STATE OF WISCONSIN

SUPREME COURT

Appeal No. 15AP175

DEUTSCHE BANK NATIONAL TRUST COMPANY,

Plaintiff-Respondent-Petitioner,

v.

THOMAS P. WUENSCH,

Defendant-Appellant,

HEIDI WUENSCH,

Appellant.

PLAINTIFF-RESPONDENT-PETITIONER'S BRIEF

K. Lee Marshall
BRYAN CAVE LLP
Three Embarcadero Center
San Francisco, California 94111
Pro Hac Vice

Thomas C. Dill
BP PETERMAN GROUP
165 Bishops Way
Brookfield, Wisconsin 53005

Robert W. Brunner
BRYAN CAVE LLP
161 North Clark Street
Chicago, Illinois 60601
Pro Hac Vice

Counsel for Plaintiff-Respondent
Deutsche Bank National Trust Co.

March 28, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

ISSUES PRESENTED FOR REVIEW

1. Whether Wis. Stat. § 909.02(9), which provides that commercial paper (including a promissory note) is self-authenticating and thus does not require "extrinsic evidence of authenticity as a condition precedent of admissibility" nonetheless requires a circuit court to hear testimony that a plaintiff in a residential foreclosure action possesses the note when counsel presented the originally executed (*i.e.*, "wet-ink") Note to the court and established itself as the holder.

The circuit court admitted the Note into evidence and found that Petitioner was in possession of it. The Court of Appeals summarily reversed and held that Petitioner failed to prove possession of the Note without such testimony.

2. Whether, if testimonial authentication is required, the Court of Appeals should have remanded the case to allow Petitioner an opportunity to provide such, thereby preventing, in the words of the Court of Appeals, a "highly inefficient result" that "elevate[s] form over substance."

The circuit court did not reach this issue because it admitted the Note into evidence. The Court of Appeals held that the "evidence is now closed in the case."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION OF OPINION

Oral argument is appropriate and the Court's resulting Opinion should be published due to the importance and wide-spread nature of the issues presented. This case will provide clarity regarding the evidentiary requirements of the self-authentication rule of Wisc. Stat. § 909.02, resolve a conflict between prior decisions of the Wisconsin appellate court, and provide important guidance to lenders and other creditors regarding the appropriate procedure for enforcing commercial paper in Wisconsin.

STATEMENT OF THE CASE

In February 2008, the Defendant-Appellant in this case, Thomas Wuench ("Wuench"), defaulted on his home mortgage payments. The holder of his mortgage Note, Deutsche Bank National Trust Company ("Deutsche Bank") [1] subsequently commenced a residential foreclosure

[1] Deutsche Bank National Trust Company acts as Trustee for American Home Mortgage Assets Trust 2007-2, Mortgage-Backed Pass-Through Certificates Series 2007-2.

action. Five years of litigation, including a two-day bench trial, ensued. At trial, Deutsche Bank presented, and the circuit court admitted into evidence, the originally executed, wet-ink Note. The circuit court examined the Note and determined it to be the original, self-authenticating document, thus allowing its admission without requiring further testimony. The court ultimately found that Deutsche Bank was the holder of the Note and entered a judgment of foreclosure in the amount of $455,641.

The Court of Appeals summarily reversed the judgment, holding that Deutsche Bank had failed to introduce testimonial evidence that it possessed the Note. The Court of Appeals also refused to remand the case to allow Deutsche Bank an opportunity to provide the testimony the appellate court believed to be required. As a result, if the decision below is allowed to stand, Wuench will receive a $455,000 windfall and will remain in possession of the property despite having defaulted on his payments almost a decade ago.

A. Statement of Facts

On December 18, 2006, Wuench executed an adjustable rate Note issued by HLB Mortgage in the amount of $301,500 ("Note"). (App. 150.) Wuench also executed a Mortgage issued by Mortgage Electronic Systems,

Inc. as nominee for HLB Mortgage and its successors and assigns ("MERS"), which is secured by a 20 acre parcel of property known as W7333 County Rd. Z in Onalaska, Wisconsin. ("Property"). (App. 158.)[2] Per endorsement, the Note was transferred from HLB Mortgage to American Home Mortgage. (App. 150.) American Home Mortgage then endorsed the Note in blank. (App. 150.) Deutsche Bank is the current holder of the Note. (App. 033, 150.)

In February 2008, Wuench defaulted under the Note and Mortgage by failing to make the required payments. (App. 033.) Wuench failed to cure the default despite receiving notice of intent to accelerate and right to cure. (App. 033.) By July 2009, the amount due and owing under the Note and Mortgage totaled $315,615.43. (App. 033.)

B. Procedural History

On August 11, 2009, Deutsche Bank filed a Complaint in the Circuit Court of LaCrosse County. Among other things, the Complaint alleged that Deutsche Bank holds the Note and Mortgage, copies of which were attached to the Complaint. (App. 033.)

---

[2] Appellant Heidi Wuensch is not a party to the Note or Mortgage. (App. 150, 158.)

On January 25, 2010, Deutsche Bank filed a motion for summary judgment. (App. 210.) In support of the motion, Deutsche Bank attached a sworn affidavit signed by Tonya Hopkins, an employee at American Home Mortgage Servicing, Inc. ("AHMSI"), who attested that AHMSI was the servicer of Borrower's home loan and that a copy of the Note was attached to her affidavit. (App. 212.) Deutsche Bank later withdrew its summary judgment motion while it responded to Borrower's discovery. (App. 236.)

On January 11, 2013, Deutsche Bank filed a new motion for summary judgment. (App. 223.) In support of the motion, Deutsche Bank attached a sworn affidavit signed by Crystal Kearse, an Assistant Secretary at Homeward Residential, Inc., the former servicer of the loan, who attested that "[Deutsche Bank] is the holder of the note and mortgage executed by Thomas P. Wuensch" (the "Kearse Affidavit").[3] (App. 225.)

After summary judgment was fully briefed, the circuit court granted Borrower's request for a continuance of the hearing on the motion until the parties could complete additional discovery. (App. 236.) Ultimately, the

[3] Ocwen subsequently acquired Homeward Residential, Inc., including the servicing rights to the Loan. (App. 101.)

circuit court did not rule on the summary judgment motion, and the case proceeded to a bench trial on May 19, 2014 and June 25, 2014. (App. 238.)

At trial, the circuit court admitted the original Note into evidence. (App. 076.) Before the Note was admitted, Deutsche Bank's counsel handed the original and a copy of the Note to Borrower's counsel, who acknowledged that the copy was an accurate replication of the original (App. 073.) Borrower's counsel objected to the introduction of the original Note on the ground that Deutsche Bank's counsel was "testifying."[4] (App. 074.) The following is a relevant excerpt from the trial transcript:

> Mr. Karnes [counsel for Deutsche Bank]: "I'm going to have the Court inspect the original note and the copy of the original note which was marked as Exhibit 1."
>
> Mr. Peterson [counsel for Wuench]: "I'm going to object to the plaintiff's counsel testifying in this matter."
>
> The Court: "I haven't heard any testimony yet.... When I look at the document purporting to be an original, looks like original ink on

[4] The Court of Appeals highlighted the fact that Deutsche Bank's counsel did not take an oath and was not acting as a witness "on whose statements or implied statements the circuit court could rely to prove possession." (App. 005.) Deutsche Bank's counsel was not acting as a witness at trial because no authentication testimony was necessary to admit the Note into evidence or to establish that Deutsche Bank possesses the Note.

> signatures and appears to be the same as what has now been marked as a copy Exhibit 1, so for purposes of that you can have this original back...."
>
> Mr. Karnes: "The signatures on the note are presumed valid, and Mr. Wuensch isn't here today to contest the signature, so he can't challenge his signature. Mr. Peterson can't challenge his signature. He said himself he couldn't do that. He's not an expert. He's not a witness. So, the Court has to presume that the signatures are valid. The Court has to presume that the endorsements are valid, and the Court has already made a finding that [the document] appears to be a [wet ink] signature note and the original document, so I think the Court can admit the note as evidence."
>
> The Court: "Okay. It will be admitted."

(App. 074-76.) The circuit court later determined that "[Deutsche Bank] is, in my mind, the holder in due course of a note endorsed in blank and they can proceed on it." (App. 079.) Wuench did not object to the introduction of a certified copy of the Mortgage, which Deutsche Bank's counsel noted is also a self-authenticating public record under Wis. Stat. § 909.02(4). (App. 076-77.)

After the circuit court admitted the Note into evidence, Deutsche Bank called Rashad Blanchard as a witness. (App. 080.) Blanchard testified he is a loan analyst at Ocwen Financial Corporation, and that

Ocwen Loan Servicing ("Ocwen") is the servicer of Borrower's home loan. (App. 081-87.) Blanchard testified that "I analyze, review, and research loan histories as they pertain to our business records. I am called upon for trials, mediations, and things of that nature of, for particular loans that Ocwen Loan Servicing services." (App. 082.) Blanchard further testified that he is familiar with how loans and records are kept at Ocwen, and confirmed that Ocwen services Borrower's loan based on his review of Ocwen's business records. (App. 081-87.) Blanchard testified that he reviewed an Affidavit of Debt concerning the loan (marked as Plaintiff's Exhibit 9), which was found in Ocwen's system called Real Servicing. (App. 088-89.) Blanchard testified the Affidavit of Debt gives a "picture of the loan," that the current principal loan balance was $315,233.64, and the loan was due for the February 1, 2008 payment. (App. 089-92.) Blanchard further testified that a loan history (marked as Plaintiff's Exhibit 10) provides "an outlook of the payments and the current date due and owing," and it identifies the "owner of the loan." (App. 094-95.)

During cross-examination, Borrower did not ask Blanchard any questions regarding whether Deutsche Bank holds or possesses the Note. (App. 095-134.) Instead, Borrower asked Blanchard whether Ocwen was a

party to the Note or named as the lender in the Note. (App. 115-116.) Blanchard testified that Ocwen was neither the lender nor a party to the Note. (App. 115-116.)

Wuench admitted at trial that he borrowed the money subject to the Note to purchase the property and that the last payment he made on the loan was in February 2008. (App. 143-144.) But Wuench denied that he signed the Note given there was no "indentation in the paper." (App. 135-139.) Wuench testified that when he signs a document, "it make[s] an impression on the opposite side of a piece of paper" where he signs. (App. 139.) Wuench also testified that he did not think the Note admitted into evidence was genuine because of a possible cloud on title and fraud being committed on investors, but offered no evidence supporting those claims. (App.145-148.)

On December 10, 2014, the circuit court issued its Findings of Fact, Conclusions of Law, Judgment and Order. (App. 015.) Noting that it "has reviewed the entire file as currently constituted and has considered the evidence and arguments submitted at the two-part trial, as well as all post-trial briefs of the parties," the circuit court found that Deutsche Bank is the current holder of and possesses the Note, and entered a judgment of

foreclosure in Deutsche Bank's favor. (App. 015.) The circuit court made the following specific findings regarding possession of the Note:

> 6. The Plaintiff is the holder of the original Note, endorsed in blank. The Court is satisfied that the Plaintiff has in its possession the original ink Note. The Plaintiff produced the original ink Note at trial and the Court examined it. The Court is satisfied that it is the original Note executed by Wuensch on December 18, 2006. Exhibit 1 is a true and accurate copy of the original ink Note.

(App. 020.)

C. July 8, 2016, Order of Court of Appeals.

Borrower appealed the judgment on the grounds that the circuit court erred by admitting the Note into evidence at trial over defense counsel's objection and by finding that Deutsche Bank possessed the Note. (App. 001.)

After the appeal was fully briefed, the Court of Appeals issued an Order requiring additional briefing on the following issue: "whether a plaintiff in a foreclosure action may prove at trial that it possesses at the time of trial the original note by having its counsel present to the circuit court a document that counsel represents is the original note." (App. 011.)

In so doing, the Court of Appeals noted that Borrower's position appeared to be that "in order to prove possession the plaintiff was obligated to produce a witness who could give testimony, subject to cross examination, sufficient to support a reasonable inference that the document brought to court by the plaintiffs' attorney was at that time in the plaintiffs possession." (App. 012.) The Court of Appeals further noted that Borrower appeared to argue that "plaintiff's attorney could have obtained the document, even assuming it to have been the original note, from a person or entity other than the plaintiff who in fact possessed the note, not the plaintiff." (App. 012.) The Court of Appeals understood Deutsche Bank's position to be that "no such witness was necessary, because there is no question that the attorney was then representing the plaintiff as legal counsel and his representation in that role was sufficient to prove possession, regardless of an objection by [Defendant]." (App. 012.)

D. August 23, 2016, Opinion and Order of Court of Appeals.

In its August 23, 2016, Opinion and Order, the Court of Appeals summarily reversed the judgment of foreclosure because "after [Borrower] unambiguously demanded proof at trial that the plaintiff *possessed* the original note at issue, the plaintiff failed to offer any evidence on the

possession issue at trial." (App. 001.) The Court of Appeals also held that "where the plaintiff's counsel did not take an oath and did not lay a foundation to establish personal knowledge about possession of the original note, the plaintiff's counsel was not acting as a witness on whose statements or implied statements the circuit court could rely to prove possession." (App. 005.)

The Court of Appeals concluded that "sworn testimony from someone with personal knowledge was necessary, given [Borrower's] unambiguous objections at trial," and that no evidence was provided "from which a reasonable inference of current possession could arise." (App. 006-007.) The Court of Appeals "ordered that the foreclosure judgment in this action is summarily reversed under WIS. STAT. RULE 809.21(1)," which it admitted produced a "highly inefficient result" and could be seen as elevating "form over substance." (App. 008.)

E. Motion for Clarification and September 19, 2016, Order of Court of Appeals.

Deutsche Bank filed a motion for clarification in which it asked the Court of Appeals to clarify its order to include language that the case be remanded for the sole purpose of permitting Deutsche Bank to provide sworn testimony that it is the current holder of the Note. (App. 205.)

Otherwise, Deutsche Bank would be barred from foreclosing on the property on the sole basis that it had not provided sworn testimony regarding possession of the Note after the circuit court admitted the Note into evidence. (App. 205.)

On September 19, 2016, the Court of Appeals denied the motion for clarification (which it treated as a motion for reconsideration). (App. 009.) The Court held that the foreclosure judgment was reversed based on Deutsche Bank's "failure to meet its burden of proof at trial on the issue of possession. The evidence is now closed in this case. We express no opinion about the viability of any new foreclosure action that the respondent might pursue." (App. 009.)

STANDARD OF REVIEW

Following a bench trial, "[f]indings of fact shall not be set aside unless clearly erroneous." *Cianciola, LLP v. Milwaukee Metro. Sewerage Dist.*, 2011 WI App 35, ¶ 12, 331 Wis. 2d 740, 747, 796 N.W.2d 806, 810.; Wis. Stat. § 805.17(2) The appellate court "will therefore not upset a circuit court's findings of fact unless they are clearly erroneous, nor will we reweigh evidence or assess witness credibility." *Dickman v. Vollmer,* 2007 WI App 141, ¶ 14, 303 Wis.2d 241, 736 N.W.2d 202. A finding of fact is

clearly erroneous when "it is against the great weight and clear preponderance of the evidence." *Zeitler Plumbing & Septic Serv., Inc. v. Greve Const., Inc.*, 2013 WI App 115, ¶ 19, 350 Wis. 2d 508, 838 N.W.2d 137. "When evidence supports the drawing of either of two conflicting but reasonable inferences, the circuit court, and not [the appellate] court, must decide which inference to draw." *Id.* at 776, 528 N.W.2d 446. Moreover, a circuit court's evidentiary rulings are reviewed under an abuse of discretion standard. *Carney-Hayes v. Nw. Wisconsin Home Care, Inc.*, 284 Wis. 2d 56, 72–73, 699 N.W.2d 524, 532. An appellate court "will uphold a decision to admit or exclude evidence if the circuit court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." *Id.*

ARGUMENT

It is black letter law that the holder of a promissory note is entitled to enforce it. Because the borrower in this case did not contest that he had defaulted on his payments, in order to win at trial, Deutsche Bank only had to establish that it held a note Wuench was obligated to pay. Deutsche Bank offered, and the court admitted, the original, self-authenticating Note creating the payment obligation. And Deutsche Bank demonstrated

entitlement to payment under the Note. Deutsche Bank actually possessed and physically displayed the original, self-authenticating Note, which was endorsed in blank. Under Wisconsin law, Deutsche Bank was the holder of the Note, and need show no more. If allowed to stand, the appellate court's decision to the contrary would impose a testimonial possession requirement on the holder of a promissory note that finds no basis in Wisconsin law. If such a change is to be made, it must be made by the state legislature, not the state courts. This Court should reverse.

I. DEUTSCHE BANK PRESENTED A PROPERLY-ADMITTED, SELF-AUTHENTICATING NOTE AT TRIAL AND, AS THE HOLDER OF THAT NOTE, WAS ENTITLED TO ENFORCE IT.

A. Under Wisconsin Law, The Original Note Was Self-Authenticating And Its Admission At Trial Was Therefore Proper.

Under Wisconsin law, a document must be authenticated to be admissible. *Dow Family, LLC, v. PHH Mortgage Corp.*, 2013 WI App 114, at ¶ 20, 350 Wis.2d 411, 421, 838 N.W.2d 119, 125 (*citing* Wis. Stat. § 909.01). That requirement is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *Id.* The Wisconsin Rules of Evidence also provide that certain categories of documents are self-authenticating. This includes an original promissory

note, which is self-authenticating as commercial paper. Wis. Stat. § 909.02(9). Self-authenticating documents, including commercial paper, do not require "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility." *Id.* Just as in the federal courts, a self-authenticating document, "once tendered to the court, will be accepted in evidence for what it purports to be, without the shepherding angel of an authenticating witness." 2 McCormick On Evid. § 229.1 (7th ed.). A copy of an authenticated document is treated in the same way: A party may present a self-authenticating document to a trier of fact along with a copy, and the trier of fact may compare them and admit the copy. *See* Wis. Stat. § 909.015(3).

That is precisely what occurred here. Deutsche Bank's counsel produced the self-authenticating originally executed Note to the circuit court, which compared the original to the copy of the Note attached to the complaint, found them to be identical, and admitted the Note. (App. 073-76.). The circuit court thus did not abuse its discretion in admitting the Note into evidence. On the contrary, the court followed the parameters laid out clearly in Wisconsin evidentiary law. When the court admitted the Note into evidence, it made the required finding that the copy of the Note was

what it claimed to be—"a true and correct copy of an original note in [Plaintiff's] possession." *Cf. Dow Family, LLC*, 2013 WI App at ¶ 20 (noting that circuit court erred in admitting copy of note into evidence because, unlike here, there was insufficient evidence to show it was a "true and correct copy of an original note *in [Plaintiff's] possession*") (emphasis added). The admission of the Note was therefore proper as a self-authenticating document.

B. Deutsche Bank Holds The Note And Is Therefore Entitled To Enforce It.

Since the days of Lord Mansfield, courts have recognized the right of a holder in possession of a negotiable instrument to enforce it. *Miller v. Race*, 1 Burr. 452, 97 Eng. Rep. 398 (K.B. 1758). This same principle finds support in American case law dating at least as far back as 1895, when the Eighth Circuit Court of Appeals found "untenable" an argument that sworn testimony was required to prove the original note was in plaintiff's possession, even when the defendant at trial demanded such proof. *Dawson Town & Gas Co. v. Woodhull*, 67 F. 451, 452 (8th Cir. 1895). Rather, it was proper to admit the note into evidence as a note in the possession of plaintiff simply because the plaintiff's attorney had it in his own possession at trial. *Id.* The court noted the "legal presumption" that the

attorney had obtained the note from the plaintiff, and the further legal presumption that the plaintiff—who had brought suit on the note endorsed in blank—was in possession of it. *Id.* The defendant's denials of possession were insufficient to overcome this presumption. *Id.*

Courts in other jurisdictions have long applied this same presumption of possession. *See, e.g., Rodger v. Bliss*, 130 Misc. 168, 169 (N.Y. Sup. Ct. 1927) (finding plaintiff's mere production of promissory notes at trial was *prima facie* evidence of possession, despite defendant's objection); *Schmoldt v. Chi. Stone Setting Co.*, 33 N.E.2d 182, 183 (Ill. App. Ct. 1941) (finding plaintiff's production of the note by his attorney at trial was *prima facie* evidence of the plaintiff's possession, notwithstanding defendant's objections); *In re Foreclosure of a Deed of Trust Executed by Rawls*, 777 S.E.2d 796, 799-800 (N.C. Ct. App. 2015) (finding that because petitioner's "production of the original note indorsed in blank was sufficient to allow the trial court to conclude that [it] was the holder of the note," it was unnecessary to reach "respondent's arguments concerning the admissibility of the affidavits [testifying as to petitioner's possession] proffered at the hearing").

Today, courts in almost every jurisdiction—including Wisconsin—have adopted Article 3 of the UCC (Negotiable Instruments), and recognize that a holder of a note has the right to enforce it. *See* American Law Institute and the National Conference of Commissioners on Uniform State Laws, "Report of the Permanent Editorial Board for the Uniform Commercial Code: Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes" at n.6 (November 14, 2011); *see also* Del. Code tit. 6, § 3-301 (Delaware) ("'Person entitled to enforce' an instrument means the holder of the instrument...."); Md. Code, Com. Law § 3-301 (Maryland) (same); Ohio Rev. Code § 1303.31 (Ohio) (same); Ind. Code § 26-1-3.1-301 (Indiana) (same); 810 Ill. Comp. Stat. Ann. 5/3-301 (Illinois) (same).

Wisconsin law likewise permits the holder of an instrument to enforce it. This rule is codified in statute, which provides, *inter alia*, that a " '[p]erson entitled to enforce' an instrument means the holder of the instrument." Wis. Stat. § 403.301. The "holder" of a negotiable instrument, in turn, is defined as the "person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." *Id.* at § 401.201(km).

The record establishes that Deutsche Bank is the holder of the Note, and can enforce it under Wisconsin law. By statute, if an instrument is endorsed in blank then it "becomes payable to bearer and may be negotiated by transfer of possession alone until specially endorsed." Wis. Stat. § 403.205(2). The Note at issue here was endorsed in blank and held by Deutsche Bank. (App. 077.) Deutsche Bank was therefore entitled to enforce it. This standard has applied in other mortgage foreclosure cases. *See PNC Bank, N.A. v. Bierbrauer,* 2013 WI App 11, ¶ 10, 346 Wis.2d 1, 827 N.W.2d 124 ("It is undisputed that PNC is the bearer of the note, and that the note was endorsed in blank. Pursuant to § 403.205(2), the note is therefore payable to PNC."). Deutsche Bank was not required to prove that it is the "owner" of the Note (although it is), just that it is the holder of the Note. Accordingly, the circuit court's finding that Deutsche Bank is the holder of the Note entitling it to foreclose was not clearly erroneous and should be affirmed.

C. Wisconsin Law Requires No Additional Evidence Regarding Possession But, If It Did, Possession Of A Note Can Be Established By Presenting The Self-Authenticating Original Wet-Ink Note At Trial.

Sworn testimony should not be required to prove possession of a note in a residential foreclosure action where, as here, the original, wet-ink

Note is admitted into evidence by the circuit court after comparing the copy of the Note attached to the complaint to the wet-ink original that is offered into evidence by counsel for the foreclosing party. The fact that Deutsche Bank had the original Note, endorsed in blank, in its physical possession at trial is enough to establish that Deutsche Bank possesses the Note. It is that simple.

If this Court determines that the holder of a self-authenticating document must still prove possession, then presentment of the *original Note* should be sufficient. Once the trial court properly admitted the self-authenticating note, it was well within its discretion to also conclude that Deutsche Bank possessed the Note. As the trier of fact, the circuit court was in a position to decide whether the original Note handed to the court by Deutsche Bank's counsel was, in fact, identical to the copy of the Note presented to the court, and whether it was sufficient to conclude that Deutsche Bank possessed the Note given that its attorney and agent held the original Note in his hands. *See Marten Transp. Ltd. v. Hartford Specialty Co.*, 194 Wis. 2d 1, 13, 533 N.W.2d 452, 455 (1995) (attorney is agent of their client).

If any conflicting inference could be drawn from this evidence, the circuit court is afforded discretion to decide whether to do so. Based on the record evidence, the circuit court's finding that Deutsche Bank is the holder in possession of the Note was not clearly erroneous and the appellate court should have affirmed it. Based on its review of the original Note and the copy, the circuit court determined that no additional testimony was necessary because the Note is self-authenticating under Wisconsin law. This was not an abuse its discretion because it was based on the Court's own examination of the original Note. *Carney-Hayes v. Nw. Wisconsin Home Care, Inc.*, *supra*, 699 N.W.2d at 532.

Wisconsin courts have indicated that possession of a note can be established by presenting the original note at trial. For example, in *Bank of Am. N.A. v. Minkov*, 2013 WI App 115, ¶ 40, 350 Wis. 2d 507, 838 N.W.2d 137, the court reversed the circuit court's grant of summary judgment in favor of Bank of America ("Bank"), and remanded the case for further proceedings. (App. 239). In *Minkov*, the Bank moved for summary judgment and attached an uncertified copy of the note to an affidavit in support of the motion. The court ruled that this evidence was insufficient to establish that the Bank possessed the note and was entitled to foreclose.

Minkov, 350 Wis. 2d at 510. The court noted that "[n]othing *in the document* demonstrates that Bank of America has possession of the original note," nor did the Bank "identify any evidence in the record that it possesses the original note." *Minkov*, 350 Wis. 2d at 511. (emphasis added).

Minkov suggests there are two ways to establish possession, either by the document itself or some other evidence. Unlike the uncertified copy of the note presented in *Minkov*, the self-authenticating originally executed wet-ink Note presented at trial by Deutsche Bank's counsel and agent demonstrated that Deutsche Bank has possession of the original Note.

A similar finding was reached by the court in *BAC Home Loans Servicing LP v. Thompson*, 2014 WI App 24, ¶ 24, 352 Wis. 2d 754, 843 N.W.2d 710, which affirmed the circuit court's refusal to admit into evidence a document purporting to be a copy of the note. (App. 262). The original note was not presented at the trial. The appellate court held that BAC failed to prove that it possessed the original note, and noted that "[n]othing *in the document* or the evidence presented at trial demonstrates that BAC was in possession of the original note." *Thompson*, 352 Wis. 2d at 756 (emphasis added). Like *Minkov*, the *Thompson* ruling suggests there are two ways to establish possession, either by the document itself or some

other evidence. Unlike the copy of the note presented in *Thompson*, Deutsche Bank's counsel, as its agent, presented the self-authenticating and originally-executed, wet-ink Note at trial that established Deutsche Bank's possession of the Note.

Likewise, in *Bank of N.Y. Mellon v. Harrop*, the circuit court entered a judgment of foreclosure against the defendant after a bench trial. 2016 WI App 34, 369 Wis.2d 71.[5] The bank presented the "original note to the circuit court through its attorney," and defendant argued on appeal that "even if the court properly determined the note was original," that "witness testimony was necessary to establish possession." *Id.* at ¶ 11. The panel affirmed in a *per curiam* decision, agreeing that the record supported a finding of possession on the sole basis that "the fact that . . . counsel is representing the [Bank] in this case, has the note physically in his possession, is enough to establish that the note is in possession of the [Bank]." *Id.*

[5] The citation to *Harrop* here is not being used as persuasive authority or to convince this Court to accept the legal holding of *Harrop*, but is only cited to highlight the fact there is conflict between the decisions in *Harrop* and this case.

The fact that *Harrop* was affirmed *per curiam* and the instant appeal was reversed summarily on precisely the same issue with precisely the same facts demonstrates a clear contradiction within the Fourth District on an issue that is likely to be often faced by other Wisconsin courts. Further, the fact that both decisions are non-precedential and have no persuasive value means a party is left to guess as to what is sufficient at trial to establish that it is a holder of commercial paper. This Court's review is warranted to alleviate the confusion.

Based on the straight-forward record in this case, the circuit court was well within its discretion in reviewing the self-authenticating original "wet-ink" Note and making the factual finding that the "Plaintiff is the holder of the original Note, endorsed in blank. The Court is satisfied that the Plaintiff has in its possession of the original ink Note." (App. 020.) *See, e.g., Martindale v. Ripp*, 2001 WI 113, ¶¶ 28-29, 246 Wis.2d 67, 86, 629 N.W.2d 698, 705-06 (circuit courts have broad discretion in making evidentiary rulings). The circuit court did not clearly err in making such a basic factual finding. *United Food & Commercial Workers Union, Local 1473 v. Hormel Foods Corp.*, 2016 WI 13, ¶ 29, 367 Wis. 2d 131, 142, 876

N.W.2d 99, 104 (reviewing court will not overturn factual findings of circuit court unless findings are clearly erroneous).

Moreover, this is not a case in which the borrower alleged that someone other than the plaintiff seeking to enforce the Note actually holds the Note. Wuensch offered no evidence at trial that anyone other than Deutsche Bank holds the Note. The court in *PNC Bank, N.A. v. Bierbrauer*, 2013 WI App 11, ¶ 10, 346 Wis.2d 1, 827 N.W.2d 124 addressed a similar situation in a summary judgment proceeding. PNC Bank, N.A. ("PNC") moved for summary judgment on its right to foreclose. *Bierbrauer*, 2013 WI App 11 at ¶¶ 10-11. The defendants argued that PNC was not entitled to foreclose because it allegedly failed to establish that it held the note. *Id.* The court held that PNC had established a prima facie case of summary judgment to foreclose. *Id.* The court noted that while the defendants denied that PNC proved it held the original note, they "provided nothing to rebut [PNC's] assertion that [it] is the current holder of the note." *Id.*

The same holds true here. Wuensch offered no evidence to rebut the fact that Deutsche Bank is the current holder and in possession of the Note, or that anyone other than Deutsche Bank possesses the Note. Instead, Wuensch testified that he did not execute the Note even though he admits

taking out the loan to purchase the property, and thinks the Note admitted into evidence was not genuine because of some inexplicable cloud on title and fraud being committed on investors. (App. 146-148.) The circuit court was entitled to disregard this confusing and circular testimony. There is no evidence in this case that anyone other than Deutsche Bank possesses the Note.

II. IF THIS COURT AGREES WITH THE APPELLATE COURT, AND IMPOSES A REQUIREMENT ON HOLDERS OF SELF-AUTHENTICATING DOCUMENTS THAT THEY PROVIDE TESTIMONY ON POSSESSION, FAIRNESS REQUIRES THAT THE COURT REMAND SO THAT DEUTSCHE BANK CAN MAKE THAT SHOWING.

After summarily reversing the judgment of foreclosure, the appellate court refused to remand the case for further proceedings regarding Deutsche Bank's possession of the Note. (App. 008-010.). If this Court agrees with the appellate court that the holder in possession of a self-authenticating Note endorsed in blank must offer additional testimony in order to admit that evidence, the Court should remand. Fairness requires that Deutsche Bank be given the opportunity to make this showing, under the new standard, before the judgment is vacated. The alternative would give the borrower, who has not made a payment on his loan in almost a decade, an undeserved windfall.

A. Cases Are Routinely Remanded When A Trial Court Admits Or Excludes Evidence Improperly.

This Court has held that courts should not elevate form over substance. *In re Elijah W.L.*, 2010 WI 55, ¶ 48, 325 Wis. 2d 524, 549, 785 N.W.2d 369, 381 ("we will not elevate form over substance in our interpretation of Wis. Stat. § 48.355(2)(b)1."); *State v. Saunders,* 2002 WI 107, ¶ 41, 255 Wis.2d 589, 649 N.W.2d 263 ("The process we require should not elevate form over substance."). To avoid a highly inefficient result here, this case should, in the alternative, be remanded to the circuit court to allow Deutsche Bank an opportunity to provide sworn testimony that it possesses the Note.

The Court of Appeals ruled that admitting the original Note into evidence was insufficient to prove possession. Wisconsin appellate courts have remanded cases if circuit courts err in admitting or excluding evidence relating to an element of a cause of action. *See, e.g.*, *Nischke v. Farmers & Merchants Bank & Trust,* 187 Wis. 2d 96, 108-9, 120–21, 522 N.W.2d 542, N.W.2d 552 (Ct. App. 1994) (error in admitting evidence) (in negligence action brought by property owner against bank relating to environmental contamination on property, case remanded after appellate court found that circuit court erred by admitting out-of-court statements of bank employees

necessary to establish plaintiff's negligence claim that were insufficiently authenticated); *Martindale v. Ripp*, 2001 WI 113, ¶ 73, 246 Wis. 2d 67, 108, 629 N.W.2d 698, 716 (error in excluding evidence) (personal injury action remanded after appellate court found that circuit court improperly excluded testimony of doctor who would have testified on an issue of causation that injury to plaintiff was caused by whiplash motion of plaintiff's head and neck after his car was struck from behind by defendant's truck).

The circuit court made two relevant evidentiary rulings here related to possession of the Note. First, the circuit court admitted the Note into evidence, then stating that the "plaintiff is, in my mind, the holder in due course of a note endorsed in blank and they can proceed on it." (App. 079.) Second, the Court granted Deutsche Bank's motion in limine to exclude introduction of the assignments of mortgage, noting they were not relevant to the issue of standing when the "law is pretty clear that somebody that is holding a note endorsed in blank has the right to seek foreclosure of such a document." (App. 078.)

Deutsche Bank had no reason to believe that it needed to offer testimony evidence regarding possession in light of the trial court's ruling.

And that belief was clearly not unreasonable, particularly in light of the fact that the Court of Appeals later agreed with Deutsche Bank that testimony was unnecessary in an appeal presenting the exact same question. *Bank of N.Y. Mellon v. Harrop*, 2016 WI App 34, 369 Wis.2d 71.

In other words, the appellate court's ruling in this case came as a surprise. Fairness therefore requires that Deutsche Bank be given an opportunity to present the evidence required under the newly announced standard before the judgment in this case is vacated entirely and Deutsche Bank is left without a remedy. The Bank should not be punished for its failure to foresee a drastic change in a venerable evidentiary requirement, particularly when even the appellate court could not apply a consistent standard.

B. If Given The Opportunity, Deutsche Bank Could Offer Additional Testimony Regarding Possession On Remand.

Given the Court of Appeals' ruling that admission of the Note itself was insufficient to establish Deutsche Bank has the right to enforce the Note—a crucial element in a foreclosure action—Deutsche Bank should, in the alternative, be given an opportunity to provide sworn testimony that it is the current holder and in possession of the Note. The Court of Appeals refused to remand the case even though it admitted its ruling produced a

"highly inefficient result" that could be seen as elevating "form over substance." (App. 008.) The fact the decision of the Court of Appeals is a "highly inefficient result" underscores the harm to lenders by requiring them to produce witnesses at trial regarding the possession of a note when Deutsche Bank's counsel, an agent of the lender, produces a self-authenticating, original wet-ink Note at trial that establishes possession.

The record shows that Deutsche Bank could have offered (at least) two witnesses that could testify to possession on remand. The first witness is Crystal Kearse. Although she did not testify at trial, Kearse, a loan analyst from Ocwen, submitted an affidavit in support of a motion for summary judgment regarding Deutsche Bank's right to foreclose. (App. 225.) In that affidavit, Kearse attested that Deutsche Bank is the holder of the Note. (App. 226.) After the court admitted the originally executed Note into evidence at trial, it was reasonable for Deutsche Bank to believe that live testimony from Crystal Kearse or any other witness was not necessary to establish that Deutsche Bank possesses the Note. But on remand, Deutsche Bank could illicit Kearse's live testimony to establish the very fact to which she has already sworn: That Deutsche Bank is the holder in possession of the Note.

The record also demonstrates that Deutsche Bank could have elicited live testimony regarding its possession of the Note from a second witness, Rashad Blanchard, who did take the stand at trial. His testimony already created a reasonable inference that Deutsche Bank possessed the Note. Blanchard, another loan analyst with Ocwen, testified to his familiarity with how loans and records are kept at Ocwen, and confirmed that Ocwen services Borrower's loan based on his review of Ocwen's business records. (App. 084-087.) Blanchard also testified that Borrower's loan appears in Real Servicing (the database Ocwen uses), as well as an imaging system where Blanchard can "see copies and images of documents that are particular to a file." (App. 083.) Blanchard further testified that he reviewed an Affidavit of Debt concerning the loan, and that a loan history provides "an outlook of the payments and the current date due and owing," and identifies the "owner of the loan." (App. 094.)

If the case were remanded, Deutsche Bank can provide sworn testimony from a loan analyst that it is the current holder and in possession of the Note. Deutsche Bank would be severely prejudiced if not given an opportunity to present this sworn testimony, particularly when the judgment of foreclosure was for $455,641.85. (App. 029.) If the judgment is

summarily reversed with no opportunity for Deutsche Bank to provide the sworn testimony, then Deutsche Bank could be barred from foreclosing on the property on what amounts to, at most, a pure technicality. In effect, this means that Wuensch could would get a free house and 20 acres of property despite his default more than nine years ago. This would be a draconian result in light of the nature of the alleged error and the ease with which it could be corrected. Justice would be served, and the "highly inefficient result" avoided, if this case was remanded to the circuit court with instructions to allow Deutsche Bank an opportunity to provide sworn testimony regarding possession of the Note. *See Martindale*, 2001 WI at ¶¶ 28-30 (when evidence is improperly admitted and affected substantial rights of the party, cause should be remanded for a new trial).

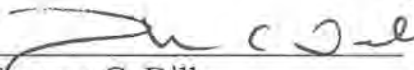
CONCLUSION

Plaintiff-Respondent-Petitioner Deutsche Bank National Trust Company respectfully requests that this Court reverse the August 23, 2016 Opinion of the Court of Appeals and affirm the judgment of foreclosure entered by the circuit court on December 14, 2016, or, in the alternative, remand the case to the circuit court with instructions to allow Deutsche

Bank an opportunity to provide sworn testimony regarding possession of the Note.

March 28, 2017

BP PETERMAN LAW GROUP LLC

By: 

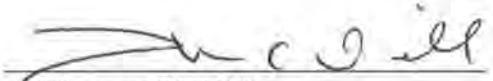
Thomas C. Dill
(State Bar No.: 1018514)
165 Bishops Way, Ste. 100
Brookfield, WI 53005
Counsel for Petitioner-Respondent
Deutsche Bank National Trust Co.

K. Lee Marshall
BRYAN CAVE LLP
Three Embarcadero Center
San Francisco, California 94111
Pro Hac Vice

Robert W. Brunner
BRYAN CAVE LLP
161 North Clark Street
Chicago, Illinois 60601
Pro Hac Vice

FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(b) and (d) for a brief produced using a proportional serif font. The length of the brief is 6,926 words. This was calculated using the word count feature of Microsoft Word.



Thomas C. Dill

CERTIFICATION REGARDING APPENDIX

I certify that filed with this brief, as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

Thomas C. Dill

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2017, I filed an original and 21 copies of the foregoing Brief and Appendix with the Clerk of the Wisconsin Supreme Court, and served 3 copies on the following counsel of record:

Thomas C. Dill

APPENDIX