In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted] and [redacted]

Appellants,

v.

BANK OF AMERICA, N.A. SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP F/K/A COUNTRYWIDE HOME LOANS SERVICING, LP,

Appellee.

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

INITIAL BRIEF OF APPELLANTS

Respectfully submitted,

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INTRODUCTION

This is a foreclosure case in which BANK OF AMERICA, N.A. ("the Bank") seeks to take the home of [redacted] and [redacted] (collectively "Homeowners") to collect on a loan made by America's Wholesale Lender, a trade name of Countrywide Home Loans, Inc.[1]

[1] Interest Only Fixed Rate Note attached to Complaint to Foreclose Mortgage and to Enforce Lost Loan Documents (R. 19) and endorsed version attached to Amended Complaint to Foreclose Mortgage (R. 126).

QUESTION PRESENTED

The core appellate issue is what may constitute the "personal knowledge" required for a witness to authenticate documents and to lay the foundation for a business records exception to hearsay for those documents. Specifically, it presents the question whether the party offering those documents as evidence may convey information to its otherwise unknowledgeable witness to create a veneer of "personal knowledge" with two simple preparatory steps:

- having its witness read the documents before trial; and
- telling its witness what to say in court about the record-keeping policies of an entirely different entity which actually created and kept the records.

The trial court believed that only the first step—simply having the witness read the records before trial—was sufficient to qualify the witness to testify:

> THE COURT: … I think the case law makes it clear that a representative of the … servicer who has got the kind of responsibility as the witness has is competent to testify on the business practices and the accuracy of records if he has reviewed the file prior to testifying.[2]

Notably, the witness's job "responsibility" to which the trial court referred was working with the Bank's attorneys to move contested foreclosure matters to "resolution."[3]

It was manifest error to admit the hearsay documents.

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[2] Transcript of Trial held September 25, 2013 ("T.__"; Supp. R. 1), p. 200-201.

[3] T. 36, 140, 188-190.

STATEMENT OF THE CASE AND FACTS

I. The Pleadings.

In 2006, [redacted] a signed a Note payable to America's Wholesale Lender, a trade name of Countrywide Home Loans, Inc.[4] He and his wife, [redacted] signed a Mortgage to Mortgage Electronic Registration Systems, Inc.[5] making their home collateral for the loan. In 2008, after the Homeowners were no longer able to make timely payments, a stranger to the original transaction, Countrywide Home Loans Servicing, LP, filed a foreclosure action claiming to be the "servicer for the owner and acting on behalf of the owner with authority to do so" as well as something it called a "designated holder of the note and mortgage." [6] Despite this claim to be a holder, 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.[7]

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[4] Interest Only Fixed Rate Note attached to Complaint to Foreclose Mortgage and to Enforce Lost Loan Documents (R. 19) and endorsed version attached to Amended Complaint to Foreclose Mortgage (R. 126).

[5] Mortgage attached to Complaint (R. 4). Ms. [redacted] was not, however, identified as a mortgagor in the "granting clause" of the mortgage.

[6] Complaint, filed April 10, 2009, ¶ 5 (R. 1).

[7] Complaint, Count II (R. 2-3).

Over a year later, the Bank amended the Complaint to drop its lost note count.[8] Attached was a copy of the Note which was now sporting a new endorsement in blank purporting to have been executed by the original lender.[9] After preliminary motions, the Homeowners filed an Answer and Affirmative Defenses[10] which they later amended.[11]

During the litigation, Countrywide (when represented by the Law Offices of David J. Stern) notified the court that its name had changed to BAC Home Loans Servicing, LP.[12] BAC later announced that it had merged into Bank of America, N.A.[13] This name change and merger were the result of Bank of America's purchase of the separate entity, Countrywide.[14]

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[8] Amended Complaint to Foreclose Mortgage, filed May 24, 2010 (R. 106).

[9] R. 126.

[10] Defendants, [redacted] and [redacted] Answer to Amended Complaint and Affirmative Defenses, served October 5, 2011 (R. 248).

[11] Defendants, [redacted] and [redacted] Amended Answer to Amended Complaint and Affirmative Defenses, served May 16, 2013 (R. 332).

[12] Notice of Name Change of Plaintiff, served August 11, 2010 (R. 130).

[13] BAC's Motion to Substitute Party Plaintiff, served June 18, 2013 (R. 357).

[14] *See*, T. 44, 181.

II. The Trial—The Bank's "Document Reader."

At trial, the Bank called a single witness, John Blade, to prove all the elements of its case. Mr. Blade is a lawyer by education.[15] At the time of trial, he had been an employee of Bank of America, N.A. for approximately fifteen months.[16] His employment, therefore, started three years after the previous servicer was purchased by Bank of America and, coincidentally, about three years after this case was filed.[17]

His job duties as "Mortgage Resolution Associate"—the only post he has ever held at the Bank[18]—are to work with outside counsel to move his "portfolio of contested foreclosure matters" to resolution by verifying and consulting the Bank's records and testifying.[19] With the exception of a handful of situations that are "potentially litigious," he deals exclusively with foreclosure cases that are actively

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[15] T. 220.

[16] T. 75.

[17] The merger of BAC Home Loans Servicing, LP into Bank of America was in July of 2011 (T. 40), but Countrywide became part of the Bank of America conglomerate at some time before April 21, 2009 (Plaintiff's Exhibit 1; R. Exh. 4).

[18] T. 179.

[19] T. 36, 140, 188-189.

being litigated—i.e. they have already been filed and contested by an answer or denial.[20]

The Bank trained him for this job, by telling him what to say about the record-keeping policies of the previous servicer the Bank had purchased, Countrywide:

TESTIMONY	BASIS
Bank of America adopted the same systems used by Countrywide.	"Based on my training and experience with the bank."[21]
When a collateral file is received [by Countrywide], the contents are examined and confirmed as to belonging to the correct loan and to make sure it is endorsed and logged into the system.	"Based on my training with the bank."[22]
Countrywide's record that allegedly shows that the Note was received by that company on February 11, 2006 is from the same system now used by Bank of America.	"Based on my training and experience with dealing with many of these kinds of records."[23]
Bank of America uses the same system as Countrywide.	"Based on my training and experience with dealing with these records."[24]

[20] T. 189-190.

[21] T. 43-44.

[22] T. 72-73.

[23] T. 82-83.

TESTIMONY	BASIS
Countrywide logged information into the instance summary at or around the time that it received the Note.	"Based on my training with the bank."[25]
Individuals in the cashiering department (where he has never worked) directly enter the information in the loan payment history.	"Based on my training and experience with the bank."[26]
Claimed familiarity with the policies and procedures that were in place for the entry of payment information at Countrywide or BAC.	"…We've had quite a bit of training [by Bank of America] on the correct inputting of records, including how those were done within Countrywide and BAC."[27]
Bank of America inputs records in the same way and into the same system as Countrywide did.	"Based on my training, based on my experience with reviewing the files and the accuracy of information."[28]
Records from other servicers that are boarded into the Bank of America system are audited and cross-checked when they come in.	"…I have received training as to these practices."[29]

[24] T. 83.

[25] T. 97-98.

[26] T. 129.

[27] T. 140-41.

[28] T. 139.

[29] T. 141.

TESTIMONY	BASIS
Claimed familiarity with the process and procedures used by Countrywide's Breach Letter Department.	"From my training and experience with the bank."[30]
Countrywide sent the acceleration notice by first class mail and certified mail.	"From my training and experience with the bank…"[31]

The court sustained objections to several other questions about the basis for Blade's purported knowledge:[32]

- "Q. …Though you may be aware of the policies and procedures that govern the various departments of the bank, you don't actually have any firsthand knowledge of how those policies and procedures are applied or carried out in those various departments, correct?"[33]
- "Q. And that great faith [in the integrity of the Bank's records] is largely, if not entirely, formed by the training that you have received on the policies and procedures of the various departments in the bank, correct?"[34]
- After witness denies that the only reason he believes everything contained in the computer system is accurate is because he was trained to

[30] T. 154.

[31] T. 155.

[32] While not a point that would, standing alone, require reversal, erroneously sustaining the objections to these questions blocked additional testimony that most likely would have further demonstrated the witness's lack of personal knowledge.

[33] T. 200. Objection sustained as "asked and answered."

[34] T. 200. Objection sustained as "asked and answered" and "mischaracterization of the testimony."

> believe that by Bank of America: "Q. In other words, then, there are independent means that you have to verify the information that's contained in this instance detail?"[35]

The Bank's training of Blade consisted of large group sessions that addressed basic policies and procedures and how to use the systems and how to input data.[36] In those sessions, they would "discuss" how Bank of America would create records in departments other than that in which the witness worked.[37]

Blade never worked for Bank of America's Cashiering Department—much less that of Countrywide (or BAC Home Loans Servicing, LP.)—which created the records regarding incoming payments.[38] And although he "believe[d]—if memory serves" that this particular account used automatic debiting for payments, he did not know the details of how the automatic debiting system works. Nor did he know the "specifics behind this particular debiting account and how it was set up."[39]

Blade never worked in, or supervised anyone in, the Boarding Department that would audit data being transferred from other servicers.[40] He conceded that, in

[35] T. 77. Objection sustained on "relevance."

[36] T. 184.

[37] T. 186-87.

[38] T. 129, 130, 142.

[39] T. 205, 210, 212.

[40] T. 140.

any event, for Countrywide's data, there was "not a boarding in the normal sense…[but]… more of a continuation of the prior existing records."[41] Although he still claimed there was a "very large auditing process that took place," the witness never demonstrated sufficient personal knowledge to describe it:

> Q. [Bank's counsel] So although there was an auditing process you said -- Did that auditing process occur when the merger occurred?
>
> MR. HOLTZ: Objection; calls for hearsay, lack of personal knowledge.
>
> THE COURT: Sustained.
>
> THE WITNESS: It was sustained.
>
> THE COURT: Lay a foundation.[42]

Rather than laying a foundation, the Bank's counsel went on to have the witness say that, based on what he had been told, the Countrywide documents were the same as Countrywide had maintained them: "Yes, they are the same records maintained in the same systems, created in the same way, maintained in the same way."[43]

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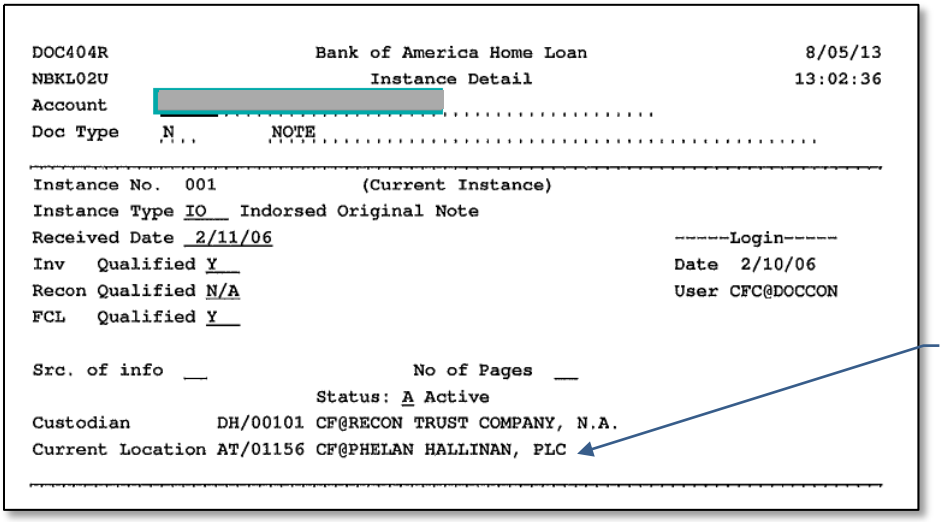
[41] T. 146.

[42] T. 147.

[43] T. 148.

Additionally, Blade never worked in the Collateral Department of Bank of America—much less that of Countrywide—which he asserted created the "Instance Detail" (Plaintiff's Exhibit 5) six years before he began his employment at the Bank.[44] Based on his training, he claimed that the Instance Detail disclosed when Countrywide received an endorsed copy of the Promissory Note. The document states, however, that the "current location" of the Note on the date of that record was a law firm, Phelan Hallinan, PLC:



DOC404R Bank of America Home Loan 8/05/13
NBKL02U Instance Detail 13:02:36
Account [redacted]
Doc Type N NOTE

Instance No. 001 (Current Instance)
Instance Type IO Indorsed Original Note
Received Date 2/11/06 -----Login-----
Inv Qualified Y Date 2/10/06
Recon Qualified N/A User CFC@DOCCON
FCL Qualified Y

Src. of info No of Pages
Status: A Active
Custodian DH/00101 CF@RECON TRUST COMPANY, N.A.
Current Location AT/01156 CF@PHELAN HALLINAN, PLC

PLAINTIFF'S EXHIBIT 5

[44] T. 74-75, 97.

Phelan Hallinan, however did not become counsel of record in this case until four years after the case was filed when it first made an appearance for BAC Home Loans Servicing.[45]

Additionally, the Instance Detail listed the "Custodian" as Recon Trust Company, N.A.—another company for which Blade had never worked.[46] Blade conceded that he did not know when Recon Trust Company had possession of the note—or if it ever did—because knowledge of this "really goes beyond my job duties."[47]

Additionally, Blade never worked in the Breach Letter Department of Bank of America —much less that of Countrywide—which he asserted sent out a notice of acceleration.[48] His testimony that Countrywide actually mailed the letter, and when it mailed the letter, was based on the document itself, as well as what his employer told him about Countrywide's procedures.[49] He also asserted the letter

[45] Stipulation for Substitution of Counsel for Plaintiff, served April 25, 2013 (R. 320). The letter attached to the Stipulation is dated December 14, 2012 and is entitled "Transfer of Bank of America files from Morales Law Group, P.A. to Phelan Hallinan, PLC…" implying that, if the Bank gave its attorney possession of the original Note as suggested by Blade (T. 100-01), it was not transferred to Phelan Hallinan until late 2012.

[46] T. 86, Plaintiff Exhibit 5 (R. Exh. 31).

[47] T. 93-94, 95.

[48] T. 154, 179.

[49] T. 154, 155, 156.

had been received ten days later based on a return receipt containing a signature by Donna [redacted][50]

The only time Blade looked at the information regarding the loan in this case was after it was assigned to him as a contested foreclosure case.[51] He had never seen what he identified to be the original note before the day of trial.[52]

Over repeated hearsay objections, the trial court admitted every Bank document proffered as an exhibit.[53] After the Bank rested, and again after the defense rested, the Homeowners moved for involuntary dismissal—motions which the court denied.[54] Based on the Plaintiff's exhibits and Blade's testimony about them, the court entered judgment for the Bank[55] from which this appeal was taken.[56]

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[50] T. 157; Plaintiff's Exhibit 7 (R. Exh. 40).

[51] T. 191.

[52] T. 50.

[53] Plaintiff's Exhibits 1-2, 4-8 (R. Exh. 1-9, 14-44); T. 41, 64, 69, 102, 153, 158, 174 (Plaintiff's Exhibit 3 for identification was never moved into evidence.)

[54] T. 236, 251.

[55] Final Judgment of Foreclosure, filed September 25, 2013 (R. 483).

[56] Notice of Appeal, filed October 10, 2013 (R. 503).

SUMMARY OF THE ARGUMENT

The Bank's sole witness, John Blade, was a professional testifier hired and trained by the Bank to read records about which he had no personal knowledge and then regurgitate them to the fact-finder at trial. His only connection to the documents and record-keeping policies to which he testified (all of which were from companies and departments for which he had never worked) was that he had read them after being assigned to this trial or told about them during training to be a witness. His 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 him 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 endorsement—which appeared over a year after the suit was filed—was placed on the Note. For the same reason, the Bank also failed to prove conditions precedent and damages.

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 "Document Reader" 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, John Blade, was a professional testifier whose job duty with Bank of America was to review loan documents so that he can communicate the hearsay within those documents to the court. His only connection with the documents admitted into evidence, over objection, was that he had read them after being assigned—sometime shortly before trial—to help the Bank's attorneys move the case to "resolution." In short, the only competence he offered the trier of fact was that he 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, Blade 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, Blade needed to be a "qualified" witness—one who is in charge of the activity constituting the usual business practice or sufficiently experienced 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 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*.

The case of *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825 (Fla. 3d DCA 2014) is virtually identical to this case. There, the trial court admitted evidence from a "document reader" (Gergeceff) over multiple hearsay objections. Like Blade, Gergeceff testified she had only seen the subject note for the first time the day of trial. *Id*. at 826. Like Blade, Gergeceff testified she had only become familiar with the mortgage file when she learned the case was being tried. *Id*. As in this case, the defendants objected to the witness's authentication of the note, mortgage, and other documents because she was incompetent to testify. *Id*.

Although the plaintiff bank in *Kelsey* filed what the opinion described as a "proper concession of error," the Third District wrote an opinion expressing its agreement with the concession and illuminating the error that had occurred below:

> Without the proper foundation, the documents Gergeceff relied upon to establish the amount due on the note were indisputably hearsay and were not properly authenticated. § 90.803, Fla. Stat. (2012); *Yisrael v. State*, 993 So.2d 952, 956 (Fla.2008). …

Id. The court agreed that the trial court had "erred in allowing the documents, as they are hearsay without the proper authentication." *Id*.

As in *Kelsey*, this Court should also reverse the judgment below as having been based on pure hearsay.

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

The Bank will argue that Blade was "familiar" with the records—citing to its witness "training" as though it were something laudable. 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 his "knowledge" is not personal, but rather based on rank hearsay. And it is hearsay of the worst kind because it is deliberately communicated to him 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 experience—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." *Id*. (emphasis added). 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, Blade was similarly unqualified to lay the foundation for the records from the many Bank of America departments (such as the Cashiering Department, the Boarding Department, the Breach Letter Department, and the Collateral Department) where he had never worked. He "had no responsibilities" regarding the business practices of the Bank in generating its bookkeeping records. The nature of his job responsibilities—reading records to judges—is insufficient precisely because his familiarity with those records was not gained in the course of performing or supervising the business activity in question. Instead, his "familiarity" was artificially created specifically for the purpose of litigation.

Accordingly, because Blade was not a qualified witness, his testimony, and the Bank documents introduced through him, should have been excluded.

Blade was even less qualified to lay the foundation for documents from entities where he had never worked.

The key documents that the Bank offered as evidence were not Bank of America records, but came from Countrywide (where Blade had never been employed). This even further distanced him from any personal knowledge of how they were created or maintained. Specifically, those documents were:

- **Plaintiff's Exhibit 5 (Instance Detail)**—the only document offered to date the endorsement of the Note—was a Countrywide document allegedly created six years before Blade was employed by Bank of America.
- **Plaintiff's Exhibit 6 (Payment History)**—because the default occurred before the Bank's first "name change," all or nearly all of the entries of the Homeowners' payments were created by Countrywide. All but two of the entries of costs paid by the Bank occurred before Blade was employed by Bank of America.
- **Plaintiff's Exhibit 7 (Notice of Intent to Accelerate and return receipt)**—a Countrywide document created three years before Blade was employed by Bank of America.
- **Plaintiff's Exhibit 8 (Account Information Statement)**—a compilation of mostly Countrywide data from Plaintiff's Exhibit 6.

Records from another servicer are hearsay within hearsay.

Blade was singularly unqualified to provide the necessary testimony for a business records exception to hearsay for the records of his own employer, Bank of America, because he had no experience in the departments that actually generated them. Because the "Bank of America records" were merely an adoption of digital

information from the previous servicer, his 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.* This 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 Blade was trained (i.e. "told") to say that the record-keeping policies did not change when Bank of America bought the troubled institution, he had no personal experience with the Countrywide policies—creating them, enforcing them, or living by them. Moreover, he could not lay the foundation to testify whether Bank of America had done anything to verify that Countrywide's records were accurate.[57]

Accordingly, Blade'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

[57] T. 147.

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.

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"):

> (11) An original or a duplicate of evidence that would be admissible under s. 90.803(6), which is maintained in a foreign country or domestic location and is accompanied by a certification or declaration from the custodian of the records or another qualified person certifying or declaring that the record:
>
> (a) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters;
>
> (b) Was kept in the course of the regularly conducted activity; and
>
> (c) Was made as a regular practice in the course of the regularly conducted activity,
>
> provided that falsely making such a certification or declaration would subject the maker to criminal penalty under the laws of the foreign or domestic location in which the certification or declaration was signed.
>
> § 90.902, Fla. Stat.

See also § 90.803(6)(c), Fla. Stat. (providing the procedure for using such an affidavit, which includes reasonable notice 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 actual Countrywide employees in charge of its record-keeping policies, despite the relative ease of doing so. It did not seek to admit the payment history with a certification from someone in the Cashiering Department (who could personally describe the actual data entry procedures for automatic debiting or the Bank's payment of insurance and taxes) or the Boarding Department (who could personally describe what, if any, measures were taken to ensure the accuracy of Countrywide's records).

Nor did it seek to admit the Instance Detail with a certification from someone in the Collateral Department (who could personally describe the involvement of the "Custodian," Recon Trust Company, N.A., in the chain of possession and how the document could be dated in 2006, yet reference a law firm that made its first appearance over seven years later.) And lastly, it did not seek to admit the acceleration letter with a certification from someone in the Breach Letter Department.

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 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);[58] Press Release of the Department of Justice Financial Fraud Enforcement Task Force, March 12, 2012 and related court filings[59] including the consent judgment against Bank of America Corp.[60]

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.

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[58] 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

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

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

Another reason that banks claim that the records must be trustworthy is because they "relied" upon them for their own business purposes.[61] At best, this is a circular argument, because the records allegedly being relied upon are of a non-performing loan. There is no business purpose other than to collect the loan in a legal action. The Bank's only demonstrated "reliance," therefore, is upon the court to enforce the note in accordance with the records in question—whether they are accurate or not. This is all the more true, in cases such as this, where the servicing agent is the keeper of the payment history of other, defunct servicers. Because it did not itself invest in the loan, any financial incentive to ensure the accuracy of these second-hand records is highly attenuated, if it exists at all. Stated plainly, the record is devoid of any suggestion that the servicer proffering this evidence suffers any financial penalty if the records it inherits are inaccurate.

Thus, the Bank's arguments that the documents it presents in the courtroom are worthy of trust are deceptively misplaced. So too, would be any temptation to change the rules of evidence to benefit any particular industry.

[61] Blade himself alludes to this when defending the accuracy of Countrywide records: "These records, we use them on a day-to-day basis. We depend on them on a day-to-day basis to do our business. They are, in my experience, very accurate." (T. 144). His only "business," however, is assisting attorneys to resolve foreclosure cases.

Accordingly, the trial court erred in admitting the Bank's exhibits and the testimony about them because it was unmitigated hearsay.

II. Involuntary Dismissal Should Have Been Granted Because There Was No Admissible Evidence to Support the Judgment.

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 competence of that witness to testify would taint the entire case. Without the inadmissible exhibits and the testimony based upon them, there was no evidence of the essential elements of the Bank's case. These elements (discussed individually below) are:

- **Standing:** Because Blade was not qualified to testify about the Countrywide's Collateral Department and its creation and maintenance of the Instance Detail (Plaintiff's Exhibit 5)—there was no admissible evidence that the Bank had standing when it filed suit.
- **Conditions Precedent:** Because Blade was not qualified to testify about Countrywide records, the acceleration letter and the certified mail receipt (Exhibit 7) were inadmissible, leaving no evidence of compliance with the Mortgage prerequisite for acceleration.
- **Damages:** Because Blade was not qualified to testify about records from, or policies of, companies or departments he never worked in, the so-called Payment History (Plaintiff's Exhibit 6) was inadmissible. The

payment history was the only identified source of information for the amounts due and owing that were impermissibly read into evidence from the summary (Plaintiff's Exhibit 8).

Accordingly, the trial court erred, not only in admitting these documents and testimony into evidence, but ultimately, in denying the motion for involuntary dismissal.

A. 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.").

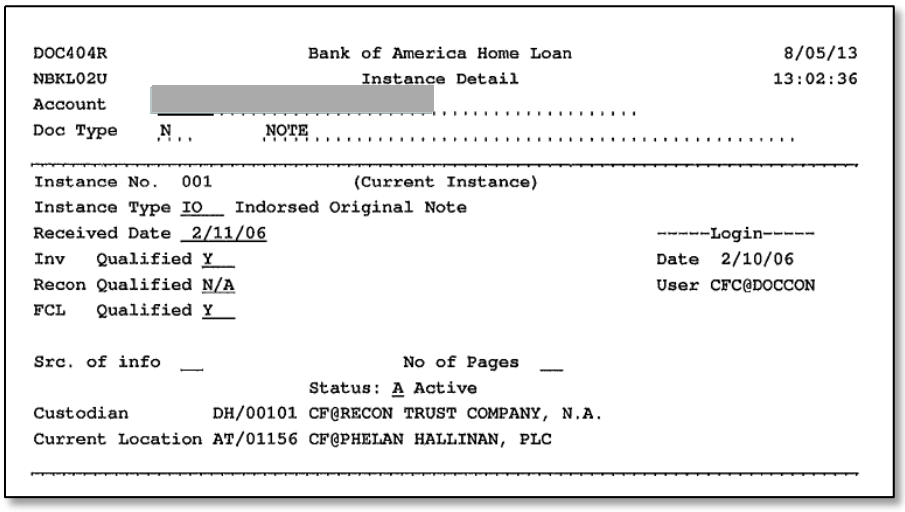
Where, as here, the foreclosing plaintiff—a stranger to the original transaction—chooses to demonstrate standing by showing it is a holder under

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 endorsement in blank first appeared in the case over a year after the case was filed. But Blade was not present and could not testify as to when the endorsement was placed on the Note.[62] The only attempt to establish that the Note was endorsed before the case was filed was the proffer of the Instance Detail which, according to Blade, shows that an endorsed Note was received by Countrywide in February of 2006:



DOC404R Bank of America Home Loan 8/05/13
NBKL02U Instance Detail 13:02:36
Account [redacted]
Doc Type N NOTE

Instance No. 001 (Current Instance)
Instance Type IO Indorsed Original Note
Received Date 2/11/06 -----Login-----
Inv Qualified Y Date 2/10/06
Recon Qualified N/A User CFC@DOCCON
FCL Qualified Y

Src. of info No of Pages
Status: A Active
Custodian DH/00101 CF@RECON TRUST COMPANY, N.A.
Current Location AT/01156 CF@PHELAN HALLINAN, PLC

[62] T. 51.

On its face, however, the document's meaning is, at best, ambiguous. First, it purports to be a document of "Bank of America Home Loan" although no entity by that name has ever been involved in the suit. Since the "Received Date" is shown as 2006—at least two years before Bank of America bought Countrywide—either the document title has been retitled with the "Bank of America" moniker or the record was created years later. Either one of these two possibilities destroys the ability of the document to be considered a business record that would qualify for a hearsay exception.

Additionally, the document reports that the "Custodian" is Recon Trust Company, N.A., not Countrywide, and that the "Current Location" (presumably of the Note) is a law firm that did not receive the file until four years after this case was filed. Again, either the document was changed or it was first created long after the purported "Received Date" in 2006. Indeed, the date of August 5, 2013 (top right corner) comports more with the time period during which Phelan Hallinan would have possession of the file, suggesting that this document can, and is, changed at will.

Blade's ignorance about the document is best shown in his answer to a question about the "Login" date—one day before the alleged "Received Date":

> Q. [Homeowners' attorney] Then there is no significance to the log-in information indicating that a user logged into this record on February 10, 2006?
>
> A. Well, as we have discussed, I don't work in the department so I don't know every notation that is used in this. My understanding is that the log-in is something slightly different that's being recorded possibly the receipt of an envelope or something of that nature.
>
> Q. Okay. You are just speculating at this point, right?
>
> A. That would be speculation, yes.[63]

Blade lacked knowledge about Recon Trust Company's role in the chain of custody:

> Q. [Homeowners' attorney] as a designated custodian, wouldn't their responsibility be to maintain physical custody of the note - of the original endorsed note?
>
> MR. CALLAHAN: Objection, foundation.
>
> THE COURT: Overruled.
>
> THE WITNESS: At some point, yes.
>
> * * *
>
> Q. So when did -- Okay. Recon Trust Company -- When did Recon Trust Company obtain the note?
>
> MR. CALLAHAN: Objection, no foundation. He hasn't established that he obtained the note.
>
> THE COURT: Overruled. If he doesn't know, he will say that.
>
> THE WITNESS: I don't know that they did and I don't remember when.[64]

[63] T. 85-86.

* * *

> Q. My question is: When did Recon Trust get the note or obtain the endorsed original note?
>
> MR. CALLAHAN: Same objection.
>
> THE COURT: Same ruling.
>
> THE WITNESS: I don't know that they did, and I don't know when.[65]

Later, in answer to the judge's questions, Blade admits confusion and lack of knowledge:

> THE COURT: … What do you understand the word custodian to mean? Custodian of what?
>
> THE WITNESS: Custodian of records, Your Honor.
>
> THE COURT: Of records.
>
> THE WITNESS: Yes, sir. But my point of confusion is there could be a designated custodian and the record may not be sent to them. But I don't know -- <u>This really goes beyond my job duties</u>.[66]

Accordingly, the trial court erred in admitting this document—and any testimony about it—over the hearsay objection.[67] Because there was no admissible evidence of when the Note was endorsed, the trial court erred in denying the

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[64] T. 92-93.

[65] T. 93-94.

[66] T. 95 (emphasis added).

[67] T. 96.

motion for involuntary dismissal on the grounds that the Bank failed to prove it had standing at the inception of the case.[68]

There was no evidence that Countrywide (the servicer) was authorized to bring the action.

Another problem with the Instance Detail is that, even if it showed that Countrywide's servicing subsidiary (the original Plaintiff here) was in possession of an endorsed Note in 2006, its claim of standing was based upon an alleged agency relationship with the Note owner, Freddie Mac:

> Plaintiff, as servicer for the investor, Federal Home Loan Mortgage Corporation, and acting on its behalf with authority to do so, is the present holder of the note and mortgage with authority to pursue the present action.[69]

No document establishing this alleged authority was proffered at trial. The words Federal Home Loan Mortgage (or Freddie Mac) were never even spoken.

Nor can the Bank establish standing as an agent by way of being (an alleged) holder. Article 3 of the Uniform Commercial Code ("UCC") was never designed as a substitute for proof of authority as an agent. One may only become a holder through "negotiation"—which involves a transfer of the entire bundle of rights in the instrument. § 673.2011, Fla. Stat. (defining negotiation); § 673.2031(4), Fla.

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[68] T. 237.

[69] Amended Complaint to Foreclose Mortgage, ¶5 (R. 106).

Stat. ("If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur."). Thus, Freddie Mac cannot "negotiate" the Note it received from Countrywide (the original lender) back to Countrywide (the servicer) for the sole purpose of permitting the latter to enforce the Note on Freddie Mac's behalf. The Bank needed to have come forward with documents demonstrating that Countrywide (the servicer) was authorized to bring this suit as Freddie Mac's agent.

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.[70]

B. There was no admissible evidence that a notice of acceleration was sent.

For the reasons shown above, the Bank failed to adduce admissible evidence that it had sent a "notice of acceleration" as required under Paragraph 22 of the Mortgage, which provides:[71]

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[70] 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).

[71] Mortgage, Plaintiff's Exhibit 4, R. Exh. 24.

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

Blade was unqualified to lay the predicate for the Countrywide document proffered by the Bank as the acceleration notice (and return receipt) and it was erroneously admitted. Accordingly, the case should be dismissed for a failure of proof of compliance with conditions precedent, as alleged in Paragraph 8 of the Amended Complaint.[72]

C. There was no admissible evidence of the amounts due and owing.

Likewise, Blade was unqualified to lay the foundation for a business records exception to hearsay for the Countrywide Payment History (Plaintiff's Exhibit 6) and the summary of those records,[73] the Account Information Statement (Plaintiff's

[72] R. 107.

[73] Notably, the Account Information Statement (R. Exh. 43) and the Final Judgment (R. 483) include alleged Inspection fees that are not in the Payment

Exhibit 8). Without these documents, or Blade's "testimony"—his reading of these records to the court—there is no evidence to support the amount of contractual damages in the judgment.

History or any other document in evidence. The evidence, therefore, does not support this portion of the judgment even if all the exhibits were properly admitted.

CONCLUSION

There simply was no competent (or credible) evidence upon which to enter a judgment for the Bank. The Bank, with its single, document reader, failed to adduce any admissible evidence of the *prima facie* elements of its claim, such as standing, conditions precedent, or the amount of damages. The Bank had its day in court and the case should have been dismissed with prejudice. This Court should reverse and remand for entry of judgment for the Homeowners.

Dated: April 30, 2014

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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 Roman, 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 April 30, 2014 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this brief has been electronically filed this April 30, 2014.

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