own claim rather than the claims of another. Dunmore v.  
14 United States, 358 F.3d 1107, 1112 (9th Cir. 2004).

15 In addition, claim objections are contested matters under  
16 Rule 9014. Rule 9014(c) makes Civil Rule 17(a)(1) (incorporated  
17 by Rule 7017) applicable to contested matters. Civil  
18 Rule 17(a)(1) provides that "[a]n action must be prosecuted in the  
19 name of the real party in interest." To satisfy the requirements  
20 of prudential standing and Civil Rule 17(a)(1), "the action must  
21 be brought by the person who, according to the governing  
22 substantive law, is entitled to enforce the right." 6A Wright,  
23 Miller, Kane & Marcus, FED. PRAC. & PROC. ¶ 1543 (3d ed. 2010);  
24 In re Veal, 450 B.R. at 908. A party without the legal right to  
25 enforce an obligation under substantive law is not a real party in  
26 interest. See Simon v. Hartford Life, Inc., 546 F.3d 661, 664  
27 (9th Cir. 2008); In re Veal, 450 B.R. at 908 ("The modern function  
28 of the rule . . . is simply to protect the defendant against a  
subsequent action by the party actually entitled to recover, and  
to insure generally that the judgment will have its proper effect  
as res judicata.").

22 <sup>4</sup> For the purpose of determining who is entitled to enforce a  
23 note, "the forum state's choice of law rules determine which  
24 state's substantive law applies." In re Veal, 450 B.R. at 920  
25 n.41. Washington's choice of law statute provides that in the  
26 absence of an agreement stating which law governs, Washington's  
27 version of the Uniform Commercial Code applies to transactions  
28 bearing a "reasonable relation" to the state. See RCW 62A.1-105.  
The Allens reside at the Property which is located in Washington,  
and USB does not dispute that Washington law governs. To the  
extent that we are called upon to construe Washington state law,  
the Washington Supreme Court instructs that: "In interpreting a  
statute, our primary objective is to ascertain the legislative

28

(continued...)

1 which a person may acquire "person entitled to enforce the note"  
2 status:

3 "Person entitled to enforce" an instrument means (i) the  
4 holder of the instrument, (ii) a nonholder in possession  
5 of the instrument who has the rights of a holder, or  
6 (iii) a person not in possession of the instrument who  
7 is entitled to enforce the instrument pursuant to  
RCW 62A.3-309 or 62A.3-418(d). 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.

8 RCW 62A.3-301. This statute, in turn, refers to RCW 62A.3-309,  
9 the provision applicable to lost notes, which provides:

10 (a) A person not in possession of an instrument is  
11 entitled to enforce the instrument if (i) the person was  
12 in possession of the instrument and entitled to enforce  
13 it when loss of possession occurred, (ii) the loss of  
14 possession was not the result of a transfer by the  
15 person or a lawful seizure, and (iii) the person cannot  
reasonably obtain possession of the instrument because  
the instrument was destroyed, its whereabouts cannot be  
determined, or it is in the wrongful possession of an  
unknown person or a person that cannot be found or is  
not amenable to service of process.

16 (b) A person seeking enforcement of an instrument under  
17 subsection (a) must prove the terms of the instrument  
18 and the person's right to enforce the instrument. If  
19 that proof is made, RCW 62A.3-308 applies to the case as  
if the person seeking enforcement had produced the  
instrument[.]

20 RCW 62A.3-309.

21 The plain meaning of RCW 62A.3-309(a) is that a person no  
22 longer in possession of an instrument is nonetheless entitled to  
23

24 \_\_\_\_\_  
25 <sup>4</sup>(...continued)  
26 body's intent. If a statute's meaning is plain on its face, the  
27 court must give effect to that plain meaning as an expression of  
28 legislative intent." Dowler v. Clover Park Sch. Dist. No. 400,  
258 P.3d 676, 682 (Wash. 2011) (citation omitted). Neither party  
has suggested that the applicable Washington U.C.C. provisions are  
in any way ambiguous, so we assign those provisions their plain  
meaning.

1 enforce it if that person was in possession and entitled to  
2 enforce it when the loss of possession occurred. Subsection (b)  
3 requires a proponent under subsection (a) to prove the terms of  
4 the instrument, e.g., via a Lost Note Affidavit. As the  
5 bankruptcy court correctly reasoned, the questions that arise in  
6 this case are: (1) did the Lost Note Affidavit constitute adequate  
7 proof of the terms of the Note under RCW 62A.3-309; and (2) could  
8 an assignee of a lost promissory note enforce the note based on  
9 the Lost Note Affidavit. The court noted that there was no  
10 Washington case law interpreting RCW 62A.3-309, and our own  
11 research confirms that. But the bankruptcy court did refer to  
12 cases from other courts in states with comparable U.C.C.  
13 provisions where a Lost Note Affidavit was used as a substitute  
14 for a lost promissory note, and holding that rights under a lost  
15 note may be assigned.

16 For example, according to the holding in Bobby D. Assocs. v.  
17 DiMarcantonio, 751 A.2d 673, 676 (Pa. Super. Ct. 2000), the  
18 assignee of a lost promissory note may enforce the note through a  
19 Lost Note Affidavit. And the Alabama Supreme Court decided in  
20 Atl. Nat'l Trust, LLC v. McNamee, 984 So. 2d 375 (Ala. 2007) that  
21 a valid assignment gives the assignee the same rights, benefits,  
22 and remedies that the assignor possesses, such that the assignee  
23 simply steps into the shoes of the assignor. Applying this law in  
24 the context of a lost, destroyed, or stolen promissory note, if  
25 the assignor of a promissory note was entitled, when the assignor  
26 owned the note, to enforce the note under Ala. Code § 7-3-309, the  
27 assignee of the promissory note steps into the assignor's shoes  
28 and acquires the right to enforce the promissory note under

1 § 7-3-309. Id. at 378.

2 The Fifth Circuit applied the Louisiana U.C.C. in Caddo  
3 Parish-Villas S., Ltd. v. Beal Bank, S.S.B. (In re Caddo Parish-  
4 Villas S., Ltd.), 250 F.3d 300, 302 (5th Cir. 2001). The trial  
5 court had been given an affidavit and other evidence as proof of  
6 the contents of the original note. As the assignee of a note,  
7 plaintiff stood in the shoes of the assignor and obtained all the  
8 rights, title, and interest that the assignor had at the time of  
9 the assignment. This would include the right of enforceability  
10 under La. Rev. Stat. Ann. § 10:3-309.

11 These states' versions of U.C.C. § 3-309 – RCW 62A.3-309(a),  
12 13 Pa. Cons. Stat. § 3309(a), Ala. Code § 7-3-309, and La. Rev.  
13 Stat. Ann. § 10:3-309 – are virtually indistinguishable, and we  
14 have found no case law in those states inconsistent with the cited  
15 cases.

16 The Allens challenge reliance upon these cases as  
17 inconsistent with In re Weisband, 427 B.R. 13 (Bankr. D. Ariz.  
18 2010). The bankruptcy court in In re Weisband indeed held that an  
19 allonge attached to a Note would not be sufficient to transfer the  
20 Note because an indorsement in blank must appear on the face of  
21 the note and not on an attached page. But as the bankruptcy court  
22 noted, that holding is of no moment in this case, since here the  
23 allonge was superfluous because the Note contained an endorsement  
24 in blank on its face. As the court explained, RCW 62A.3-204  
25 provides:

26 (a) "Indorsement" means a signature, other than that of  
27 a signer as maker, drawer, or acceptor, that alone or  
28 accompanied by other words is made on an instrument for  
the purpose of (i) negotiating the instrument,  
(ii) restricting payment of the instrument, or

1 (iii) incurring indorser's liability on the instrument,  
2 but regardless of the intent of the signer, a signature  
3 and its accompanying words is an indorsement unless the  
4 accompanying words, terms of the instrument, place of  
5 the signature, or other circumstances unambiguously  
6 indicate that the signature was made for a purpose other  
7 than indorsement. For the purpose of determining  
8 whether a signature is made on an instrument, a paper  
9 affixed to the instrument is a part of the instrument. .

6 (c) For the purpose of determining whether the  
7 transferee of an instrument is a holder, an indorsement  
8 that transfers a security interest in the instrument is  
9 effective as an unqualified indorsement of the  
10 instrument.

9 Based on its analysis of available law, the bankruptcy court  
10 determined that the Lost Note Affidavit, with the endorsement in  
11 blank appearing on its face, was sufficient to replace the  
12 original Note. We find no error in this conclusion. Once it was  
13 established that the Note was endorsed in blank, the Note became a  
14 bearer instrument:

15 Special indorsement; blank indorsement; anomalous  
16 indorsement . . . . (b) If an indorsement is made by  
17 the holder of an instrument and it is not a special  
18 indorsement, it is a "blank indorsement." When indorsed  
19 in blank, an instrument becomes payable to bearer and  
20 may be negotiated by transfer of possession alone until  
21 specially indorsed.

19 RCW 62A.3-205; Pequignot v. Deutsche Bank Nat'l Trust Co. (In re  
20 Pequignot), 2010 WL 3605326, at \*3 (W.D. Wash. 2010).

21 It is uncontested that USB presented the Lost Note Affidavit  
22 and the copy of the original Note, endorsed in blank, at the  
23 hearing on August 30, 2011. As a bearer instrument, the Note was  
24 negotiable by transfer of possession alone. RCW 62A.3-201(a)  
25 ("Negotiation" means a transfer of possession, whether voluntary  
26 or involuntary, of an instrument by a person other than the issuer  
27 to a person who thereby becomes its holder.). The bankruptcy  
28 court found, and counsel for the Allens agreed, that the Note was

1 authentic and admissible in evidence, and was in the possession of  
2 USB. That the Lost Note Affidavit with a copy of the original  
3 Note endorsed in blank was in the possession of USB and physically  
4 presented to the bankruptcy court, standing alone, gave USB status  
5 of a holder and a "person entitled to enforce" the instrument and,  
6 consequently, the real party in interest for purposes of filing a  
7 proof of claim. In re Veal, 450 B.R. at 920.

8 The Allens, as noted above, did not deny that they were  
9 obligated under the terms of the Note, nor did they object to the  
10 admission of the Assignment of Deed of Trust, the Note, the Lost  
11 Note Affidavit, the DOT, the PSA, the MLS and the declaration of  
12 Beverly DeCarlo, vice president for loan documentation of Wells  
13 Fargo. Indeed, the Allens failed to submit any declaratory or  
14 documentary evidence to the bankruptcy court at all. Instead, the  
15 focus of the Allens' objection to USB's status as a holder of the  
16 Note consisted solely of their challenge to the chain of  
17 possession of the Note:

18 [USB] is not a person entitled to enforce the Note as  
19 (a) it failed to prove that the Debtors' mortgage loan  
20 was even within the inventory of DHMC at the time of the  
21 alleged conveyance thereof to DLJ; (b) the MLSA which  
22 was the alleged source of the authority for the transfer  
23 from DHMC to DLJ was never introduced into evidence;  
24 (c) there was no evidence of actual delivery of the  
25 Debtors' mortgage loan to [USB]; and (d) there is a  
26 factual finding that the DOT was never assigned to [USB]  
27 as required by the PSA to which [USB] was a party, which  
28 it was bound by, and which it agreed to in terms of the  
manner by which mortgage loans were to be conveyed to  
the Trust. Thus, the bankruptcy court's decision was  
clear error and must thus be reversed and vacated.

26 The Allens' Op. Br. at 18.

27 None of these allegations is supported by the record. On the  
28 contrary, the bankruptcy court examined each allegation and, based

1 on the evidence, ruled against the Allens. As the court  
2 explained:

3 1. The Allens' first allegation: "[USB] is not a person  
4 entitled to enforce the Note as (a) it failed to prove that the  
5 Debtors' mortgage loan was even within the inventory of DHMC at  
6 the time of the alleged conveyance thereof to DLJ[.]" In its  
7 Memorandum, the bankruptcy court cited to ¶ 1 of the Lost Note  
8 Affidavit, which recites, "[i]mmediately prior to the assignment  
9 by the Seller [DHMC] of its interest in such Mortgage Loan to the  
10 Purchaser [DLJ], the Seller [DHMC] was the current holder of the  
11 indebtedness evidenced by the Mortgage Note." A copy of the Note  
12 was attached to and incorporated in the Lost Note Affidavit. The  
13 Lost Note Affidavit was executed and sworn by John C. Pointe,  
14 president of DHMC, and constitutes evidence that the original note  
15 was in the possession (or in the Allens' term, in the "inventory")  
16 of DHMC at the time of the conveyance to DLJ. The Allens provide  
17 no evidence to the contrary.

18 2. The Allens second allegation: "[USB] is not a person  
19 entitled to enforce the Note as . . . (b) the MLSA which was the  
20 alleged source of the authority for the transfer from DHMC to DLJ  
21 was never introduced into evidence[.]" The "phantom" MLSA is a  
22 recurring theme of the Allens' arguments, even though the  
23 bankruptcy court clearly disposed of this contention in its  
24 Memorandum:

25 Even though the [conveyance from DHMC to DLJ] took place  
26 four years after the underlying transaction [the MLSA],  
27 the [Lost Note Affidavit] introduced into evidence  
28 acknowledges and recites that all rights under the Note  
have been transferred to DLJ. This satisfies the burden  
of producing evidence that the purpose of the transfer  
was to enforce the Note as "all right[s]" and "all

1 interest" must necessarily include the right to enforce  
2 [the definition of a "holder"]. At a minimum, this  
3 evidence shifts the burden of producing evidence to the  
Debtors to produce evidence casting doubt upon the  
recitations in the agreement.

4 In short, the bankruptcy court found that the missing MLSA was not  
5 essential in determining if possession of the Note and authority  
6 to enforce its provisions was conveyed from DHMC to DLJ. The  
7 court found that, based on the evidence in the Lost Note  
8 Affidavit, the Note was conveyed to DLJ with authority to enforce  
9 it, thus making DLJ a holder by negotiation of the Note. Again,  
10 the bankruptcy court correctly observed that the Allens had  
11 produced no evidence casting doubt upon the recitations in the  
12 Lost Note Affidavit.

13 3. "[USB] is not a person entitled to enforce the Note as  
14 . . . (c) there was no evidence of actual delivery of the Debtors'  
15 mortgage loan to [USB][.]" Relying on the PSA, which was admitted  
16 into evidence without objection by the Allens, in its Memorandum,  
17 the bankruptcy court stated,

18 Section 2.01(b)(i)(A) of the PSA recites that delivery  
19 of each original Note or a Lost Note Affidavit has  
20 occurred. Section 2.01(d) reiterates that the intent of  
21 the PSA is to convey and sell the Mortgage Loans. In  
22 Section 2.06, U.S. Bank acknowledges the assignment and  
23 delivery of the Mortgage Loans. There is no evidence  
24 which indicates or from which it could be inferred that  
25 the transfer of this Note by DLJ [to Credit Suisse to  
26 USB] was a transfer of less than all rights held in the  
27 Note.

24 In other words, the sole evidence presented to the bankruptcy  
25 court was that the Note was conveyed and delivered, with the right  
26 to enforce the Note intact, from DLJ to Credit Suisse to USB. The  
27 Allens provided no contrary evidence.

28 4. Finally: "[USB] is not a person entitled to enforce the



1 Note as . . . (d) there is a factual finding [by the bankruptcy  
2 court] that the DOT was never assigned to [USB] as required by the  
3 PSA to which [USB] was a party[.]” The Allens take this factual  
4 finding out of context. The complete statement in the factual  
5 section of the bankruptcy court’s Memorandum reads:

6 No assignment of the Deed of Trust has occurred. Under  
7 Washington law, the person entitled to enforce the  
8 obligation secured by the Deed of Trust is entitled to  
9 foreclose. The determination of the identity of the  
“person entitled to enforce” the Note will therefore  
determine the identity of the entity entitled to  
foreclose the Deed of Trust.

10 By this statement, the bankruptcy court is explaining that, in  
11 this setting, the DOT, which was not directly conveyed by the PSA,  
12 is unimportant. As noted by the court, the critical issue for  
13 claim purposes of judging allowance of a claim is who is the  
14 “person entitled to enforce the Note” (i.e., the holder of the  
15 Note). In this respect, the bankruptcy court is correct that an  
16 assignment of the DOT is not relevant because under Washington  
17 law, the security for an obligation follows the debt.

18 RCW 61.24.005(2) (“‘Beneficiary’ means the holder of the  
19 instrument or document evidencing the obligations secured by the  
20 deed of trust, excluding persons holding the same as security for  
21 a different obligation.”); Mutual Sec. Fin. v. Unite, 847 P.2d 4,  
22 6 (Wash. Ct. App. 1993) (“the promissory note was secured by the  
23 deed of trust . . . and . . . assignment of the note . . . carried  
24 with it the deed of trust”).

25 In summary, USB established by documented, probative evidence  
26 that it was holder of the Note by negotiation from DHMC to DLJ to  
27 Credit Suisse to USB. In contrast, the Allens provided no  
28 evidence whatsoever to challenge the physical transfer of the Note

1 with its rights intact. Indeed, at the hearing, counsel for the  
2 Allens consented to the admission of all the USB supporting  
3 documents, and instead argued that the evidence should be given  
4 little weight. But weighing of evidence is within the "broad  
5 discretion" of the trial court. Carijano v. Occidental Petroleum  
6 Corp., 643 F.3d 1216, 1225 (9th Cir. 2011); Hagans v. Andrus,  
7 651 F.2d 622, 627 (9th Cir. 1981) ("Of course, the evaluation and  
8 weighing of evidence is within the discretion of the [trial]  
9 judge."). Here, the bankruptcy court did not abuse its discretion  
10 in weighing the evidence when it ruled in favor of the only side  
11 presenting evidence.

12 Because the bankruptcy court found that the evidence proved  
13 that USB was a holder of the Note, its determination that USB was  
14 a "person entitled to enforce the Note" will not be disturbed.

15 **CONCLUSION**

16 We AFFIRM the bankruptcy court's order overruling the Allens'  
17 objection to the USB claim.

18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28