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August 5, 2016

Judges Kloppenburg, Higginbotham, and Blanchard
Wisconsin Court of Appeals, District IV
110 East Main Street, Ste 215
Madison, Wisconsin 53701

Re: *Deutsche Bank Nat. Trust. Co. v. Wuensch et al.*, Appeal No. 15AP175

Your Honors:

Plaintiff-Appellee Deutsche Bank National Trust Company as Trustee ("Plaintiff") submits this letter brief pursuant to the Court's July 8, 2016 Order, and in response to Defendant-Appellant Thomas Weunsch's ("Defendant") July 22, 2016 letter brief to the Court.

The Court requested that the parties brief the narrow issue of "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." (Jul. 8, 2016 Order at 1.) Introduction of the original Note at trial was sufficient to prove Plaintiff's possession, despite Defendant's objection. This is because the Wisconsin Rules of Evidence provide that an original promissory note is self-authenticating as commercial paper. Wis. Stat. § 909.02(9). In turn, the rules provide for the authentication of a copy of a document by a trier of fact – here, the circuit court judge – by comparing it with an authenticated document. *See* Wis. Stat. § 909.015(3).

There are no reported Wisconsin cases that directly address the narrow issue presented here. However, this Court addressed a somewhat similar issue in *Dow Family, LLC v. PHH Mortg. Corp*, 2013 WI App 114, 350 Wis. 2d 411 (2013), aff'd, 2014 WI 56, 354 Wis. 2d 796 (2014). In *Dow*, the plaintiff moved for summary judgment and submitted affidavits attaching a copy of the note to establish it had standing to foreclose. *Id.* at ¶¶ 7-10. However, the affidavits failed to state that the "[plaintiff] was in possession of the original note or that the copy of the note was a true and correct copy" of the original. *Id.* at ¶ 21. The circuit court ruled that the affidavits were sufficient to establish standing. *Id.* at ¶ 1. The defendant argued on appeal that the *copy* of the note was wrongfully admitted into evidence, and therefore the plaintiff had not proven possession. *Id.* at ¶ 17.

The appellate court agreed, and found the affidavits were insufficient to "authenticate the copy of the note." *Id.* at ¶ 17. Accordingly, the plaintiff had not submitted "evidence sufficient to support a finding that the copy of the note is what [plaintiff] claims – namely, a true and correct copy of an *original note in [plaintiff's] possession.*" *Id.* at ¶¶ 20-21 (emphasis added). The plaintiff argued that no witness testimony was required to authenticate the copy of the note because a "note is commercial paper and is therefore self-authenticating." *Id.* at ¶ 22. The court rejected that argument, noting no authority was presented to establish that a *copy* of commercial

paper was self-authenticating. *Id.* In sum, the court found that "without the original note, or a properly authenticated copy, there is no factual showing that [the plaintiff] is entitled to enforce the note as the party in possession of a note endorsed in blank." *Id.* at ¶ 24.

Unlike the plaintiff in *Dow*, Plaintiff's counsel submitted the original note to the circuit court. (R. Supp. App. 115, Tr. at 15.) He asked the circuit court to inspect the original, compare it to the copy, and allow the copy to be admitted into evidence. *Id.* As Plaintiff argued in its response brief, an original promissory note is self-authenticating as commercial paper under Wis. Stat. § 909.02(9). (Response Br. at. 10-12.) The circuit court inspected the original and determined it to be an "original ink on signature" document. (R. Supp. App. 115, Tr. at 15.) The Wisconsin Rules of Evidence also expressly provide for the authentication of a copy of a document by a trier of fact – here, the circuit court judge – by comparing it with an original that is self-authenticating. *See* Wis. Stat. § 909.015(3).

The Court was well within its discretion in comparing the self-authenticated original to the copy and determining whether the copy was authentic and should be admitted into evidence. *See, e.g., Martindale v. Ripp*, 2001 WI 113, ¶¶ 28-29, 246 Wis. 2d 67, 86 (2001) (trial courts have broad discretion in making evidentiary rulings). The following is a relevant excerpt from the trial transcript:

> **Mr. Karnes**: "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**: "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 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."

(R. Supp. App. 115, 117, Tr. at 15, 17.)

Plaintiff proved possession by establishing the copy of the note was what it claimed to be – "a true and correct copy of an original note in [its] possession." *Dow*, 2013 WI App at ¶ 20; *see also* Complaint at ¶¶ 2-3 (Defendant "duly executed and delivered a note and mortgage...copies of which are annexed hereto as Exhibit 1 and Exhibit 2," and "plaintiff is the lawful holder of said note and mortgage.") Defendant's argument that "Plaintiff chose not to present any evidence

of authenticity or possession" is belied by the record. (Letter Br. at 2.) Additionally, Defendant offered no testimony that the Note admitted into evidence was not the original Note, given that Defendant elected not to appear at trial. (R. Supp. App. 107-13, Tr. at 7-13.)

Plaintiff's counsel's legal argument that a note is commercial paper and is self-authenticating under Wisconsin law was in no way "suggestive," nor did it constitute testimony. (Letter Br. at 1-2.) Defendant argues that Plaintiff's counsel was impermissibly testifying as an unsworn "*de facto* witness" when he presented the original note and copy to the Court. (Letter Br. at 2.) The term "*de facto* witness" does not appear in any reported Wisconsin court case. Rather, Defendant asks this Court to accept its illogical analogy to the "*de facto* officer" doctrine, which states that acts performed by a person acting under color of an election or appointment are valid as to the public and third parties, even if the legality of that person's office is deficient. *Joyce v. Town of Tainter*, 2000 WI App 15, ¶¶ 5-7, 232 Wis. 2d 349, 354 (1999). There is absolutely no logical or legal basis for such an analogy, and it should be disregarded.

Defendant's argument that Plaintiff's counsel's "ethical obligations prohibited him from acting as counsel at trial" is also without merit. (Letter Br. at 2.) It appears Defendant is invoking the advocate-witness rule to argue Plaintiff's counsel could not act as an attorney at trial because he was "likely to be a necessary witness." WI ST R SCR S 20:3.7. This argument is baseless because Plaintiff's counsel gave no testimony, and the Note was authenticated by means other than testimony.

In its July 8, 2016 Order, this Court "stress[ed] that the parties are to provide...argument[s] that may assist [it] in resolving the *narrow proof-of-possession* issue that [it has] identified here *and not other issues*." Defendant's letter brief includes arguments outside the scope of the narrow issue. As such, the Court should disregard Defendant's argument regarding application of the "strategic waiver doctrine." (Letter Br. at 3.) Even if it is considered, Defendant's citation in support establishes that the doctrine applies only in *criminal* cases when a *defendant* fails to object to admissibility of evidence for tactical purposes. *Upchurch v. State*, 64 Wis. 2d 553, 560 (1974). Thus, this doctrine does not apply here. Defendant also asks that this case be dismissed with prejudice. (Letter Br. at 3.) Should this Court determine that the trial court erred in admitting the Note into evidence and finding Plaintiff possessed the note, the case should be remanded for the sole purpose of deciding that issue. *See Dow*, 2013 WI App 114 at ¶ ¶ 2 (reversing and remanding for a trial on the issue of whether plaintiff was in possession of the note and thus had standing to enforce it).

Dated: August 5, 2016

Respectfully submitted,
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cc: Counsel of Record