In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No [redacted])

[redacted] and [redacted]

Appellants,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS INDENTURE TRUSTEE, FOR THE BENEFIT OF THE HOLDERS OF THE AAMES MORTGAGE INVESTMENT TRUST 2005-4 MORTGAGE BACKED NOTES,

Appellees.

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

INITIAL BRIEF OF APPELLANTS

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

I. Introduction

[redacted] and [redacted] [redacted] (collectively, "the Homeowners") appeal the final judgment of foreclosure rendered in favor of Deutsche Bank National Trust Company, as indenture trustee for the benefit of the holders of the Aames Mortgage Investment Trust 2005-4 mortgage backed notes ("the Bank") after a non-jury trial. The Homeowners present three reasons why the trial court should have granted their motion for involuntary dismissal:

- The evidence does not establish the Bank's standing at the inception;
- The evidence does not support compliance with Paragraph 22 of the mortgage;
- The Bank's trial witness could not lay the business records predicate for admission of the payment history.

II. Appellant's Statement of the Facts

A. The Pleadings and Discovery

The Bank initiated this action when it filed its one-count mortgage foreclosure complaint.[1] The allegations of the complaint were verified under

[1]Verified Mortgage Foreclosure Complaint, August 24, 2011 (R. 7-36).

penalty of perjury by the Bank's servicer, Select Portfolio Servicing, Inc. ("the servicer").[2] These verified allegations included an allegation that a copy of the original note was attached to the Bank's pleading.[3] The note attached to the complaint identified the lender as Aames Funding Corporation d/b/a Aames Home Loan ("Aames") and did not include any endorsement, either in blank or specifically to the Bank.[4]

The trial court later ordered that the Bank file a "verified more definite statement of its standing."[5] The Bank responded to this order with a statement verified under penalty of perjury asserting that it had standing to prosecute the foreclosure on the day the lawsuit was filed.[6] The Bank attached to this verified statement what it averred was a true and correct copy of the original note which was also made payable to Aames and also did not include any endorsement.[7]

The Homeowners filed an answer in which they claimed they were without knowledge as to the Bank's allegation that it was entitled to enforce the note and

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[2]Verified Mortgage Foreclosure Complaint, pg. 4, August 24, 2011 (R. 10).

[3]Verified Mortgage Foreclosure Complaint, ¶2, August 24, 2011 (R. 8).

[4] Adjustable Rate Note attached to Verified Mortgage Foreclosure Complaint, August 24, 2011 (R. 33-36).

[5] Order on Defendants' Amended Motion to Dismiss Complaint, July 16, 2012 (R. 130).

[6]Verified More Definite Statement of Standing, ¶11, July 16, 2012 (R. 164).

[7]Verified More Definite Statement of Statement, Exhibit C, July 16, 2012 (R. 176-179).

therefore denied this allegation.[8] They also raised the affirmative defenses of lack of standing and non-compliance with conditions precedent in their responsive pleading.[9] In the latter, they specifically alleged that the Bank had not complied with Paragraph 22 of the mortgage, which required pre-suit notice and an opportunity to cure.[10]

The Bank moved for summary judgment asserting that it had proven its standing to sue by filing a copy of an allonge along with its verified more definite statement in support of its standing.[11] The Homeowners filed a reply memorandum asserting that this was not correct since no allonge was filed along with the Bank's verified statement.[12] The trial court denied the Bank's motion and, in the same order, set the matter for trial.[13]

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[8] Answer, ¶3, July 20, 2012 (R. 217).

[9] Third Affirmative Defense, "Plaintiff Lacks Standing," July 20, 2012 (R. 221-222).

[10]Second Affirmative Defense, "Plaintiff Failed to Comply with Conditions Precedent," July 20, 2012 (R. 219-220).

[11]Plaintiff's Motion for Final Summary Judgment of Foreclosure, pg. 14, July 17, 2013 (R. 347).

[12] Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, pg. 4, n. 1, November 18, 2013 (R. 462).

[13]Order Denying Plaintiff's Motion for Summary Judgment, November 20, 2013 (R. 482).

B. The Trial

The Bank's only witness at trial was Lorraine Baggs.[14] Baggs, an employee of the servicer, had begun working there only a month before trial.[15] Over the Homeowners' hearsay and authenticity objection, Baggs testified about the original note (Exhibit 1).[16] Under the court's own questioning, she expressed uncertainty as to whether the allonge had been affixed to the note, at which point the court opined that the witness's function was to communicate what she "knew" from reviewing records:

> THE COURT: Okay. So counsel was asking about allonges and things like that. When did all of that take place? He's concerned that the copy he got on the complaint is not the same as the original one.
>
> So, Ms. Baggs, tell me about the endorsements and allonges.
>
> THE WITNESS: The endorsement, this is -- I can't guarantee this is what happened. But the endorsement is affixed to the note. They have the same staple holes.
>
> THE COURT: You don't have to guarantee anything. You have to tell me what you know by reviewing the records.[17]

She then testified that the note contained an allonge endorsing the note in blank by Aames.[18]

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[14] T. 22.

[15] T. 22, 61.

[16] T. 34.

[17] T. 40-41.

[18] T. 41.

In any event, under direct questioning by the court, the witness asserted that the Bank acquired standing by an assignment of mortgage.[19] Yet, the witness did not have an assignment and did not know if there was one.[20]

She also identified, again over the Homeowners' objection, a bailee letter addressed to a law firm from the servicer[21] as well as a screenshot of the servicer's acquisition screen.[22] The court accepted the bailee letter (Exhibit 3)[23] and the screenshot (Exhibit 4) into evidence.[24]

And again over the Homeowners' hearsay and authentication objection, the Bank asked the witness to identify a notice of default letter[25] which specified a default date of August 1, 2008 (Exhibit 5).[26] Immediately after this testimony, however, the Bank's attorney alerted the trial court that the Bank had in fact received payments after August 1, 2008 which "bumped the due date by a few months."[27] No other demand letter was introduced or accepted into evidence.

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[19] T. 40.

[20] T. 109.

[21] T. 43.

[22] T. 45.

[23] T. 44.

[24] T. 46.

[25] T. 47.

[26] T. 48.

[27] *Id.*

Although the letter was dated May 15, 2009, the Bank sought to prove that it had actually been mailed six days earlier by way of a document that Bank handed her on the stand.[28] However, when it became apparent that the Bank had not given this document to the defense prior to trial, the Bank withdrew this document from evidence[29] and the Homeowners' request to strike the document from evidence was granted.[30]

Later, and as promised by the Bank's attorney, the witness testified that the loan was not due and payable for August 1, 2008, but January 1, 2009.[31] Despite Ms. [redacted] again objecting on hearsay and authenticity grounds,[32] the court permitted the witness to testify regarding the loan's payment history and that the numbers thereon matched up with the numbers on the Bank's proposed final judgment.[33]

On cross-examination, Baggs admitted that she did not know the exact date the Bank acquired possession of the note with the blank endorsement.[34] She also testified that she did not know whether the notice of default accepted into evidence

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[28] T. 49.

[29] T. 51.

[30] *Id.*

[31] T. 55.

[32] T. 56.

[33] T. 58.

[34] T. 65.

was a photocopy of the letter that was alleged to have been sent or a computer recreation[35] and conceded that she had no evidence that the letter was received by mortgagor, Ms. [redacted][36] Ultimately, she admitted she had no evidence whatsoever that the letter was actually mailed:

> Q. Do you have any evidence whatsoever that this letter was actually [[37]]mailed?
>
> A. No, I do not.[38]

The trial court even acknowledged that it fully understood that the witness knew nothing about whether the letter was actually sent—only that it was supposed to have been sent:

> Q. [The Homeowners' attorney] What's the name of the department of the division that generates the letters?
>
> MS. TEMPLER [The Bank's lawyer]: Objection. Relevance.
>
> THE COURT: Sustained.
>
> BY MR. ACKLEY:
>
> Q. Actually, if I may proffer for the record, I'm trying to get out the necessary requisite background to establish the foundation as business record. There's no testimony at this point reflecting any experience working with this loan or the departments that generated the letter.

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[35] T. 67.

[36] T. 77.

[37] The transcript indicates that the word was "e-mailed," but the context reveals that the questioning was about mailing, not emailing (T. 70-71).

[38] T. 72.

> THE COURT: … She doesn't know who sent that letter. She doesn't know when it was received. All she knows is pursuant to the mortgage contract, when a loan is in default, like every other loan that we litigate, the client or the borrower has to be sent a default letter. That's all she knows.[39]

The court went on to express the belief that "personal knowledge" sufficient to qualify a witness to introduce documents into evidence may be gained simply by reviewing them:

> THE COURT: Right. She's not going to know something that she doesn't know. And that's the ru[b] that we always have. What is required in accordance with the rules of evidence.
>
> I think what's required is a human being like we have today, who is a records custodian, she has to have some personal knowledge. It can't be just somebody off the street. She reviewed the records. She checked the numbers. And that's all she can say. These documents are kept in the regular course, according to the accustomed practice. They are generated by somebody with knowledge at or near the time, kept in the regular course. It's the function of the bank. End of story.
>
> Now, if an appella[te] court requires us to have somebody with personal knowledge from---
>
> When was that letter sent out?
>
> THE WITNESS: May 15th, 2009.
>
> THE COURT: From 2009, to have somebody in this room that was around in 2009, who can say yes, I sent the letter when the appeal court asks us to do that, I will do that. Or if the bank is supposed to get some sort of certification from 2009, right now, that's not the law.
>
> So, why do we have to go there.[40]

[39] T. 69-70 (emphasis added).

[40] T. 70-71 (emphasis added).

The cross-examination then turned to the payment history. Baggs admitted that a part of the payment history was generated by the previous servicer of the loan and that she had neither worked for that company nor reviewed that company's policies and procedures for maintaining payment histories.[41] After this testimony, the Homeowners moved to strike the payment history from evidence, but the motion was denied.[42]

On redirect, the witness described a "boarding process" for adopting the records of a previous servicer. Over a hearsay objection, the witness said that the information is mapped over and an audit is done "to review to make sure all of the information is electronically transferred [and] matches the system."[43] Other than making sure the information is accurately copied, the witness did not describe any audit by the new servicer that would insure that the original information was accurate or trustworthy.

After the close of the Bank's case, the Homeowners made a motion for involuntary dismissal first reasserting that the witness's testimony did not qualify her for application of any hearsay exception.[44] They argued that the Bank failed to

[41] T. 102.

[42] T. 102-103.

[43] T. 116.

[44] T. 119.

prove its standing to sue at the inception of the action.[45] They also asserted that involuntary dismissal was proper because, as the trial court itself pointed out, there was no evidence that the demand notice was actually mailed,[46] and even if mailed, was insufficient for Paragraph 22 purposes.[47] The trial court denied the motion.[48]

During the Homeowners' case-in-chief, Ms. [redacted] testified that she never saw the notice mailed to her house.[49] Additionally, Ms. [redacted] testified that she and Mr. Varacel were the only two individuals responsible for opening mail on May 15, 2009.[50] Mr. Varacel also proffered that he too never received the notice.[51]

After the close of all testimony, the Homeowners renewed their motion[52] which the court again denied. The court entered judgment in favor of the Bank.[53]

This appeal followed.

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[45] T. 119-122.

[46] T. 122.

[47] T. 122-130.

[48] T. 134.

[49] T. 136.

[50] T. 136.

[51] T. 145.

[52] T. 149.

[53] T. 150.

SUMMARY OF THE ARGUMENT

The trial court should have granted the Homeowners' motion for involuntary dismissal because the Bank failed to prove a *prima facie* case for foreclosure. Initially, the only evidence presented at trial of the Bank's standing was the blank endorsement on the allonge affixed to the note. But the witness could not testify when the allonge was affixed to the note or the exact date the Bank gained possession of the note. Without this evidence, the trial court was required to grant the Homeowners' involuntary dismissal.

Additionally, the Bank failed to provide any evidence whatsoever that the notice of default was actually sent to Ms. [redacted] In fact, the only document which the Bank's witness claimed supported this contention was actually withdrawn by the Bank and properly stricken by the court. Further, even if the Bank did send the notice, the letter did not comply with the plain language of the notice requirements in the mortgage. Therefore, there was no evidence of compliance with conditions precedent to foreclosure.

Finally, the Bank's witness was wholly incompetent to lay the business records hearsay exception for Bank's documents and they should have been excluded from evidence.

Therefore, this Court should reverse the judgment with instructions that the trial court enter an order of involuntary dismissal on remand.

STANDARD OF REVIEW

A trial court's ruling of a motion for involuntary dismissal is reviewed *de novo*. Likewise, a party's standing to bring a foreclosure action is required *de novo*. *LaFrance v. U.S. Bank Nat. Ass'n*, 141 So. 3d 754, 755 (Fla. 4th DCA 2014); *Lacombe v. Deutsche Bank Nat. Trust Co.*, 149 So. 3d 152 (Fla. 1st DCA 2014) ("We review the sufficiency of the evidence to prove standing to bring a foreclosure action *de novo*.").

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. 2dDCA 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. 3dDCA 1987); *see also, Blazina v. Crane*, 670 So. 2d 981, 983 (Fla. 2dDCA 1996) (reversing where there was no record support for the trial court's findings of fact).

An appellate court reviews a trial court's decision to admit evidence for abuse of discretion. *Hudson v. State*, 992 So. 2d 96, 107 (Fla. 2008) . However, the *de novo* standard applies when the issue is whether the trial court erred in

applying a provision of the Florida Evidence Code (here, § 90.803(6), Fla. Stat.). *See Shands Teaching Hosp. and Clinics, Inc. v. Dunn*, 977 So. 2d 594, 598 (Fla. 2d DCA 2007); *Lucas v. State*, 67 So. 3d 332, 335 (Fla. 4th DCA 2011); *see also Burkey v. State*, 922 So. 2d 1033, 1035 (Fla. 4th DCA 2006) (question of whether evidence falls within the statutory definition of hearsay is a matter of law subject to *de novo* review).

ARGUMENT

I. The trial court should have granted the Homeowners' motion for involuntary dismissal.

When confronted with the Homeowners' motion for involuntary dismissal, the trial court was required to determine whether the Bank had made a *prima facie* showing of foreclosure based on competent, substantial evidence. *Valdes v. Association Ined, HMO, Inc.*, 667 So. 2d 856, 856-57 (Fla. 3dDCA 1996). Because no view of the evidence or testimony presented at trial establishes this, the trial court erred in denying the motion.

A. The Bank failed to establish that it had standing to sue on the day the lawsuit was filed.

1. The pleadings and pre-trial filings evidenced that the Bank lacked standing on the day the lawsuit was filed.

The party seeking foreclosure must prove that it had standing to enforce the note on or before the day the lawsuit was filed. *Boyd v. Wells Fargo Bank, N.A.*, 143 So.3d 1128 (Fla. 4th DCA 2014) (reversing summary judgment of foreclosure because foreclosing lender failed to produce documentation establishing that it had standing at the time it filed the foreclosure complaint); *LaFrance*, 141 So. 3d at 755 (Fla. 4th DCA 2014) ("A crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose…Standing to foreclose is determined at the time the lawsuit is filed.) (Citations omitted).

If the foreclosing plaintiff is not the original lender, standing (to enforce the note[54]) may be established by submitting the promissory note with a blank or special endorsement, an assignment of the note, or an affidavit that proves the plaintiff's noteholder status. *Focht v. Wells Fargo Bank, N.A.*, 124 So.3d 308, 310 (Fla. 2dDCA 2013). Nevertheless, this evidence must be established on the day the foreclosure lawsuit was filed. *Id.*; *Wright v Deutsche Bank Nat'l Trust Co.*, Case No. 4D13-3221 (Fla. 4th DCA January 7, 2015) (reversing final judgment after trial because note attached to complaint was not endorsed, endorsement was not dated, and bank failed to present testimony or evidence as to date of endorsement); *Joseph v. BAC Home Loans Servicing, LP*, Case No. 4D12-4137 (Fla. 4th DCA January 7, 2015) (reversing with instructions to vacate the final judgment and enter a dismissal of the complaint after trial because "the plaintiff produced no evidence to show that it owned the note or mortgage on the date of the filing of the complaint."); *Fischer v. U.S. Bank National Association*, Case No. 4D13-3798 (Fla. 4th DCA January 7, 2015) (reversing with instructions to enter final judgment in favor of defendant because bank failed to prove that it had

[54] Many written opinions simply state, without analysis or careful draftsmanship, that establishing oneself as a holder of the note under Article 3 of the Uniform Commercial Code ("UCC") is sufficient to foreclose as if the UCC applies to non-negotiable instruments such as mortgages. In reality, the plaintiff must also prove itself to be the mortgagee to enforce the mortgage lien. Although mortgages are said to "follow the note," equity contemplates that only the owner, not the holder, of the note could be the beneficiary of such automatic transfers.

standing at the time the complaint was filed); *Deutsche Bank Nat'l. Trust Co. v Boglioli*, Case No. 4D13-2323 (Fla. 4th DCA January 7, 2015) (affirming final judgment in favor of borrower because bank failed to present competent, substantial evidence at trial to prove that it had standing at time complaint was filed).

In this case, attached to its complaint was what the Bank alleged, under penalty of perjury, was a correct copy of the original note.[55] That note, however, was made payable to Aames, and did not contain any endorsement, either in blank or specifically to the Bank. Nor did the Bank attach any "allonge" to the complaint, whether "affixed" to the note or not.[56]

The Bank thereafter filed a "verified" more definite statement which averred, once again under penalty of perjury, that a true and correct copy of the original note was attached as an exhibit.[57] The copy of the note attached to this verified statement, however, was identical to the note attached to the complaint

[55] Complaint, August 24, 2011 (R. 33-36).

[56] *Id*. An allonge is a piece of paper annexed to a promissory note on which to write an endorsement when there is no more room to write the endorsement on the note itself; this paper must be so firmly affixed to the note that it becomes a part of the instrument. *Isaac v. Deutsche Bank Nat. Trust Co.*, 74 So 3d 495, 496 n. 1 (Fla. 4th DCA 2011); *Taylor v. Deutsche Bank Nat. Trust Co.*, 44 So. 3d 618, 623 n. 2 (Fla. 5th DCA 2010). This definition, particularly that an allonge must be "affixed" to the note, is the crux of the Homeowners' argument.

[57] Verified More Definite Statement of Standing, ¶7, July 16, 2012 (R. 163-164).

since it was made payable to Aames and did not include any endorsement or any allonge.[58]

In their answer, both the Homeowners pled that they were without knowledge of the Bank's allegation that it was entitled to enforce the note and therefore denied this allegation.[59] Homeowners also raised the affirmative defense of lack of standing in their affirmative defenses.[60]

Thus, at the time the matter was set for trial the record reflects two sworn statements filed by the Bank "authenticating" two separate "true and correct" purported copies of the original note, neither of which were made payable to Aames and neither of which contained endorsements, either on the note itself or an allonge affixed to the note; an answer by the Homeowners denying the Bank's

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[58] Verified More Definite Statement of Statement, Exhibit C, July 16, 2012 (R. 176-179). The Bank falsely represented to the trial court in its motion for summary judgment that a copy of an allonge was filed along with its verified statement. Plaintiff's Motion for Final Summary Judgment of Foreclosure, pg. 14, July 17, 2013 (R. 347). The Homeowners pointed this out in their response to the Bank's motion. Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, pg. 4, n. 1, November 18, 2013 (R. 462). The Bank has not taken any corrective action to correct this obvious misstatement in the record.

[59] Answer, ¶3, July 20, 2012 (R. 217). Because the Homeowners denied the Bank's right to enforce the note in their answer, this was an issue it had to prove. *Carapezza v. Pate*, 143 So.2d 346, 347 (Fla. 3dDCA 1962); *Gee v. U.S. Bank Nat. Ass'n*, 72 So. 3d 211, 214 (Fla. 5th DCA 2011) ("When Ms. Gee denied that U.S. Bank had an interest in the Mortgage, ownership became an issue that U.S. Bank, as the plaintiff, was required to prove.")

[60] Third Affirmative Defense, "Plaintiff Lacks Standing," July 20, 2012 (R. 221-222).

right to enforce the note; and an affirmative defense of lack of standing. The Bank was therefore required to prove, through competent and substantial evidence, that it was the owner of the note on the day the lawsuit was filed. This it failed to do.

2. The evidence and testimony at trial failed to prove the Bank's standing at inception.

On a direct question posed by the court, the Bank's witness first testified that the Bank acquired its standing through an assignment of mortgage.[61] However, this purported assignment of mortgage was never introduced or admitted as an exhibit at trial.[62] The witness testified that she did not have an assignment of mortgage and, in fact, did not know if there was one.[63] Therefore, the witness's initial testimony regarding the never-produced assignment which she was not sure even existed fails to establish the Bank's standing at the inception of the lawsuit.

Next, the witness testified (over the Homeowners' objection) regarding the contents of the July 20, 2009 bailee letter (Exhibit 3), testifying that this letter indicated that the note and mortgage were sent from the servicer to a law firm on that date.[64] But the witness did not testify that the note contained any endorsements on that day, and the bailee letter is silent on this issue.[65] Therefore,

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[61] T. 40.

[62] Clerk's Exhibit List, May 28, 2014.

[63] T. 109.

[64] T. 43.

[65] Bailee Letter, Plaintiff's Exhibit 3.

the bailee letter does not establish that the Bank had the right to enforce the note when it was allegedly sent to the law firm.[66]

Likewise, the "acquisition screen shot" admitted (also over objection) as Exhibit 4 fails to establish the Bank's standing. As the Bank's own witness testified, this screenshot merely shows when the servicer "acquired" the servicing rights to the loan, not the date when Bank acquired the right to enforce the note.[67] Moreover, nothing on the document indicates that a fully endorsed note was transferred at that time.

Ultimately, the witness—who had not seen the original note until a week before trial[68]—conceded that she did not know when the endorsement was added to the four page note:

> Q. [The Homeowners' attorney] When did the Plaintiff come into possession of the note that has the -- or the endorsement that's attached to the note that's before you?
>
> A. I don't have the exact date, but the documents were all [apart] -- what we have in our imaging system is copies of the document, and each document is a four page document. And it goes from Page 1 to Page 4. They are all imaged together.

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[66] The testimony or evidence of an endorsement on the note is crucial because the Bank would not have had the right to enforce the note unless the note was either endorsed in blank or specifically to it since it was not the original lender.

[67] T. 45. In fact, nowhere on this "acquisition screenshot" is the Bank even mentioned. Acquisition Screenshot, Plaintiff's Exhibit 4. (Note that the document states "Acquisition Type 3" which is listed as a "Serv[ice] Transfer").

[68] T. 66.

> So, the fact that this is separated, I don't know when it happened, or when it was imaged. All of the documents were together.

Q. When was that?

A. Sometime after February, 2009, when the loan was acquired.[69]

Therefore, as the witness admitted under cross examination,[70] the only evidence of the Bank's standing was the original note accepted into evidence as Exhibit 1. And the note itself is insufficient to prove standing at inception. This is because the only indication of the Bank's right to enforce the note is found on the allonge which contains an undated blank endorsement.[71]

And when a foreclosing plaintiff attempts to prove its standing through an allonge, it must prove that the allonge "took effect" on or before the day the lawsuit was filed. *Cutler v. U.S. Bank*, 109 So. 3d 224, 226 (Fla. 2d DCA 2012). In order for an allonge to "take effect," it must be affixed to the note it

[69] T. 65.

[70] T. 108.

[71] Adjustable Rate Note, Plaintiff's Exhibit 1. To avoid confusion, it should be noted that the allonge (not the endorsement) bears a date of August 2, 2005 in the top right corner. Because there is no evidence of when the allonge was attached, whether that date (apparently, the date the unendorsed allonge was prepared) bears any relationship to the date that the endorsement was placed on the allonge is irrelevant. The date on the allonge is not indicative of when the endorsement was executed—just as the date that a note is signed would not be indicative of when an endorsement was placed on the last page of the note. It is notable that this date is typed, while the signature is handwritten and stamped. Coupled with the fact that the endorser appears to have corrected the "Note Date" on the allonge by hand rather than re-typing that information, it suggests that the typed portions of the allonge had been prepared some indeterminate amount of time before the actual endorsing.

accompanies. Fla. Stat. §673.2041 (1) ("[f]or the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument"); *Issac*, 74 So. 3d at 496 n. 1. Apparently, no Florida court has articulated what is considered a legally sufficient mode of annexing or affixing an allonge to an instrument, although a body of case law has developed on this issue in other states. *Wells Fargo Bank, N.A. v. Bohatka*, 112 So. 3d 596, 604 n. 4 (Fla. 1st DCA 2013). This body of case law is clear that, despite the exact mode of affixation, the allonge must somehow be physically made part of the note. *See e.g. Adams v. Madison Realty & Dev., Inc.*, 853 F.2d 163 (3d Cir. 1988) (mere folding of the alleged allonge around the note is insufficient); *HSBC Bank USA v. Thompson*, 2010 Ohio 4158 (Ohio App. 2010) (unattached pages cannot be an allonge); *In re Weisband*,427 B.R. 13 (Bkrtcy.D.Ariz. 2010) (same).

The common law actually required gluing. ALI, Comments & Notes to Tentative Draft No. 1 – Article III 114 (1946), reprinted in 2 Elizabeth Slusser Kelly, Uniform Commercial Code Drafts 311, 424 (1984) ("[t]he indorsement must be written on the instrument itself or an allonge, which, as defined in Section _____, is a strip of paper so firmly pasted, stapled or otherwise affixed to the instrument as to become part of it.") Modern courts have equated stapling with gluing. *Lamson v. Commercial Credit Corp.*, 531 P. 2d 966, 968 (Co. 1975) ("Stapling is the modern equivalent of gluing or pasting. Certainly as a physical

matter it is just as easy to cut by scissors a document pasted or glued to another as it is to detach the two by unstapling"); *accord Southwestern Resolution Corp. v. Watson*, 964 S.W.2d 262, 263 (Tex.1997). In any event, the law appears well-settled on the issue: the allonge must somehow be physically attached to the note in order for it to be affixed. Otherwise, it is piece of paper with no legal effect.

At trial, the Bank failed to prove that the allonge in question had any more legal significance than any other stray piece of paper. The Bank was required to prove not only its "physical possession" of the note prior to the day the lawsuit was filed, but that the note was also properly endorsed. *Kiefert v. Nationstar Mortg., LLC*, 39 Fla. L. Weekly D2591 (Fla. 1st DCA Dec. 16, 2014); *Sosa v. U.S. Bank National Association*, 39 Fla. L. Weekly D2554 (Fla. 4th DCA December 10, 2014) (judgment reversed and case remanded for involuntary dismissal where bank failed to prove date of endorsement).

Without testimony or evidence that the allonge was physically affixed to the note on or before the day the lawsuit was filed, the Bank failed to present a *prima facie* case for mortgage foreclosure and the trial court was required to grant the Homeowners' motion for involuntary dismissal. *May v. PHH Mortg. Corp.*, 150 So. 3d 247, 248 (Fla. 2d DCA 2014) ("May's motion for involuntary dismissal could only have been denied if the court found that the bank presented competent substantial evidence to establish a prima facie case.").

3. The proper remedy on remand is reversal.

Where a foreclosing plaintiff fails to establish its standing at the inception of the lawsuit, reversal of the final judgment and entry of an involuntary dismissal on remand is appropriate. *See Lacombe v. Deutsche Bank Nat. Trust Co.*, 149 So. 3d at 156; *Correa v. U.S. Bank, N.A.*, 118 So. 3d 952, 955 (Fla. 2dDCA 2013); *cf. Guerrero v. Chase Home Fin., LLC*, 83 So. 3d 970, 973 (Fla. 3dDCA 2012) (remanding with specific directions to allow the plaintiff to properly reestablish the note upon a proper pleading—but only because the evidence "confirmed the current owner/holder's entitlement to foreclose the mortgage attached to the complaint").

Therefore, on remand, the trial court should be instructed to enter an involuntary dismissal.

B. The Bank failed to prove compliance with conditions precedent to filing foreclosure.

1. There is no evidence that the notice was sent in accordance with the terms of the mortgage.

Prior to filing the foreclosure action, the Bank was required to send Ms. a notice of default and opportunity to cure which complied with Paragraph 22 of the mortgage. The Bank, however, failed to present any competent substantial evidence that this notice was sent and therefore the trial court should have granted the Homeowners' motion for involuntary dismissal.

The Bank adduced a single document—purportedly a copy of the notice itself—to prove that it sent a notice. The Bank's only witness, however, could not even testify whether the exhibit was a photocopy or a computer recreation of what the document might have looked like.[72] Additionally, while the witness initially identified a document she said would show that the letter was mailed (six days earlier than the date on the letter),[73] the Bank withdrew the document from evidence and the Homeowners' subsequent request to strike was granted.[74] Since the Bank withdrew (and the court struck) the only document which would have informed the witness as to when (if ever) the notice was mailed, the witness's testimony did not provide competent, substantial evidence that the Bank mailed the notice to Ms. [redacted] *Sas v. Federal Nat. Mortg.Ass'n*, 112 So. 3d 778 (Fla. 2dDCA 2013) (reversing final judgment of foreclosure after trial because trial court permitted bank witness to testify, over objection, to contents of business record without first introducing the record into evidence.)

Furthermore, even if the document substantiating the witness's testimony had not been withdrawn and stricken from evidence, it would have been expressly contradicted by the notice itself since the notice contained a date of May 15, 2009

[72] T. 67.

[73] T. 49.

[74] T. 51.

(rather than May 9, 2009).[75] In other words, the Bank's evidence and testimony would have been that the notice was mailed six days before it was even drafted. This cannot be considered competent, substantial evidence that the notice was mailed.

Furthermore, on cross-examination, the witness admitted that she had no evidence that the notice was mailed by the servicer[76] and no evidence whatsoever that Ms. [redacted] received the notice.[77] This testimony is critical because Paragraph 15 of the mortgage requires that all notices sent pursuant to the mortgage are deemed to have been given either when mailed by first class mail or when actually delivered to Ms. [redacted].[78] Here, there was no evidence to find that the conditions had been satisfied for the notice to "be deemed to have been given" because there was no evidence that that the letter was sent by first class mail. In fact, the notice itself does not say anything about the manner in which it might have been sent.

The Bank could have tried to offer such proof that the notice was mailed by first class mail by way of testimony that it was the servicer's normal routine

[75] Notice dated May 15, 2009, pg. 1 of 2, Plaintiff's Exhibit 5.

[76] *Id.* Again, while the transcript reflects the question posed as whether the witness had any evidence that the notice was "e-mailed," this is clearly a typo.

[77] T. 72.

[78] Mortgage, pg. 11, ¶15, Plaintiff's Exhibit 2, February 28, 2014.

practice to send such letters by first class mail.[79] *See Brown v. Giffen Indus., Inc.*, 281 So. 2d 897, 900 (Fla. 1973) (the requirement of showing proper mailing satisfied by proof of general office practice); *Berwick v.Prudential Prop.&Cas. Ins. Co.*, 436 So. 2d 239, 240 (Fla. 3dDCA 1983) (same). But the witness was not qualified to provide such testimony because she testified that she was not an employee at the time the notice was allegedly mailed.[80] *See Eig v. Ins. Co. of N. Am.*, 447 So. 2d 377, 379 (Fla. 3dDCA 1984) (testimony from witness who was not an employee of the company at the relevant time was incompetent to establish the routine practice of that company). Given that the witness expressly admitted that she had no evidence that the notice was mailed at all—whether it was by first class mail or otherwise—there was insufficient evidence to support a finding that the notice was mailed to Ms. by first class mail.

Additionally, Ms. testified that she never saw the notice.[81] This testimony was bolstered by Mr. Varacel's proffer that he too never received the notice.[82] Since Ms. testified that only she and Mr. Varacel were the only

[79] T. 61.

[80] T. 61 (testimony admitting that the witness had only worked for the servicer for one month prior to trial.)

[81] T. 136.

[82] T. 145.

two individuals responsible for opening mail on May 15, 2009,[83] and since the testimony establishes that neither Ms. [redacted] nor her husband received the notice, the Bank was not entitled to a finding that the notice was delivered to Ms. [redacted] All Baggs testimony established was that she had no reason to "think" that the notice did not get mailed because the notice was created for "everyone" and the servicer "assures" that the notice was mailed to the borrower. But she had no personal knowledge of this because, as she admitted, she did not work in the department responsible for generating default notices;[84] had not read the policies and procedures that were in place regarding sending notices at the time the notice was allegedly sent;[85] and did not know anyone who works in the department responsible for mailing default notices, either at the time the notice was allegedly sent to Ms. [redacted] or at the time her testimony was taken.[86] Baggs was thus legally incompetent to give any testimony regarding mailing.

Finding that the Bank actually sent a notice in accordance with the mortgage requires more than the mere existence of some piece of paper. There must be proof that the notice was actually sent as required by Paragraph 15 of the mortgage. Since the Bank failed to present any testimony or evidence indicating

[83] T. 136.

[84] T. 78.

[85] T. 79.

[86] T. 80.

that the notice was sent as required, and because Ms. [redacted] testimony and Mr. Varacel's proffer clearly established that they did not receive the notice, there is no competent, substantial evidence that the Bank complied with the mortgage's notice provisions. The Homeowners' motion for involuntary dismissal should therefore have been granted.

2. Even assuming it was sent, the notice did not comply with the mortgage's unambiguous requirements.

Paragraph 22 of Ms. [redacted] mortgage provides that the borrower be given thirty-days' notice to cure a default before the lender may bring a foreclosure action:

> 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 Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure.

It is black letter law that this language in the mortgage is clear, unambiguous, and creates conditions precedent to filing foreclosure. *Konsulian v. Busey Bank, N.A.*, 61 So.3d 1283 (Fla. 2dDCA 2011). Furthermore, where, as

here, a mortgage contains specific requirements for the contents of the pre-acceleration notice that must be given, a plaintiff is not entitled to foreclosure unless the evidence shows that it provided notice in a form that included all of the required contents. *Kurian v. Wells Fargo Bank, N.A.*, 114 So.3d 1052, 1055 (Fla. 4th DCA 2013) (finding notice insufficient for failing to "advise of the default, provide an opportunity to cure, or provide thirty days in which to do so"); *Haberl v. 21st Mortg. Corp.*, 138 So. 3d 1192 &n.1 (Fla. 5th DCA 2014) (finding notice insufficient for failing to meet mortgage's requirements of informing the borrower of "the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or other defense of borrower to acceleration and foreclosure").

Because the notice admitted into evidence at trial does not comply with Paragraph 22 for two distinct reasons, Ms. [redacted] motion for involuntary dismissal should also been granted even if the Bank had been able to prove the notice was sent.

The notice does not inform of the right to reinstate.

Paragraph 22 is clear that the notice must inform Ms. [redacted] of her right to reinstate after acceleration. The notice admitted at trial, however, fails to do this. Rather, it states that the servicer's "acceptance of one or more payments for less

than the amount required to cure the default shall not be deemed to reinstate your loan or waive any acceleration."[87]

The Fifth District has held that this exact language is wholly insufficient to satisfy Paragraph 22's requirement that the notice inform the borrower of the right to reinstate:

> [I]t is apparent in comparing the letter to the requirements of paragraph 22 that it does not comply with the notice requirements set forth in paragraph 22 of the mortgage. Importantly, it does not inform the [borrowers] of their right to reinstate after acceleration. Rather, it informs the [borrowers] that the 'acceptance of one or more payments for less than the amount required to cure the default shall not be deemed to reinstate [their] loan or waive any acceleration of the loan.' This in no way suggests the right to reinstate after acceleration.

Samaroo v. Wells Fargo Bank, 137 So. 3d 1127, 1129 (Fla. 5th DCA 2014).

In support of her motion for involuntary dismissal, the Homeowners actually cited *Samaroo*.[88] Despite reading the opinion into the record, the trial court inexplicably found that the notice was "one hundred percent in compliance with Paragraph 22."[89] This finding was error because the notice does not, in any way, inform Ms. [redacted] of her right to reinstate after acceleration.

[87]Notice dated May 15, 2009, pg. 1 of 2, Plaintiff's Exhibit 5.

[88] T. 126.

[89] T. 130.

Finally, any argument from the Bank that it "substantially complied" is without merit:

> Wells Fargo contends that it 'substantially' complied with the contractual notice requirements, an argument we cannot credit. None of the cases cited by Wells Fargo involved compliance with pre-acceleration notice requirements contained in a mortgage. Its own mortgage specified the important information that it was bound to give its borrower in default, and it simply failed to do so.

Samaroo, 137 So. 3d at 1129. Therefore, the Homeowners' motion for involuntary dismissal should have been granted.

The notice improperly included a breach that had already been cured.

Furthermore, the notice did not specify the default Ms. [redacted] allegedly committed and the action required to cure that default—rather, it alleged a default that the witness testified was actually cured and a cure amount that clearly contained payments already made.

Specifically, the notice alleges that Ms. [redacted] "loan is currently due and owing for the 08/01/2008 payment and subsequent payments."[90] Indeed, the witness admitted on direct examination that the default date listed on the letter was August 1, 2008.[91] Immediately after this testimony was given, however, the Bank's attorney alerted the trial court that it would be introducing evidence of

[90]Notice dated May 15, 2009, pg. 1 of 2, Plaintiff's Exhibit 5 (emphasis added).

[91] T. 48.

payments after August 1, 2008.[92] And this is exactly what Baggs's testimony established.

The witness unequivocally testified that the loan was due and owing for January 1, 2009.[93] While this testimony may match up with the default alleged in the complaint,[94] it does not match up with the default alleged in the notice. And the failure to specify the default in the notice letter is fatal to the Bank's claim that sufficient notice was given. *Judy v. MSMC Venture, LLC*, 100 So.3d 1287 (Fla. 2dDCA 2012) (reversing summary judgment of foreclosure because lender failed to specify the default as required by Paragraph 22.)

The failure to specify the proper default date also renders the notice ambiguous because the notice demanded, at a minimum, that Ms. [redacted] tender $42,412.51.[95] But included in this number were delinquent payments from August 1, 2008 through January 1, 2009 which the Bank's witness testified were not due.

And finally, the notice is also ambiguous because it does not provide a definite course of action Ms. [redacted] could take to cure the default since it required Ms [redacted] to "take such actions" that the servicer may "reasonably require"

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[92] *Id.*

[93] T. 55.

[94] Complaint, ¶5, August 24, 2011 (R. 8).

[95] Notice dated May 15, 2009, pg. 1 of 2, Plaintiff's Exhibit 5..

without explaining what these actions were or how to perform them.[96] As such, the notice fails to specify the action required to "cure" the default.

The notice was designed, according to the parties' express agreement in the mortgage, to "specify" the default and to precisely identify the action to cure. And specify means to mention specifically in full and explicit terms so that misunderstanding is impossible. *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992)(explaining that "'Specify' means [t]o mention specifically; to state in full and explicit terms; to point out; to tell or state precisely or in detail; to particularize, or to distinguish by words one thing from another…"Specify" means a statement explicit, detailed, and specific so that misunderstanding is impossible.") (Citations omitted). The alleged notice does not specify "the default," nor does it appropriately explain the action required to cure the default.

In short, not only does the notice fail to inform Ms. [redacted] of the right to reinstate or give a definite course of action Ms. [redacted] had to take to cure the default, <u>but it also demanded a sum of money to which the Bank was not even entitled</u>. It does not comply with the plain language of Paragraph 22.[97]

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[96] *Id*.

[97] While this argument may not have been specifically presented to the trial court in Ms. [redacted] motion for involuntary dismissal, this Court may still consider it when considering whether the notice admitted at trial was sufficient evidence to support the judgment. Fla. R. Civ. P. 1.530(e).

3. The proper remedy on remand is involuntary dismissal.

The demand letter was a key element of the Bank's *prima facie* foreclosure case. *Kelsey v. SunTrust Mortg., Inc.*, 131 So.3d825, 826(Fla. 3dDCA 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 [borrowers'] outstanding debt on the note." [emphasis added]). Therefore, in order for there to be sufficient evidence to support the judgment, there must be proof that the Bank sent Ms. [redacted] a sufficient Paragraph 22 notice. Short of this, involuntary dismissal must be entered on remand.

This Court has explicitly recognized that where a mortgage contains a notice provision and this provision is not complied with, dismissal is the appropriate remedy. *Rashid v. Newberry Fed. S& L Ass'n*, 526 So.2d 772 (Fla. 3d DCA 1988) (holding that implicit in a prior decision by this Court reversing summary judgment of foreclosure for failure to give the required notice of default prior to instituting the foreclosure proceeding was that the case be dismissed on remand.)

The Fourth District's *sua sponte* holding in *Holt v. Calchas, LLC*, 39 Fla. L. Weekly D2305 (Fla. 4th DCA November 5, 2014) concluding that failure to comply with the demand letter requirements of a mortgage does not require dismissal of the foreclosure action is simply incorrect. Indeed, this holding (that expresses the belief that the bank could still recover payments missed in the past)

not only overlooks *Rashid*, but is contradicted by Paragraph 20 of the mortgage which explicitly prohibits either the borrower or the lender from commencing, joining, or being joined to any judicial action that alleges the other party breached any term of the mortgage until notice has been given to the other party.[98]

Therefore, prior precedent from this Court demands that upon remand, the case be dismissed because the Bank has failed to present sufficient proof of proper notice prior to filing the lawsuit.

C. The witness could not lay the foundation for the payment history the trial court accepted into evidence.

1. The witness could not lay the business records foundation for the payment history (i.e. hearsay cannot be used to establish a hearsay exception).

To properly authenticate hearsay documents under the "business records" exception, the proponent must establish that

1) The hearsay document was made at or near the time of the event;

2) The hearsay document was made by or from information transmitted by a person with knowledge;

3) The hearsay document was kept in the ordinary course of a regularly conducted business activity;

4) It was a regular practice of that business to make such the hearsay document; and

5) The circumstances do not show a lack of trustworthiness.

[98]Mortgage, pg. 13, ¶20, Plaintiff's Exhibit 2. In fact, Paragraph 20 of the mortgage explicitly recognizes that the Paragraph 22 notice satisfies the requirements of Paragraph 20. *Id.*

§ 90.803(6), Fla. Stat.; *Yisrael v. State*, 993 So. 2d 952, 956 (Fla. 2008).

Furthermore, a witness purporting to establish this predicate at trial must have personal knowledge of the record-keeping practices to be qualified to lay a foundation for their admission into evidence under the business records exception. *Yang v. Sebastian Lakes Condo. Ass'n*, 123 So. 3d 617, 621 (Fla. 4th DCA 2013) (holding that despite witness's use of "magic words"—the elements of a business records exception to hearsay—records were inadmissible because the witness did not have the personal knowledge required to lay a foundation for business records of an entity for whom she had never worked and about whose record-keeping practices she had no personal knowledge). The personal knowledge required to introduce a company's records is not familiarity with what the records say, but with the facts of how, when, and why the records were created and kept. *Id*.

But to even be permitted to testify to these threshold facts, the witness must be a records custodian or an otherwise "qualified" witness—that is, one who is in charge of the activity constituting the usual business practice or sufficiently experienced with the activity to give the testimony. *Hunter v. Aurora Loan Servs., LLC*, 137 So. 3d 570, 573 (Fla. 1st DCA 2014) (finding witness unqualified where the witness "lacked particular knowledge of a prior servicer's record-keeping procedures and "[a]bsent such personal knowledge, he was unable to substantiate when the records were made, whether the information they contain derived from a

person with knowledge, whether [the previous servicer] regularly made such records, or, indeed, whether the records belonged to [the previous servicer] in the first place."); *Burdeshaw v. Bank of New York Mellon*, 148 So. 3d 819 (Fla. 1st DCA Oct. 13, 2014) (reversing and remanding for dismissal because bank failed to establish any foundation qualifying the exhibit as a business record or its witness "as a records custodian or person with knowledge of the four elements required for the business records exception"); *Lacombe v. Deutsche Bank Nat. Trust Co.*, 149 So. 3d 152 (Fla. 1st DCA 2014) (reversing and remanding for dismissal because bank's witness was not a records custodian for the current servicer or any of the previous servicers); *Holt v. Calchas, LLC*, 39 Fla. L. Weekly D2305 (Fla. 4th DCA November 5, 2014) (witness was not qualified to introduce bank's payment records over hearsay objection).[99] *See also Mazine v. M & I Bank*, 67 So.3d 1129, 1131 (Fla. 1st DCA2011) (holding that a witness was not qualified because the witness "had no knowledge as to who prepared the documents submitted at trial by the bank as he is not involved in the preparation of documents such as the ones proffered by the bank, that he does not keep records as a records custodian, that he

[99] Notably, in *sua sponte dicta*, the panel in *Holt* declared that an assignment of mortgage and a notice of acceleration would be admissible over a hearsay objection as "verbal acts." *Id*. at *7, n. 2. This decision was simply incorrect because the date on the notice of acceleration was offered for the truth of the matter asserted (the implied assertion being that it was mailed on that day), and therefore, was not a verbal act. *See*, Law Revision Council Note—1976 for § 90.801, Fla. Stat., Subsection (1)(c) and cases cited therein.

has no personal knowledge as to how the information…was determined…"); *Lassonde v. State*, 112 So. 3d 660, 662 (Fla. 4th DCA 2013) ("The customer service clerk's testimony does not meet the requirements of *Yisrael*. While the clerk was able to testify as to how the store re-rings merchandise stolen from the store, this was not his duty nor within his responsibilities."); *Snelling & Snelling, Inc. v. Kaplan*, 614 So. 2d 665, 666 (Fla. 2dDCA 1993) (holding that a witness who relied on ledger sheets prepared by someone else was not sufficiently familiar with the underlying transactions to testify about them or to qualify the ledger as a business record); *Alexander v. Allstate Ins. Co.*, 388 So.2d 592, 593 (Fla. 5th DCA 1980) (holding that an adjuster was not qualified to testify about the usual business practices of sales agents at other offices). *See also Specialty Linings, Inc. v. B.F. Goodrich Co.*, 532 So. 2d 1121, 1122 (Fla. 2dDCA 1988) (testimony was insufficient under the business records exception to hearsay because the witness was not the custodian, and was not in charge of the activity constituting the usual business practice); *Thomasson v. Money Store/Florida, Inc.*, 464 So. 2d 1309, 1310 (Fla. 4th DCA 1985) (statement that demonstrates no more than that the documents in question appear in the company's files and records is insufficient to meet the requirements of the business record hearsay exception); *Holt v. Grimes*, 261 So. 2d 528, 528 (Fla. 3d DCA 1972) (records properly excluded where there was "no testimony as to the mode of preparation of these records nor was the witness

testifying in regard to the records in the relationship of 'custodian or other qualified witness'"); *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825 (Fla. 3dDCA 2014) (holding that without the proper foundation, the documents relied upon by the professional witness were indisputably hearsay.)

Here, Baggs testified that the first part of the payment history accepted into evidence was generated by the previous loan servicer.[100] But the witness testified that she never worked for the prior loan servicer or reviewed its policies and procedures for maintaining payment histories.[101] In short, the witness had absolutely no personal knowledge regarding the document for which she had parroted the "magic words."

Therefore, the trial court erred when it denied the Homeowners' motion to strike the document based on the witness's inability to lay the predicate for admission.[102] As the witness admitted, the servicer's payment history was dependent upon information generated by the prior servicer.[103] And without the ability to lay the requisite foundation for the first part of the payment history, the witness could not lay the proper foundation for the second part. The payment history should have been excluded from evidence.

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[100] T. 102.

[101] *Id.*

[102] T. 102-103.

[103] T. 102.

The trial court explained its rationale for admitting all of the Bank's exhibits under the business records exception by stating:

> THE COURT: Let's be clear. Ms. Baggs is -- her job -- I don't know if she said it here or the prior trial that I did with her today. She is a loan specialist for loans that are in default. She's only been working with SPS for a month, but she has 25 years of banking experience. I don't know if that's been established here. I heard it earlier. You were here when she testified to that, I think.
>
> In any event, she reviewed the documents that are a part of SPS's bank of documents, in order to prepare for a trial. I don't know what else you want…[104]

The trial court's last statement is precisely why the court erred in admitting the documents. This statement presupposes that anyone who works for a corporate litigant, no matter how briefly, can merely review the corporation's documents in anticipation of trial, and by that alone, be qualified to lay the foundation for the admission of hearsay statements under the business records exception. But this is not the law because it ignores the foundational requirement for admittance under the exception—that the witness is either in charge of the activity constituting a normal business practice or sufficiently acquainted with it in order to give testimony. Baggs, on the other hand, never worked for the prior servicer and lacked any knowledge regarding the prior servicer's business practices. She was therefore legally incompetent to lay the business records exception for the prior servicer's payment history.

[104] T. 69 (emphasis added).

On redirect, Baggs was asked to describe a boarding process by which the previous servicer's records had been copied over to the new servicer. The Homeowners properly objected to this testimony on hearsay and relevancy grounds.[105] These objections should have also been sustained because the witness testified she had only been an employee of the servicer for one month[106] and therefore necessarily lacked any personal knowledge of boarding processes which allegedly occurred a half-a-decade before, especially since she did not actually participate in the boarding process. At best, her knowledge would be regarding current boarding processes which would not be relevant to policies and procedures that occurred five years ago. *Cf. WAMCO XXVIII, Ltd. v. Integrated Electronic Environments, Inc*., 903 So.2d 230, 233 (Fla. 2d DCA 2005) (finding business records exception satisfied where loan servicer's records incorporated payment data from previous servicer, and officer of current servicer testified he had worked on the loans at issue and verified the payment data, and described his company's verification process).

Even if the process Baggs described had been used, the process did not actually check the reliability of the prior servicer's records so as to lend any trustworthiness to the documents. *See Bank of New York v. Calloway*, Case No.

[105] T. 116.

[106] T. 61.

4D13-2224 (Fla. 4th DCA January 7, 2015) (holding that prior servicers' records were admissible where there is testimony that the new servicer reviewed the accuracy of all information transferred to it upon acquiring a loan, so long as the testimony is not from a "'robo' witness"). Instead, Baggs testified that the servicer merely checked the accuracy of the copying process:

> Q. And can you briefly describe what the boarding process is?
>
> MR. ACKLEY: Objection. Hearsay. authenticity. Foundation.
>
> THE COURT: Overruled. You may answer.
>
> A. Um, prior to the loan transferring to SPS, we worked with a previous servicer. We match all their fields in the servicing system to our current platform, and once the information is mapped over, then an audit is done to review to make sure all of the information is electronically transferred matches the system. If it doesn't, there's an error report that comes out, and that is we work with the previous servicer, to make sure it's illogical of incorrect fields and they are corrected. It goes into our system as review only status. And there's two days that -- again, those loans are reviewed by loan boarding teams to assure information is correct before it goes live. Meaning, that a customer service representative can document on the loan. It's in our system. We vet it out before we actually --
>
> THE COURT: So, it sounds like what you do is, you adopt the information, the prior servicer, but before you claim it as your own, you review it for accuracy, that type of thing?
>
> THE WITNESS: Correct.[107]

Accordingly, Baggs testified that the new servicer checked the accuracy of its copying, precisely confirming that every entry was correctly duplicated in the

[107] T. 116.

new system, warts and all. She did not testify that the accuracy, reliability and trustworthiness of the original data were ever confirmed. The servicer did not compare expense entries with bills from insurance companies or taxing authorities or with pay records such as copies of checks. The servicer did not confirm that the previous servicer applied the appropriate interest rates or charged the correct fees. It did not confirm whether the old servicer had timely applied the borrowers' payments to the proper accounts—or applied them all.

In short, the new servicer simply (albeit very carefully) copied whatever erroneous, untrustworthy information was in the original servicer's records. Indeed, there was no testimony as to the reason why the Bank hired a new servicer—i.e. whether it had been displeased with the accuracy of the previous servicers' accounting.

These objections should have been sustained because Baggs did not actually participate in the "boarding" process, and because that process did not, in any event, confirm the reliability of the records. The witness's testimony is legally insufficient to support the judgment.

2. The proper remedy on remand is involuntary dismissal.

The amounts due and owing as contractual damages were an essential element of the Bank's case and since the payment history should have been excluded as evidence at trial, involuntary dismissal is the appropriate remedy on

remand. *Kelsey*, 131 So. 3dat 826; *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, 39 Fla. L. Weekly D1159, at *3 (Fla. 2dDCA May 30, 2014) ("When a party seeking monetary damages fails to establish an evidentiary basis for the damages ultimately awarded at trial, reversal for entry of an order of dismissal is warranted.")

CONCLUSION

The Court should reverse the judgment and remand for entry of dismissal of the case with prejudice.

Dated: January 9, 2015

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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 14 Point.

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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this January 9, 2015 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 January 9, 2015.

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