In the District Court of Appeal
Fourth District of Florida

CASE NO [redacted]

(Circuit Court Case No. [redacted])

[redacted] and [redacted]

Appellants,

v.

AURORA LOAN SERVICES LLC,

Appellee.

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

INITIAL BRIEF OF APPELLANTS

Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

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STATEMENT OF THE CASE AND FACTS

I. Introduction

This is an appeal from a final judgment of foreclosure entered against Appellants, [redacted] and [redacted] and in favor of Appellee, Wells Fargo Bank, National Association, as Trustee for SRMOF II 2011-1 Trust, in an action filed by Aurora Loan Services LLC, based on a loan extended by Lehman Brothers Bank, FSB. As set forth in detail below, the trial court erroneously entered judgment in favor of Wells Fargo despite that Wells Fargo failed to submit competent, substantial evidence that Aurora Loan Services, a prior servicer of the loan and the original plaintiff: (1) was the owner or holder of the note and mortgage at the time it filed suit; and (2) complied with the contractual condition precedent of providing notice under the subject mortgage.

II. Appellants' Statement of the Facts

A. The Pleadings

Through its then-counsel, the Law Offices of David J. Stern, P.A., Aurora filed a Complaint to Foreclose Mortgage, To Reform Mortgage and to Enforce Lost Loan Documents on May 13, 2009.[1] It contained three counts. In Count I of its Complaint, Aurora alleged that Mr. [redacted] had entered into a promissory note;

[1] Record Volume 1, pp. 1-43 (R.1: 1-43).

that Mr. [redacted] together with Mrs. [redacted] had entered into a mortgage securing the note; and that Aurora "owns and holds the Note and Mortgage."[2] According to Aurora, the mortgage had been assigned to it through "an assignment to be recorded."[3]

Aurora further alleged that there had been "a default under the terms of the note and mortgage for the MAY 1, 2008 payment and all payments due thereafter."[4] In addition, Aurora alleged that all "conditions precedent to the acceleration of this Mortgage Note and to foreclosure of the Mortgage have been fulfilled or have occurred."[5]

In Count II, Aurora asserted a cause of action to reform the Mortgage.[6] Because the legal description of the subject property had been "omitted" from the Mortgage, Aurora asserted that the Mortgage should be reformed to include the proper legal description.[7]

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[2] R.1: 1.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] R.1: 3.

[7] *Id.*

Finally, in Count III, Aurora sought to enforce a lost note and mortgage.[8] It alleged that it was "not presently in possession of the original Note and Mortgage, but had been in possession of them, had not transferred them, and could not "reasonably obtain possession of the Note and Mortgage because their whereabouts cannot be determined."[9] The complaint was not verified.[10]

Attached to the complaint was a purported copy of the Note, which was dated September 29, 2006.[11] In it, the borrower promised to pay $650,000.00, plus interest, to "Lehman Brothers Bank, FSB, A Federal Savings Bank."[12] Under the borrower's signature on the last page of the Note were two endorsements.[13] First, there was a special endorsement from Lehman Brothers Bank, FSB to Lehman Brothers Holdings, Inc.[14] Second, there was a blank endorsement by Lehman Brothers Holdings, Inc.[15]

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[8] R.1: 3-4.

[9] R.1: 3.

[10] R.1: 4.

[11] R.1: 26-29.

[12] R.1: 26

[13] R.1: 29

[14] *Id*.

[15] *Id*.

About one year later, Aurora filed a motion for leave to file an amended complaint.[16] In the Amended Complaint, Aurora again alleged that it "owns and holds the Note and Mortgage."[17] It also again alleged that it had fulfilled all conditions precedent to acceleration of the Note and foreclosure of the Mortgage.[18] Unlike in the original Complaint, however, Aurora no longer asserted that it was not in possession of the Note and Mortgage or that it could not obtain possession of them.[19] Like the original Complaint, the Amended Complaint did not contain a verification.[20] Attached to the Amended Complaint was a purported Corporate Assignment of Mortgage, dated June 8, 2009 (a month after suit was filed), purporting to assign the Note and Mortgage from Lehman Brothers Bank, FSB to Aurora Loan Services, LLC.[21]

Proceeding *pro se*, the [redacted] moved to dismiss the Complaint on a variety of grounds.[22] On March 2, 2012, the trial court entered an order dismissing

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[16] R.1: 44.

[17] R.1: 46.

[18] *Id*.

[19] *See* R.1: 46-49.

[20] *See* R.1: 48-49.

[21] R.1: 75.

[22] R.1: 77-89.

the Amended Complaint based on lack of verification.[23] Aurora was ordered to serve "a properly verified second amended complaint no later than April 3, 2012."[24] When Aurora failed to comply, the [redacted] filed a motion to dismiss with prejudice on April 13, 2012.[25] More than two months later, Aurora filed a motion requesting an extension of time to file a verified amended complaint.[26]

On August 3, 2012, the plaintiff filed a motion for leave to file a second amended complaint.[27] The motion stated that the loan had been sold by "Aurora Loan Services, LLC to Wells Fargo Bank, National Association, not in its individual or banking capacity, but solely as trustee for SRMOF II 2011-1" and that Wells Fargo would be substituted as the plaintiff."[28]

The Second Amended Complaint attached to the motion named the plaintiff in the same way but alleged that Wells Fargo was "the holder of all real and beneficial interests in the subject Promissory Note and Mortgage…by virtue of an unconditional transfer to the Plaintiff" that "occurred prior to the commencement

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[23] R.1: 91.

[24] *Id*.

[25] R.1: 93-94.

[26] R.1: 99.

[27] R.1: 173.

[28] *Id*.

of this action."[29] The Second Amended Complaint contained a count for foreclosure and a lost note count, but no count for reformation of the mortgage.[30]

Over the [redacted] objection, on September 10, 2012, the trial court entered an Order Allowing Plaintiff to File Second Amended Complaint and deemed the Second Amended Complaint filed.[31] After their motion to dismiss was denied, the [redacted] filed an Answer and Affirmative Defenses, denying most of the allegations.[32] The [redacted] denied Wells Fargo's allegation that all conditions precedent had been satisfied.[33] They also asserted numerous affirmative defenses, including lack of standing and that the plaintiff had failed to comply with the condition precedent of providing notice in accordance with the terms of the Mortgage.[34]

B. The Trial

A non-jury trial was conducted on January 31, 2014.[35] Wells Fargo called Christine Coffron, an employee of Selene Finance, to lay a foundation for

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[29] R.1: 182, 183.

[30] R.1: 183-185.

[31] R.2: 278.

[32] R.4: 627-638.

[33] R.2: 183, ¶12; R.4: 628, ¶12.

[34] R.4: 629-637.

[35] Transcript of Foreclosure Trial, pg.1 ("T.1").

admission of purported business records.[36] She testified that she is "a contested default case manager" for Selene, which was the mortgage servicer for Wells Fargo.[37] Her job consists of reviewing documentation and testifying at foreclosure trials.[38]

Ms. Coffron had been employed by Selene since May 2013, about eight months before the trial.[39] Prior to that position, she had worked for a mortgage servicing company called Homeward Residential for about a year.[40] She had previously been unemployed for an extended period of time.[41]

Asked whether she was "involved at all in loans that are transferred or assigned to Selene and the boarding process of bringing the loans on at Selene," Ms. Coffron answered that she "was not involved in that, no."[42] Yet, without elaborating on the basis for her knowledge, she claimed to be familiar with "that process," and with "the normal business operations and practices" of Selene.[43]

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[36] T.14-15.

[37] T.15.

[38] T.15-16.

[39] T.48-49.

[40] T.49.

[41] *Id*.

[42] T.16.

[43] T.16.

Selene had only begun servicing Mr. [redacted] loan in May 2012, four years after the alleged default.[44] Prior to that time, the loan had been serviced by Aurora Loan Services, LLC until July 1, 2011, when servicing was transferred to Aurora Bank, FSB until it was transferred again to Selene.[45] Ms. Coffron had never worked for Aurora Loan Services, LLC or Aurora Bank, FSB.[46] She claimed to be "familiar with the servicing history of" Mr. [redacted] loan because it was part of her "daily duties to become familiar with the files that I manage."[47]

Asked how she could have personal knowledge of the creation of business records by prior servicers, Ms. Coffron recited her answers about there being an "on-boarding process," when "both servicing companies work together" to verify the records.[48] She "did not do the loan boarding process," but claimed that "looking at all the notes, it is accurate."[49] Asked who created the records, Ms. Coffron answered only that they were created by "employees of Aurora, employees of Selene Finance."[50]

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[44] T.52.

[45] T.46-47.

[46] T.51

[47] T.38.

[48] T.57-59.

[49] T.60.

[50] T.60.

Wells Fargo offered into evidence a certified copy of the mortgage.[51] In paragraph 22, the Mortgage contained a requirement to give notice containing specific information, including a date at least thirty days from the date of the notice by which the borrower could cure any default:

> Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure.[52]

Despite having stated in its Verified Second Amended Complaint that the original Note was lost and incapable of being located, Wells Fargo offered into evidence what it claimed to be the original Note.[53] The Note contained two undated endorsements.[54] The first endorsed the Note from Lehman Brothers Bank,

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[51] T.19-20.

[52] R.10: 15.

[53] T.22-24.

[54] R.10: 26.

FSB to Lehman Brothers Holdings Inc.[55] The second was an endorsement in blank by Lehman Brothers Holdings Inc.[56] Mr. [redacted] objected to the admissibility of the Note based on lack of foundation, noting that the Complaint and Second Amended Complaint had both claimed that the original Note had been lost, but it was now purportedly in Wells Fargo's possession without any testimony as to how that came to be.[57] The trial court overruled the objection.[58]

To establish standing, Wells Fargo offered into evidence a series of Assignments of Mortgage (that did not include the June 8, 2009 Assignment of Mortgage attached to the Amended Complaint), purporting to show that the Note and Mortgage had been transferred:

- On July 9, 2008, from Lehman Brothers Bank, FSB (the entity that had specially endorsed the Note to Lehman Brothers Holdings Inc.) to Aurora Loan Services LLC;[59]
- On March 23, 2012, from Aurora Loan Services LLC to Aurora Bank FSB;[60]

[55] *Id*.
[56] *Id*.
[57] T.23.
[58] T.24.
[59] R.10: 30.

- On May 9, 2012, from Aurora Bank FSB to Selene Finance, LP;[61] and
- On July 18, 2012, from Selene Finance LP to Wells Fargo.[62]

When asked whether Aurora Loan Services, LLC was an owner or servicer of the loan, Ms. Coffron testified that it was the servicer.[63]

To show that it had fulfilled the Mortgage's condition precedent of sending notice of a breach and an opportunity to cure, Wells Fargo did not offer into evidence a copy of the actual letter it claimed that Aurora Loan Services, LLC had sent. Instead, it offered into evidence a document that it said contained the text of the letter that Aurora supposedly had sent four year before Selene began servicing the loan.[64] Two different dates were contained on the document.[65] In the body of Aurora's "letter," the date June 20, 2008 was written.[66] On the other hand, the document's header indicated a date of "07-05-08."[67]

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[60] R.10: 32.

[61] R.10: 33.

[62] R.10: 34.

[63] T.77.

[64] T.27-28; R.10: 40-41.

[65] R.10: 40.

[66] *Id*.

[67] *Id*.

The text stated that the borrower would have thirty days "from the date of this letter" to cure the default.[68] But it did not give any indication that the letter was ever mailed, or if it was, on what date it may have been mailed.[69] The text stated that to cure the default, the borrower would need to pay $11,804.44.[70] However, it also stated that if any payments became due within thirty days after the date of the letter, the borrower would also need to pay the unspecified amount that became due in order to cure the default.[71]

Wells Fargo did not offer into evidence a copy of a postmark or postal receipt, but instead offered into evidence one page of a four-page document purportedly created by Aurora Bank, FSB, which Wells Fargo called an online letter writing history.[72] Wells Fargo's counsel admitted that the document had never been disclosed to Mr. [redacted] prior to the trial.[73] That document contained an entry stating a "letter date" of June 21, 2008.[74] Wells Fargo also offered into evidence a document purporting to have been created by a previously unmentioned

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[68] *Id*.

[69] *See* R.10: 40-41.

[70] R.10: 40.

[71] *Id*.

[72] T.29-30; R.10: 38.

[73] T.29.

[74] R.10: 38.

entity called "Aurora Commercial Corp."[75] Counsel for Wells Fargo and Ms. Coffron claimed this document contained "Aurora's" servicing notes.[76] That document contained an entry appearing to reflect that a breach letter was sent on June 21, 2008, but it did not state whether the letter had been sent by First Class Mail.[77]

Mr. [redacted] objected to admitting into evidence the purported text of the letter and the notes purportedly showing that Aurora had sent a letter containing that text to Mr. [redacted][78] As to the text of the letter, he objected that "It's not even a letter. The letter has no letterhead to it. It's not signed. And this witness is incompetent to testify as to the validity of that letter."[79] The trial court admitted it into evidence over objection.[80] He also objected to the admissibility of a supposed online letter writing record based on the document not having been disclosed to him prior to trial.[81] Despite that Wells Fargo's counsel had admitted that the

[75] T.30-31; R.10: 43-100.

[76] T.30-31; R.10: 43-100.

[77] R.10: 93.

[78] T.30-33.

[79] T. 32.

[80] *Id*.

[81] *Id*.

document had not been shown to Mr. [redacted] prior to trial,[82] the trial court admitted that document into evidence.[83] Mr. [redacted] objected to the admissibility of Aurora's purported servicing notes based on Ms. Coffron not being qualified to lay a foundation for their admission into evidence, but the trial court overruled the objection.[84] The court also denied Mr. [redacted] motion to strike the testimony of Ms. Coffron.[85]

After a document examiner testified for Wells Fargo, Mr. [redacted] testified that he had never received the notice of acceleration.[86] The parties then presented closing arguments.[87] Among other things, Mr. [redacted] argued that judgment should be granted in his favor based on failure of proof that notice was sent to him in accordance with the terms of the Mortgage, that Ms. Coffron was not a qualified witness to lay a foundation for the admissibility of either Selene or the prior servicers' business records, and that the original plaintiff, lacked standing.[88]

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[82] T.29.

[83] T.33.

[84] T.33.

[85] T.76.

[86] T. 113, 124-25.

[87] T.143-162.

[88] T.146-153, 162.

Despite that the Second Amended Complaint did not include a count for reformation of the mortgage, Wells Fargo asked the trial court to reform the Mortgage by taking judicial notice of the *lis pendens*, which, unlike the Mortgage, contained a legal description of the property.[89] The trial court stated that it would take judicial notice of the *lis pendens*, but that for the moment it was "holding aside the issue of the reformation of the mortgage which was not in the operative complaint…"[90] It then stated on the record that it found the plaintiff had carried its burden of proof as to its prima facie case, and that the defense had not carried its burden as the affirmative defenses.[91]

On February 14, 2014, the trial court entered a Final Judgment of Foreclosure in favor of Wells Fargo.[92] Mr. [redacted] timely appealed.

[89] T.159-161.

[90] T.162. The complete lack of evidence to reform the Mortgage is not raised as a separate issue on appeal. It is mentioned here merely to provide context for the other rulings which are being challenged in that they share the same defect.

[91] T.163-164.

[92] R.9: 1638-1643.

SUMMARY OF THE ARGUMENT

The Final Judgment of Foreclosure should be reversed for two separate and independent reasons. First, the plaintiff failed to demonstrate standing to sue at the time when suit was filed. Wells Fargo submitted no evidence that Aurora Loan Services, LLC, the original plaintiff, held the note at the time it filed suit, and Aurora affirmatively averred in its complaint that it was *not* in possession of the note at that time. The assignment of mortgage Wells Fargo offered into evidence could not have conferred standing on Aurora as the owner because the assignor had specially endorsed the note to another entity. Thus, the assignor lacked ownership rights to confer on Aurora.

Second, Wells Fargo failed to submit substantial, competent, admissible evidence that it served pre-acceleration notice in accordance with the requirements of the mortgage. It did not submit a copy of the actual letter supposedly sent, or substantial, competent proof of mailing. The documents Wells Fargo did submit were inadmissible because its witness was not qualified to lay a foundation for admission of those documents, created by an independent entity four years and two servicers before the witness's employer became involved with the loan. Finally, even if the documents had been admissible, their contents do not comply with the Mortgage's specific requirements for the contents of notice that must be given.

STANDARD OF REVIEW

The trial court's findings that Wells Fargo carried its burden to prove its prima facie entitlement to foreclosure and that Mr. [redacted] failed to prove his affirmative defenses are reviewed for competent, substantial evidence. *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278, 283 (Fla. 1st DCA 2003). To be substantial, evidence must "establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). To be competent, "the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Id*. Findings of fact should 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).

This Court generally "review[s] a trial court's ruling on the admissibility of evidence for an abuse of discretion." *Yang v. Sebastian Lakes Condo. Ass'n*, 123 So. 3d 617, 620 (Fla. 4th DCA 2013). However, the trial court's discretion "is limited by the rules of evidence." *Id*. Thus, rulings interpreting and applying the rules of evidence are reviewed *de novo*. *Lucas v. State*, 67 So. 3d 332, 335 (Fla. 4th

DCA 2011) ("[W]hether evidence falls within the statutory definition of hearsay is a matter of law, subject to de novo review."); *Shands Teaching Hosp. and Clinics, Inc. v. Dunn*, 977 So. 2d 594, 598 (Fla. 2d DCA 2007); *Burkey v. State*, 922 So. 2d 1033, 1035 (Fla. 4th DCA 2006).

ARGUMENT

I. Because there was no competent, substantial evidence that the plaintiff had standing when it filed suit, the trial court erred in entering judgment for Wells Fargo.

The trial court erred in granting judgment to Wells Fargo because there was no competent, substantial evidence that Aurora Loan Services, LLC had standing to sue at the time that this action was filed. Although that evidentiary failure is sufficient to require reversal, there was also no competent, substantial evidence that Wells Fargo had standing to sue at the time that it was substituted as plaintiff in the Second Amended Complaint.

It is by now firmly established in Florida law that "[a] crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose." *McLean v. JP Morgan Chase Bank N.A.*, 79 So. 3d 170, 172 (Fla. 4th DCA 2012); *Rigby v. Wells Fargo Bank, N.A.*, 84 So. 3d 1195, 1196 (Fla. 4th DCA 2012); *Lizio v. McCullom*, 36 So. 3d 927, 929 (Fla. 4th DCA 2010); *Verizzo v. Bank of N.Y.*, 28 So. 3d 976, 978 (Fla. 2d DCA 2010); *Philogene v. ABN Amro Mortg. Group Inc.*, 948 So. 2d 45, 46 (Fla. 4th DCA 2006). Moreover, "a party's standing is determined at the time the lawsuit was filed." *McLean*, 79 So. 3d at 172 (citing *Progressive Exp. Ins. Co. v. McGrath Cmty. Chiropractic*, 913 So. 2d 1281, 1286 (Fla. 2d DCA 2005).

Thus, to be entitled to judgment, the plaintiff must prove standing not only at the time of trial, but at the time of filing suit. *Bristol v. Wells Fargo Bank, N.A.*, 137 So. 3d 1130, 1132 (Fla. 4th DCA 2014); *Zimmerman v. JPMorgan Chase Bank, N.A.*, 134 So. 3d 501, 502 (Fla. 4th DCA 2014); *Jeff-Ray Corp. v. Jacobson*, 566 So. 2d 885, 886 (Fla. 4th DCA 1990). And when the plaintiff has failed to present competent, substantial evidence to carry its burden of proving standing, the trial court cannot enter judgment in favor of the plaintiff. *Klemencic v. U.S. Bank Nat'l Ass'n*, 142 So. 3d 983, 984 (Fla. 4th DCA 2014) ("Because appellee failed to prove it had standing to foreclose, we reverse the final judgment and remand for the trial court to enter an involuntary dismissal of the complaint."); *Dixon v. Express Equity Lending Grp., LLLP*, 125 So. 3d 965, 968 (Fla. 4th DCA 2013) (reversing final judgment of foreclosure entered after trial due to failure of proof as to standing).

Wells Fargo failed to submit competent, substantial evidence that Aurora Loan Services, LLC, the plaintiff that filed this action, had standing at the time it filed suit. To prove standing, "the plaintiff must show it held or owned the note at the time the complaint was filed." *Hunter v. Aurora Loan Servs., LLC*, 137 So. 3d 570, 573 (Fla. 1st DCA 2014). That means the plaintiff must present admissible "evidence of a valid assignment, proof of purchase of the debt, or evidence of an

effective transfer." *Stone v. BankUnited*, 115 So. 3d 411, 413 (Fla. 2d DCA 2013) (quoting *BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936, 939 (Fla. 2d DCA 2010)); *Hunter*, 137 So. 3d at 574; *McLean*, 79 So. 3d at 172. Standing may be proven by the plaintiff's possession of an original note endorsed in blank only if the plaintiff proves that it was in possession of the original note on the date the complaint was filed. *Bristol v. Wells Fargo Bank, N.A.*, 137 So. 3d 1130, 1132 (Fla. 4th DCA 2014).

No competent, substantial evidence was submitted here to show that Aurora Loan Services, LLC acquired ownership of the Note prior to filing suit, or otherwise had standing when this case was filed. First, Wells Fargo did not submit any competent evidence to show that Aurora Loan Services, LLC was the holder of the Note at the time it filed suit. To the contrary, when Aurora filed suit, it specifically alleged that it was *not* in possession of the original Note.[93]

And no evidence was offered at trial to show that Aurora Loan Services, LLC had the Note in its possession at the time it filed suit or at any other time. That the original Note may have been in Wells Fargo's possession at the time of trial is insufficient to show standing at the time suit was filed. *Bristol v. Wells Fargo Bank, N.A.*, 137 So. 3d 1130, 1132 (Fla. 4th DCA 2014). Thus, Wells Fargo

[93] R.1: 3

failed to submit competent, substantial evidence to demonstrate standing based on Aurora Loan Services, LLC being a holder of the Note at the time it filed suit.

Indeed, as of the substitution of Wells Fargo as the party plaintiff, its verified pleading represented that the Note was still lost.[94] There could have been no transfer of possession between the original plaintiff, Aurora Loan Services, LLC, and Wells Fargo where there is no evidence that the Note had ever been found in the interim. Without a transfer of possession of the instrument, Wells Fargo cannot be a holder under Article 3 of the Uniform Commercial Code. § 673.2011, Fla. Stat. (a person may only become a "holder" by means of a "negotiation" which requires a "transfer"); § 673.2031, Fla. Stat. (a "transfer" is a delivery of the instrument).

Second, Wells Fargo failed to submit competent, substantial evidence of a valid assignment to Aurora Loan Services, LLC prior to the time it filed suit. Although Wells Fargo offered into evidence a purported assignment, the evidence contradicted its validity, and Wells Fargo failed to offer any evidence to support its validity. The original Note, which was admitted into evidence at trial, contained a special endorsement from Lehman Brothers Bank, FSB to Lehman Brothers

[94] R.1: 183-185.

Holdings, Inc.[95] By specially endorsing the Note to Lehman Brothers Holdings, Inc., Lehman Brothers Bank, FSB ceded its own standing to foreclose. *Dixon v. Express Equity Lending Grp., LLLP*, 125 So. 3d 965, 967-68 (Fla. 4th DCA 2013) ("Here, the lender did not have standing to foreclose. Although the lender's president testified that the lender was the owner and holder of the note, the special endorsement appearing on the back of the original note suggests otherwise. Under § 673.2051(1), Fla. Stat. and *Rigby*, the special endorsement stating 'pay to the order of U.S. Century Bank' established that only U.S. Century Bank had standing to bring the foreclosure action.").

Yet Aurora Loan Services, LLC's standing was supposedly derived not from Lehman Brothers Holdings, Inc., to which the Note had been specially endorsed, but from a post-default assignment of Lehman Brothers Bank, FSB's interests, which it had already relinquished.[96] Given that Lehman Brothers Bank, FSB had endorsed the Note to Lehman Brothers Holdings, Inc., the assignment of Lehman Brothers Bank, FSB's interests to Aurora Loan Services, LLC could not have conferred standing on Aurora Loan Services, LLC.[97]

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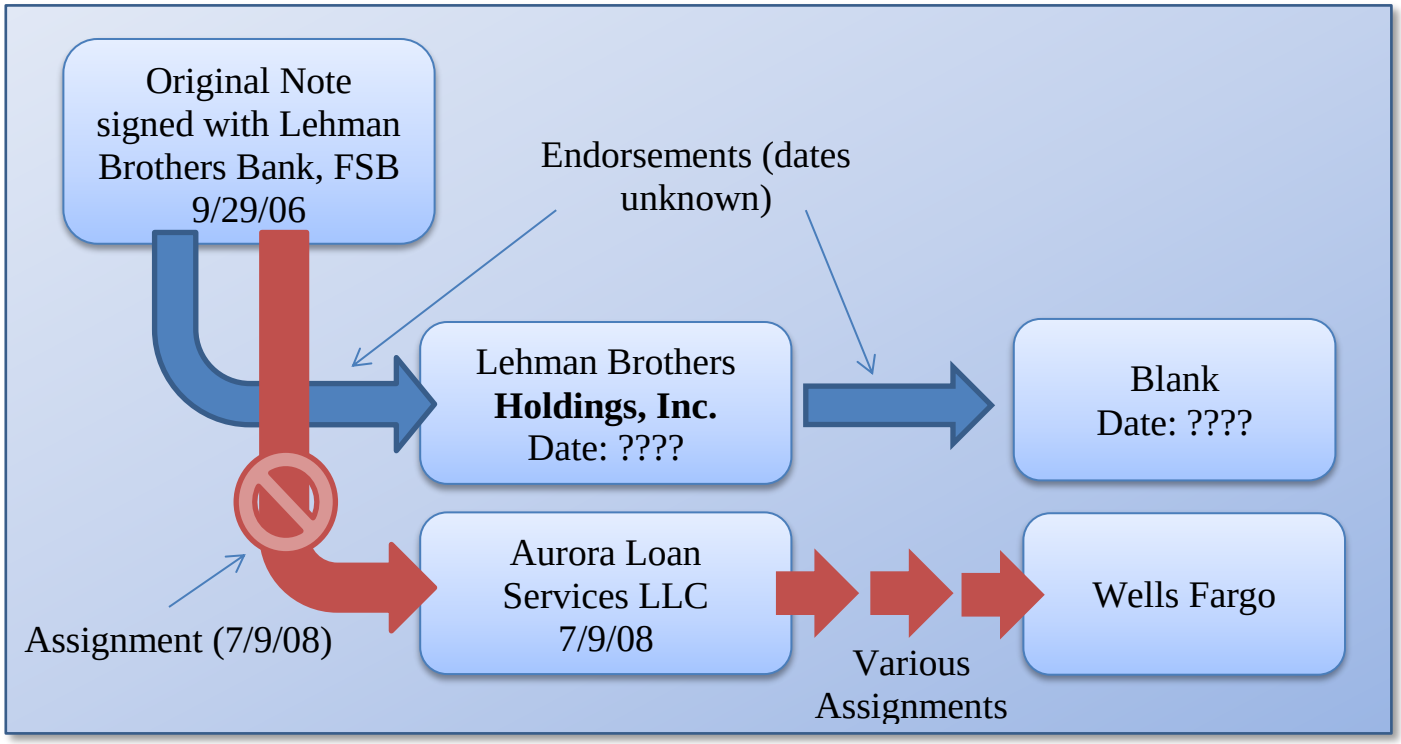
[95] R.10: 26.

[96] R.10: 30.

[97] The Corporate Assignment of Mortgage dated June 8, 2009 (after the original complaint was filed) and recorded on September 24, 2009, which was attached to



Accordingly, without evidence dating the endorsement to Lehman Brothers Holdings, Inc., the Corporate Assignment of Mortgage that Wells Fargo relied on to show Aurora Loan Services, LLC's supposed ownership of the Note was not competent, substantial evidence that Aurora had standing at the time it filed suit.

Moreover, absent any competent records admitted into evidence showing that Aurora Loan Services, LLC had standing at the time it filed suit, Ms. Coffron was not competent to testify that it did. Ms. Coffron admitted that her only knowledge of the loan was obtained from the information she had gleaned from

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Aurora's Amended Complaint but not relied on by Wells Fargo at trial, similarly purported to assign Lehman Brothers Bank FSB's interests to Aurora rather than Lehman Brothers Holding, Inc.'s interests. *See* R.1: 75.

reviewing business records.[98] And Wells Fargo did not offer into evidence any business records showing that Aurora was in possession of the Note at the time it filed suit. Thus, even if Ms. Coffron had been a qualified witness to lay a foundation for the admission of Aurora Loan Services, LLC's business records, her conclusory testimony that Aurora had the right to enforce the loan at the time it filed suit would be incompetent and inadmissible absent the admission into evidence of business records from which that testimony was derived. *See Sas v. Fed. Nat. Mortg. Ass'n*, 112 So. 3d 778 (Fla. 2d DCA 2013).

Nor did Wells Fargo submit substantial, competent evidence that it had standing when it was substituted as plaintiff. In the verified Second Amended Complaint, in which Wells Fargo was substituted as plaintiff, Wells Fargo affirmatively stated that the Note was not in its possession.[99] The assignment relied on by Wells Fargo, from Selene Finance LP, which had received an assignment from Aurora Bank FSB, which, in turn, had received an assignment from Aurora Loan Services, LLC. So the lack of substantial, competent evidence that the purported assignment from Lehman Brothers Bank, FSB effectively conferred ownership of the Note to Aurora Loan Services, LLC also precluded

[98] T.57-58.

[99] R.1: 184.

Wells Fargo from proving its ownership of the Note through the subsequent chain of assignments.

And while Wells Fargo had possession of the Note at the time of trial, its possession at that time did not evidence that it possessed or owned the Note at the time suit was filed. *See McLean*, 79 So. 3d at 173 ("Because Chase presented to the trial court the original promissory note, which contained a special endorsement in its favor, it obtained standing to foreclose, at least at some point…Nonetheless, the record evidence is insufficient to demonstrate that Chase had standing to foreclose at the time the lawsuit was filed.") (citation omitted).

Thus, because there was no competent, substantial evidence that Aurora Loan Services, LLC was the holder of the Note at the time it filed suit, and no evidence that it had acquired standing via an assignment from an entity with standing, Wells Fargo failed to prove that the plaintiff had standing at the time this action was filed. As such, the trial court's judgment in favor of Wells Fargo should be reversed.

II. There was no evidence that the prior servicer sent a notice of acceleration that complied with the Mortgage's requirements.

A. Wells Fargo adduced no evidence to show that notice was transmitted as required by the Mortgage.

The document offered by Wells Fargo as evidence that Aurora Loan Services, LLC, a previous servicer, had sent a Notice of Acceleration in compliance with the Mortgage was not a letter or even a copy of a letter, but a representation of what the contents of such a letter might have been. There was no evidence that this electronic text was ever typed onto paper, much less that the paper was mailed.

The text was contained in computerized records supposedly created by Aurora Loan Services, LLC, two servicers prior to Ms. Coffron's employer, Selene Finance.[100] And while Ms. Coffron was quite effusive in claiming that Selene Finance had a collaborative process with Aurora Bank, FSB to verify the accuracy of records boarded from it—a process she admitted she had never participated in[101]—she did not testify as to any process Aurora Bank, FSB may have used to verify records it received from Aurora Loan Services, LLC, the servicer that

[100] T.27-28; R.10: 40-41.

[101] T. 16.

supposedly created the letter, or about any attempts to verify that the text was sent as a letter, and if so, when.

Critical to this issue was the absence of any testimony about Aurora's policies and procedures for preparing and mailing notices of acceleration. 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."[102] There was no evidence to find that the conditions had been satisfied for the notice to "be deemed to have been given" because there was no evidence that that the letter was sent by first class mail, or that it was actually delivered to Mr. [redacted]

Aurora Bank FSB's "Online Letter Writer History," which Wells Fargo offered into evidence, contained an entry dated June 21, 2008 that stated "BREACH LTTR-REG MAILINR080620."[103] Aurora Commercial Corp.'s purported notes also contained an entry dated that day, stating "CL700 BREACH LTTR-REG MAILING LETTER SENT."[104] Even if those entries might show that a letter was mailed in some fashion, neither entry shows that it was mailed by first

[102] R.10: 12.

[103] R.10: 38.

[104] R.10: 94.

class mail, as the mortgage required. Nor did Ms. Coffron testify that any records showed that the letter was sent first class mail.

Wells Fargo 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). But Ms. Coffron 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). Nor did Wells Fargo even attempt to adduce such testimony from her or anyone else. Accordingly, there was no evidence that would entitle Wells Fargo to a finding that Aurora had sent a notice by first class mail.

Finding Wells Fargo served notice in accordance with the Mortgage requires more than the existence of text in a computer system that tracks the language of a notice of acceleration. There must be proof that the letter was actually sent by first class mail, and no such proof was submitted here. There was, therefore, insufficient evidence to support the judgment on the issue of whether notice was

delivered in such a manner that it could be deemed to have been given under the terms of the Mortgage.[105]

But there exists an even more fundamental issue—whether the text and notes should have been admitted into evidence at all. Because Ms. Coffron was a corporate witness trained in the ways of testifying, but with no actual experience with Aurora Loan Servicing LLC's policies and procedures for mailing notices (or with Aurora Bank, FSB or Selene Finance's process of boarding records from other servicers), the documents and her testimony were both inadmissible hearsay.

B. The documents through which Wells Fargo attempted to prove that notice was given were inadmissible.

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

The trial court allowed Wells Fargo to introduce Aurora Loan Servicing, LLC's purported business records pertaining to notice through Ms. Coffron, an eight-month employee of Selene Finance, who had never worked for Aurora Loan Servicing, LLC, or the servicer that came between Aurora Loan Servicing, LLC and Selene Finance. And no testimony was offered as to how Ms. Coffron could

[105] 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 Wolkoff v. Am. Home Mortg. Servicing, Inc.*, 39 Fla. L. Weekly D1159 (Fla. 2d DCA May 30, 2014); *Hall v. Wilson*, 530 So.2d 410, 411 n. 1 (Fla. 3d DCA 1988).

have any personal knowledge of Aurora Loan Servicing, LLC's business practices. As this Court has held, a witness must have personal knowledge of record-keeping practices to be qualified to lay a foundation for their admission into evidence under the business records exception. *Yang v. Sebastian Lakes Condo. Ass'n*, 123 So. 3d 617, 621 (Fla. 4th DCA 2013) (holding that despite witness's use of "magic words"—the elements of a business records exception to hearsay—records were inadmissible because the witness did not have the personal knowledge required to lay a foundation for business records of an entity for whom she had never worked and about whose record-keeping practices she had no personal knowledge).

By contrast, to permit a witness such as Ms. Coffron to lay a foundation for admission of documents created not by the prior servicer, but the servicer before that, would be to say that a party offering 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. *Yang*, 123 So. 3d at 621. 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.

Ms. Coffron was not a records custodian or otherwise "qualified witness"

Ms. Coffron was a professional testifier whose job duty with Selene Finance 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.

To properly authenticate the documents before admitting them into evidence, Ms. Coffron would have had to be sufficiently familiar with them to testify that they are what Wells Fargo claims them to be. § 90.901, Fla. Stat. Moreover, to overcome the hearsay objections made to the acceleration letter (as well as the purported servicing notes and online letter writing history), Wells Fargo would have needed to first lay the predicate for the "business records" exception. There are five requirements for such an exception:

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

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

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

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

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

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

But to even be permitted to testify to these threshold facts, Ms. Coffron needed to be a records custodian or an otherwise "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. *Hunter v. Aurora Loan Servs., LLC*, 137 So. 3d 570, 573 (Fla. 1st DCA 2014) (finding witness unqualified where the witness "lacked particular knowledge of a prior servicer's record-keeping procedures and "[a]bsent such personal knowledge, he was unable to substantiate when the records were made, whether the information they contain derived from a person with knowledge, whether [the previous servicer] regularly made such records, or, indeed, whether the records belonged to [the previous servicer] in the first place."); *Burdeshaw v. Bank of New York Mellon*, 39 Fla. L. Weekly D2145 (Fla. 1st DCA Oct. 13, 2014) (reversing and remanding for dismissal because bank failed to establish any foundation qualifying the exhibit as a business record or its witness "as a records custodian or person with knowledge of the four elements

required for the business records exception"); *Lacombe v. Deutsche Bank Nat. Trust Co.*, 39 Fla. L. Weekly D2156 (Fla. 1st DCA Oct. 14, 2014) (reversing and remanding for dismissal because bank's witness was not a records custodian for the current servicer or any of the previous servicers); *Holt v. Calchas, LLC*, Case No. 4D13-2101 (Fla. 4th DCA November 5, 2014) (witness was not qualified to introduce bank's payment records over hearsay objection).[106]

See also Mazine v. M & I Bank, 67 So. 3d 1129, 1131 (Fla. 1st DCA 2011) (holding that a witness was not qualified because the witness "had no knowledge as to who prepared the documents submitted at trial by the bank as he is not involved in the preparation of documents such as the ones proffered by the bank, that he does not keep records as a records custodian, that he has no personal

[106] Notably, in *sua sponte dicta*, the panel in *Holt* declared that an assignment of mortgage and a notice of acceleration would be admissible over a hearsay objection as "verbal acts." Opinion, pp. 9, 10, 2-3 at n. 2. Here, Mr. [redacted] objected on the grounds that the bank's witness "was incompetent to testify as to the validity of that letter" (T. 32). Thus Mr. [redacted] objection also related to the authentication of the document—which also requires a records custodian or otherwise qualified witness—and the trial court should have excluded the document even if it were not hearsay. Moreover, the *Holt* panel was simply incorrect because the date on the notice of acceleration was offered for the truth of the matter asserted (the implied assertion being that it was mailed on that day), and therefore, was not a verbal act. *See*, Law Revision Council Note—1976 for § 90.801, Fla. Stat., Subsection (1)(c) and cases cited therein. The mortgage assignment in *Holt* also did not qualify as a verbal act because it too was being offered to prove the truth of the matter: that a transfer of the mortgage had taken place as of a certain date.

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

testimony as to the mode of preparation of these records nor was the witness testifying in regard to the records in the relationship of 'custodian or other qualified witness'"); *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825 (Fla. 3d DCA 2014) (holding that without the proper foundation, the documents relied upon by the professional witness were indisputably hearsay).

Ms. Coffron was not qualified to lay the foundation for Aurora Loan Servicing, LLC's documents because she had never worked for Aurora.

While Ms. Coffron was not qualified to lay the foundation even for those records that originated from her employer, Selene Finance, she was even less qualified to establish a business records hearsay exception for documents that had purportedly been generated and maintained by Aurora Loan Servicing, LLC. That she was never employed by Aurora even further distanced her from any personal knowledge of how its records were created or maintained. *Glarum v. LaSalle Bank Nat. Ass'n*, 83 So. 3d 780, 783 (Fla. 4th DCA 2011) (holding a servicer's employee was 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*, 123 So. 3d at 621 (holding that an employee from a 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).

Ms. Coffron had no personal knowledge of either Aurora Bank, FSB or Selene Finance's boarding processes.

Ms. Cofron did not testify about the creation or mailing of the proffered acceleration letter, Aurora Commercial Corp.'s purported servicing notes, or Aurora Bank's purported online letter writing history. Instead, she provided vague, but glowing generalities about the transition process when the records from Aurora Bank, FSB were "boarded" into Selene Finance's system. When asked about the veracity of records created by Aurora Loan Servicing, LLC, she claimed that "Selene and Aurora [an apparent reference to Aurora Bank, FSB, the successor to Aurora Loan Servicing, LLC and predecessor to Selene Finance] worked together to verify all information when the servicing was transferred."[107] But she admitted she had never had any involvement whatsoever with that supposed process at

[107] T.61.

Selene Finance.[108] All she could do was claim that "looking at all the notes, it is accurate."[109]

And she testified in generalities about supposed standard servicer practices, though she was not qualified as an expert witness on industry practices:

> Q And you say this is a demand letter. When did that typically generate?
>
> A Typically after default, roughly 30 to 45 days afterwards.
>
> Q And where did the information from the demand letter come from?
>
> A The information is pulled from the payment history and other parts of our business records.
>
> Q Is it the normal course of your -- of the plaintiff to generate these types of letters?
>
> A Yes, it is.
>
> Q Is it the normal course of other servicers to generate these types of letters?
>
> A Yes, it is.[110]

Yet Ms. Coffron had no responsibilities regarding the business practices of Selene Finance in creating or boarding the records, much less the recordkeeping and boarding practices of Aurora Bank, FSB, Aurora Commercial Corp., or Aurora

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[108] T.60.

[109] *Id*.

[110] T.28. She did not even purport to provide testimony about the creation of the purported servicing notes and online history. *See* T.29-32.

Loan Services, LLC, for which she had never worked. 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 professional 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 there is no document that a witness cannot be told to say meets the exception.

Accordingly, because Ms. Coffron was not a qualified witness, her testimony and Wells Fargo's exhibits pertaining to notice should have been excluded.[111]

Wells Fargo 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 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).

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

Accordingly, because the trial court erred in admitting the letter text, servicing notes, and online letter writing history into evidence, it also erred in entering judgment for Wells Fargo.

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

Wells Fargo's own "evidence" proved that it provided less than thirty days' notice.

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 $11,804.44 within thirty days of "the date of the letter." Assuming that the date of an actual letter was June 20, 2008, the Homeowners were being told to cure this breach by Sunday, July 20, 2008.

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

informing the borrower of "the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or other defense of borrower to acceleration and foreclosure"); *Samaroo v. Wells Fargo Bank*, 137 So. 3d 1127, 1129 (Fla. 5th DCA 2014) (finding notice insufficient for failing to inform borrowers "of their right to reinstate after acceleration"); *Judy v. MSMC Venture, LLC*, 100 So. 3d 1287, 1288-89 (Fla. 2d DCA 2012) (finding notice insufficient because it only generally stated that a breach had occurred but "failed to specify the breach").

Under Paragraph 22 of the Mortgage, the notice was required to specify, among other things, "a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured."[112] The "date the notice is given" is defined in Paragraph 15 of the Mortgage, under which notice is "deemed to have been given…when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means."[113] In other words, Paragraph 22 requires the pre-acceleration notice to specify a date by which the default can be cured that is not less than 30 days from the date the notice is *mailed*.

[112] R.10: 15.

[113] R.10: 12.

The text of the pre-acceleration notice that Wells Fargo claimed to have sent, rather than specifying a date certain, stated that the borrower had to cure the default "within thirty (30) days of the date of this letter."[114] That same text shows the letter dated June 20, 2008, thus informing the borrower that the default had to be cured by 30 days from June 20, 2008, or Sunday, July 20, 2008.

Yet, according to Aurora Bank FSB's "Online Letter Writer History," and Aurora Commercial Corp.'s purported notes, the letter was not *mailed* until June 21, 2008.[115] So even if the letter was sent by first class mail, it would have been deemed to have been given to the borrower on June 21, 2008, not June 20, 2008. And June 21, 2008 was less than thirty days before July 20, 2008, the deadline to cure stated in the notice. Thus, the notice failed to satisfy Paragraph 22's requirement that the notice specify a cure deadline date that is "not less than 30 days from the date the notice is given." Because Wells Fargo's evidence, even if admissible, showed that the pre-acceleration notice it purported to have given did not satisfy the requirements of the Mortgage, the trial court erred in finding Wells Fargo had proved a prima facie case, and entering judgment for Wells Fargo.

[114] R.10: 40.

[115] R.10: 38, 94.

The notice of acceleration improperly included a breach that had not yet occurred.

In addition, the letter also failed to comply with the requirements of the Mortgage in warning of another breach—one that had not yet occurred—if it did not receive the next payment.

Here, 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. …[116]

Thus, the plain wording of the Mortgage requires that notice of breach be given only *after* the breach, and that acceleration cannot occur until thirty days after that. Here, Aurora Loan Servicing, LLC attempted to provide notice that was not only prior to the breach, but which provided the borrower less than thirty days

[116] R.10: 15 (emphasis added).

to cure that breach. That is because the future breach would not occur until July 1st, leaving the borrower only twenty days to cure this additional breach. In other words, Aurora Loan Servicing, LLC impermissibly tried to start the thirty-day clock to cure a default on the July payment ten days before it was even due.

Aurora's attempt to include a future breach was obviously intended as an unauthorized shortcut to providing the required notice after a July default. There is no reading of Paragraph 22 that would permit such a shortening 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 yet another inference that Aurora sent the actual letter by first class mail,[117] the alleged notice is defective as a result of Aurora'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

[117] *Cf. Stanley v. Marceaux*, 991 So. 2d 938, 940 (Fla. 4th DCA 2008) (explaining that it is impermissible to prove a claim by stacking an inference on another inference).

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 July 20th but is unaware of—or simply miscalculates—the "charges or other fees."

It is black letter law that the thirty day notice must be strictly observed. *See Kurian*, 114 So. 3d at 1055 (Fla. 4th DCA 2013) (summary judgment reversed where notice stated that acceleration had 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 there was no competent, substantial evidence that it had given notice in compliance with the contractual condition precedent.

CONCLUSION

Because there was no substantial, competent evidence that Aurora Loan Services, LLC had standing to sue at the time it filed suit; and because there was no substantial, competent, and admissible evidence that notice was provided to the [redacted] in accordance with the condition precedent set forth in Paragraph 22 of the Mortgage; the trial court erred in entering judgment for Wells Fargo. This Court should reverse and remand for entry of judgment in favor of the defense.

Dated: November 10, 2014

ICE APPELLATE
Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

CERTIFICATE OF 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.

ICE APPELLATE
Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this November 10, 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 November 10, 2014.

ICE APPELLATE
Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

SERVICE LIST

Frank G. Cosmen
Quintairos, Prieto, Wood & Boyer, PA.,
9300 S. Dadeland Blvd.,
Miami, FL 33156
fcosmen@qpwblaw.com
servicecopies@qpwblaw.com
Appellee's Counsel

SACHS SAX CAPLAN
6111 Broken Sound Parkway NW,
Boca Raton Florida 33487
foreclosures@ssclawfirm.com