McDONALD, J., dissenting. The majority determines that the record was sufficient to establish the standing of the plaintiff, Equity One, Inc., as servicer for Nomura Home Equity Loan, Inc. (Nomura), to bring the present foreclosure action. The record, however, does not actually reveal a single factual finding by the trial court or any evidence that affirmatively establishes the requisite facts necessary to support the plaintiff's standing. Instead, the majority's conclusion rests on inferences from evidence in the record that is legally and factually insufficient from which to infer that the plaintiff established its rights at the dispositive point in time and on unwarranted assumptions that procedures under our rules of practice necessarily must have been followed.

Significantly, the question of whether the plaintiff presented the note during any of the foreclosure proceedings, which in fact the record does not disclose, would not necessarily, in and of itself, resolve the issue of standing in the present case. The specific question before us is whether the plaintiff was the holder of the note *at the time it commenced the action*. See *RMS Residential Properties, LLC* v. *Miller*, 303 Conn. 224, 226, 32 A.3d 307 (2011); *Ulster Savings Bank* v. *28 Brynwood Lane, Ltd.*, 134 Conn. App. 699, 710, 41 A.3d 1077 (2012). As the majority properly explains, under the theory advanced in the present case, the plaintiff would need to prove that it was in possession of the note and had the right to enforce it under its terms.[1] For the reasons set forth subsequently in this opinion, it is clear that the record contains sufficient facts and omissions to give rise to a substantial question whether the plaintiff had standing to initiate this action. The existence of that question, in turn, required the trial court, at the very least, to conduct a further inquiry into this matter and to make specific findings on the record before rendering a judgment of strict foreclosure to the detriment of the self-represented defendant, Thomas J. Shivers.

The record contains the following affirmative evidence, and more importantly, omissions, leading up to the original judgment of foreclosure by sale on September 24, 2007 (original judgment). In its complaint dated June 6, 2007, but filed on June 27, 2007, the plaintiff alleged that the defendant had executed a note payable to the order of ResMAE Mortgage Corporation (ResMAE) and had mortgaged certain property to secure that note to Mortgage Electronic Registration Systems, Inc. (MERS), solely as nominee for ResMAE. The complaint then alleged that the plaintiff is the holder of the note and mortgage.[2] The complaint contained no allegations indicating on what basis the plaintiff had become the holder of a note payable to ResMAE.

See General Statutes § 42a-1-201 (b) (21) (defining holder as person in possession of instrument payable to bearer or to identified person who is person in possession); General Statutes § 42a-3-205 (b) (defining instrument endorsed in blank as payable to bearer). Nothing in the complaint indicated any relationship between ResMAE and either the plaintiff or Nomura. Although the complaint indicated that an exhibit was attached thereto containing a description of the parcel of property on which foreclosure was sought, nothing indicated that either a copy of the note or any other documentation that would demonstrate the plaintiff's status as holder was similarly provided to the court.

At the hearing immediately preceding the trial court's original judgment, the defendant represented himself. The entire discussion at this hearing revolved around questions of the amount of the defendant's debt and attorney's fees. Nothing in the record indicates that the plaintiff presented to the court, or had in its possession, the original note at that time, that the note had been endorsed in a manner that would authorize a party other than ResMAE to enforce it, or that the plaintiff presented documentation to demonstrate that its right to enforce the note had otherwise been established. When asked by the plaintiff's counsel to verify that a default for failure to plead previously had been entered, the trial court simply responded that "[t]he *clerk's notes* indicate to me that it was granted." (Emphasis added.) Accordingly, there is no affirmative evidence in the record leading up to entry of the original judgment to establish the plaintiff's standing at the commencement of the action, let alone at the time the original judgment was rendered.

Thus, at the November 24, 2008 hearing on the plaintiff's motion to open the judgment, there clearly was a valid basis for the defendant, again representing himself, to challenge the plaintiff's standing. Preceding that hearing, the defendant had filed an "Objection to Foreclosure," questioning the plaintiff's standing and seeking production of the note to prove that "the plaintiff is the actual note holder, presently, and at the time the plaintiff commenced [the] action," accompanied by a motion to compel production of the original note to prove standing. At the hearing on the plaintiff's motion to open the judgment, although the defendant's standing arguments were not stated in the clearest of terms, he did argue that the plaintiff was not the "actual note holder at the time the action was commenced." In response to that claim, the plaintiff did not submit any evidence to prove that it was in possession of the note *at the time it commenced the action*. Instead, the plaintiff's counsel equivocally stated: "The production of the note, Your Honor. The original note. Your Honor, that was handed up at the time of—I *believe* the original judgment."[3] (Emphasis added.) Putting aside both the inconclusive nature of the comment by the plaintiff's

counsel and the fact that the transcript of the original judgment hearing does not support the plaintiff's contention that the note was provided to the trial court, nothing in the transcript of the hearing on the motion to open the judgment put on the record the essential fact of when the note came into the plaintiff's possession and what that note reflected vis-á-vis the plaintiff's right to enforce it.

Other facts arising in that proceeding underscore the merit of the defendant's challenge. The trial court record contains no copy of the note to demonstrate that the plaintiff then was in possession of it. Although the plaintiff's counsel unequivocally stated that he had the original note in hand and offered to show it to the defendant to comply with his motion to compel, nothing in the record indicates that the note was presented to the court or, for that matter, to the defendant. The court did not invite counsel to approach the bench after the reference to the note was made, and the court did not make any comment to suggest that it actually had seen the note. Rather, the court simply responded, "[y]ou may do that," meaning that counsel for the plaintiff was given permission to show the note to the defendant, and immediately the court turned to question the parties on the amount of debt.[4] In fact, the first time any copy of the note appeared in the record of the proceedings of the present case was when it was submitted to the Appellate Court.[5]

By contrast, the record clearly reflects that the plaintiff not only offered to show the defendant a certified copy of an assignment of the mortgage to the plaintiff, but also produced that document to the court. The copy of the assignment in the record, unlike the copy of the note, bears a court stamp of November 24, 2008. The court expressly referred to the assignment, appearing in fact to have relied exclusively on it as the basis for its conclusion that the plaintiff had standing to bring the foreclosure action.[6]

It is important to point out that the only copy of the note in the record, submitted to the Appellate Court, reflects an *undated* endorsement in blank from ResMAE. Accordingly, even if the plaintiff was in possession of the note at the time of the hearing on the motion to open the judgment, there was no affirmative evidence before the trial court that the plaintiff had the right to enforce the note as its holder at the relevant point in time. In my view, the sum of these omissions in the record was sufficient to require the trial court to order an evidentiary hearing or, at the very least, to conduct a further inquiry at the hearing on the motion to open the judgment into the plaintiff's claimed status as holder of the note at the time it commenced the action. Therefore, I disagree with the majority that the defendant was obligated to come forward with additional proof to entitle him to a hearing.

The concerns raised by the record as to the plaintiff's status as holder, in fact, should have been heightened by the circumstances surrounding the motion to open the judgment. The plaintiff represented in the motion that "the plaintiff obtained relief from the automatic stay to proceed with the subject foreclosure action." The order of the United States Bankruptcy Court appended to that motion, however, did not grant such relief to the plaintiff at all. Rather, the bankruptcy relief that was obtained was for the benefit of J.P. Morgan Mortgage Acquisition Corporation (J.P. Morgan) "and/or its successors and assigns," and nothing in the record established any relationship between J.P. Morgan and the plaintiff. Under federal bankruptcy law, J.P. Morgan would have had to establish that it is a real party in interest in the foreclosure action to have obtained the stay. See *In re Neals*, 459 B.R. 612, 616–17 (Bankr. D.S.C. 2011); *In re Wilhelm*, 407 B.R. 392, 401–402 (Bankr. D. Idaho 2009). Although the majority correctly points out that, even if J.P. Morgan held the right to enforce the note at the time the plaintiff filed the motion to open the judgment, the plaintiff may have been able to maintain the foreclosure action as J.P. Morgan's agent or to substitute J.P. Morgan as the proper party plaintiff, the evidentiary basis to support such an action was never provided to the trial court. Of course, the plaintiff could not be both the assignor of the note to J.P. Morgan, as it claims in its brief to this court, and a "successor" and/or "[assign]" of J.P. Morgan, as it would have to be to benefit in its own right from the bankruptcy court's order. Under these circumstances, the plaintiff's misrepresentation to the trial court that it had obtained relief from the stay should have bolstered the concerns raised by the defendant. Although the defendant did not draw the trial court's attention to the aforementioned specific omissions and inconsistencies, some of these matters should have been readily apparent to the trial court from the record before it; others might have been brought to the court's attention had the defendant been afforded an opportunity to review the note and to form specific objections before the court summarily rejected his standing claim on the basis of the assignment. See footnote 4 of this dissenting opinion.

Undoubtedly, our rules of practice would have *permitted* the plaintiff to prove its right to foreclose by presenting the original note and mortgage to the trial court in the original judgment. See Practice Book § 23-18. Rather than rely on a presumption that the trial court determined that the plaintiff had complied with this procedure, however, I believe that it is incumbent on the trial court to make the requisite findings *on the record*, especially when the issue of standing has been raised. No such findings were made in the present case. A contrary conclusion, such as the one reached by the majority, exalts the presumption over the facts of the case which belie the reality that nothing in the record

supports the conclusion that the trial court ever viewed the note at any stage of this litigation, be it at the time of the original judgment or at the time of the final judgment, to ensure that the plaintiff had the right to enforce the note at the commencement of the action.

Indeed, in considering the standing question before us in the present case, it is useful to consider the context in which this issue arose. The present foreclosure action was commenced in 2007, in the midst of the mortgage foreclosure crisis that overwhelmed courts around the country, including Connecticut's,[7] during which time deficiencies in foreclosure practices were rampant.[8] Around this same time, standing challenges in foreclosure actions were on the rise due to the securitizations of mortgages, wherein various parties to pooling and servicing agreements, including loan servicers, claimed to have standing to bring foreclosure actions.[9] See *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 313 n.6, A.3d (2013). Inconsistencies between the pleading and proof commonly have been raised as issues in such cases.[10] See generally *Anderson* v. *Burson*, 424 Md. 232, 35 A.3d 452 (2011); *Bank of New York* v. *Raftogianis*, 418 N.J. Super. 323, 13 A.3d 435 (2010). Against this backdrop, the present case commenced with a default judgment entered by the court clerk. The same trial court judge presided over all of the relevant proceedings in the case, but he never indicated, in response to the defendant's standing challenge, that he would not have entered the judgment of foreclosure without having confirmed the plaintiff's right to enforce the note. Therefore, an assumption that the plaintiff conformed with the rules of practice by presenting the original note to the trial court to establish its standing to bring the present foreclosure action seems particularly unwarranted under these circumstances.

Finally, further inquiry into a party's right to foreclose when such questions arise is consonant with sound policy. As one court noted in connection with a standing challenge implicating similar parties and concerns as in the present case: "[T]he law must not yield to expediency and the convenience of lending institutions. Proper procedures must be followed to ensure the reliability of the chain of ownership, to secure the dependable transfer of property, and to assure the enforcement of the rules that govern real property." *Bank of New York* v. *Silverberg*, 86 App. Div. 3d 274, 283, 926 N.Y.S.2d 532 (2011).

The concern articulated by the plaintiff that the Appellate Court's decision imposes an undue burden in foreclosure actions is overblown and hyperbolic. Fundamentally, it is never too burdensome to require that a plaintiff establish, firmly, its standing before it utilizes the courts of this state to foreclose a mortgage and dispossess a defendant from his or her property. A plaintiff readily could submit a verified complaint

establishing the transfer history of the note, along with a copy of the note and mortgage, or could submit an affidavit in support of a motion for summary judgment. See, e.g., *RMS Residential Properties, LLC* v. *Miller*, supra, 303 Conn. 227; *HSBC Bank USA, N.A.* v. *Navin*, 129 Conn. App. 707, 711–12, 22 A.3d 647, cert. denied, 302 Conn. 948, 31 A.3d 384 (2011). Indeed, in response to the defendant's motion to compel production of the note, the plaintiff could have produced the same affidavit of its counsel that was later filed in the Appellate Court.

I respectfully dissent.

[1] The plaintiff invokes the Uniform Commercial Code (UCC); General Statutes § 42a-1-101 et seq.; as the pertinent law governing its right to enforce the note. Although "not every note used in a mortgage transaction is [necessarily] negotiable"; D. Whitman, "How Negotiability Has Fouled Up the Secondary Mortgage Market, and What to Do About It," 37 Pepp. L. Rev. 737, 749 (2010); I assume, without deciding, that the note is a negotiable instrument and thus subject to the UCC provisions cited by the majority.

[2] The plaintiff's complaint sought both a judgment of strict foreclosure and a deficiency judgment, thus seeking to enforce its rights under the note, not simply its security interest in the mortgaged property.

[3] Lawrence Garfinkel, who was the plaintiff's counsel at the November, 2008 hearing, also represented the plaintiff at the September, 2007 hearing preceding the original judgment.

[4] Even if the defendant was shown the note at the hearing on the motion to open the judgment, which he does not concede, it is clear that he had no meaningful opportunity to review it before the court ruled that the plaintiff had standing. The note is two and one-half pages of fine print. After the trial court agreed that the plaintiff's counsel could show the note to the defendant, the trial court immediately thereafter asked the defendant whether he wanted to comment on the affidavit concerning the amount of debt and inquired about other matters before ruling on the standing issue. Under these circumstances, fairness dictated, at the very least, giving the self-represented defendant an opportunity to review the note and to form specific objections to present to the court.

[5] A copy of the note was submitted to the Appellate Court as an exhibit appended to an affidavit by the plaintiff's counsel in support of a motion to lift the stay pending appeal. The copy of the note has no court stamp on it, which further suggests that the note never was produced to the court.

[6] Although that assignment purports to assign the mortgage, "together with the mortgage note secured thereby" from MERS to the plaintiff as servicer for Nomura, there is nothing in the record indicating that ResMAE ever assigned the note to MERS or that the note was transferred from ResMAE to MERS, with or without a blank endorsement. These omissions likely explain why the plaintiff's brief to this court does not rely on the assignment as evidence of its right to enforce the note as its holder. Indeed, challenges to standing based on assignments by MERS without proper authority have commonly been made and have succeeded. See, e.g., *Bank of New York* v. *Silverberg*, 86 App. Div. 3d 274, 281, 926 N.Y.S.2d 532 (2011) ("[A]s nominee, MERS's authority was limited to only those powers which were specifically conferred to it and authorized by the lender [see Black's Law Dictionary 1076 (8th Ed. 2004) (defining a nominee as [a] person designated to act in place of another, [usually] in a very limited way)]. Hence, although the consolidation agreement gave MERS the right to assign the mortgages themselves, it did not specifically give MERS the right to assign the underlying notes, and the assignment of the notes was thus beyond MERS's authority as nominee or agent of the lender [see *Aurora Loan Services, LLC* v. *Weisblum*, 85 App. Div. 3d 95, 108, 923 N.Y.S. 2d 609 (2011) . . . .]." [Citations omitted; internal quotation marks omitted.]); *Bank of New York* v. *Silverberg*, supra, 283 ("[B]ecause MERS was never the lawful holder or assignee of the notes described and identified in the consolidation agreement, the corrected assignment of mortgage is a nullity, and MERS was without authority to assign the power to foreclose to the plaintiff. Consequently, the plaintiff failed to show that it had standing to foreclose."); see also C. Peterson, "Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System," 78 U. Cin. L. Rev. 1359, 1374–86

(2010) (making case that MERS does not hold legal title to mortgage as nominee for actual mortgagee and has no legal right to negotiate note).

[7] See Connecticut Dept. of Banking, "Avoiding Foreclosure," available at http://www.ct.gov/dob/cwp/view.asp?a=2235&q=386114 (last visited August 21, 2013) (copy contained in the file of this case in the Supreme Court clerk's office) (noting that "State of Connecticut Department of Banking Foreclosure Hotline was established on August 24, 2007, in response to the subprime mortgage crisis"); J. Hoctor, "Safe as Houses," Hartford Advocate, December 16, 2010, p. 8 ("Connecticut foreclosures soared by 185 percent from January 2007 to January 2008, according to the CT Foreclosure News blog. Connecticut ranked eighth nationally for foreclosures per total number of houses at the start of its mandatory foreclosure mediation program."); C. Haughney & J. Roberts, "Foreclosures Rise, With No End in Sight," N.Y. Times, May 17, 2009, p. CT1 ("More than 27,000 homes in Fairfield, Hartford, Litchfield and New Haven Counties were in some stage of foreclosure between January 2005 and August 2008, according to an analysis by The New York Times of data from the Warren Group. . . . [T]here are indications that the foreclosure crisis could be worsening in Connecticut, based on statewide data on mortgage delinquencies showing that in March, 4.8 percent of the mortgages held by Connecticut homeowners were at least 90 days past due. That is up from 2.7 percent a year earlier. This gives Connecticut the 13th-highest delinquency rate among the 50 states . . . .").

[8] See, e.g., A. Cha & B. Dennis, "Lost in the System That Took the House," Washington Post, September 29, 2010, p. A1 (noting that Connecticut foreclosures by one major lender halted due to shoddy paperwork practices).

[9] Securitization is a relevant consideration in the present case not simply because of the plaintiff's status as a loan servicer, but also because the mortgage and the note at issue in the present case purportedly were assigned to the plaintiff from MERS. The complaint alleges that MERS is the nominee of the loan originator. It is well documented that "[t]he [creation of the] MERS system facilitated the transfer of loans into pools of other loans which were then sold to investors as securities . . . ." (Citation omitted.) *Bank of New York* v. *Silverberg*, 86 App. Div. 3d 274, 278, 926 N.Y.S.2d 532 (2011).

"Securitization of residential mortgages, once a very lucrative practice, is denounced frequently now by the public and media, described as shoveling loans into trusts like coal into the Titanic's boilers. [G.] Morgenson, Guess What Got Lost in the Pool?, N.Y. Times, [March 1, 2009, p. BU1]. At best, it is a modern, fast-paced commercial practice that mis-aligns with some of the hoary law of negotiable instruments secured by realty. Yet only since the advent of the recent economic downturn have courts been called upon to consider the claims of borrowers challenging some of these industry practices and shortcomings." (Internal quotations marks omitted.) *Anderson* v. *Burson*, 424 Md. 232, 235, 35 A.3d 452 (2011).

[10] Just recently, this court addressed a challenge to a loan servicer's standing in which the loan servicer had alleged in the foreclosure complaint that it was the "owner" of the note, when in fact it was a nonholder/transferee in whom the note's owner and holder had vested the right to enforce the note, a status that called for different proof. See *J.E. Robert Co.* v. *Signature Properties, LLC*, supra, 309 Conn. 313 n.6.