In the District Court of Appeal
Fourth District of Florida

---

CASE NO.
(Circuit Court Case No.

---

and

Appellants,

v.

COUNTRYWIDE BANK, FSB,

Appellee.

---

ON APPEAL FROM THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

---

# INITIAL BRIEF OF APPELLANTS

---

Respectfully submitted,

**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

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page**

**Cases**

**Statutes**



**Rules**



**Other Authorities**

## PARTIES

This foreclosure case was initially filed by Countrywide Bank, FSB.[1] A little over two years later, Plaintiff moved to amend its name to reflect that it had changed to Bank of America, N.A.[2] An order granting this request could not be located in the record.

Nearly five months later, a nonparty, BAC Home Loans Servicing, L.P., calling itself "Plaintiff" filed an Ex-Parte Motion to Substitute Party Plaintiff Due to Merger.[3] That motion also sought to substitute Bank of America, N.A. as the plaintiff. But contrary to the earlier motion to amend, it did not claim that Countrywide FSB had changed its name to Bank of America, N.A—it did not even mention the actual Plaintiff. Rather, Bank of America, N.A. now claimed entitlement to appear as the Plaintiff through yet another nonparty, Countrywide Home Loans Servicing, L.P. Over objection, and without an evidentiary hearing,[4] the trial court granted the motion:

> Plaintiff's name is hereby substituted to reflect Bank of America, N.A., as Successor by Merger to BAC Home Loan Servicing, L.P. FKA Countrywide Home Loans Servicing, L.P.[5]

---

[1] Index to the Record on Appeal ("R.__"), p. 1.

[2] R. 102.

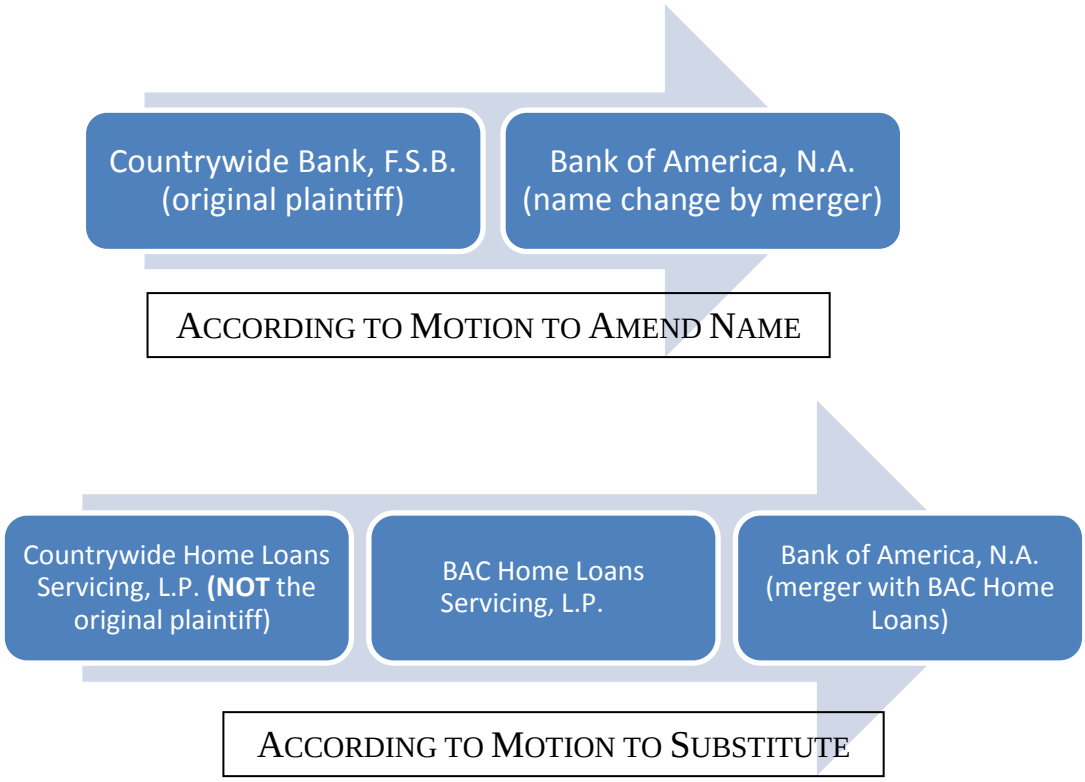
[3] R. 123.

[4] Transcript of Hearing Before the Honorable Amy Smith, December 1, 2011 (attached to Motion to Supplement the Record on Appeal, dated March 3, 2014).

[5] R. 181.

A motion by the nonparty BAC Home Loan Servicing, L.P. asking to amend the Complaint was also granted[6] such that an Amended Complaint was deemed filed with the style: Bank of America, N.A. as Successor by Merger to BAC Home Loans Servicing, L.P. FKA Countrywide Home Loans Servicing, L.P.[7]

According to the pleadings, therefore, the entities that have claimed some sort of entitlement to enforce the note are:




[6] R. 177, 180.

[7] R. 135.

The trial order styled the case as "Countrywide Bank FSB, Bank of America NA successor by merger to BAC Home."[8] The final judgment (prepared by the Plaintiff) was styled in the same way as the Amended Complaint.

Accordingly, due to the ambiguity as to the chain of mergers and name changes giving rise to the Plaintiff's standing (and a case style that is now unconnected with the original Plaintiff), this Brief will refer to the Plaintiff as "the Bank," or where necessary for clarity, by the name of a particular banking entity.

The homeowner defendants below, and appellants here, [redacted] and [redacted] will be referred to as "the [redacted] or "the Homeowners."

[8] R. 473.

## STATEMENT OF THE CASE AND FACTS

### I. Appellant's Statement of the Facts

#### A. The Pleadings

On August 17, 2007, [redacted] signed a Note payable to Diversified Mortgage.[9] She and her husband, [redacted] signed a Mortgage making their home collateral for the loan. In 2009, after the [redacted] were no longer able to make timely payments, a stranger to the original transaction, Countrywide Bank, FSB, filed a foreclosure action claiming to be the "owner and holder of the Promissory Note and Mortgage by virtue of an assignment to be recorded."[10] Countrywide Bank, FSB did not claim to be the holder of an endorsed negotiable instrument. In fact, the copy of the Note attached to the Complaint was not endorsed. And, in any event, the original note, having been lost, was not in the Bank's possession.[11]

Almost three years later, the Complaint was amended such that a new entity, Bank of America, N.A., claimed to be entitled to enforce the Note by way of a chain of mergers involving two other entities, neither of which was the original

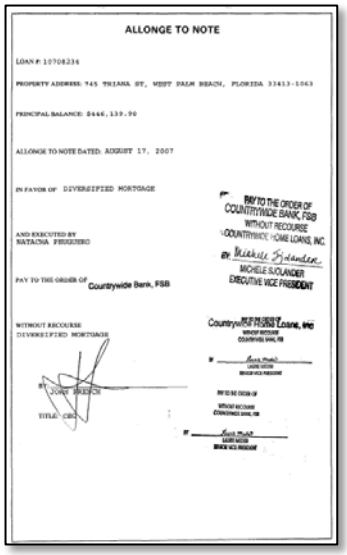
[9] Adjustable Rate Note attached to Complaint (R. 14).

[10] (emphasis added) Complaint, filed February 17, 2009, ¶ 4 (R. 1).

[11] Complaint, Count II (R. 3).

Plaintiff.[12] The verified Amended Complaint alleged that Bank of America, N.A. was "the holder of all real and beneficial interests in the subject Promissory Note and Mortgage…by virtue of an unconditional transfer to the Plaintiff of [those interests] which occurred prior to the commencement of this action."[13]

Making its appearance for the first time, an allonge now accompanied the Note attached to the Amended Complaint.[14] The Allonge was stamped with a labyrinthine array of undated endorsements purporting to transfer the Note twice to, and twice from, Countrywide Bank, FSB and ending in an endorsement in blank.



ALLONGE TO NOTE

LOAN #: 10708234

PROPERTY ADDRESS: 745 TRIANA ST, WEST PALM BEACH, FLORIDA 33413-1063

PRINCIPAL BALANCE: $446,139.90

ALLONGE TO NOTE DATED: AUGUST 17, 2007

IN FAVOR OF: DIVERSIFIED MORTGAGE

AND EXECUTED BY: NATACHA FIGUEIRO

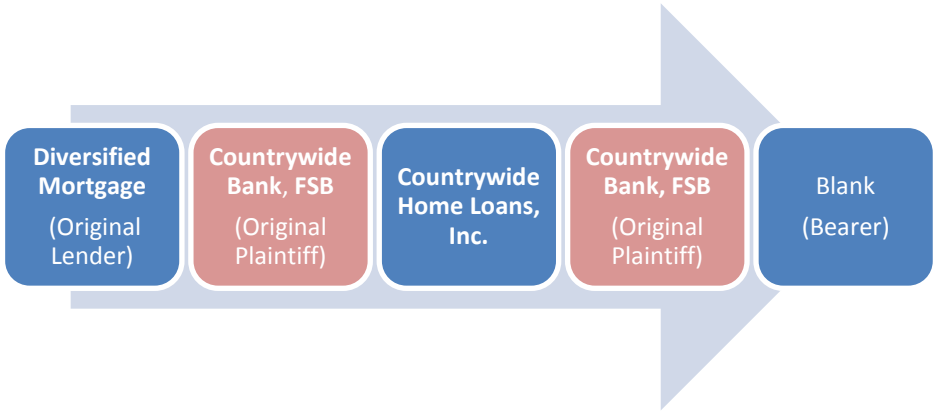
PAY TO THE ORDER OF Countrywide Bank, FSB

WITHOUT RECOURSE
DIVERSIFIED MORTGAGE

JOHN SMITH
TITLE: CEO

PAY TO THE ORDER OF COUNTRYWIDE BANK, FSB
WITHOUT RECOURSE
COUNTRYWIDE HOME LOANS, INC.
BY: Michele Sylvander
MICHELE SYLVANDER
EXECUTIVE VICE PRESIDENT

Countrywide Home Loans, Inc.




[12] Ex-Parte Motion to Substitute Party Plaintiff Due to Merger, filed August 25, 2011 (R. 123); Motion for Leave to File Amended Complaint, filed December 1, 2011 (R. 177); Amended Complaint to Foreclose Mortgage, filed December 1, 2011 (R. 135).

[13] (emphasis added) Amended Complaint to Foreclose Mortgage, filed December 1, 2011, ¶ 5 (R. 136).

[14] Allonge to Note (on an aptly titled "DocMagic" form) attached to Amended Complaint to Foreclose Mortgage filed December 1, 2011 (R. 146).

**B. The Trial—the Bank's document reader.**

At trial, the Bank called a single witness, Michelle Words, to prove all the elements of its case. Ms. Words is an attorney by education and was licensed to practice law in 2006.[15] She has been an employee of Bank of America, N.A. for about two years.[16] Her job duties as "Assistant Vice President and Mortgage Resolution Associate" are to "work with in-house and outside counsel to resolve cases that are in current litigation."[17] A significant portion of these duties is testifying at trials and at depositions.[18] The Bank trained her for this job which consisted of role playing as a witness[19] and instruction on various Bank of America policies and procedures concerning loans in default.[20] As she put it:

> My job is to manage a case load as well as review documents and loan information that relates to loans that are in default primarily, and to work with our counsel to resolve litigated issues, whether that involves providing documentation of the bank to our counsel or to appear as a witness in a trial or deposition.[21]

Thus, Ms. Words' duties and training were litigation oriented—not the day-to-day business of the Bank.

---

[15] Transcript of Trial ("T.__"), p. 69 (attached to Motion to Supplement the Record on Appeal, dated February 20, 2014).

[16] T. 15.

[17] T. 15.

[18] T. 65.

[19] T. 67-68.

[20] T. 16-17; 74.

[21] T. 19.

Despite this training, she could not identify the group within the Bank who would be notified if a loan payment was missed and was uncertain to which department that group belonged. She believed that the group was "possibly" part of the Pre-Foreclosure Department—a department for which she had never worked.[22] She was not certain how the group is notified of overdue payments, but stated "there's probably a reporting once a payment is missed and then the default letters are then sent to the borrower."[23]

Also, she had never worked in Bank of America's Payment Processing Department which would have input the payment records about which she testified. She conceded that her knowledge of that department's procedures for recording payments was based entirely on what she was told during "training."[24] She was trained how to review loan information in the Bank's "AS-400" computer system, but cannot input information.[25] She was trained how to review images of documents in the Bank's "iPortal" computer system, but cannot image documents herself.[26]

---

[22] T. 75-76.

[23] T. 76-77.

[24] T. 89-90.

[25] T. 81.

[26] T. 82.

Additionally, Ms. Words never worked for the original lender, Diversified Mortgage.[27] She was never in charge of creating or maintaining its records and readily conceded she knew nothing about its policies for the maintenance of documents there.[28] She was not present whenever Diversified executed the endorsement on the allonge.[29] In fact, the Bank's counsel posited that because "she wasn't there [when Diversified endorsed the Allonge], she wouldn't have known anything."[30]

Moreover, Ms. Words never worked for, or supervised anyone who worked for, Recon Trust, the company she said maintained the Note and Mortgage before they were sent to the Bank's foreclosure attorneys.[31] She conceded she was not familiar with Recon Trust's policies and procedures, and that anything she knew had been told to her by way of the Bank of America training and a former Recon Trust employee.[32]

[27] T. 137.

[28] T. 137.

[29] T. 25, 138.

[30] T. 138.

[31] T. 112, 123, 125.

[32] T. 123-124.

Likewise, Ms. Words never worked for the original plaintiff, Countrywide Bank, FSB or the predecessor servicer, Countrywide Home Loans, Inc.[33] Her knowledge of Countrywide's recordkeeping policies and procedures was based solely on what she was told by Bank of America while being trained to be a witness:

> Q. Let's talk about the policies and procedures of Countrywide for maintaining documents. You have not been instructed on the policies and procedures at Countrywide before any merger or name change or anything involving Bank of America, were you?
>
> A. [Ms. Words] It's my understanding that those are the same policies and procedures in place.
>
> Q. That's what someone told you, right?
>
> A. That would be part of my training, yes.[34]

(She was confident that the people who told her about the Countrywide record-keeping policies were, in fact, knowledgeable about them…because they told her that they were.[35]) She admitted that she did not know whether Bank of America had done anything to verify that Countrywide's records were accurate.[36]

---

[33] *See* T. 18, 131. "Countrywide" appears to be used throughout the transcript to refer to either entity and will similarly be used here to refer to one or both as context permits.

[34] T. 129.

[35] T. 130-131.

[36] T. 136.

Prior to her assignment as a witness in this case, she had never seen the documents she testified about and knew nothing about the case or the [redacted][37] Only after being assigned to testify in this case, she prepared for her courtroom presentation by reviewing the documents later presented as evidence: the Note, the Mortgage, the breach (or "default") letter, and the payment history.[38] When asked if she had reviewed the entire loan file for the [redacted] she responded that she had only reviewed the information that she herself determined was "pertinent."[39] She conceded that there is additional information pertaining to the loan in the computer system that was not included in the printout provided as an exhibit.[40]

After these documents had been admitted into evidence over objection, the Bank's counsel showed the witness the proposed final judgment. She claimed that she had verified "the information on the final judgment" using "bank records," with the payment history (Exhibit 2) serving as "one reference."[41] Over objection,

[37] T. 70.

[38] T. 20.

[39] T. 73.

[40] T. 91.

[41] T. 58.

Ms. Words was then permitted to read various figures from the proposed final judgment—which was not in evidence.[42]

After cross-examination and the close of the Bank's case, the Homeowners moved for an involuntary dismissal upon which the court reserved ruling.[43] The Homeowners' case consisted of the testimony of [redacted] who affirmed that she did not remember ever seeing the default letter (Exhibit 3).[44]

The Homeowners also read excerpts from a deposition of Michele Sjolander—an "Executive Vice President" of Countrywide Home Loans, Inc. whose name appears on the endorsement stamp from that entity back to Countrywide Bank, FSB.[45] Her testimony established that there had existed an unknown number of rubber stamps with her name that were routinely used by others to endorse notes.[46] She had no oversight regarding when they were used or which promissory notes were stamped.[47] When the stamps were no longer needed, she retrieved them, took them home, and burned them.[48]

---

[42] T. 59-63.

[43] T. 187-204.

[44] T. 217-18.

[45] T. 224-34.

[46] T. 227-28.

[47] T. 232-33.

[48] T. 228-29.

The Homeowners closed their case and renewed their motion for involuntary dismissal, as well as all prior motions and objections.[49] The court once again reserved ruling, but later entered an order denying the motion for involuntary dismissal[50] and executed a judgment in favor of the Bank.[51] The Homeowners promptly appealed.[52]

[49] T. 237.

[50] Order on Defendant's Motion for Involuntary Dismissal, dated August 27, 2013 (R. 504).

[51] Final Judgment dated August 27, 2013 (R. 490).

[52] Notice of Appeal, docketed August 29, 2013 (R. 508).

## SUMMARY OF THE ARGUMENT

The Bank's sole witness, Michelle Words, was a professional testifier hired and trained by the Bank to read records about which she had no personal knowledge and then regurgitate them to the fact-finder at trial. Her only connection to the documents and record-keeping policies to which she testified (all of which were from companies and departments for which she had never worked) was that she had read them after being assigned to this trial or told about them during training to be a witness. Her knowledge was not "personal" because it was not gained through actual experience with the documents and policies in the course of a business-related duty. Instead it is hearsay knowledge of the worst kind because it was imparted to her for the very purpose of this litigation.

As a result, the Bank failed to prove it had standing at the inception of the suit because there was no admissible testimony as to when the endorsements were stamped on an Allonge which first appeared years after the suit was filed. For the same reason, the Bank also failed to prove conditions precedent and damages.

Worse, there was no evidence to support the amount of interest awarded, which represented more than a quarter of the total damages. Instead, the court awarded an amount that the witness read (over objection) from a proposed judgment. The trial court should have granted an involuntary dismissal because there was no competent evidence to support the elements of the Bank's claim.

## STANDARD OF REVIEW

Although a trial court's decision to admit evidence is generally reviewed for abuse of discretion, the *de novo* standard applies when the issue is whether the trial court erred in applying a provision of the Florida Evidence Code. *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). Because the Homeowners challenge the trial court's application of the Florida Evidence Code, § 90.803(6), Fla. Stat., the *de novo* standard of review applies. *See 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).

The standard of review for a trial court's ruling on a motion for involuntary dismissal is also *de novo*. *Lizio v. McCullom,* 36 So. 3d 927 (Fla. 4th DCA 2010) (citing *Brundage v. Bank of Am.,* 996 So. 2d 877, 881 (Fla. 4th DCA 2008)). The burden is on the plaintiff to establish a *prima facie* case. *Tillman v. Baskin,* 260 So. 2d 509, 512 (Fla. 1972).

## ARGUMENT

### I. The Trier of Fact May Not Consider Information in Documents Merely Because They Were Read by a Professional Testifier Who Was Not a "Qualified" Witness.

***Personal knowledge of the facts needed to introduce records is an essential requirement of due process.***

The Bank's only witness, Michelle Words, was a professional testifier whose job duty with Bank of America was to review loan documents so that she can communicate the hearsay within those documents to the court. Her only connection with the documents admitted into evidence, over objection, was that she had read them after being assigned as a witness sometime shortly before trial. In short, the only competence she offered the trier of fact was that she was sufficiently literate in the English language to read the documents to the fact-finder (a skill already possessed by the court).

To authenticate the documents before admitting them into evidence, Ms. Words would have to be sufficiently familiar with them to testify that they are what the Bank claims them to be. § 90.901, Fla. Stat. Moreover, to overcome the hearsay objections made to each and every exhibit, the Bank would have to first lay the predicate for the "business records" exception. There are five requirements for such an exception:

1) the record was made at or near the time of the event;

2) the record was made by or from information transmitted by a person with knowledge;

3) the record was kept in the ordinary course of a regularly conducted business activity;

4) it was a regular practice of that business to make such a record; and

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

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

But to even be permitted to testify to these threshold facts, Ms. Words needed to be a "qualified" witness—one who is in charge of the activity constituting the usual business practice or well enough acquainted with the activity to give the testimony. *Mazine v. M & I Bank*, 67 So. 3d 1129, 1132 (Fla. 1st DCA 2011) (judgment of foreclosure after bench trial reversed where bank's only witness "had no knowledge as to the preparation or maintenance of the documents offered by the bank"); *Snelling & Snelling, Inc. v. Kaplan*, 614 So. 2d 665, 666 (Fla. 2d DCA 1993) (witness who relied on ledger sheets prepared by someone else was neither the custodian nor 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) (adjuster not qualified to testify about the usual business practices of sales agents at other offices). *See also 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'").

In *Specialty Linings, Inc. v. B.F. Goodrich Co.*, 532 So. 2d 1121 (Fla. 2d DCA 1988) the court addressed the admissibility of computerized records virtually identical to those in this case. There, the court held that the testimony of a general manager of one department of the business did not lay the proper predicate for admission of monthly billing statements prepared in another department. The testimony was insufficient under the business records exception to hearsay because the manager, like Ms. Words in this case, admitted that he was not the custodian and did not prepare the statements, nor supervise anyone who did:

> [The manager] Darby was not the custodian of the statement. He was not an otherwise qualified witness. Darby was not "in charge of the activity constituting the usual business practice." He admitted that neither he nor anyone under his supervision prepared such statements. Darby was not "well enough acquainted with the activity to give the testimony." He admitted that he was not familiar with any of the transactions represented by the computerized statement.

*Id*. at 1122. (internal citations omitted). The court held that the trial court had abused its discretion in admitting the evidence because the manager was not

qualified to lay the necessary predicate. It reversed and remanded the case for a new trial. *Id*.

### *Being told about record-keeping procedures is not a substitute for personal knowledge ("training" is another word for "hearsay").*

The Bank will argue that Ms. Words was "familiar" with the records—citing to its witness "training" as though it were something laudable. Thus, the issue on appeal turns on:

- Can a person with no hands-on, business experience with a company's records or its record-keeping policies be "trained" to have personal knowledge of the records and policies?

First, "training" for purposes of regurgitating information to the fact-finder is nothing more than a synonym for "hearsay." Had the witness said, "my boss told me to testify that the policy was that these records are made at or about the time of the event by persons with knowledge…" there would be no question that her "knowledge" is not personal, but rather based on rank hearsay. And it is hearsay of the worst kind because it is deliberately communicated to her for the specific purpose of testifying in court. It is witness coaching to create the façade of familiarity. Simply substituting "my boss trained me" for "my boss told me" does not alter the fact that the witness has no personal knowledge.

Hearsay knowledge cannot be allowed to substitute for personal knowledge gained through an actual job-responsibility tied to the business activity. Hearsay knowledge specifically imparted for purposes of litigation is doubly suspect. To hold otherwise would have the business record exception swallow the rule because there is no record that a witness cannot be told (or "trained") to say meets the exception.

This Court has already held that "familiarity" with records is something that must be gained in the course of performing or supervising the business activity in question. In *Lassonde v. State*, 112 So. 3d 660 (Fla. 4th DCA 2013), the trial court had permitted a store clerk to testify regarding how a store receipt showing the value of the goods stolen was generated. The Court held that it was reversible error to admit the receipt as a business record because the clerk was not qualified to introduce the exhibit. *Id*. at 661.

After outlining the basic requirements of the business records hearsay exception, the Court noted that "[i]n order to prove a fact of evidence of usual business practices, it must first be established that the witness is either in charge of the activity constituting the usual business practice or is well enough acquainted with the activity to give the testimony." *Id.* at 662. Thus, because the store clerk "had no responsibilities regarding the business practices of the [store]" he was not qualified to introduce the receipt as a business record. *Id*. "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." (emphasis added) *Id*. This Court sympathized with the plight of the prosecution—in that the qualified witness, the manager, did not appear to testify (and was, as a result, held in contempt)—but steadfastly decreed that "the rules of evidence must be observed." *Id*.

Here, Ms. Words was similarly unqualified to lay the foundation for the records from the many Bank of America departments (such as Payment Processing Department and the Pre-Foreclosure Department) where she had never worked. She "had no responsibilities" regarding the business practices of the Bank in generating its bookkeeping records. The nature of her job responsibilities—reading records to judges—is insufficient precisely because her familiarity with those records was not gained in the course of performing or supervising the business activity in question. Instead, her "familiarity" was artificially created specifically for the purpose of litigation.

This is the underlying reason why the records of physicians performing "independent" medical examinations are not admissible, while those of treating physicians are. *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"), *citing*, 1 C. Ehrhardt, Florida Evidence

§ 803.6, at 695 (1999 ed.). And aside from being told what to say about the Bank's record-keeping policies, Ms. Words also crafted—for the purpose of litigation—the very contours of the records being presented—having culled out only those that she thought were "pertinent."[53]

Accordingly, Ms. Words was not a qualified witness and her testimony and the Bank documents introduced through her should have been excluded.

### *Ms. Words was even less qualified to lay the foundation for documents from entities where she had never worked.*

Many of the documents that the Bank offered as evidence were not Bank of America records, but came from completely different entities (where Ms. Words had never been employed). This even further distanced her from any personal knowledge of how they were created or maintained. Specifically:

- **Exhibit 2 (Payment History):** The Bank's Motion to Amend Plaintiff's name suggests Bank of America's purchase of the previous servicer, Countrywide, became effective April 27, 2009. This means that only the computer entries after that date were made by Bank of America. The entries from August 2007 through April 2009 were made by the previous servicer, Countrywide, which had no relationship with Bank of America at that time.

[53] T. 73.

- **Exhibit 3 (Alleged Default Letter):** The Default Letter was, on its face, prepared by Countrywide—a company for which Ms. Words had never worked.
- **Exhibit 4 (Certified Mail Receipt):** The Certified Mail Receipt was also allegedly prepared by Countrywide.
- **Exhibit 1 (The Allonge):** The Allonge that appeared years after the case was filed purportedly documented transfers among three companies (Diversified Mortgage, Countrywide Bank, FSB, and Countrywide Home Loans, Inc.). Ms. Words never worked for any of them. Notably, the Bank established that two of the signers were now employed by Bank of America, but it did not bring them to testify or have them execute certificates under § 90.902(11) Fla. Stat. (*see*, argument regarding this statute below).

### *Records from another servicer are hearsay within hearsay.*

Ms. Words was singularly unqualified to provide the necessary testimony for a business records exception to hearsay for the records of her own employer, Bank of America, because she had no experience in the departments that actually generated them. When the "Bank of America records" were merely an adoption of digital information from other servicers, her lack of personal knowledge was even more glaring.

In the case of *Glarum v. LaSalle Bank Nat. Ass'n*, 83 So. 3d 780 (Fla. 4th DCA 2011), this Court specifically disapproved of testimony from one servicer's employee about the records of a previous servicer when, as here, the witness had no personal knowledge as to when or how the entries were made:

> He relied on data supplied by Litton Loan Servicing, with whose procedures he was even less familiar. Orsini could state that the data in the affidavit was accurate only insofar as it replicated the numbers derived from the company's computer system. Orsini had no knowledge of how his own company's data was produced, and he was not competent to authenticate that data. Accordingly, Orsini's statements could not be admitted under section 90.803(6)(a), and the affidavit of indebtedness constituted inadmissible hearsay.

*Id*. at 783.

This Court recently confirmed that *Glarum* applies in the context of a foreclosure bench trial. *Yang v. Sebastian Lakes Condo. Ass'n, Inc.*, 123 So. 3d 617 (Fla. 4th DCA 2013). In *Yang*, the plaintiff's witness had testified about account balances found in the records of a prior management company, even though she had never been employed there. *Id*. at 621. Even more so than in this case, on direct examination (and over objection), the witness in Yang "employed all the 'magic words'" of the business record exception to hearsay. Cross-examination revealed a different story—that she did not have personal knowledge of the prior management company's practice and procedure and had no way of knowing whether the data obtained from that company was accurate. *Id.* The District Court reversed the trial court's final judgments of foreclosure and remanded for entry of

a directed verdict in favor of the condo owners. *Id*.; *see also, Thompson v. Citizens Nat. Bank of Leesburg, Fla.*, 433 So. 2d 32, 33 (Fla. 5th DCA 1983) (summary judgment reversed where affiant could not state that he had personal knowledge of matters contained in bank's business records, that the records were complete, or that they were kept under his supervision and control).

Notably, while Ms. Words was trained (i.e. "told") to say that the record-keeping policies did not change when Bank of America bought the troubled institution, she had no personal experience with the Countrywide policies—creating them, enforcing them, or living by them. Moreover, she admitted that she did not know whether Bank of America had done anything to verify that Countrywide's records were accurate.[54]

Accordingly, Ms. Words's lack of personal knowledge of the transition process distinguishes this case from one typically relied upon by the banks, *WAMCO XXVIII, Ltd. v. Integrated Elec. Environments, Inc.*, 903 So. 2d 230, 233 (Fla. 2d DCA 2005). In that case, the WAMCO witness was personally involved in overseeing the collections of the subject loans and "described the process that [his employers] use to verify the accuracy of information received in connection with loan purchases." *Id*. at 233.

[54] T. 136.

### *The myth that providing admissible evidence from qualified witnesses is "impractical."*

Strict compliance with the hearsay exception rules is required. *Johnson v. Dep't of Health & Rehabilitative Services*, 546 So. 2d 741, 743 (Fla. 1st DCA 1989). The foreclosing banks often argue, however, that the court should not follow binding precedent (*Glarum*, *Yang*, and *Lassonde*) because it would be impractical for the banks to comply with the Florida hearsay exception rule when the paperwork has been prepared by different entities and departments located far from the courthouse. Ignoring for the moment the impropriety of making evidentiary rulings based on the unproven impact it would have on nonparties, Florida law has already provided a practical, efficient means for the bank to introduce records from far-flung departments or corporate affiliates.

Section 90.902(11) Fla. Stat. provides that the records custodian or qualified person need not be present in court to lay the business record foundation for documentary evidence. Instead, their testimony may be admitted through an affidavit (a "certification or declaration"):

*See also* § 90.803(6)(c), Fla. Stat. (providing the procedure for using such an affidavit, which includes notice sixty days before trial and, if opposed, a pre-trial motion); *Yisrael v. State*, 993 So. 2d at 957. Indeed, the courts have already suggested that foreclosing banks can meet the hearsay exception requirements in exactly this manner. *Mazine v. M & I Bank*, 67 So. 3d at 1132.

In this case, however, the Bank chose not to avail itself of these rules which seems specifically designed to simplify the procedure by which the records of modern, highly departmentalized and geographically dispersed corporations may be admitted into evidence. It is telling that the Bank chose not to supply certifications or declarations from Countrywide employees in charge of its record-

keeping policies, despite the relative ease of doing so.[55] Nor did it seek to admit the payment history with a certification from someone in the Payment Department or Pre-Foreclosure Department who could personally describe what, if any, measures were taken to ensure the accuracy of its records and those of the previous servicer.

Thus, even if it were proper for the trial court to concern itself with the ramifications of evidentiary rulings on the economic well-being of the litigants or non-parties, it was unnecessary to ignore binding precedent from its own District Court or to rewrite the rules of evidence to allay that concern.

### *The myth that bank records are inherently trustworthy.*

Another typical bank argument is that bank records are commonly viewed as particularly trustworthy, and therefore, the hearsay rules should be loosened as to them.

There can be no doubt that the business records hearsay exception is conditioned upon the records being considered "trustworthy." The Florida rule itself provides that records of regularly conducted business activity are admissible "unless the sources of information or other circumstances show lack of trustworthiness." § 90.803(6)(a), Fla. Stat. Trustworthiness, therefore, is an

[55] Indeed, two key witnesses, Lori Meder and Michele Sjolander, still worked for Bank of America (T. 26).

additional requirement for admissibility, not a shortcut that bypasses the other criteria.

Moreover, the era when banking records were considered trustworthy, at least in the context of foreclosure litigation, is long gone. Now, the banking industry's flagrant abuse of the judicial system with perjured affidavits in which the affiants falsely claimed personal knowledge (robo-signing) has become common knowledge—so much so that it may be judicially noticed. *See Pino v. Bank of New York Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011) (case involving the same plaintiff as this case in which the court commented: "…many, many mortgage foreclosures appear tainted with suspect documents."); Memorandum No. 2012-AT-1803 of the Office of the Inspector General of the Department of Housing and Urban Development, September 28, 2012 (concluding that the five largest servicers—including Bank of America—had "flawed control environments" which permitted robo-signing, the filing of improper legal documents, and, in some cases, mathematical inaccuracies in the amounts of the borrowers' indebtedness);[56] Press Release of the Department of Justice Financial

[56] Available at: http://www.hudoig.gov/sites/default/files/Audit_Reports/2012-CH-1803.pdf.; *see also*, Memorandum No. 12-FW-1802 of the Office of the Inspector General of the Department of Housing and Urban Development, March 12, 2012 regarding Bank of America Corporation available at: http://www.hudoig.gov/sites/default/files/documents/audit-reports//2012-fw-1802.pdf

Fraud Enforcement Task Force, March 12, 2012 and related court filings[57] including the consent judgment against Bank of America Corp.[58]

Arguably, this known lack of trustworthiness is enough to hold that banks can never qualify for the business records hearsay exception in a foreclosure case. But at a minimum, the banks cannot be told that they may skip bringing a qualified witness to establish the criteria of the business-record exception because banks are somehow worthy of the court's trust.

### *There was no admissible evidence of the essential elements of the Bank's case.*

Because the Bank chose to attempt to prove every element of its case with a single witness, it should not be surprising that the lack of any qualification of that witness would taint the entire case. Specifically:

- **Standing:** Because Ms. Words was not qualified to testify about the records or policies of Diversified Mortgage—and offered no evidence of the timing of the endorsements—there was no evidence that the Bank had standing when it filed suit (discussed in more detail in Section II, below).

- **Damages:** Because Ms. Words was not qualified to testify about records from, or policies of, companies or departments she never worked in, the payment history (Exhibit 2) was inadmissible. The payment history was the only identified source of information for the amounts due and owing that were impermissibly read into evidence

[57] Available at: http://www.nationalmortgagesettlement.com/.

[58] Available at https://d9klfgibkcquc.cloudfront.net/Consent_Judgment_BoA-4-11-12.pdf.

from the proposed judgment. (In any event, over a quarter of these damages representing the accrued interest is nowhere to be found in Exhibit 2—see more detail in Section III, below).

- **Conditions Precedent:** Because Ms. Words was not qualified to testify about Countrywide records, the default letter (Exhibit 3) and the Certified Mail Receipt (Exhibit 4) were inadmissible, leaving no evidence of compliance with the Mortgage prerequisite for acceleration.

Accordingly, the trial court erred in admitting these documents and testimony into evidence, and ultimately, in denying the motion for involuntary dismissal.

## II. There was no admissible evidence that the necessary endorsement was placed on the Note before the case was filed.

A crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose. *Verizzo v. Bank of N.Y.*, 28 So.3d 976, 978 (Fla. 2d DCA 2010). In addition to showing standing as of the time of trial, the foreclosing party must show that it had standing before it filed the case. *See Marianna & B.R. Co. v. Maund*, 62 Fla. 538 (Fla. 1911) ("plaintiff cannot supply the want of a valid claim at the commencement of the action by the acquisition or accrual of one during the pendency of the action."); *Stegemann v. Emery*, 146 So. 650 (Fla. 1933) ("suit may not be maintained upon an after-acquired right.").

Where, as here, the foreclosing plaintiff—a stranger to the original transaction—chooses to demonstrate standing by showing it is a holder under Article 3, there must be evidence that it became the holder before it filed suit. *McLean v. JP Morgan Chase Bank, N.A.*, 79 So. 3d 170 (Fla. 4th DCA 2011) ("While it is true that standing to foreclose can be demonstrated by the filing of the original note with a special endorsement in favor of the plaintiff, this does not alter the rule that a party's standing is determined at the time the lawsuit was filed.").

To prove that it was a holder, the Bank must do more than show that it currently possesses the note, or even that it possessed the note before it filed the foreclosure case. It must show that the requisite endorsement was placed on the

note prior to filing suit. *See Feltus v. U.S. Bank Nat. Ass'n*, 80 So. 3d 375, 377, n. 2 (Fla. 2d DCA 2012) (noting that "even if U.S. Bank had properly amended its complaint to travel on the original note endorsed in blank, it would have needed to prove the endorsement in blank was effectuated before the lawsuit was filed."); *Cutler v. U.S. Bank Nat. Ass'n*, 109 So. 3d 224 (Fla. 2d DCA 2012) (summary judgment reversed where allonge was not dated and there was no evidence that the allonge took effect prior to the date of the complaint); *Zervas v. Wells Fargo Bank, N.A.*, 93 So. 3d 453, 455 (Fla. 2d DCA 2012) (summary judgment reversed where the bank filed a note that contained a new endorsement after it filed suit, because there was "no evidence in the record establishing that the endorsement in blank was made to [the plaintiff bank] prior to the filing of the foreclosure complaint."); *Green v. JPMorgan Chase Bank, N.A.*, 109 So. 3d 1285, 1288 (Fla. 5th DCA 2013) ("the indorsement in blank did not establish that the Bank had the right to enforce the note when it filed suit, because the indorsement was undated."); *Gonzalez v. Deutsche Bank National Trust Company*, 95 So. 3d 251, 252 (Fla. 2d DCA 2012) (same).

Here, the endorsements (along with the Allonge itself) first appeared in the case almost three years after the case was filed. The very absence of the Allonge from the copy of the Note attached to the Complaint is suspect since it must be permanently affixed to the Note. *See Booker v. Sarasota, Inc.*, 707 So.2d 886, 887

n. 1 (Fla. 1st DCA 1998); § 673.2041(1), Fla. Stat. If, as Ms. Words testified, the Allonge (and the first endorsement) was "executed at the time of the loan,"[59] it would have been attached to Note when the case was filed.

But Ms. Words was not present and could not testify as to when any of the endorsements were placed on the Allonge.[60] And notwithstanding the mistaken impression of the Bank's counsel that "[t]he date on the allonge was the exact date of the execution of the loan,"[61] there is no documentary evidence as to when the first endorsement and transfer took place. First, the preparation date of the Allonge—even if it was signed by the Diversified Mortgage that day—is not evidence of when it was actually transferred to, and stamped with the name of, Countrywide Bank, FSB. It is common knowledge that the payee on endorsements is often left blank such that the Note is a bearer instrument until one of the holders in the chain takes the precaution of filling in its own name to restrict the endorsement to itself. And given that "Countrywide Bank, FSB" is stamped, rather than typed in, it is more probable that it was added sometime later.

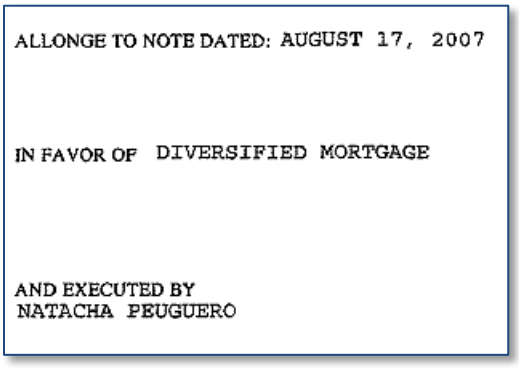
Second, the Allonge itself is not, in fact, dated. The words "Allonge to Note Dated: August 17, 2007," along with the phrases that immediately follow ("in

[59] T. 51.

[60] T. 25.

[61] T. 201.

favor of Diversified Mortgage" and "Executed by [redacted] merely identify the Note for which the Allonge was prepared:


ALLONGE TO NOTE DATED: AUGUST 17, 2007

IN FAVOR OF DIVERSIFIED MORTGAGE

AND EXECUTED BY
NATACHA PEUGUERO

Thus, it is the Note that has the date August 17, 2007, not the Allonge, and there is no documentary evidence of when the Allonge was created.

So at best, the Bank offered inadmissible testimony that the first endorsement to Countrywide Bank, FSB occurred at the time the loan.[62] It was inadmissible because it was based on hearsay information that Diversified Mortgage was a correspondent lender and that it was the practice of correspondent lenders to transfer the loans immediately.[63]

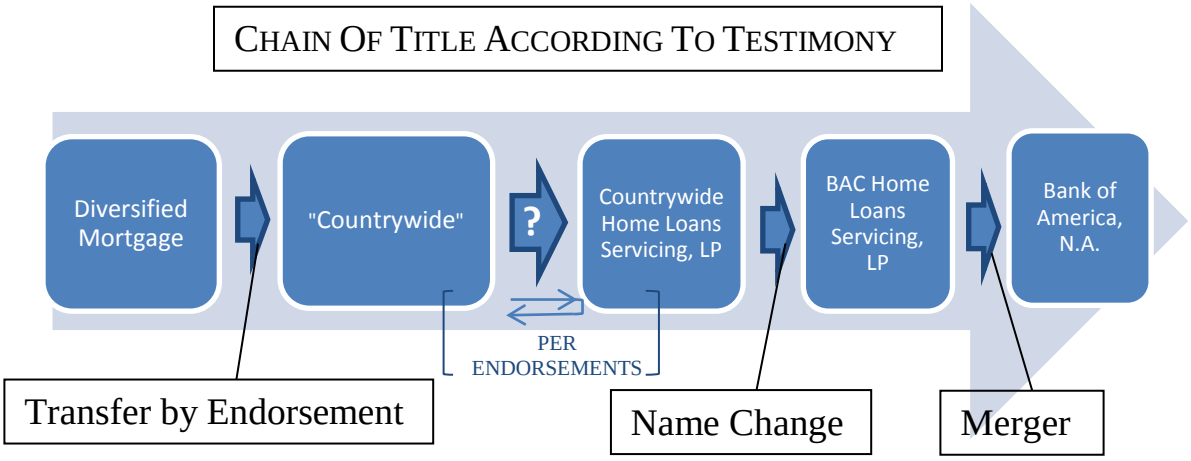
But even if that testimony is taken at face value, other undated endorsements on the Allonge show that the Note was endorsed away from Countrywide Bank, FSB and then back to Countrywide Bank, FSB before being endorsed in blank. Thus, even if, on the day the Note was signed, Diversified had transferred the Note

[62] T. 51.

[63] T. 50-52.

to the entity that filed this action (Countrywide Bank, FSB), there is no evidence that that entity still owned and held the Note on the day of filing.

In fact, it is at this crucial point that Ms. Words' testimony leaves a gap in the chain of ownership—the very same gap left by the pleadings (*see*, "Parties" section above). She first testified that Diversified transferred the Note to "Countrywide" (presumably Countrywide Bank, FSB, the first endorsee) and then testified that "Countrywide Home Loan Servicing LP" changed its name to BAC Home Loan Servicing LP which then merged with Bank of America N.A:[64]




Notably, Ms. Words does not mention the transfer from "Countrywide" to Countrywide Home Loans Servicing. While the endorsements imply that that transfer took place (on some unknown date), they also imply another transfer back to Countrywide. Because there is no evidence—admissible or otherwise—of when

[64] T. 52-54.

any of these transfers occurred (much less the two to Countrywide),[65] there is no evidence that the original Plaintiff, Countrywide Bank, FSB, was the holder when it filed suit. That is so, even if the Court were to accept the hearsay testimony that Diversified divested itself of the Note immediately.

Accordingly, the trial court erred in denying the motion for involuntary dismissal on the grounds that the Bank failed to prove it had standing at the inception of the case.[66]

Furthermore, in contrast to this absence of evidence to support the Bank's claim of standing, the Homeowners adduced undisputed evidence that the loan was assigned to the original Plaintiff after the case was filed. Specifically, the Homeowners introduced a recorded Assignment of Mortgage showing that the loan (the Mortgage "together with the Note") was assigned by the original mortgagee, Mortgage Electronic Registration Systems, Inc. ("MERS"), to Countrywide Bank, FSB. It was prepared by the same attorneys who filed the suit and executed February 24, 2009—a week after the Complaint was filed.[67] The Assignment is all the more damaging to the Bank's claim of standing given that it originally alleged

[65] *See also,* T. 162 (Words concedes that no documentation exists as to what time or in what order the endorsements were placed on the Allonge).

[66] T. 195-98

[67] Assignment of Mortgage (Defendant's Exhibit 1) (R. Exh. 2).

that it obtained the right to sue, not by transfer of an endorsed Note, but "by virtue of an assignment to be recorded."[68]

Accordingly, aside from the trial court's error in denying the motion for involuntary dismissal, the evidence does not support the judge's verdict in favor of the Bank on the issue of standing.[69]

[68] Complaint, filed February 17, 2009, ¶ 4 (R. 1).

[69] When an action has been tried by the court without a jury, the sufficiency of the evidence to support the judgment may be raised on appeal whether or not the party raising the question has made any objection thereto in the trial court or made a motion for rehearing, for new trial, or to alter or amend the judgment. Fla. R. Civ. P. 1.530(e).

## III. The Trial Court Erred in Permitting the Witness to Read In "Evidence" from a Proposed Judgment.

In a bizarre ritual quite foreign to any evidentiary rules, the Bank's counsel handed Ms. Words a document which he identified as a "copy of the final judgment in this case" and asked her to confirm that she had reviewed it before coming in that day.[70] She testified that the numbers "was verified with bank records" and that the payment record was "one reference" for verification.[71] Then, over objection, the trial court permitted the witness to read the numbers appearing on the document into the record even though it was not an exhibit and not admitted into evidence:

> Q. From the payment history were you able to determine what out-of-pocket costs the bank has had to pay for this action?
>
> MR. HOLTZ: Your Honor, I have to object. I can see the witness is reading and I think she's read the last couple of answers. She's reading directly from the document, Your Honor.
>
> THE COURT: Overruled

First, the trial court erred in permitting any testimony over the Homeowner's objection that the document from which the witness was reading was not in evidence.[72] *Sas v. Fed. Nat. Mortg. Ass'n*, 112 So. 3d 778, 779 (Fla. 2d DCA 2013) (Error to permit bank witness to testify about the contents of business

[70] T. 55-58.

[71] T. 58.

[72] T. 32.

records when the records were not in evidence.); *McKeehan v. State*, 838 So. 2d 1257, 1260 (Fla. 5th DCA 2003) (where original evidence is available, best evidence rule bars "substitutionary" evidence, such as oral testimony about the original evidence). The Bank never moved to have the document (which was not on its exhibit list) admitted into evidence.

Nor could the trial court have admitted the document without committing reversible error. 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.

Second, Ms. Words did not testify that the figures could be computed from other exhibits—only that she verified them from "bank records" which included the payment history as "one reference."[73] In fact, she admitted that the title search expenses were not reflected on the payment history.[74]

More importantly, the amount of unpaid interest due and owing ($196,381.05) that Ms. Words read from the proposed judgment—and now contained in the final judgment—cannot be computed from the payment history (Exhibit 2). The payment history does not show the interest that is accruing or

[73] T. 58.

[74] T. 103.

even the applicable interest rate, because the rate adjusts according to the "LIBOR" as published in The Wall Street Journal every six months. Thus, well over a quarter of the judgment under review has no supporting evidence other than the witness reading from the proposed judgment.

Accordingly, this outlandish procedure of bootstrapping the final judgment—known only to foreclosure trials—is not merely a highly improper backdoor attempt to do what is prohibited by *Sas v. Fed. Nat. Mortg. Ass'n.*, but is the ultimate end run around the hearsay rule. *See Kelsey v. SunTrust Mortg., Inc.*, 3D12-2994, 2014 WL 540498 (Fla. 3d DCA 2014) (approving of the Bank's concession of error where, among other things, the witness had "relied on a proposed final order that had been prepared by a third party to testify regarding the amount owing on the note at the time of foreclosure").

## CONCLUSION

The judgment should be reversed and remanded with instructions for entry of judgment in favor of the Homeowners.

Dated March 3, 2014

**ICE APPELLATE**
Counsel for Appellant
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 respectfully 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

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this March 3, 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.

**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

Matt Mitchell, Esq
Lisa J. Geiger, Esq.
BURR & FORMAN, LLP
200 South Orange Avenue Suite 800
Orlando, FL 32801
lgeiger@burr.com
swade@burr.com
mmitchell@burr.com
sfoshee@burr.com
*Attorney for Appellee*