

The document below is hereby signed.

Dated: January 4, 2013.



S. Martin Teel, Jr.

**S. Martin Teel, Jr.
U.S. Bankruptcy Judge**

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re)	
)	
DEBRA M. STEVENSON,)	Case No. 06-00306
)	(Chapter 13)
Debtor.)	
_____)	
)	
FIRST AMERICAN TITLE)	
INSURANCE COMPANY, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	Adversary Proceeding No.
v.)	07-10005
)	
DEBRA M. STEVENSON, <i>et al.</i> ,)	Not for Publication in
)	West's Bankruptcy Reporter.
Defendants.)	

MEMORANDUM DECISION SUBMITTING
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
RECOMMENDING THAT THE DISTRICT COURT GRANT SUMMARY JUDGMENT IN
FAVOR OF THE PLAINTIFFS ON THEIR CLAIM FOR EQUITABLE SUBROGATION

The following constitutes the bankruptcy court's proposed findings of fact and conclusions of law under Fed. R. Bankr. P. 9033 as to the issues in this adversary proceeding other than the defendants' claims that the loan at issue is void based on

alleged violations of state and federal lending laws.¹

I

First American Title Insurance Company commenced this action by filing a two-count complaint in the bankruptcy court against the debtor, Debra M. Stevenson, and her son, Eugene Smith. Fremont Investment & Loan made a loan ("the Fremont Loan") to Stevenson in order to refinance a pre-existing loan made by Wells Fargo Bank, NA, evidenced by a promissory note ("the Wells Fargo Note"), and secured by a lien, a security interest granted by a deed of trust ("the Wells Fargo Deed of Trust"), on real property owned by Smith and Stevenson as joint tenants. Stevenson executed a promissory note ("the Fremont Note") promising to

¹ The defendants' lending law claims asserted defenses to Stevenson's obligations under the loan, and amounted to an objection to the proof of claim filed in the main bankruptcy case, an objection seeking a declaration that the claims under the loan are void. The adjudication of such challenges to a creditor's claim in the bankruptcy case fall within the bankruptcy court's authority to decide core proceedings. The right to challenge the loan belongs to Stevenson as the obligor on the loan. Adjudication of disputes affecting the creditor-debtor relationship are a core proceeding that this court is authorized to decide. 28 U.S.C. § 157(b)(2)(K) ("determinations of the validity, extent, or priority of liens") and § 157(b)(2)(O) ("adjustment of the debtor-creditor . . . relationship").

In contrast, the claims asserted by the plaintiffs (e.g., for equitable subrogation to a lien on Smith's property interest), although affecting the administration of the case, are only related to the bankruptcy case and are non-core in nature. The bankruptcy court is authorized to hear and make proposed findings of fact and conclusions of law in such non-core "related to" proceedings. 28 U.S.C. § 157(c)(1).

repay the Fremont Loan. Stevenson granted Fremont a lien, a security interest granted pursuant to a deed of trust ("the Fremont Deed of Trust"), against the real property to secure the Fremont Loan, but Smith did not execute that Fremont Deed of Trust, thus making the Fremont Loan unenforceable against Smith's interest in the real property unless, for example, the holder of the Fremont Loan is entitled to be equitably subrogated to the Wells Fargo Deed of Trust. First American was Fremont's title insurer in the transaction, and has an obvious interest in the Fremont Loan being collectible from both Stevenson's and Smith's interests in the property.

First American's complaint has since been amended. The amended complaint added as plaintiffs HSBC Bank USA, National Association, as Trustee for SG Mortgage Securities Trust 2006-FRE 1² (as Fremont's successor in interest and as First American's insured lienholder), and Wells Fargo (as the bank that services the Fremont Loan).³ The amended complaint also struck an erroneous allegation in the original complaint that Wells Fargo was Fremont's successor in interest and First American's insured

² References in this decision to HSBC mean HSBC in its role of serving as the trustee of the Trust. As will be seen, at one point there was a mistaken belief in this proceeding that HSBC Bank USA, N.A., in a non-trustee role, was the holder of the Fremont Note.

³ Coincidentally, Wells Fargo was also the entity whose loan was satisfied out of the Fremont Loan proceeds, but it has not been added as a plaintiff in that capacity.

lienholder. The amended complaint made no other material changes to the original complaint. This court adopts the bankruptcy court's rulings permitting the filing of the amended complaint.

Count I of the amended complaint (like the original complaint) seeks (1) a declaration that Smith is obligated on the loan, and (2) reformation of the Fremont Deed of Trust to include Smith's signature. Count II of the amended complaint (like the original complaint) seeks to have Fremont's successor in interest equitably subrogated to the lien position previously held by Wells Fargo, whose loan was satisfied through the Fremont Loan and whose related deed of trust had encumbered both Stevenson's and Smith's interest in the property.

II

The court has subject matter jurisdiction under 28 U.S.C. § 1334(b), tested as of the filing of the adversary proceeding complaint, as the disposition of the proceeding could have an impact on the administration of the case. Wells Fargo is administering the loan for Fremont's successor,⁴ and sought relief from the automatic stay in the debtor's bankruptcy case (Case No. 06-00306) to proceed with foreclosure against the real property based on Stevenson's failure to make postpetition

⁴ Wells Fargo's service in this capacity is apparently unrelated to the fact that it also happened to be the prior lienholder whose loan was satisfied through the Fremont Refinance.

monthly mortgage payments. The extent of the lien that could be enforced against the property will have an impact on the amount of debt that Stevenson would owe after a foreclosure, and thus the amount of any deficiency claim that could be asserted as an unsecured claim against the estate. Moreover, the defendants have raised challenges to the enforceability of the Fremont Loan. Wells Fargo needed to know the extent of the lien, and the enforceability of the underlying Fremont Loan against the property, before it could proceed with a foreclosure sale. A foreclosure sale could have impacted Stevenson's ability to continue to make plan payments.

III

The parties filed cross-motions for summary judgment in the bankruptcy court, and on January 29, 2008, the bankruptcy court held a hearing to address those motions, and later issued a *Memorandum Decision re Cross-Motions for Summary Judgment* (Dkt. No. 82).

A.

As to Count I of the original complaint, the bankruptcy court ruled that the defendants are entitled to summary judgment and this court adopts the bankruptcy court's *Memorandum Decision re Cross-Motions for Summary Judgment* in that regard as disposing of the identical Count I of the amended complaint.

B.

As to Count Two of the original complaint, the bankruptcy court ruled in its *Memorandum Decision re Cross-Motions for Summary Judgment* that Fremont's successor in interest is entitled to equitable subrogation, unless the court later determined that the Fremont Loan is altogether void based upon allegations that Fremont violated various federal and state lending laws. Again, this court adopts the bankruptcy court's *Memorandum Decision re Cross-Motions for Summary Judgment* as a ruling on the cross-motions for summary judgment with respect to Count II of the amended complaint, with the clarification that the Fremont successor in interest that is entitled to equitable subrogation is HSBC, not Wells Fargo.⁵ There remain various issues:

- The issue of alleged violations of lending laws is addressed in part IV, below.
- The issue of whether the plaintiffs are real parties in interest is addressed in parts V and VI, below.
- The attempt of the defendants to file a "Reply" in support of their authorized supplemental opposition to the plaintiffs' motion for summary judgment on the real

⁵ As noted previously, the original complaint erroneously treated Wells Fargo, the prior lienholder whose loan was satisfied through the Fremont Loan, as Fremont's successor in interest. Instead, Wells Fargo services the Fremont Loan on behalf of HSBC, the current holder of the Fremont Note, and Fremont's successor in interest.

parties in interest question is addressed in part VII, below.

- The defendants' claim that the Fremont Deed of Trust is avoidable is addressed in part VIII, below.
- Finally, the appropriate rate of interest to apply pursuant to equitable subrogation is addressed in part IX, below.

The defendants' memorandum in the bankruptcy court on December 31, 2012 (Dkt. No. 238) after the bankruptcy court asked for briefing on the appropriate rate of interest to apply pursuant to equitable subrogation, went beyond the interest rate question and tried to get in one last lick attacking the bankruptcy court's *Memorandum Decision re Cross-Motions for Summary Judgment* regarding equitable subrogation. The defendants' memorandum cites to an observation in *Bynum v. Equitable Mortg. Grp.*, 2005 WL 818619, at *12 (D.D.C. Apr. 7, 2005), that the doctrine of equitable subrogation:

appears to apply when priority of competing liens is at issue, as opposed to situations where no lien exists. See e.g., *Eastern Sav. Bank, FSB v. Pappas*, 829 A.2d 953 (D.C. App. 2003); *Restatement (Third) of Property*, § 7.6 (equitable subrogation exists to determine priority of liens).

But *Bynum* declined to decide that question (as the Truth in Lending Act governed available remedies). In any event, *Restatement (Third) of Property* § 7.6, the section of the *Restatement* treatise cited by *Bynum*, includes an Illustration No.

24 that is directly on point and supports this court's conclusion that equitable subrogation is appropriate by stating:

24. Blackacre is owned by A and B, subject to a mortgage held by Mortgagee-1. A and B are tenants in common, and under applicable law are equally responsible with respect to one another to pay the debt secured by the mortgage, so that either who pays is entitled to contribution from the other for one-half of the payment. A refuses to pay any part of the debt, and Mortgagee-1 institutes foreclosure proceedings. B, learning of these facts, approaches Mortgagee-2 and obtains a loan the proceeds of which are used to fully discharge Mortgagee-1's mortgage. B gives Mortgagee-2 a mortgage on B's interest in Blackacre, but A refuses to execute a mortgage on A's interest. Mortgagee-2 is subrogated to Mortgagee-1's rights, and may enforce the first mortgage against A's interest in Blackacre.

Accordingly, *Bynum* furnishes no basis to reject the analysis set forth in the bankruptcy court's *Memorandum Decision re Cross-Motions for Summary Judgment* regarding equitable subrogation.

IV

The bankruptcy court later rejected the defendants' contentions that were based on alleged violations of lending laws, and ruled that those contentions gave rise to a core proceeding. To the extent that the bankruptcy court was correct that it had authority to decide the contentions that were based on alleged violations of lending laws, this court affirms the bankruptcy court's order rejecting those contentions. To the extent that the bankruptcy court was in error in treating itself as authorized to adjudicate those contentions, and they were required to be decided de novo by the district court, this court

adopts the bankruptcy court's rulings as to those contentions as its own.

V

The defendants contend that the added plaintiffs in this action, HSBC and Wells Fargo, as well as the original plaintiff, First American, are not the real parties in interest to this dispute.⁶ The plaintiffs filed a motion for summary judgment in the bankruptcy court seeking resolution of this issue (Dkt. No.

⁶ Because this defense as to HSBC and Wells Fargo arises solely out of the first amended complaint, and was not forfeited or otherwise barred in connection with the defendants' failure timely to file an answer to the original complaint, the defendants are permitted to pursue this defense on the merits. The plaintiffs argue that the court's prior order limiting the defenses available to the defendants bars the defendants from raising the real party in interest defense as to First American. Rather than striking it as an unavailable defense, however, the court will address it on the merits. As discussed below, the court finds that First American is a real party in interest to this dispute.

176).⁷ After thorough briefing, and arguments heard at a November 12, 2008 hearing in the bankruptcy court, the real parties in interest dispute was narrowed to a question of whether either Wells Fargo or HSBC can demonstrate an enforceable interest in the Fremont Note. For the reasons that follow, the court concludes that HSBC is the current holder of the note and thus a real party in interest.⁸ Wells Fargo, as the servicer of

⁷ Following a November 12, 2008 hearing, the bankruptcy court issued a scheduling order permitting additional limited discovery and briefing to address the real parties in interest issue (Dkt. No. 217). The defendants had previously sought to strike the affidavit of Amy Viers, and related exhibits, filed by the plaintiffs in support of their summary judgment motion addressing the real parties in interest issue. The defendants complained that the documents offered by the plaintiffs as exhibits to the motion should have been produced through discovery earlier in this proceeding. The bankruptcy court denied the motion to strike on the grounds that any failure to disclose documents on the part of the plaintiff was unintentional and not in bad faith, and the interim order permitting additional discovery on the real parties in interest issue eliminated any hardship to the defendants arising from any delay in the plaintiffs' disclosures (Dkt. No. 219). This court adopts the bankruptcy court's ruling in that regard.

⁸ The party with the right to enforce the note is not only a real party in interest, it is also a necessary party to this proceeding. Otherwise, *res judicata* would not bar the non-party entity who actually possesses enforcement rights from later re-litigating the same issues addressed in this proceeding.

that note, is also a real party in interest.⁹

A. Time for Testing Real Party in Interest Status

In their papers, the defendants repeatedly contend that the issue is whether any of the plaintiffs had an enforceable interest in the note as of the commencement of the adversary proceeding. Federal Rule of Civil Procedure 17(a)(3), however, provides that:

The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

The Rule provides that the action will proceed as if it had been originally commenced by the real party in interest, but it does not limit relation back to situations in which either the original plaintiff or the substituted plaintiff was the real party in interest as of the commencement of the action. For purposes of Rule 17, it is sufficient for the plaintiffs to show that they currently have an interest in the note in order to

⁹ First American as a real party in interest, however, is somewhat different. Unlike Wells Fargo and HSBC, First American does not claim an enforceable interest in the note. It has, however, demonstrated (as discussed in part VI, below) that, regardless of which entity actually has an enforceable interest in the note, First American, as title insurer, will ultimately bear some of the financial consequences if it is determined that equitable subrogation does not apply.

proceed as the named plaintiffs in this proceeding.

There are, however, cases in which it may be necessary to establish that a substituted party was the real party in interest as of the commencement of the case. For example, in the *In re Foreclosure Cases*, 2007 WL 3232430 (N.D. Ohio Oct. 31, 2007), a federal district judge dismissed a group of foreclosure actions that were being prosecuted in federal court based upon diversity jurisdiction. The judge found that the plaintiffs lacked standing because they failed to prove that they were entitled to enforce the relevant promissory notes as of the date of the commencement of the action. The *In re Foreclosure Cases* are distinguishable from the instant case because the plaintiffs here are not relying on diversity jurisdiction to prosecute their claims.

B. The Viers Affidavits

In support of their motion for summary judgment on the real parties in interest issue, the plaintiffs have submitted three affidavits of Amy Viers, a Litigation Representative on behalf of

Wells Fargo as servicer for HSBC.¹⁰ The defendants have opposed the admissibility of those affidavits on the grounds that Viers is not qualified to testify (a) because she has no personal knowledge of any facts concerning the plaintiffs' interest in the Fremont Note, and (b) because one of Viers's answers to the defendants' post-hearing interrogatories contradicts her affidavit testimony. For reasons that follow, the court rejects these arguments and the objection to the admissibility of the Viers affidavits is overruled.

According to her affidavits, Viers's testimony is based upon her review of the records of Wells Fargo as servicer for HSBC, kept in the course of regular business as the records pertain to 3721 Grant Place, N.E., Unit B, Washington, D.C. 20019. The defendants complain that Viers's affidavits are inadmissible because Viers lacks personal knowledge of the facts to which she testifies. Federal Rule of Civil Procedure 56(e) (as in effect in 2008), made applicable to these proceedings by Fed. R. Bankr.

¹⁰ The first affidavit is dated September 26, 2008, and was filed as an exhibit to the *Plaintiffs' Motion for Summary Judgment as to Whether Substituted Parties are Real Parties in Interest* (Dkt. No. 176). The second affidavit is dated September 30, 2008 (Dkt. No. 177), and was filed to supplement the September 26, 2008 affidavit. The third affidavit is dated October 27, 2008, and was filed as an exhibit to the plaintiffs' Opposition (Dkt. No. 182) to the *Defendants' Motion to Dismiss or in the Alternative for Summary Judgment* (Dkt. No. 180). The affidavits are also attached as exhibits M, N, & O to the *Plaintiffs' Response to Defendants' Supplemental Memorandum* (Dkt. No. 225).

P. 7056, provides that “[a] supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. . . .”¹¹ It is, however, “axiomatic that a corporate representative may testify and submit affidavits based on knowledge gained from a review of books and records.” *Philbrick v. eNom, Inc.*, 593 F. Supp.2d 352, 364 (D.N.H. 2009) (quoting *Harrison-Hoge Indus., Inc. v. Panther Martin S.R.L.*, 2008 WL 905892 (E.D.N.Y. March 31, 2008) (rejecting argument that corporate representative’s affidavit in support of summary judgment motion ought to be stricken based upon affiant’s lack of personal knowledge)). Viers makes clear that she is testifying in her capacity as a corporate representative and that her testimony is based upon her review of corporate records. Her affidavits are thus admissible notwithstanding the “personal knowledge” requirement of Rule 56(e). Likewise, Fed. R. Evid. 803(6) provides a business records exception to the hearsay rule, rendering admissible certain business records offered by way of a corporate representative’s affidavit. Thus, it was proper for the plaintiffs to seek admission of various exhibits through the

¹¹ The Rules were amended in 2010, and the requirement that an affidavit be made on personal knowledge, which was previously found in Rule 56(e), was moved to Rule 56(c)(4).

Viers affidavits.¹²

C. Facts Established by the Viers Affidavits

Having concluded that the Viers affidavits are admissible, the court finds, based on those affidavits, that the following facts are not reasonably in dispute. On March 24, 2006, SG Mortgage Securities, LLC, Wells Fargo, and HSBC Bank USA, NA entered into a Pooling and Servicing Agreement (Dkt. No. 176-3). HSBC Bank USA, NA is the Trustee for the SG Mortgage Securities Trust 2006-FRE1 established by SG Mortgage Securities LLC as depositor and Wells Fargo is the custodian, servicer, master servicer, and securities administrator. On August 15, 2006, Mortgage Electronic Registration Systems, Inc., as nominee for

¹² In response to the interrogatories posed to Viers by Smith, Viers acknowledges an inaccuracy in her affidavits (Dkt. No. 224-10). Specifically, Viers states in answer to interrogatory No. 23:

I incorrectly stated that HSBC Bank USA, NA purchased the note from Fremont Investment & Loan as HSBC Bank USA, NA is merely the Trustee for SG Mortgage Securities Trust 2006-FRE1. I have subsequently spoken to our Client Services Department. They have informed me that the Stevenson Note was sold to SG Mortgage Finance Corporation on January 26, 2006. It was subsequently sold on May 11, 2006 to SG Mortgage Securities, LLC. At which time, it was placed into the SG Mortgage Securities Trust 2006-FRE1 to be securitized effective with the June 1, 2006 payment.

This statement is inadmissible hearsay, and cannot be offered to establish the facts asserted therein. Nevertheless, the court will accept Viers's statement for the limited evidentiary purpose of modifying Viers's prior affidavit testimony to reflect that it is not Viers's position that HSBC Bank USA, NA purchased the note.

Fremont, assigned and transferred to HSBC, all its rights, title and interest in the Fremont Deed of Trust executed by Debra Stevenson on December 9, 2005. The Fremont Note executed by Debra Stevenson on December 9, 2005 in the amount of \$135,000.00 was endorsed to HSBC, and that Fremont Note is part of the pool of loans serviced by Wells Fargo through the Pooling and Servicing Agreement dated March 24, 2006. A copy of the endorsed Fremont Note (Dkt. No. 182-3) is attached to Viers's Supplemental Affidavit of October 27, 2008 (Dkt. No. 182-4), and was filed and served on the defendants on October 28, 2008.

D. The Bankruptcy Court's Allowance of Further Discovery and a Supplemental Response to the Plaintiffs' Motion for Summary Judgment on the Real Parties in Interest Issue in Light of the Belated Production of the Fremont Note

The plaintiffs had not produced the original Fremont Note for examination by the defendants prior to disclosing it as part of their filing of October 28, 2008 (Dkt. No. 182-3). At a November 12, 2008 hearing to address the plaintiffs' motion for summary judgment on the real parties in interest issue, the plaintiffs produced what the plaintiffs represented to be the original of the Fremont Note which included, on the back of page

3 of the note, an endorsement of the note to HSBC.¹³ The plaintiffs' attorney expressly noted, in open court and for the record, that he had with him the Fremont Note bearing an original endorsement, and he showed the endorsed Fremont Note to the defendant Smith. At the hearing, Smith objected to the timeliness of the production of the endorsed Fremont Note, but did not challenge the plaintiffs' representation that the document was an original document, nor did he challenge the authenticity of the endorsement appearing on the document.

At the hearing of November 12, 2008, the bankruptcy court overruled the objection that the production of the endorsed Fremont Note was untimely. Bearing in mind the delay in the plaintiffs' production of the original of the endorsed Fremont Note until the November 12 hearing, however, the bankruptcy court agreed to permit the defendants certain limited additional discovery. After a brief discussion on the record as to what

¹³ The plaintiffs represented in Dkt. No. 182 at 4 that "[t]he back of page 3 of the note (copied as page 4) indicates that the Note was endorsed to 'HSBC Bank USA, National Association, as Trustee for SG Mortgage Securities Trust 2006-FRE1.'" At the later hearing of November 12, 2008, and in their supplemental memorandum (Dkt. No. 224) filed later, the defendants have not challenged the representation that the endorsement appears on the back of page 3 of the note. It would not matter whether the endorsement appeared on a separate page. Specifically, the Uniform Commercial Code ("U.C.C.") (codified in D.C. Code §§ 28:1-101, *et seq.*) provides in § 3-204(a) (D.C. Code § 28:3-204(a)) that "[f]or the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument."

form of additional discovery the defendants desired and what would be permitted, it was decided that the defendants would pose written interrogatories, to be answered by Amy Viers, whose affidavits were submitted in support of the plaintiffs' motion. The defendants did not request discovery beyond that.¹⁴

At the November 12, 2008 hearing, the court set a deadline for the defendants to file a supplemental response to the plaintiffs' motion for summary judgment on the real parties in interest issue, and an Order entered on December 1, 2008 (Dkt. No. 217) memorialized that deadline. The defendants filed a supplemental memorandum on December 29, 2008, but failed to file any affidavits in opposition to the plaintiffs' motion for summary judgment.

¹⁴ At the hearing of November 12, 2008, the defendant Smith expressly declined to take the deposition of Amy Viers, deeming it cost prohibitive. In their supplemental memorandum, the defendants complain that Amy Viers does not have personal knowledge regarding the endorsed Fremont Note. The extent of Amy Viers's direct personal knowledge regarding the endorsed Fremont Note is entirely consistent with her previously disclosed position as a litigation representative assigned to review and report on the records maintained by a corporate entity not capable of testifying on its own behalf. If the defendants sought discovery beyond interrogatories posed to Amy Viers, they had an opportunity to request such additional discovery at the November 12, 2008 hearing. The court thus does not consider it appropriate to allow the defendants additional discovery based upon Viers's lack of personal knowledge regarding the endorsed Fremont Note.

E. The Defendants' Supplemental Memorandum Failed to Establish a Genuine Dispute of Material Fact Regarding the Authenticity of the Endorsed Fremont Note

In their supplemental memorandum filed on December 29, 2008, the defendants for the first time contended that:

[The] Plaintiffs have not produced the original Fremont Note purportedly endorsed by [Fremont]. On November 12, 2008, Plaintiffs' counsel represented to Smith and the Court that a copy of the Fremont Note to Court which had purportedly been endorsed by [a Fremont] representative to HSBC was the original. The version that Plaintiffs' counsel presented to Smith and the Court was, however, a copy and not an original of the Fremont Note as evidenced by the photocopied signature of the [Fremont] representative.

Def's Supp. Mem. at 4, ¶ 13 (Dkt. No. 224). The memorandum further states that "the note that Plaintiffs have produced is not an original and bears no date or certification to determine when it was endorsed." Def's Supp. Mem. at 6. In contravention of Fed. R. Civ. P. 56(e)(2) (as in effect in 2008), the defendants neglected to include an affidavit with their memorandum in support of their contention that the endorsed note produced at the November 12 hearing was not an original. See *Johnson v. McNeil*, 278 Fed. Appx. 866, 870-71 (11th Cir. 2008) (failure to include affidavit severely undermined claim and violated Fed. R. Civ. P. 56(e)(2) "which requires a party to respond with affidavits of its own when a properly made motion for summary judgment includes affidavits.").

To the extent that the defendants' argument was that summary

judgment is inappropriate because the plaintiffs have never complied with their obligation in discovery to produce the original note, that argument must be rejected. At the hearing of November 12, 2008, the defendants were allowed to examine the endorsed Fremont Note (a photocopy of which had been appended to the plaintiffs' October 28, 2008 filing as Dkt. No. 182-3), and they did not contend that what the plaintiffs produced was not the original Fremont Note such that the plaintiffs had still failed to comply with their obligation to produce the original Fremont Note. It is too late for the defendants to contend that the plaintiffs failed to produce the original Fremont Note. Moreover, the defendants' argument fails under Fed. R. Civ. P. 56 because their supplemental memorandum failed to point to any evidence supporting their contention that what the plaintiffs produced for examination at the hearing of November 12, 2008, was not the original Fremont Note.

To the extent that the defendants' argument was that the plaintiffs were required to submit the original endorsed Fremont Note, instead of a photocopy,¹⁵ in support of their motion for summary judgment, that argument also fails. Fed. R. Evid. 1003 (as in effect in 2008) provides that "[a] 'duplicate' is

¹⁵ On October 28, 2008, the plaintiffs had submitted in support of their motion for summary judgment a *Supplemental Affidavit of Amy Viers* (Dkt. No. 182-4) that attached a copy of the endorsed Fremont Note (Dkt. No. 182-3).

admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."¹⁶ Under Fed. R. Civ. P. 56, the defendants were required to submit an affidavit or point to other evidence in the record supporting their argument under Rule 1003, but failed to do so. Accordingly, the defendants' supplemental memorandum raised no genuine question as to the authenticity of the original endorsed Fremont Note, and did not otherwise show any reason why it would be unfair for the court to admit the duplicate in lieu of the original. The defendants were allowed to take further discovery in light of the belated production of the endorsed Fremont Note at the hearing of November 12, 2008, and the supplemental memorandum pointed to no evidence that would warrant treating the photocopy as inadmissible.

F. The Defendants' Attempt, via Their *Motion for Leave to File a Reply Brief to the Plaintiffs' Response to the Defendants' Supplemental Memorandum*, to Submit Smith's Untimely Supplemental Declaration Must be Rejected

The plaintiffs' response of December 31, 2008, to the defendants' supplemental memorandum argued that the defendants had failed to present or point to any evidence to support their contention that the Fremont Note produced at the November 12,

¹⁶ Rule 1003 was amended in 2011 to make certain non-substantive stylistic changes.

2008 hearing was not an original document. On January 3, 2009, the defendants filed *Defendants' Motion for Leave to File Reply to Plaintiffs' Response to Defendants' Supplemental Memorandum*, attaching the reply they sought to file (Dkt. No. 226). The *Reply* attached a supplemental declaration of Smith in support of the assertion that the Fremont Note that was produced on November 12, 2008, was not the original Fremont Note. The *Motion* alleged:

1. The Plaintiffs, through the recent testimony of Amy Viers and other exhibits belatedly filed, have introduced new evidence which the Defendants have not had the opportunity to previously address. In particular, one piece of new evidence suggests that Fremont sold Stevenson's mortgage loan on January 26, 2006 prior to perfecting its mortgage on Subject Property.

2. The Defendants should be allowed to file a reply to Plaintiffs' response as would be the normal procedures for motions.

The *Motion* alleges no basis for establishing that, based on excusable neglect, the defendants should be allowed to submit Smith's supplemental declaration out of time. Moreover, the court's order allowing the filing only of the defendants' supplemental opposition and the plaintiffs' reply thereto was entirely consistent with "normal procedures" as evidenced by LBR 9013-1 (providing for only an objection to a motion and a reply to the objection). Accordingly, the court denies the request to consider Smith's untimely supplemental declaration.

The court is mindful of precedent in this circuit requiring courts to give special consideration to a party's status as a pro se litigant. *See e.g., Malik v. District of Columbia*, 574 F.3d

781 (D.C. Cir. 2009) (holding that the district court was required, under the circumstances, to give the pro se plaintiff an 'explanation of the risks attending failure to respond' to the defendants' motion for summary judgment). Indeed, the bankruptcy court on numerous occasions permitted the defendants to file documents out of time and to correct otherwise fatal procedural defects in their filings based upon the defendants' status as pro se litigants. It is one thing to give additional leeway to a pro se litigant not trained in the law,¹⁷ it is, however, entirely another to give a pro se litigant license to repeatedly disregard the Federal Rules of Civil Procedure notwithstanding that

¹⁷ Stevenson is not an attorney, but the claim for equitable subrogation has been asserted by the plaintiffs in order to reach Smith's interest in the property; the Fremont Loan was already enforceable against Stevenson's interest in the property. In any event, Smith, an attorney, is Stevenson's son and has been obviously acting on her behalf.

litigant's training as a licensed attorney.¹⁸ The defendants having failed to include an affidavit in support of their allegation that the plaintiffs failed to produce the original of the Fremont Note, the court rejects the unsupported contention that the endorsement is not an original.

G. Even if the Court Were to Allow the Filing of Smith's Untimely Supplemental Declaration, That Document Does Not Defeat the Plaintiffs' Motion for Summary Judgment

Even if the court were to take into account Smith's supplemental declaration submitted as part of the defendants' reply brief (Dkt. No. 226), that declaration fails to raise a genuine issue of material fact as to the authenticity of the Fremont Note (filed as Dkt. No. 182-3), including the signatures

¹⁸ Smith is a licensed attorney, a fact supported by his deposition testimony. See Exh. 3 to *Opp. to Defs' Motion to File Motion Beyond Scheduling Order Deadline* (Dkt. No. 45) (Smith testified that he is an attorney with the U.S. Commodity Futures Trading Commission). It is inappropriate to disregard Smith's training as an attorney and treat him as an unsophisticated pro se litigant. Smith has repeatedly complicated this litigation by failing to comply with the Federal Rules of Civil Procedure and the Local Bankruptcy Rules applicable in the bankruptcy court. Perhaps the most extraordinary example of Smith's failure to comply with the Rules was his failure to file an answer to the complaint until June 30, 2008 (Dkt. No. 142), more than one year after the filing of the complaint. At this advanced stage of the litigation, the court finds it appropriate to require Smith, like his adversary, to comply with the rules of procedure, including the requirement timely to file an affidavit in support of evidence offered in opposition to a motion for summary judgment. Accordingly, the court will deny the defendants' motion for leave to file a reply to the extent it was intended as a vehicle for introducing an untimely affidavit in support of the defendants' supplemental memorandum.

on the note.¹⁹

A promissory note, including its endorsements, is self-authenticating. Fed. R. Evid. 902(9) (stating that extrinsic evidence is not required to demonstrate the authenticity of “[c]ommercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law”).²⁰ See *United States v. Carriger*, 592 F.2d 312, 316 (6th Cir. 1979) (promissory notes were self-authenticating, and “no testimony was

¹⁹ As a practical matter, moreover, the court observes that the defendants’ suggestion that the endorsement is not authentic, but rather a forgery or an altered document, paints a bizarre and unlikely picture of a conspiracy on the part of HSBC, Wells Fargo, and First American, to defraud some unidentified entity of its right to enforce the Fremont Note, while at the same time having to engage in time and resource-consuming litigation to judicially cure a defect as to this lien that, according to the defendants, is not enforceable by any of the plaintiffs. That is not to say that senseless fraud never occurs, but it is not the norm. It is noteworthy that through the debtor’s confirmed plan in the bankruptcy case, the debtor made payments on the Fremont Note to an agent for Wells Fargo without objecting in the main case that Wells Fargo (who acts as HSBC’s servicer) was not entitled to receive the payments.

That said, the practice of mortgage securitization has created what can best be described as a shell game as to the plaintiffs’ respective interests in the Fremont Note. It has invited confusion into this litigation and has made it more difficult for the court to sort through the issues in this proceeding. Even the plaintiffs had difficulty producing documentation to support their asserted rights in the Fremont Note, a circumstance that can likely be explained by the pooling of the Fremont Note with other like instruments. The fact that the plaintiffs experienced such difficulty, however, does not render their ultimate production of the Fremont Note bearing an endorsement to HSBC a fraud.

²⁰ This Rule was amended in 2011 to make certain non-substantive stylistic changes.

required to establish the genuineness of the signatures on the notes"). The production of the Fremont Note shifted the burden to the defendants to present evidence disputing the presumptive authenticity of the endorsed note. *Id.* at 316-17.

As explained below, Smith's supplemental declaration does not constitute such evidence. Accordingly, there is no reasonable basis upon which a finder of fact could find the endorsed Fremont Note not to be genuine. Smith's declaration states:

The note [shown to Smith by Plaintiffs' counsel at the November 12, 2008 hearing] did not appear to contain the original signature of the Fremont representative, Michael Koch but rather appeared to be a photo copy of his signature, while parts of the endorsement to HSBC was in original blue ink.

So Smith's declaration asserts that two different types of ink appear on the endorsement and that Koch's signature appears to Smith to be a photocopy. Neither assertion is adequate to create a genuine issue of material fact.

1. The Different Colors of Ink Are Immaterial

That part of the endorsement page appears in black and part in blue ink is immaterial. The endorsement page of the Fremont Note (Dkt. No. 182-3) offered by the plaintiffs in seeking summary judgment included the following part:

Pay to the order of *
without recourse.
[The purported signature of Michael Koch]
Fremont Investment & Loan
Michael Koch
Vice President

All of the bolded parts, and the signature line, appear to have been placed on the page using a rubber stamp; the asterisk and the signature appear to be in ink. A second part of the endorsement page is the following:

***HSBC Bank USA, National Association, as Trustee** for SG Mortgage
Securities Trust
2006-FRE1

The bolded part ("**HSBC Bank USA, National Association, as Trustee**") appears to have been affixed using a rubber stamp. The asterisk and the words "for SG Mortgage Securities Trust 2006-FRE1" appear to have been added in hand by ink. It appears that what may have occurred is that Koch caused his signature (appearing in black) to be affixed to the signature line, and then, either simultaneously or later, someone added the asterisk to "**Pay to the order of * without recourse**" and added the second part to indicate that the Fremont Note was now payable to HSBC using (according to Smith) ink of a different color to add the asterisk in front of "**HSBC Bank USA, National Association, as Trustee**" and to add the words "for SG Mortgage Securities Trust 2006-FRE1."

If someone other than Koch completed the endorsement of the Fremont Note after Koch's signature was affixed, that would be

neither improper nor unusual. This follows because U.C.C. § 3-205 provides that an endorsement may be made in blank, which endorsement consists only of a signature, but such blank endorsement can be converted "into a special indorsement by writing, above the signature of the indorser, words identifying the person to whom the instrument is made payable." U.C.C. § 3-205(c). When a promissory note is "specially indorsed, [the] instrument becomes payable to the identified person and may be negotiated only by the indorsement of that person." U.C.C. § 3-205(a). Viers explains in her interrogatory responses that "[i]t is customary at the time of loan acquisitions for the promissory notes to [b]e endorsed in blank. The notes are then subsequently endorsed as needed." Viers Answer to Interrog. 37 (Dkt. No. 224-10).

For all of the foregoing reasons, the different colors on the endorsement create no genuine issue of material fact.

2. Smith's Conclusory Assertion That Koch's Signature Appears to be a Photocopy is Neither Competent Evidence Nor Material

Smith's conclusory assertion that Koch's signature appears to Smith to be a photocopy is similarly not a basis for treating the presumed authenticity of Koch's signature on the Fremont Note (Dkt. No. 183-2) to be in genuine dispute. *See Orix Fin. Servs., Inc. v. Thunder Ridge Energy, Inc.*, 2006 WL 587483, at *2 n.2 (S.D.N.Y. March 8, 2006) (conclusory affidavit stating that

affiant did not sign guaranty bearing her name held insufficient as a matter of law to rebut presumption that notarized signature was authentic).²¹

Even if Koch's signature had been shown by competent evidence to be a photocopy, that would not matter because the defendants have not offered any evidence to support a finding that Fremont's representative did not intend for the affixed signature to constitute a valid signature. Thus, Smith's assertion that one of the signatures of the endorsement appears to be a photocopy fails to create a triable issue of fact as to the authenticity of the endorsement.

There is no requirement that an original signature be affixed to a document by pen. See *McGrady v. Munsey Trust Co.*, 32 A.2d 106, 107 (D.C. 1943) ("In the absence of statutory direction as to the method of signing, we perceive no substantial difference between affixing one's name with a stamp or with a pen, when the intention is that such name constitute one's authentic signature."); *Weiner v. Mullaney*, 140 P.2d 704, 712 (Cal. Dist. Ct. App. 1943) ("An instrument is deemed signed

²¹ Beyond there being no competent evidence showing that Koch's signature is a photocopy, it is difficult to believe that Koch's signature on the backside of page 3 of the Fremont Note would have been placed there via putting page 3 of the original Fremont Note in the paper basket of a photocopier, then running the page through the photocopier to affix a photocopy of Koch's signature to the backside of page 3, and somehow causing that photocopied signature to line up with the signature line of the rubber stamp portion of the endorsement. The defendants' speculations have an air of unreality.

although the signature is typed, lithographed, rubber-stamped or **printed.**") (emphasis added); *Blackburn v. City of Paducah*, 441 S.W.2d 395 (Ky. 1969) ("In legal contemplation the signing of an instrument means attaching a name or causing it to be attached by any of the known methods of impressing the name on paper with the intention of signing it. A rubber stamp impression may constitute a signature.") (internal citations omitted); *Katz v. Teicher*, 107 S.E.2d 250, 251 (Ga. Ct. App. 1959) (under Georgia law, a negotiable instrument must be signed by the maker or drawer, and to be valid, that "signature may be in one's handwriting, or printed, engraved, lithographed or **photographed** . . .") (emphasis added). Fremont's representative could have, for example, affixed his signature to the document using a signature stamp, which Smith might describe as a photocopy. Even if Koch had used a photocopy of an endorsement signed by him in blank to affix to the Fremont Note, that would be the equivalent of using a rubber stamp to affix his endorsement and would be an effective signature. The critical factor in an endorsement's effectiveness is intent, and the defendants have not challenged the intent of Michael Koch to endorse the Fremont Note. No effort was made to take Koch's deposition.

Smith is asking me to evaluate the character of a signature based upon a self-serving allegation that lacks both evidentiary support and specificity. Smith raised no objection when he

examined the Fremont Note at the hearing before the bankruptcy court that the note and its endorsement were not originals. Just because Smith has now come back and asserted that the signature is a photocopy does not persuade the court. All the court has before it is Smith's unsubstantiated eleventh hour claim that the signature appears to be a photocopy. If Koch affixed his signature to the page, whether by pen to paper or by using a signature stamp, or if he authorized the affixing of his signature to the page by use of a photocopy, and it was his intent to thus endorse the Fremont Note, the signature constitutes an effective signature. In short, Smith's perception of the signature does nothing to inform the question of whether Mr. Koch affixed his signature or intended to affix his signature to the Fremont Note.

VI

Having concluded that HSBC and Wells Fargo are real parties in interest, the issue remains whether First American is a real party in interest. It is, for the following reasons.

First American has established that it is, and continues to be, the title insurer in connection with the issuance of the

Fremont Note.²² Although First American does not claim a right to enforce the Fremont Note, it is nevertheless a real party in interest entitled to participate in this litigation. This is not an action to foreclose upon the mortgage; rather, it is an action to subrogate the holder of the Fremont Note to the rights of the lienholder whose note and deed of trust were discharged and released incident to the Fremont Loan. Liability stemming from a defect in the lien arising incident to the Fremont Loan exposed the title insurer to liability, and the title insurer has a direct stake in the outcome of litigation seeking to cure that defect. It does not matter that First American is not the holder of the Fremont Note and not entitled to enforce the Fremont Note. The nature of the relief requested expands the universe of potential real parties in interest beyond those that are entitled to enforce the Fremont Note to include those parties that will be

²² The defendants contend that First American did not issue title insurance to Fremont until January 31, 2006, after Fremont transferred its interest in the subject property. Thus, according to the defendants, the insurance policy was a nullity. The date of policy issuance does not determine whether First American is liable as title insurer in connection with the Fremont Loan. In contrast, the evidence supports First American's assertion that it is bound as the title insurer in this transaction. For example, line 1108 of the settlement statement attached to the complaint reflects that First American Title Insurance Company issued title insurance in connection with the Fremont Loan, and Exhibit K to First American's motion for summary judgment (Dkt. No. 36-13) includes a check issued by PSS Title to First American Title Insurance Company, as title underwriter to the Fremont Loan, on December 14, 2005. The defendants have not offered evidence that creates a genuine issue of disputed fact as to First American Title's status as the title insurer relative to the Fremont Loan transaction.

subject to increased liability arising from the defect in the lien. The court finds that the holder of the Fremont Note is a necessary party to this action insofar as there is a need for the outcome of this adjudication to be binding on the holder of the Fremont Note, but that does not render the title insurer, who will be financially impacted by any uncured defect in the lien, without standing.

VII

The court will deny the *Motion for Leave to File a Reply Brief to the Plaintiffs' Response to the Defendants' Supplemental Memorandum*. As noted in part V(F), above, the defendants have not alleged any grounds establishing excusable neglect warranting permitting them to further supplement their opposition to the plaintiffs' motion for summary judgment.

In any event, the *Reply* they seek to file raises no meritorious defense to the motion for summary judgment. Part V(F), above, addressed why the *Reply* and Smith's supplemental declaration appended thereto failed to present a meritorious defense to the real parties in interest issue. The remaining contentions the *Reply* raised are similarly unavailing.

- A. The *Reply's* invocation of Rule 56(f) is ineffective to justify not granting summary judgment to the plaintiffs.

The *Reply* noted that Smith's supplemental declaration "is being submitted pursuant to Federal Rules of Civil Procedure,

Rule 56(f)." *Reply* at 4 n.2 (Dkt. No. 226-2). Rule 56(f) (the version then in effect) provided:

When Affidavits are Unavailable. If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) deny the motion;
- (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or
- (3) issue any other just order.

Rule 56(f) is not a valid basis upon which to deny or delay acting on the plaintiffs' motion for summary judgment. The defendants have not shown any reason why they could not have filed a Rule 56(f) affidavit when they filed their supplemental memorandum. Moreover, Smith's supplemental declaration does not allege that the defendants cannot present facts essential to justify their opposition. Instead, it sets forth his belief that the signature endorsing the Fremont Note to HSBC *appears* to him to be a photocopy. In any event, the defendants have not provided any justification for allowing further discovery when the court already allowed further discovery at the hearing of November 12, 2008, and the defendants agreed to limit that to propounding interrogatories to be answered by Amy Viers.

- B. The *Reply* adds nothing to the avoidability argument raised by the defendants' supplemental memorandum, and that argument is frivolous and immaterial.

In their *Reply*, the defendants contend that "new evidence" raises the question of whether the Fremont Deed of Trust may be

avoided by the trustee's strong-arm powers under 11 U.S.C. § 544(a)(3), but the avoidability argument was already raised in the defendants' supplemental memorandum. As discussed below, that argument is frivolous and immaterial.

VIII

In support of their argument that the Fremont Deed of Trust is avoidable, the defendants assert that the Fremont Deed of Trust was not perfected by Fremont until January 31, 2006, several days after Fremont sold its interest on January 26, 2006. The argument is immaterial because equitable subrogation would apply even if there had been no executed deed of trust. Moreover, the argument attempts belatedly to inject a new claim into the proceeding without a showing of good cause to permit the defendants to do so.

In any event, the argument is frivolous. The argument is that Fremont was too late recording its interest, that the chapter 13 trustee, in the exercise of her avoidance powers, would not be deemed on notice of the Fremont Deed of Trust and "any other documents stemming from this improperly recorded mortgage" From this the defendants further conclude that any interest the plaintiffs are found to have in the Fremont Note ought to be declared unsecured.

The debtor and her co-defendant, Smith, lack the authority to exercise the chapter 13 trustee's avoidance powers under 11

U.S.C. § 544. See *In re Dawson*, 411 B.R. 1, 25 (Bankr. D.D.C. 2008) (citing cases). Thus, even if the Fremont Deed of Trust at issue in this adversary proceeding were avoidable under § 544, the fact remains that the trustee did not bring an avoidance action and the Fremont Deed of Trust remains undisturbed.

Moreover, even if the defendants were entitled to exercise the chapter 13 trustee's avoidance powers under § 544, their argument in favor of avoidance lacks merit and is misplaced. The defendants complain that the original Fremont Deed of Trust was not perfected until January 26, 2006, several days after Fremont sold its interest in the Fremont Note. Section 544, however, addresses liens that remain unperfected as of the petition date, and as the defendants acknowledge, Fremont's perfection of its lien occurred more than seven months prior to the filing of the bankruptcy case. There is no contention that any lien asserted in this adversary proceeding remained unperfected as of the petition date, and as such, § 544 is inapplicable.

The defendants appear to further argue, however, that Fremont's untimely perfection of its deed of trust created an incurable defect in the security interest granted by the deed of trust. As such, all future holders of the Fremont Note were nothing more than unsecured creditors without an enforceable security interest in the Stevenson property. This argument misconstrues the significance of perfection. Perfection is a

device used to put other creditors and transferees on notice of the lien holder's security interest. Thus, had a creditor obtained a security interest in Stevenson's property after Fremont, but perfected that interest before Fremont perfected its lien, the intervening creditor would have a valid argument that it possessed a lien in the property superior in priority to Fremont's lien. Although a delay in perfecting a lien can alter the relative priority of various creditors' liens, a delay in perfecting the lien does not render the lien void, and Fremont's Deed of Trust remained valid and enforceable as against Stevenson notwithstanding any alleged delay in perfecting the lien. Likewise, if a subsequent transferee of the Fremont Note properly recorded the Fremont Deed of Trust, the validity of that lien cannot be collaterally attacked by Stevenson on the basis that a prior holder of the Fremont Note failed to record the deed of trust. Accordingly, the court rejects the defendants' argument that the Fremont Deed of Trust ought to be avoided under § 544, and likewise rejects the request to treat any interest asserted by the plaintiffs to be unsecured.

IX

For all of these reasons, the court finds that the plaintiffs are the real parties in interest to this dispute, and that the plaintiffs are entitled to summary judgment in their favor on the claim for equitable subrogation with respect to the \$118,334.02 in secured obligations satisfied by the Fremont Loan.

