

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT OF APPEALS

STATE OF NEW YORK

-----

JPMORGAN CHASE BANK, NATIONAL  
ASSOCIATION,

Respondent,

-against-

NO. 85

ROSS R. CALIGURI, ET AL.,

Appellant.

-----

20 Eagle Street  
Albany, New York  
November 17, 2020

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

JEFFREY HERZBERG, ESQ.  
JEFFREY HERZBERG, P.C.  
Attorney for Appellant  
300 Rabro Drive  
Suite 114  
Hauppauge, NY 11788

ALAN E. SCHOENFELD, ESQ.  
WILMER CUTLER PICKERING HALE AND DORR LLP  
Attorney for Respondent  
7 World Trade Center  
250 Greenwich Street  
New York, NY 10007

Penina Wolicki  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first appeal on this  
2 afternoon's calendar is appeal number 85, JPMorgan Chase,  
3 National Association v. Caliguri.

4 Counsel?

5 MR. HERZBERG: May it please the court, my name  
6 is Jeffrey Herzberg, appearing on behalf of the appellant,  
7 Ross Caliguri.

8 JUDGE RIVERA: Sir, what information would - - -  
9 I'm sorry - - -

10 CHIEF JUDGE DIFIORE: Excuse me, Judge Rivera.  
11 One second.

12 Sir, would you like for me to reserve some  
13 rebuttal time for you?

14 MR. HERZBERG: Yes.

15 CHIEF JUDGE DIFIORE: How much would you like?

16 MR. HERZBERG: Three minutes.

17 CHIEF JUDGE DIFIORE: Three? Fine.

18 All right, Judge.

19 JUDGE RIVERA: Thank you. Sir, what - - - what  
20 information would be revealed by getting access to this  
21 original note?

22 MR. HERZBERG: Whether or not it was authentic in  
23 the chain of the original note.

24 JUDGE RIVERA: Um-hum. Something you say could  
25 not be discerned from the copy of the note; is that your



1 point?

2 MR. HERZBERG: Absolutely not.

3 JUDGE RIVERA: Um-hum.

4 MR. HERZBERG: To make sure that a note is  
5 original - - - original signatures. The forensic document  
6 specialist Jeffrey Luber needs to examine the original  
7 note.

8 JUDGE STEIN: Counsel, could you just clarify one  
9 thing along those lines? Are you only arguing the  
10 authenticity, or are you also disputing standing?

11 MR. HERZBERG: Both.

12 JUDGE STEIN: Both. Okay.

13 MR. HERZBERG: Okay.

14 JUDGE STEIN: Thank you.

15 JUDGE FAHEY: So - - - so I'm clear on the  
16 record, sir - - - up here. So I'm clear on the record, has  
17 the original note ever been produced?

18 MR. HERZBERG: Absolutely not.

19 JUDGE FAHEY: I see. So - - - so and - - - so  
20 you only got an affidavit and a copy of the note?

21 MR. HERZBERG: A copy and affidavit. And the  
22 affidavit says according to the custodian of records, but  
23 it's not from the actual custodian. And they - -- there  
24 was never a document forensic specialist affidavit that it  
25 was a genuine copy.



1 JUDGE FAHEY: Um-hum. I see.

2 JUDGE GARCIA: But your - - - your position - - -  
3 I'm sorry. Up here. Your position - - - you've never  
4 filed an affidavit on any of this, right? I mean, it seems  
5 to be your position is, I get the original note because I  
6 want to see it and I want to see that it's authentic. But  
7 there's no affirmation in opposition to this at all, is  
8 there?

9 MR. HERZBERG: As far - - -

10 JUDGE GARCIA: Any facts? You've not put any  
11 facts in dispute?

12 MR. HERZBERG: It's important to realize that  
13 there was an original case that - - - on the same - - -

14 JUDGE GARCIA: No, no, I understand that - - -  
15 that point. But in this case, you've not put in any  
16 affirmation in opposition saying that doesn't look like my  
17 signature, that - - -

18 MR. HERZBERG: No. No.

19 JUDGE GARCIA: All right.

20 JUDGE STEIN: And - - - and doesn't the UCC  
21 presume authenticity unless you do that, unless you - - -

22 MR. HERZBERG: No, it does - - -

23 JUDGE STEIN: - - - specifically put it into  
24 issue?

25 MR. HERZBERG: We put - - - put it in issue in



1 the case - - - the first case and also the second case.

2 JUDGE STEIN: But, no - - -

3 JUDGE FEINMAN: Right, but we're not here about  
4 that. We're here about this case.

5 MR. HERZBERG: But the - - - but the first case -  
6 - - Judge Baisley specifically said that note had to be  
7 produced in discovery. At no time did they ever produce  
8 it.

9 JUDGE FEINMAN: Yeah, but this is a new case,  
10 this is a new index number, years later.

11 MR. HERZBERG: But - - -

12 JUDGE FEINMAN: This is not law of the case.  
13 This is not that situation. And as I understand it, to the  
14 extent that you asked to have the case transferred back to  
15 Judge Baisley, that was denied and affirmed, because under  
16 the so-called "related case" rule, at least how it used to  
17 operate in New York County - - - I don't know about Suffolk  
18 County - - - but once a case is gone and dismissed, any new  
19 case is no longer considered a related case.

20 MR. HERZBERG: Except that - - -

21 JUDGE FEINMAN: To me, that's just a request for  
22 forum shopping.

23 MR. HERZBERG: Absolutely not. The first case  
24 was dismissed on a motion for summary judgment, motion to  
25 compel.



1           If you read the case of Collins v. Bertrand Yacht  
2 Corp., it says the grant of summary judgment, the  
3 procedural equivalent of a trial, results in a final  
4 judgment on the merits which bars another action between  
5 the same parties upon the same causes of action.

6           In fact, Judge Rivera, in her affirmance, or  
7 concurrence, I should say, on the Paramount Pictures Corp.  
8 v. Allianz Risk Transfer AG, specifically said, "It is  
9 blackletter law that a valid final judgment bars future  
10 actions between the same parties on the same causes of" - -  
11 -

12           JUDGE RIVERA: Can I - - - can I just clarify  
13 again. It'll circle back to something I asked at the  
14 beginning. So your position is that they may have a  
15 document that is a note, because they showed a copy of  
16 note, but that it may not be valid.

17           MR. HERZBERG: That is right.

18           JUDGE RIVERA: Is that the argument? Okay.

19           MR. HERZBERG: That's what - - -

20           JUDGE RIVERA: So how is that going - - - how is  
21 that going to standing?

22           MR. HERZBERG: The first case was dismissed - - -

23           JUDGE RIVERA: No, no, no. This case. How is  
24 that going to standing?

25           MR. HERZBERG: If they can't produce the original



1 note under the UCC specifically - - -

2 JUDGE RIVERA: No, but why - - - why isn't that  
3 just - - - if you went to trial - - - a question that you  
4 are trying to resolve at trial, if you went to trial? I'm  
5 not - - - I'm not really clear how that's about standing.

6 MR. HERZBERG: Because to get standing you have  
7 to - - - under Aurora Loan Services v. Taylor, a case I'm  
8 very familiar with - - -

9 JUDGE RIVERA: Yes.

10 MR. HERZBERG: - - - you must produce the - - -  
11 you must have the original note.

12 JUDGE RIVERA: Okay.

13 MR. HERZBERG: If they don't have the original  
14 note - - -

15 JUDGE RIVERA: Right, but - - -

16 MR. HERZBERG: - - - they can't get - - -

17 JUDGE RIVERA: - - - and they put in evidence to  
18 show that they're in possession of the original note at the  
19 time that they commenced the action, right?

20 MR. HERZBERG: But then - - -

21 JUDGE RIVERA: And you - - - your - - - your  
22 point, as other members of the bench have already said, is  
23 well, we just want to see the original.

24 MR. HERZBERG: That's right.

25 JUDGE RIVERA: The copy is not good enough, the



1 rest of it isn't good enough.

2 MR. HERZBERG: How do we know - - -

3 JUDGE RIVERA: But again - - -

4 MR. HERZBERG: - - - it's not - - -

5 JUDGE RIVERA: - - - your point - - - as I  
6 understand it, your point is not that they don't have the  
7 original note.

8 MR. HERZBERG: No - - -

9 JUDGE RIVERA: Your point is that whatever  
10 document they have is invalid, because it's forged or  
11 whatever it is you're arguing.

12 MR. HERZBERG: Before the first case was - - -  
13 when the first case was started, I got a call from Margie,  
14 a secretary at Flower, Medalie & Markowitz, who's since  
15 passed away, okay, who specifically told me that the  
16 closing terms on the - - - there was three people in  
17 attendance: Mr. Caliguri, Randy Medalie from Flower  
18 Medalie, who's now institutionalized, and also the title  
19 closer.

20 JUDGE STEIN: Well, but we have - - -

21 MR. HERZBERG: Margie told me - - -

22 JUDGE STEIN: - - - we have no - - - counsel, we  
23 have rules of evidence that allow a foundation to be laid  
24 about business records and so on and so forth. So it - - -  
25 it doesn't require physical - - - the affidavit of someone



1 who is physically present at the closing, does it?

2 MR. HERZBERG: No. I - - - I agree with you.

3 JUDGE STEIN: Okay.

4 MR. HERZBERG: But let me tell you, Margie told  
5 me - - - she called me and told me - - -

6 JUDGE STEIN: Wait, is this - - -

7 JUDGE GARCIA: Is this in the record?

8 JUDGE STEIN: - - - is this in the record.

9 MR. HERZBERG: No.

10 JUDGE STEIN: Okay, well then - - -

11 JUDGE WILSON: So look, if the affidavit in  
12 Aurora was sufficient, why is this not?

13 MR. HERZBERG: Okay, the affidavit - - - in  
14 Aurora this honorable court specifically said that there  
15 was no demand for the production of the original note, but  
16 they inferred that if there was a demand, it had to be  
17 produced. So that was the - - -

18 JUDGE GARCIA: Are you - - - - -

19 MR. HERZBERG: - - - difference - - -

20 JUDGE GARCIA: - - - I'm sorry. Are you arguing  
21 for a per se rule that every time the original note is  
22 demanded in discovery you have to produce it before you can  
23 get summary judgment? Is that the rule you want?

24 MR. HERZBERG: Yes, especially since Judge  
25 Baisley specifically ordered that it be produced, and they



1 never produced it. So I want that issue - - - there's  
2 collateral estoppel - - -

3 JUDGE RIVERA: But - - - but even if there's  
4 nothing that they present that suggests that they don't  
5 have the note? But rather all of their evidence suggests  
6 they actually do have the note, and in this case Mr.  
7 Caliguri doesn't come forward with anything to suggest they  
8 don't have the note. All he's saying is whatever you have  
9 is not valid.

10 MR. HERZBERG: However, how would they get by the  
11 fact that Judge Baisley, in the first case specifically  
12 compelled them to produce the note?

13 JUDGE WILSON: But isn't - - - isn't the reason  
14 that this is a negotiate instrument, so that there is not -  
15 - -

16 MR. HERZBERG: Absolutely.

17 JUDGE WILSON: - - - real - - - so that there's  
18 not really a collateral estoppel effect, because the bearer  
19 of the - - - the owner of the instrument can negotiate it,  
20 right?

21 MR. HERZBERG: Yeah, but it - - -

22 JUDGE WILSON: That is to say - - -

23 MR. HERZBERG: In the - - -

24 JUDGE WILSON: - - - the bank could have sold it  
25 to me, and I'm not going to be collaterally estopped by



1 Judge Bailey - - - Baisley, am I?

2 MR. HERZBERG: Except I disagree with you.

3 JUDGE WILSON: Okay.

4 MR. HERZBERG: The first case was started by  
5 JPMorgan Chase. That's the same plaintiff in the second  
6 case. So why are they not bound by the - - -

7 JUDGE WILSON: So you - - -

8 MR. HERZBERG: - - - res judicata - - -

9 JUDGE WILSON: - - - your view is - - -

10 MR. HERZBERG: - - - on the standing issue?

11 JUDGE WILSON: - - - they could have - - - your  
12 view is that Chase could have sold me the note, and I  
13 wouldn't be barred - - -

14 MR. HERZBERG: That may be different. But the  
15 fact that - - -

16 JUDGE WILSON: Well, that's what I'm asking you -  
17 - -

18 MR. HERZBERG: - - - it was the same plaintiff -  
19 - -

20 JUDGE WILSON: - - - to answer. Is it - - - is  
21 it different, or is it maybe different?

22 MR. HERZBERG: No, I think if it's a different -  
23 - - if it's an assignee of the note, that may be different,  
24 okay. But when it's the same plaintiff in - - -

25 JUDGE STEIN: But what if he - - - what if the -



1 - - that - - - this same plaintiff actually didn't have the  
2 note when the first action was brought but now does have  
3 the note? Why would that same plaintiff be precluded from  
4 commencing the action now that it has the note?

5 MR. HERZBERG: Why? Because the - - - why did  
6 they commence the first action when that was part of the  
7 cause of action? If they didn't have the first - - - the  
8 note at the commencement of the first action, they  
9 shouldn't have commenced this - - - the first action, and -  
10 - -

11 JUDGE RIVERA: Right. Right. And they got  
12 dismissed.

13 MR. HERZBERG: Excuse me?

14 JUDGE RIVERA: They suffered a consequence.

15 MR. HERZBERG: That's right.

16 JUDGE RIVERA: Right. But - - - but to Judge  
17 Stein's point, now they've got the note.

18 MR. HERZBERG: How do we know? We never saw it.

19 JUDGE RIVERA: They - - - they presented a copy,  
20 and they've got other evidence that suggests the chain is  
21 intact.

22 MR. HERZBERG: If you look at the - - -

23 JUDGE RIVERA: And - - - and your client is not  
24 saying anything that puts it in question.

25 MR. HERZBERG: Except that we did at the first -



1 - -

2 JUDGE RIVERA: Other than saying, look, when we  
3 asked for it before, they never gave it to us. But that's  
4 not a reason - - -

5 MR. HERZBERG: We absolutely asked for it - - -

6 JUDGE RIVERA: - - - to put it in question.

7 MR. HERZBERG: - - - in the second case, and they  
8 never produced it. Instead of producing it, they  
9 immediately filed the motion for summary judgment, before  
10 the time limit for the production.

11 JUDGE GARCIA: Well, did you raise a 3212(f)  
12 objection?

13 MR. HERZBERG: Absolutely, Your Honor.  
14 Absolutely.

15 JUDGE GARCIA: Where in the record did you raise  
16 a 3212(f) objection?

17 MR. HERZBERG: In the first motion for summary  
18 judgment.

19 JUDGE GARCIA: You cite - - - you raised that  
20 provision of the CPLR?

21 MR. HERZBERG: Yes, I do.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 MR. HERZBERG: Thank you.

24 CHIEF JUDGE DIFIORE: Let's hear from respondent.

25 MR. SCHOENFELD: Certainly, Your Honor. Alan



1 Schoenfeld for JPMorgan Chase.

2 Judge Wilson, to start with your question, I  
3 think this case is directly controlled by Aurora Loan  
4 Services. There, the "critical issue was whether the  
5 record demonstrated a basis for finding that Aurora had  
6 standing to commence the mortgage foreclosure action."

7 The same question is presented here. And as in  
8 Aurora Loan, the answer is yes. There, as here, the  
9 plaintiff demonstrated its standing by attaching a copy of  
10 the note to the complaint and submitting an affidavit by a  
11 knowledgeable person describing the bank's - - -

12 JUDGE RIVERA: But - - - but he does have a point  
13 when he says the - - - this argument about producing the  
14 original note - - - the court in Aurora didn't say that  
15 that's irrelevant, and it could have done so.

16 MR. SCHOENFELD: Well, so - - -

17 JUDGE RIVERA: By saying you didn't raise it.  
18 You're leaving the possibility and the question open. So  
19 why not put - - - why didn't you produce the note? Is it  
20 over-burdensome? What's - - - what's the story?

21 MR. SCHOENFELD: I do think it's burdensome, and  
22 I think it's an important point to raise.

23 So in a world of negotiable instruments where  
24 possession is the lynchpin of your rights- -

25 JUDGE RIVERA: Um-hum.



1 MR. SCHOENFELD: - - - transporting notes all  
2 across the country from a secure facility in Monroe,  
3 Louisiana, where there's no issue as to the authenticity or  
4 the possession of the loan, is burdensome. It will create  
5 much more litigation - - -

6 JUDGE FEINMAN: So how does - - - how does the  
7 defendant put that authenticity in question without  
8 inspection?

9 MR. SCHOENFELD: So I think - - - I mean, his  
10 position is that it's not his signature on the loan. He's  
11 the one who would know if it's his signature on the loan.

12 In years of litigating this case and litigating  
13 an authenticity defense, he has never once submitted a  
14 verified answer or a sworn declaration saying that is not  
15 my signature on the loan.

16 JUDGE RIVERA: So you're saying his argument is  
17 one that is based solely on his own knowledge, in that  
18 sense?

19 MR. SCHOENFELD: Yeah, absolutely.

20 JUDGE RIVERA: Seeing the original note is not  
21 going to change that?

22 MR. SCHOENFELD: With respect to authenticity,  
23 absolutely. There's a notarized document in the record,  
24 the consolidated note, that says that it was physically  
25 signed and - - - it was signed in the - - - in the presence



1 of a notary.

2 JUDGE RIVERA: But is there any affiant who says  
3 I saw that original note?

4 MR. SCHOENFELD: I'm sorry, say that one more  
5 time?

6 JUDGE RIVERA: Is there any affiant who swears  
7 under oath, I saw the original note?

8 MR. SCHOENFELD: So I - - - I think the - - - the  
9 notary who notarized the CEMA - - -

10 JUDGE RIVERA: Okay.

11 MR. SCHOENFELD: - - - is notarizing a document  
12 that said - - - that waives any objections to the  
13 authenticity of the original note - - -

14 JUDGE RIVERA: Um-hum.

15 MR. SCHOENFELD: - - - and consolidates them  
16 under a consolidated agreement. So Mr. Caliguri, in  
17 executing the notarized CEMA, I think, waived any objection  
18 that the original - - -

19 JUDGE RIVERA: But with respect to the affidavit  
20 in support of summary judgment - - -

21 MR. SCHOENFELD: With respect to the affidavit  
22 that was submitted - - -

23 JUDGE RIVERA: Your employees. Let's put it that  
24 way.

25 MR. SCHOENFELD: Yeah, the affidavit of note



1 possession.

2 So Sherry Stafford submitted an affidavit saying,  
3 in her role as a custodian of the records - - -

4 JUDGE RIVERA: Did she ever see the original  
5 note?

6 MR. SCHOENFELD: She does not testify that she  
7 saw the original note.

8 JUDGE RIVERA: Okay.

9 MR. SCHOENFELD: That's an object - - - that's a  
10 hearsay objection - - -

11 JUDGE RIVERA: Okay.

12 MR. SCHOENFELD: - - - that Mr. Caliguri has  
13 never made.

14 JUDGE RIVERA: All right.

15 MR. SCHOENFELD: If he wanted to contest the  
16 adequacy of the Stafford affidavit of note possession on  
17 that ground, he was certainly free to do so in the trial  
18 court, but he never did.

19 JUDGE WILSON: But before the litigation started  
20 - - - over here. Sorry.

21 MR. SCHOENFELD: Sorry.

22 JUDGE WILSON: Before the litigation - - - before  
23 the litigation started at all, when the - - - when there's  
24 a default, essentially, and Chase sends a notice of  
25 default, wouldn't Mr. Caliguri have had the ability under



1 UCC 3-505(1) (a) to demand production of the original?

2 MR. SCHOENFELD: I don't know the answer to that  
3 question.

4 JUDGE WILSON: Do you know whether he ever tried?

5 MR. SCHOENFELD: I - - - I don't believe, in the  
6 non-litigation posture, he ever demanded production of the  
7 original note.

8 He paid on the consolidated note between 2007 and  
9 2008. He defaulted in September of 2008. And foreclosure  
10 proceedings began, I think, about a year later. I'm not  
11 aware, I can't say one way or the other, whether he ever  
12 demanded production of the note in a non-litigation  
13 posture. And of course, everyone knows about the first  
14 foreclosure proceedings.

15 But in the second foreclosure proceedings, the -  
16 - - the documentary and testimonial evidence before the  
17 court was identical if not superior to what was before the  
18 court in Aurora Loan Services.

19 JUDGE FAHEY: So let me - - - so let me be clear  
20 here. No one's ever come in and said we have the original  
21 note, I've seen it, and here's my affidavit I saw it, so  
22 the copy's valid, right?

23 MR. SCHOENFELD: Correct.

24 JUDGE FAHEY: Okay. So we have a split now  
25 between the Third and the Fourth Department and the First



1 and the Second Department as to what amount of proof would  
2 be required to establish possession of the original note.

3 Where would you fall on either side of that  
4 split?

5 MR. SCHOENFELD: So I think the issue was waived  
6 in this case. I want to answer your question, but the  
7 issue was waived - - -

8 JUDGE FAHEY: That's all right. Go ahead.

9 MR. SCHOENFELD: - - - because that's a hearsay  
10 objection. I - - - I agree that there's a split below in  
11 cases where the issue is properly preserved.

12 It's also not necessarily - - - not necessary to  
13 address the question, in this case, because taking - - -

14 JUDGE FAHEY: So moving that aside, where do you  
15 fall on either side of that - - - you?

16 MR. SCHOENFELD: So I - - - I don't think the  
17 Stafford affidavit testifies to her inspection of the  
18 physical note.

19 JUDGE FAHEY: I understand that. Where do you  
20 fall on either side of the - - - you have different  
21 objections there. Where do you fall on either side of the  
22 split between the Departments? Because it seems that we  
23 have the Third and the Fourth saying the - - - the Third  
24 saying we require an individual swearing that they had  
25 posse - - - they took possession of the original note



1 following review of the admissible bank records and a copy  
2 of the note being attached to the affidavit. That seems to  
3 be what the Third and the Fourth are requiring.

4 The - - - the Second makes reference to it - - -  
5 it may be a better practice, but it only seems to be  
6 requiring a copy of the note itself.

7 Where do you fall on that divide as a policy - -  
8 -

9 MR. SCHOENFELD: So I don't mean to be difficult.  
10 Are you asking what I think the rule should be - - -

11 JUDGE FAHEY: Yes.

12 MR. SCHOENFELD: - - - or - - -

13 JUDGE FAHEY: Yes.

14 MR. SCHOENFELD: So I think - - - I think it is  
15 consistent with this court's summary judgment and  
16 evidentiary rulings that a copy of a note is a rebuttable  
17 piece of evidence about possession of the note.

18 JUDGE FAHEY: So you're saying that you don't  
19 think, as a matter of basic proof, that an affidavit  
20 establishing the chain of custody or the basis for that  
21 copy is required?

22 MR. SCHOENFELD: So I think the affidavit does  
23 establish the chain of custody.

24 JUDGE FAHEY: So - - -

25 MR. SCHOENFELD: It gives the precise - - -



1 JUDGE FAHEY: - - - should it be required or not?

2 MR. SCHOENFELD: What - - - what - - - I  
3 apologize. What's the "it" there? Physical inspection of  
4 the note?

5 JUDGE FAHEY: No, no. Should the affidavit be  
6 required and say: I saw the note, I saw the original,  
7 here's a copy of it?

8 MR. SCHOENFELD: Um - - -

9 JUDGE FAHEY: That seems straightforward.

10 MR. SCHOENFELD: Yeah, I don't think that's  
11 required. I think the Stafford affidavit is - - -

12 JUDGE RIVERA: Well, how is that not required  
13 under 3212(b)?

14 MR. SCHOENFELD: Because I think that - - -

15 JUDGE RIVERA: It says that - - - excuse me - - -  
16 the affidavit shall be by a person having knowledge of the  
17 facts. If you have no knowledge of the facts, if you can't  
18 say the copy is, indeed, an accurate representation of the  
19 original, how can you be a proper affiant?

20 MR. SCHOENFELD: So I think she - - -

21 JUDGE RIVERA: Isn't the question your burden?

22 MR. SCHOENFELD: So I think the Stafford aff - -  
23 - Stafford affidavit does - - - does do exactly that. She  
24 testifies that she is an employee with knowledge of the  
25 ordinary business practice of Chase Custodial Services,



1           that the - - -

2                       JUDGE RIVERA: But if she never saw the original,  
3 how can she say the copy is an accurate representation of  
4 the original?

5                       MR. SCHOENFELD: Because she knows how the - - -  
6 how the business records are maintained.

7                       JUDGE RIVERA: So she can say that's what we  
8 usually do, but she can't say that this document is,  
9 indeed, accurate.

10                      MR. SCHOENFELD: I think that the evidence that  
11 she offered is enough to - - - to demonstrate the ordinary  
12 way in which these documents - - -

13                      JUDGE RIVERA: But do you agree that it's not,  
14 then, a hearsay objection; that it has to be that we would  
15 have to agree that under 3212(b), what you have just  
16 described satisfies the requirement of admissible proof in  
17 terms of an affidavit, of the person having knowledge of  
18 the facts?

19                      MR. SCHOENFELD: So I think she has knowledge of  
20 the facts that she testified to. I think the question of  
21 whether she needed to inspect the physical note or the  
22 business records maintained in the ordinary course that  
23 revealed the presence of the note in the physical custody  
24 of JPMorgan Chase is more than sufficient - - -

25                      JUDGE RIVERA: So yeah, but the problem is she's



1 not saying that this copy is that document that we have  
2 possession of.

3 MR. SCHOENFELD: What she's saying - - -

4 JUDGE RIVERA: I agree with you that she is  
5 saying we have possession of something - - -

6 MR. SCHOENFELD: Well, so - - -

7 JUDGE RIVERA: - - - and this how we maintain  
8 that document.

9 MR. SCHOENFELD: - - - understood. But I do  
10 think there are two distinct issues there. One is  
11 testimony that JPMorgan is the physical custodian of the  
12 note.

13 JUDGE RIVERA: Okay.

14 MR. SCHOENFELD: It's a separate question about  
15 whether the copy of the note is, in fact, a copy of the  
16 original. I think you can separate those two things out.

17 Sherry Stafford's affidavit is an affidavit of  
18 note possession. She is testifying to the circumstances  
19 under which JPMorgan Chase came into possession of the note  
20 for purposes - - -

21 JUDGE RIVERA: So then you think if you hadn't  
22 attached - - - doesn't that then lead to this conclusion,  
23 that even if you didn't attach a copy of the note, it would  
24 have been good enough? Because she has said in her  
25 affidavit, this is the way we do our business, and this



1 shows we have possession of the note. I don't need to show  
2 it to you; I'm telling you we have possession of it.

3 MR. SCHOENFELD: I do. I think either of those  
4 pieces of evidence, probably standing alone, would be  
5 sufficient. Together they are incontrovertible and  
6 certainly haven't been controverted by Mr. Caliguri.

7 JUDGE RIVERA: You mean without the affidavit,  
8 just a copy of the note would be enough?

9 MR. SCHOENFELD: So that's certainly the - - -  
10 the rule in the Second Department, or at least as some  
11 courts have articulated it, is that submitting a copy - - -

12 JUDGE RIVERA: Okay.

13 MR. SCHOENFELD: - - - gives rise to a rebuttal  
14 presumption that you are in possession of the note.

15 But again, the - - - there are two reasons why I  
16 don't think this issue is squarely presented for the court.  
17 The first is, JPMorgan Chase established its right to  
18 foreclose as an assignee of the note from Washington  
19 Mutual, both at the time of the purchase and assumption  
20 agreement, in 2008, and upon the recordation of the  
21 mortgage in 2009.

22 So its physical possession of the note is not  
23 necessary to establish its standing. So I don't think this  
24 issue, which I - - - I grant you, is a complicated one, is  
25 squarely presented in this case, both because the hearsay



1 objections weren't made and because it's not necessary to  
2 the resolution of the case.

3 If the court were to resolve - - -

4 JUDGE RIVERA: But as I was saying before, he may  
5 not - - - he may not need to have objected. You - - -  
6 you've got to satisfy your burden.

7 MR. SCHOENFELD: So - - -

8 JUDGE RIVERA: Remember, he need not do anything  
9 if you don't meet your burden.

10 MR. SCHOENFELD: I - - - I understand that. I  
11 think the - - - the manner in which JPMorgan Chase met its  
12 burden here, however - - -

13 JUDGE RIVERA: Um-hum.

14 MR. SCHOENFELD: - - - was a combination of  
15 attaching a physical copy of the note, which gives rise to  
16 a presumption that you are in possession of it; an  
17 affidavit that attests to the circumstances under which you  
18 came into possession of the note.

19 Again, this is exactly what the court considered  
20 in the record in Aurora Loan Services, only five years ago,  
21 in a - - - in a materially identical case, also brought by  
22 Mr. Caliguri's counsel, that presented the question of  
23 whether that body of evidence - - -

24 JUDGE RIVERA: Yeah.

25 MR. SCHOENFELD: - - - is sufficient to - - -



1 JUDGE RIVERA: And then the proof of default, and  
2 - - - and I assume the last part of your statement - - -  
3 because I know you're going to run out of time in a moment  
4 - - - is that he never rebutted the presumption.

5 MR. SCHOENFELD: He never rebutted - - -

6 JUDGE RIVERA: With respect to the copy.

7 MR. SCHOENFELD: Certainly. He never rebutted  
8 the presumption. And also, with respect to affirmative  
9 defenses about ownership or authenticity - - -

10 JUDGE FAHEY: So if he had rebutted the  
11 presumption, how would you have had to respond?

12 MR. SCHOENFELD: So I - - - I think there are  
13 different ways to rebut the presumption. It depends on  
14 whether he's talking about authenticity - - -

15 JUDGE FAHEY: No, forget about - - - let's just  
16 assume he did. Assume he said, oh, there's a question of  
17 fact here, blah, blah, blah. How would you have had to  
18 respond? What would your burden have been then?

19 MR. SCHOENFELD: So I think it's possible that we  
20 either could have brought in another affidavit that said I  
21 physically inspected the note as for the proof.

22 JUDGE FAHEY: I see.

23 MR. SCHOENFELD: Or we could have produced the  
24 physical note. But again - - -

25 JUDGE FAHEY: Right.



1 MR. SCHOENFELD: - - - that's - - - you know,  
2 litigants - - -

3 JUDGE FAHEY: No, I - - - I'm thinking beyond  
4 your case.

5 MR. SCHOENFELD: Absolutely.

6 JUDGE FAHEY: You understand? Okay.

7 MR. SCHOENFELD: I do understand.

8 JUDGE RIVERA: And - - - and if you didn't, then  
9 you haven't met your burden, and you're going to trial?

10 MR. SCHOENFELD: Say that one more time?

11 JUDGE RIVERA: Or he could - - - if you didn't,  
12 you haven't met your burden, he can try and cross-move for  
13 summary judgment. But let's say he didn't. Then you're  
14 going to trial - - -

15 MR. SCHOENFELD: Exactly.

16 JUDGE RIVERA: - - - and you'll have to decide  
17 what to do with that.

18 MR. SCHOENFELD: Yeah, exactly. I mean, the  
19 ordinary rules of summary judgment apply in mortgage  
20 foreclosure cases. We had a right to move when we did with  
21 the proof that we had, admit our prima facie burden. We  
22 also disproved all of his affirmative defenses.

23 It stayed discovery, including production of the  
24 note. He could have moved under 3212(f). I don't believe  
25 he did. I don't believe he raised it until his reply brief



1 in this case.

2 The court made clear that he didn't object to the  
3 sort of procedural choreography that eventuated in a motion  
4 for summary judgment, the - - - the Supreme Court below.  
5 And so I think all of these issues may present thorny  
6 questions in other cases, but they're not presented here.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 Mr. Herzberg, you have your three minutes of  
9 rebuttal, sir.

10 MR. HERZBERG: Thank you. First of all, counsel  
11 is absolutely incorrect about the effect of WAMU or  
12 Washington Mutual transferring the note to - - - if they  
13 actually transferred it - - - to Chase.

14 Under - - - under 12 U.S.C. 1823, at the U.S.  
15 Supreme Court case called D'Oench Duhme, the only thing  
16 that is knocked out from a defense is any side or secret  
17 agreements. This is not a side or secret agreement. Okay?  
18 This is actual, physical production of a note. That's not  
19 a side or secret agreement.

20 Second of all, he talks about - - -

21 JUDGE RIVERA: Well, what about his argument that  
22 really only your response to this question of the copy  
23 versus the original is that it's forged? But - - - but Mr.  
24 Caliguri has never said I never signed such a thing.

25 MR. HERZBERG: Mr. Caliguri cannot say that



1 that's the note he actually signed.

2 Let me go on.

3 JUDGE RIVERA: Oh, I see.

4 MR. HERZBERG: He talks about this - - - the  
5 Stafford affidavit. Paragraph 4 says according to Chase's  
6 custodial system of records, M Trust, Chase received the  
7 original note on 9/19/2012. 5- Chase remains in possession  
8 - - - maintains possession of the note at its storage  
9 facility located at 780 Delta Drive, Monroe, Louisiana,  
10 71201.

11 Second - - - first of all, they never produced a  
12 business record that showed that Chase still maintains the  
13 business record. Also, they - - - the first action was  
14 started in 2009. What happens if - - - Chase got  
15 possession of the note in 2012, but the first action was  
16 commenced in 2009, what happened to the interlude? Where  
17 was the note?

18 This note, I don't think is the original note  
19 that's - - - and we've been trying to prove it.

20 Second of all, if the note was actually in a  
21 storage facility in Monroe, Louisiana, how difficult - - -  
22 how difficult is it for the production of the original  
23 note? All they had to do was send it to counsel.

24 When Judge Baisley issued the order he  
25 specifically said that the plaintiff's counsel, Chase's



1 counsel, take physical possession of the note and let the  
2 inspection take place.

3 We went there, Mr. Caliguri, myself, and Mr.  
4 Luber. They admitted that they didn't have the original  
5 note. This note that they attach as a copy, magically  
6 appeared? Where was it from 2009 to 2012?

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 MR. HERZBERG: Thank you.

9 (Court is adjourned)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of JPMorgan Chase Bank, National Association v. Ross R. Caliguri, et al., No. 85 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

Signature: \_\_\_\_\_

Agency Name: eScribers  
Address of Agency: 352 Seventh Avenue  
Suite 604  
New York, NY 10001  
Date: November 22, 2020

