

In the District Court of Appeal  
Fourth District of Florida

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CASE NO. [REDACTED]

(Circuit Court Case No. [REDACTED])

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[REDACTED] [REDACTED]

Appellant,

v.

THE BANK OF NEW YORK MELLON AS TRUSTEE FOR THE  
CERTIFICATE HOLDERS, CWALT, INC., ALTERNATIVE LOAN TRUST  
2006-OA19, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-  
OA19,

Appellee.

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

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**INITIAL BRIEF OF APPELLANT**

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Respectfully submitted,

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## STATEMENT OF THE CASE AND FACTS

### I. The Pleadings

██████████<sup>1</sup> the Appellant and a defendant below, borrowed money from Countywide Bank, N.A. The debt was documented in an Adjustable Rate Note and secured by a mortgage that he and his wife, Tricia ██████████<sup>2</sup> granted to Mortgage Electronic Registration Systems, Inc. (“MERS”).<sup>3</sup> After finding themselves unable to continue making timely payments, a stranger to this transaction, The Bank of New York Mellon<sup>4</sup> (“the Bank”) brought this foreclosure suit against them.

In the Complaint, the Bank alleged that it was “the holder of the Note and Mortgage which are the subject of this suit.”<sup>5</sup> The Bank also alleged that it “now

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<sup>1</sup> Incorrectly named as Raphael ██████████

<sup>2</sup> Tricia ██████████ passed away during these proceedings and prior to the evidentiary hearing on her motion to vacate the default. She was, however, never dropped or substituted out of the case. Accordingly, the Defendants will be referred to in the plural as “the ██████████ or “the Homeowners.”

<sup>3</sup> Note and Mortgage attached to the Complaint, filed March 19, 2009 (R. 1, 5, 17).

<sup>4</sup> The capacity of the Plaintiff is as a trustee, making the full name of the Plaintiff/Appellee: THE BANK OF NEW YORK MELLON AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWALT INC. ALTERNATIVE LOAN TRUST 2006-OA19, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-OA19

<sup>5</sup> Complaint, ¶ 1 (R. 1).

owns and is the holder of the Note and Mortgage.”<sup>6</sup> Additionally, it stated that a “copy of the Mortgage and Promissory Note is attached hereto” and that “[s]aid Note and Mortgage were subsequently assigned and/or endorsed in favor of the Plaintiff.”<sup>7</sup>

The Bank also alleged that the “Note and Mortgage owned by Plaintiff, copies of which are attached to the Complaint, have been lost or misplaced” and that the “whereabouts of the instruments cannot be determined.”<sup>8</sup> The Bank stated that it was in possession of the documents when they were lost or some other entity was in possession when they were lost.<sup>9</sup>

Attached to the Complaint was the familiar Adjustable Rate Note made payable to Countrywide Bank, N.A., stamped with the words “Certified to be true and correct copy.”<sup>10</sup> The Note was not endorsed.

Over a month later, the Bank filed an Assignment of Mortgage from MERS to the Bank which had been prepared by the Bank’s counsel and recorded after the

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<sup>6</sup> Complaint, ¶ 5 (R. 1).

<sup>7</sup> Complaint, ¶ 4 (R. 1).

<sup>8</sup> Complaint ¶ 21, 24 (R. 3, 4).

<sup>9</sup> Complaint ¶ 22 (R. 3).

<sup>10</sup> Adjustable Rate Note (R. 17).

Complaint was filed.<sup>11</sup> The signature on the Assignment is undated, but it states that it “relates back to 3/4/2009”—exactly fifteen days before the Complaint was filed.

When the Homeowners did not respond to the Complaint, the court entered a default against them.<sup>12</sup> After retaining counsel, the Homeowners moved to vacate the default on two grounds: 1) excusable neglect (which is not being raised as an issue on this appeal); and 2) the Complaint upon which the default was granted failed to set forth a viable cause of action.<sup>13</sup> The argument on the latter incorporated the accompanying Motion to Dismiss which pointed out that the Complaint and its attachments failed to state a cause of action. Specifically, it spotlighted the fact that the attached Note was not endorsed to the Plaintiff as the Bank had alleged and that exhibits control over, and negate, contrary allegations in the Complaint.<sup>14</sup> The trial court denied the motion to vacate the default.<sup>15</sup>

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<sup>11</sup> Undated Assignment of Mortgage (R. 47).

<sup>12</sup> Motion for Default, dated November 1, 2010 (R. 81); Order Granting Motion for Judge’s Default, dated April 25, 2011 (R. 108)

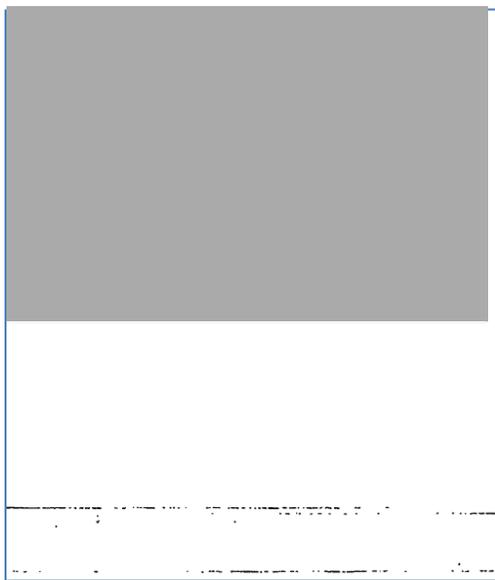
<sup>13</sup> Defendants, Raphael [REDACTED] and Tricia [REDACTED] Motion to Vacate and Default and Motion to Dismiss, dated February 2, 2012 (R. 123)

<sup>14</sup> Defendants, Raphael [REDACTED] and Tricia [REDACTED] Motion to Vacate and Default and Motion to Dismiss, dated February 2, 2012, p. 6-8 (R. 128-30).

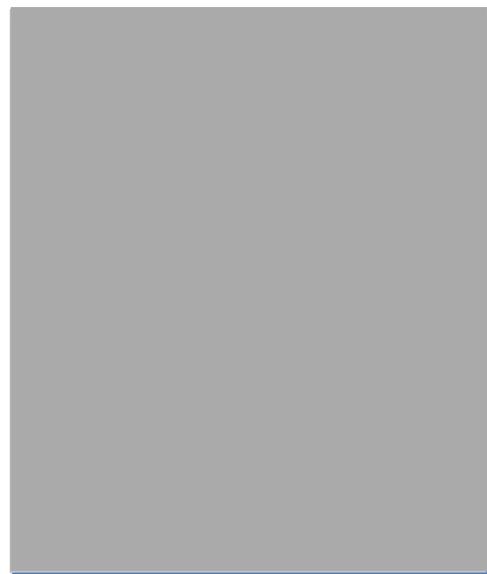
Nearly ten months later, the trial court ordered the case to trial.<sup>16</sup> The Bank filed an exhibit list indicating that it would be presenting an “Original promissory note,”<sup>17</sup> but did not drop its lost note count or otherwise amend its pleadings to attach an endorsed version of the Note.

## II. The Trial

On the appointed day of trial, the Bank appeared without a witness—but with a Note that was now endorsed in blank:



**Note attached to Complaint (R. 21).**



**Note brought to trial (R. 310).**

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<sup>15</sup>Order on Defendant's Motion to Vacate Default and Motion to Dismiss, dated October 23, 2012 (R. 222).

<sup>16</sup> Order Setting Residential Foreclosure Non-Jury Trial and Directing Pretrial Procedures, dated August 13, 2013 (R. 255).

<sup>17</sup> Plaintiff's Trial Witness and Exhibit Lists, served September 5, 2013, ¶ 1 (R. 294, 295).

The Bank asked that the Court enter judgment against the Homeowners based on the default.<sup>18</sup>

The Homeowners again argued that they were only defaulted to the allegations of the Complaint, which were that the Note—which was not even endorsed to the Plaintiff Bank—was lost.<sup>19</sup> Because, on the day of trial, the Bank was effectively amending its Complaint to drop the lost note count and “attach” a Note that was now endorsed, the Homeowners argued that they should have an opportunity to respond to these new allegations.<sup>20</sup>

The trial court did not grant that request, but instead admitted as evidence what the Bank’s attorney presented as the original Note with the new endorsement on the grounds that it was self-authenticating.<sup>21</sup> The Bank did not offer the Assignment into evidence (or even mention it). The court then entered judgment

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<sup>18</sup> Transcript of Hearing before Judge Richard Oftedal, dated September 20, 2013 (“T. \_\_”), p. 3 (attached to Motion to Supplement the Record on Appeal, dated February 24, 2014).

<sup>19</sup> T. 13-14.

<sup>20</sup> T. 13.

<sup>21</sup> T. 23.

for the amount of principal alleged in the Complaint, \$277,078.51<sup>22</sup>—a total of \$16,828.51 more than what the Homeowners borrowed.

This appeal ensued.<sup>23</sup>

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<sup>22</sup> Final Judgment, dated September 20, 2013 (R. 336).

<sup>23</sup> Notice of Appeal, filed October 8, 2013 (R. 341).

## **SUMMARY OF THE ARGUMENT**

The Bank's Complaint did not state a cause of action when it was filed because it did not attach a copy of an instrument it could enforce. The unendorsed Note (coupled with the lost note count) contradicted, and thus negated, the Bank's claims that it owned and held the instrument. The Homeowners' default to this Complaint, therefore, admitted no facts upon which a judgment could be entered. The trial court erred in refusing to vacate the default about ten months before the trial.

On the day of trial, even the Bank conceded (at least tacitly) that its Complaint did not state a cause of action when it chose not to proceed on its lost note count. Instead it relied on an endorsed version of the Note revealed for the first time. To the extent that the trial judge may have deemed the Complaint amended on the day of trial such that it now referred to this endorsed version of the Note, it erred in refusing to vacate the default so that the Homeowners could respond to these radically different allegations.

## STANDARD OF REVIEW

Normally, the standard of review for an order denying a motion to vacate a default judgment is abuse of discretion. *BoatFloat, LLC v. Cent. Transp. Intern., Inc.*, 941 So. 2d 1271, 1272 (Fla. 4th DCA 2006). Even under this standard, there is a strong preference for lawsuits to be determined on the merits rather than by default judgment. *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. McWilliams ex rel. Estate of Meyer*, 799 So. 2d 378, 380 (Fla. 4th DCA 2001). Florida public policy favors the setting aside of defaults. *Elliott v. Aurora Loan Services, LLC*, 31 So. 3d 304, 306 (Fla. 4th DCA 2010). If there be any reasonable doubt in the matter of vacating a default, it should be resolved in favor of granting the application and allowing a trial upon the merits. *Lloyd's Underwriter's At London v. Ruby, Inc.*, 801 So. 2d 138, 139 (Fla. 4th DCA 2001).

But where there is no factual dispute upon which the trial court based its decision to deny a motion to vacate default—where the ruling was made as a matter of law—the standard of review is *de novo*. *Florida Eurocars, Inc. v. Pecorak*, 110 So. 3d 513, 515 (Fla. 4th DCA 2013); *Mourning v. Ballast Nedam Const., Inc.*, 964 So. 2d 889, 892 (Fla. 4th DCA 2007).

Here, whether the default should be vacated is dependent upon whether the Complaint states a cause of action—a legal issue that is reviewed *de novo*. *See*

*Infante v. Vantage Plus Corp.*, 27 So. 3d 678, 680 (Fla. 3d DCA 2009) (“The standard of review of an order that vacates a final judgment by default as void for a complaint's failure to state a cause of action is *de novo*.”) Just as with a motion to dismiss, the ruling on whether the Complaint states a cause of action is an issue of law, and therefore, should be reviewed under the same *de novo* standard. *See Regis Ins. Co. v. Miami Mgmt., Inc.*, 902 So. 2d 966, 968 (Fla. 4th DCA 2005) (standard of review of rulings on motions to dismiss is *de novo*).

## ARGUMENT

### **I. The Trial Court Erred in Refusing to Vacate the Default on the Grounds that the Complaint Did Not State a Cause of Action.**

#### ***A party cannot be defaulted to a non-viable complaint.***

A default judgment must be set aside where the complaint upon which the default was granted fails, on its face, to set forth a viable cause of action. *Ginsberg v. Lennar Florida Holdings, Inc.*, 645 So. 2d 490, 493 (Fla. 3d DCA 1994) (reversing denial of motion to vacate a default because attached documents negated the cause of action); *Becerra v. Equity Imports, Inc.*, 551 So. 2d 486, 488 (Fla. 3d DCA 1989) (“Failure to state a cause of action, unlike formal or technical deficiencies, is a fatal pleading deficiency not curable by a default judgment.”); *Opti, Inc. v. Sales Eng'g Concepts, Inc.*, 701 So. 2d 1234, 1235 (Fla. 4th DCA 1997) (“a default should be set aside where, as here, the complaint on its face fails to state a cause of action”), citing, *Lee & Sakahara Associates, AIA, Inc. v. Boykin Mgmt. Co.*, 678 So. 2d 394, 396 (Fla. 4th DCA 1996) (same).

Notably, a motion to set aside a default judgment requires no allegations or showing of excusable neglect where the basis for the motion is that the allegations in the complaint do not entitle the plaintiff to relief. *Magnificent Twelve, Inc. v. Walker*, 522 So.2d 1031 (Fla. 3d DCA 1988) .

***The Complaint failed to state a cause of action.***

Here, the Complaint failed to state a cause of action because the attachment (the unendorsed Note) superseded and negated the Bank's allegations that it was entitled to enforce it. *Fladell v. Palm Beach County Canvassing Board*, 772 So. 2d 1240 (Fla. 2000) ("If an exhibit facially negates the cause of action asserted, the document attached as an exhibit controls and must be considered in determining a motion to dismiss."). "When there is an inconsistency between the general allegations of material fact in the complaint and the specific facts revealed by the exhibit, and they have the effect of neutralizing each other, the pleading is rendered objectionable" *Greenwald v. Triple D Properties, Inc.*, 424 So. 2d 185, 187 (Fla. 4th DCA 1983) (affirming dismissal of foreclosure complaint with prejudice where assignment attached to complaint contradicted the textual allegations). Although the Bank specifically alleged that the "Note and Mortgage were subsequently assigned and/or endorsed in favor of the Plaintiff,"<sup>24</sup> it attached neither an assignment nor an endorsed Note to the Complaint.

It is axiomatic that, under Rule 1.130(a) Fla. R. Civ. P., a pleading that asserts a claim for relief based on a written instrument is subject to dismissal for failure to state a cause of action if the instrument is not attached. *Safeco Ins. Co. of*

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<sup>24</sup> Complaint, ¶ 4 (R. 1).

*America v. Ware*, 401 So. 2d 1129 (Fla. 4th DCA 1981). *See also, In re Estate of Vickery*, 564 So. 2d 555 (Fla. 4th DCA 1990) (complaint which failed to allege or attach agreement did not state cause of action); *Patriotcom v. Vega*, 821 So. 2d 1261 (Fla. 4th DCA 2002) (Court improperly considered documents not attached to complaint).

Here, the Bank attached a Note payable to a different entity, thus failing to allege by way of its attachments a viable claim on its own behalf. *See BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936, 938 (Fla. 2d DCA 2010) (bank did not establish entitlement to foreclose where it had alleged it was the holder of the note and mortgage, but the attached documents indicated that the debt was owed to a different entity); *Jeff-Ray Corp. v. Jacobson*, 566 So. 2d 885, 886 (Fla. 4th DCA 1990) (plaintiff failed to state a cause of action when its allegation of standing at the time of filing was contradicted by an assignment referenced in, but unattached to, the complaint).

Moreover, the Bank's allegations that it was a "holder"—implying a right to enforce the Note under Article 3 of the Uniform Commercial Code ("UCC")—are negated by its explicit assertion that the Note was not in its possession. § 673.201(21)(a), Fla. Stat. (A "holder" is the person in possession of the instrument that is payable to bearer or to an identified person in possession.).

***The Homeowners were defaulted only to the facts alleged—i.e. they “admitted” that the note was neither endorsed nor in the bank’s possession.***

A default does not admit facts not pleaded, not properly pleaded or conclusions of law. *Bd. of Regents v. Stinson-Head, Inc.*, 504 So. 2d 1374, 1375 (Fla. 4th DCA 1987), *quoting*, H. Trawick, *Trawick's Florida Practice and Procedure* § 25-4 (1986 ed.); *Days Inns Acquisition Corp. v. Hutchinson*, 707 So. 2d 747, 749 (Fla. 4th DCA 1997) (a defaulting party admits only the well-pleaded factual allegations of the complaint). The rationale for this rule is grounded in due process considerations:

When process is served upon a defendant, he is thus brought into court to answer only the case made by preceding pleadings. Adjudication of any other claim would be outside the issues and beyond the jurisdiction of the court. Hence, if a defendant upon whom process has been served decides to confess the complaint by failure to plead, he has the right to assume that only the claim thus confessed will be decided. If a different claim is decided, there is a lack of due process of law.

*Colburn v. Highland Realty Co.*, 153 So. 2d 731, 735-36 (Fla. 2d DCA 1963).

Thus, the Homeowners did not admit that the Bank was in possession of an endorsed note—a fact which was pled, but which was negated by the attached unendorsed Note. Nor did the Homeowners admit that the Bank was an “owner

and holder” of the Note—a conclusion of law, which would never be admitted by default, but which was, in any event, belied by the attached unendorsed Note). Because these facts and conclusions were not admitted, the trial court erred in denying the Homeowners’ motion to vacate the default.

## **II. The Trial Court Erred in Allowing the Bank to Amend its Complaint on the Day of Trial Without Vacating the Default to Permit the Homeowners to Respond to the New Allegations.**

At trial, the Bank did not seek to adduce the evidence needed to reestablish a lost note, but instead tried to prove something outside of its pleadings—that it was in possession of an endorsed Note. If the Bank had found the Note, it was incumbent on it to amend the Complaint in accordance with this theory of enforcement—presumably by dismissing the lost note count and attaching the endorsed version of the note.

And while the Bank may have had the right to amend its Complaint in this way, the Homeowners have a concomitant right to answer to these new allegations. *Lee & Sakahara Associates, AIA, Inc. v. Boykin Mgmt. Co.*, 678 So. 2d at 396. (“Plaintiffs may be able to amend their complaint to state a cause of action, but defaulted defendant ... will have to be served with any amended complaint and be provided with an opportunity to respond.”). Such an amendment—which radically

changes the posture of the case—cannot be permitted on the day of trial over objection.

***The Bank effectively amended its Complaint on the day of trial.***

The judgment in this case was predicated on the trial court’s understanding that the Bank was voluntarily dismissing its lost note count at trial—a notion with which the Bank agreed:

MR. ACKLEY [Homeowners’ counsel]: If they're – they’re dropping the lost note count, they're amending their pleadings and we have a right to respond.

THE COURT: They can drop the count. They can take the voluntary dismissal.

MS. CUMMINGS [Bank’s counsel]: Exactly.<sup>25</sup>

Indeed, proceeding on the lost note count would have directly contradicted the Bank’s stance that it now had the original note:

MS. CUMMINGS [Bank’s counsel]: Your Honor, if I may respond. I think if I heard correctly, it said that they needed to produce the original note, we have the original note in this case.<sup>26</sup>

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<sup>25</sup> T. 13.

<sup>26</sup> T. 6-7.

...like I said, we do have the original note in this case, Your Honor...<sup>27</sup>

\* \* \*

...So we are in possession of the original note, Your Honor, it is endorsed –

\* \* \*

...So -- and we are here with the original note today, Your Honor. It is endorsed in blank...<sup>28</sup>

Additionally, the note was admitted into evidence as “self-authenticating” precisely because the Court believed that it was the original instrument (rather than a copy being reestablished).<sup>29</sup>

Thus, there can be no doubt that the Bank disposed of its lost note count at trial—something that is permissible under recent changes to Fla. R. Civ. P.

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<sup>27</sup> T. 7.

<sup>28</sup> T. 17.

<sup>29</sup> T. 22-23. The Homeowners do not concede that the UCC provides a short-cut for authenticating whether a proffered document is an original instrument (as opposed to a copy). Rather, it provides a rebuttable presumption for the authenticity and authority of the maker’s signature. § 90.902(8), Fla. Stat.; § 673.3081, Fla. Stat. To hold otherwise would eviscerate § 90.953(1), Fla. Stat. which makes negotiable instruments an exception to the rule that duplicates are just as admissible as an original. If an attorney’s representation that the document is the original of the instrument is sufficient to prove that fact, then §90.953(1) has no meaning.

1.420(a).<sup>30</sup> However, stripping the Complaint of its lost note count still does not make the Complaint state a cause of action—the Bank’s pleadings would still not support the judgment entered.

The only way that the Complaint could state a cause of action is if it were formally amended to attach the “found” Note with the new endorsement. *See Feltus v. U.S. Bank Nat. Ass’n*, 80 So. 3d 375, 377 (Fla. 2d DCA 2012) (Summary judgment for bank reversed where pleadings at the time of judgment still alleged a lost, unendorsed note and judgment was based on its possession of an endorsed note). But even if the trial court were to ignore the requirement of an official amendment and simply deem the altered Note “attached” to the Complaint as of the day of trial,<sup>31</sup> such an eleventh-hour change in the pleadings robbed the Homeowners of their right to defend against the new claim.

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<sup>30</sup> Until a recent change in Fla. R. Civ. P. 1.420(a), the only proper method of deleting less than all counts from a pleading was to amend the pleading under Fla. R. Civ. P. 1.190. *Deseret Ranches of Florida, Inc. v. Bowman*, 340 So. 2d 1232, 1233 (Fla. 4th DCA 1976). Effective 2011, however, the voluntary dismissal rule was amended to permit the dismissal “of any part of an action or claim”—a change made without commentary. *In re Amendments to The Florida Rules of Civil Procedure*, 52 So. 3d 579 (Fla. 2010).

<sup>31</sup> *See Deutsche Bank Nat. Trust Co. v. Taperi*, 89 So. 3d 996, 997 (Fla. 4th DCA 2012).

For example, the Homeowners were denied the opportunity to raise defenses and conduct discovery regarding the authenticity of the endorsement, the authority of the person signing the endorsement, and most importantly, the date the endorsement first appeared on the Note—a fact crucial to the potential defense that the Bank lacked standing when it initiated the suit. Here, because the undated endorsement conveniently appeared years after the Complaint was filed, the case was particularly ripe for such a defense. *Venture Holdings & Acquisitions Grp., LLC v. A.I.M. Funding Grp., LLC*, 75 So.3d 773, 776 (Fla. 4th DCA 2011) (“A party must have standing to file suit at its inception and may not remedy this defect by subsequently obtaining standing.”); *McLean v. JP Morgan Chase Bank Nat. Ass’n*, 79 So. 3d 170 (Fla. 4th DCA 2012) (where note attached to complaint is unendorsed and later version of the note bears an undated endorsement, necessary evidence that plaintiff had standing before the suit was filed was lacking); *Rigby v. Wells Fargo Bank, N.A.*, 84 So. 3d 1195 (Fla. 4th DCA 2012) (undated endorsement with post-complaint assignment failed to establish standing). *See also Feltus v. U.S. Bank Nat. Ass’n*, 80 So. 3d at 377, n. 2 (“Thus, 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.”).

And while the Bank may argue that the trial court was correct in believing that standing at inception is an affirmative defense that is waived unless pleaded in an answer,<sup>32</sup> there is no waiver until the Homeowners are given an opportunity to respond to a complaint that actually pleads possession of an endorsed instrument. The Bank cannot hide the very document that would give rise to that defense until after default (indeed, until the very day of trial), and then be allowed to argue that the Homeowners should have raised the defense earlier. *Beaumont v. Bank of New York Mellon*, 81 So. 3d 553, 555 (Fla. 5th DCA 2012) (homeowner’s standing defense not waived by failure to plead as an affirmative defense where bank had concealed basis for the defense); *cf. Johnston v. Hudlett*, 32 So. 3d 700, 703 (Fla. 4th DCA 2010) (claim that cross-complaint did not state a cause of action for foreclosure because the mortgage and note were not attached must be raised sometime before appeal.)

*See also* Fla. R. Jud. Admin. 2.516 (“No service need be made on parties against whom a default has been entered, except that pleadings asserting new or additional claims against them must be served in the manner provided for service of summons.”); *Kitchens v. Kitchens*, 162 So. 2d 539, 541 (Fla. 3d DCA 1964) (“Even the most minimal standards of due process would require that notice be

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<sup>32</sup> *See*, T. 4.

given to a party who had suffered a default ... where the complaint has been amended in a matter of substance after the entry of such default.”); *State Farm Mut. Auto. Ins. Co. v. Horkheimer*, 814 So. 2d 1069, 1074 (Fla. 4th DCA 2001) (that a defaulted party is entitled to notice of a change in the pleadings or the issues to be litigated at trial is an issue of elementary due process).

Accordingly, the lower court erred in permitting the Bank to effectively amend its Complaint on the day of trial—i.e. to travel under an endorsed version of the Note as if it had been attached to the Complaint—without vacating the default and permitting the Homeowner to plead to these new allegations.

## CONCLUSION

The Homeowners request that the judgment be reversed and the default vacated such that they may respond to the Complaint.

Dated: February 26, 2014

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**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.

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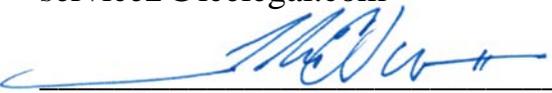
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this February 26, 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.

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