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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-14-1578-KuDTa
)		
ALLANA BARONI,)	Bk. No.	12-10986
)		
Debtor.)	Adv. No.	13-01069
)		
_____)		
ALLANA BARONI,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
NATIONSTAR MORTGAGE, LLC,)		
)		
Appellee.)		
_____)		

Argued and Submitted on September 24, 2015
at Malibu, California

Filed - November 10, 2015

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Alan M. Ahart, Bankruptcy Judge, Presiding

Appearances: Louis J. Esbin argued for appellant Allana Baroni;
Bernard Kornberg of Severson & Werson argued for
appellee Nationstar Mortgage, LLC.

Before: KURTZ, DUNN and TAYLOR, Bankruptcy Judges.

*This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8024-1.

1 **INTRODUCTION**

2 The debtor Allana Baroni¹ commenced an adversary proceeding
3 against Nationstar Mortgage LLC challenging Nationstar's proof of
4 secured claim, and the bankruptcy court granted summary judgment
5 in favor of Nationstar. The bankruptcy court determined that
6 there was no genuine factual dispute that Nationstar possessed
7 the original promissory note indorsed in blank, so Nationstar
8 qualified as a person entitled to enforce the note and hence had
9 standing to file the proof of claim. Allana asserts that
10 Nationstar demonstrated neither that it had a right to enforce
11 the note and the deed of trust nor that it had an agency
12 relationship with someone else who did.

13 Our resolution of this appeal largely hinges on our answer
14 to a single question: when a creditor, in the process of
15 supporting a proof of claim based on a promissory note, presents
16 the bankruptcy court with two materially different copies of the
17 indorsements supposedly accompanying the note, can the court on
18 summary judgment correctly determine that there is no genuine
19 dispute that the note has been duly indorsed in blank? We answer
20 this question in the negative. While the bankruptcy court's
21 summary judgment against Allana on one of Allana's four claims
22 for relief can be affirmed on alternate grounds, summary judgment
23 on the other three claims for relief must be reversed.

24 Accordingly, we AFFIRM IN PART, REVERSE IN PART AND REMAND
25 FOR FURTHER PROCEEDINGS.

26
27
28

¹For the sake of clarity, we refer to Allana and her husband James Baroni by their first names. No disrespect is intended.

1 **FACTS**

2 In February 2004, Allana's husband James refinanced a parcel
3 of residential real property located in Carmel, California.
4 According to several of Allana's filings in her bankruptcy case,
5 the Baronis did not actually reside in the Carmel property but
6 instead used it as a rental property. In furtherance of the
7 refinancing, James executed a note in the amount of \$1,430,000.00
8 and a deed of trust securing repayment of the note.

9 At the time of the refinancing, James owned the Carmel
10 property as his sole and separate property. But shortly after
11 the refinancing, James executed a grant deed conveying the Carmel
12 property to himself and Allana as husband and wife as joint
13 tenants. Allana does not dispute that she took her interest in
14 the Carmel property subject to the deed of trust and in that
15 sense has admitted that she might be obliged to repay the Carmel
16 note in order to prevent foreclosure of her real property
17 interest. On the other hand, Allana claims that she is not
18 certain **who** she is obliged to pay. She also claims that the
19 Carmel note and the Carmel deed of trust have been irrevocably
20 split, which has rendered the deed of trust unenforceable.

21 In February 2012, Allana commenced her bankruptcy case by
22 filing a voluntary chapter 13² petition. Later that same month,
23 she voluntarily converted her case from chapter 13 to chapter 11.
24

25 ²Unless specified otherwise, all chapter and section
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
27 all "Rule" references are to the Federal Rules of Bankruptcy
28 Procedure. All "Civil Rule" references are to the Federal Rules
of Civil Procedure, and all "Evidence Rule" references are to the
Federal Rules of Evidence.

1 In September 2012, Nationstar filed a proof of claim asserting a
2 claim in Allana's bankruptcy case in the approximate amount of
3 \$1,480,000.00. Nationstar attached to the proof of claim copies
4 of a promissory note and a deed of trust both apparently executed
5 by James in February 2004 (respectively, the "POC Note Copy" and
6 the "POC Trust Deed Copy"). The POC Note Copy identifies James
7 as the borrower and Platinum Capital Group as the lender. The
8 principal amount stated in the POC Note Copy is \$1,430,000.00.

9 The POC Note Copy also contains on the signature page what
10 appears to be James' signature. The page immediately following
11 the signature page is blank, with the exception of what appear to
12 be three indorsements.³ Reading from left to right, the first
13 indorsement appears to be signed by an "assistant secretary" of
14 Platinum Capital Group and appears to make the note payable to
15 "Lehman Brothers Bank FSB." Immediately to the right of the
16 first indorsement is another indorsement apparently signed by an
17 "authorized signatory" of Lehman Brothers Holdings, Inc. The
18 "pay to the order" line of that indorsement is blank.
19 Immediately beneath the Lehman Brothers Holdings, Inc.
20 indorsement is a third indorsement apparently signed by a "Vice
21 President" of Lehman Brothers Bank, FSB and apparently making the
22 note payable to Lehman Brothers Holdings, Inc.⁴

24 ³A copy of this indorsements page is attached as Appendix A
25 to this decision.

26 ⁴Of course, reading these undated indorsements in this order
27 makes no sense except for the purpose of describing their
28 relative positions on the indorsements page. The three
indorsements only can be understood sensibly in the following
(continued...)

1 The POC Trust Deed Copy identifies James as the borrower,
2 Platinum Capital Group as the lender, and MERS as the
3 beneficiary, but solely as the nominee of the lender and the
4 lender's successors and assigns. The recording information on
5 the first page of the POC Trust Deed Copy indicates that the
6 trust deed was recorded in the Monterey County Recorder's Office
7 in March 2004. The POC Trust Deed Copy further reflects the
8 transfer of an interest in the Carmel property to secure the
9 repayment of the Carmel note.

10 In April 2013, over Nationstar's objection, Allana obtained
11 an order confirming her second amended reorganization plan. In
12 relevant part, Allana set forth in her disclosure statement and
13 plan that she disputed and objected to Nationstar's proof of
14 claim but that, to the extent the bankruptcy court ultimately
15 allowed any claim secured by the Carmel property, she would pay
16 the holder of that allowed claim in accordance with the terms of
17 her plan.

18 That same month, Allana filed her complaint against
19 Nationstar. In the complaint, Allana pointed out that neither
20 the Carmel note nor the Carmel deed of trust identify Nationstar
21 in any way. Therefore, Allana posited, nothing in Nationstar's
22 proof of claim established that Nationstar was entitled to
23 enforce either the Carmel note or the Carmel deed of trust.

24 _____
25 ⁴(...continued)
26 order: (1) the indorsement by Platinum Capital Group (the
27 original payee identified in the note) making the note payable to
28 Lehman Brothers Bank; (2) the indorsement by Lehman Brothers Bank
making the note payable to Lehman Brothers Holdings, Inc.; and
(3) the indorsement in blank by Lehman Brothers Holdings, Inc.
making the note payable to the bearer.

1 Allana also included in her complaint copies of a number of
2 communications she received from third parties. These
3 communications opine (without actually proving) that the Carmel
4 note was sold to a mortgage securitization trust and that the
5 trust owns the note. The complaint then proceeds to conflate the
6 concept of note ownership with the concept of being a "holder" of
7 the note. The complaint asserts that Nationstar only could prove
8 its standing to file the proof of claim if it demonstrated its
9 title to the Carmel note within the "chain of ownership."
10 According to the complaint, Allana would be unjustifiably exposed
11 to the risk of having to pay the amount due on the Carmel note
12 multiple times unless the bankruptcy court determined who was the
13 "holder" of the Carmel note and hence had standing to file a
14 proof of claim based on the Carmel note.

15 In addition, Allana's complaint pointed out that there was
16 no documentation indicating that Nationstar is the beneficiary
17 under the deed of trust or an assignee of the beneficiary.

18 Based on the allegations set forth above, Allana's complaint
19 included a claim for declaratory relief seeking a judicial
20 determination as to whether Nationstar's proof of claim should be
21 allowed or disallowed and whether that claim was secured or
22 unsecured. The complaint also included a claim for relief
23 alleging that Nationstar would be unjustly enriched if its claim
24 were allowed in the absence of proof that Nationstar was
25 entitled to enforce the Carmel note and deed of trust. The
26 complaint's third claim for relief under the Fair Debt Collection
27 Practices Act, 15 U.S.C. § 1692, et seq., alleged that Nationstar
28 falsely represented that it was entitled to enforce the Carmel

1 note and deed of trust by filing the proof of claim.⁵ Allana's
2 fourth and final claim for relief, based on all of the same
3 allegations, set forth a claim under California's unfair
4 competition law, Cal. Bus. & Profs. Code § 17200, et seq.

5 Nationstar sought dismissal of Allana's complaint under
6 Civil Rule 12(b)(6), but the bankruptcy court denied Nationstar's
7 dismissal motion. Nationstar then filed an answer to Allana's
8 complaint in November 2013, and close to a year later, in
9 September 2014, Nationstar filed its summary judgment motion.
10 Even though Nationstar did not so indicate in its proof of claim,
11 Nationstar identified itself in the summary judgment motion as
12 the servicing agent for the owner of the note, Wells Fargo Bank,
13 as trustee of the securitization trust referenced in Allana's
14 complaint.

15 In order to prove up Wells Fargo's interest in the Carmel
16 note, Nationstar submitted the declaration of Edward Hyne. Hyne
17 identified himself as a "Litigation Resolution Analyst" employed
18 by Nationstar. By virtue of his employment, Hyne claimed
19 familiarity with the manner in which Nationstar's business
20 records are prepared and maintained. Hyne further claimed that
21 Nationstar's records are "prepared" by Nationstar employees and
22 agents with personal knowledge of the facts set forth therein or
23 with information supplied by others with personal knowledge.

24
25 ⁵The FDCPA claim also alleged that Nationstar has
26 misrepresented the amount due on the note and has falsely failed
27 to credit Allana for all of the payments she has made. Allana
28 has abandoned these issues for appeal purposes by not addressing
them in her opening appeal brief. Christian Legal Soc'y v. Wu,
626 F.3d 483, 487-88 (9th Cir. 2010); Brownfield v. City of
Yakima, 612 F.3d 1140, 1149 n.4 (9th Cir. 2010).

1 In a bit of a disconnect, Hyne stated that the facts set
2 forth in his declaration were based on "the files and records for
3 [Allana's] loan," but he does not identify those loan files and
4 records as Nationstar's business records. Nor would it seem
5 accurate to characterize them as Nationstar's business records.
6 There is no reason to suspect let alone conclude that anyone at
7 Nationstar "prepared" any of the documents pertaining to the
8 origination or sale of the Carmel loan. In fact, nothing in the
9 summary judgment record suggests that Nationstar played any role
10 in the origination or sale of that loan, so it makes no sense
11 that Nationstar would have prepared any documents pertaining to
12 the origination or sale of the loan.

13 Based on the above description of the source of his
14 knowledge, Hyne asserted that the note attached as Exhibit A to
15 his declaration was a true copy of the Carmel note and that
16 Exhibit C to his declaration - a mortgage loan sale & assignment
17 agreement between Lehman Brothers Holdings, Inc. as seller and
18 Structured Asset Securities Corp. as buyer - evidences the
19 transfer of the Carmel note to Wells Fargo as Trustee for the
20 Structured Adjustable Rate Mortgage Loan Trust Mortgage Pass-
21 Through Certificates, Series 2004-5.

22 Unfortunately, Hyne did not specify **what** was purportedly
23 transferred to Wells Fargo: possession of the note, beneficial
24 ownership of the note, mere legal title to the note, or the right
25 to payment under the note. Moreover, the sale and assignment
26 agreement attached as Exhibit C does not evidence or even
27 reference any such transfers to Wells Fargo.

28 Meanwhile, attached to Exhibit C is a single page on which

1 everything is redacted, except for the following single line of
2 information: "17362807 3 Carmel CA 93923 1430000 1430000."⁶
3 Hyne and Nationstar presumably claim that this redacted page
4 attached to Exhibit C evidences the inclusion of the Carmel note
5 in the mortgage pool covered by the sale and assignment
6 agreement. Immediately preceding the redacted page are two
7 schedules that are supposed to identify the loans covered by the
8 sale and assignment agreement, but both of those schedules are
9 blank, except for a type-written notation on the face of each
10 schedule indicating that the actual listing of covered loans is
11 "on file" in the Philadelphia offices of Morgan, Lewis & Bockius
12 LLP. There is no explanation in the sale and assignment
13 agreement of the relationship between the blank schedules and the
14 redacted page immediately following the blank schedules. Nor did
15 Hyne attempt to explain the relationship. More importantly, no
16 one who arguably might have had personal knowledge of what
17 actually is in the completed schedules supposedly held by Morgan,
18 Lewis & Bockius attempted to explain the significance of the
19 redacted page.

20 Finally, Hyne stated that Nationstar is Wells Fargo's
21 servicing agent for purposes of the Carmel note. In support of
22 this statement, Hyne referenced the limited power of attorney
23 attached to his declaration as Exhibit D. The power of attorney,

24
25 ⁶The significance of the number "17362807" is equivocal. It
26 is not the loan number assigned to the Carmel refinancing loan at
27 the time the loan was made. That loan number apparently is
28 11101490. The summary judgment record reflects that "17362807"
was handwritten onto some copies of the Carmel note but not onto
others. Who wrote that number on some copies and what that
number purportedly signifies never was addressed by either party.

1 apparently executed by Wells Fargo as the trustee of certain
2 designated securitization trusts, identified Nationstar as the
3 assignee of Aurora Loan Services LLC's loan servicing rights and
4 duties and granted Nationstar the authority to, among other
5 things, execute on Wells Fargo's behalf "all documents and
6 instruments necessary in appearance and prosecution of bankruptcy
7 proceedings" The limited power of attorney listed the
8 Structured Adjustable Rate Mortgage Loan Trust Mortgage Pass-
9 Through Certificates, Series 2004-5, as one of the securitization
10 trusts covered. But nothing in the limited power of attorney
11 established that ownership of the Carmel note had been
12 transferred to that particular securitization trust, any more
13 than the sale and assignment agreement had.

14 Nationstar further supported its summary judgment motion by
15 filing the declaration of one of its attorneys, Adam Barasch. In
16 relevant part, Barasch stated that, on behalf of his client
17 Nationstar, he was in possession of the original note and
18 original deed of trust executed by James. Barasch further stated
19 that the copy of the Carmel note attached as Exhibit A to the
20 Hyne declaration is a true copy of the original note in his
21 possession.

22 In October 2014, Allana filed her opposition to Nationstar's
23 summary judgment motion. Allana principally argued that a
24 genuine issue of material fact existed as to whether there were
25 two different original Carmel notes memorializing the same
26 obligation. Allana pointed out that the copy of the Carmel note
27 attached to the Hyne declaration differs in several respects from
28 the POC Note Copy. Most importantly, the indorsements page in

1 each copy is significantly different. As described above, in the
2 POC Note Copy, the Platinum Capital Group indorsement and the
3 Lehman Brothers Holdings indorsement are side by side and the
4 Lehman Brothers Bank indorsement is beneath the Lehman Brothers
5 Holdings indorsement. In the Hyne declaration copy of the Carmel
6 note, the Lehman Brothers Bank indorsement and the Lehman
7 Brothers Holdings indorsement are side by side and the Platinum
8 Capital Group indorsement is above the Lehman Brothers Bank
9 indorsement.⁷

10 In support of her opposition, Allana submitted a declaration
11 of a questioned-documents expert by the name of Meredith DeKalb
12 Miller. Miller explained in her declaration that she examined in
13 2011 several different copies of the Carmel note and deed of
14 trust that Allana had provided to her as well as an original note
15 and an original deed of trust, which she examined in person in
16 June 2011 in the Chicago offices of McGinnis Tessitore Wutcher
17 LLP. Miller observed that some of the note copies she examined
18 had marks indicative of hole punches and fasteners while others
19 did not. Miller further observed that some of the note copies
20 she examined had the hand-printed notation "kahrl" and "17362807"
21 in the upper right hand corner while others did not. Meanwhile,
22 one of the four note copies included a stamped notation stating
23 that the copy was certified to be a true and correct copy.

24 Notwithstanding these and other differences, Miller also
25 stated that all of the copies provided to her were

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27
28 ⁷A copy of the indorsements page accompanying the Hyne
declaration is attached as Appendix B to this decision.

1 "representative copies of the same adjustable rate note" and that
2 the signatures of James' she observed on the original note and on
3 all of the note copies "are consistent." Miller Decl. at ¶¶ 20,
4 26.

5 In her summary judgment opposition, Allana claimed that a
6 2011 report attached to Miller's declaration as Exhibit 2 (on
7 which Miller's 2014 declaration was based) demonstrated that the
8 POC Note Copy and the Hyne declaration note copy are not copies
9 of the same original note.⁸ However, neither the 2011 Miller
10 report nor the 2014 Miller declaration demonstrate what Allana
11 claims they do. At most, Miller's declaration and report observe
12 certain minor differences between various copies of the note
13 provided to her long before either Nationstar's 2012 proof of
14 claim or Hyne's 2014 declaration even existed.⁹

15 In addition to her claim that there appeared to exist two
16 different original Carmel notes, Allana asserted that the Hyne
17 declaration and the Barasch declaration did not contain competent
18 evidence regarding who owned the Carmel note and who was the
19 holder of the Carmel note. In conjunction with this assertion,
20 Allana formally made several different evidentiary objections to
21 both declarations, which the bankruptcy court never addressed.

23 ⁸The summary judgment opposition stated at page 9: "As
24 described in the Forensic Examiner's report attached as
25 "Exhibit 2," the Note Mr. Barasch apparently has in his
26 possession, and attached as Exhibit A to Mr. Hyne's declaration
is not the same Note attached to Claim 9-1"

27 ⁹The indorsement pages included with the note copies
28 provided to Miller are a different matter. Miller duly noted
that the indorsement signatures on some copies were "configured
differently" than other copies.

1 Allana further contended that she was not given adequate
2 opportunity to conduct discovery. In support of this contention,
3 Allana referenced certain examinations and document requests she
4 had sought under Rule 2004 from Nationstar, Wells Fargo and
5 others before she filed her adversary proceeding against
6 Nationstar. According to Allana, none of the responding parties
7 fully complied with her Rule 2004 examination and document
8 requests. Allana did not identify what efforts, if any, she had
9 made to conduct or compel discovery during the roughly 18 months
10 that elapsed between the filing of her complaint and the filing
11 of her summary judgment opposition.

12 After holding a hearing at which both parties submitted
13 without argument, the bankruptcy court entered an order granting
14 summary judgment to Nationstar. The order set forth the court's
15 reasoning. According to the court, Allana lacked standing to
16 challenge Nationstar's proof of claim because only James executed
17 the Carmel note and deed of trust.

18 Alternately, the bankruptcy court explained, Nationstar had
19 established that it had possession of the original Carmel note,
20 indorsed in blank, so Nationstar was a "person entitled to
21 enforce" the Carmel note under Uniform Commercial Code § 3-301
22 and hence had standing to file a proof of claim based on the
23 Carmel note. Even if Nationstar had not qualified as the holder
24 of the note, the court reasoned, Nationstar had established that
25 it possessed the note on behalf of Wells Fargo as trustee of a
26 securitization trust and that Wells Fargo owned the Carmel note
27 as trustee of that trust. Thus the court held that, as Wells
28 Fargo's servicing agent, Nationstar had alternately established

1 that it was "a nonholder in possession of the instrument who has
2 the rights of a holder" under Uniform Commercial Code § 3-301.

3 Based on its analysis of Nationstar's and Wells Fargo's
4 rights in relation to the Carmel note, the bankruptcy court
5 concluded that, as a matter of law, Allana could not prevail on
6 any of her claims for relief. As an additional ground for
7 denying relief on Allana's unjust enrichment claim, the
8 bankruptcy court held that Allana's action was an action based on
9 contract and that unjust enrichment was not available in an
10 action based on contract. As additional grounds for denying
11 relief on Allana's Fair Debt Collection Practices Act claim, the
12 bankruptcy court held that Nationstar was not a debt collector
13 within the meaning of the Act, that the Act only applied to
14 consumer debts and that the debt secured by the Carmel property
15 was not consumer debt.

16 On December 15, 2014, Allana timely filed her notice of
17 appeal from the bankruptcy court's summary judgment.

18 **JURISDICTION**

19 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
20 §§ 1334 and 157(b)(2)(B) and (C). We have jurisdiction under
21 28 U.S.C. § 158.

22 **ISSUES**

23 Did the bankruptcy court correctly grant summary judgment in
24 favor of Nationstar?

25 **STANDARD OF REVIEW**

26 We review de novo the bankruptcy court's summary judgment
27 ruling. Wank v. Gordon (In re Wank), 505 B.R. 878, 886 (9th Cir.
28 BAP 2014).

1 not controverted at trial, would entitle him to a Rule 50
2 judgment as a matter of law that evidence must be accepted as
3 true on a summary-judgment motion.”).

4 DISCUSSION

5 A. Allana’s Standing

6 We first address the bankruptcy court’s ruling that Allana
7 lacked standing to pursue her adversary proceeding against
8 Nationstar. Standing typically is jurisdictional.

9 Employers-Teamsters Local Nos. 175 & 505 Pension Trust Fund v.

10 Anchor Capital Advisors, 498 F.3d 920, 923 (9th Cir. 2007)

11 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561

12 (1992)). It is a threshold requirement that must be satisfied in

13 every federal case. Warth v. Seldin, 422 U.S. 490, 498 (1975).

14 The three core components necessary for constitutional
15 standing are: (1) injury in fact, (2) causation, and

16 (3) redressability. See Sprint Commc'ns Co. v. APCC Servs.,

17 Inc., 554 U.S. 269, 273-74 (2008). Even if the the core

18 constitutional components are present, the plaintiff also may

19 need to address certain prudential standing concerns. Veal v.

20 Am. Home Mortg. Servicing, Inc. (In re Veal), 450 B.R. 897,

21 906-07 (9th Cir. BAP 2011). These prudential standing concerns

22 are “judicially self-imposed limits on the exercise of

23 jurisdiction.” Id. (quoting Sprint Commc'ns Co., 554 U.S. at

24 289). One of the more common prudential standing concerns is

25 known as third party standing. Sprint Commc'ns Co., 554 U.S. at

26 289-90. This means that “a plaintiff must assert its own legal

27 rights and may not assert the legal rights of others.” In re

28 Veal, 450 B.R. at 907. In the context of both constitutional and

1 prudential standing issues, the plaintiff bears the burden of
2 proof to establish its standing as to each claim for relief
3 asserted. Id. at 907 n.11.

4 We disagree with the bankruptcy court's ruling that Allana
5 lacked standing. Allana's adversary proceeding was filed in
6 response to the proof of claim Nationstar filed in her bankruptcy
7 case, pursuant to which Nationstar sought to perfect its right
8 (or Wells Fargo's right) to share in any distributions made by
9 Allana to her creditors in accordance with her proposed
10 reorganization plan. The potential impact of Nationstar's proof
11 of claim on her plan distributions amply satisfies the core
12 constitutional standing components of injury in fact, causation
13 and redressability. Cf. In re Veal, 450 B.R. at 906 (holding
14 that creditor had satisfied constitutional standing requirements
15 in light of the effect of bankruptcy claim allowance procedures
16 on the creditor's ability to obtain a distribution on its claim).

17 Nor do we perceive the third party standing doctrine as an
18 impediment to Allana's entitlement to sue Nationstar. While the
19 bankruptcy court indicated that Nationstar's proof of claim was
20 based on a debt for which only James was personally liable, the
21 debt was secured by property of Allana's bankruptcy estate, and
22 in light of the clear impact of Nationstar's proof of claim on
23 both Allana's property and on her chapter 11 plan, we hold that
24 she was asserting and protecting her own rights and interests and
25 not those belonging to James.

26 Allana's position is no different than that of any debtor
27 whose property is encumbered by a non-recourse debt. While she
28 might not be personally liable for repayment of the Carmel note,

1 her interest in the Carmel property is directly and adversely
2 affected pecuniarily by Nationstar's claim. Nationstar has not
3 cited any authority to us indicating that a person whose interest
4 in real property is encumbered by a non-recourse debt lacks
5 standing to challenge both the validity of the lien and the
6 validity of the underlying debt. Nor are we aware of any such
7 authority. To the contrary, as indicated by one of our prior
8 decisions, a debtor whose property is subject to a lien securing
9 non-recourse debt may object to a claim filed in his or her
10 bankruptcy case based on that debt. See Simpson v. Deutsche Bank
11 Nat. Trust Co. (In re Simpson), 2013 WL 2350967 (9th Cir. BAP
12 May 29, 2013) (Mem. Dec.).

13 Furthermore, the fact that Allana's standing arose after
14 James incurred the debt - when James conveyed an interest in the
15 Carmel property to Allana subject to the Carmel deed of trust -
16 does not alter or impair her standing to challenge the lien and
17 the underlying debt. As noted in Sprint Commc'ns Co., 554 U.S.
18 at 290, a party with standing may confer standing on a third
19 party by transferring a property interest to that third party.

20 Accordingly, the bankruptcy court's standing ruling does not
21 support the court's summary judgment in favor of Nationstar.

22 **B. Nationstar's Standing**

23 Having concluded that Allana had standing to challenge
24 Nationstar's proof of claim and to assert the claims for relief
25 set forth in her complaint, we next turn our attention to
26 Nationstar's standing to file its proof of claim, an issue on
27 which resolution of this appeal largely turns.

28 Allana sometimes refers to this as a problem of standing and

1 sometimes as a problem of who qualifies as the real party in
2 interest under Civil Rule 17(a). In In re Veal, this Panel
3 explained that who has standing and who is the real party in
4 interest are legally distinct issues. See In re Veal, 450 B.R.
5 at 907-08. At the same time, in the context of a proof of claim
6 based on a promissory note, we effectively held in In re Veal
7 that the distinction between the two issues is irrelevant because
8 a claimant who is a person entitled to enforce the note satisfies
9 both the standing and real party in interest requirements, and a
10 claimant who is not a person entitled to enforce the note
11 satisfies neither requirement. Id. at 920.

12 **1. Applicable Law**

13 Similar standing and real party in interest issues have been
14 addressed in a number of published and unpublished Panel
15 decisions over the last several years. See, e.g., Allen v. U.S.
16 Bank, N.A. (In re Allen), 472 B.R. 559, 565 (9th Cir. BAP 2012);
17 In re Veal, 450 B.R. at 897; see also Rivera v. Deutsche Bank
18 Nat'l Trust Co. (In re Rivera), 2014 WL 6675693, at *6-7 (9th
19 Cir. BAP Nov. 24, 2014) (Mem. Dec.); Green v. Waterfall Victoria
20 Master Fund 2008-1 Grantor Trust Series A (In re Green), 2012 WL
21 4857552, at *6-7 (9th Cir. BAP Oct. 15, 2012) (Mem. Dec.); cf.
22 Edwards v. Wells Fargo Bank, N.A. (In re Edwards), 454 B.R. 100,
23 105 (9th Cir. BAP 2011) (focusing on creditor standing issue in
24 the context of a relief from stay motion). In In re Allen and in
25 In re Veal, we generally held that a party is entitled to file a
26 proof of claim based on a secured promissory note if that party
27 is a "person entitled to enforce" the note under § 3-301 of the
28

1 Uniform Commercial Code ("UCC").¹⁰ In re Allen, 472 B.R. at 565;
2 In re Veal, 450 B.R. at 902. There are several ways a party may
3 become a person entitled to enforce the note under UCC § 3-301,
4 but one common way is for the person to become a "holder" of the
5 note, as defined in UCC § 1-201(b) (21) (A). In re Allen, 472 B.R.
6 at 565; In re Veal, 450 B.R. at 910-11. As set forth in UCC
7 § 1-201(b) (21) (A), a "holder" includes a "person in possession of
8 a negotiable instrument that is payable . . . to bearer"
9 And a negotiable instrument is payable to the bearer when it is
10 indorsed in blank. See UCC § 3-205(b) ("If an indorsement is
11 made by the holder of an instrument and it is not a special
12 indorsement, it is a 'blank indorsement.' When indorsed in
13 blank, an instrument becomes payable to bearer and may be
14 negotiated by transfer of possession alone until specially
15 indorsed."); see also In re Allen, 472 B.R. at 567.¹¹

17 ¹⁰Because the Carmel note and deed of trust apparently were
18 signed in California, the real property securing the note is
19 located in California and Allana at all relevant times has
20 resided in California, California's version of the UCC applies
21 for purposes of determining the parties' rights and duties with
22 respect to the note. See UCC § 1-301(b); Barclays Discount Bank
23 Ltd. v. Levy, 743 F.2d 722, 725 (9th Cir. 1984); see also
24 In re Veal, 450 B.R. at 921 n.41 (applying Arizona's counterpart
25 to UCC § 1-301(b) under similar circumstances). For purposes of
26 resolving this appeal, there is no material difference between
27 the uniform version of the UCC and California's version of the
28 UCC. Meanwhile, the deed of trust identifies federal law and the
law of the jurisdiction in which the Carmel property is located
as the governing law. Thus, California law also governs
interpretation and enforcement of the deed of trust. Id.
Moreover, the parties' papers assume that California law applies.

¹¹The reasoning of the bankruptcy court and the arguments of
both parties have at all times assumed that the Carmel note
(continued...)

1 **2. Nationstar's Alleged Possession of the Original Note**
2 **Indorsed in blank**

3 Nationstar claims to have possession of the Carmel note
4 indorsed in blank and thereby claims to be a holder of the note
5 and hence a person entitled to enforce the note. Allana claims
6 that Nationstar's possession of the Carmel note indorsed in blank
7 would be insufficient by itself to support the assertion that
8 Nationstar is entitled to enforce the note. According to Allana,
9 Nationstar also must establish who owns the note and whether
10 Nationstar is the owner's agent. Allana is incorrect. As the
11 plain language of UCC § 3-301 provides, "[a] person may be a
12 person entitled to enforce the instrument even though the person
13 is not the owner of the instrument or is in wrongful possession
14 of the instrument."

15 As we explained at length in In re Veal, so long as Allana
16 knows that, if she pays Nationstar she has satisfied the debt,
17 Allana should be indifferent as to who ultimately is determined
18 to be the owner of the note and whether Nationstar is the owner's
19 agent. In re Veal, 450 B.R. at 910, 912 & n.27; see also id. at
20 913, 919 (holding that alleged servicer can establish entitlement
21 to payment and to file proof of claim by showing that it is a
22 person entitled to enforce the note **or** that it is the agent of a
23 person entitled to enforce the note). Put another way, if

24
25 ¹¹ (...continued)
26 qualifies as a negotiable instrument within the meaning of UCC
27 § 3-104(a). Consequently, any issue regarding whether UCC
28 Article 3 applies to the Carmel note has been forfeited. See
Golden v. Chicago Title Ins. Co. (In re Choo), 273 B.R. 608, 613
(9th Cir. BAP 2002).

1 Nationstar has established it is a person entitled to enforce the
2 note, then Nationstar has provided Allana with the requisite
3 assurance that her plan payments on account of Nationstar's claim
4 will satisfy the debt, in accordance with UCC § 3-602. See
5 In re Veal, 450 B.R. at 910.

6 Allana argues that there is a triable issue of fact
7 regarding whether there exist two originals of the Carmel note.
8 We disagree. We have reviewed all of the note copies in the
9 summary judgment record as well as the declaration and expert
10 report of Meredith DeKalb Miller and none of these items support
11 the notion that two original notes exist. Rather, the summary
12 judgment record indicates that there is only one original Carmel
13 note and that Nationstar's attorney Adam Barasch is in possession
14 of it. Having studied all of the note copies, we agree with
15 Miller's statement that all of the note copies are representative
16 copies of the same note and that James' signature on each of the
17 note copies is consistent.

18 Allana attacked Adam Barasch's declaration on a number of
19 evidentiary grounds including hearsay, lack of foundation and
20 lack of personal knowledge, but these grounds are meritless to
21 the extent Allana seeks to challenge Barasch's assertion that he
22 is in possession of the original of the Carmel note. Barasch is
23 competent to employ his powers of personal observation to assess
24 whether he is in possession of an original document. See
25 Evidence Rule 602 and accompanying Advisory Committee Notes.
26 Barasch also is competent to compare the original in his
27 possession to the copy attached to the Hyne declaration and to
28 declare whether the Hyne declaration note copy is identical to

1 the original. Id. Barasch cannot attest to the authenticity of
2 James's signature on the Carmel note, but he does not need to.
3 Signatures on negotiable instruments are presumed to be authentic
4 and authorized, and Allana has not presented any evidence to
5 overcome that presumption. See In re Stanley, 514 B.R. 27, 39
6 (Bankr. D. Nev. 2012) (citing UCC §§ 1-206 & 3-308).

7 On the other hand, the authenticity of the indorsements is a
8 different matter. Like James' signature on the note, indorsement
9 signatures on a negotiable instrument typically are self-
10 authenticating. Id. And yet, here, there are genuine and
11 material issues regarding whether the original of the Carmel note
12 was duly indorsed in blank.

13 Barasch indicated in his declaration that the indorsement
14 page attached to the Hyne declaration note copy is identical to
15 the original. However, Barasch did not specify whether the
16 indorsements appear on the back of the note's signature page or
17 whether they appear on a separate piece of paper attached to the
18 note, which would make the page containing the indorsements an
19 allonge. See In re Veal, 450 B.R. at 911 & n.24. Either way,
20 when as here the debtor legitimately contests the validity of the
21 indorsements, the bankruptcy court is obliged to physically
22 inspect them. Id.

23 Here, Nationstar itself created a genuine issue of material
24 fact by presenting with its proof of claim a copy of the note
25 containing a materially different indorsements page than that
26 contained in the Hyne declaration note copy. As we explained
27 above, the indorsements are configured differently in the POC
28 note copy and in the Hyne declaration note copy. In spite of the

1 statement in the Barasch declaration that the Hyne declaration
2 note copy is identical to the original, the contents of the
3 indorsements page in the POC note copy is controverting evidence
4 that could permit a reasonable trier of fact to discredit
5 Barasch's statement regarding what the original Carmel note looks
6 like (at least regarding what the indorsements page accompanying
7 the original note looks like). More importantly, a reasonable
8 trier of fact also might infer from the divergent indorsements
9 pages that the original Carmel note never was properly indorsed;
10 rather, an indorsements page might have been placed with the
11 original note by some unknown third party without authority to
12 indorse the Carmel note.

13 As a result, there is a genuine issue of material fact
14 regarding whether the Carmel note was duly endorsed in blank and
15 made payable to the bearer and hence there also is a genuine
16 issue of material fact as to whether Nationstar qualifies as a
17 holder of the note and a person entitled to enforce the note.

18 **3. Wells Fargo as Non-holder in Possession of Note with**
19 **the Rights of a Holder; Evidentiary Problems**

20 Alternately, Nationstar claims that it possesses the Carmel
21 note on Wells Fargo's behalf and that Wells Fargo therefore
22 qualifies as nonholder in possession of the note with the rights
23 of holder, which is another means of qualifying as a person
24 entitled to enforce the note under UCC § 3-301. See In re Veal,
25 450 B.R. at 911. This alternate claim depends upon Nationstar's
26 dual contentions that Wells Fargo, as trustee of a securitization
27 trust, owns the Carmel note and that Nationstar is Wells Fargo's
28 agent. As indicated in In re Veal, proving a non-holder claim of

1 this type is harder than proving holder status because the
2 claimant must demonstrate not only possession of the original
3 note but also the transfer of some form of interest in the note -
4 either to the party in possession of the note or to a party on
5 whose behalf the possessor has taken possession of the note. Id.
6 at 911-12.

7 To support these contentions, Nationstar largely relies on
8 the Hyne declaration. But Hyne's critical declaration testimony
9 lacks adequate foundation as to his personal knowledge of key
10 factual matters, and many of his statements appear to be based on
11 inadmissible hearsay contained in documents attached as exhibits.

12 Generally speaking, in order to establish the admissibility
13 of his declaration testimony, Hyne needed to satisfy the
14 foundational requirement of demonstrating his personal knowledge
15 of the facts set forth in his declaration. Evidence Rule 602;
16 see also United States v. Lopez, 762 F.3d 852, 863 (9th Cir.
17 2014) ("Personal knowledge means knowledge produced by the direct
18 involvement of the senses."). To the extent Hyne did not
19 properly lay a foundation regarding his personal knowledge or
20 based his testimony on inadmissible hearsay statements contained
21 in documents attached to his declaration as exhibits, his
22 testimony is inadmissible. See Medina v. Multaler, Inc.,
23 547 F.Supp.2d 1099, 1105 n.8 (C.D. Cal. 2007); see also United
24 States v. Snodgrass, 635 F.3d 324, 329 (7th Cir. 2011) (affirming
25 exclusion of witness testimony that was based on inadmissible
26 hearsay).

27 From an evidentiary standpoint, of most concern to us is
28 Hyne's statement indicating that ownership of the Carmel note was

1 transferred to Wells Fargo as trustee of a securitization trust
2 in April 2004. There is no specific explanation as to how Hyne
3 came by this information. His generic statement that he relied
4 on Nationstar's books and records in preparing his declaration
5 does virtually nothing to assure us of his personal knowledge
6 regarding ownership of the Carmel note. Nor is there any
7 reliable indication that anyone else at Nationstar had personal
8 knowledge regarding the sale of the Carmel note to Wells Fargo or
9 that anyone at Nationstar prepared business records regarding the
10 sale based on information received from persons known to have
11 personal knowledge.

12 To corroborate his statement regarding Wells Fargo's
13 ownership of the Carmel note, Hyne apparently relied on the
14 document attached to his declaration as Exhibit C: the mortgage
15 loan sale & assignment agreement between Lehman Brothers
16 Holdings, Inc. as seller and Structured Asset Securities Corp. as
17 buyer. But the statements in Exhibit C that Hyne seems to be
18 relying upon to corroborate his declaration testimony qualify as
19 inadmissible hearsay. For instance, in a passing reference, the
20 sale and assignment agreement refers to Wells Fargo as trustee of
21 certain mortgage note securitization trusts. While Hyne
22 attempted to establish that the contents of the sale and
23 assignment agreement were excepted from the rule against hearsay
24 by the business records exception set forth in Evidence
25 Rule 803(6), Hyne failed to demonstrate that he qualified as the
26 custodian of the sale and assignment agreement or as "another
27 qualified witness" competent to testify regarding the
28 prerequisites for application of the business records exception.

1 See Evidence Rule 803(6) (D) .

2 If Allana had not objected to this particular portion of
3 Hyne's declaration testimony on foundation, lack of personal
4 knowledge, hearsay and similar grounds, we might have concluded
5 that Allana had forfeited these evidentiary objections. But
6 Allana did make the requisite evidentiary objections, and the
7 bankruptcy court ignored these objections. Under the
8 circumstances presented here, the bankruptcy court committed
9 reversible error in doing so.

10 Even if Nationstar somehow could overcome Allana's evidentiary
11 objections, the sale and assignment agreement's passing reference
12 to Wells Fargo's role as trustee of certain securitization trusts
13 does not contain admissible evidence that would permit the
14 bankruptcy court to conclude for summary judgment purposes that
15 the Carmel note was included in any of the securitization trusts
16 for which Wells Fargo allegedly serves as trustee.

17 As for Nationstar's contention that it is Wells Fargo's
18 servicing agent, Hyne's statement to that effect appears at first
19 blush to be corroborated by the limited power of attorney
20 attached as Exhibit D to Hyne's declaration. Nonetheless, even
21 if we were to assume that Allana's evidentiary objections to this
22 statement are not well taken, the limited power of attorney does
23 not demonstrate that it covers the Carmel note. Nowhere in the
24 limited power of attorney is the Carmel note listed. The limited
25 power of attorney does list the securitization trust that
26 Nationstar asserts included the Carmel note: the Structured
27 Adjustable Rate Mortgage Loan Trust Mortgage Pass-Through
28 Certificates, Series 2004-5.

1 But there is a critical gap in Nationstar's evidence.
2 Nowhere in the Hyne declaration or in the exhibits attached
3 thereto is there any competent evidence demonstrating that
4 ownership of the Carmel note was transferred to the above-
5 referenced securitization trust. In the absence of such
6 evidence, Nationstar did not establish, for summary judgment
7 purposes or otherwise, that Wells Fargo owned the Carmel note and
8 that Nationstar was Wells Fargo's agent for purposes of servicing
9 the Carmel note.

10 In short, Nationstar did not meet its summary judgment
11 burden to establish that it qualified as a person entitled to
12 enforce the Carmel note under either of its alternate theories
13 pursuant to UCC § 3-301. This means that the bankruptcy court
14 erred when it granted Nationstar summary judgment with respect to
15 Allana's declaratory relief claim and her California unfair
16 competition law claim, which rulings wholly relied on
17 Nationstar's status as a person entitled to enforce the note.

18 **C. Alternate Theories in Support of Summary Judgment**

19 The bankruptcy court offered an alternate theory for its
20 summary judgment ruling with respect to Allana's unjust
21 enrichment claim. According to the court, Allana's complaint
22 against Nationstar sounded in contract, and unjust enrichment
23 does not apply to actions based in contract. See Klein v.
24 Chevron U.S.A., Inc., 202 Cal. App. 4th 1342, 1388 (2012).

25 We are perplexed by the bankruptcy court's unjust enrichment
26 ruling. We are not aware of any contract between Nationstar and
27 Allana. At most, the summary judgment record reflects that
28 Allana obtained an interest in the Carmel property subject to the

1 lien securing repayment of the Carmel note. We simply don't
2 perceive any contractual relationship between Allana and
3 Nationstar, nor do we perceive any contract-based claim in
4 Allana's complaint against Nationstar.

5 Some California courts have held that unjust enrichment is a
6 remedy and is not an independent cause of action. See, e.g.,
7 Jogani v. Superior Court, 165 Cal.App.4th 901, 911 (2008);
8 Melchior v. New Line Prods., Inc., 106 Cal.App.4th 779, 794
9 (2003). Even so, the Ninth Circuit Court of Appeals recently
10 interpreted California law on this point and held that, when
11 faced with a claim for relief alleging unjust enrichment,
12 district courts ordinarily should treat the claim for relief "as
13 a quasi-contract claim seeking restitution." Astiana v. Hain
14 Celestial Grp., Inc., 783 F.3d 753, 762 (9th Cir. 2015). Astiana
15 further held that courts should not dismiss such claims as
16 duplicative or superfluous of other claims. Id.

17 As for Allana's fourth and final claim - her Fair Debt
18 Collection Practices Act ("FDCPA") claim - the bankruptcy court
19 also offered an alternate theory for its summary judgment ruling
20 on that claim. The bankruptcy court held that, as matter of law,
21 the FDCPA did not apply because Nationstar was not a "debt
22 collector" within the meaning of the FDCPA. The Act provides a
23 specialized and narrow definition of the term "debt collector,"
24 which states in relevant part as follows:

25 (6) The term "debt collector" means any person who uses
26 any instrumentality of interstate commerce or the mails
27 in any business the principal purpose of which is the
28 collection of any debts, or who regularly collects or
attempts to collect, directly or indirectly, debts owed
or due or asserted to be owed or due another. . . .
The term does not include-

1 * * *

2 (F) any person collecting or attempting to collect
3 any debt owed or due or asserted to be owed or due
4 another to the extent such activity (i) is
5 incidental to a bona fide fiduciary obligation or
6 a bona fide escrow arrangement; (ii) concerns a
7 debt which was originated by such person;
8 (iii) concerns a debt which was not in default at
9 the time it was obtained by such person; or
10 (iv) concerns a debt obtained by such person as a
11 secured party in a commercial credit transaction
12 involving the creditor.

13 15 U.S.C.A. § 1692a (West).

14 The bankruptcy court did not explain its reasoning for this
15 holding, but it seems to be based on the notion that mortgage
16 servicers generally are not considered debt collectors under the
17 FDCPA, so long as their role as mortgage servicer arose before
18 the borrower defaulted. Perry v. Stewart Title Co., 756 F.2d
19 1197, 1208 (5th Cir. 1985); see also Lal v. Am. Home Servicing,
20 Inc., 680 F.Supp.2d 1218, 1224 (E.D. Cal. 2010) (quoting Perry
21 and stating: "[t]he law is well settled that FDCPA's definition
22 of debt collector 'does not include the consumer's creditors, a
23 mortgage servicing company, or any assignee of the debt.'");
24 Mansour v. Cal-Western Reconveyance Corp., 618 F.Supp.2d 1178,
25 1182 (D. Ariz. 2009) (same).

26 Assuming without deciding that Perry, Lal and Mansour have
27 correctly interpreted the FDCPA, we still cannot affirm the
28 bankruptcy court's ruling on the FDCPA claim on this basis.
29 There are a number of disputed material factual issues that
30 prevent us from doing so, including but not limited to the
31 following: (1) whether the Carmel loan is in default; (2) if so,
32 when that default occurred; (3) whether Nationstar is the
33 mortgage servicer for the Carmel note; and (4) if so, when it

1 became the servicer for that note. The parties contested all of
2 these issues in the adversary proceeding, and the bankruptcy
3 court incorrectly attempted to decide them on summary judgment.

4 As a second alternate theory for granting summary judgment
5 against Allana on her FDCPA claim, the bankruptcy court held that
6 the Carmel refinancing loan was not a "debt" covered by the
7 FDCPA. We agree. Under the FDCPA, a "debt" is defined as:

8 any obligation or alleged obligation of a consumer to
9 pay money arising out of a transaction in which the
10 money, property, insurance, or services which are the
11 subject of the transaction **are primarily for personal,
12 family, or household purposes. . . .**

13 15 U.S.C. § 1692a(5) (emphasis added); see also Miller v.
14 McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.,
15 214 F.3d 872, 874-75 (7th Cir. 2000); Bloom v. I.C. Sys., Inc.,
16 972 F.2d 1067, 1068 (9th Cir. 1992).

17 Here, the summary judgment record establishes that the
18 Carmel loan was used to refinance the Carmel property, and in her
19 bankruptcy filings, Allana repeatedly admitted that the Carmel
20 property was not used as the Baronis' residence, but
21 rather was used as a rental property to generate income.¹² Under
22 these circumstances, we hold that the bankruptcy court correctly
23 determined that the Carmel refinancing loan was not a debt
24 covered by the FDCPA. Cf. Miller, 214 F.3d at 874-75 (indicating
25 that a loan used to refinance property that at the time of the

26 ¹²The loan documentation for the Carmel refinancing loan
27 further supports the notion that the Carmel property was not used
28 as the Baronis' residence at the time James entered into the
transaction. The Carmel deed of trust included an assignment of
rents rider that, among other things, relieved James from the
obligation of occupying the Carmel property as his residence.

1 transaction is used as a rental property to generate income is
2 not covered by the FDCPA). Thus, on this basis, the bankruptcy
3 court correctly granted Nationstar summary judgment on Allana's
4 FDCPA claim.¹³

5 **D. Other Arguments and Issues**

6 We also must address Allana's argument that the Carmel note
7 and the Carmel deed of trust have been irrevocably split and,
8 therefore, that the Carmel deed of trust is invalid, so the claim
9 based on the Carmel note should be treated as unsecured. This
10 argument fails because, under California law, the right to
11 enforce the deed of trust automatically follows the note. See
12 Cal. Civ. Code § 2936 ("The assignment of a debt secured by
13 mortgage carries with it the security."); Cockerell v. Title Ins.
14 & Trust Co., 42 Cal.2d 284, 291 (1954) ("Assuming for the moment
15 that the assignment of the note, secured by the third trust deed,
16 was a valid assignment, no further assignment of the deed of
17 trust was necessary."); see also Carpenter v. Longan, 83 U.S.
18 271, 275 (1872) ("The transfer of the note carries with it the
19 security, without any formal assignment or delivery, or even
20 mention of the latter.").

21 Allana additionally argued that the bankruptcy court erred
22 by not giving her more time to conduct discovery before ruling on
23 Nationstar's summary judgment motion. In support of this

24
25 ¹³Allana did not attempt to address this issue regarding the
26 application of the FDCPA until she filed her reply brief on
27 appeal. Her failure to address this issue in her opening appeal
28 brief provides a separate and independent basis for rejecting her
belated contention that the Carmel refinance loan is covered by
the FDCPA. Christian Legal Soc'y, 626 F.3d at 487-88;
Brownfield, 612 F.3d at 1149 n.4.

1 argument, Allana contends that Nationstar, Wells Fargo and others
2 never fully complied with the discovery requests she made
3 pursuant to Rule 2004 before she filed her adversary proceeding.
4 Allana further contends that Nationstar violated Civil Rule 26 by
5 not disclosing its alleged servicer role and Wells Fargo's
6 alleged ownership of the Carmel note.

7 In light of our disposition of this appeal, we decline to
8 resolve Allana's discovery-related issues. However, we do note
9 that there is no evidence in the summary judgment record that
10 Allana took any affirmative action to conduct or compel discovery
11 during the entire time her adversary proceeding was pending. Nor
12 did she comply with the applicable procedures for requesting
13 additional time to conduct discovery. See Civil Rule 56(d); see
14 also Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1443
15 (9th Cir. 1986).

16 **CONCLUSION**

17 For the reasons set forth above, we AFFIRM IN PART, REVERSE
18 IN PART AND REMAND FOR FURTHER PROCEEDINGS.
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Appendix A

PAY TO THE ORDER OF
LEHMAN BROTHERS BANK FSB
WITHOUT RECOURSE
PLATINUM CAPITAL GROUP
A CALIFORNIA CORPORATION
BY *[Signature]*
ASST SECRETARY

Carleton Pytko

PAY TO THE ORDER OF
WITHOUT RECOURSE
LEHMAN BROTHERS HOLDINGS, INC.
[Signature]
RAN F. A. LEZIZI
AUTHORIZED SIGNATORY

PAY TO THE ORDER OF
LEHMAN BROTHERS HOLDINGS, INC.
WITHOUT RECOURSE
LEHMAN BROTHERS BANK, FSB
BY *[Signature]*
RICK W. SKOGL
VICE PRESIDENT

Appendix B

PAY TO THE ORDER OF
LEHMAN BROTHERS BANK FSB
WITHOUT RECOURSE
PLATINUM CAPITAL GROUP
A CALIFORNIA CORPORATION

BY *Carleton*
ASST. SECRETARY

Carleton Pyfron

PAY TO THE ORDER OF
LEHMAN BROTHERS HOLDINGS, INC.
WITHOUT RECOURSE
LEHMAN BROTHERS BANK, FSB
BY *Rick W. Skogg*
RICK W. SKOGG
VICE PRESIDENT

PAY TO THE ORDER OF
WITHOUT RECOURSE
LEHMAN BROTHERS HOLDINGS, INC.
BY *Ralph A. Lenzi III*
RALPH A. LENZI III
AUTHORIZED SIGNATORY