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COURT OF APPEALS  
STATE OF NEW YORK

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AURORA LOAN SERVICES, LLC,  
Respondent,

-against-

TAYLOR, et al.,  
Appellants.

No. 83

Judicial Institute  
84 North Broadway  
White Plains, New York 10603  
April 30, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: So let's start with  
2 Number 83, Aurora Loan Services v. Taylor.

3 Counselor, do you want any rebuttal time?

4 MR. HERZBERG: Yes.

5 CHIEF JUDGE LIPPMAN: What - - - what would  
6 you like?

7 MR. HERZBERG: Four or five minutes. Five  
8 minutes.

9 CHIEF JUDGE LIPPMAN: Five? You have it.  
10 Go ahead; you're on.

11 MR. HERZBERG: May it please the court, my  
12 name is Jeff Herzberg of Zinker & Herzberg. I  
13 represent Le - - - Leonard and Monique Taylor. The  
14 Taylors do not dispute that Mon - - - Monique's  
15 default on the - - -

16 CHIEF JUDGE LIPPMAN: Coun - - - counsel,  
17 what's the - - - the key issue here? Is it the  
18 mortgage or the loan? What's - - - what's important  
19 in terms of the issues before the court?

20 MR. HERZBERG: The mortgage for the first  
21 two issues and the note for the third issue.

22 CHIEF JUDGE LIPPMAN: Yes, translate that.  
23 What does that mean?

24 MR. HERZBERG: Okay, the first issue is,  
25 there was an assignment of the mortgage that Aurora

1 was seeking to foreclose upon that they received and  
2 - - - nine months before they actually had - - -

3 CHIEF JUDGE LIPPMAN: But do they - - - but  
4 the issue is that - - - let's - - - let's cut to the  
5 chase. If they have possession of the note, is that  
6 enough? And do you have to have both the mortgage  
7 and the note? What - - - what - - - how does that  
8 break down?

9 MR. HERZBERG: Your Honor, I think that  
10 while there - - - there's been no higher court  
11 decision, meaning this Court of Appeals, and so it's  
12 a case of first impression, most of the Appellate  
13 Division cases say - - - hold that in order to have  
14 standing to foreclose a mortgage, you must have both,  
15 physical possession of the note - - -

16 CHIEF JUDGE LIPPMAN: What's the theory of  
17 that? Why - - - why is it not enough to have the  
18 note?

19 MR. HERZBERG: Why - - -

20 CHIEF JUDGE LIPPMAN: What's your theory?  
21 Why - - - why - - -

22 MR. HERZBERG: Because if all you have is  
23 the note, all you are is unsecured. You have to have  
24 some perfected or valid security interest which is  
25 default - - -

1 CHIEF JUDGE LIPPMAN: Can - - - can the  
2 note be dispositive? If that's the underlying - - -

3 MR. HERZBERG: No, the note should not be  
4 dispositive, because you need - - -

5 CHIEF JUDGE LIPPMAN: Why not?

6 MR. HERZBERG: Because you need the per - -  
7 - an actual - - -

8 CHIEF JUDGE LIPPMAN: Aren't I - - - aren't  
9 I suing on a note, essentially?

10 MR. HERZBERG: Well, if they're suing on  
11 the note, they did not - - - what they're actually  
12 doing is trying to enforce the security interest,  
13 namely the mortgage, which was recorded way before.  
14 They received the mortgage note nine months after  
15 they received the - - -

16 CHIEF JUDGE LIPPMAN: What if they have the  
17 note before the lawsuit? Why isn't that enough?

18 MR. HERZBERG: Why? Because the assignment  
19 of the mortgage that they received is a nullity, as  
20 Your - - - this Honorable Court decided in Merritt v.  
21 Bartholomew (ph.). You can't have mortgage  
22 assignments floating unless there's - - - they  
23 actually receive a note. Here, the note was received  
24 nine months after they got physical possession of - -  
25 -

1 JUDGE FAHEY: But it was - - - but it was  
2 four days before the actual - - -

3 MR. HERZBERG: Agreed.

4 JUDGE FAHEY: So - - - if - - - the general  
5 commercial rule is that the mortgage follows the note  
6 in the same way that a lien follows a debt, but the  
7 debt doesn't follow the lien, that - - - that  
8 wouldn't that problem be solved? Is - - - isn't this  
9 really more about the Holland affidavit from your  
10 point of view?

11 MR. HERZBERG: No, I think it's - - -

12 JUDGE FAHEY: No? Okay. Go ahead.

13 MR. HERZBERG: I think it's - - - why - - -

14 JUDGE READ: Do you think the affida - - -  
15 the affidavit is adequate from your point of view?

16 MR. HERZBERG: No, I do not. That's the  
17 third issue.

18 JUDGE READ: Okay.

19 MR. HERZBERG: The af - - - the affidavit  
20 was conclusive.

21 JUDGE FAHEY: Well, we all - - - we - - -  
22 the real reason I say it is because you don't have  
23 much time, so I'm trying - - - I'm trying to focus  
24 you - - -

25 MR. HERZBERG: Okay.

1                   JUDGE FAHEY: - - - in on it a little on  
2 it; that's why.

3                   MR. HERZBERG: I think a major issue and  
4 one that the lower courts would really want this  
5 Honorable Court to decide, is a MERS issue, which is  
6 the second issue. The MERS issue - - - there's no  
7 information that was ever in any of the documents  
8 concerning the right of any of these banks to assign  
9 the mortgage note, i.e., there was an assignment of  
10 the note from the former First National Bank of  
11 Arizona to the former First National Bank of Nevada.

12                   The only problem is that the FDIC closed or  
13 they merged the two in July of 2008. At the time  
14 that there was an assignment of the mortgage from  
15 MERS' nominee, there's no proof that there was actual  
16 agency relationship that survived. Agency  
17 relationships, which is the nominee, become defunct  
18 upon the defunct - - - the closing of the - - -

19                   JUDGE PIGOTT: But why - - - why do you - -  
20 - why do you care? I mean, it would - - - it would  
21 seem to me that you get a homeowner who - - - who has  
22 a mortgage on their property and they're paying - - -  
23 they're paying it. And every now and then somebody  
24 says instead of paying Bank A, you got to pay Bank B  
25 or - - - or Bank C, that - - - I know they - - - they

1 change a lot. And - - - and - - - but if you - - -  
2 if you then, at some point, stop paying, isn't it - -  
3 - isn't it the - - - the bank that's holding the  
4 mortgage at that time that has the right to  
5 foreclose? You don't care what happened before that.

6 MR. HERZBERG: I sure do, because let's say  
7 - - - while it may not have happened in this case,  
8 what would have happened if the Taylors went to sell  
9 the property? Why should somebody who does not have  
10 a perfect - - - a recorded lien be paid on their  
11 mortgage lien?

12 JUDGE PIGOTT: Well, you would - - - what  
13 you would do then is - - - is obviously you would  
14 notify whoever you were paying, let's say Bank C for  
15 - - - for - - - and you would say I need a - - - I  
16 need a discharge figure and a discharge.

17 MR. HERZBERG: Ex - - -

18 CHIEF JUDGE LIPPMAN: And if you don't get  
19 them, you're not closing. And - - - but when you do  
20 get them, your mortgage is discharged.

21 MR. HERZBERG: Except that you're paying  
22 somebody - - - an entity that doesn't have a  
23 perfected lien. The lien was still in MERS as  
24 nominee - - -

25 JUDGE FAHEY: So you're saying there's a

1 chance under that system that - - - that the lien  
2 could continue after - - - after you paid off someone  
3 else for the lien.

4 MR. HERZBERG: Let's say - - -

5 JUDGE FAHEY: Is that - - - is that what  
6 you're arguing?

7 MR. HERZBERG: Yes.

8 JUDGE FAHEY: Okay.

9 MR. HERZBERG: And - - -

10 JUDGE FAHEY: Let me - - - let me just take  
11 it one step further then in going back to what Judge  
12 Read said on this Holland affidavit. The Second  
13 Department said that you could infer that it came  
14 from - - - that - - - that the note came from  
15 Deutsche Bank, correct?

16 MR. HERZBERG: No, it came from Aurora.  
17 Oh, yeah.

18 JUDGE FAHEY: They said that though, right?

19 MR. HERZBERG: Yes.

20 JUDGE FAHEY: And so isn't - - - isn't the  
21 core of your argument is, is that - - - while they -  
22 - - you may be able to infer it, there is actual - -  
23 - no actual proof of where the note came from, so  
24 they aren't a proper holder then.

25 MR. HERZBERG: They're not a proper holder,





1 Aurora have standing - - -

2 MR. HERZBERG: That's right.

3 JUDGE FAHEY: - - - because they - - - did  
4 they have the rights as a transferee as opposed to a  
5 holder in due course to - - - to sue?

6 MR. HERZBERG: Yes.

7 JUDGE FAHEY: Right.

8 MR. HERZBERG: And I also think that it's  
9 important to realize that Second and First Department  
10 cases specifically says, if you're suing, you could  
11 foreclose as the ser - - - mortgage servicer.  
12 However, you have to identify the principal. That  
13 was never done. Aurora - - -

14 CHIEF JUDGE LIPPMAN: Okay, counselor.

15 MR. HERZBERG: Thank you.

16 CHIEF JUDGE LIPPMAN: You're going to have  
17 your rebuttal time.

18 MR. HERZBERG: Thank you.

19 CHIEF JUDGE LIPPMAN: Let's hear from your  
20 adversary.

21 Counselor?

22 MR. BRYCE: Good afternoon, Chief Justice.  
23 And may it please the court, Martin Bryce for - - -

24 CHIEF JUDGE LIPPMAN: Counsel, is the note  
25 dispositive and what about the affidavit?

1                   MR. BRYCE: The - - - the note is  
2 completely dispositive, Chief Judge - - - Chief  
3 Judge.

4                   CHIEF JUDGE LIPPMAN: Why is it  
5 dispositive?

6                   MR. BRYCE: New York case after New York  
7 case - - - Silverberg, Coakley, Pietranico, for  
8 instance, have repeatedly held what controls is the  
9 note, and the mortgage follows the note. That's not  
10 - - -

11                   CHIEF JUDGE LIPPMAN: Can you split the  
12 two? It's okay to split the note and mortgage?

13                   MR. BRYCE: Well, there was no split here  
14 because MERS held the mortgage on behalf of the First  
15 Bank of Arizona and its successors and assigns. Yes,  
16 there needed to be a mortgage or else this loan would  
17 have been unsecured - - -

18                   CHIEF JUDGE LIPPMAN: Right, right.

19                   MR. BRYCE: - - - and we couldn't have  
20 foreclosed. There's no dispute that the Taylors  
21 entered into the mortgage. What is completely  
22 unnecessary and what New York case after New York  
23 case has held, is any further formal assignment of  
24 that mortgage, simply because what controls is the  
25 note. Under the UCC, if you possess the note, you

1 have standing to foreclose.

2 JUDGE READ: What was - - -

3 MR. BRYCE: It's that simple.

4 JUDGE READ: Was the affidavit sufficient  
5 to show that?

6 MR. BRYCE: Well, yes, Judge, it was  
7 sufficient. The affidavit, the Holland affidavit,  
8 expressly stated it was made on personal knowledge.  
9 It was made after a review of the note. It's - - -

10 JUDGE FAHEY: But the problem is it doesn't  
11 say where the note came from, does it?

12 MR. BRYCE: Well, it re - - -

13 JUDGE FAHEY: The Holland affidavit.

14 MR. BRYCE: It references Deutsche Bank,  
15 which is the last endorsement on the allonge. And  
16 according to both the PSA and the Master Assignment  
17 Agreements, Deutsche Bank held the note and Deutsche  
18 Bank can transfer it.

19 JUDGE STEIN: How can we tell it's the last  
20 possessor on the allonge, because there's no dates?  
21 There are just - - - they're placed on the page. How  
22 - - - how do we know? Do we have to assume or infer  
23 based upon where they are on the page?

24 MR. BRYCE: Well, it - - - it - - - it  
25 fits. The note was initially made payable to the

1 First Bank of Arizona. Then there's an endorsement  
2 from it to the First Bank of Nevada. And then from  
3 the First Bank of Nevada to Residential into RFC, and  
4 then from RFC to Deutsche Bank, and that all fits  
5 with the - - - the pooling and servicing agreements,  
6 and with the Holland affidavit that references  
7 Deutsche Bank.

8 JUDGE RIVERA: You're saying up until that  
9 point, you have an unbroken chain?

10 MR. BRYCE: Ex - - - ex - - - exactly.  
11 That's exactly what we had, Judge. And we have the  
12 original in our possession, and that's precisely what  
13 Ms. Holland says - - -

14 CHIEF JUDGE LIPPMAN: Counsel, is the - - -

15 MR. BRYCE: - - - we have the original.

16 CHIEF JUDGE LIPPMAN: As the loan servicer,  
17 that's - - - is that your arguing, that's an  
18 independent ground for standing?

19 MR. BRYCE: Well, yes, because there is  
20 also a power of attorney as well as the specific  
21 terms of the PSA that granted us that right.

22 Now, back to the - - - back to the  
23 affidavit - - -

24 CHIEF JUDGE LIPPMAN: Yeah, okay.

25 MR. BRYCE: The affidavit very specifically

1 says, we have the original note as of May 20.

2 JUDGE PIGOTT: Who says - - - who says  
3 that?

4 MR. BRYCE: Ms. Holland.

5 JUDGE PIGOTT: And what - - - and what - -  
6 - what is her authority? What is her position within  
7 the firm?

8 MR. BRYCE: She holds the position as a  
9 legal liaison with the sub-servicer.

10 JUDGE PIGOTT: Yeah, is she an officer or  
11 director - - - is she an officer or director of any  
12 interest in the firm, separate from that? Because we  
13 went through this once before when somebody did this  
14 affidavit and said they were a team leader in  
15 Cleveland, Ohio. And - - - and we didn't know,  
16 because our CPLR doesn't provide for team leaders to  
17 do things like that. And I'm wondering if Ms.  
18 Holland is an - - - is an associate or a partner in a  
19 law firm who gets a hearsay statement from someone  
20 saying, you know, go foreclose on this; it's not  
21 quite what we need, is it?

22 MR. BRYCE: Well, Judge, Ms. Holland  
23 explains that she's employed by the sub-servicer.  
24 That she's a legal liaison. That she's got authority  
25 to enter - - - to execute the affidavit. That it's

1 based on her personal knowledge, and that's she - - -

2 JUDGE PIGOTT: That's - - - that's where -  
3 - - that's the hang-up, is her personal knowledge. I  
4 mean, that's a conclusory statement, it seems to me.  
5 And I'm - - - I'm not - - - I'm not challenging, you  
6 know, necessarily the veracity of it, but normally,  
7 you know, when - - - if we go back to the old days,  
8 you know, the bank president or the bank vice-  
9 president or someone with authority in the bank would  
10 say, they're not paying their mortgage, we want to  
11 foreclose, and here we go.

12 In this one, of course, you've got all of  
13 these assignments, and that's - - - that's MERS. But  
14 at some point it would seem to me that somebody - - -  
15 that you can't simply say, oops, you know, I wasn't  
16 there that day, and I just signed the affidavit, and  
17 I didn't know. And the fact that now there's two  
18 liens on this property is not my concern, because I'm  
19 just a liaison.

20 MR. BRYCE: Well, if - - - if you - - - if  
21 an affiant simply uses the term personal knowledge  
22 without any explanation, I - - - I would agree with  
23 you that that doesn't act like some sort of magic  
24 words. But Ms. Holland did more than that here. She  
25 specifically says she looked at the note. She

1 specifically says she looked at the business records.

2 JUDGE PIGOTT: You make the point that they  
3 could have gotten the note and the mortgage in - - -  
4 in discovery.

5 MR. BRYCE: Yes.

6 JUDGE PIGOTT: All right. Why didn't you  
7 just give it to them?

8 MR. BRYCE: Well, they didn't ask for it.  
9 And they - - -

10 JUDGE PIGOTT: I know. Why didn't you just  
11 give it?

12 MR. BRYCE: They - - - they invoked the  
13 best evidence rule, but that really doesn't make  
14 sense if you think about it, simply because if we  
15 produce to them the original note six months after  
16 the foreclosure was instituted, that would show we  
17 have the original notes - - -

18 JUDGE PIGOTT: Well, but most foreclosures  
19 have the bond and mortgage attached, and they - - -  
20 in the liber and page in which it's filed within the  
21 county in which the - - - the property is. That  
22 doesn't happen here, because goodness knows what MERS  
23 is doing.

24 MR. BRYCE: Well, yes, but - - - but  
25 there's no reason for the borrower to necessarily be



1 ignorant of - - - of MERS or the identity of the  
2 servicer. Under both TILA and RESPA, you're required  
3 to disclose any assignment of the loan, any  
4 assignment of servicing rights. Under RESPA, a  
5 borrower or their counsel can send what's known as a  
6 qualified written request, a QWR, demanding any  
7 information they want about the loan. And a servicer  
8 is subject to suit and sanction if they don't provide  
9 that information.

10 So the idea that all of this is in someway  
11 hidden is just patently false.

12 JUDGE PIGOTT: Not so much hidden, as we  
13 want to make sure that all the Ts are crossed and Is  
14 are dotted, so you don't end up with a double lien.

15 MR. BRYCE: No. And - - - and there's been  
16 no claim of a double lien here, Your Honor, and I've  
17 never heard of that in all the years I've practiced  
18 in this area. It's sort of a boogiemán that's  
19 invoked without there ever being any evidence of the  
20 - - - of the same.

21 Now, the - - - the - - - the Taylors and a  
22 number of the cases they cite say, well, there should  
23 be more detail in an affidavit. But nobody ever  
24 explains what that detail should be. That's always  
25 left unsaid. The Taylors don't really suggest it

1 here - - -

2 JUDGE FAHEY: Well, I - - - I think with -  
3 - - -

4 MR. BRYCE: - - - nor do the cases.

5 JUDGE FAHEY: - - - I think that where you  
6 want to end up is making sure that the - - - the note  
7 - - - you're taking the note in such a way that the  
8 foreclose - - - the standing is clear for the party  
9 bringing the action. I think that's what - - - what  
10 the goal is here. So the question is, was the  
11 affidavit sufficient to do that?

12 MR. BRYCE: I a hundred percent agree with  
13 that, Your Honor. And the affidavit was sufficient;  
14 as the - - - as the Second Department noted, it gave  
15 a specific date four days before the foreclosure was  
16 commenced as of which Aurora held the note. That is  
17 detail.

18 JUDGE ABDUS-SALAAM: Would it have been too  
19 much trouble, counsel, just to add something to the  
20 affidavit saying how the note was delivered, maybe by  
21 FedEx or, you know, something like that? Would that  
22 have been too troubling?

23 MR. BRYCE: Well - - - well, two - - - two  
24 points, Your Honor. One, with all due respect, I  
25 would ask why would it matter whether the note

1 arrived via FedEx or Brinks truck? Why does that  
2 matter?

3 And two, we're dealing with mortgage loans,  
4 which can have a fifteen, thirty, forty-year life.  
5 You could find - - - we could find ourselves in the  
6 situation maybe ten, fifteen, twenty years after a  
7 servicer comes into possession of an original note  
8 where a decade or more later, nobody can figure out  
9 how they got it. They know they've got it, but  
10 there's no record of precisely how they got it.

11 JUDGE PIGOTT: The argument there is - - -

12 MR. BRYCE: And then - - -

13 JUDGE PIGOTT: - - - it's MERS' problem,  
14 because before MERS, they were all - - - there were  
15 liber and pages that had them all listed, and if you  
16 went to somebody's mortgage, even forty years ago, it  
17 would be in the book, and - - - and the title  
18 examiners would - - - could tell you exactly what  
19 happened between then and now.

20 MR. BRYCE: Well, Your Honor, that would  
21 show how the mortgage passed - - -

22 JUDGE PIGOTT: Right.

23 MR. BRYCE: - - - that wouldn't necessarily  
24 show how the note passed.

25 JUDGE PIGOTT: Because they never got

1 separated before.

2 MR. BRYCE: I - - - I frankly do think that  
3 they did even before - - - before MERS.

4 JUDGE PIGOTT: We just didn't know about  
5 it.

6 MR. BRYCE: You - - - you can have one  
7 entity hold the mortgage, the other be the servicer  
8 or the servicer hold - - - holds the note. The  
9 servicer brings the foreclosure.

10 JUDGE PIGOTT: Oh, I see - - - okay.

11 MR. BRYCE: So - - - so it's not unusual  
12 for a servicer to hold a note and to potentially hold  
13 the note a very long time. If you've got to indicate  
14 whether it was Brinks as opposed to FedEx, or what  
15 specific vault the note was held in ten, fifteen,  
16 twenty years after the fact, you could paradoxically  
17 find a servicer that can't demonstrate that fact, but  
18 it does hold the original note. So what's it  
19 supposed to do - - -

20 JUDGE FAHEY: Here's - - - here's - - -

21 MR. BRYCE: - - - not have standing to  
22 foreclose?

23 JUDGE FAHEY: Here's the core of the  
24 problem, and - - - and if you can address it. I'm  
25 not even sure if there's probably pre - - - but if -

1           - - if MERS - - - it matters who delivered the note  
2           because if the transferor was Deutsche and - - - and  
3           it - - - and then the Deutsche - - - from Deutsche to  
4           the plaintiff, then the plaintiff has all the rights  
5           that Deutsche had and they can foreclose.

6                     But if MERS physically delivered the note,  
7           then they only have the right of a - - - of a - - -  
8           of a transferee, the way I read the record, and so  
9           the plaintiff may not have had standing then to go  
10          ahead and foreclose.

11                    MR. BRYCE: Well, Your Honor, there's never  
12          been any contention here. They - - - they really set  
13          up and then attempt to knock down a straw man - - -

14                    JUDGE FAHEY: Well, but in the Second - - -  
15          in - - - in the decision, of course, of the Second  
16          Department, they're - - - they're implying that that  
17          - - - they're saying that you could infer it from  
18          there, but it isn't really - - - that's why we're  
19          asking about the affidavit.

20                    MR. BRYCE: Right, right.

21                    JUDGE FAHEY: Okay.

22                    MR. BRYCE: My - - - my point, though, Your  
23          Honors, is there's never been any contention on our  
24          part that MERS held the note. We've never contended  
25          that. It didn't. And - - - and in fact, I don't

1 believe the Taylors are arguing that MERS held the  
2 note. To the contrary, they're arguing it - - - it  
3 didn't. MERS simply has nothing to do with this.  
4 There's - - - there's - - - there's no record ever  
5 demonstrating that MERS held the note.

6 JUDGE FAHEY: That's why you put - - -

7 MR. BRYCE: We don't contend - - -

8 JUDGE FAHEY: That's why you put it in the  
9 affidavit.

10 MR. BRYCE: Well - - - well, what we did  
11 put in the affidavit is, again, there's a specific  
12 reference to Deutsche Bank. There is the endorsement  
13 to Deutsche Bank on the original note that Ms.  
14 Holland reviewed and expressly incorporated. And  
15 again, she states that Aurora held the original note.  
16 Putting all of that together, as well as the specific  
17 date, it clearly demonstrates, we had the note before  
18 we commenced the foreclosure.

19 Briefly, before I run out of time, another  
20 red herring here is this nullity argument with  
21 respect to the - - - the mortgage assignment. It's a  
22 red herring, clearly, because the mortgage assignment  
23 doesn't matter. Yes, there are New York cases  
24 holding that an assignment of mortgage where there's  
25 no possession of the note is a nullity. That simply

1 means that an assignment of mortgage in and of itself  
2 doesn't confer standing. We've never contended  
3 otherwise. We're not arguing we got standing through  
4 MERS. We're not relying on the assignment of  
5 mortgage. The assignment of mortgage has nothing to  
6 do with it.

7 CHIEF JUDGE LIPPMAN: Okay, counsel,  
8 thanks.

9 MR. BRYCE: Thank you very much.

10 CHIEF JUDGE LIPPMAN: Let's - - - let's  
11 hear rebuttal from your adversary.

12 MR. HERZBERG: Thank you. For the first  
13 argument or rebuttal, there was this divergent path  
14 between the note and the mortgage. The note was  
15 given to First National Bank of Arizona. The  
16 mortgage was given to MERS, separate and distinct  
17 entity. MERS was a nominee - - - agent. The agency  
18 expired by operation of law upon the death, so to  
19 speak, of the First National Bank of Nevada - - - of  
20 Arizona, the principal.

21 JUDGE PIGOTT: Well, MERS - - - MERS - - -  
22 correct me if I'm wrong, but isn't MERS just kind of  
23 a place where you go - - - you file these things?

24 MR. HERZBERG: It's a - - -

25 JUDGE PIGOTT: I mean, it's an electronic

1 recording system.

2 MR. HERZBERG: That's right. That we're  
3 trying to do away with the recording fees - - -

4 JUDGE PIGOTT: Right.

5 MR. HERZBERG: - - - and the timing - - -

6 JUDGE PIGOTT: Right.

7 MR. HERZBERG: - - - with the county clerk.  
8 Now, with all these assignments of the - - - before  
9 this happened to the note, it's fascinating that not  
10 one filing fee was paid until Aurora. Under RP - - -  
11 RPL 291, to have the valid recorded assignment, there  
12 must be a filing fee to be paid to the county clerk.  
13 It was not done.

14 JUDGE PIGOTT: What - - - is the assignment  
15 recorded?

16 MR. HERZBERG: The assignment - - - the one  
17 to Aurora? It was recorded - - - it's a null - - -  
18 it's a nullity. It was recorded seven months before  
19 they had the right to record it.

20 JUDGE PIGOTT: That - - - the only thing  
21 they pay the price for on that, though, is if there  
22 were other creditors that preceded it, that then - -  
23 - that they were subordinate - - -

24 MR. HERZBERG: And there was.

25 JUDGE PIGOTT: - - - but it doesn't affect



1 the validity of the assignment, right?

2 MR. HERZBERG: But there was, Your Honor.  
3 The problem is that they're suing to get rid of both  
4 New Roc Parcel and also Joseph Maltese. They had  
5 subordinate all - - - they had liens. How does  
6 somebody who does not have a valid mortgage wipe out  
7 subordinate mortgages? It's not possible legally  
8 under the laws of the State of New York.

9 Now, the power of attorney and the PSA were  
10 really never made part of the - - - the record. The  
11 complaint was filed in the name of Aurora. Aurora  
12 was the owner and possessor of the note according to  
13 the complaint. They failed to disclose anything.  
14 There's a lack of transparency.

15 Now, if the Taylors happen to call up MERS,  
16 tell me - - - or the servicer, they would never find  
17 out who the true owner of the note is. They would -  
18 - - as this Honorable Court stated in the Romaine,  
19 MERSCORP v. Romaine, it's impossible to find out.  
20 That's a problem. There's a failure of disclosure,  
21 transparency.

22 Now, the only way - - - I like the idea of  
23 this court. Why don't they attach - - - I said  
24 business records - - - about the receiver of the  
25 mortgage note, instead of having a conclusive

1 statement? Have business records. That's the only  
2 way that anybody can contest Ms. Holland's statement  
3 that four days before the - - - the commencement of  
4 the case, and one day before the execution of this  
5 summons and complaint, that they physically had  
6 possession of the note.

7 She makes a bald-faced statement. There's  
8 no way to contest it with the proof that she gives.  
9 It's conclusive, and I don't think it - - - it should  
10 be held - - -

11 JUDGE ABDUS-SALAAM: Are you - - - are you  
12 suggesting that they should have some kind of log  
13 where - - - that they could attach to the affidavit -  
14 - -

15 MR. HERZBERG: Yes.

16 JUDGE ABDUS-SALAAM: - - - that says we  
17 received this on May 20th.

18 MR. HERZBERG: Like Bank of America, for  
19 instance, keeps iPortals (ph.) of their receipt of  
20 mortgage - - - of mortgage notes. I'm sure that  
21 Aurora does the same. There has to be some system in  
22 place internally that would reflect that on such-and-  
23 such a date, they have this mortgage note.  
24 Otherwise, they may be suing on a note that they  
25 never even possessed because it was lost. And that

1 probably goes on more than people realize. That's an  
2 important issue.

3 CHIEF JUDGE LIPPMAN: Okay, counsel.

4 MR. HERZBERG: Thank you.

5 CHIEF JUDGE LIPPMAN: Thank you both.

6 MR. HERZBERG: Thank you.

7 CHIEF JUDGE LIPPMAN: Appreciate it.

8 MR. BRYCE: Thank you very much.

9 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Aurora Loan Services, LLC v. Taylor, No. 83, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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