In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] and [redacted]

Appellants,

v.

NATIONSTAR MORTGAGE, LLC,

Appellee.

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

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE AND FACTS

I. The Pleadings

This appeal arises from a foreclosure action, originally filed by Aurora Loan Services, LLC against Ira and [redacted] ("the Homeowners") to recover on a loan made by Homecomings Financial, LLC.[1] Although Aurora at first claimed to be the owner and holder of the Note,[2] two years later, it admitted that it was merely the servicing agent for the endorsee of the note, Deutsche Bank Trust Company Americas as Trustee.[3] Aurora was later replaced with a new servicer, Nationstar Mortgage, LLC ("the Servicer") who became the new plaintiff.[4]

The Homeowners denied nearly all the Servicer's allegations, which included the allegation that it had complied with conditions precedent.[5] The Homeowners' first affirmative defense alleged that the Servicer had failed to

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[1] Complaint to Foreclose Mortgage and to Enforce Lost Loan Documents, February 18, 2009 (R. 1).

[2] Complaint, ¶ 5 (R. 1); Amended Complaint to Foreclose Mortgage, October 15, 2009 (R. 49).

[3] Second Amended Complaint for Foreclosure, April 14, 2011 (R. 167).

[4] Motion to Substitute Party Plaintiff, September 20, 2012 (R. 258); Order On Motion to Substitute Party Plaintiff, January 9, 2013 (R. 261).

[5] See Second Amended Complaint, ¶ 8 (R. 168) and Defendants, Answer and Affirmative Defenses, November 22, 2011 (R. 237).

comply with a contractual condition precedent because it had not provided them with a Notice of Default and Intent to Accelerate that complied with the mortgage.[6]

II. The Trial—the Servicer's "Corporate Witness."

On the day of trial, the Servicer presented a single witness, Fay Janati.[7] Ms. Janati, a long-time employee of Nationstar, had worked as a "Litigation Resolution Analyst" for approximately six months.[8] She had never worked for the previous servicer, Aurora, or the note owner, Deutsche Bank.[9] When asked about her job duties she described herself as a "corporate witness":

> At my current position, I am [a] corporate witness. We try to settle the account before the foreclosure. We offer settlement. And I also provide deposition if needed. And, you know come to trials as a witness for the company.[10]

She was not familiar with the documents in this case before it was set for trial.[11]

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[6] Answer and Affirmative Defenses, ¶ 3 (R. 116-117) (mistakenly citing to Paragraph 7, rather than Paragraph 22 of the Mortgage).

[7] Transcript of Trial, November 20, 2013 ("T. __") (R. 396).

[8] T. 21-22.

[9] T. 22.

[10] T. 23.

[11] T. 24.

The Notice of Acceleration

One of the many documents introduced by this professional witness was a "demand letter" intended to prove that the Servicer had complied with the notice of acceleration requirement of Paragraph 22 of the Mortgage (Plaintiff's Exhibit 7).[12] The "letter" was merely a computer printout of text with the title "MSP Letterwriter Activity for Month of 11-08 … Page 42,019." It had three dates, two in the heading (12-06-08 and 11-21) and another in the body (November 20, 2008). The computer printout had no letterhead or even a return address. It did include what has the appearance of an "address block" (or "inside address") but the zip code (33449) did not match that of the property address (33467).[13]

Ms. Janati "guessed" that the letter was from the previous servicer, Aurora, and that it went out on November 10, 2008—which matched none of the dates on the letter.[14] The trial court sustained an objection to the witness's "assumption" that Aurora sent the letter.[15] The witness was then asked to describe the "boarding" process by which the records of the previous servicer are incorporated

[12] T. 35; Exhibit 7 (Exh. R. 66).

[13] Ex. R. 66. Compare with Mortgage (Exh. R. 12) showing property address—and therefore, notice address—to have the zip code 33467.

[14] T. 36.

[15] T. 36.

into Nationstar's records.[16] She admitted, however, that she did not personally take part in the boarding of the loan.[17]

The Homeowners objected to the admission of the printout as an exhibit on the grounds that there was no showing that it qualified for the business records exception to hearsay.[18] The Servicer's attorney argued that the letter was not hearsay because it was not being offered to prove the truth of matter asserted.[19] Yet, in the same breath, he stated that he was trying to prove "that a demand letter was sent out."[20] The trial court admitted the printout as Exhibit 7.[21]

Notably, aside from the discrepancy in the dates (both on the face of the printout and in the testimony), Exhibit 7 stated that Aurora would accelerate the loan—not if the amount in default was not paid in thirty days—but if the loan was not brought current (i.e. that it was also necessary to pay amounts that were not yet due as of the date of the letter):

> To cure this default, you must remit $15760.28 within thirty (30) days of the date of this letter… Any payments, charges, or other fees that become due during this thirty (30) day time period must be included

[16] T. 37-38.

[17] T. 39.

[18] T. 63.

[19] T. 66.

[20] T. 66.

[21] T. 70.

> with the amount provided above…. If you do not bring your loan current within thirty (30) days of the date of this letter, Aurora Loan Services may demand the entire balance outstanding under the terms of your Mortgage/Deed of Trust.[22]

Paragraph 22 of the Mortgage, however, states that the lender must specifically identify a default and that acceleration cannot occur until the borrower has been given thirty days to cure that default:

> 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 and sale of the Property. …[23]

The Evidence of the Amount Owed

Also admitted over a hearsay objection was Exhibit 8, a list of transactions, purportedly made by Nationstar and "prior servicers."[24] Over objection, the court allowed the witness to testify that the records Nationstar received from Aurora "appear to be compiled with an acceptable banking system standard" without

[22] Exh. R. 66 (emphasis added).

[23] Mortgage, ¶ 22 (Exh. R. 23).

[24] T. 41.

requiring the witness to specify what those standards were or how she would be familiar with them.[25]

While Janati called the composite Exhibit 8 a "payment history," in reality it consists of three sets of documents:

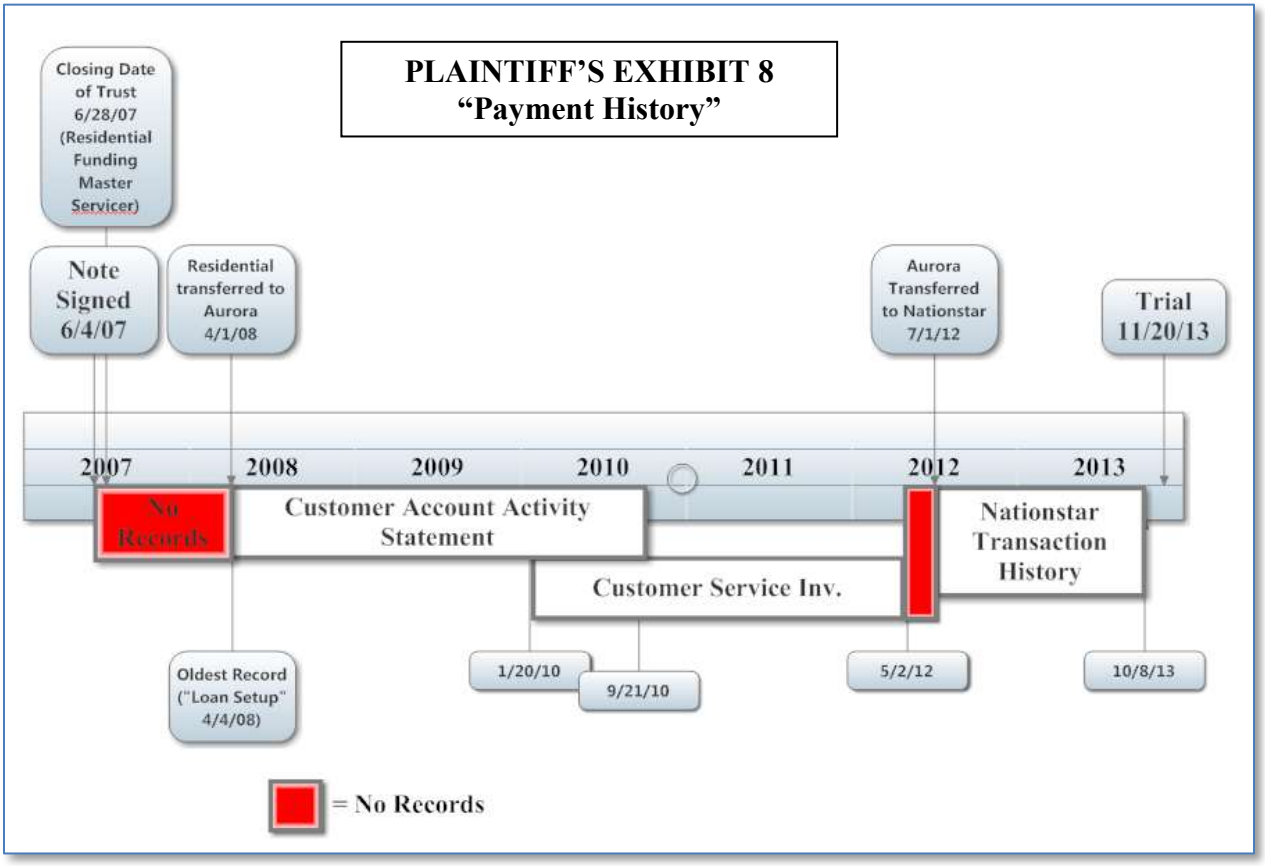
- Customer Account Activity Statement with entries ranging from 4/4/08 to 9/21/10;
- Customer Service Inv With entries ranging from 1/20/10 to 3/21/12;
- Nationstar Detail Transaction History with transaction entries ranging from 7/1/12 to 10/8/13.[26]

Thus, the oldest set of records, starting just after Residential Funding Company became the servicer begins with the notation "LOAN SETUP" on April 4, 2008. The Note, however, was signed nearly a year earlier, with the first payment beginning July 1, 2007.[27] There is a gap, therefore, for the first nine months of the payment history. There is another gap between May 2, 2012 (the date of the Customer Service Inv Report) and July 1, 2012.

[25] T. 47-48.

[26] Entries 13 through 58 report "Late Charges" up to nearly four years before Nationstar began servicing the loan. Each entry, however, is for a zero amount. None of these entries, therefore, change the relevant computations.

[27] Exh. R. 2-3.



As a result, the earliest record in evidence shows a $30,000 jump in the principal without showing any of the records to support the increase.[28] It also shows an initial escrow deficit without any support in the record for the amount.[29] And while Janati testified at length about the transfer of records from Aurora to Nationstar—even though she was not involved in the process[30]—she did not say

[28] Exh. R. 209.

[29] Exh. R. 209.

[30] T. 39.

one word about any "boarding" process Aurora may have used to adopt Residential's records. The trial court admitted the transaction records from the three servicers as Plaintiff's Exhibit 8.[31]

Then the Servicer's attorney asked the witness if she had seen "the proposed final judgment" before the trial and asked two questions before ending the direct examination:

> Q. Prior to today's trial, did you have an opportunity to review the proposed final [judgment]?
>
> A. Yes, sir.
>
> Q. And do the figures in the final [judgment] accurately reflect the amounts that are due on the loan as indicated in the payment history [Exhibit 8]?
>
> A. Yes, sir.[32]

The numbers that Janati had just blessed were never read into evidence. Nor was the document marked as an exhibit for identification, moved into evidence, or even, according to the transcript, shown to the witness. The Servicer adduced no other evidence of the specific amounts for the different items of damages it was seeking. And there was no testimony as to how the judgment amounts could be computed from Exhibit 8.

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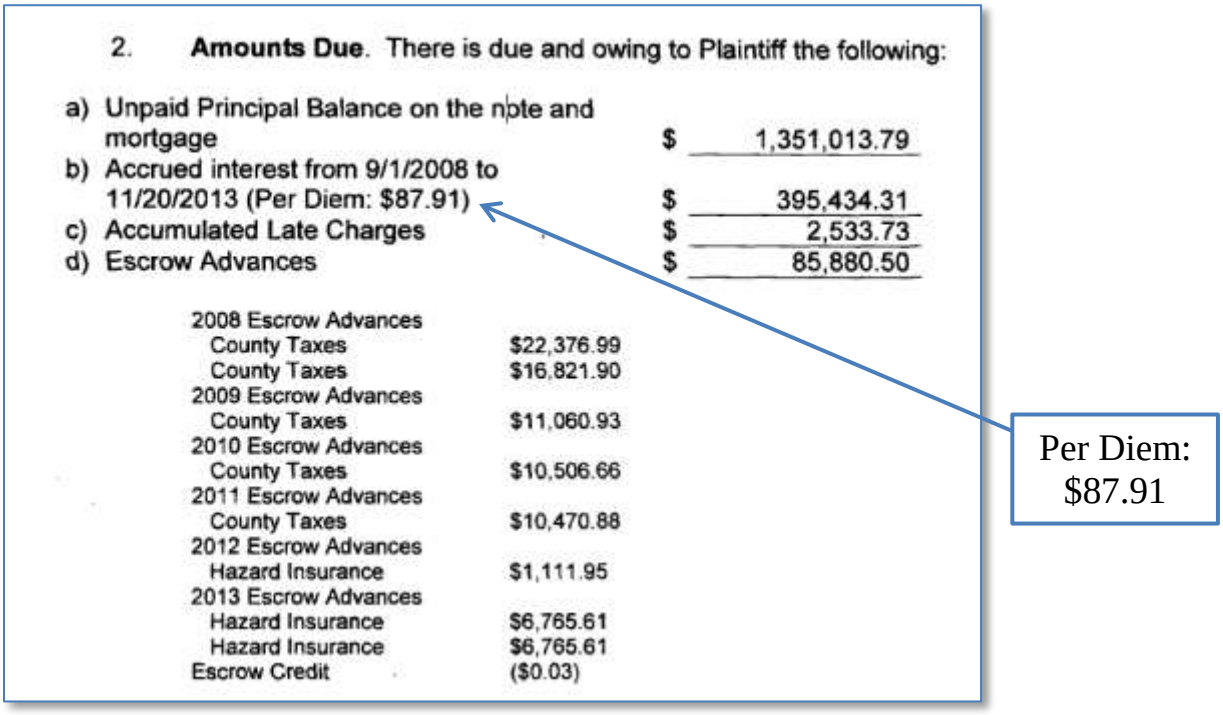
[31] T. 70.

[32] T. 87.

As a result, the final judgment in this case (whether or not the same as the proposed judgment Janati referred to)[33] contains amounts not found in, or computable from, Exhibit 8. For example, the final judgment indicates that the per diem rate of interest applied was $87.91:



2. **Amounts Due**. There is due and owing to Plaintiff the following:

a) Unpaid Principal Balance on the note and mortgage		$ 1,351,013.79
b) Accrued interest from 9/1/2008 to 11/20/2013 (Per Diem: $87.91)		$ 395,434.31
c) Accumulated Late Charges		$ 2,533.73
d) Escrow Advances		$ 85,880.50
2008 Escrow Advances		
County Taxes	$22,376.99	
County Taxes	$16,821.90	
2009 Escrow Advances		
County Taxes	$11,060.93	
2010 Escrow Advances		
County Taxes	$10,506.66	
2011 Escrow Advances		
County Taxes	$10,470.88	
2012 Escrow Advances		
Hazard Insurance	$1,111.95	
2013 Escrow Advances		
Hazard Insurance	$6,765.61	
Hazard Insurance	$6,765.61	
Escrow Credit	($0.03)	

Not only was there nothing in Exhibit 8, or elsewhere in the record, to establish what the per diem interest should be on an adjustable rate loan, applying the given per diem over the indicated time period—$87.91 x 1,906 days—yields an accumulated interest of only $167,556.46 (or $ 227,877.85 less than the figure in the judgment). To arrive at the figure in the judgment, the fact-finder would be

[33] Final Judgment of Mortgage Foreclosure, p. 2 (R. 546).

required to apply a per diem of $207.47 which would correspond with an interest rate in excess of 5.6 percent—a rate which is nowhere to be found in the evidence.

The aborted trial.[34]

Six transcript pages into the Homeowners' cross-examination of Janati, the trial court warned that, because the trial had only been allotted three hours, he was leaving at 1:15, "and I don't care where you are in this wonderful trial we're having here."[35] As promised, the judge later ended the trial abruptly, even though the Homeowners' counsel made no indication that cross was complete and even though neither party had rested.[36]

The trial court accepted closing arguments in writing[37] and entered the judgment for the Servicer from which this appeal was taken.[38]

[34] The propriety of ending the trial midstream is not an issue on appeal, but is mentioned here as context for the errors that are raised in this appeal, particularly to the extent they may be attributable to excessive haste.

[35] T. 94.

[36] T. 122.

[37] T. 123.

[38] Final Judgment of Mortgage Foreclosure, December 17, 2013 (R. 545); Notice of Appeal, January 8, 2014.

SUMMARY OF THE ARGUMENT

The trial court's judgment is not supported by the evidence. One of the defenses raised by the Homeowners was that the Servicer had failed to send a notice of acceleration that complies with the terms of the mortgage prior to bringing suit. At trial, the Servicer introduced a printout of text that it contended had been in a letter sent to the Homeowners. There was no evidence, however, that the text was actually mailed, and if so, when or how it was mailed. The Servicer's only witness, Janati, never testified to the previous servicer's routine practices for mailing—nor was she qualified to do so.

Indeed, Janati was not qualified to lay the foundation for a business records exception to hearsay for the printout to be admitted in the first place. As a professional witness, she had no personal knowledge of the creation and maintenance of the document or Nationstar's "boarding" process for adopting a previous servicer's records. Even if the printout was admissible, the language of the document did not comply with the mortgage.

Similarly, there was insufficient evidence to support the amount of damages awarded. The records in evidence do not cover the lifespan of the loan and, in any event, Janati never testified to any verification procedure for the transfer between the first two servicers (from Residential to Aurora).

STANDARD OF REVIEW

As to the Insufficiency of the Evidence

The standard of review applicable to the trial court's factual findings is whether they are supported by competent, substantial evidence. *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278, 283 (Fla. 1st DCA 2003). Findings of fact by the trial court must be set aside when totally unsupported by competent, substantial evidence. *See Crawford Residences, LLC v. Banco Popular N. Am.*, 88 So. 3d 1017, 1019 (Fla. 2d DCA 2012); *Randy Intern., Ltd. v. Am. Excess Corp.*, 501 So. 2d 667, 670 (Fla. 3d DCA 1987).

As to the Admissibility of Evidence

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

ARGUMENT

I. There Was No Evidence That The Previous Servicer Sent a Notice of Acceleration That Complies with the Mortgage Requirements.

A. The servicer adduced no evidence of mailing or the date of mailing.

The document offered by the Servicer as evidence that the previous servicer sent a Notice of Acceleration was not a letter or even a copy of a letter, but a representation of what the contents of such letter might have been. There is no evidence that this electronic text was ever typed onto paper, much less that the paper was mailed.

The source of printout was never established. First, Janati implied, but never testified, that it was found among the Nationstar records, and more importantly, never testified that she found the printout among the Nationstar records. Janati admitted that she was only "guessing" that the printout came from the previous servicer, Aurora:

> Q. And what is this document?
>
> A. Demand letter.
>
> Q. Have you reviewed this letter prior to today?
>
> A. Yes, sir.
>
> Q. Now does Nationstar send out demand letters for loans that it services that go into default?

> A. We do send out demand letters, but it's very possible that demand letter was sent from prior servicers according to delinquency of the account. So this demand letter was sent by – I'm guessing this was from the previous servicer, and it went out on November 10, 2008. That tells me the account was delinquent --[39]

The judge then sustained an objection to this testimony on the grounds that it was an assumption.[40] And while Janati was quite loquacious in lauding the process used by Nationstar to verify the accuracy of records boarded from other servicers—a process she had never participated in[41]—she never testified that Nationstar verified that the text reproduced in Exhibit 7 was sent as a letter, and if so, when.

Critical to this issue was the absence was any testimony about Aurora's policies and procedures for preparing and mailing notices of acceleration. For example, Paragraph 15 of the Mortgage requires that all notices "shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means."[42] Yet there was no evidence that the letter was sent at all, much less by first class mail.

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[39] T. 35-36 (emphasis added).

[40] T. 36.

[41] T. 39.

[42] Paragraph 15, Mortgage (Exh. R. 20).

Notably, Nationstar could have tried to offer such proof by way of testimony that it was Aurora's normal routine practice to send such letters by first class mail. *See Brown v. Giffen Indus., Inc.*, 281 So. 2d 897, 900 (Fla. 1973) (the requirement of showing proper mailing satisfied by proof of general office practice); *Berwick v. Prudential Prop. & Cas. Ins. Co.*, 436 So. 2d 239, 240 (Fla. 3d DCA 1983) (same). Not only did the Servicer fail to provide such evidence of routine practice, Janati was not qualified to provide such testimony. *See Eig v. Ins. Co. of N. Am.*, 447 So. 2d 377, 379 (Fla. 3d DCA 1984) (testimony from witness who was not an employee of the company at the relevant time was incompetent to establish the routine practice of that company). Accordingly, there no evidence that would entitle the Servicer to a presumption that its predecessor mailed a notice and no evidence that would support even a finding that it had mailed a notice.

And even if the fact-finder were entitled to infer from the mere existence of the text of a notice that such text was put into the form of a letter and placed in the mail, there still was no evidence as to when it was mailed. First, there were three dates on the printout, ranging from November 20, 2008 to December 6, 2008, any one of which could be the recorded date of mailing.

Second, even if it assumed that the one above the address block (November 20, 2008) was the date that would be printed with the rest of the text on bank

letterhead, there was no evidence that it was printed, put in an envelope, stamped and mailed that same day. At a minimum, evidence was needed to prove that Aurora routinely printed and mailed such notices by first class mail—and would routinely do so on the same date indicated above the address block.

The judgment requires more than a finding that there exists text in a computer system that tracks the language of a notice of acceleration. There must be proof of a letter that was actually mailed. There was, therefore, insufficient evidence to support the judgment on the issue of whether Exhibit 7 was ever a letter, and if so, whether, when, and in what manner it was mailed.[43]

But there exists an even more fundamental issue—whether the printout should have been admitted as an exhibit in the first place. Because Janati was a "corporate witness" trained in the ways of testifying, but with no actual experience with Aurora's policies and procedures for mailing notices (or with Nationstar's process of boarding records from other servicers), the printout and her testimony were both inadmissible hearsay.

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

B. The printout of the text of a notice was, in any event, inadmissible.

Personal knowledge of how, when and why the records were created and kept is an essential requirement of due process.

This issue presents the question of 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 asks 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 personal knowledge required to introduce a company's records is not familiarity with what the records say, but with the facts of how, when, and why the records were created and kept. To hold that the personal knowledge requirement for authenticity and the business records hearsay exception can be satisfied by reading the records themselves, is to make all records admissible and the hearsay rule superfluous.

Janati was not a records custodian or otherwise "qualified witness"

Here, the Servicer's only witness, Janati, was a professional testifier whose job duty with Nationstar was to review documents pertaining to the subject loan so that she could 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. She did not testify that she herself (or anyone else for that matter) found the documents among the Nationstar records.[44]

To properly authenticate the documents before admitting them into evidence, Janati would have had to be sufficiently familiar with them to testify that they are what the Servicer claims them to be. § 90.901, Fla. Stat. Moreover, to overcome the hearsay objections made to the acceleration letter (as well as the transaction detail, Exhibit 8), the Servicer would have had to first lay the predicate for the "business records" exception. There are five requirements for such an exception:

[44] While not an issue raised for reversal, it is at least telling that Janati testified that it was part of Nationstar's "regular practice" and "ordinary course of business" to gather Exhibits 3, 4, 9, and 10 from the Securities and Exchange Commission's website "once Nationstar begins servicing the loan" (T. 29-30). Yet Nationstar took over servicing in July of 2012 (T. 82, Exh. R. 55). And according to the date on the face of the referenced exhibits, they were printed from the SEC's internet site over a year and four months later. The date that these exhibits were printed (November 7, 2013) is just two weeks before the first trial was scheduled to take place in this case (November 20, 2013). (Exh. R. 36, 50, 69, 211; R. 307).

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, Janati 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'"); *Specialty Linings, Inc. v. B.F. Goodrich Co.*, 532 So. 2d 1121, 1122 (Fla. 2d DCA 1988) (testimony was insufficient under the business records exception to hearsay because the witness was not the custodian, and was not in charge of the activity constituting the usual business practice); *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825 (Fla. 3d DCA 2014) (without the proper foundation, the documents relied upon by the professional witness were indisputably hearsay).

Janati was not qualified to lay the foundation for the Aurora printout because she had never worked for Aurora.

While Janati was not qualified to lay the foundation even for those records that originated from her employer, Nationstar, she was even less qualified to establish a business records hearsay exception for the printout of text (which she called a "demand letter")—which had purportedly been generated and maintained by Aurora. That she was never employed by Aurora even further distanced her

from any personal knowledge of how it was created or maintained. *Glarum v. LaSalle Bank Nat. Ass'n*, 83 So. 3d 780, 783 (Fla. 4th DCA 2011) (one servicer's employee not qualified to testify about records of a previous servicer when, as here, the witness had no personal knowledge as to when or how the entries were made); *Yang v. Sebastian Lakes Condo. Ass'n, Inc.*, 123 So. 3d 617 (Fla. 4th DCA 2013) (witness from successor HOA management company 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); *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).

Janati had no personal knowledge of the boarding process.

Janati did not testify about the creation or mailing of the proffered acceleration letter. Instead, she provided vague, but glowing generalities about the transition process when the records from Aurora were "boarded" into Nationstar's system. For example, she claimed that Nationstar has "checkpoints" to "make sure everything is accurate"—which appears to consist mainly of talking to the

borrower.[45] Then there are "reports that [they] run that shows anything that can go wrong on this account…"[46] In addition to these unspecified reports, all the department managers, vice presidents and assistant vice presidents run their own individual reports which will "pop out" if there is anything wrong.[47]

She admitted, however, that documents, such as notices of acceleration ("demand letters"), are transmitted separately from this boarding process.[48] Given that no actual copy of a notice was presented—only text stored on page 42,019 of a digital data dump—this implies that Nationstar never received a physical copy of a notice that had been printed and mailed.

Moreover, nothing in her description about the data transfer described how she or Nationstar would (or could) verify that text stored in the computer was ever printed and mailed. She never testified that reports would "pop out" to warn them that the text of a notice had never left the ethereal world of data, or if it did, that the resulting paper letter was mailed on a date different from that which appears within the text, or that the notice was not sent by first class mail as required by the

[45] T. 38.

[46] T. 38.

[47] T. 38.

[48] T. 37-38.

Mortgage. Nor did she explain how "reports" could even make those determinations.

The Servicer relied upon the case of *WAMCO XXVIII, Ltd. v. Integrated Elec. Environments, Inc.*, 903 So. 2d 230, 233 (Fla. 2d DCA 2005) for the proposition that knowledge of this boarding process allows the proponent of the records from a predecessor company to skip the requirements of the business records hearsay exception.[49] This case appears to suggest that proof that one has accurately copied records from another company is sufficient for the business records hearsay exception, even if the information is incorrect. It also suggests that, after testimony regarding the boarding process, the burden of proof suddenly shifts to the objecting party to prove that the previous company's records are untrustworthy. *Id*. at 233.[50]

[49] T. 66.

[50] While the court in *WAMCO* cites nothing for this notion, it is undoubtedly based upon the common (but dated) view that bank records are particularly trustworthy. However, the era when that might have been true is long gone, at least in the context of foreclosure litigation. 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 a definite absence of trustworthiness may well be judicially noticed. *See Pino v. Bank of New York Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011) (in which the court commented: "…many, many mortgage foreclosures appear tainted with suspect documents.").

Fortunately, this Court need not address whether *WAMCO*'s view of adopted business records should be adopted in face of numerous contrary opinions (cited above) because it differs from this case in two major respects. First, 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

In stark contrast, Janati did not participate in the audit and boarding process.[51] Instead, she simply made the blanket, conclusory claim that she knew where to look to make sure everything is accurate and that for "this account, everything is accurate."[52] She never explained what this meant with respect to any of the exhibits, much less where she would look to confirm that notices were actually sent and sent timely.

This distinction between the witness in *WAMCO* and Janati, is in keeping with the fact that the necessary "familiarity" with record keeping procedures must be obtained by way of a business-related duty—performing or supervising the activity in question. *Lassonde v. State*, 112 So. 3d 660 (Fla. 4th DCA 2013) (While a store clerk was able to testify as to how the store re-rings merchandise, he was

[51] T. 39.

[52] T. 39.

not qualified to introduce a receipt because he had no responsibilities regarding that business practice of the store.). Thus familiarity by way of a litigation-related duty is insufficient.

Here, Janati had no responsibilities regarding the business practices of the Servicer in boarding the records. The nature of her job responsibilities—reading records to judges—is insufficient precisely because her "familiarity" was artificially created in anticipation of trial. And having never participated in the boarding process, her "knowledge" of it—as can also be gleaned from her reliance on broad generalizations—was not personal, but was told to her, presumably so she could perform her job as a "corporate witness."

Of course, being "told" about such processes for purposes of regurgitating such information to the fact-finder is nothing more than a synonym for "hearsay." And it is hearsay of the worst kind because it is deliberately communicated to her for the specific purpose of testifying in court—i.e. improper witness coaching to create the façade of familiarity. To hold that such hearsay knowledge can be substituted for personal knowledge gained through an actual job-responsibility tied to the business activity is to allow the business record exception to swallow the rule because <u>there is no document that a witness cannot be told to say meets the exception.</u>

The second distinction between *WAMCO* and this case is that the testimony came from a vice president of WAMCO, which was the owner of the loan, not a mere servicer. *WAMCO XXVIII, Ltd. v. Integrated Elec. Environments, Inc.*, 903 So. 2d at 232. The WAMCO witness testified that the company had "relied on the documentation and balance information that it received from [the previous bank] at the time WAMCO purchased the loans." *Id*. 233.

Here, the bank also injected the notion of reliance, leading Janati to say that she saw Nationstar rely on records received from prior servicers.[53] But, from the perspective of a mere servicer, there can be no business-related reliance on the accuracy of records transferred from another servicer. 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 appellate record is devoid of any suggestion that the servicer proffering this evidence suffers any financial penalty if the records it inherits are inaccurate.

Accordingly, because Janati was not a qualified witness, her testimony and the Servicer's exhibits introduced through her—particularly the acceleration letter—should have been excluded.[54]

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[53] T. 39.

[54] Which is not to say that records of predecessor banks can never be admitted without bringing a diaspora of live witnesses to a Florida courtroom. Section

The letter was offered to prove the truth of the matter asserted.

The Servicer also argued that the hearsay objection was not applicable because it was not offered for the truth of the matter asserted:

> Certainly with [Exhibit] 7, the document is not being offer[ed] to prove the truth of the letter, certainly. This is a demand letter. It's not being offered to say that this is the amount owned. All we're trying to show is that a demand letter was sent out.[55]

Of course, the matter being asserted is the inference that the text became a letter and the letter was sent. The most obvious, undeniable "matter asserted" is that the date that appears in the text was the date that the notice was mailed to the Homeowners. These are matters being admitted for their "truth" and are classic hearsay.

The Servicer failed to prove a prima facie case

Had the trial court properly applied the hearsay rule to exclude the raw text presented as a notice of acceleration, a key element of a *prima facie* foreclosure case would be missing. *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d at 826 ("To establish its entitlement to foreclosure, [the bank] needed to introduce the subject

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90.902(11), Fla. Stat. provides that the testimony of a records custodian or qualified person (who often still works for the successor bank) may be admitted through an affidavit (a "certification or declaration"). *See also* § 90.803(6)(c), Fla. Stat.; *Yisrael v. State*, 993 So. 2d at 957; *Mazine v. M & I Bank*, 67 So. 3d at 1132.

[55] T. 66.

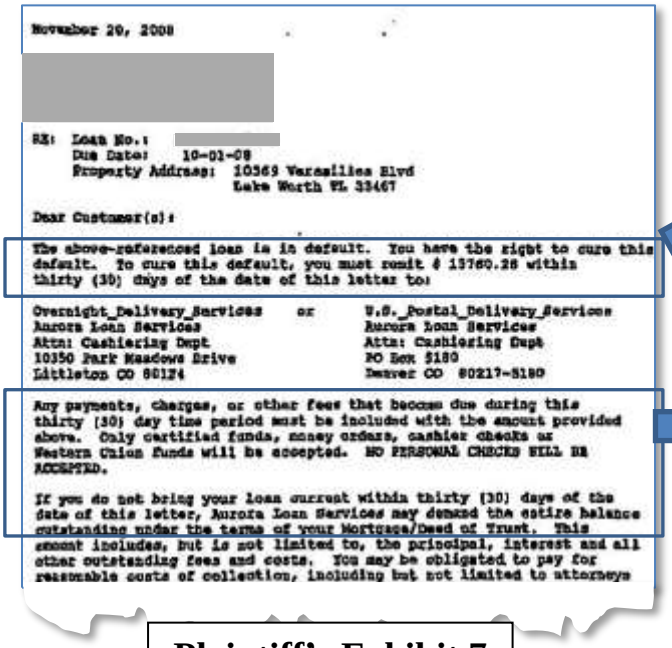
note and mortgage, an acceleration letter, and some evidence regarding the [borrowers'] outstanding debt on the note." [emphasis added]); *Ernest v. Carter*, 368 So. 2d 428 (Fla. 2d DCA 1979) (same); *see DiSalvo v. SunTrust Mortg., Inc.*, 115 So. 3d 438, 439 (Fla. 2d DCA 2013) (unauthenticated notice of acceleration insufficient for summary judgment); *Bryson v. Branch Banking & Trust Co.*, 75 So. 3d 783 (Fla. 2d DCA 2011) (copies of default letters that purportedly were sent to mortgagor were not self-authenticating and thus could not be considered).

Accordingly, the trial court erred in admitting the printout into evidence and in relying upon this inadmissible document to enter judgment for the Servicer.

C. Even if the printout was admissible, it did not comply with the Mortgage requirement that the borrower be given at least thirty days from the default to cure the default.

The printout introduced as a notice of acceleration states that there was an existing breach (impliedly, a breach of making the monthly payments) and that the breach could be cured by the payment of $15,760.28 within thirty days of "the date of the letter." Assuming that the date of an actual letter was November 20, 2008, the Homeowners were being told to cure this breach by Saturday, December 20th.

In addition, the letter warned of another breach—one that had not yet occurred—if it did not receive the December payment timely:



November 29, 2008

[redacted]

RE: Loan No.: [redacted]
Due Date: 10-01-08
Property Address: 10369 Versailles Blvd
Lake Worth FL 33467

Dear Customer(s):

The above-referenced loan is in default. You have the right to cure this default. To cure this default you must remit $ 15760.28 within thirty (30) days of the date of this letter to:

Overnight Delivery Services	or	U.S. Postal Delivery Services
Aurora Loan Services		Aurora Loan Services
Attn: Cashiering Dept		Attn: Cashiering Dept
10350 Park Meadows Drive		PO Box 5180
Littleton CO 80124		Denver CO 80217-5180

Any payments, charges, or other fees that become due during this thirty (30) day time period must be included with the amount provided above. Only certified funds, money orders, cashier checks or Western Union funds will be accepted. NO PERSONAL CHECKS WILL BE ACCEPTED.

If you do not bring your loan current within thirty (30) days of the date of this letter, Aurora Loan Services may demand the entire balance outstanding under the terms of your Mortgage/Deed of Trust. This amount includes, but is not limited to, the principal, interest and all other outstanding fees and costs. You may be obligated to pay for reasonable costs of collection, including but not limited to attorneys

Plaintiff's Exhibit 7
Exh. R. 66.

"The above-referenced loan is in default. You have the right to cure this default. To cure this default you must remit $ 15760.28 within thirty (30) days of the date of this letter…"

Existing Breach

"Any payments, charges, or other fees that become due during this thirty (30) day time period must be included with the amount provided above… If you do not bring your loan current within thirty (30) days of the date of this letter, Aurora Loan Services may demand the entire balance outstanding under the terms of your Mortgage/Deed of Trust."

Future Breach

However, Paragraph 22 of the Mortgage upon which this foreclosure action is based prohibits accelerations until after thirty days from a notice sent after a breach. Stated differently, it contemplates that the borrower will always have a minimum of thirty days to cure a breach:

> 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 and sale of the Property. …[56]

Thus, the plain wording of the Mortgage requires that acceleration cannot occur until thirty days' notice is given after the breach. Here, the Servicer is attempting to provide notice that is not only prior to the breach, but which provides the borrower less than thirty days to cure that breach. This is because the future breach will not occur until December 1st, leaving the borrower only twenty days to cure this additional breach. In other words, the Servicer impermissibly tried to start the thirty-day clock on the December payment ten days before it is even due.

The Servicer's attempt to include a future breach is obviously intended as an unauthorized shortcut to providing the required notice after a December default. There is no reading of Paragraph 22 that would permit such a foreshortening of the time between breach and acceleration. Thus, even if this printout of the text of a notice was admissible, and even if it were proper to infer that an actual letter was created from this text, and even if it were proper to then stack an inference that this actual letter was sent on the date indicated, and even if were proper to then stack

[56] Paragraph 22, Mortgage (Exh. R. 23) (emphasis added).

yet another inference that Aurora sent the actual letter by first class mail,[57] the alleged notice is defective as a result of the Servicer's own overreaching.

To make matters worse, by including unnecessary (and not-yet-true) information—the reference to a potential future breach—Aurora rendered the alleged notice defectively ambiguous. The notice was designed, according to the parties' express agreement in the Mortgage, to "specify" the default and to precisely identify the action to cure. The alleged notice does not specify "the default," but refers to two that it claims must both be cured by the deadline.

Nor does it specify a definite course of action to cure because it does not unambiguously state an amount that must be paid to avoid acceleration. Instead, it alludes to "charges or other fees" that are not identified in the notice. This, of course, leaves the unwary borrower subject to acceleration if he or she makes all the payments before December 20th but is not aware of—or simply miscalculates—the "charges or other fees."

It is black letter law that the thirty day notice be strictly observed. *See Kurian v. Wells Fargo Bank, Nat. Ass'n*, 114 So. 3d 1052, 1055 (Fla. 4th DCA 2013) (summary judgment reversed where notice stated that acceleration had

[57] *See Stanley v. Marceaux*, 991 So. 2d 938, 940 (Fla. 4th DCA 2008) (The rule that an inference may not be stacked on another inference is designed to protect litigants from verdicts based upon conjecture and speculation.)

already occurred and was dated only six days before the complaint was filed); *Konsulian v. Busey Bank, N.A.*, 61 So. 3d 1283, 1285 (Fla. 2d DCA 2011) (reversing summary judgment where suit was filed three days after the bank sent an acceleration letter); *Laurencio v. Deutsche Bank Nat. Trust Co.*, 65 So. 3d 1190, 1191 (Fla. 2d DCA 2011) (summary judgment reversed where suit filed two days after default letter).

Accordingly, the trial court erred in granting judgment in favor of the Servicer because the evidence was inadequate (nonexistent) that it had complied with the contractual condition precedent.

II. The amount of damages awarded in the judgment is not supported by the evidence.

A. The transaction history was inadmissible.

For the same reasons detailed above, the Aurora transaction history (Plaintiff Exhibit 8)[58] was inadmissible because the Servicer's "corporate witness" was not qualified to testify about the records or Nationstar's boarding process.

Worse, the transaction history in evidence begins nine months after the payments began because none of the records of Residential Funding Company, LLC—the servicer prior to Aurora—were admitted, or even offered into evidence. It is apparent that a number of transactions occurred during Residential's watch

[58] Exh. R. 192, with the portion from Aurora starting at Exh. R. 199.

because Aurora's records begin with an escrow balance and a principal balance that is $30,000 more than what was borrowed.[59] And given that the alleged date of default was September of 2008, all but five months of the records regarding the Homeowners' payments fall withing the missing records from Residential.

Accordingly, the critical records needed to compute the principal balance and negative escrow balance are twice removed from Janati. And while Janati testified about Nationstar's boarding process of Aurora's records in 2012, she never testified as to any verification process for Aurora's adoption of a starting point for principal and escrow back in 2008.

The trial court expressly overruled the Homeowners' hearsay objection to this evidence.[60]

B. There was no evidence from which the fact-finder could arrive at the damage amounts in the judgment.

Even if the transaction history had been admissible, it does not support the amounts entered (or approved) by the fact-finder in the final judgment.

The record on appeal reveals that, other than the Exhibit 8, the Servicer did not have the witness introduce a single document regarding damages—nothing was marked for identification and moved into evidence. Instead, in a bizarre

[59] Exh. R. 209.

[60] T. 63-70.

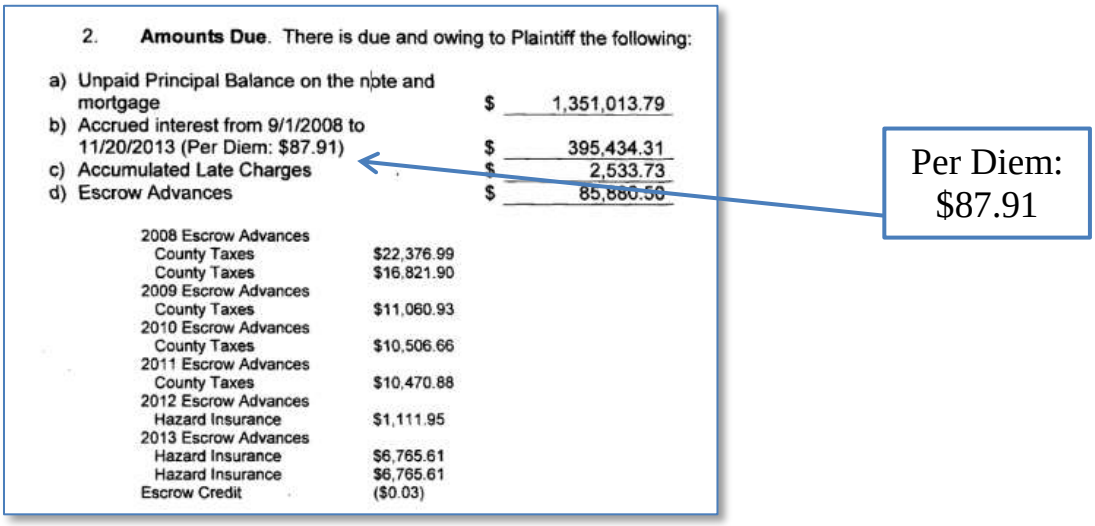
evidentiary ritual known only to foreclosure courts, Janati testified that certain, undisclosed numbers in an unmarked document "accurately reflect the amounts that are due on the loan as indicated in the payment history [Exhibit 8]."[61] That document, which the Servicer's lawyer called a "proposed final judgment," was never marked for identification or even shown to the witness while she was on the stand. There is nothing in the appellate record for this Court to determine what amounts Janati believed "accurately reflect the amounts that are due on the loan…"[62]

The final judgment ultimately entered by the court[63] (whether or not the same as the proposed judgment Janati referred to) contained specific findings regarding the amounts due and owing that are not found in Exhibit 8. Nor can they be computed from Exhibit 8. For example, the final judgment in this case indicates that the per diem rate of interest applied was $87.91:

[61] T. 87.

[62] T. 87.

[63] Final Judgment of Mortgage Foreclosure, December 17, 2013, p. 2 (R. 546).



Nothing in Exhibit 8, or elsewhere, establishes what the applicable interest rate was between June 1, 2012 (the date upon which the rate became variable) and November 20, 2013, much less what the per diem equivalent should be. If the per diem interest rate were correct, the interest would be overstated by over 100 percent. The Note (Plaintiff's Exhibit 1) states that the interest, even after default, will be variable, recalculated on a monthly basis by adding 2.2500% to the "Index" starting in June of 2012.[64] The Servicer never provided the monthly values of the Index to the fact-finder to permit this computation.

[64] Adjustable Rate Note, ¶ 2, Exh. R. 2-3. The "Index" is the "Twelve-Month Average" of the annual yields on actively traded United States Treasury Securities adjusted to a constant maturity of one year as published by the Federal Reserve Board in the Federal Reserve Statistical Release entitled "Selected Interest Rates (h.15)" (the "Monthly Yields").

Nor can the amounts due for Escrow Advances be computed from the evidence because the "Escrow Credit" is dependent upon the accuracy of the amount used by Aurora to set up the loan in its system. Aurora simply adopted an amount based on nine months of Residential's unverified recordkeeping—recordkeeping which is not in evidence.

And because the Note itself provides three different payment options,[65] each of which would have differing effects on the excess interest computation,[66] the Unpaid Principal Balance also cannot be computed from the evidence. The amount of principal is, once again, dependent upon the accuracy of Aurora's "Loan Setup," which tacks on an additional $30,000 without disclosing the prior servicer's records of payments or the associated computations for additional principal.

Because Exhibit 8 does not support the numbers in the judgment, and none of the judgment figures were mentioned in testimony, the only possible source of the amounts was the proposed judgment. To the extent that a proposed judgment could ever serve as substantive evidence in a case, here, it was not marked,

[65] Adjustable Rate Note, ¶ 3.(H), Exh. R. 4-5.

[66] The Note provides that interest (computed as a function of the Index) in excess of the payment will be treated as additional principal (Adjustable Rate Note, ¶ 3.(E), Exh. R. 4).

introduced as an exhibit, or even shown to the witness. *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, ___ So. 3d ___, 39 Fla. L. Weekly D1159 (Fla. 2d DCA May 30, 2014) (a document never admitted into evidence as an exhibit is not competent evidence to support a judgment). In *Wolkoff*, the Second District rejected a bank's attempt to prove indebtedness with a proposed final judgment because it was never moved into evidence (and because it recognized that the document was "not likely" an admissible business record, in any event). The bank in *Wolkoff*—like the Servicer here—had also introduced payment records, but the court reversed for entry of involuntary dismissal because the records—like the records here—did not support the dollar amounts awarded for interest, taxes, property inspections and other expenses.

Even if the signed judgment contains the same figures as shown on the proposed judgment, because they cannot be computed from the evidence, it is apparent that trial court did not independently verify the information before signing. It is an abdication of the court's fact-finding role to simply sign a proposed judgment without determining whether the documents in evidence supported the amounts awarded. *Perlow v. Berg-Perlow*, 875 So. 2d 383 (Fla. 2004) (trial court's verbatim adoption of proposed final judgment suggested that trial court did not independently make factual findings and legal conclusions,

created appearance of impropriety, and was reversible error); *see Justice Admin. Com'n v. Taylor*, 50 So. 3d 753, 754-55 (Fla. 1st DCA 2010) ("It is error for a trial court to adopt verbatim a proposed final judgment without giving the opposing party an opportunity to comment."); *Walker v. Walker*, 873 So. 2d 565, 566 (Fla. 2d DCA 2004) (a proposed judgment cannot substitute for a thoughtful and independent analysis of the facts, issues, and law by the trial judge).

Accordingly, the judgment is not supported by competent evidence and must be reversed. 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); *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, ___ So. 3d ___, 39 Fla. L. Weekly D1159 (Fla. 2d DCA May 30, 2014).

CONCLUSION

The Servicer had its day in court and failed to adduce evidence sufficient to support: 1) the finding that it had complied with a condition precedent; and 2) the amount of damages awarded in the judgment. The judgment should be reversed and the case remanded for entry of judgment in favor of the Homeowners.

Dated: September 24, 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 September 24, 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 September 24, 2014.

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