In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] and [redacted]

Appellants,

v.

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION SUCCESSOR IN INTEREST TO WASHINGTON MUTUAL BANK F/K/A WASHINGTON MUTUAL BANK FA, et al.

Appellee.

ON APPEAL FROM THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS

Respectfully submitted,

Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Rules

STATEMENT OF THE CASE AND FACTS

I. Introduction

This is a foreclosure action in which the Plaintiff, JPMORGAN CHASE BANK, NATIONAL ASSOCIATION SUCCESSOR IN INTEREST TO WASHINGTON MUTUAL BANK F/K/A WASHINGTON MUTUAL BANK FA ("the Bank") seeks to take the home of [redacted] and [redacted] ("the Homeowners") in satisfaction of a debt.

II. Appellants' Statement of the Facts

The Bank filed a Complaint seeking to foreclose on an Adjustable Rate Note signed by [redacted] and a mortgage in which he was joined by his wife, [redacted][1] The original loan, in December of 2004, was for nearly 1.4 million dollars.[2]

The entire clerk's file for this case, including a document that was purported to have been the original Note, was lost sometime before trial.[3] Trial took place in

[1] Complaint filed December 23, 2009 (Supp. R. 1); Adjustable Rate Note, Exhibit 1 (R. 215); Mortgage, Exhibit 2 (R. 221).

[2] Adjustable Rate Note, Exhibit 1 (R. 215).

[3] *See*, gap in Index Record on Appeal between December 31, 2009 and July 25, 2012.

two separate proceedings spaced nearly a month apart.[4] The mid-trial delay was to provide the clerk an opportunity to find the file, but it was never located.[5]

The Notice of Acceleration

At trial, the Bank's case consisted of a single witness, Leticia Companioni. The Bank stipulated that Ms. Companioni was only a records custodian and had no personal knowledge.[6] She introduced a "breach letter" (a notice of default or notice of acceleration) which was admitted as Plaintiff's Exhibit 3.[7] The letter was intended to demonstrate compliance with the Bank's obligation under Paragraph 22 of the Mortgage to provide written notice of breach prior to acceleration:

> **22. Acceleration; Remedies.** Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security

[4] Transcript of Proceeding before Judge Jacqueline Hogan Scola, July 24, 2009 (Supp R. 1) ("T-1.__"); Transcript of Proceedings Before Judge Jacqueline Hogan Scola August 20, 2013(R. 348) ("T-2.__").

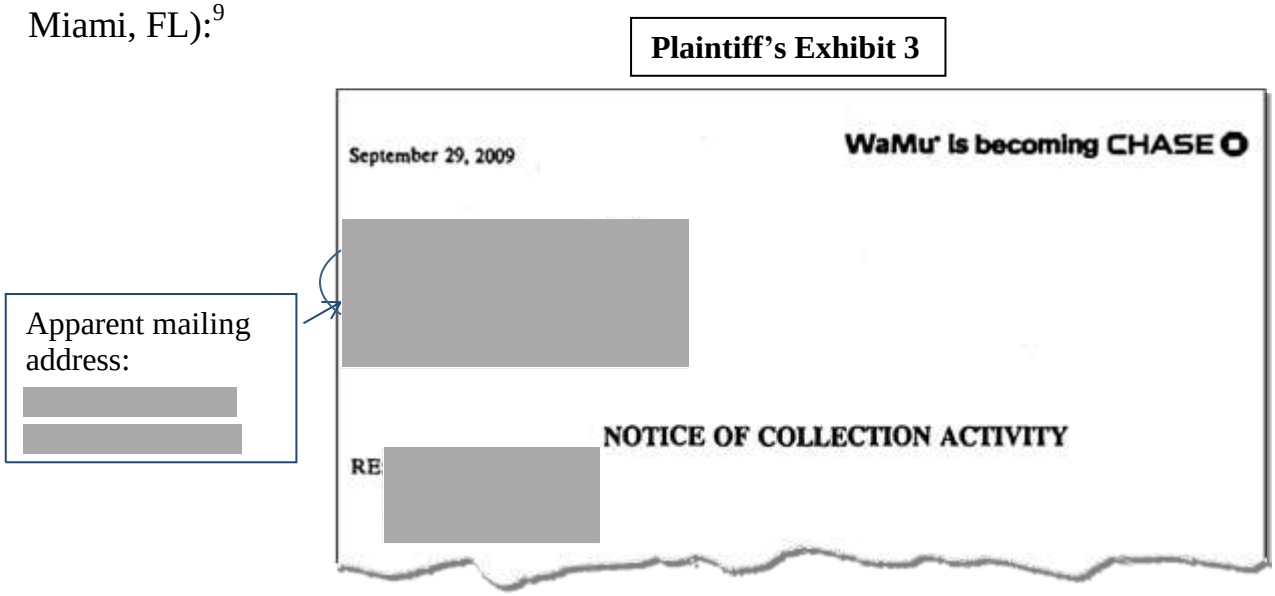
[5] T-2. 3-10, 21. Response in Opposition to Defendant's Motion for Rehearing, dated November 20, 2013 (R. 465) (representing that "[t]he court continued this trial because the court file was lost by the clerk.").

[6] T-1. 9-10; T-2. 19.

[7] T-1. 39.

> Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding.[8]

Apart from the letter itself, there was no record or testimony as to where or when the letter was sent. The letter was dated September 29, 2009 and indicated a mailing address different than the subject property address (1755 Fairhaven Pl, Miami, FL):[9]



On cross-examination Ms. Companioni admitted that the mailing address did not match the mailing address used on other correspondence with the borrower.[10]

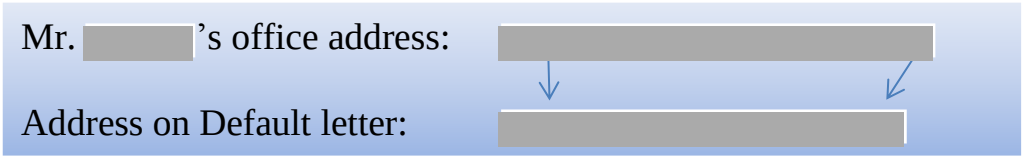
[8] Mortgage (R. 235).

[9] T-1. 37-38; Exhibit 3 (R. 238).

[10] T-1. 58-60.

The witness surmised there must have been a request to the change the address, but had never seen such a request in the Bank's business records.[11] She had not looked to see if any other mail had been sent to the address on the notice of acceleration.[12] She had "no idea" whether the Bank would even keep a record of a change-of-address request and even guessed that the request "could have been done by phone."[13] Of course, the Mortgage requires that changes in a borrower's notification address must be in writing.[14]

During the Homeowners' case, Mr. [redacted] testified that the address on the default letter was not his address.[15] It had the same street name as his business address, but a different street number and different suite number:[16]



[11] T-1. 59, 63-64.

[12] T-1. 100.

[13] T-1. 65.

[14] Paragraph 15 of the Mortgage requires that all notices given by Borrower or Lender must be in writing. The notice address for the Borrower "shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender." (emphasis added).

[15] T-2. 22-23.

[16] T-2. 22-24.

Mr. [redacted] further testified that he had stopped receiving statements in the mail in May of 2009.[17]

He also testified that he had stopped making payments in late 2009 for two reasons. First, for months, he had disputed a payment discrepancy of approximately $60,000 for which he could get no satisfactory explanation from the Bank. The Bank had taken the funds from a bank account he had set up for the purpose of allowing the Bank to withdraw his monthly payments automatically.[18] In an unsuccessful attempt to resolve the discrepancy, he made over a dozen phone calls, sent at least twenty letters, and met with a bank employee at the branch where he was personally making the payments.[19] Eventually, he concluded that he had overpaid and resolved that withholding payments for the next few months would "even [him] out."[20]

Second, based on his conversation with the Bank branch employee, an Assistant Financial Center Manager Lending Consultant, he believed that nonpayment would qualify him for a loan modification and that he would begin

[17] T-2. 39, 47.

[18] T-2. 26.

[19] T-2. 25-42, 47, 60.

[20] T-2. 40.

paying on a new loan in January of 2010.[21] In December, however, he was served with the summons for the Bank's foreclosure lawsuit.[22]

The court admitted as an exhibit one of the letters Mr. [redacted] wrote the bank which was on his business letterhead containing the address which he had testified was his correct business address.[23] The court also admitted two loan statements which indicated that, prior to May of 2009, the Bank had sent him correspondence at that same address—i.e. Mr. [redacted] correct business address, not the address used for the notice of acceleration.[24]

The Homeowners argued that the Bank had failed to prove its compliance with the condition precedent, because the only notice of acceleration it had placed in evidence indicated it had been sent to the wrong address.[25] In rejecting this argument, the trial judge found that the Bank's failure to send the notice of acceleration to the correct address nevertheless amounted to "substantial

[21] T-2. 30-44, 54.

[22] T-2. 45-46.

[23] T-2. 50-51; Defendants' Exhibit A (R. 266).

[24] T-2. 52-54; Defendants' Exhibit A (R. 269; admitted at T-2. 53); Defendant's Exhibit B (R. 271, legible copy at R. 283).

[25] T-2. 72-74.

compliance" with the requirements of the mortgage because Mr. [redacted] "was already aware [that he was not paying] and he intentionally didn't pay it."[26]

The Amount Due and Owing

During her direct testimony, the Bank's witness, Ms. Companioni, introduced a document she called a "payment history."[27] The document, entitled "Chase Detailed Transaction History" (Plaintiff's Exhibit 4) is a listing of transactions that purports to begin in March of 2005. The witness conceded, however, that it does not reflect any payments prior to November of 2008—a date that corresponds with the Bank's acquisition of the original lender, Washington Mutual.[28] Ms. Companioni claimed to have the Washington Mutual payment history from before the takeover—but not with her.[29] She conceded that the Transaction History did not show any of the Homeowners' payments for nearly four years even though the account was not past due until November of 2008.[30] She was "not really sure why" it did not reflect payments during those four years,

[26] T-2. 76.

[27] T-1. 40.

[28] T-1. 69-71. Ms. Companoni testified that JPMorgan Chase acquired Washington Mutual from the FDIC on September 25, 2008. T-1. 31-32.

[29] T-1. 69-70.

[30] T-1. 70-71.

but was still assuming the payments had been made.[31] Ms. Companioni did not even know whether a missing payment for October of 2008—immediately following the transfer of the loan to the Bank—"went to Washington Mutual and wasn't credited up to FDIC into JPMorgan Chase."[32]

Ms. Companioni was also at a loss to explain a transaction labeled "Misapplication Reversal" in which the Bank deducted $13,170.72 from this partial Transaction History only days before it sent its notice of acceleration.[33] Other than stating it was an "internal adjustment by the bank,"[34] Ms. Companioni could not say specifically why the money was subtracted or where the money went:

> THE WITNESS: [On 9/23 o]f 2009 there is an entry on the loan payment history for a misapplication reversal. I'm not certain if that was monies that were sent back to the client or perhaps was a credit on the escrow account but the total amount is $13,170.72.
>
> THE COURT: What does that mean misapplication reversal? Can you explain that?
>
> THE WITNESS: I can't.
>
> THE COURT: Oh, okay.

[31] T-1. 71-72.

[32] T-1. 93.

[33] Plaintiff's Exhibit 4, p. 8 (R. 257)

[34] T-1. 90.

> THE WITNESS: Other than to say something was misapplied and it was reversed (inaudible) on 9/23/2009.[35]
>
> * * *
>
> THE WITNESS; I don't know about $13,000.00 misapplication reversal it's --
>
> THE COURT: So it could be simply a record keeping error.
>
> THE WITNESS: Yeah this is a negative amortization loan you know there's things about it that, things about the functionality of that type of a loan that if I could be honest I don't really know.[36]
>
> * * *
>
> THE COURT: So the next question is who would know, if anyone in your entity that being JPMorgan Chase what this $13,000.00 misapplication actually is or means? Where it came from? How do we discern that?
>
> THE WITNESS: I'm sure there is someone within our entity that could shed some light on what exactly it means. I also am confident that we will not change the amount due and it will not the change the fact that we're still due for the August 1st '09 payment. No matter what that misapplication reversal fee, how it's explained.[37]

Because it is merely a list of transactions (and only a partial list), rather than a true bookkeeping ledger for either the loan or the escrow for the loan, Plaintiff's Exhibit 4 contains no running totals. For example, it does not show how much of each of the payments during the first four years went to escrow and, therefore, does

[35] T-1. 44-45.

[36] T-1. 81.

[37] T-1. 82-83.

not show what the beginning balance of the escrow account was at the moment that the Bank claims the Homeowners defaulted on the loan. Likewise, the partial Transaction History does not show what fraction of each payment made during the first four years was apportioned to interest, and therefore, does not show the amount of unpaid interest that would have already accumulated at the time of the default (or how much, if any, had already become additional principal).

The Variable Interest Rate and its Impact on Accumulated Interest and Principal

The apportionment between interest and principal would have varied monthly because the interest rate specified by the Note was variable. Both before and after default, the rate changed on a monthly basis (beginning in February of 2005) and was equal to an "Index" plus a "Margin" of 2.350 percent.[38] The payments, however, changed on an annual basis.[39] Because the payment in any given month could be greater than or less than needed to pay the interest for that month, the Note provided that this difference would be applied to either increase or decrease the principal:

[38] Adjustable Rate Note, ¶¶ 2 and 4 (R. 215-16).

[39] Adjustable Rate Note, ¶ 4 (E) (R. 216).

(G) Changes in My Unpaid Principal Due to Negative Amortization or Accelerated Amortization

> Since my payment amount changes less frequently than the Interest rate and since the monthly payment is subject to the payment limitations descried in Section 4(F), my monthly payment could be less or greater than the amount of the Interest portion of the monthly payment that would be sufficient to repay the unpaid Principal I owe at the monthly payment date In full on the maturity date in substantially equal payments. For each month that the monthly payment is less than the Interest portion, the Note Holder will subtract the monthly payment from the amount of the Interest portion and will add the difference to my unpaid Principal, and Interest will accrue on the amount of this difference at the current Interest rate. For each month that the monthly payment is greater than the Interest portion, the Note Holder will apply the excess towards a principal reduction of the Note.[40]

The partial Transaction History does not contain these computations or any of the underlying data to perform the calculations. Specifically, it does not contain:

- The Current Index on the Interest Rate Change Dates (needed for each month)
- The resulting interest rate to be applied each month (Current Index plus the Margin)
- The outstanding principal each month against which that interest rate would be applied.
- The amount of the payment for that year (changed on an annual basis)
- The amount that each payment differed from that computed to amortize the current principal and interest (payment amounts in

[40] Adjustable Rate Note, ¶ 4 (G) (R. 217).

excess would reduce principal, while shortfalls would increase principal).

- Whether the computed payment was reduced by the payment and interest caps.

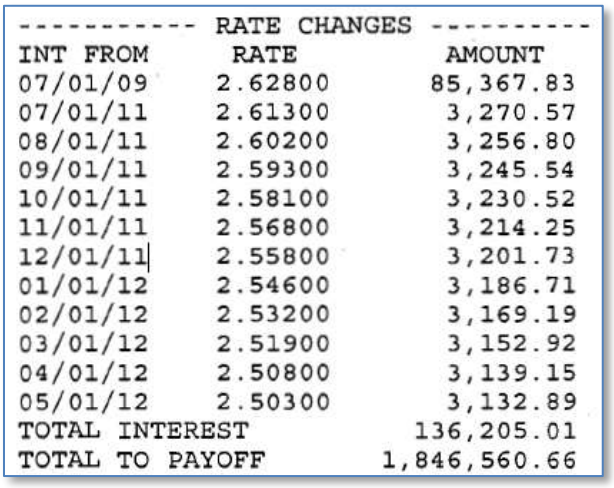
The Bank's records submitted with its summary judgment confirm that the interest rate was subject to near constant change. In its Affidavit as to Amounts Due and Owing, the affiant acknowledges that the interest rate is "VARIABLE."[41] The "Payoff Calculation" attached to the affidavit states that the computations cross multiple interest rate change periods.[42]

The summary judgment documents also demonstrate some of the information and calculations needed to compute interest and principal for a variable interest rate loan with negative amortization. For example, it provides some of the monthly interest rate changes required to calculate the interest—those between July of 2011 and May of 2012 (although it lumps all prior interest into one entry for July 1, 2009 without displaying the earlier rates):[43]

[41] Affidavit as to Amounts Due and Owing, filed January 2, 2013 (R. 38), p. 2 (R. 39).

[42] Payoff Calculation (PAY4) (R. 40).

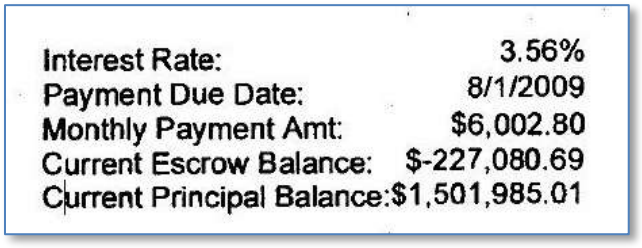
[43] Payoff Calculation (PAY4) (R. 40).



---------- RATE CHANGES ----------

INT FROM	RATE	AMOUNT
07/01/09	2.62800	85,367.83
07/01/11	2.61300	3,270.57
08/01/11	2.60200	3,256.80
09/01/11	2.59300	3,245.54
10/01/11	2.58100	3,230.52
11/01/11	2.56800	3,214.25
12/01/11	2.55800	3,201.73
01/01/12	2.54600	3,186.71
02/01/12	2.53200	3,169.19
03/01/12	2.51900	3,152.92
04/01/12	2.50800	3,139.15
05/01/12	2.50300	3,132.89
TOTAL INTEREST		136,205.01
TOTAL TO PAYOFF		1,846,560.66

In contrast, the trial exhibit—the partial Transaction History—contains only one interest rate and does not expressly associate that rate with any particular month. This static rate is contained in a grouping of select information that is repeated in the top right-hand corner of each page[44]



Interest Rate:	3.56%
Payment Due Date:	8/1/2009
Monthly Payment Amt:	$6,002.80
Current Escrow Balance:	$-227,080.69
Current Principal Balance:	$1,501,985.01

The Bank's Witness Testifies to Only Two Numbers on the Proposed Judgment.

Ms. Companioni testified that she had reviewed the proposed judgment and that the amount written there as the principal amount ($1,501,985.01) was supported by the partial Transaction History. Other than mentioning that the Bank

[44] Plaintiff's Exhibit 4, Chase Transaction History (R. 240-64).

had agreed to pay $1,200.00 in attorneys' fees, Ms. Companioni did not testify what other numbers appeared on the proposed judgment—a document that was not admitted into evidence or even marked for identification. The entirety of her testimony regarding every other figure on the proposed judgment was contained in a single word answer to a single question—she agreed that the numbers were supported by the partial Transaction History:

> MR. DE LEON: So Ms. Companioni you've already testified then that the sums sought, Your Honor this is a copy of the proposed final judgment that plaintiff seeks to have entered today. … Ms. Companioni I believe it was your testimony prior to counsel's voir dire of you that the amount of the judgment sought, the expenses indicated on the proposed judgment as well as the interest paid are all supported by the payment history that is now in evidence as plaintiff's number 4 correct?
>
> THE WITNESS: Yes.[45]

Whatever those numbers were, they are not part of the record. The Bank rested its case and the remainder of the trial was postponed to allow for a search of the missing court file. At the conclusion of the first portion of the trial, the court returned the unmarked proposed judgment to Bank's counsel.[46]

Trial recommenced nearly a month later at which time the Bank's counsel provided a new proposed judgment form to the court which he had modified to

[45] T-1. 53-54.

[46] T-1. 103.

include language regarding reestablishment of the lost Note.[47] The Homeowners moved for involuntary dismissal arguing, among other things, that evidence of the amount due was insufficient.[48] The court denied the motion.[49]

After the defense presented its case, the court entered judgment in favor of the Bank.[50] The Homeowners filed a motion for rehearing which was denied.[51] This appeal ensued.

[47] T-2. 11, 77.

[48] T-2. 14-19.

[49] T-2. 20.

[50] Final Judgment of Foreclosure, August 21, 2013 (R. 496).

[51] Defendants, [redacted] R. [redacted] and [redacted] [redacted] Motion for Rehearing, served August 30, 2012; Order Denying Defendants' Motion for Rehearing, December 3, 2013.

SUMMARY OF THE ARGUMENT

The subject Mortgage required the Bank to send a notice of acceleration to the Homeowners as a condition precedent to accelerating the loan and filing suit. The Bank's only evidence of an attempt to comply with this requirement was a letter which, on its face, was sent to the wrong address. Although the correct address would have been the property address unless changed in writing by the Homeowners, the Bank did not show that the Homeowners had asked for such a change, much less, that they had asked the Bank to change it to one that has no connection with the Homeowners. The court's theory that the Homeowners had actual notice of a default does not relieve the Bank of its contractual duty. Moreover, the uncontradicted evidence showed that they had no actual notice, but rather, believed they had paid more than was due and that discontinuing payments would either reduce their overpayment or result in a loan modification.

Additionally, the Bank failed to introduce a scintilla of testimonial or documentary evidence of many of the dollar amounts that appeared in the final judgment. Other dollar amounts, such as the principal due, were inadequately supported by the evidence because it cannot be computed from the incomplete records submitted by the Bank. The judgment, therefore, is not supported by competent evidence and must be reversed.

STANDARD OF REVIEW

In a non-jury case, sufficiency of the evidence may be raised for the first time on appeal. Fla. R. Civ. P. 1.530(e). Findings of fact by the trial court must be set aside when totally unsupported by competent, substantial evidence. *See Crawford Residences, LLC v. Banco Popular N. Am.*, 88 So. 3d 1017, 1019 (Fla. 2d DCA 2012). If a trial court's decision is manifestly against the weight of the evidence or totally without evidentiary support, it becomes the duty of the appellate court to reverse. *Randy Intern., Ltd. v. Am. Excess Corp.*, 501 So. 2d 667, 670 (Fla. 3d DCA 1987); *see also, Blazina v. Crane*, 670 So. 2d 981, 983 (Fla. 2d DCA 1996) (reversing where there was no record support for the trial court's findings of fact).

ARGUMENT

I. There Was No Evidence That the Bank Complied With the Condition Precedent of Sending a Notice of Acceleration to the Homeowners.

Paragraph 22 of the subject Mortgage required the Bank to send written notice to the Homeowners before accelerating the debt and filing foreclosure.[52] This notice of acceleration must be sent to "the Property Address, unless the Borrower had designated a substitute notice address by notice Lender."[53]

The Homeowners raised this failure to comply with a condition precedent in its affirmative defenses:

> Plaintiff failed to provide a notice of default that complies with the notice provisions set out in the subject mortgage. Specifically, pursuant to paragraph 22 of the subject mortgage and note, Plaintiff was required to provide Defendants thirty days notice prior to acceleration of the subject mortgage. Plaintiff failed to provide the requisite notice. As such, Plaintiff failed to meet a condition precedent prior to the institution of this action.[54]

The Bank's only evidence of whether it had complied with Paragraph 22 was a letter which bears a mailing address different from that of the subject

[52] Plaintiff's Exhibit 2, ¶ 22 (R. 235).

[53] Plaintiff's Exhibit 2, ¶ 15 (R. 232).

[54] Amended Answer and Affirmative Defenses, served July 16, 2012, ¶ 18; see also, ¶¶ 8-15, 17, 19, 21. While the Amended Answer was filed over a year before trial, there was no order granting the amendment until trial itself. T-2. 37.

property.[55] The Homeowners' evidence was undisputed that the address on the letter was "not affiliated" with him or his wife.[56] While Mr. [redacted] had used his business address to communicate with the Bank, it was meaningfully different from the address on the notice of acceleration.

The Bank did not present any evidence that the Homeowners had requested any change of address, much less, the address that appears on the Bank's letter. Significantly, the Bank was well aware of the problem with its evidence, at least as of the first part of the trial in July when its witness was cross-examined concerning the discrepancy.[57] And although nearly a month passed before the trial resumed in August, the Bank did not proffer any documentation that the Homeowners had requested a change of address. It did not seek to recall its witness or introduce any additional exhibits. Thus, even though Ms. Companioni testified that she had never looked for change-of-address records,[58] the Bank had nearly a month do so before the trial resumed, yet brought no such records.

Because the Bank failed to prove that it sent the letter to the Homeowners' "notice address" as required by Paragraph 22 of the Mortgage, there is no evidence

[55] Plaintiff's Exhibit 3 (R. 238).

[56] T-2. 22-24.

[57] T-1. 59-60, 64-65.

[58] T-1. 64-65.

to support the judgment on this issue. *See Patel v. Aurora Loan Services, LLC*, 39 Fla. L. Weekly D840 (Fla. 4th DCA 2014) (summary judgment in favor of the bank reversed because the alleged notice was not produced as summary judgment evidence); *Samaroo v. Wells Fargo Bank*, 39 Fla. L. Weekly D670 (Fla. 5th DCA 2014) (summary judgment in favor of the bank reversed because the default letter failed to satisfy the pre-acceleration notice requirement of the mortgage); *Haberl v. 21ST Mortg. Corp.*, 5D12-4839, 2014 WL 2130283 (Fla. 5th DCA 2014) (same); *Kurian v. Wells Fargo Bank, Nat. Ass'n*, 114 So. 3d 1052 (Fla. 4th DCA 2013) (summary judgment for the bank reversed where there was no evidence that the bank had sent the notice required by Section 22 of the mortgage); *Judy v. MSMC Venture, LLC*, 100 So. 3d 1287 (Fla. 2d DCA 2012) (summary judgment reversed where acceleration notice did not specify the default); *Bryson v. Branch Banking & Trust Co.*, 75 So. 3d 783, 786 (Fla. 2d DCA 2011) (summary judgment reversed where alleged notices were not authenticated); *DiSalvo v. SunTrust Mortg., Inc.*, 115 So. 3d 438, 440 (Fla. 2d DCA 2013) (same); *Frost v. Regions Bank*, 15 So. 3d 905 (Fla. 4th DCA 2009) (summary judgment reversed where there was no evidence that the bank sent an acceleration letter); and cases citing *Frost*.

In *Star Lakes Estates Ass'n, Inc. v. Auerbach*, 656 So. 2d 271 (Fla. 3d DCA 1995), this Court reversed a summary judgment of foreclosure in favor of a

condominium association because there was no evidence to prove the specific address to which it claimed to have sent a notice of special assessment:

> Although we recognize that proof of mailing normally raises a rebuttable presumption that mail was received, [internal citations omitted] such a presumption only arises where there is proof that the mail is being sent to the *correct address.*

Id. at 274 (emphasis original).

The trial court ruled that the failure to send the notice of acceleration to the correct address was inconsequential because Mr. [redacted] "was already aware [that he was not paying] and he intentionally didn't pay it."[59] First, to rule that actual notice of the fact of default on the part of the borrower amounts to "substantial compliance" on the part of the lender is virtually the same as ruling that banks need never comply with Paragraph 22 of the mortgage. Most borrowers are aware that they are behind in their payments before a lawsuit is filed. The point of the notice of acceleration is to provide specific notification, not only of the default, but of "the action required to cure the default."[60] In short, it is to provide an explicit and precise accounting of the extent of the default—how much must be paid to bring the account current. It is also intended to provide a deadline for curing the default,

[59] T-2. 76.

[60] Mortgage, ¶ 22 (R. 235).

and to specify the consequences of failing to do so.[61] A borrower's knowledge that he has not made some payments does not provide this requisite information.

Second, while most borrowers are aware that they missed some payments before being served with a foreclosure complaint, there is not a single iota of evidence that such was the case for the Homeowners. The only evidence was that Mr. [redacted] had decided not to pay <u>because he believed he had already paid</u>.[62] He also believed, rightly or wrongly, that nonpayment would not result in foreclosure, but in a loan modification.[63] This is precisely the situation for which the notice provision was designed—to clear up any confusion that the borrower might have as to what was actually in arrears and what the lender intended to do if it was not paid.

Moreover, as the Bank's witness testified, the Homeowners had continued to make monthly payments despite being one or two payments behind for months.[64] Yet, there was no evidence that the Homeowners were aware of this ongoing deficiency because: 1) the payments had, until 2008, been automatically withdrawn

[61] *Id*.

[62] T-2. 25-42, 47, 60.

[63] T-2. 30-46, 54.

[64] T-1. 68-69, 72-73, 94-95.

from the Homeowners' bank account;[65] 2) the Homeowners had stopped receiving statements in May of 2009;[66] and 3) the rolling deficiency (where each month's payment was logged as an earlier month) had apparently not triggered a notice of acceleration that summer.[67]

Additionally, although the Bank's witness could not say what specifically triggered the Bank's decision to accelerate the loan and file suit,[68] the notice of acceleration is dated only days after an unexplained "Misapplication Reversal" of $13,170.72.[69] Oddly, it was the very same day that the Bank posted two more monthly payments from the Homeowners.[70] If the "reversal" was a deduction from the record of his payments, Mr. [redacted] would have no way of knowing that the Bank had made this "internal adjustment" which presumably[71] increased the arrearage even though he had just made two payments. If, as it appears, this

---

[65] T-2. 30.

[66] T-2. 39, 47.

[67] T-1. 73-74, 86, 94-95.

[68] T-1. 86.

[69] Compare Reference No. 64 on Plaintiff's Exhibit 4 (R. 257) with Plaintiff's Exhibit 3 (R. 238).

[70] Reference Nos. 65 and 66 on Plaintiff's Exhibit 4 (R. 257).

[71] "Presumably" because, as discussed in the following section, it is impossible to compute the amount due and owing from the partial Transaction History (Plaintiff's Exhibit 4) either in September of 2009 or at the time of the court entered judgment in this case.

significant arrearage increase precipitated the decision to foreclose, then the Homeowners were never made aware of this development.

For multiple reasons, therefore, the Homeowners were denied advance warning that the Bank would file this lawsuit—a warning to which they were entitled under the mortgage documents drafted by the Bank. More importantly, they were denied the opportunity to reinstate. The express provision of Paragraph 22 cannot simply be brushed away with the notion that the Homeowners knew they were in default—particularly when that notion is not supported by the evidence in this case.

II. The Evidence of the Amount Due and Owing Was Completely Nonexistent, or at Best, Insufficient to Support the Judgment.

A. The total amount due and owing (and many of the addends) were never put into evidence.

With the exception of the principal amount, the Bank completely neglected to adduce evidence—whether by way of a document or testimony—of the amount owed by the Homeowners. In a bizarre ritual quite foreign to any evidentiary rules, the Bank's counsel handed his witness a document which he identified as a "proposed final judgment" and asked the witness to agree that the figures were supported by the partial Transaction History (Plaintiff's Exhibit 4).[72] With the

[72] T-1. 53-54.

exception of the principal amount and attorneys' fees, the Bank never asked the witness to recite whatever numbers might have been there.

Additionally, the Bank never asked that the document be marked for identification and never moved that it be admitted into evidence. The trial court, therefore, never admitted the document as an exhibit. Nor could it have. It would be difficult to imagine a document that would fit the description of "prepared for the purpose of litigation" more than a proposed final judgment. Such documents do not qualify for the business records exception—or any other exception—to hearsay. *See McElroy v. Perry*, 753 So. 2d 121, 125-26 (Fla. 2d DCA 2000) ("when a record is made for the purpose of litigation, its trustworthiness is suspect and should be closely scrutinized").

Stated simply, because the proposed final judgment was not the final judgment signed by the trial court, the appellate record is absolutely silent (except as to the principal amount and attorneys' fees) as to what dollar amounts the Bank's witness claimed were supported by the Bank's partial Transaction History.

Nor does the partial Transaction History support the numbers in the actual final judgment. First, other than the numbers shown for property tax and hazard insurance payments, the amounts cannot be located in the list of transactions. For example, the amounts shown for Title Search, Title Update, Mediation Fee,

Property Preservation, Property Inspection and BPO/Appraisals (for a total of $2,694.40) are not listed. Even the attorney fee of $1,200.00 is not listed.

Nor does the partial Transaction History show the payment of $64,825.72 for property taxes in 2010 as shown in the final judgment. Instead, it shows exactly half that ($32,412.86).[73] Tellingly, the figure in the judgment is more than double the taxes paid for each of the preceding two years.[74]

Interest

More importantly, the interest amount of $163,728.39 is nowhere to be found in the partial Transaction History. Nor are there any entries that can be combined to equal that amount. Nor can it be computed from the single interest rate printed on the top of each page of the transaction listing for three reasons.

First, applying the stated interest rate over the indicated time period of just over four years yields an amount nearly twenty-five percent greater than the

[73] Reference No. 100, Plaintiff Exhibit 4 (R. 252).

[74] According to public records, the Bank paid only $31,448.85 (*see*, https://www.miamidade.county-taxes.com/public/real_estate/parcels/01-4115-023-0020/bills). The difference of $964.01 was the result of a refund which appears in the Bank's transaction list about two and half months later, but which is shown as two entries directed to "Escrow Amt," one positive and one negative. While this may be the result of a double-entry accounting system, that system is not used consistently throughout the transaction listing, and without knowing how the entry is treated in the escrow account itself, the ultimate benefactor of this refund cannot be determined.

judgment figure. Clearly, the average interest rate over the time period was much lower than that shown on the partial Transaction History.

Second, according to the Note itself, the interest rate is subject to change on a monthly basis, so providing a single number for the interest rate is insufficient on its face. The Bank's own evidence for its summary judgment affidavit shows that the interest rate varied between 2.503 and 2.628 percent over the time period between July of 2011 and May of 2012—a time period encompassed within that covered by the final judgment's interest computation. Thus, the trier of fact would need to know these interest rates, along with those for all the other months (July of 2009 through July 2011 and June of 2012 through July of 2013) which are nowhere in the record on appeal, much less in Plaintiff's Exhibit 4.

Third, even if all the above interest rates were known, the trier of fact would need to know how much of this interest was actually paid by the Homeowners. This would require knowledge of all the payments made over the life of the loan and how those payments were apportioned between interest and principal. For example, one of the payments on September 23, 2009 is apportioned such that $1,253.22 went to pay principal while $4,749.58 went to pay interest.[75] The other payment of the exact same amount on the same day was apportioned $1,381.20 and

[75] Reference No. 65 Plaintiff's Exhibit 4 (R. 257).

$4,621.60 to pay principal and interest respectively. Without showing all the other payments and their respective apportionments, the accumulated interest cannot be known.

Additionally, because the amount of each monthly payment required under the Note would also vary (on an annual basis), the trier of fact cannot estimate what the previous payments may have been or what the apportionment between interest and principal was or should have been. Because the partial Transaction History has none of the Homeowners' payments for the first four years of the loan—and does not even disclose a beginning balance on overdue interest—it provides absolutely no support in computing the amount of interest that had accrued.

For the same reason, there is no support for the per diem interest rate because the partial Transaction History merely states a single interest rate that was in use, if at all, as of June 25, 2013. The per diem is purportedly calculated for July for which a different interest rate may be applicable.

* * *

Thus, the following amounts in the Final Judgment of Foreclosure have no support in the record, either by way of testimony or documentary evidence:

Interest	$ 163,728.39
Per Diem	$ 4,395.00

Title Search	$ 325.00
Title Update	$ 75.00
Property Tax 2010	$ 32,412.86
Mediation Fee	$ 246.75
Property Preservation	$ 715.00
Property Inspection	$ 463.40
BPO/Appraisals	$ 870.00
TOTAL	$ 203,231.40

With respect to these amounts, the recent opinion from the Second District in *Wolkoff v. American Home Mortgage Servicing, Inc.*, Case No. 2D12-6460 (Fla. 2d DCA May 30, 2014) is on all fours. In that case, the bank's witness authenticated a payment history that was "incomplete, out of date and failed to reflect the current debt owed on the mortgage." *Id*. The witness then "merely confirmed that the totals given to him on a proposed final judgment 'seemed accurate'; he never openly recited the total amount of indebtedness…" *Id*. The appellate court reversed the entry of judgment for the bank on the grounds that "[t]here was no testimony or evidence to support the award of interest, taxes, property inspections, property evaluations, or attorney's fees." *Id*.

B. The evidence was inadequate to support the amount of principal due.

Unlike all but one of the other figures in the final judgment, Ms. Companioni did recite the amount of principal due ($1,501,985.01) and testified

that Plaintiff's Exhibit "demonstrate[d] and support[ed]" that number.[76] That number is, in fact, printed in the top corner of the partial Transaction History.

But the number is not supported by the partial Transaction History because it cannot be computed from any of the transactions in the abridged listing that the Bank provided. This is because the original principal was only $1,397,500.00.[77] The additional amount ($104,485.01) could only be the result of an amortization of interest as principal. For the same reason that accumulated interest cannot be computed from a partial listing of payments (discussed above), "principal" that is just accumulated interest being treated as principal cannot be computed from that listing. And conversely, if the payment records showed an overpayment of interest, the principal would have decreased from the original amount borrowed.

If the amount of principal due can be supported by a document, it can only be one which was never identified, never authenticated, and never before the court. Here, the Bank stipulated that Ms. Companioni is merely a records custodian and has no personal knowledge beyond the records themselves[78]—indeed, she could not even explain transactions that were listed in the exhibit, such as the

[76] T-1. 41-42.

[77] Adjustable Rate Note, p. 1 (R. 215).

[78] T-1. 9-10; T-2. 19 ("…she's a records custodian and could only testify as to what was in the records in front of her.").

"misapplication reversal." The fact that she read an isolated, unsupported number to the trier of fact, therefore, does not imbue it with evidentiary significance.

Additionally, the trial court made no factual findings regarding applicable interest rates and apportionment of payments—there is no analysis as to how it arrived at the amount of principal due (or for that matter, how it arrived at the related calculation of accumulated interest). In the absence of such factual findings or analysis, "the appellate court must determine whether, based upon the record, the proper analysis would have produced the result reached by the trial court." *Town of Jupiter v. Alexander*, 747 So. 2d 395, 400 (Fla. 4th DCA 1998). Where the record evidence does not permit such an analysis, the judgment should be reversed. *See Garcia v. Carter Const. Co.*, 794 So. 2d 723, 724 (Fla. 3d DCA 2001) (judgment which did not contain findings of fact or analysis to support damages awarded reversed).[79]

Accordingly, the mere reading of the unsupported number by a witness who cannot explain it has no probative value. In the addition to the complete absence of evidence of other amounts, there was insufficient evidence to support the

[79] The Homeowners were not required to make a contemporaneous objection to the sufficiency to the evidence to preserve this issue for appeal. Fla. R. Civ. P. 1.530(e); *see Hall v. Wilson*, 530 So.2d 410, 411 n. 1 (Fla. 3d DCA 1988).

amount of principal due in the final judgment. The Court, therefore, should reverse the judgment below.

C. The Bank had its day in court.

The Bank failed to prove any specific amount of damages in this case. Nor did it make more than a half-hearted attempt to even adduce evidence of such damages. Damages, or course, are a crucial element of what is essentially a breach of contract claim that underlies the request to foreclose the security lien on the home. *Rollins, Inc. v. Butland*, 951 So. 2d 860, 876 (Fla. 2d DCA 2006) (listing "damages resulting from the breach" as one of the elements of a breach of contract action); *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825, 826 (Fla. 3d DCA 2014) ("To establish its entitlement to foreclosure, [the bank] needed to introduce the subject note and mortgage, an acceleration letter, and some evidence regarding the [the borrowers'] outstanding debt on the note.").

Litigants are not permitted "mulligans" or "do-overs" when it comes to trial. *See Pain Care First of Orlando, LLC v. Edwards*, 84 So. 3d 351, 355 (Fla. 5th DCA 2012) (Reversing damages award but finding new trial unwarranted because "[h]aving proceeded to judgment on legally insufficient proof, Appellee does not get a do-over."); *J.J. v. Dep't of Children & Families*, 886 So. 2d 1046, 1050 (Fla. 4th DCA 2004) ("No statute or rule permitted the trial court to give the

[plaintiff] a "do-over" after a three and a half-day trial."); *Wolkoff v. American Home Mortgage Servicing, Inc.*, Case No. 2D12-6460 (Fla. 2d DCA May 30, 2014) (reversing for entry of order of dismissal because "[a]ppellate courts do not generally provide parties with an opportunity to retry their case upon a failure of proof." [internal quotation omitted]). Accordingly, upon reversal of the judgment, this Court should also instruct the trial court to enter an involuntary dismissal of the case.

CONCLUSION

Due to: 1) the complete absence of any evidence that the Bank satisfied a condition precedent by mailing a notice of acceleration to the Homeowners' address; 2) the complete absence of any evidence of certain dollar amounts that were awarded as damages; and 3) insufficient evidence of the other amounts in the final judgment, the Court should reverse and remand with instructions to enter an involuntary dismissal in favor of the Homeowners.

Dated: June 17, 2014

ICE APPELLATE
Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

ICE APPELLATE
Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this June 17, 2014 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this brief has been electronically filed this June 17, 2014.

ICE APPELLATE
Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

SERVICE LIST

Marisa D. Ajmo, Esq.
McGLINCHEY STAFFORD
10407 Centurion Pkwy. N., Ste. 200
Jacksonville, FL 32256
wgrimsley@mcglinchey.com
majmo@mcglinchey.com